Neutral Citation Number: [2024] EWHC 1880 (Comm)

Case No: LM-2022-000141

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

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 31/07/2024

Before :

HHJ RUSSEN KC

(Sitting as a judge of the High Court)

- -

Between :

IG INDEX LIMITED	**Claimant**
- and -	
ROBERT TCHENGUIZ	**Defendant**

- -
- -

DAVID MAYALL (instructed by **Dentons UK and Middle East LLP**) for the **Claimant**
ZOË BARTON KC and **DANIEL LEWIS** (instructed by **Withers LLP**) for the **Defendant**

Hearing dates: 4th, 5th, 6th and 7th June 2024
(Draft judgment circulated to the parties on 19th July 2024)

Approved Judgment

This judgment was handed down remotely at 10.00am on Wednesday 31st July 2024 by circulation to the parties or their representatives by e-mail and by release to The National Archives.

HHJ Russen KC:

INDEX **PARAGRAPHS**

A. INTRODUCTION

1. The Claimant ('**IG**') is a specialist margin trading broker whose services include the provision of spread betting accounts for its customers. The spread bets IG offer relate to financial instruments. In these proceedings IG seek to recover from their former client ('**Mr Tchenguiz**') the balance of £6,549,430.34 which IG claim was due from him on the closing out of his spread betting account on 19 March 2020. Mr Tchenguiz had used that account to take out spread betting positions on the share price of FirstGroup Plc.

2. By the date of the Claim Form (24 June 2022) IG were also seeking to recover from Mr Tchenguiz contractual interest on the principal sum quantified at £592,398. By the time of the trial before me in June 2024 the claim for interest had risen to just over £1.5m.

3. Mr Tchenguiz denies he is liable for these sums. He says he only became exposed to paying them because IG had re-categorised him as an Elective Professional Client ('**EPC**'). Had he remained a retail client (which is what he was for about 3½ hours between the opening of his account with IG on 11 December 2019 and being re-categorised as an EPC later that day) he would not have become so exposed. That is because retail clients of such business benefit from negative balance protection ('**NBP**') which means that they cannot be liable for anything more than the funds in their account.

4. NBP is a protection afforded to retail clients under the rules of the Financial Conduct Authority ('**FCA**'). The rules which are material to the present claim are contained within the FCA's Conduct of Business Sourcebook (**'COBS'**). COBS 22.5.17R provides NBP for retail clients.

5. As an EPC, Mr Tchenguiz was not entitled to that protection. However, the defence that he benefits from NBP is based upon the contention that he is to be treated by the court as having remained as a retail client. This, he says, is because his re-categorisation as an EPC by IG was not done in accordance with other provisions of COBS, specifically COBS 3.5.3R and 3.5.6R ("**the Re-**

categorisation Issue"). It is the alleged breach of COBS by IG in re-categorising him as an EPC which he relies upon in saying he remained a retail client with the corresponding protection of NBP ("**the NBP Defence**").

6. By his Amended Defence dated 22 January 2024, Mr Tchenguiz had also alleged that IG owed him certain duties in connection with the closing out of his positions in March 2020; and he had also required IG to prove certain matters in relation to the hedging positions (in relation to his bets) which IG said it held and the unwinding of those positions. IG's Re-Amended Reply said that Mr Tchenguiz had not pleaded any breach of duty on the part of IG in this regard nor made any counterclaim for loss allegedly suffered by him. There would have been issues for me to decide about the existence of the pleaded duties in relation to close-out and what consequences, if any, flowed from them but those issues disappeared upon a further amendment of the Defence. By his Re-Amended Defence dated 30 May 2024, Mr Tchenguiz abandoned that part of his defence relating to the close-out issue. The Re-categorisation Issue and the NBP Defence were, therefore, the remaining issues for trial and for determination by this judgment.

