Neutral Citation Number: [2022] EWHC 1640 (Comm)

Claim No: LM-2020-000107

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

Rolls Building
Fetter Lane
London, EC4A 1NL
1 July 2022

B e f o r e:

DAVID ELVIN QC

(Sitting as a Deputy High Court Judge)

BETWEEN:

CMC SPREADBET PLC

Claimant

- and -

ROBERT TCHENGUIZ

Defendant

- -

DANIEL SAOUL QC and BEN SMILEY (instructed by DAC Beachcroft LLP) appeared on behalf of the Claimant.

ZOË BARTON QC and DANIEL LEWIS (instructed by Withers LLP) appeared on behalf of the Defendant.

- -

Hearing dates: 18-21 October 2021

- -

J U D G M E N T
(As Approved by the Court)

This judgment was handed down by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed to be 2 pm on 01/07/2022. A copy of the judgment in final form as handed down can be made available after that time, on request by email to TranscriptRequest.Rolls@justice.gov.uk.

DAVID ELVIN QC (Sitting as a Deputy Judge of the High Court)

Introduction

1. In these proceedings the Claimant ("**CMC**"), which is a spread betting firm ("**SBF**"), seeks to recover £1.31m as a debt, alternatively as a sum due under contract, from the Defendant, Mr Robert Tchenguiz, incurred as a result of losses made under a spread betting account opened with CMC in December 2019 in respect of which positions were taken out equivalent to 3 million shares in First Group and which were closed out on 17 March 2020 during the period of market volatility triggered by the Covid Pandemic and lockdown.

2. Spread betting was helpfully described by Rix LJ in ***Spreadex Limited v Dr Vijay Ram Battu*** [2005] EWCA Civ 855:

> "1. 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, 9990 to 10010. If one buys, one is betting that the market will rise above 10010. If one sells, one is betting that the market will fall below 9990. If one buys and the market rises, one stands to gain £1 for every point that the index exceeds 10010. If one sells and the market falls, one stands to gain £1 for every point that the index drops below 9990. 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 9990, one will make £1 for every point the market falls below 9990 and lose £1 for every point the market rises above 9990. 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 9990 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.
>
> 2. 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.
>
> 3. 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."

See also HH Judge Pelling QC in ***Quinn v IG Index Ltd*** [2018] EWHC 2478 (Ch) at [3]-[10].

3. Mr Tchenguiz is an experienced spread better and, at the time relevant to these proceedings when it is claimed a debt to the Claimant became repayable, he had positions with a number of SBFs in total equivalent to about 81m shares in First Group including the position taken with CMC which is the subject matter of these proceedings.

4. It is common ground between the parties that:

   (1) A spread betting agreement was entered into by Mr Tchenguiz in December 2019 following a request made on his behalf by Mr William Thompson, a solicitor with R20 Advisory Ltd ("**R20**"), for an initial position of 2.7 million share equivalents which was subsequently increased at his request to 3 million.

   (2) The position with CMC was taken out at least initially because R J O'Brien ("**RJO**"), a SBF with which Mr Tchenguiz had a position of 18 million share equivalents in December 2019, considered its exposure to risk was too great and asked Mr Tchenguiz either to reduce his position with them or to accept a higher margin. At any rate, his position with RJO was reduced which led to his request to open an account with CMC (and probably other SBFs) which appeared to be willing to offer a more competitive margin.

   (3) At the time Mr Tchenguiz also had spread bet positions with a number of SBFs, in each case the relevant SBF sought to classify him as an elective professional client meaning he would have enjoyed fewer protections than if it had been a retail client, including significantly the lack of "negative balance protection" ("**NBP**") which protects retail clients from losing more than their stake with the SBF. In cross-examination Mr Tchenguiz was asked about the other accounts with SBFs held in early December 2019 and to confirm that "in relation to all of those accounts, you were classified as an elective professional client" which

he agreed. He was then asked

> "[Q] In relation to all of those accounts, you had signed forms confirming that you wished to be classified as an elective professional client?
>
> A. Yes.
>
> Q. And each of those spread betting companies had warned you before you became a professional client about the protections that you would lose by becoming a professional client?
>
> A. It wasn't high on my -- yes, I presume yes."

(4) That agreement was on CMC's Terms of Business ("**TOB**") (January 2018) which was provided to Mr Tchenguiz on-line on 16 December 2019, together with CMC's Risk Warning Notice and Order Execution Policy.

(5) A "Risk Warning Notice for Financial Betting (January 2018)" ("**RWN**"), which is expressly referred to in the TOB at cl. 1.1.3 as forming part of the agreement, was provided on-line to Mr Tchenguiz on 16 December 2019 as was the Order Execution Policy ("**OEP**").

(6) An account was opened by CMC for Mr Tchenguiz initially on retail terms but was the subject of a "request to become an elective professional client" ("**the Request Form**") dated 17 December 2019 and what has been described as an "opt-up agreement", more precisely the "Professional Client Categorisation and Title Transfer Collateral Agreements Agreement" dated 19 December 2019 ("**the Opt-Up Agreement**"), both agreed and signed by Mr Tchenguiz.

(7) Mr Tchenguiz was notified that his account was "active" on 19 December 2019 following receipt of the signed Opt-Up Agreement.

Defence to the claim

5. Mr Tchenguiz' defence to the money claim brought by CMC is put in two principal ways.

6. First, he contends that due to a failure to comply with the Financial Conduct Authority's ("**FCA**") Conduct of Business Sourcebook ("**COBS**") Rules he should not have been categorised as an elective professional client (as opposed to being treated as a retail client) due to a failure to give due warnings in accordance with the COBS about the loss of protections concomitant with that reclassification. The effect of this, it is submitted, is that the debt did not arise since he should have still enjoyed, in particular, NBP which would have meant that, whilst his investment might be lost, he could not be liable for additional losses such as those claimed.

7. While legal issues remain, Mr Tchenguiz candidly accepted in cross-examination that this

first issue was of lesser concern to him than the issue of close-out of his account:

> "Q. You understood perfectly well how the account was going to work.
>
> A. Fair enough.
>
> Q. Well, do you agree or not?
>
> A. How the account ... My issue is not with the account opening, my issue is with the closeout, okay? So I've accepted every point you've made on the account opening, okay. I've said that if I've signed it, I have to stand by it.
>
> Q. … Are you saying now that you don't wish to pursue any of the defences that you're taking about the account opening and classification process?
>
> A. No, I'm not saying that. I mean, if the account opening was not dealt with correctly, it's not dealt with correctly, and it has to be appointed by this court. The point I'm trying to make here, my bigger issue with this is the closeout. If I've signed a document I stand by the document I signed. The onus is on me to have read the … the small print."

8. Whilst it remains necessary to consider whether the required warnings were given to Mr Tchenguiz prior to activating his account, his answers do reveal that they were secondary considerations so far as he was concerned. It does not obviate the need for the appropriate warnings but does provide relevant context - especially since it is pleaded that the warnings should have been appropriate to a person in the same position as the Defendant (para. 9(1) of the Amended Defence & Counterclaim).

9. Secondly, it is contended that if CMC was entitled to reclassify him as a Elective Professional Client then CMC breached either COBS 2.1.1R or acted in a *Braganza* irrational manner in exercising its discretion under para. 12.3 of Schedule 1 of the CMC TOB such that he has claim for damages under section 138D of the Financial Services and Markets Act 2000 ("**FSMA**") which gives rise to an equitable set-off which extinguishes the claim. CMC's approach is contrasted with that of RJO and other SBFs which closed out on what is submitted by the Defence to have proceeded on a basis which was more favourable to Mr Tchenguiz.

10. Ms Barton advanced criticisms of CMC in its failure to call direct witnesses of fact, including Oliver and Matthew Basi (who were no longer with CMC) and David Garbacz (who is). However, it was a matter for CMC in the first place who it called to give evidence and how to prove its case and (as with the Defence's own non-disclosure of e.g., the terms agreed with RJO) I have determined the case on the evidence before me. There is significant documentary evidence dealing with the key issues and, whilst she put questions and made submissions regarding the failure by CMC to call certain witnesses, Ms Barton did not suggest that the case could not proceed in their absence or that the Defendant was prejudiced in presenting his defence (which I do not consider to have been the case in any event).

Relevant regulatory provisions

11. It is common ground that the Claimant was at all material times an "authorised person" authorised by the FCA under the FSMA to perform regulated activities and, in particular, investment business. It is also common ground that the rules COBS apply and that they contain a number of provisions relevant to the current dispute.

12. COBS Chapter 3 contains the Client Categorisation rules. COBS 3.5.1R provides:

> "A professional client is a client that is either a per se professional client or an elective professional client."

13. Since the Defendant was not a *per se professional client* he could only be an *elective professional client*, and only then if COBS 3.5.3R applied:

> "**Elective professional clients**
>
> A firm may treat a client other than a local public authority or municipality as an elective professional client if it complies with (1) and (3) and, where applicable, (2):
>
> (1) the firm undertakes an adequate assessment of the expertise, experience and knowledge of the client that gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the client is capable of making his own investment decisions and understanding the risks involved (the "qualitative test");
>
> (2) in relation to MiFID or equivalent third country business in the course of that assessment, at least two of the following criteria are satisfied:
>
> (a) the client has carried out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters;
>
> (b) the size of the client's financial instrument portfolio, defined as including cash deposits and financial instruments, exceeds EUR 500,000;
>
> (c) the client works or has worked in the financial sector for at least one year in a professional position, which requires knowledge of the transactions or services envisaged; (the "quantitative test"); and
>
> (3) the following procedure is followed:
>
> (a) the client must state in writing to the firm that it wishes to be treated as a professional client either generally or in respect of a particular service or transaction or type of transaction or product;
>
> (b) the firm must give the client a clear written warning of the protections and investor compensation rights the client may lose; and
>
> (c) the client must state in writing, in a separate document from the contract, that it is aware of the consequences of losing such protections."

14. Rule 3.5.6R states:

> "Before deciding to accept a request for re-categorisation as an elective professional client a firm must take all reasonable steps to ensure that the client requesting to be treated as an elective professional client satisfies the qualitative test and, where applicable, the relevant quantitative test."

15. There are also duties in COBS 3.8 with respect to policies, procedures and records relating to clients. COBS 3.8.1R and 3.8.2R provide:

> "**3.8.1R Policies and procedures**
>
> A firm must implement appropriate written internal policies and procedures to categorise its clients.
>
> **3.8.2R Records**
>
> (1) A firm must make a record of the form of each notice provided and each agreement entered into under this chapter. This record must be made at the time that standard form is first used and retained for the relevant period after the firm ceases to carry on business with clients who were provided with that form.
>
> (2) A firm must make a record in relation to each client of:
>
> (a) the categorisation established for the client under this chapter, including sufficient information to support that categorisation;
>
> (b) evidence of despatch to the client of any notice required under this chapter and if such notice differs from the relevant standard form, a copy of the actual notice provided; and
>
> (c) a copy of any agreement entered into with the client under this chapter.
>
> This record must be made at the time of categorisation and should be retained for the relevant period after the firm ceases to carry on business with or for that client.
>
> (3) The relevant periods are:
>
> (a) indefinitely, in relation to a pension transfer, pension conversion, pension opt-out or FSAVC;
>
> (b) at least five years, in relation to a life policy or pension contract;
>
> (c) five years in relation to MiFID or equivalent third country business; and
>
> (d) three years in any other case."

16. There is a general duty imposed by COBS 2.1.1R:

> "**2.1.1R The client's best interests rule**
>
> (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) This rule applies:
>
> (a) in relation to designated investment business carried on for a retail

> client;
>
> (b) in relation to MiFID, equivalent third country or optional exemption business, for any client; and
>
> (c) in relation to insurance distribution, for any client.
>
> (3) For a management company, this rule applies in relation to any UCITS scheme the firm manages."

17. COBS 2.1.3G provides:

> "(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 CRA, also limits the scope for a firm to exclude or restrict any duty or liability to a consumer."

18. Several other COBS provisions are relied upon by the Defendant in supporting his case that he was not given sufficient written warning of all the protection and investor compensation rights he might lose. I do not propose to quote them here, though I return to them later under Issue (1) but they include COBS 4.5AR/G, 11.2A.9R, 11.2A.10G-11G, 22.5.6R, 22.5.13R, 22.5.15R, 22.5.20R (not accurately pleaded but referred to the Defendant's skeleton argument at [80]-[81]). There is also an allegation regarding the absence of a warning of loss of CASS (Client Assets Sourcebook) client money protection. See para. 9(2) of the Amended Defence and Counterclaim which also raised other issues which were not pursued at trial.

19. In the event that the Defendant establishes one or more breaches of COBS, he relies on s. 138D(2) of the FSMA, which provides:

> "(2) A contravention by an authorised person of a rule made by the FCA 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."

Issue (1) client categorisation

20. Evidence was provided on CMC's practices in opening an account by CMC's Head of Legal, Mr Simon Nesbitt and its Head of UK Compliance since May 2020, Mr Benjamin Manley. Mr Manley gave evidence (in place of his predecessor Ms Sheena Kanabar who is now unable to give evidence), of CMC's regulatory processes for applications including becoming professional clients, which were said to be the same as at the time of Mr

Tchenguiz' application although he has only been in position since May 2020.

21. While they provided general evidence as to CMC's practices with regard to its spread betting accounts neither was involved in the opening of Mr Tchenguiz' account. While their evidence was of assistance, it has to be considered in the light of that caveat, and it is clearly necessary to focus attention on the contemporaneous documentation as well as Mr Tchenguiz' own evidence to ascertain the facts.

22. On 16 December 2019 Mr Tchenguiz, through Mr William Thompson, a solicitor at R20 (a company which acts as Mr Tchenguiz' in-house legal team), took steps to open on-line a spread betting account with CMC. There are four steps in that process as described by Mr Simon Nesbitt in his evidence:

> "19.1 Step 1: "Create your account": the applicant is required to provide an email address and create a password. There is a link to CMC's legal documentation. At the time that Mr Tchenguiz applied to open his account, the legal documentation included Financial Betting Terms of Business dated January 2018, (the "Terms of Business"), CMC's Order Execution Policy Summary for Financial Betting (as amended from time to time) (the "Order Execution Policy"), CMC's Risk Warning Notice for Financial Betting (as amended from time to time) (the "Risk Warning Notice") (1 to 40 of SN1).
>
> 19.2 Step 2: "About You": the applicant is required to provide personal information at this stage.
>
> 19.3 Step 3: "Financial Background": the applicant is required to provide information and answer questions in relation to: (i) their employment status; (ii) at the "Relevant Experience" section, applicants are asked a number of questions relating to past trading experience and knowledge to determine their appropriateness for CMC's products; and (iii) under the section "Features and Risks", there are a number of questions regarding the applicant's understanding of certain issues relating to spread betting.
>
> 19.4 Step 4: "The Declarations": in order to complete the online application, each applicant must tick a number of declarations relating to the information contained in the application form."

23. Mr Nesbitt, despite his lack of personal involvement, gave a helpful explanation of CMC's procedures for opening and closing accounts which assisted in understanding the documents. He stated that:

> "17. … Opening an account gives the customer access to CMC's spread betting platform, the Next Generation Platform ("the Platform"). The application form can be completed online via the CMC website or via the CMC mobile application.
>
> 18. The CMC website provides details about spread betting, including the risks associated with spread betting."

24. As Mr Nesbitt agreed in cross-examination, although there were 4 steps to the application they were all met by completing the same on-line form.

25. In completing the application, the boxes ticked on behalf of Mr Tchenguiz included the following:

    (1) Under the heading "Features and Risk" -

    > "I understand that when trading leveraged products, I risk losing all of my invested capital. It is my responsibility to monitor my positions and to manage the risks of trading by utilising the risk management tools available to me…"

    (2) Under the heading "Declaration" -

    > "I understand and accept that CMC Markets will provide services to me in accordance with the following documents which, for my own benefit and protection, I should read: terms of business, order execution policy, risk warning notice, key information and cost disclosure."

26. The TOB provided electronically to Mr Tchenguiz on 16 December contain a number of relevant provisions including:

> "**1. Introduction**
>
> Investing in financial betting products, Digital 100s and/or Countdowns carries a high level of risk to your capital, which may not be appropriate for all investors. The prices of financial bets may change to your disadvantage very quickly. When investing in Bets, it is possible to lose more than your investment and you may be required to make further payments. This does not apply to a CMC Start Account, an Account with Negative Balance Protection enabled or an Account with Shield Mode enabled, with which you risk losing only your Invested Capital. Therefore you should ensure you understand the risks involved and seek independent advice if necessary.
>
> 1.1.1 This document (referred to as the "Terms") is part of a wider agreement between you (also referred to as "our client", "your" and "you") and CMC Spreadbet Plc (also referred to as "CMC Spreadbet", "we", "us" and "our") in relation to your activities carried on with us
>
> 1.1.2 Capitalised words in these Terms, the Risk Warning Notice and the OEP for Financial Betting have a special meaning which are explained in the Definitions section in Schedule 4.
>
> 1.1.3 Our agreement with you consists of these Terms, our OEP for Financial Betting, our Risk Warning Notice for Financial Betting and any specific terms and conditions you accept on the Platform. These documents are available on our Website and through our Platform and are together referred to as the Agreement. In accordance with clause 9, we will notify you of any changes to the Agreement. You must ensure that you keep informed of these changes. If we agree to provide you with our sales trader service, we will provide confirmation in writing. Any additional terms agreed in writing between us and

you in relation to that service will form part of the Agreement.

1.1.4 There are additional documents and information available to you on our Website and through our Platform which contain useful information but are not part of the Agreement. These include Key Information Documents, our Summary Policy of Conflicts of Interest, our Privacy and Security Policy, our Complaints Procedure and costs disclosures.

1.1.5 For your own benefit and protection, you should take sufficient time to read the Agreement, as well as the additional documents and information available on our Website and through our Platform, before you apply to open an Account and/or place any Order. If you do not understand any aspect of this Agreement, you should contact us before opening an Account, or you should seek independent professional advice.

1.1.6 It is our intention that this Agreement contains all the terms and conditions that govern our relationship and your activities carried on with us in relation to the Platform and supersedes any prior oral or written representations and/or agreements between you and us which relate to our Platform.

…

2.2 Client categorisation.

2.2.1 We will treat you as a Retail Client for the purposes of Applicable Law, unless we have informed you otherwise in writing. If we have categorised you as a Professional Client or an Eligible Counterparty (whether or not at your request) you will not be entitled to certain protections afforded to Retail Clients by Applicable Law, including certain protections under the FCA's client money rules (see clause 5.1). You have the right to request a different client categorisation. If you request a different client categorisation, we will contact you to explain the process and any additional requirements applicable to the change.

