

Update

Marex Financial Ltd v Creative Finance Ltd & Ors

On 25 July 2013, the Court held that a broker was contractually justified in closing out a client's cross currency positions following a steep drop in Japanese Yen in 2011. The only duty of care owed by the broker was a duty to act rationally.

The facts

This case concerns a claim for money due on account between the Claimant (a foreign exchange broker, Marex) and the Defendants (Creative Finance Limited and Cosmorex Limited).

The Japanese Yen rate dropped steeply following the tsunami and earthquake that struck Japan on 11 March 2011.

The Claimant closed out NZDJPY and EURJPY positions on behalf of the Defendants at the best price achievable. The Claimant then debited the Defendants sums converted to US dollars to reflect the average cost of the close out transactions plus a mark up profit of USD 2.7 million. This resulted in a negative balance across the Defendants account of USD 7.9 million which is the sum sued for, plus interest.

The Defendants allege that the manner in which the positions were closed out was irrational or negligent. They allege that the only rational way of closing out the position would be to sell the entire positions to a market maker at a "risk transfer price" which would have left them with a profit (in respect of which they brought a Counterclaim).

The Claimant accepted a duty to act rationally, but denied that it acted in breach of this duty. The Claimant also contends that it has a contractual right to charge a profit on close-out transactions of such a size.

The Defendants state that the Claimant did not act rationally and in any event, was under a more stringent duty, to exercise reasonable care. They also contend that the Claimant had no right to charge a profit.

Socimer

The Claimant accepted that they owed a duty not to act irrationally, capriciously or perversely in light of the Court of Appeal decision in *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] 1 Lloyd's Rep 558. In this case the relevant clause provided:

"The Seller may in its sole and absolute discretion sell the Designated Assets at such time, in such manner and at such price as it deems reasonable and appropriate. The value of any Designated Assets liquidated or retained and any losses expenses or costs arising as a result of the termination or sale of the Designated Assets shall be determined on the date of determination by Seller."

The claimant in *Socimer* claimed that there was an implied term to act with reasonable care in carrying out the above valuation. The Court of Appeal held that no such term was to be implied into the agreement. The only duty was a duty to act rationally, that is to say, "a duty not to exercise the power arbitrarily, capriciously, or perversely".

Duty of care

The Court did not accept the Defendants' submissions. A tortious duty of care is at odds with the Claimant's wide ranging contractual right to protect its interests by closing out the Defendants' positions. The Claimant did not have to close out, but chose to do so for its own protection and benefit, and not out of any duty owed to the Defendants.

In addition, the Court agreed with the view held in *Euroption Strategic Fund Ltd v Skandinaviska Enskilda Banken AB* [2012] EHC 584 (Comm) that once the case for an implied statutory or contractual term fails, there is no room for a tortious duty of care.

As such, the Court held that the only duty was to act rationally.

Duty to act rationally

Mr Justice Field held that, one of the essential differences between a duty to act rationally and a duty to take reasonable care is that when the Court considers rationality the decision is focused on the decision maker, whereas a duty of reasonable care involves the Court making its own judgment on the basis of objective criteria. The Claimant had a very wide discretion as to when and how the Defendants' positions would be closed out. Its purpose was to protect the Claimant's own position.

The object of the close-out is to close-out the client's entire position at the best price possible and as quickly as possible.

Although the Court saw downsides in the strategy for closing out, the strategy was not arbitrary, capricious or perverse.

Further information

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