Margin of error: The English Court of Appeal confirms no duty to protect customer from self-inflicted economic harm

The Court of Appeal has considered whether a spread betting company owed a contractual, tortious or regulatory duty to its customer to protect the customer from incurring further potential losses by closing out his account when he failed to meet a margin call. The Court of Appeal held that the relevant contractual provisions were for the benefit of the company rather than its customer and were not there to protect the customer against himself: it would require very clear express words in the contract spelling out such a duty before the Court could conclude that such an exceptional duty arose. The existence of a tortious duty of care to protect the other party from deliberately inflicting economic harm on himself is "truly exceptional". Nor did the FSA's Conduct of Business Sourcebook 2.1.1R (the duty on regulated firms to act in the best interests of their clients) impose a duty on the company to protect the customer from himself.[1]

Background

In the summer of 2008, Mr Ehrentreu placed a significant bet with IG Index Limited on the share price of RBS rising. In the following months, as the global financial crisis took hold, RBS's share price fell dramatically, resulting in Mr Ehrentreu owing in excess of £1.2 million to IG Index at the time his account was closed out.

Once it became apparent on 15 September 2008 that Mr Ehrentreu was substantially "out of the money", IG Index began making margin calls, and thereafter made margin calls on a daily basis. The initial margin call was for £197,195.

The relationship between the parties was governed by a Customer Agreement. Term 16(4) of the Customer Agreement conferred an obligation on IG Index to close out its customers' positions in circumstances where margin calls or deposits were not paid within five business days after they became due. The specific term stated:

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

Term 16(5) said that:

> *"Subject to FSA Rules, in the event of your failing to meet a demand for deposit or margin ... we may exercise our reasonable discretion to allow you to continue to place Bets with us, or allow your open Bets to remain open, but this will depend on our assessment of your financial circumstances".*

Despite being contractually "obliged" to close out Mr Ehrentreu's positions in accordance with Term 16(4), Mr Ehrentreu pleaded with IG Index for his positions to be kept open, in the hope that the market would turn so that the positions would end up "in the money" rather than his losses being crystallised.

IG Index initially obliged but the market turnaround never happened and the positions were eventually closed out in October 2008, crystallising a liability of £1.2 million.

IG Index subsequently commenced a debt claim to recover the monies and Mr Ehrentreu, in turn, counterclaimed that IG Index had acted in breach of the Customer Agreement by not closing out his positions sooner, causing him to suffer substantial loss.

1 At the time of the relevant transactions, the spread betting company was regulated by the Financial Services Authority ("FSA").

At first instance, the High Court found that whilst IG Index had breached its contractual obligations by not closing out the positions earlier than it did (because it did not exercise discretion to keep the positions open after assessing the customer's financial position in accordance with Term 16(5) but rather simply complied with pleas from the customer not to close out), that breach had merely been the opportunity for the loss, not its cause.

Mr Ehrentreu appealed to the Court of Appeal.

Court of Appeal's decision

One of the key issues on appeal related to Term 16(4) of the Customer Agreement and whether it had been included for the benefit of the customer. If that was the case, it followed that its breach would have caused the customer's loss.

The Court of Appeal unanimously dismissed Mr Ehrentreu's appeal. In doing so, it held that the words "*we are obliged to close out such bets*" could not be read as a provision that was intended to protect IG Index's customers.

In reaching that decision, the court referred to the duty of care in tort where the duty to protect a party from deliberately inflicting self-harm is "*truly exceptional*" (as previously held in *Calvert v William Hill Credit*[2]).

The Court of Appeal held (at paragraph 47) that for such a duty to arise in a contractual context, "*very clear express words in the contract, spelling out such a duty [would be required], before the Court could conclude that such an exceptional duty arose*".

In the present circumstances, Term 16(4) did not contain such express words and was not a provision that was "*intended to protect spread betting addicts against themselves*". This, the Court of Appeal held, was "*scarcely surprising*" given that the Customer Agreement was intended to facilitate spread betting.

It therefore followed that IG Index's breach of Term 16(4) was merely the opportunity for the loss, not the effective cause and it was Mr Ehrentreu's decision to continue placing the bets which caused him to suffer the loss.

The Court of Appeal also rejected the claim that, by failing to close out the positions, IG Index was in breach of the relevant regulatory requirement (contained in COBS 2.1.1R), which requires a firm to act in the "*best interests of its client*". Flaux LJ noted that the Judge at first instance had reached that conclusion having regard to factors including the customer's trading and payment history, the customer's promise to make payments to the company, and the general principle behind the FSA's Rules that customers should take responsibility for their decisions.

Comment

This judgment helpfully highlights the very limited circumstances in which a duty of care will arise in a commercial context whereby one party is required to protect another from deliberately inflicting economic harm on itself. The Court of Appeal has clearly stated that, in practice, such a contractual duty will only arise if it is very clear from the express wording of the contract that this was the intention of the contracting parties.

The case is *Aryeh Ehrentreu v IG Index limited* [2018] EWCA (Civ) 79.

If you have any questions or comments in relation to the above, please contact the authors or your usual Mayer Brown contact.

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2 [2008] EWHC 545 (Ch)

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