…

2.7 Order execution, conflicts of interest, risk warnings and Price sources.

…

2.7.2 We enter into all Bets, Digital 100s and Countdowns with you using Prices quoted by us through our Platform or through our client management team. Our Prices are not identical to prices for similar financial instruments or their underlyings quoted on a Trading Venue or by other providers. By entering into Bets, Digital 100s and/or Countdowns via our Platform or through our client management team you consent to your Orders being executed outside of a Trading Venue and in accordance with our OEP for Financial Betting.

2.8 Duration of the Agreement and your rights to cancel.

2.8.1 The Agreement will become legally binding between you and us on the date that we confirm in writing that we have accepted your application to open an Account. Subject to clause 2.8.2, you may cancel the Agreement by giving us notice in writing within fourteen (14) calendar days of this date. Following a valid notice of cancellation, we will return any money that you have transferred to us.

…

3.1 Account types and features.

3.1.1 We offer different Account types and features. Depending on your knowledge and experience or client categorisation, some of these may not be available to you. We reserve the right to convert your Account type and/or enable/disable (as applicable) Account features if, in our sole discretion, we determine that a different Account type/feature (as applicable) is more appropriate for you or if otherwise required by Applicable Law.

3.2 Account opening process.

3.2.1 When we receive your completed application form, we may use your information to conduct any further enquiries about you as we (in our sole discretion) determine are necessary or appropriate in the circumstances. You should provide us with information about any relevant factor that could affect your betting activities with CMC Spreadbet. Where our enquiries include searches with credit reference agencies, they may appear on your credit history. We may also carry out any additional checks or periodic reviews that we (in our sole discretion) determine are necessary or appropriate in the circumstances. You will need to co-operate with us and supply any information that we request promptly.

3.2.2 We rely on the information that you provide us in your application form or otherwise as being correct and not misleading at all times, unless you notify us otherwise in writing (see clause 6.1.4). In particular, you must notify us as soon as possible in writing if any of the details provided to us in your application form or if your circumstances have subsequently changed.

3.2.3 We use any information we have about you to make an assessment of whether or not entering into Bets, Digital 100s and/or Countdowns and/or operating an Account with us is appropriate for you.

…

5.1 Your money.

5.1.1 If we have categorised you as a Retail Client (see clause 2.2.1) in accordance with Applicable Law then, subject to clauses 5.1.3 and 5.1.4, we shall hold and maintain an amount equal to your Account Value for each Account you hold with us in a segregated client money bank account. Where we consider it appropriate to do so and in accordance with our regulatory permissions, we may from time to time hold client money in segregated client money bank accounts with fixed term deposits or notice periods. Such fixed term deposit accounts or notice periods will not affect your ability to deal with or withdraw your money in the ordinary course of business. However, there is a risk that, in exceptional circumstances, the longer notice period could result in a delay in returning some or all of your money to you until the expiry of the relevant fixed term or notice period.

5.1.2 If we have categorised you as a Professional Client or an Eligible Counterparty then, as permitted by Applicable Law, you acknowledge and accept that:

(a) we will acquire full ownership of all amounts received from you or credited by us to your Account;

(b) such money does not constitute client money for the purposes of

Applicable Law and may be used by us in the course of our business; and

(c) you will rank as a general creditor of us in respect of this money in the event of our insolvency.

5.1.3 At the close of business on each Business Day, we carry out client money reconciliations between money required to be held in the client money bank accounts and client money that is held in the client money bank accounts in accordance with Applicable Law. Any required transfer to or from the client money bank account in respect of your Account will take place on the following Business Day.

…

5.2 Payments and withdrawals.

5.2.1 You are responsible for making any payments to us which are required under the Agreement. We may reject any payment that is not made in accordance with our payment procedures (details of which are available on our Platform).

5.2.2 When making payments to us, you may wish to leave "headroom", especially during volatile and potentially volatile periods, (i.e. an Amount that ensures you have sufficient funds above your Margin requirements and that your Account Revaluation Amount is in excess of your total Margin requirements (if applicable) or the Amount required to keep the Account Revaluation Amount above the applicable Close-Out Level on any Account). You should consider your Positions, Bets, Digital 100s, Countdowns and Pending Orders, the volatility of the particular Product concerned and the relevant markets for the underlying asset, the time it will take for you to make further payments of cleared funds to us and any other matter which you may think relevant.

5.2.3 Any payment made by you will only be given effect once our systems have credited it to the relevant Account and it is shown on our Platform. We cannot guarantee how long this process will take and, subject to clause 7.3.2(b), we will not be liable to you for any loss arising as a result of any delay in us crediting any payment to your Account.

5.2.4 You are responsible for any costs and charges incurred in the process of making any payment to your Account. You may also be liable for other charges that are not imposed by us, including bank transfer fees, and fees to internet and telephone service providers. If you make a payment by debit card or credit card or withdraw money from an Account, we may charge an administration fee to process that payment and/or withdrawal in accordance with Applicable Law.

5.2.5 You may make a request to withdraw money up to the lower of your Available Equity or Cash from your Account. Details on how to make withdrawals of money from your Account are available on our Website or from our client management team upon request.

5.2.6 Unless we agree otherwise or in order for us to comply with Applicable Law, we will only accept a request for a withdrawal of money from an Account that is given directly by you or certain Authorised Persons. We will not accept any request for a withdrawal of money from an Account from any other person.

Withdrawals of money from your Account will only be made in the Account Currency and will only be processed by us where the destination for the money being withdrawn is the same as the origin of your payments made under clause 5.2.1, unless (subject to our prior approval) you have notified us in writing that your payment details have changed.

5.2.7 We may in our reasonable discretion refuse or delay giving effect to your request for a withdrawal of money from your Account (in whole or in part), including as a result of any request to close that Account under clause 9.6.1. We will notify you as soon as reasonably practicable if we decide to refuse or delay giving effect to your request for a withdrawal and such action shall be a Specified Event (see clause 8.1).

5.2.8 If your Account has a negative Cash value following Account Close-Out or termination of this Agreement, that negative Cash value represents a debt owed to us which is due and payable immediately. This clause

5.2.8 does not apply to a CMC Start Account, an Account with Negative Balance Protection enabled or an Account with Shield Mode enabled.

5.2.9 If we have agreed to provide you with the sales trader service, any negative balance should be cleared promptly regardless of whether the balance is within the relevant Close-Out Level.

…

Schedule 1 – Product terms for Bets

…

7. CMC Start Account and Negative Balance Protection.

7.1 With a CMC Start Account or an Account with Negative Balance Protection enabled, you cannot lose more than your Invested Capital. If at any time you have a negative Cash value on your CMC Start Account or an Account with Negative Balance Protection enabled, we will waive our right to claim the deficit and will return the Account balance to zero (0). Please note, this may not happen immediately.

7.2 With a CMC Start Account or an Account with Negative Balance Protection enabled, you are still obliged to ensure that your Account Revaluation Amount is at all times above the applicable Close-Out Level displayed on our Platform. We retain the right to close any open Bets if you fail to maintain sufficient funds on your Account to keep your Account Revaluation Amount above the applicable Close-Out Level.

7.3 Negative Balance Protection is only enabled on your Account if we have provided you with notice that it is enabled.

…

Limits on your Bets.

8.4 We will set various limits in relation to your Bets and it is your responsibility to ensure that you know what all the current limits are before placing or modifying any Order to open a Bet by checking the information available on the Platform. If we have agreed to provide you with the sales trader service, we may, at our sole discretion, waive such limits in relation to your Bets.

8.5 If, at the time an Order would otherwise be executed, the execution of that Order would result in a breach of a limit relevant to that type of Order, the Order will be automatically rejected. Where the acceptance of a Pending Order or modification of an existing Pending Order would result in a breach of a relevant limit, the relevant Order or modification will be rejected by our Platform, save where agreed otherwise between you and our client management team.

8.5 In addition, an Account may be subject to a limit restricting the number of Bets, Positions and/or Pending Orders that could result in opening a new Position or Bet on the Account at any time. This limit is set by us in our sole discretion. We are entitled to vary such a limit at any time in accordance with clause 9.3 and it is your responsibility to ensure that you know what the current limit is before entering any new Position or Bet, or placing a new Pending Order by checking the information available on the Platform.

…

12. Account Close-Out.

12.1 You must ensure that for each Account your Account Revaluation Amount is at all times above the applicable Close-Out Level for your Account displayed on our Platform. Where your Account Revaluation Amount is less than the applicable Close-Out Level, our Platform may automatically initiate Account Close-Out in accordance with your Account settings. Further details on the applicable Close-Out Level for your Account, and the methods of Account Close-Out, can be found on our Platform. Account Close-Out does not and is not intended to limit your entire liability to us in respect of your Bets. You can lose more than your investment and you may be required to make further payments, except in respect of a CMC Start Account, an Account with Negative Balance Protection enabled or an Account with Shield Mode enabled, where you cannot lose more than your Invested Capital.

12.2 Where you have open Bets relating to Manual Products or Manual Orders, if the Platform has carried out an Account Close-Out and your Account Revaluation Amount is still at or below the Close-Out Level, the client management team will (as it sees fit in its sole discretion) manually close all or a portion of the Bets relating to Manual Products or Manual Orders within the applicable Trading Hours and where betting is not otherwise suspended.

12.3 Where we have agreed to provide you with the sales trader service, if our client management team has previously agreed with you that it may suspend or override any Account Close-Out initiated by the Platform and your Account Revaluation Amount falls to an Amount at or below the Close-Out Level, our client management team may (as it see fit in its sole discretion) during UK office hours try to contact you to request payment into the Account. If the client management team is unable to contact you and/or you are unable to fund your Account within a reasonable time, it may manually close all or a portion of the Bets in respect of any Product (including those relating to Manual Products or Manual Orders) within the applicable Trading Hours and where betting is not otherwise suspended.

…

Schedule 4 – definitions

> …
>
> Account Close-Out - A procedure by which our Platform may close the whole or a portion of your Bets and/or Positions.
>
> …
>
> Agreement - Has the meaning set out in clause 1.1.3.
>
> …
>
> Bet - A financial spread bet on a Product entered into through our Platform on an Account, which relates to the difference between the relevant Price from the time the bet was entered into and the time at which it was closed. …
>
> …
>
> Close-Out Level - In relation to any Account, the applicable level at which our Platform may close the whole or a portion of your Bets as necessary.
>
> …
>
> Negative Balance Protection - An Account function which, if enabled, ensures that you will not lose any more than your Invested Capital. Information relating to this function is in paragraph 8 of Schedule 1.
>
> OEP for Financial Betting - Means our order execution policy summary for financial betting which details how we execute Orders. It is available on our Website.
>
> …
>
> Risk Warning Notice for Financial Betting - Means the notice that we are required to provide to you under Applicable Law in respect of any financial bet, Digital 100 or Countdown on any Product, which is made available on our Website."

27. The OEP referred to in the TOB began:

> "**CMC Spreadbet Plc (referred to below as "CMC Spreadbet", "we", "us" or "our") is committed to treating you fairly and acting in your best interests when we execute your Orders. In this document, we summarise the process by which our Platform executes your Orders in accordance with our regulatory duty to take all sufficient steps to obtain the best possible result for you. When you enter into a Bet, Digital 100 and/or Countdown through our Platform you consent to your Orders being executed in the manner described below, outside of a Trading Venue.**
>
> The words and expressions in this document that begin with capital letters have the meanings set out in Schedule 4 of our Financial Betting Terms of Business."

28. The OEP set out the basis upon which CMC executed client orders and the process and terms upon which it would do so. This included:

> "**1. Key points.**
>
> *This section identifies the key points of this order execution policy summary.*

1.1 We are the sole execution venue for your Orders. This means that your Orders are executed via a bilateral transaction with us as the counterparty to your trades, through our Platform and not through a transaction on any Trading Venue or other external execution venue.

1.2 Our Platform is fully automated for pricing and Order execution. By placing an Order, you are giving our Platform an instruction to place that Order on your Account on the basis of the Prices and/or Settlement Prices generated by our Platform. Please see our Financial Betting Terms of Business and our Website for further details on how your Orders are placed and executed, as well as further details on pricing.

1.3 Our Prices and Settlement Prices are electronically generated by our Platform, and such Prices and Settlement Prices may be different to prices generated by Trading Venues, other markets, execution venues or providers. The Prices and Settlement Prices for a Product may differ depending on whether they relate to a Bet, Digital 100 or Countdown.

1.4 You must contact our client management team to enter into or close a Bet relating to:

1.4.1 a Manual Product; or

1.4.2 if we have agreed to provide you with the sales trader service, a Manual Order.

Our client management team will provide the relevant Price and other terms relating to the opening or closing of that Bet which you will be free to accept or reject.

…

5. Factors we consider when determining best execution

5.1 When executing orders, we will take all sufficient steps to obtain the best possible result for you taking into account the type of financial instrument the Order relates to, and other execution factors.

5.2 We will take into account the following execution factors when executing your Order, ranked in order of importance from highest to lowest:

5.2.1 Price,

5.2.2 speed of execution;

5.2.3 likelihood of execution and settlement; and

5.2.4 size of your Order.

…

9. How your Bets are closed without instructions from you.

9.1 There are some circumstances where the whole or a portion of your Bets will be closed without instructions from you. This includes where Account Close-Out occurs, where you fail to reduce any Position to below the applicable limit within the relevant time limit specified by us or where we exercise our rights to close your Bets. Please refer to our Financial Betting Terms of Business for more information.

> 9.2 Unless closed by you or us beforehand, any Bet will be closed and settled by our Platform automatically at the time and date of expiry on a Forward (and any Pending Order will also be cancelled on this basis).
>
> 9.3 Where the whole or a portion of your Bets and/or Positions are to be closed without instructions from you, or Account Close-Out is to occur in accordance with the elections you have made in your Account, certain procedures apply. Further informat ion on these procedures can be found on our Platform. …"

29. The RWN was referred to in the TOB, and also provided electronically on 16 December when Mr Tchenguiz' account was created. This and other documentation was available on line as explained by Mr Nesbitt. The Notice began as follows:

> "It is important that you read and understand this risk warning notice before accepting it. Except where expressed otherwise, certain terms used in this risk warning notice have specific meanings as set out in Schedule 4 of the Financial Betting Terms of Business.
>
> CMC Spreadbet Plc (referred to below as "CMC Spreadbet", "we", "us" or "our") is committed to treating you fairly. In this notice, we provide you with information to help you understand the nature and risks of your Bets, Digital 100s, Countdowns and our services. However, this notice does not explain all of the risks and other significant aspects involved in our Bets, Digital 100s and/or Countdowns. You should take sufficient time to read all the relevant information that we provide to you before entering into a Bet, Digital 100 or Countdown.
>
> Our Products can carry a high risk to your capital as Prices may move rapidly against you, particularly during volatile market conditions. Certain Products, such as Bets on cryptocurrencies, are more volatile than others and may be even more susceptible to sharp and sudden movements in Price. When entering into Bets you can lose more than your investment and you may be required to make further payments. This does not apply to a CMC Start Account, an Account with Negative Balance Protection enabled or an Account with Shield Mode enabled, with which you risk losing your Invested Capital. The higher the leverage involved in a Bet, the higher the risks involved. By comparison, your potential losses from Digital 100s and Countdowns are limited to the amount of your Digital 100 Amount or Stake (as applicable).
>
> You should not enter into Bets, Digital 100s and/or Countdowns with us unless you fully understand the risks involved. If you are in any doubt you should seek independent professional advice."

30. It continued in terms which refer specifically to the risks if, for example, NBP, is not enabled:

> "**1. Bets, Digital 100s and/or Countdowns may not be appropriate for you.**
>
> 1.1 We are under a regulatory duty to assess whether our products and services are appropriate for you. When we process your application to open an Account with us, we will conduct an assessment as to whether you have sufficient knowledge and experience to understand the risks involved in investing in Bets,

Digital 100s and/or Countdowns based on the information you provide us. We will inform you if, as a result of our assessment, we consider that Bets, Digital 100s and/or Countdowns may not be appropriate for you. However, our assessment does not relieve you of the need to carefully consider whether to enter into our Products. Any decision to enter into our Products is entirely at your own risk.

1.2 If we warn you that entering into Bets, Digital 100s and/or Countdowns may not be appropriate for you on the basis of your knowledge and experience, then you should refrain from entering into Bets, Digital 100s and/or Countdowns. If you still wish to enter into Orders, you should only invest once you have acquainted yourself sufficiently with Bets, Digital 100s and/or Countdowns through the demo account available on our Website and understand the risks involved.

…

5. You may lose more than any deposit when you enter into Bets with us, except with a CMC Start Account, an Account with Negative Balance Protection enabled or an Account with Shield Mode enabled.

5.1 When you enter into Bets with us, you risk losing more than the amount (if any) that you deposited with us and you may be required to make further payments. This does not apply to a CMC Start Account, an Account with Negative Balance Protection enabled or an Account with Shield Mode enabled, with which you risk losing your Invested Capital. Although our Platform has features that are designed to help limit your risk of loss, none of these other than the Shield Mode and Guaranteed Stop Loss Orders are guaranteed and you should not rely on them.

5.2 The amount of loss for an individual Bet will be the amount that you owe us when that Bet is closed. Bets involve leverage (also known as 'gearing' or 'margining'), which means that the effects of small movements in Price are multiplied and may have large impacts on the value of your Positions, both in respect of profits made and losses incurred and the higher the leverage rate, the higher the risk involved. In addition, the nature of leverage means that your losses may exceed the amount of any deposit (if any) that you hold with us when entering into a Bet.

5.3 It is therefore important that you monitor your Bets closely and the rate of leverage utilised. A small movement in Price may have a large impact on your Bets and Account and may result in immediate Account Close-Out.

5.4 There are costs associated with betting with us. Depending on the Bets you enter into, and how long you hold them for, we may require you to pay holding costs. If you keep Bets open for an extended time, the aggregate holding costs may exceed the amount of any profits or increase your loss. Only trade with money you can afford to lose.

5.5 If we have agreed to provide you with the sales trader service and have waived or permitted a negative Margin on your Account, this does not restrict your losses or financial liability. You are still liable to pay all losses which are due and payable to us.

…

> **8. Your Bets, Digital 100s and/or Countdowns and Positions are at risk of being closed automatically.**
>
> 8.1 The automatic closure of your Bets and/or Positions by our Platform and/or our client management team (if we have agreed to provide you with the sales trader service) is intended to prevent you incurring further losses and we may close all Bets and/or Positions on your Account, not just Bets that are making a loss. However, we do not guarantee such closure and you must not rely on it. It is your responsibility to monitor your Positions and your Account Revaluation Amount closely. Our Platform and/or our client management team will attempt to notify you when your Account Revaluation Amount reaches a specific level, although you should not rely on our Platform and/or our client management team giving you this warning. To prevent Account Close-Out, you should keep an amount in your Account that allows sufficient headroom to keep your Positions open in case of sudden changes to the required Margin amount resulting from Price movements. It is important to note that an amount deposited into your Account (which appeared to be sufficient) can very quickly become insufficient, due to rapidly changing market conditions. …"

31. Prior to the opening of the retail account and completion of the request, there had been an email exchange on 16 December between David Garbacz, Senior Relationship Manager with CMC, and Mr Tchenguiz. Mr Garbacz emailed:

> "Good to speak to you earlier. Further to our conversation please find below the link which leads you straight to the account opening page. https://oaf.cmcmarkets.com/en-gb/onboarding-start?iaid=351052. Please click on this and complete the form as required. It shouldn't take more than a few minutes to fill in. Please call me either on 0203 0038598 or on my mobile 07831 544429 if you have any questions. After the account is set up I will send you the form to upgrade to Professional status. We will then discuss what facilities you require. We can set you up on something known as the FRS (fixed rate schema) for margins. This will ensure that all your equity trades will be margined at either 10% or at a maximum of 25% whatever size you are dealing in depending on the market cap of the stock in question. Please note there will be a cap on the actual amount you can trade in on this scheme per share but usually it is a pretty decent size. Obviously all other non-equity business will be at the normal Professional rates which are probably the most competitive in the industry. All clients that get introduced by me have access to our bespoke dealing desk. The desk will deal with all your trades and are incredibly professional both in their manner and execution of the business. I'm sure you will be more than happy with the service. First thing first though is to get the account open so please let me know either by email or through a quick call when the application has been made and I'll make sure we get this processed as quick as possible. Looking forward to doing some good business together…"

32. Following the opening of the account, Mr Garbacz emailed Mr Thompson with regard to upgrading the account to professional at 10 am and just after noon on 17 December.

33. Mr Tchenguiz exchanged emails with Mr Thompson who emphasised that Mr Tchenguiz was disclosing to CMC that he had trading accounts with other brokers. Mr Tchenguiz

replied that he had traded "every day almost" in the last four quarters.

34. Clients who wished to gain the advantages given to professional clients, which included additional spread betting and trading opportunities, were required by CMC to complete a request form to become an elective professional client. On 17 December 2019 Mr Tchenguiz signed the completed Request Form (*Request to become an elective professional client*) which stated:

> "In order for us to classify you in this way, we must assess your expertise, experience and knowledge, and be reasonably assured that in light of the transactions and services envisaged, you are capable of making your own investment decisions, understand the risks involved and are able to bear those risks in making out assessment, we may rely on information we already possess about you and/or request additional information from you and/or call you to discuss your investment experience. In addition to this qualitative test, you must satisfy at least two of the three quantitative criteria."

35. Mr Tchenguiz ticked two of the boxes indicating that he met the required two out of three quantitative criteria i.e., that -

(1) the size of his financial instrument portfolio exceeded €500,000; and

(2) he had worked in the financial sector for at least one year in a professional position which required knowledge of the transactions or services envisaged.

36. The Request Form was also marked to indicate that the current value of Mr Tchenguiz' portfolio was greater than £1 million. It also notified the applicant of the "Protections you lose" –

> "**Protections you lose**
>
> Communications and Financial Promotions
>
> Certain FCA (or equivalent) rules relating to the form and content of information provided by CMC Markets do not apply, including those relating to communications and financial promotions.
>
> Financial Ombudsman Service (or equivalent)
>
> Access to the Financial Ombudsman Service (the "FOS") will not extend to all Professional Clients (only those that meet the FCA Handbook definition of a consumer) and may therefore not extend to you. The FOS is an independent service for settling disputes between FCA regulated firms and eligible complainants. If you are not sure whether you will be entitled to refer your complaint to FOS, we suggest you contact FOS directly.
>
> Leverage restrictions
>
> CMC Markets is required to restrict leverage to between 30:1 and 2:1 on the products we offer to retail clients. Higher leverage can work against investors and amplify losses.

> Negative balance protection
>
> Retail clients benefit from negative balance protection. However, this functionality is not available to professional clients.
>
> Risk warnings
>
> CMC Markets will not be required to provide you with the risk warnings we must provide to retail clients in relation to transactions in complex financial products."

37. It also noted under "Categorisation":

> "You retain the right to request a different categorisation at any time, for example if you wish to be afforded the higher level of regulatory protections. You understand that in these circumstances CMC Markets may not be able to provide certain services to you."

38. Under "evidence to support quantitative criteria", Mr Tchenguiz indicated that:

    (1) he had on average traded 10 times or more over the last four quarters though not with CMC; and

    (2) under "relevant work experience" his most relevant employer was R20 Advisory Limited of which he was director. Further details were provided –

> "Mr Tchenguiz is a director of R20 Advisory Limited which is a company that provides asset management, corporate finance and consulting services to various related entities in family trust structures. These financial services include advising on investments in both public and private companies, for example in the venture capital and private equity sector, and across various asset classes including equities, fixed income and other money market instruments. The Company also assists in the financing of related parties. Prior to 2010, these services were provided by a related company, R20 Limited, of which Mr Tchenguiz is also a director."

39. Mr Tchenguiz signed the client declaration which included confirmation that he wished to be treated as a professional client and that he confirmed he understood the protections he would lose. The form also finally warned the applicant that –

> "For your own benefit and protection you should read this form carefully before accepting the risks. If you do not understand any point please ask for further information."

40. The signed Request Form was emailed to CMC by Mr Thompson of R20 on 17 December 2019 at 16.31.

41. On 17 December 2019, CMC sent Mr Tchenguiz a letter and email confirming that his application for an account had succeeded. Both documents contained an additional

warning to that in the Risk Warning Notice:

> "Spread Bets and CFDs are complex instruments and come with a high risk of losing money rapidly due to leverage. **75% of retail investor accounts lose money when trading CFDs with this provider**. You should consider whether you understand how CFDs work and whether you can afford to take the high risk of losing your money.
>
> Professional clients: Losses can exceed deposits when spread betting and trading CFDs. Countdowns carry a level of risk to your capital as you could lose all of your investment. Invest only what you can afford to lose. These products may not be suitable for all clients therefore ensure you understand the risks and seek independent advice."

42. On 18 December 2019, Mr Thompson met Mr David Garbacz. At 11:46 on that day, Mr Garbacz emailed Mr Thompson seeking information for the purposes of Mr Tchenguiz' application to be an Elective Professional Client: namely a trade history and evidence of funds. Following further emails, Mr Thompson on behalf of Mr Tchenguiz sent a screenshot of Mr Tchenguiz' position at RJO, another SBF, and a daily trading statement from RJO, the intention being for CMC to take on certain trading which Mr Tchenguiz had been conducting with RJO but which RJO no longer wanted to conduct (see further below).

43. On 19 December at 13:40, Mr Garbacz emailed Mr Tchenguiz (copied to Mr Thompson) attaching the Opt-Up Agreement (*Professional Client Categorisation and Title Transfer Collateral Arrangement Agreement*).

44. Shortly afterwards, at 13:46, CMC sent a "Welcome to CMC Pro" email that confirmed acceptance of Mr Tchenguiz's application to become a professional client which noted a number of "exclusive benefits for CMC Pro Clients":

> "**Exclusive benefits for CMC Pro clients**
>
> - Margin rates from 0.2%
> - Dedicated account manager
> - Access to cash rebates and rewards^
> - Priority access to new products
> - Access to Countdowns"

45. It also set out further warnings:

> "**Protections you may lose**
>
> As a professional client, please remember that you may lose some of the FCA protections afforded to retail clients:
>
> - Our communications, including financial promotions, will not be subject to

all of the retail regulatory requirements

- We may assume your level of experience when assessing whether our products are appropriate for you
- Access to the Financial Ombudsman Service only extends to professional clients that meet the FCA's Handbook definition of a consumer
- You won't receive negative balance protection, so your losses can exceed deposits
- CMC Markets are required to restrict leverage to between 30:1 and 2:1 on the products we offer to retail clients. Higher leverage can work against investors and amplify losses."

46. It also repeated both in text and footer formats the warning that had been in the letter of 17 December:

> "CFDs are complex instruments and come with a high risk of losing money rapidly due to leverage. 75% of retail investor accounts lose money when spread betting and/or trading CFDs with this provider. You should consider whether you understand how spread bets and CFDs work and whether you can afford to take the high risk of losing your money.
>
> Professional clients: Losses can exceed deposits when spread betting and trading CFDs. Countdowns carry a level of risk to your capital as you could lose all of your investment. These products may not be suitable for all clients therefore ensure you understand the risks and seek independent advice. Invest only what you can afford to lose."

47. The Opt-Up Agreement with its declaration (see below) was signed by Mr Tchenguiz and dated 19 December 2019. It was emailed by Mr Thompson to Mr Garbacz (copied to Mr Tchenguiz and Ms Martin) at 14:04 that day.

48. The Opt-Up Agreement included the following terms and warnings:

> "**The Client hereby understands, agrees and confirms that**:
>
> They are to be treated as a Professional Client, as opposed to a Retail Client, in respect of the investment activities the Client conducts with CMC Markets.
>
> They are capable of making their own investment decisions, understanding the risks involved and bearing those risks.
>
> As a Professional Client, the Client will not be entitled to the protections and rights afforded exclusively to Retail Clients under the FCA (or equivalent) rules
>
> …
>
> They will retain the right to request a different categorisation at any time for example by requesting to be categorised as a Retail Client because they believe that they are unable to properly assess the risk involved and wish to be afforded the higher level of regulatory protection.
>
> …
>
> Upon signing this Agreement, they will be treated as a Professional Client and

will continue to be treated so until CMC Markets inform them otherwise.

The following protections and rights that apply to Retail Clients will not apply to the Client or will be limited in application to the Client as a result of being categorised as a Professional Client:

- Retail client leverage level restrictions will not apply
- You will not benefit from negative balance protection
- The mandatory margin close out on an account basis (at 50% of minimum required margin) may not apply
- Our communications, including financial promotions, will not be subject to all the retail regulatory requirements including risk warnings
- Access to the Financial Ombudsman Service only extends to professional clients that meet the FCA Handbook's definition of a consumer
- Your funds will not be subject to the client money rules and will not be segregated by us

…

Declaration

The Client confirms that they wish to be treated as a Professional Client by CMC Markets for the purpose of their Account(s). the Client has read the above written warning from CMC Markets regarding the protections and rights that the Client may lose and how CMC Markets will treat the client's money and the Client accepts the consequences of losing such protections and rights."

49. At 14.25, Mr David Garbacz of CMC emailed Mr Tchenguiz (copied to Mr Thompson). By that email, CMC confirmed that as a sales trader client, additional terms would be applied to Mr Tchenguiz' contract. The relevant terms included:

> "Further to our recent discussions regarding your Account 18245808, I am pleased to confirm that, in accordance with the Sales Trader Terms of Business (the "Terms"), CMC Markets has agreed to apply the following to your Account:
>
> [**Manual Account Close-Out**
>
> …We have agreed that if and when your Account Revaluation Amount falls below the Close- Out Level, the client management team will be able to suspend or override any Account Close-Out initiated by the Platform and initiate Manual Account Close-Out.]
>
> **Absolute Close-Out Level**
>
> An Account Close-Out is triggered when your Account Revaluation Amount (i.e. your Cash + Net Unrealised Profit or Loss) falls to an amount equal to or below the Close-Out Level specified for your Account. The Absolute Close-Out Level for your Account is 80%.
>
> Please note that the negative Absolute Close- Out Level is designed as a short term buffer to cover variation margin. Any debit balance should be cleared

> promptly.]
>
> **Please note that [neither the Absolute Close-Out Level nor the manual account close out] is a credit facility or a loan. They do not restrict your losses or your financial liability to us in any way.**
>
> **We may amend or remove the [Manual Account Close-out, Absolute Close-Out Level) at any time in accordance with the Terms. You should ensure that you have read and understood the provisions of the Terms and Sales Trader Risk Warning Notice that relate to these changes to your Account**
>
> If you are happy to proceed and are comfortable that you understand the above, please reply to this email to confirm your acceptance of these credit arrangements and I will have the necessary changes applied to your Account
>
> In addition to the above you have also been approved for our FRS (fixed rate scheme) scheme with regards to margin requirements."

50. In its footer, that email repeated the earlier warnings:

> "Spread bets and CFDs are complex instruments and come with a high risk of losing money rapidly due to leverage. 75% of retail investor accounts lose money when spread betting and/or trading CFDs with this provider. You should consider whether you understand how spread bets and CFDs work and whether you can afford to take the high risk of losing your money.
>
> Professional clients: Losses can exceed deposits when spread betting and trading CFDs. Countdowns carry a level of risk to your capital as you could lose all of your investment. These products may not be suitable for all clients therefore ensure you understand the risks and seek independent advice. Invest only what you can afford to lose."

51. At 14:35 Mr Tchenguiz replied to Mr Garbacz's 13:35 email (which was attached to it, including the warning in the footer):

> "That's ok with me."

52. I note that Mr Tchenguiz had said in his witness statement at paras. 24 and 25 that there was an internal email to this effect and that he was not previously aware of the change. However, it is clear that this was not an internal email and Mr Tchenguiz eventually accepted that he had received it and has replied to accept it. Whether or not he had troubled to read it carefully or to understand its implications (which he suggested in cross-examination) does not alter the fact that he was notified and had an opportunity to query or reject the notification or even not to activate his account later that day.

53. Accordingly, the declaration in the Opt-Up Agreement was made and signed before that Agreement was returned and accepted, and Mr Tchenguiz' account activated, as was the notification (and acceptance of it by Mr Tchenguiz) of the terms relating to manual account close-out and absolute close-out level.

54. At 16:14, Mr Tchenguiz was emailed by CMC welcoming him to CMC and confirming that "your account is now open". It explained under "What's the next step?" that:

> "We just need you to:
>
> 1. verify your email address to activate your account; and
> 2. confirm whether you are a private or non-private investor.
>
> For your own benefit and protection, you should visit the Legal section of our website and ensure you read the cost disclosure and the Key Information Documents, as well as the Terms of Business, Risk Warning Notice and Order Execution Policy, before you start to trade."

55. At 18:50 CMC notified Mr Tchenguiz that his account "is now active".

56. Those emails both repeated at the end (twice in both cases, the first in the main email text, the second as a footer) the warning statements which had been given earlier:

> "CFDs are complex instruments and come with a high risk of losing money rapidly due to leverage. **75% of retail investor accounts lose money when trading CFDs with this provider**. You should consider whether you understand how CFDs work and whether you can afford to take the high risk of losing your money.
>
> Professional clients: Losses can exceed deposits when spread betting and trading CFDs. Countdowns carry a level of risk to your capital as you could lose all of your investment. Invest only what you can afford to lose. These products may not be suitable for all clients therefore ensure you understand the risks and seek independent advice."

57. Mr Tchenguiz gave oral evidence during the trial and explained that at the time he opened an account with CMC he had accounts with a number of SBFs and referred to RJO, InterTrader and IG Index. By March 2020 he had opened accounts with two other SBFs. With regard to the three SBFs with whom Mr Tchenguiz already had accounts in December 2019, as set out at 4(3) above, he accepted in cross-examination that in relation to all of those accounts he was classified as an elective professional client, that he had signed forms confirming this was how he wished to be classified and that he assumed that each had warned him about the protections he would lose as a professional client.

58. Indeed, in giving his answers, Mr Tchenguiz did not seem to have been concerned to read the warnings he was given or to have checked the detail which reinforces the impression that he considered he knew what he was doing and was experienced in spread betting. Moreover, he also accepted that in opening his account with CMC (for which he had personally signed the disclosure certificate) he had failed to disclose any of his contracts with other SBFs or the warning notices he had been given in relation to classification as a professional client.

59. Having accepted that he was warned by the other companies that he would lose his NBP as a result of being classified as a professional client, the following exchange took place:

> "MR SAOUL: Now, as a result of those warnings, Mr Tchenguiz and as a result of your wider experience, you were well aware that if you were classified as a professional client, you would lose a number of protections that are available to retail clients.
>
> A. Yes.
>
> Q. And you were well aware that one of the protections that would be lost was negative balance protection.
>
> A. Yes.
>
> Q. And you knew what negative balance protection meant, didn't you?
>
> A. Yes.
>
> Q. It means -- and you knew at the time that you opened your account with CMC that removing negative balance protection meant your account could go into deficit?
>
> A. Yes.
>
> Q. Now, becoming an elected [sic] professional client with each of those brokers, before you opened your account with CMC, allowed you to acquire very substantial spread bet positions in relation to the First Group shares?
>
> A. Yes.
>
> Q. And it enabled you to trade on a highly leveraged basis with each of them?
>
> A. Market leveraged basis, yes.
>
> Q. And it meant in practice that you could have exposure to a very substantial amount of First Group shares without having to put down anywhere near the amount of money that would have been required to buy the shares themselves?
>
> A. Yes.
>
> Q. Now, prior to opening your account with CMC, you held a spread bet position with RJ O'Brien which was equivalent to approximately 18 million shares in First Group; do you remember that?
>
> A. Yes.
>
> Q. And you wanted to move some of those positions away from RJ O'Brien because they were increasing their margin requirements from 20% to 35% in your case. Do you remember that?
>
> A. Yes."

60. It is clear that prior to opening the account with CMC Mr Tchenguiz was well aware and understood the effect of being classified as a professional client, that he was already classified as such with 3 other companies and that, in opening the account with CMC, he wished to take advantage of the benefits of being a professional client i.e., being able to trade on a high leveraged basis with reference to First Group without having had to expend

the same capital as would have been the case had he acquired First Group shares themselves.

61. I was left with the impression, with that exchange and that concerning the manual account close-out and absolute close-out level, that Mr Tchenguiz was not greatly concerned with these issues but was seeking more to support points that had been taken in the pleadings rather than making an effort to recall accurately, or reconstruct from the documents, what had happened.

62. Mr Tchenguiz also took issue with whether he had moved his position equivalent to 10 million First Group shares from RJO because of the proposed increase in margin, or whether that was simply a feature of RJO seeking to reduce its risk, and in so doing contradicted evidence called on his behalf from Mr Arron Fletcher of RJO which supported the proposition that it was the increase in margin that led to the move.

63. However, although I am concerned at the lack of consistency in Mr Tchenguiz' written and oral evidence, it was clear that Mr Tchenguiz wished to maintain an equivalent position with CMC and other SBFs with regard to the 10 million equivalent.

64. Mr Tchenguiz said:

> "[RJO] recognised the risk of 18 million shares to Robert Tchenguiz was too high and one of the ways of dealing with it is to increase margin or telling me to reduce the position, hence why, when I went to CMC, they knew that they're going to take this position out of RJ O'Brien, a proportion of it, which is a 2.5 million share. They knew it. And it wasn't a margin issue, it was just that RJ O'Brien did not want me to have -- they didn't want to hold more than a certain amount of shares, once they recognised I have over 54 million shares in the market."

65. In evidence, Mr Tchenguiz conceded that he would have moved from RJO to another SBF had not CMC classified him as a professional client as they required, though he then said he thought that this would not have made a difference (although subsequent responses indicated that the position was not settled with all of the other SBFs):

> "Q. Had CMC not been able to take on the 2.5 million shares from RJO, you would have looked to move that 2.5 million shares to another spread betting company.
>
> A. Yes.
>
> Q. And that's in all likelihood what you would have done; do you agree?
>
> A. Yes.
>
> Q. And the market in due course over the following three months would then have moved against you as it did in fact; do you agree? Let me ask that again. The market then would have moved against you in exactly the same way that it

> did.
>
> A. Yes.
>
> Q. But you have no basis to suggest, do you, that if one of these brokers had had the 2.5 million shares in addition that they would have behaved any differently?
>
> A. Well, probably they wouldn't have behaved differently, but I could have stayed with RJO and had a totally different outcome, which is a different outcome had it stayed with RJO.
>
> Q. You've accepted in answer to one of my earlier questions that had CMC not taken on the 2.5, you would have looked to move it to one of the other operators --
>
> A. Fine.
>
> Q. Do you accept that?
>
> A. Fine, I accept that …"

66. Further, whilst Mr Tchenguiz at first disputed whether he had asked to be classified as a retail client, rather than CMC requiring him to be such, what is clear from the correspondence including various WhatsApp messages between himself and David Garbacz of CMC between 17-19 December 2019 was that Mr Tchenguiz was content to be classified as a professional client and at no point did he state that he did not wish to be so classified, or otherwise resist the classification or even express any misgivings with it despite the warnings in the documentation that he would lose NBP and his acceptance in cross-examination that he knew he would not have NBP.

67. That exchange over WhatsApp is telling since it shows Mr Tchenguiz as being comfortable with his becoming a professional client, readily completing the Request Form and then signing the Opt-Up Agreement both with their warnings about loss of protection (quoted above):

> "[12/17/19, 11:56:51] David Garbacz: Hi Robbie - I sent you an email confirming your account is open and we now need to fill in the cmc Pro form. Would you like me to come and meet you somewhere to sort it with you and then we can discuss other terms for your account and I can take you through how we work?
>
> [12/17/19, 12:06:21] Robbie Tchenguiz: That would be great David. I could do any today except at 5 pm. I will send 300k today to you if you tell me where to send it.
>
> [12/17/19, 12:09:26] David Garbacz: I've unfortunately got to go to a funeral this afternoon so wouldn't really be back until around 5. What about tomorrow either first thing or any other time is good for me . I'll send you the bank details
>
> …
>
> [12/17/19, 12:25:49] David Garbacz: Ok superb - see you tomorrow at 9am. I sent you the bank details to your email by the way.
>
> [12/17/19, 12:25:56] Robbie Tchenguiz: Thx

> …
>
> [12/18/19, 14:46:09] David Garbacz: Hi Robbie - lovely to meet you earlier. There are a couple more bits and pieces of paperwork to be organized which I've spoken to William about so it looks like, all being well, we will aim to do the trade tomorrow after everything is in place. Hope that's ok with you. Cheers
>
> [12/18/19, 16:14:15] Robbie Tchenguiz: Thank you
>
> [12/19/19, 13:49:43] David Garbacz: Hi Robbie - I hope you are well. Just to let you know we are nearly there with regards the account set up...
>
> The pro opt up is done and complete.
>
> I just sent you the document re the non-seg which is standard for clients on the FRS scheme that we discussed. This needs your signature and to return to me.
>
> Also sent you an email confirming the account is a manual liquidation one at an account value of zero (not that I would expect it to ever get
>
> there hopefully) and confirmation that you were approved for the FRS.
>
> If you could just reply to that email saying you agree. Once we receive those two bits back we can then start to receive instructions and we can do the switch from RJ if you want .
>
> Many thanks and looking forward to a successful relationship.
>
> Regards
>
> David
>
> [12/19/19, 13:50:27] Robbie Tchenguiz: Thank you will do in the next hour."

68. The emails passing between Mr Garbacz and Mr Tchenguiz (or his representative Mr Thompson) over 16-18 December 2019 referred to the account opening and the proposed upgrade to professional status in similar terms and did not generate any concerns from Mr Tchenguiz. The email of 16 December referred to by Mr Garbacz in his WhatsApp message stated:

> "Good to speak to you earlier. Further to our conversation please find below the link which leads you straight to the account opening page.
>
> https://oaf.cmcmarkets.com/en-gb/onboarding-start?iaid=351052
>
> Please click on this and complete the form as required. It shouldn't take more than a few minutes to fill in. Please call me either on 0203 0038598 or on my mobile 07831 544429 if you have any questions. After the account is set up I will send you the form to upgrade to Professional status.
>
> We will then discuss what facilities you require. We can set you up on something known as the FRS (fixed rate schema) for margins. This will ensure that all your equity trades will be margined at either 10% or at a maximum of 25% whatever size you are dealing in depending on the market cap of the stock in question. Please note there will be a cap on the actual amount you can trade in on this scheme per share but usually it is a pretty decent size. Obviously all other non-equity business will be at the normal Professional rates which are probably the most competitive in the industry. All clients that get introduced by me have access to our bespoke dealing desk. The desk will deal with all your trades and are incredibly professional both in their manner and execution of the

> business. I'm sure you will be more than happy with the service.
>
> First thing first though is to get the account open so please let me know either by email or through a quick call when the application has been made and I'll make sure we get this processed as quick as possible. Looking forward to doing some good business together,
>
> Many thanks and kind regards,
>
> David"

69. Again, I was left with the impression from his oral evidence that Mr Tchenguiz was, initially at least, seeking to present a version of events which aligned better with this defence relating to categorisation than was justified by the documents and was not wholly reliable. For example, in the light of the above documents:

> "MR SAOUL: Even prior to CMC sending you the various forms that they sent you, you knew that electing up to professional status would mean you would not benefit from certain protections that retail clients get.
>
> A. Yes.
>
> Q. And you knew in particular that you would not get the benefit of negative balance protection.
>
> A. Yes.
>
> Q. And you knew what that meant which was that your losses could exceed your deposits?
>
> A. Yes.
>
> Q. Now, let's just pause there for a moment, Mr Tchenguiz. Had CMC not classified you as a professional client, and had they instead treated you as a retail client, you would not have been able to move the position from RJ O'Brien to CMC, would you?
>
> A. Sorry, why do you say that?
>
> Q. Well, CMC were clear with you, weren't they, that to accept this position, they required you to be elected to [sic] a professional client?[1]
>
> A. Oh fine, if that was the term, fine.
>
> Q. Let's assume that's right.
>
> A. That's your assumption."

70. I was also concerned by the lack of a clear response to questions put to Mr Tchenguiz regarding his failure to disclose his contract documentation with other SBF since they may well have been relevant to his state of understanding of the regulatory risks and the significance of the warnings given.

71. In closing, Mr Saoul was very critical of Mr Tchenguiz' evidence, and what he submitted

[1] I assume that this is a transcription error for "you to be an elective professional client".

was his evasiveness and his lack of candour. Whilst it is not necessary for me to go so far as Mr Saoul's criticisms, it nonetheless is the case that where there are differences in evidence between Mr Tchenguiz and the documents, or with other witnesses, I prefer to rely on the documents or on the evidence of other witnesses.

72. A late, unpleaded issue arose with regard to an alleged failure in CMC's record-keeping (para. 36 of the Defence Skeleton Argument), contrary to COBS 3.83.2(2). I do not need to consider this in detail since the records were disclosed and did not appear to me to demonstrate a failure to comply. Moreover, as CMC submitted it does not appear that any loss was caused had there been a failure or that it would have fundamentally altered the dispute over the categorisation issue for which so much documentation already exists. The point was not pressed by Ms Barton in closing.

Were adequate warnings given of the losses of regulatory protection?

73. The primary complaint, set out at para. 9(1) of the Amended Defence and Counterclaim is that:

> "In breach of COBS 3.5.3(3)(b), the Request Form did not give the Defendant a clear written warning of the protections and investor compensation rights he may lose. The Request Form failed to mention a number of protections that would be lost altogether, and/or it failed to give any clear description of the protections it did mention, sufficient to bring home to a person in the position of the Defendant the consequences of losing all the retail client protections and investor compensation rights."

74. Further, criticisms about the inadequacy of warnings are also made. I note the reliance now placed on COBS 4.5A (concerning MiFID business), rather than COBS 4.5 pleaded at para. 9(2)(d) of the Amended Defence (which concerned non-MiFID business). It is now accepted that no protections under either COBS 4.5 or 4.5A were lost and no warnings were required. However, reliance was placed by Ms Barton in opening on COBS 4.5A (Opening paras. 59-61) and its requirements as to the manner of provision of information which ought to be considered when considering the warnings given here and the need for accurate provision of information in 4.5A3 that "always gives a fair and prominent indication of any relevant risks" (4.5A.3(a)). 4.5A.3 also requires that:

> "(d) the information is sufficient for, and presented in a way that is likely to be understood by, the average member of the group to whom it is directed, or by whom it is likely to be received,
>
> (e) the information does not disguise, diminish or obscure important items, statements or warnings,"

75. Although I have considered the efficacy of the warnings in general terms, and in the light of COBS 4.5A.3, I have also taken into account when considering "a person in the position

of the Defendant" as pleaded, that Mr Tchenguiz was experienced in the spread betting market and I have referred on a number of occasions to his overall positions, equivalent to 81m shares, across many SBFs and the fact, as he confirmed, that he was categorised as a professional client with other firms. It is also relevant that he was aware of the advantages of being a professional client and had gone to CMC because of the reduction in his position required by RJO and would, in all likelihood, have gone elsewhere had CMC not agreed to treat him on professional terms.

76. In cross-examination, Mr Tchenguiz confirmed that, in connection with his professional client status with other SBFs, he had received similar warnings about loss of NBP. When questioned about the reading of the documents referred to in the opt-up form and the declaration he signed, he said that:

> "I scanned over them. They weren't that important to me at the time."

77. He then added that he did not consider this significant and that he fully understood the risks of being categorised as a professional client:

> "A. It was a small position relative, and it was --- wasn't that important, but I guess if I've signed it, I'm bound by it, that's fine, I don't say anything wrong, but you're asking me whether I read it in detail, no, I didn't read it in detail.
>
> Q. And you didn't --
>
> A. But I've signed it, so that's what it is . Or have I signed it? Yes, I have.
>
> Q. Well, I think this was in electronic form. I think you signed subsequent forms.
>
> A. Yes, fair enough. I'm not dodging the fact of what I've signed. I signed. I 'm responsible for it.
>
> Q. No, no, and you didn't read the risk warning notice because so far as you were concerned you fully understood all the risks that came with this?
>
> A. I did, I understood the risks that came, yes."

78. Further he candidly accepted he knew that classification as a professional client would not only provide advantages to him but would lose him NBP as it had done with other SBFs (see above at [59]).

79. This does put into clear context the efficacy of the warnings especially when given to someone with Mr Tchenguiz' experience. It requires caution to be taken to the pleaded submission by the Defence in para. 9(2)(k) of the Amended Defence and Counterclaim that the warnings in the Opt-Up Agreement was insufficiently clear or that "the description was too general and insufficiently detailed to constitute a clear warning of what would be lost."

80. Mr Tchenguiz' dismissive attitude to the warnings, as demonstrated in his replies to cross-

examination, lends an air of unreality to the series of points mounted in his favour with regard to reclassification. Whether the warnings were inadequate or not, I find it difficult to believe that this would have troubled him given his imperative to open new positions to replace those being closed at RJO. The fact that his defence on recategorisation may be opportunistic, however, does not provide a basis for rejecting it - though I approach with care the submissions about the insufficiency of the warnings given this context.

81. The Defendant confirmed in his skeleton argument that he did not rely on para. 9(4)(a) of the Amended Defence that the incorporation of the Opt-Up Agreement into the Contract prevented it from being a "separate document from the contract". It is therefore common ground that the Opt-Up Agreement and its signing by Mr Tchenguiz is relevant to consideration of whether there was compliance with COBS 3.5.3R(3)(c).

82. However, it seems to me that, although other warnings were contained in the contract documents and 3.5.3R requires an acknowledgment apart from the contract:

(1) Mr Tchenguiz had already been provided with explanations/warnings in the TOB and RWN before he submitted the request for Opt-Up. See para. 7 of Schedule 1, and the definition of "negative balance protection" in Schedule 4 and Section 5 of the RWN.

(2) Mr Tchenguiz acknowledged his agreement to the proposed terms on several occasions e.g. in the email of 19 December at 14:00 responding to that from Mr Garbacz at 13:36 which reminded Mr Tchenguiz in bold of the need to read the RWN.

(3) The warning in the Request Form, quoted above, especially when taken in the context of the earlier warnings and the repeated warnings included in the correspondence, was sufficient to make clear that Mr Tchenguiz would lose a number of the protections available to retail clients under "Protections you lose" and, in particular, NBP.

(4) While signing the declaration in the Opt-Up Agreement might appear not to have been a statement "in a separate document from the contract", in fact the account was not confirmed to be open or activated until later on 19 December (at 16:14 and 18:50 respectively) and Mr Tchenguiz had had the opportunity before then to read its terms and warnings before signing it. Activation and trading only took place after the Opt-Up Agreement had been signed. In my judgment it is necessary for there to be a degree of pragmatism in approaching the application of COBS 3.5.3R and the fact that it was subsequently accepted as forming the basis for opening and activating the account does not alter the fact that the warnings had been acknowledged before this occurred.

83. Clear written warnings were given additionally in the TOB and Opt-Up Agreement which in my judgment satisfied 3.5.3R(3)(b):

    (1) TOB clauses 2.2.1, 5.1.2, Schedule 1 sections 7 and the Schedule 4 definitions set out earlier in this judgment.

    (2) The Opt-up Agreement set out earlier in this judgment.

    (3) The "Welcome to CMC Pro" confirmation of acceptance of the application to opt-up on 19 December which contained further warnings under "Protections you may lose."

84. I do not accept the Defendant's submission in closing that the explanation in the Opt-Up Agreement that -

    "You will not benefit from negative balance protection"

    - was inadequate given the lack of any explanation of the meaning of "negative balance protection". In my judgment, the meaning of NBP was already made sufficiently clear in earlier documents as set out above.

85. I am therefore satisfied that CMC complied with the regulatory requirements of COBS 3.5.3R(3) with regard to the need to give clear written warnings concerning the loss of NBP, both in general terms, from an objective point of view, having regard to the requirements of COBS 4.5A.3 and also having specific regard to the circumstances, knowledge and experience of the Defendant.

86. Although NPB is a key issue in these proceedings, and probably most central to the Defence, it is also contended (see para. 9(2) of the Amended Defence and Counterclaim) that warnings ought to have been given in respect of several other protections other than NBP that would be lost with recategorisation. I have not considered those issues pleaded but no longer pursued by the Defendant[2]:

    (1) COBS 2.1.3(1) provides that "a firm should not, in any communication to a retail client relating to designated investment business" seek to exclude or restrict any duty or liability other than under the regulatory system, or rely on such restrictions, "unless it is honest, fair and professional for it to do so".

        (a) The Defendant submits that this is separate from the duty not to exclude or restrict duties under the regulatory system (under COBS 2.1.2) and that the Defendant ought to have been told that he was losing the protection of an FCA rule that would otherwise protect him. Even if the Claimant's contract

[2] E.g. para. 9(2)(a) of the Amended Defence – see the Defendant's Skeleton Argument at para. 49.

provided the same level of protection as the FCA rules, it is submitted that contractual rights are inferior to the protection FCA rules afford if contravened and have less generous limitation periods.

(b) CMC submits that it does not seek to exclude or restrict such duties any further than was notified and that any limitations are only valid and enforceable in any event if they are honest, fair and professional. It follows that since the Defendant was not losing that protection the matter turns on the significance of the difference between a contractual limitation period (for the agreement as it stood following the Opt-Up Agreement).

(c) I agree that the correct construction of COBS 2.1.3(1) having regard to its purpose is that any exclusion contrary to its provisions would not be effective and CMC accepts that it does not seek the right to deprive a client of the ability to challenge on that basis (though 2.1.3 only applies to retail clients).

(d) I do not consider that the prospect of a difference in approach to limitation periods between tortious and contractual claims (in reliance on ***Martin v Britannia Life*** [2000] Lloyd's Rep P.N. 412 at [9.2]) is an exclusion or restriction of liability within COBS 2.1.3(1) nor, if it were, is it sufficient to warrant the need for a warning of the detailed differences between tortious and contractual claims with regard to potential limitation periods, where the basic periods are the same but there is scope for the extension of the tortious period for negligence, I assume, in accordance with ss. 14A-14B of the Limitation Act 1980 (given the reference to ***Martin*** – see [9.3.1] of the judgment). The application of a limitation period relates to the eventual barring of a remedy rather than the existence or limitation of a duty or liability and I do not consider that it falls within the purpose of COBS 3.5.3R(3)(b) to give a warning "of the protections and investor compensation rights" that may be lost. I also note that there appears to be little or no realistic prospect of its being relevant to the circumstances of the Defendant.

(2) COBS 11.2A.9-11 (R and G). Whilst the best execution rule applies to all clients, that rule has a specific variation for retail clients in COBS 11.2A.9-11. Those provisions require that, when carrying out best execution for retail clients, the "best possible result" must be determined –

> "in terms of the total consideration, representing the price of the financial instrument and the costs related to execution, which must include all expenses incurred by the client which are directly related to

> the execution of the order, including execution venue fees, clearing and settlement fees and any other fees paid to third parties involved in the execution of the order"

(a) In this case, it is submitted that CMC's OEP is insufficient and does not mention the requirement that the best possible result be determined by total consideration including reference to fees since those fees included the 10 basis points added to each underlying share transaction by the CMC.

(b) In my judgment this point lacks substance since CMC applies the same OEP, and the duty of best execution, in the case of both retail and professional clients. It is referred to in the TOB as part of the agreement at cl. 1.1.3 (above) and defined in Schedule 4 in terms that apply in principle to all transactions. That policy does not distinguish between retail and professional clients. That policy includes at cl. 6.1 provision for "total consideration" including price and costs which would in my judgment include the fees referred to by the Defendant -

> "6.1 The best possible result when executing your Order will be determined in terms of the total consideration (i.e. the price of your Order and costs related to execution)."

(c) Further, in relation to COBS 11.2A.11 see also the OEP at cl. 5.2 -

> "We will take into account the following execution factors when executing your Order, ranked in order of importance from highest to lowest:
>
> 5.2.1 Price;
>
> 5.2.2 speed of execution;
>
> 5.2.3 likelihood of execution and settlement; and
>
> 5.2.4 size of your Order."

(d) With regard to the issue of the substitution of the contractual protection in the OEP with the specific protection of retail clients in COBS 11.2A.9-11, the provisions provide the same protection subject to a difference in approach to limitation periods between tortious and contractual claims as made in connection with the previous point concerning COBS 2.1.3(1).

(3) COBS 22.5.6 requires SBFs to include additional risk warnings in its communications with regard to disclosure of information about investor losses and "whether you can afford to take the high risk of losing your money" which were intended to provide protection for retail investors.

(a) The Defendant submits that CMC was required to provide a clear written

warning about the fact that it would not need to provide such warnings, and provide such disclosure, to professional clients. While there was a general warning in the Request Form, it was insufficient and failed to give any detail as to the nature of the warnings or the fact that the statements required by the FCA also required disclosure of average performance by clients of the firm over a 12-month period. Without a summary explanation of the protection that a risk warning affords, it is submitted that the anodyne reference to the loss of "risk warnings" was insufficient for the purpose of COBS 3.5.3

(b) It is accepted by the Defendant that a written warning was given, in particular the terms of the Opt-Up Request Form quoted above, and the Defendant signed the declaration that he understood he would lose the protections (though it appears from his answers in cross-examination, that he was little concerned with these in any event). I reject the submission that the risk warnings were "anodyne", or "bland and lacking in real content", and the lack of detail rendered them inadequate. In my judgment they were expressed in broad but nonetheless clear terms that –

> "Communications and Financial Promotions
>
> Certain FCA (or equivalent) rules relating to the form and content of information provided by CMC Markets do not apply, including those relating to communications and financial promotions."

> "Risk Warnings
>
> CMC Markets will not be required to provide you with the risk warnings we must provide to retail clients in relation to transactions in complex financial products."

(c) The Op-Up Agreement itself stated in respect of loss of protections -

> "Our communications, including financial promotions, will not be subject to all the retail regulatory requirements including risk warnings."

(d) Moreover, as I have mentioned, frequent warnings were given in the communications from CMC (e.g. in the Request Form and David Garbacz's emails of 19 December quoted above at [50]).

(e) I consider that these warnings did meet the requirements of COBS 3.5.3R both of itself and taken together with the reference to the ability to ask for clarification of any point -

> "For your own benefit and protection you should read this form carefully before accepting the risks. If you do not understand any point please ask

for further information."

(f) I do not consider that a detailed listing of all the warnings lost that might have been given to a retail client, for example with regard to annual average performance, is necessary in order to provide the "clear written warning" required, having regard to the requirements of 4.5A.3. The nature of the loss or protection was clearly spelled out. I also consider that the warning was fair and sufficiently prominent and was not disguised, diminished, or obscured. I add that it appears to me to be open to question whether the sort of very detailed listing urged by the Defendant would create any greater clarity or whether such detail might be counterproductive and might lose the clarity of the warning or possibly obscure or diminish it.

(4) COBS 22.5.13R imposes a duty to observe particular margin close-out requirements for retail clients including where "net equity falls below 50% of the margin requirement, the firm must close the retail client's open position(s) on restricted speculative investments as soon as market conditions allow".

(a) The Defendant submitted that no warning was given of the loss of this protection except in unsatisfactory conditional terms in the Opt-Up Agreement –

> "The mandatory margin close out on an account basis (at 50% of minimum required margin) may not apply"

(b) I accept CMC's submission that this does not mean that the 50% margin would be lost simply by reason of recategorisation. In any event I do not consider that it was necessary at that stage to say any more than that there was a possibility that it might not be applied – that was a risk that was highlighted to the Defendant and in respect of which he signed the declaration in the Opt-Up Agreement.

(c) Further, by his email of 14:25 on 19 December Mr Garbacz notified Mr Tchenguiz under "Absolute Close-Out Level" that the close-out level would be changed to 80%. The email requested that if he was happy to proceed and "comfortable that you understand the above" he should confirm acceptance which, as I have already set out, Mr Tchenguiz did by email at 14:35 on the same day ("That's ok with me").

(d) I therefore consider that, viewing the above documents and correspondence as a whole, proper warning was given to the Defendant that his margin level for close-out would be changed to 80%, which was accepted by him.

(5) COBS 22.5.15R imposes a duty to provide a clear description of how the Close-Out Level would be calculated -

> "A firm must provide to a retail client a clear description in a durable medium or make available on a website (where that does not constitute a durable medium) that meets the website conditions of how the retail client's margin close out level will be calculated and triggered:
>
> (1) in good time before the retail client opens their first position; and
>
> (2) in good time before any change to the terms and conditions applicable to the retail client takes effect."

(a) This was touched on without much elaboration in opening by Ms Barton but it did not feature significantly in closing.

(b) I agree with CMC's submission that it is not clear on what basis this complaint was pursued but having regard to the documentation I have already set out above, I do not consider that there was a failure to describe clearly how close out would be calculated and triggered. See the terms of the TOB including Schedule 1, including but not limited to para. 12 "Account Close-Out" and the definitions in Schedule 4. See also Section 9 of the OEP, the RWN, and the changes made in the Opt-Up Agreement and following regarding level of margin, considered above.

(c) It follows in my judgment that a clear description was provided and that nothing was lost which required a warning to be given to the Defendant on recategorisation.

(6) COBS 22.5.20R (not subject to an application for permission to amend though it results from an erroneous pleaded reference at para. 9(2)(j) to COBS 22.5.18) provides that there was a duty not to offer monetary or non-monetary incentives and no warning that this was lost on recategorisation:

(a) This was unsatisfactory and should have been the subject of an application for permission to amend by the Defendant, especially given the unhelpful (and inaccurate) response in Answer 7 given on 4 November 2020 to CMC's Request for Further Information - but was not. However, since the allegation pleaded related to 22.5.20R ("duty not to offer monetary or non-monetary incentives") as a matter of substance, and plainly was not dealing with 20.5.18, I will deal with the allegation.

(b) CMC responds that it did provide warnings which covered this issue in the warnings regarding communications and financial promotions in the Request Form and the Opt-Up Agreement (quoted above) and that the email

at 13.46 on 19 December 2019 informed Mr Tchenguiz that a feature of being a professional client (under "Exclusive benefits for CMC Pro clients") was "Access to cash rebates and rewards". CMC also points out that Mr Tchenguiz did not in fact receive any incentives. CMC therefore submits that the Defendant did not lose anything in this respect and so did not require a warning.

(c) I agree that sufficient warning was given and reject the Defendant's criticism.

(7) There is also an allegation at para. 9(2)(l) of the Amended Defence that CMC did not draw attention to the loss of client money protections in CASS and gave the false assurance that the client money protections would continue to be available.

(a) This protection existed until Mr Tchenguiz accepted the terms of the Opt-Up Agreement as noted above and that agreement, which was sent to him prior to approval as a professional client, stated (under the list of protections lost or limited) –

"Your funds will not be subject to the client money rules and will not be segregated by us"

(b) I do not therefore consider that false or inaccurate assurances were given to the Defendant and that his attention was sufficiently drawn to the loss of client money protections before he signed the Opt-Up Agreement and prior to the activation of his account and his ability to trade as a professional client.

87. I also reject the unpleaded allegation that in some way the Defendant was in some way wrongly requested to opt-up to elective professional status if that is intended to add anything to the other issues with regard to the warnings. It seems first to have been raised in the Defendant's Amended Skeleton Argument of 14 October 2021 (para. 3.1(2)). Taking into account the correspondence and the Defendant's own evidence, I do not consider that the Defendant was in some way compelled to opt-up or that he was anything other than willing to proceed. Moreover, Mr Tchenguiz' solicitor, Mr Thompson, responded to many of the emails from CMC concerning opt-up and both willingly completed the Request Form and complied with the requests for information concerning Mr Tchenguiz' trading experience. There was at no stage any suggestion from Mr Tchenguiz or Mr Thompson that this was not what Mr Tchenguiz wanted or that he was resistant to being recategorised.

88. The reference by Mr Garbacz to "We do need to upgrade the account to Professional

status as per the new regulations" should not be over-construed since it was relatively informally expressed in email correspondence and seems to me to mean little more than it was expected that Mr Tchenguiz wanted professional status and that this had to be done in accordance with the regulations.

89. Finally, I do not consider (as was suggested in the Amended Skeleton Argument) that COBS 3.5.3R(3)(a) "the client must state in writing to the firm that it wishes to be treated as a professional client" means that the initiative must come from the client. All it requires is that there is a written record in some form of the client's wish to do so. There was such a record in the present case, as set out above, and I do not consider a proper or fair reading of the correspondence and WhatsApp messages between CMC (Mr Garbacz), Mr Thompson and Mr Tchenguiz around 16-19 December 2019 leads to any conclusion other than that Mr Tchenguiz was willingly seeking to be treated as a professional client and must have instructed his solicitor, Mr Thompson, to ensure that this was done.

Conclusions on the first main issue

90. For the reasons set out in detail above, and having regard to the documents in evidence, I reject the submissions advanced on behalf of Mr Tchenguiz that inadequate warnings were given to him, that no sufficient reference was made to the disadvantages of recategorisation as a professional client or any implication that he was not in fact well aware of them or that he was wrongly required to opt-up to professional status. I conclude on the first issue that Mr Tchenguiz was properly and willingly recategorized by CMC as an Elective Professional Client.

91. It follows from this that NBP did not apply to Mr Tchenguiz at close-out and, subject to the second issue regarding close-out, the debt claimed by CMC was capable of arising and becoming due despite its exceeding the amount he had invested.

92. In that event, I turn to consider the issues arising in connection with the closing out of Mr Tchenguiz' positions with CMC.

Issue (2): Close out of Mr Tchenguiz' positions with CMC

93. On the basis that Mr Tchenguiz was properly classified as a professional client, and that his account was not protected against negative balance, he raises several defences to the claim brought against him for the debt.

94. The defence and counterclaim by Mr Tchenguiz was put in three principal ways by Ms Barton QC, namely that the exercise of the power to close out Mr Tchenguiz' position should have been exercised:

    (1) in a manner that was reasonable and not irrational, arbitrary or capricious. See

Rix LJ in ***Socimer v Standard Bank*** [2009] Bus LR 1304 approved by Lady Hale in ***Braganza v BP Shipping*** [2015] 1 WLR 1661 which has both procedural and substantive aspects and applies an approach akin to the Administrative Law concept of *Wednesbury* reasonableness;

(2) in accordance with the duty under COBS 2.1.1R to act in the best interests of the client.

95. The third defence was by reference to an implied term that close out would be conducted in accordance with reasonable market practice. This was pleaded at para. 26(1) of the Amended Defence and Counterclaim and mentioned as an issue in closing (and identified in the List of Issues at para. 5(b)) but was not pursued, I was told, because no single joint expert had been permitted by the Court on the issue of reasonable market practice.

96. In any event, I reject the implication of a term to comply with reasonable market practice for several reasons which I only set out briefly:

(1) It is unnecessary to imply such a term in a detailed and professionally drawn contract and which is subject to regulation by COBS and is subject to the ***Braganza*** duty. Moreover, the terms on which CMC may close out accounts is set out in detail in the agreement between CMC and Mr Tchenguiz.

(2) Evidence has not been adduced which would demonstrate with clarity the existence of a specific market practice, or what such a term would mean here, with regard to close outs. Such a term cannot in my judgment be demonstrated with sufficient clarity and certainty.

(3) As Dyson J. (as he then was) held in ***Bedfordshire CC v Fitzpatrick Contractors Ltd*** [1998] 62 Con. LR 64

> "Secondly, the court should in any event be very slow to imply into a contract a term, especially one which is couched in rather general terms, where the contract contains numerous detailed express terms such as the contract in this case. In my judgment, in such a case, the court should only do so where there is a clear lacuna. The parties in this case took a great deal of trouble to spell out with precision and in detail the terms that were to govern their contractual relationship. The alleged implied term is expressed in broad and imprecise language. I can see no justification for grafting such a term on to a carefully drafted contract such as this."

See also Lord Neuberger in ***Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd*** [2016] AC 724 at [14]-[32] and Lord Hughes in ***Ali v Petroleum Company of Trinidad and Tobago*** [2017] ICR 531 at [7].

97. Even if there had been a standard market practice with respect to closing out spread betting positions (rejected by Mr Morris in his first witness statement at 34.2), and which does not seem to be borne out by the actions of the other SBFs (see Mr Morris' table), I am not convinced that it would have added significantly to the issues arising on the two bases of defence and counterclaim actively pursued before me.

98. Ms Barton submitted that there was a failure to comply with the ***Braganza*** duty and COBS 2.1.1R requirements as follows:

    (1) in making the decision to close out Mr Tchenguiz' position ("**the Close Out Decision**"); and

    (2) the manner in which the Claimant executed the liquidation ("**the Execution Decision**").

99. The evidence of the following matters bears on these questions:

    (1) The approach by CMC to requiring Mr Tchenguiz to make payments into his account to restore his balance due to the volatility in the market for the shares in respect of which Mr Tchenguiz had taken a spread bet position;

    (2) The refusal to accept offers of security made on behalf of Mr Tchenguiz;

    (3) The manner in which close out was conducted and in particular the speed of close out which it is alleged harmed Mr Tchenguiz' interests since if close out had been conducted more slowly, this would have allowed the opportunity for the value of his position to improve and for his losses to be reduced.

The evidence

100. By March 2020, Mr Tchenguiz' account with CMC stood at the equivalent of 3 million shares in First Group.

101. His positions were "Manual Orders," so that to the extent that the balance in the account (the "Account Revaluation Amount") fell below the Close-Out Level which was the point at which the funds in Mr Tchenguiz' account did not sufficiently cover the exposure on the positions he had taken, the client management team were able to suspend or override any Account Close Out initiated automatically by the Platform and initiate Manual Account Close Out.

102. In those circumstances, CMC's client management team, under the agreement with Mr Tchenguiz, were entitled in their discretion to contact Mr Tchenguiz to request payment into the Account. However, if he could not be reached or was unable to make payment within a reasonable time, CMC was entitled to manually close all or a portion of the

Account. Mr Tchenguiz' Account had an Absolute Close Out Level of 80% of margin (paragraph 12.3 of Schedule 1 of the TOB as varied by the exchange of emails with Mr Garbacz on 19 December 2019), which alters in accordance with movements in the price of the underlying stock.

103. In early March, as a result of the increasing effect of the COVID 19 pandemic, there was volatility in the markets, and a reduction in the First Group plc share price, which had an adverse effect on Mr Tchenguiz' spreadbet positions. It was not suggested that these market circumstances were anything other than unusual.

104. On 6 March 2020 at 11:43, Mr Garbacz emailed Mr Tchenguiz (forwarded to Mr Thompson later the same day) providing CMC's bank details and requiring payment to equalise Mr Tchenguiz' account:

> "With the downward pressure continuing on Firstgroup your account is about to go on a margin call. As mentioned could you please arrange to send £200,000 to the details below so that we can keep the account above call levels."

105. On 9 March 2020 at 08:05, CMC emailed Mr Tchenguiz a Low Account Revaluation Amount Notice:

> "Your Account Revaluation Amount is approaching the close-out level, which is the amount of funds required to support your open position(s). If your overall Account Revaluation Amount reaches the close-out level, then any or all of your open positions may be closed in accordance with the Terms of Business."

106. Mr Tchenguiz' account reached the Absolute Close Out Level on five occasions between 12 and 15 March 2020, and on each occasion an automated Manual Liquidation Event Notice was sent out.

107. Mr Tchenguiz made payments of £100,000 into his account on both 12 and 13 March 2020. Despite those payments, Mr Tchenguiz' account remained at the Absolute Close Out Level on 16 March 2020, when a further notice was sent to Mr Tchenguiz.

108. As at March 2020, it appears that Mr Tchenguiz' accounts in respect of other SBFs in relation to shares in First Group plc, were in substantial deficit. The documents reveal that in respect of the other accounts (see the Table provided by Mr Morris in his Second Witness Statement):

    (1) a margin call was made by InterTrader on 12 March 2020 which started closing out Mr Tchenguiz' accounts the following day. By 13.41 on 13 March 2020, InterTrader had sold 2.8m positions out of 45m and completed its sales on 16 and 17 March. Thus, several days before CMC had begun closing out Mr Tchenguiz' positions, InterTrader had already sold nearly as many positions as

CMC held in total.

(2) Mr Tchenguiz also faced a margin call from RJO on 13 March 2020 and from Spreadex on 16 March 2020. RJO liquidated its 8.75m position over 20 days from 17 March.

(3) IG Index started selling its positions on 16 March 2020, before CMC did, and closed out its total position of 17,499m over 4 days.

(4) Spreadex also started selling on 16 March 2020 and made it clear to Mr Tchenguiz that they could not wait and watch the stock go down. Spreadex's total position of 3.894m was closed over 16 and 17 March.

(5) ETX closed out its 2m position completely on 16 March 2020 (the day before CMC).

109. There was a flurry of correspondence on 16 March from various SBFs with regard to the volatile market conditions then being experienced. Mr Tchenguiz emailed CMC on 16 March at 9:34 am (copying in other SBFs):

> "I hope you guys appreciate the position we are in.
>
> I hope you will all assist with a normalised process in reduction or replacing of the position.
>
> I have the following positions
>
> 45m @ InterTrader
>
> 18m @ IG
>
> 3 m @ CMC
>
> 8.75 m @ RJO
>
> 4.250m @ Spreadex
>
> 2m @ ETX
>
> Could you all assist Intertrader … to have a controlled way forward."

110. By 16 March, 4 of the SBFs had begun, or were about to begin, closing out positions (see above).

111. On 16 March 2020 at 10:11, Toby Morris emailed Mr Tchenguiz:

> "… today's move in FGP now has the account owing £1.24m. Can you let us know urgently when this can be transferred over please. I realise conditions are pretty unprecedented but our credit team are pushing us for an update."

112. Mr Tchenguiz replied within 3 minutes to the effect that -

> "Intertrader is coordinating a process i have sent emails to all my brokers."

113. No evidence was provided of this coordination and, in fact, as Mr Tchenguiz accepted in his witness statement at para. 15:

> "At the time I sent the email I was not aware that InterTrader … had already closed out on 13 March on 2.3 million shares."

114. At 11:58, Mr Morris replied clearly requiring Mr Tchenguiz to put forward any plans to avoid close out:

> "Fully understand the circumstances but unfortunately aside from any instruction to give out positions to Intertrader we can't speak to them on any co-ordinated basis as they have no POA over your account. If you're not able to transfer funds today and we don't get an instruction to either sell or move the position it's likely they will instruct us to close the trade today which naturally we all want to avoid. So if you could update us on the plan we will in turn speak to our credit team to try and keep this all within our control."

115. At 14:36, Mr Morris emailed Mr Tchenguiz again, underlining the need for information as to his proposals:

> "Again we realise the situation and appreciate you are in contact with David G, but I'm afraid we really do need confirmation on what the intention is here.
>
> At present it looks like there are 3 options:
>
> - Fund the £1.1m outstanding on the account
> - Give out the position elsewhere.
> - Sell position on your instruction.
>
> If we don't have a clear instructions shortly its likely this will be out of our hands and the position will be sent to market, so please give us a ring or reply to this chain to state your intentions if we want to avoid this. If we want to have any chance of an extension on this we will need a clear plan to go back to our Risk/Credit teams with."

116. Some 20 minutes later Mr Garbacz sent a WhatsApp messages to Mr Tchenguiz which also made it clear CMC was anxious for information:

> [3/16/20, 14:46:47] David Garbacz: Robbie please can you get back to Toby on the sales trading - we've heard nothing from IT and time is running out
>
> [3/16/20, 14:53:57] Robbie Tzenguiz: David please speak to Oliver Basi. He is speaking to Intertrader.
>
> [3/16/20, 14:59:35] David Garbacz: He isn't speaking to them sir. He is only concerned about what is happening with your position here at cmc and as far as cmc are concerned the options are quite clear..
>
> 1. You find the margin required
>
> 2. You find someone else to give it up to

> 3. We sell the position in the market on your instruction
>
> 4. We sell the position if you can't pay the margin
>
> Sorry to be blunt on this Robbie but I'm getting huge heat from the board and have to have a decision."

117. At 15:59 on 16 March, Mr Tchenguiz had forwarded to Mr Garbacz email details of a leasehold property with the suggestion

> "Could you see if this asset could help buy some time with all brokers?"

The forwarded email claimed:

> "I am able to procure this asset. Basically it a 54 year lease to Whitbread which has a present value of cash flow at today's interest rate of over 35m. I have a 5 year loan from ICICCI bank (credit approved) of 15m. I also enclosed JPMs cash flow valuation (last year) plus a PWCs placing to a pension fund."

118. At 16:13, Mr Garbacz spoke to Mr Tchenguiz on the telephone. During that conversation, Mr Garbacz stated that CMC would need confirmation in the morning of 17 March 2020 as to whether funds would be provided or whether instructions would be provided to transfer his position to another spread betting provider.

119. Mr Garbacz sent Mr Tchenguiz further WhatsApp messages saying:

> "[3/16/20, 16:55:16] David Garbacz: Hi Robbie I've managed to get you leeway overnight however we will need funds or proof of funds by tomorrow morning 8am or we will have to either ... Give it up to inter trader in the morning which would be preferable for all concerned or if they don't want to do that we would then have to sell in the market. I'm doing the best I can sir but obviously need to know and can't just let this run.
>
> [3/16/20, 17:58:36] David Garbacz: If you are not sending the margin and Inter trader will take the stock then please let us know ASAP so that we can organize with them."

120. Ms Nicole Anne Martin, a trustee of a number of trusts of which the Defendant was beneficiary, gave evidence in support of the attempts by the Defendant to address his losses. In an email to InterTrader forwarded by Mr Tchenguiz to Mr Garbacz at 20:46, Ms Martin stated:

> "As you know, I act on behalf of the trustees of certain trusts which Robert is a beneficiary of. Robert has explained his personal position, which has arisen as a consequence of the unprecedented market conditions, to the trustees, and has asked the trustees for assistance, as Robert himself has no personal assets and as such is unable to meet the demands being made of him today. The trusts however are discretionary trusts, and although the trustees may be willing to help Robert, they are not obligated to do so and need to consider the request in all of the circumstances.

> With this in mind I have been asked to contact you to see whether there is a compromise that can be reached with all the brokers (InterTrader, IG, RJ O'Brien, Spreadex, CMC, ETX) in respect of the existing First Group position. The existing value of the position today is c.£33 million. The trustees have identified an asset that possibly could be made available to support Robert's position; I understand that Robert has already provided you some information in relation to this asset, which is a long leasehold of a property in Cardiff let for 54 years to Whitbread. Before any recommendation can be made to the trustees however, I would appreciate it if you could let me know whether this proposal is viable. I expect that we would need to agree an extension of time for at least 12 months for regularising Robert's position, given the current state of affairs. Could you please revert urgently as to whether in principle you consider this is a viable option, and whether you believe you will be able to enlist the co-operation of the other brokerage firms."

121. However, as the evidence demonstrated, there was only limited information regarding this asset and, critically, it had a number of features which made it unlikely to be attractive to CMC:

    (1) It was not a cash asset and not readily available to make good the deficit in Mr Tchenguiz' account but was only being offered as security. Ms Nicole Anne Martin made in clear in evidence that she was not aware that the provision of security was not appropriate since Mr Tchenguiz did not own shares but only a contractual spread bet position. Moreover, it was clear from her evidence that she had not been provided with information as to Mr Tchenguiz' exposure – "I truly do not recall Mr Tchenguiz giving me any total amount of exposure at all".

    (2) The property was not vested in Mr Tchenguiz and, looking at the matter as beneficially as possible, it would have taken time to secure its availability even if it had been of sufficient value and even if the provision of security rather than cash had been acceptable to meet contractual obligations.

122. Moreover, as the email made clear, and Ms Martin subsequently confirmed in evidence, Mr Tchenguiz held no substantial assets other than personal effects. It was also the case that no instructions were given to transfer Mr Tchenguiz' position to another broker.

123. Mr Morris took part in a call on 17 March with Oliver and Matt Basi to discuss the security proposal and what to do with Mr Tchenguiz' positions given that no funds would be provided in the foreseeable future. They had authority to make the decision with regard to close out. On a consideration of legal and commercial issues, they decided to proceed with liquidation and Mr Morris explained in his witness statement that the following issues were considered when taking the decision to close out:

> "25.1 Mr Tchenguiz had not funded his Account, nor had he made any concrete or swift proposals to fund the Account – in fact, he and R20 had told us that he

could not do so and that he had significant exposure with other brokers, so the prospect of him being able to fund his Account within a reasonable period of time seemed limited;

25.2 During a margin call there are 4 key considerations:

25.2.1 The state of the account at the time (the negative balance was circa £1.24 million on 16 March 2020 and the Account had been on call at various points in the last week);

25.2.2 Commitments made by the client regarding funding the Account (Mr Tchenguiz had made it very clear that he was not able to fund the positions personally, and thus a close out had to proceed to protect both the client and CMC from further downside if he could not fund the Account);

25.2.3 The size of the position both absolute and relative to the underlying market (the position was large and still had significant downside); and

25.2.4 Market conditions (there was high volatility in the market).

25.3 No instruction was given to us to transfer the positions to another broker;"

124. Mr Morris explained that the security proposal was rejected since:

"25.4 Whilst the Security Proposal had been made, it was unclear what was actually being proposed and the proposal was being made by a third party (and R20 did not have a power of attorney in relation to Mr Tchenguiz's Account). The Security Proposal was rejected because it did not amount to a concrete, acceptable or reliable offer of security as it was vague and unrealistic:

25.4.1 It appeared that the asset was not owned by Mr Tchenguiz. Indeed, I have been told by DACB that Mr Tchenguiz has confirmed in the pleadings that he does not own the relevant property. It was a complex and unusual third party arrangement;

25.4.2 It was not a liquid asset and there were no clear proposals about the duration of the proposed arrangement save that the Trustees had indicated that the positions may need to remain open for another 12 months, without any funds being paid into CMC to fund the Account;

25.4.3 If CMC was to accept the asset as security, due diligence would need to take place and a charge procured, which would have required the participation of the legal owner of the asset and there was insufficient time for that;

25.4.4 Mr Tchenguiz made the Security Proposal conditional on all operators participating – when the decision was taken to close out the positions, we were focussing on CMC's position and Terms of Business and not all of the operators – CMC's Terms of Business do not require or permit it to liaise with third parties without a power of attorney; and

25.4.5 CMC's business model does not cater for taking proprietary

> interests in property as a means of securing any deficit on a customer's account.
>
> 26. The key point was that Mr Tchenguiz had been given time to provide proposals to fund his Account and it was abundantly clear that he would be unable to do so. We had allowed a period of 24 hours for proposals on funding to be made but it was clear that none would be forthcoming – the decision was made to close out the trades to prevent further losses being incurred on the Account."

125. A further proposal was made on 17 March when Ms Martin sent an email proposal at 09:38:

> "I write further to the positions held by Mr Robert Tchenguiz with your various firms in relation to FirstGroup PLC. As you will be aware, Mr Tchenguiz is a beneficiary of certain discretionary trusts and he has approached his trustees for assistance to help deal with the present situation.
>
> I have spoken to the trustees who are potentially willing to assist Mr Tchenguiz, subject to certain conditions. Their proposal is as set out below.
>
> 1. The trustees will replace Mr Tchenguiz's personal guarantee with their own guarantee for FirstGroup shares at 40p/share; the trustees hold assets of over £200m – Mr Tchenguiz has no personal assets.
>
> 2. In addition, Mr Tchenguiz will forgo 30% of the upside.
>
> In the event Mr Tchenguiz is able to close out his positions in cash within the next two weeks, then the 30% referred to at (2) above will reduce to 20%.
>
> Can you please revert to me urgently on the above proposal; I am happy to arrange a call to discuss."

126. Mr Morris explained that, having discussed this proposal with Messrs Basi, the proposal was not considered acceptable or sufficient to halt the proposed liquidation of Mr Tchenguiz' positions because they were made by a third party and did not contain a proposal to fund the deficit in Mr Tchenguiz' account.

127. I note that when cross-examined about the agreement reached between RJO and Mr Tchenguiz, Mr Fletcher also underlined the need for cash in the account after a margin call:

> "I would imagine RJO would have just taken the view we will do as we see fit, unless -- the only comfort they would have obviously taken on board is if money had come across to meet the margin call. And I was unaware of that situation, so I'd not been advised of anything differently, so, no. The only comfort that any financial firm would take with a client who owes money is money in, and that's it. Outside of that the firm have to do at that point what they think's best in the situation."

128. Mr Morris proceeded with the execution of the liquidation orders which were undertaken in accordance with the OEP using a Barclays market algorithm which closed out the trades

over the whole day (in three tranches) to minimise the impact on the First Group share price. This avoids CMC having to speculate on future movements in the share price or take the risk that future delays might cause in a volatile market. Mr Morris pointed out that the market for First Group shares was liquid in the period up to and following 17 March and between approximately 5m and 28m First Group shares were being traded each day. He considered therefore in his second witness statement that -

> "16.3 … the sale of 3 million shares, appropriately staggered during the day (which CMC did, through an algorithm, as I explain below), was unlikely to have an undue effect on the market due to the volumes being traded at the time. Indeed, notwithstanding the sale on 17 May 2020 of the shares in which CMC had an interest, there was consistent trading at or around the price of 30p per share that day.
>
> 16.4 In order to monitor the impact that the sale of the shares may be having on the underlying market and to ensure that the sale of the shares did not unduly affect the market (to achieve best execution), the orders for the sale of 3 million shares were divided into three batches of 1 million shares, which were each placed during course of the day. Each order was processed using an industry standard algorithm supplied by Barclays, which would determine the best time and price at which to execute each order (and would in effect do so gradually). Each order of a million shares was therefore processed over time. As I have mentioned, the trades were submitted via an automatic trading algorithm, in this case a VWAP which aims to match trades with volume throughout the day to minimise market impact. To be clear, CMC sold the shares on behalf of Barclays, who then closed out the CFDs to which I referred above. CMC in turn closed-out Mr Tchenguiz's spreadbet positions.
>
> 16.5 By using the algorithm, it eliminates issues arising out of individuals using discretion and delays in execution…
>
> 16.6 As mentioned above, the shares were sold at an average price of 30.9174. Underlying VWAP for the day on 17 March 2020 was 30.699. In other words, we achieved a better sale price than the average price for the day. The liquidation orders were then booked onto Mr Tchenguiz's account at 30.886 (which includes a 10 basis points standard charge) …. Mr Tchenguiz was informed of the outcome of the close-out on 18 March 2020 ..."

129. When cross-examined about the decision to close out and execute in a single day, Mr Morris said:

> "A. However, the main thing, certainly for me at the time, was to have a very clean record of how we'd executed the trade, because liquidations in my experience tend to be scrutinised after the event ….
>
> "We wanted transparency. If we could do it within a day that would also serve purpose to do -- with regards to the likelihood of execution as well , which is another best execution matter. The trajectory that the stock was on at the time may well have pointed to that market not being available in the near future. Stocks on that sort of trajectory have a habit of going into lengthy suspensions,

> sometimes taken off the exchange pending news from the underlying company. So we had to factor that in to try and do it as quickly as was reasonable, and given the recent volumes in the previous two days, 3 million shares in one day seemed reasonable, so we set that out with the intention of monitoring it throughout the day to make sure it was still -- remained reasonable."

130. Mr Morris explained that while it was theoretically possible for a liquidation to be brought to an end without completing closing out the accounts, if the share price had improved, he said that this would have required a very large move in price in the circumstances. He also said that since they were monitoring the market it would have been clear if the sales they were making was having an effect of the market but noted –

> "That's very hard to see in real time. However, the algorithm that we use, its sole purpose is minimal market impact. So it attempts to split the trade up into a number of different pieces and trade in line with the volume that trades for that day. So we can look at each individual trade or the speed at which we are putting volume to market and whether or not it looks to be our trades as each piece goes through that is moving the market adversely, but it's very hard to see in real time."

131. In response to questions from me, he confirmed that if the setting of the algorithm had proved too aggressive for the market "we may well have got a rejection message" although he later confirmed he had not seen one before.

132. As for monitoring, this appeared to be of a limited nature given reliance on the algorithm:

> "A. However, it does not participate at a set percentage rate. So it will complete on our instruction 3 million 5 shares over the course -- broken up into three separate trades here, but 3 million shares over the course of the day, but it does not know any better than anybody else what the total number of shares will be at the end of the day.
>
> So in addition to using something that tried to trade with the volume that went through, we also wanted to monitor what proportion of the actual volume that was being traded we were participating at.
>
> Q. So you did that separately?
>
> A. Correct.
>
> Q. And what was the purpose of your monitoring it, to do what the algorithm couldn't do?
>
> A. It's an additional sense check."

133. Mr Morris agreed that it was relevant to look at the amount of trading then taking place:

> "Q. Well, if you're already in a peak of excess selling, anything you add to the market in terms of volume is going to exacerbate that position, isn't it?

> A. I see these as two separate things. So we can't control, and we would be speculating if we tried to understand why something is trading more than it usually does. We are just looking at our trade versus the underlying market on that day or to set the parameters initially to look at the nearest thing that we have, which was the previous day. In terms of the volume being more, this was in the middle of a pandemic, volumes were through the roof, fairly much, across the board."

134. A follow-on question then put to Mr Morris that it was self-evident that as a result of the pandemic shares were being dumped across the board. When asked when that trend began he said:

> 'A. … I can't say that this was exactly the same timings as volume levels in the underlying market, all I can say is across the board there were lots of strange things happening with stocks in general and other asset classes as well, and it was no particular surprise to see a large pick-up in volume around that time."

135. There was an exchange between Ms Barton and Mr Morris about what CMC knew at the time about other liquidations in the market and the fact that trades on the 16 March were of c 29m shares but on the preceding Friday only c 8.5m, and so there was a substantial increase on 16 March compared with the previous week. He agreed that as a result of the email on 16 March from Mr Tchenguiz, CMC then had a clear idea of the extent of Mr Tchenguiz' exposure but did not know who was selling:

> "Q. So you think that CMC's approach was unusual in seeking to unwind in those circumstances. Is that your point, that CMC was somehow going to be doing something different?
>
> A. No, I'd expect everyone to act with the information that they had, but we didn't know who was selling and who wasn't."

136. I have no reason to reject that evidence. Indeed, as Mr Morris explained is his second witness statement the sale by other SBFs was not known at the time but only became clear with the subsequent disclosure of documents by the Defendant:

> "16.8.3 It appears from an account statement provided by RJ O'Brien that it sold its first 3 million shares between 17 March and 24 March 2020. Based on documents provided by Mr Tchenguiz, I have calculated that the average price achieved during that period was 32.4p. i.e. a difference of 1.426p per share, less than 4.5% as compared with the price achieved by CMC, which is a very small difference.
>
> 16.8.4 By selling the shares incrementally over a period of 4 weeks, RJ O'Brien took a risk that the share price would worsen further and that Mr Tchenguiz's negative balance would then increase. By selling the shares within a day, CMC avoided such a risk. As I mentioned above, in fact the share price continued to drop the day after CMC had sold the shares in which it had an interest.
>
> 16.8.5 I have been told by CMC that the other 4 Operators that Mr Tchenguiz had positions with also closed out the positions in or around the same time. At

> the relevant time, we did not know whether any of the other Operators were selling or had sold any shares, in what volumes or at what price. Yesterday, Mr Tchenguiz's legal team provided DACB with documents which are said to set out how those other Operators closed out their positions. I have tried to interpret these statements to assist the Court – the number of shares equivalent sold, average closing price, period of close out and average shares sold per day has been set out in the table below for reference."

137. Given the unique circumstances prevailing with the pandemic at this time, and the general lack of access to the information concerning what other SBFs were doing, I do not find Mr Morris' explanation implausible as Ms Barton sought to suggest.

Was there a breach of the *Braganza* duty?

138. Whilst there is no dispute that the ***Braganza*** duty applied in this case, the Claimant disputes that it was breached in any of the respects alleged by the Defendant.

139. In a passage from ***Socimer International Bank Ltd v Standard Bank London Ltd*** [2008] approved by Baroness Hale in ***Braganza v BP Shipping Ltd*** [2015] 1 WLR 1661 at [22], Rix LJ held at [66]:

> ""It is plain from these authorities that a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused. Reasonableness and unreasonableness are also concepts deployed in this context, but only in a sense analogous to Wednesbury unreasonableness, not in the sense in which that expression is used when speaking of the duty to take reasonable care, or when otherwise deploying entirely objective criteria: as for instance when there might be an implication of a term requiring the fixing of a reasonable price, or a reasonable time. In the latter class of case, the concept of reasonableness is intended to be entirely mutual and thus guided by objective criteria … Laws LJ in the course of argument put the matter accurately, if I may respectfully agree, when he said that pursuant to the Wednesbury rationality test, the decision remains that of the decision-maker, whereas on entirely objective criteria of reasonableness the decision-maker becomes the court itself."

140. Baroness Hale then held that there were two limbs to this approach:

> "The first limb focuses on the decision-making process—whether the right matters have been taken into account in reaching the decision. The second focuses on its outcome—whether, even though the right things have been taken into account, the result is so outrageous that no reasonable decision-maker could have reached it. The latter is often used as a shorthand for the Wednesbury principle, but without necessarily excluding the former."

141. At [29]-[30] having reviewed additional authorities, she added:

> "29. If it is part of a rational decision-making process to exclude extraneous considerations, it is in my view also part of a rational decision-making process to take into account those considerations which are obviously relevant to the decision in question. It is of the essence of "Wednesbury reasonableness" (or "GCHQ rationality") review to consider the rationality of the decision-making process rather than to concentrate on the outcome. Concentrating on the outcome runs the risk that the court will substitute its own decision for that of the primary decision-maker.
>
> 30. It is clear, however, that unless the court can imply a term that the outcome be objectively reasonable—for example, a reasonable price or a reasonable term—the court will only imply a term that the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose. For my part, I would include both limbs of the Wednesbury formulation in the rationality test. Indeed, I understand Lord Neuberger PSC (at para 103 of his judgment below) and I to be agreed as to the nature of the test."

142. Although there were dissenting opinions in ***Braganza*** on the facts, the minority agreed with Baroness Hale's legal analysis of the applicable principles: see Lord Neuberger (with whom Lord Wilson agreed) at [102]-[103]. Lord Hodge delivered a separate judgment concurring with that analysis at [52]-[53].

143. As Rix LJ pointed out, approved by Baroness Hale at [30], a consequence of applying a Wednesbury standard is that the Court is not substituting its own objective view for what was reasonable on a specific issue but, as in public law cases, reviewing the exercise of the discretion given to one of the contracting parties. It is trite law that the threshold of Wednesbury unreasonableness/irrationality is a high one.

144. The context of the contractual discretion to close out is relevant to its exercise. The contractual provisions governing close out, set out above, are found primarily in para. 12 of Schedule 1 to the TOB. The purpose of those provisions is to ensure that the account remains above the applicable close out level though in certain cases (such as the present) the management team may delay close out in order to request payment into the account within a reasonable time. Para. 12.3 in particular provided:

> "Where we have agreed to provide you with the sales trader service, if our client management team has previously agreed with you that it may suspend or override any Account Close-Out initiated by the Platform and your Account Revaluation Amount falls to an Amount at or below the Close-Out Level, our client management team may (as it see fit in its sole discretion) during UK office hours try to contact you to request payment into the Account. If the client management team is unable to contact you and/or you are unable to fund your Account within a reasonable time, it may manually close all or a portion of the Bets in respect of any Product (including those relating to Manual Products or Manual Orders) within the applicable Trading Hours and where betting is not otherwise suspended"

145. See also cl. 5.2 of the main TOB which provides that the client is responsible for making payments required under the agreement and at 5.2.2 that "headroom" may be left during "volatile and potentially volatile periods" to ensure that there are sufficient funds above the applicable margin requirements and to keep funds above the applicable close out level. Cl. 5.2.9 states that where a sales trader service is provided, "any negative balance should be cleared promptly regardless of whether the balance is within the relevant Close-Out Level". These make clear the contractual duty on the client to maintain not only a balance above the Close Out Level but a positive balance in any event. Cl. 5.2.2 makes it clear that the agreement contemplated the consequences of a volatile market.

146. Ms Barton's submissions in support of the Defendant's contention that the ***Braganza*** duty was breached, and that CMC acted irrationally in reaching the Close Out Decision can be summarised as follows.

147. It is submitted that there was a failure to take into account a number of relevant factors:

(1) The process for the close out of the entirety of Mr Tchenguiz' account on 17 March 20202 was "almost entirely unevidenced" and no evidence in the form of notes or of the factors considered to reach the decision was produced nor was evidence given by either of the Messrs Basi, who were involved in the decision.

(2) The Close Out Decision failed to take into account the unusual trading volumes taking place (going from less than 10m shares to a high of about 29m) when deciding to sell the whole position in one day which must have comprised 35% of the readily tradable volumes on First Group.

(3) Mr Morris was disingenuous in claiming he did not know that everyone was selling since there was a real likelihood of other positions being closed out and this was made clear by Mr Tchenguiz' email of 16 March at 9:34 am of which Mr Morris was aware from his telephone conversation with Mr Basi on 17 March.

(4) Mr Morris made it clear in evidence that he considered Mr Tchenguiz' overall position to be irrelevant to the decision to close out and that CMC's sole concern was with its own position.

(5) No consideration appears to have been given to the soundness of the underlying company, First Group, despite the acknowledged relevance of market distortion, and no consideration of whether the trading price was based on a realistic valuation of First Group. Mr Fletcher, who could not explain the decision-making process of RJO did explain that the market was distorted as a result of the offloading of First Group stock and that this price did not reflect the value

of the company.

148. First, regardless of the points now advanced none of the SBFs appear on the evidence to have responded positively to Mr Tchenguiz' request for a coordinated approach. One began to close out on 13 March and concluded the bulk of the sales on 16 and 17 March and three others sold or began selling on 16 March. RJO began selling on 17 March. Referring to Mr Fletcher's witness statement, Mr Morris commented in his second that –

> "16.8 I have seen Mr Fletcher of RJO Brien's witness statement, which suggests that RJ O'Brien held 8.75 million shares in First Group and that it sold them over a period of 4 weeks, with Mr Tchenguiz's spreadbet positions being closed out incrementally along with the share sales. To the extent Mr Tchenguiz might assert that CMC should have done something similar, my observations on that would be:
>
> > 16.8.1 Firstly, it is not a direct comparable because RJ O'Brien had almost 3 times as many shares as CMC did. Plus, their order execution policy may have different terms.
> >
> > 16.8.2 I note that in Mr Fletcher's statement, at paragraph 17, it was RJ O'Brien's view that it would be able to sell 1 million shares per day without disturbing the share price. Had CMC sold 1 million shares per day following the decision to close out, and therefore sold 1 million shares on each of 17, 18 and 19 March 2020, the average price achieved would likely have been worse, because the average share price over those days was 29.8659,"

149. On the question of trading volumes on 16 March, Mr Morris explained that CMC was aware of them but that the algorithm was designed to minimise impact. I have already found that Mr Morris did not know what volumes of sales of First Group shares represented liquidations by the other SBFs although he might have thought that they were likely to be looking to close out and liquidate themselves. His responses to Ms Barton were not disingenuous in my judgment but explained the difficulties of the circumstances then prevailing and of the risks of speculating.

150. As Mr Morris stated in his first witness statement:

> "35. I understand from DACB that in his Defence, Mr Tchenguiz asserts that the reasons for the fall in the price of First Group shares in mid-March 2020 (i.e. between 9 and 17 March 2020) may have been affected by the market-wide reaction to the pandemic, which could reasonably have been expected to be a temporary phenomenon. However, in mid-March 2020, that was not clear and the fall in the share price may have been intrinsic to First Group. Even if the fall was related to the pandemic, it was far from clear that any fall in the price could be expected to be temporary (whatever temporary might mean in this context) or that CMC should have known or assumed that the price might recover in the near term. I would add for completeness that pursuant to the Contract in place, CMC was not in any event required to speculate in relation to such matters –

> but even had we sought to do so, it would have been very difficult to form a reliable view as to what might happen next.
>
> 36. The decisions made in relation to close-out were taken at all times based on the situation as it developed (current price and volatility), not speculation as to future price moves – CMC was in no better position than anyone else to guess what may have happened to the share price on a day to day basis. Had CMC not closed out the positions when it did, the share price could have continued to fall, making the losses on the Account higher."

151. I do not regard anything put to Mr Morris in cross-examination, or his answers, substantially shook the accuracy of this explanation. I considered that Mr Morris sought to answer questions (from both Ms Barton and myself) as accurately and helpfully as possible.

152. When questioned further about what was known about what was going on the market, Mr Morris acknowledged that there was potential for many more sellers to enter the market and that trading had been double of what the normal trading had been over a previous 30-day period. There was a telephone discussion with Oliver Basi at 11:18 on 17 March which included discussion of the suggested security but also of what was happening with execution:

> "TM There are buyers, we've found buyers. We had to go quite a long way down to find them so it is down 17%.
>
> OB But that's… alright.
>
> TM I don't know how much of that is natural.
>
> OB Do we know how much other volumes out there are selling because that is going to tell us if IG are doing that?
>
> TM There is more than normal, it looked like it was just me on the open and then it looked like more people were getting involved later on. That is just a hunch but the volumes really picked up.
>
> OB Well I'll wait for him to call me.
>
> TM It is what it is.
>
> OB There is nothing he can really respond saying… none of that email is of any value or any worth to us. Equally we should not be discussing our exposures with 20 other people we don't know over there on that email.
>
> …
>
> TM Well the good news is we are not all selling, well we can't all be selling because there would be hell of a lot more gone through."

153. In an email about 20 minutes later to Oliver and Matt Basi and David Fineberg, Mr Morris wrote:

> "Spoken briefly with Oli too but just for the tapes.

> Chain gives us nothing new. No funds coming to support the position and no direct update from the client so we keep going as normal.
>
> Selling another 1m which will finish at 2 and then the final 1m into the close. VWAPs again with a 30p low."

154. It was suggested that CMC were keen just to clear out their position in the market:

> "Q. Thank you. You'll appreciate that it appears to Mr Tchenguiz that rather than cooperate to lessen the effect on the market of what was a very substantial position being unwound with a number of brokers, it appears to him that CMC's approach was to try and get out of the market before larger positions were closed out like that of IG, for example, and that's a fair concern to have in light of the conversation that we see between you and Mr Basi, isn't it?
>
> A. I don't really see how. Again, our knowledge of whether or not other people had sold or were yet to sell was purely speculative. At that point, we didn't realise that InterTrader had actually sold the bulk of their position already. "

155. Moreover, when it was put to Mr Morris that CMC was more concerned with its own credit risk than with its clients' interests he said:

> "A. There's no conflict there, my Lord, because if there's some suspicion that we purposefully knocked down the price or we would only be increasing the debt realised on the account, our best interests were aligned. If there could have been a way -- if the market had rallied 50% from that point before we had a chance to put anything to market, everyone would have been very happy."

156. Ms Barton suggested that the Claimant was protecting its own interests in terms of its own hedged positions rather than considering Mr Tchenguiz' interests, Mr Morris rejected the suggestion that CMC's approach was driven by protection of its own credit risk:

> "we will always look to be as market neutral as we can be. So if a client was to buy 10,000 shares of company X and we hedged 10,000 shares of company X, we wouldn't reduce that hedge position unless the client reduces their own position, because we would actually be increasing our risk to the market, which makes no sense."
>
> "There's no conflict there … because if there's some suspicion that we purposefully knocked down the price or we would only be increasing the debt realised on the account, our best interests were aligned. If there could have been a way - if the market had rallied 50% from that point before we had a chance to put anything to market, everyone would have been very happy."

157. Further, as Mr Morris pointed out in response to further questions from Ms Barton, the existence of CMC's hedge meant that there was no difference between the trade risk and credit risk that might have created a conflict of interest despite the fact that the market was going down. He had explained in some detail in his second witness statement how the hedging had occurred with regard to Mr Tchenguiz' position, through a stock transfer from RJO to CMC's main broker, and that CMC fully hedged his positions when he

increased them. Although Ms Barton pursued this point in closing and complains about the lack of disclosure of the Claimant's underlying hedged positions, I have no convincing basis for rejecting Mr Morris' explanation or of finding a conflict of interest.

158. In the difficult circumstances in late March 2020 and the fact that all the SBFs with which Mr Tchenguiz has taken out positions were looking to close out and were not cooperating to provide a global solution, I find it difficult in the context of the CMC agreement to treat CMC's approach as irrational. Its financial interests were aligned with Mr Tchenguiz because of its hedge and it had allowed Mr Tchenguiz a short period of time, at his request, to try to find a funding solution.

159. As for the timing of the close out whilst it is true that CMC was aware of the volatility in the market and of the volume of sales that were taking place on 16 March, it was entitled, given the contractual requirements, not to speculate as to what was happening with other SBFs or to delay further a close out decision given the lack of realistic proposals by Mr Tchenguiz to resolve his outstanding balances, as he was contractually obliged to do, or to delay further in the hope that the market might improve.

160. Rationality must be considered in the context of Mr Tchenguiz' contractual duties in cl. 5.2 of CMC's TOB and Mr Tchenguiz' obligation to clear any negative balance promptly as well as to keep his account above the relevant close out level. It must also be considered in the context of its willingness to allow him in its discretion a short period of time to provide a solution to resolve his negative balance. However, the only solutions that were offered were far from clear in how they would operate still less how they would adequately enable Mr Tchenguiz to meet his obligations to fund his account. The solutions advanced offered vague forms of security though there was no provision for this in the agreement with CMC and the TOB made it clear the balances must be fully funded and the close out level met. The forms of security offered were not advanced to do this, would have been well outside the contractual funding obligations Mr Tchenguiz owed, and it was clear Mr Tchenguiz did not hold substantial assets in his own name.

161. When considering rationality, it is also important to bear in mind that the spread betting market is a volatile one in which the spread better inevitably takes risks, as the various warnings given to Mr Tchenguiz by CMC emphasised. See Rix LJ in in ***Spreadex Limited***, in the passage cited above -

> "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"

162. Moreover, CMC took what appears to me to have been a rational decision that Mr Tchenguiz was "unable to fund' his account "within a reasonable time" as referred to in para. 12.3 of Schedule 1 given the circumstances I have described above. Despite his

requests, and the fact he was told that CMC needed a solution quickly, Mr Tchenguiz was unable to come up with a proposal which held out any prospect of satisfaction of his account balances within any particular timescale, still less a reasonable one.

163. As Mr Morris explained on several occasions, to act as the Defence now suggests and delay further would have been speculation and, in my judgment, a SBF is not rationally required to delay further in the circumstances here when an opportunity had already been provided to Mr Tchenguiz to suggest a solution. None of the other SBFs appear to have been interested in an extra-contractual arrangement to devise a global settlement (and nothing in the CMC agreement entitled Mr Tchenguiz to insist upon it) as was shown by the fact that liquidations by 4 of the SBFs began before CMC liquidated on 17 March. CMC chose, as Mr Saoul put it, to close out the account to protect both Mr Tchenguiz and itself.

164. It is an application of the concerns as to speculation and delay that also provides the answer to Ms Barton's submission that there was a failure to consider the underlying robustness of First Group and whether the share value fairly reflected its true value and how this might bear on a recovery in share price. CMC and the other SBFs were in a falling market caused by unique circumstances and were concerned as to the effect of allowing any further delay in closing out Mr Tchenguiz' accounts. It seems unrealistic in the circumstances, given the nature of Mr Tchenguiz' financial obligations to CMC, to have expected CMC to go further than it did and to have conducted an exercise in seeking to estimate the value of First Group apart from its share price and to assess the likelihood of a recovery in share price. This also seems to me to ignore the fundamentals of a spread betting contract and the risks which a person assumes when entering into obligations to keep an account in positive balance throughout, regardless of market volatility.

165. I also note that Ms Barton did not suggest that any particular period of time should have been adopted for close out in order to achieve a better position than was in fact achieved. Indeed, it would have been difficult to do so given the lack of any realistic proposals from Mr Tchenguiz to meet his obligations. Moreover, the fact that other SBFs acted also to close out Mr Tchenguiz' positions suggests that there was a degree of consistency among SBFs. I find it difficult to find that CMC should have proceeded with greater caution or over a longer period, or to have done other than it did, and note Mr Morris' example that if close out had taken place over three days, 16-18 March, the loss would have been greater. IG Index with a 17.499m equivalent position, and which closed out over 4 days beginning on 16 March, achieved a lower average price per share than CMC (30.4p instead of 30.9174p). Spreadex closed out on a position equivalent to 3.894m shares on 16 and 17 March and achieved a lower average price per share (25.02p) than CMC.

166. Although I have not heard from the former officers of CMC, Oliver and Matt Basi, who

took part in the Close Out and Execution Decisions, I have heard from Mr Toby Morris who was party to the discussions and who set out the principal issues which led, after time had been allowed to Mr Tchenguiz to put forward proposals to meet the deficit in his account, to the rejection of the offers of security and the reasons for closing out his positions. He also explained the approach to execution and the utilisation of the industry standard algorithm supplied by Barclays. In my judgment CMC provided sufficient evidence to consider the rationality of CMC's approach – in contrast to the very limited material put in front of the court by the Defence relating to the close out decisions, or subsequent settlement, with RJO.

167. Mr Fletcher was called by the Defence to explain what happened at RJO concerning the reduction in Mr Tchenguiz' exposure with them and concerning close out by RJO, but little evidence was available, from Mr Fletcher or otherwise, to explain the decision-making whether with regard to the decision to close out or how it proceeded with liquidation. Mr Fletcher, who was contracted through another company (Luke Andrews) to provide advice to RJO, was not responsible for the decision making in RJO with regard to client classification, margins or decisions with regard to the closing out of accounts and, while as he said, he provided his advice to RJO with regard to Mr Tchenguiz' account, he was unable to speak to the actual decision making process within RJO with regard to closing out of the account, or any commercial agreement that may have been reached between RJO and Mr Tchenguiz.

168. Much of the documentation is not available since it is either not within Mr Tchenguiz' custody or control or else RJO has claimed confidentiality. Mr Tchenguiz has resisted disclosure of the terms of settlement of RJO's claim throughout these proceedings despite its potential relevance and, though there was a very late indication on the last day of trial in cross-examination that he might now agree, it came far too late in the day and no further information was provided. Nonetheless, the upshot is that the Court does not have anything like sufficient information to draw conclusions as to how RJO went about making its decisions or on what basis it reached a settlement with Mr Tchenguiz.

169. Mr Fletcher told me what he advised but was unable to explain what the RJO team considered internally, and he was not called as an expert witness. I do however question whether there has been compliance with the duty of disclosure given the ground advanced of "confidentiality" since RJO's conduct is put in issue directly by the comparison made between RJO and CMC by Mr Tchenguiz at paragraph 28 of his witness statement –

> "I entered further trades on 6 and 8 January 2020 which took my position in FirstGroup with CMC to 3 million. It is very hard to accept that it is reasonable that on 3 million shares, CMC have told me they incurred a loss of about £1. lm in closing out my positions when by comparison, RJO, who held 8.75 million shares for me, reported a loss of c.£450,000 when they closed out. On a share-

> by-share comparison, CMC incurred a loss of 37p/share and RJO 5p/share. CMC have offered no explanation for this discrepancy. My risk at most should be at an equivalent ratio which would have resulted in a loss with CMC of no more than £150,000."

170. It is difficult, in the absence of better evidence, to reach firm conclusions with regard to RJO's decision making which allows a sensible comparison to be made with CMC's decisions and it is not appropriate to speculate. A comparison would not necessarily be straightforward in any event since the Defendant's position with RJO was almost three times the size of that with CMC and, without information as to RJO's decision-making, I do not know to what extent that may have influenced RJO's approach and decisions

171. I am therefore unable to conclude that RJO acted in a manner more conducive to Mr Tchenguiz' interests than did CMC other than in respect of the outcome, or that RJO's conduct of close-out provides a useful comparator for what it is said that CMC ought to have done.

172. Ms Barton also submitted in closing that there was a lack of evidence as to how the decision was reached pursuant to para. 12.3 of Schedule 1 to close out on 17 March when Mr Tchenguiz had been on margin call for a week or more, whereas Mr Tchenguiz pointed out that had the power been exercised on 13 March no loss would have been occurred on his account. Yet, she submitted, no consideration appears to have been given at that time to an earlier close out.

173. This was not a point advanced previously, or put to Mr Morris, and may derive opportunistically from the fact that InterTrader began close out on 13 March, completing on 16 and 17 March, at an average price of 37.464p. Further, it does not appear consistent with the evidence since Mr Tchenguiz made payments of £100,000 into his account on both 12 and 13 March 2020 to meet the margin calls. Given that efforts were made by Mr Tchenguiz, initially at least, to clear the negative balance on his account, it would have been premature for CMC to initiate close out on 13 March. It seems to me also that there has been the application of hindsight in making this submission. Moreover, Mr Tchenguiz was trying to persuade CMC (and other SBFs) not to close out and to find a solution to the difficulties with his accounts. CMC allowed Mr Tchenguiz an opportunity to provide a solution which proved fruitless, as I have already explained, and for reasons that appear to me to be rational. It is therefore inconsistent now for the Defence to suggest that Mr Tchenguiz' attempts to resolve his difficulties ought to have been ignored.

174. Additionally, it is submitted that a number of irrelevant factors were taken into account:

> (1) The decision-making process was focussed on CMC's own hedged position, in a falling market, and no disclosure was made of CMC's underlying hedged positions. CMC appears to have "asked itself the wrong question, namely

whether to unwind it own hedged position".

(2) The related question of the impact of the market conditions on CMC's own position arising from the tension created by a falling market.

175. I reject these points also since I accept Mr Morris' evidence that the focus was on compliance with the contractual obligations and on taking reasonable steps to protect both Mr Tchenguiz and CMC. It must again be recalled that Mr Tchenguiz had entered into an obligation to maintain his account with CMC above the close out level and in any event to clear any negative balance promptly.

176. Although a point is made that CMC has failed to show that its exercise of discretion under para. 12.3 was rational, I take this as not a reference to the burden of proof (which generally lies on the party asserting irrationality) but to the overall conclusion.

177. The submissions with regard to the claim that CMC acted irrationally in reaching the Execution Decision to liquidate in three tranches of 1 million each over the course of 17 March using an automated proprietary algorithm noted that the process in making the decision was "opaque". In particular it was submitted that:

(1) Although Mr Morris' evidence was equivocal in stating that the market was monitored to provide a "sense check" to the automated system the process was automated and there appeared to be no evidence of a manual "sense check".

(2) CMC did not "take proper account" of the communications made by or on behalf of Mr Tchenguiz and there was evidence of a "dismissive attitude" to him.

178. In my judgment these point focus on points of minor relevance to the overall rationality of the decision and I am unable to conclude that they could have affected the rationality of the Execution Decision. I have already set out Mr Morris' evidence as to the manner in which the Execution Decision was carried out and why it was done as it was employing a Barclays trading algorithm which took account of market movements, the volume of trading and seeks to avoid adverse market impact. In this context, I have found that the role of a sense check was limited, as Mr Morris explained it, and I do not find that Mr Morris' reference to it was disingenuous, as Ms Barton submitted.

179. I do not agree that CMC failed to take account of Mr Tchenguiz' communications and his request for time to provide a solution or that they were dismissive in the sense of not considering them seriously. While the language used in the telephone calls and emails was casual, I do not find that surprising and the overall tone is reflective of the fact that the officers of CMC found it difficult to understand the proposals being offered on behalf of Mr Tchenguiz and how they could meet his obligations. It is notable that Ms Barton

did not allege that *no* account was taken of the communications but that *proper* account was not taken. In the area of rationality, the weight or significance to be attached to factors which have been taken into account is generally a matter of judgment of the party with the discretion. The complaint appears therefore to be one that sufficient weight was not attached to Mr Tchenguiz' representations which I reject.

Duty to act in the client's best interests COBS 2.1.1R

180. COBS 2.1.1R imposes a duty to

> "act honestly, fairly and professionally in accordance with the best interests of its client".

181. In ***Ehrentreu v IG Index Ltd*** [2018] EWCA Civ 79 Flaux LJ held at [16] that:

> "16. Like the judge I regard section 5 of the Financial Services and Markets Act 2000 as of some assistance in considering the purpose of COBS 2.1.1R. That provides:
>
> > "(1) The protection of consumers objective is: securing the appropriate degree of protection for consumers.
> >
> > (2) In considering what degree of protection may be appropriate, the Authority must have regard to—
> >
> > (a) the differing degrees of risk involved in different kinds of investment or other transaction;
> >
> > (b) the differing degrees of experience and expertise that different consumers may have in relation to different kinds of regulated activity;
> >
> > (c) the needs that consumers may have for advice and accurate information; and
> >
> > (d) the general principle that consumers should take responsibility for their decisions.""

182. The factors relied on by Ms Barton to demonstrate a breach of COBS 2.1.1R are the same factors as those I have already set out above in respect of the ***Braganza*** duty. It does not necessarily follow that because I consider that CMC acted rationally in exercising its discretion to close out under para. 12.3 of Schedule 1 that this equates to compliance with COBS 2.1.1R. However, some of the reasons for considering CMC's actions to be rational may nonetheless be relevant to this duty.

183. Mr Saoul submitted that there was good authority for doubting the application of this rule to the closing out of accounts but, before turning to those issues, I will first consider the application of the duty in the circumstances applicable to Mr Tchenguiz.

184. In considering this aspect of the defence, it appears to me right that I should take into account Mr Tchenguiz' expertise and general involvement in spread betting and the fact

that it was his own choice to take up positions shown as the equivalent to £81 million in shares as detailed in his email of 16 March. The closure of part of his position at RJO and a corresponding new account opened with CMC from RJO was, in my judgment, likely to have been the result of his concern at the proposed increase in margin and it is notable that rather than simply reduce his position, he appears to have transferred his position with respect to the equivalent of 10 million shares in First Group to other SBFs including CMC and therefore maintained his overall position and exposure in the market.

185. I have considered the facts and contentions advanced by Ms Barton in the context of the COBS 2.1.1R duty and it seems to me that:

(1) Having regard to the factors recognised by Flaux LJ in ***Ehrentreu v IG Index Ltd*** [2018] EWCA Civ 79 in s. 5 of the Financial Services and Markets Act 2000, I take into account Mr Tchenguiz' considerable experience in the spread betting market and the degree of risk he willingly assumed with such a high degree of exposure to volatile markets particularly with regard to one company, First Group (see Rix LJ in ***Spreadex***).

(2) Mr Tchenguiz was unable to comply with his contractual obligations owed to CMC due to market volatility arising from the pandemic and there was no evidence that it would have been possible within a reasonable period of time for him to provide funding so that he could meet the margin call and put his account into a positive balance sufficient to satisfy the close out level requirement. There was inevitably difficulty in acting in Mr Tchenguiz' best interests in dealing with the consequences of his breaches of the agreement with CMC and in closing out in accordance with the contractual provisions.

(3) CMC did not act significantly differently from other SBFs with whom Mr Tchenguiz had opened accounts. 4 of the SBFs acted to begin liquidation of his accounts before 17 March.

(4) The approach adopted by CMC in closing out Mr Tchenguiz' account was at a level which may have been lower than some SBFs achieved, with larger positions and a longer period for execution, but was better than that achieved by a number of SBFs at this time as I have already set out and as appears in Mr Morris' table.

(5) CMC did not pursue a determinedly self-interested course in closing out, as Ms Barton submitted, but one which sought to protect both Mr Tchenguiz and itself, even if Mr Tchenguiz with hindsight says that if they had done something different, they could have put him into a better position. Compliance with the client best interest duty does not proceed by reference solely to the outcome.

> Moreover, I do not consider that CMC in undertaking the 2.1.1R duty is bound, where the contract has been breached, to ignore its own interests under the contract or the fact that the client has failed to meet contractual obligations.

(6) CMC acted reasonably and fairly in dealing with the state of the market by operating the Barclays trading algorithm and by closing out in tranches over the course of 17 March.

186. I find support for this approach in Supperstone J's judgment in ***IG Index Ltd v Ehrentreu*** [2015] EWHC 3390 (QB) at [99] (which was not appealed on this point):

> "99. In my judgment the Claimant was not in breach of its duty to act in the Defendant's best interests by not closing out his bets in the period from 15 September to 14 October 2008. In reaching this conclusion I have 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."

187. Further, the difficulties of applying the client best interest rule to the closing out of positions has been recognised by the courts on several occasions. Mr Saoul submits that COBS 2.1.1R does not apply to a close out of an account on the basis of a number of judgments of this court.

188. In ***ED&F Man Commodity Advisers Ltd v Fluxo-Cane Overseas Ltd*** [2010] EWHC 212 (Comm) at David Steel J held at [76] (although it was *obiter* since COBS 2 was excluded on the facts):

> "76. COBS 2.1.1 provides: "A firm must act honestly, fairly and professionally in accordance with the client's best interest" but COBS 2 is also excluded from counterparty business. Even if applicable, it is not suggested as such that MCA acted other then honestly, fairly and professionally. As regards the best interests of the client, this is a difficult concept in circumstances where the client is refusing to pay margin and expecting MCA to close out as best it can. MCA was in effect trading on its own account. Furthermore the interests of MCA were in common with FCO namely to limit the loss that might be sustained as a result of the liquidation. Thus I reject the suggestion if it be made that MCA were obliged by COBS 2.1.1 to manage FCO's position as if still acting as FCO's broker but at its own risk and without the provision of margin."

189. In ***Sucden Financial Ltd. v Fluxo-Cane Overseas Ltd.*** [2010] 2 CLC 216, having regard to the view of David Steel J in ***ED&F Man***, Blair J held that in a case of liquidation of a client's account the broker is not executing the client's orders but is entitled to put its own interest ahead of the client "*although in practice both parties had a mutual interest in*

liquidation on the best terms possible." At [52]-[53] he stated:

> "52. The first question is what degree of care Sucden had to exercise. In that regard, the parties are in disagreement as to the standards that Sucden had to observe when carrying out the liquidation. Fluxo-Cane has argued that when liquidating the account, Sucden was subject to the provisions set out in the New Conduct of Business Sourcebook (COBS) promulgated by the regulator, the Financial Services Authority. The sourcebook sets out the conduct of business requirements applying to firms with effect from 1 November 2007. It sets out rules to the effect that a firm must act in accordance with the best interests of its client, and must act subject to a best execution obligation. I believe it to be common ground that COBS would apply if Fluxo-Cane was categorised as a "professional client". That is how Sucden did classify Fluxo-Cane in a letter of 26 October 2007. I have to say that Sucden has not satisfied me that in those circumstances the "Eligible Counterparty" exemption (which was decisive in *ED & F Man*) applies on the facts here. In any event, the annex to the letter of 26 October 2007 acknowledges a best execution obligation, and despite Sucden's submissions to the contrary, I consider that this plainly overrides clause 9.6 of its standard terms of business which are inconsistent.
>
> 53. However, I am equally satisfied that the COBS (and the annex to the letter of 26 October 2007 so far as it creates an independent obligation) do not apply when the broker is liquidating the customer's account pursuant to an Event of Default. That is because these rules apply when the broker is executing its customer's orders, which is not the case in a liquidation. It is not correct either that in those circumstances the firm has to act in the best interest of its client. It cannot ignore the client's interests, but as the present case shows, the firm has interests of its own to consider. Here, liquidation was required to eliminate Sucden's own exposure with its counterparty. It was, in my judgment, entitled to put its own interest ahead of that of its client in that regard, although in practice both parties had a mutual interest in liquidation on the best terms possible. This conclusion is the same as that reached in *ED & F Man* at [75] and [76]. There David Steel J rejected the suggestion that the claimant was obliged to manage the defendant's position as if it was still acting as the defendant's broker, but (as he put it) at its own risk and without the provision of margin."

190. In the present case, unlike ***Sucden***, CMC was entitled to liquidate the account given the failure of the Defendant to maintain his account above the Close Out Level and in any event to maintain a positive balance. However, as ***Sucden*** shows, it was not necessary to demonstrate an event of default.

191. In ***Marex Financial Ltd. v Fluxo-Cane Overseas Ltd***. [2010] EWHC 2690 (Comm) David Steel J considered the issue again, in the context of another failure to meet a margin call and repeated his comments from ***ED&F Man*** referring to both it and Sucden. These cases were also cited without criticism by Gloster J in ***Euroption Strategic Fund Limited v Skandinaviska Enskilda Banken AB*** [2012] EWHC 584 (Comm) at [119]-[120].

192. Ms Barton sought to distinguish ***Sucden*** on the basis that it was dealing with an event of

default. However, that is a distinction which, in my view, is not material when what is considered is the nature of what occurred as a result of the default. Blair J, having regard to the ***ED&F Man*** judgment, focused on the fact that liquidation brought about a different set of circumstances to those which applied when executing client orders –

> "That is because these rules apply when the broker is executing its customer's orders, which is not the case in a liquidation. It is not correct either that in those circumstances the firm has to act in the best interest of its client. It cannot ignore the client's interests, but as the present case shows, the firm has interests of its own to consider. Here, liquidation was required to eliminate Sucden's own exposure with its counterparty. It was, in my judgment, entitled to put its own interest ahead of that of its client in that regard"

193. Ms Barton also invited me not to follow ***Sucden*** even if it was materially indistinguishable. I reject that approach and the criticism that Blair J's reasoning was insufficient or defective. The concurrence of a number of judges with his view demonstrates the cogency of the point and, with respect, I regard his reasoning as clear and compelling. I would in any event, have acted with considerable circumspection before departing from Blair J.'s view having regard to the fact it is a decision of the Commercial Court, supported by others, and would have required demonstration of much more compelling reasons not to follow it than those advanced by Ms Barton.

194. In my judgment, though the context differs from the present, the same considerations apply when considering the applicability of COBS 2.1.1R to a close out following a margin call (in fact a series of margin calls). It is unnecessary to go as far as Mr Saoul submitted and to find the breach as repudiatory or equivalent to an event of default. By way of footnote only, I note that the breaches here were "Specified Events" under para. 8.1 of the TOB which, following the definitions in Schedule 4, included a breach of any of the terms of the agreement (part (iv) of the definition) which entitled CMC to take a Reserved Action (provided it was fair and reasonable within para. 8.3) which included closing any account (definition part (viii)) as well as initiating close out under para. 12 of Schedule 1. However, I do not base my decision on this since it was not argued.

195. I have already found that in the circumstances CMC did discharge its duty, if owed, under COBS 2.1.1R but I also agree with the above cases that it is not applicable to cases of close out following a failure to meet a margin call since in such circumstances the SBF is seeking to remedy the breach of agreement in accordance with its terms and was entitled to put its own interest ahead of the client in such circumstances. In any event, CMC's pursuit of close out and execution and the timing of them were in both the interests of CMC and Mr Tchenguiz. Contrary to the submissions advanced by Ms Barton, I have already found that by reason of CMC's hedging its interests were in any event aligned with the Defendant's own. The fact that Mr Tchenguiz considers he ought to have been put in a better position at liquidation is not itself a good reason to find the duty either

applicable or breached or, as I have also found, contrary the ***Braganza*** duty.

196. I therefore reject the defence based on the alleged breach of COBS 2.1.1R.

Conclusion

197. In my judgment, the Defendant was lawfully categorised as a professional client and CMC did not fail to comply with the duty in COBS to give appropriate warnings with regard to the loss of protections and rights which he would have enjoyed as a retail client but not as a professional client.

198. Further, for the reasons I have given, I reject the Defendant's contentions that in closing out his account CMC breached the Braganza duty or failed to comply with COBS 2.1.1R and the duty to act in the best interests of its client.

199. It follows that the claim succeeds, the Defendant is indebted to CMC in the sum of £1.31 million together with interest due.

200. Following the circulation of my judgment in draft, I received a draft form of agreed order from the parties which, with minor amendments, I approve.