7. IG's position is that the Re-categorisation Issue does not provide Mr Tchenguiz with the basis of a defence to the claim. IG deny they acted in breach of COBS in re-categorising him as an EPC. However, even if a breach in that regard was established, it would not follow that his debt as an EPC was extinguished. Instead, the position under the Financial Services and Markets Act 2000 ('**FSMA**') is that any such breach would potentially provide him with a cause of action for damages but "*no such contravention makes any transaction void or unenforceable*" (to quote from section 138E(2) of FSMA). Mr Tchenguiz has not sought to bring a counterclaim for such damages in extinction or reduction of IG's debt so, IG contend, there is no defence (not even one of set-off) to what the firm claims from him.

8. In response to Mr Tchenguiz's application (dated 26 September 2023) to amend his Defence to plead the allegations in relation to close-out (which, as explained, he duly did but then later abandoned by the Re-Amended Defence) IG had applied, by an application dated 5 October 2023, for the defence to be struck out and/or for summary judgment against Mr Tchenguiz. IG's application was founded largely upon the contention that (even assuming IG failed on the Re-categorisation issue) the absence of a counterclaim meant that, in the light of section 138E(2) of FSMA, there could be no defence to the claim. Even Mr Tchenguiz's then proposed re-amendment did not include a counterclaim.

9. By an order dated 17 November 2023 HHJ Keyser KC directed that the applications be heard together. HHJ Jarman KC heard the applications on 18 January 2024. In support of IG's application, Mr Mayall, for IG, relied upon section 138E(2) and the authorities I address below in Section G of this judgment. Ms Barton KC and Mr Lewis, on behalf of Mr Tchenguiz made the argument that the particular statutory provision and earlier authorities addressing it (or its predecessor in what was then section 151(2) of FSMA) now had to be read subject to the protections (including NBP) introduced in 2018 for retail spread betting clients by the first of a number of Decisions of the European Securities and Markets Authority ('**ESMA**') and reflected in COBS 22.5.17R with effect from 1 August 2019.

10. By his judgment dated 18 January 2024 ([2024] EWHC 216 (Comm), at [33], HHJ Jarman KC concluded:

> "Mr Mayall says that this is a very simple issue. The statute provides for a claim for breach of statutory duty and so I should grapple with the contrasting and conflicting submissions of the parties. In my judgment, it is not appropriate to do this on a summary judgment or strike-out application. This is not just a short point of law or construction. In my judgment, the defendant has a realistic prospect of showing that this is a novel point which should be resolved in his favour in light of the changes made in 2018. I accept the submission that the authorities relied upon by Mr Mayall, which predate this time, must be approached with caution."

11. Although that was sufficient to dispose of IG's application, the judge went on to say that he did not accept IG's reasons for the delay in making the application (so close to a trial which was then due to take place before me in February but which was soon after vacated by agreement between the parties) to be good ones.

12. The judge also had before him Mr Tchenguiz's application to re-amend the Defence in relation to close-out issues. He granted that application though, as already noted, he did so in vain. In their written opening submissions for trial, Ms Barton KC and Mr Lewis said the matters pleaded in relation to close-out had been advanced to obtain disclosure showing the process adopted by IG and, having reviewed that disclosure, the decision had been made not to make a counterclaim.

13. At this introductory stage of the judgment following the trial, I express my gratitude to counsel and their respective instructing solicitors for their clear and comprehensive written and oral submissions, made by reference to authorities confined to a number which obviously reflected their deep thought about the arguments to be made on the Re-categorisation Issue and the NBP Defence, and also a very well-ordered trial bundle. As I explain in Section G below, there was a little bump in the road to judgment on the last day of trial (arising out of the potential impact of section 137D of FSMA on the NBP Defence and disagreement between counsel as to whether that was "in play" on the NBP Defence) but, for the reasons given in that section, I believe I have been able to overcome that while still doing justice to the parties without further recourse to them.

B. BACKGROUND

14. Mr Tchenguiz did not give evidence at the trial and IG did not seek to rely upon his witness statement served in the proceedings as hearsay evidence in relation to any contentious aspects of the Re-categorisation Issue (cf. CPR 32.5(5)).

15. However, Mr Tchenguiz's witness statement contained a useful summary of how, prior to opening his account with IG, he had taken out extensive spread betting positions with other spread betting providers on the share price of FirstGroup plc. This position was taken as part of a strategy Mr Tchenguiz was pursuing in

conjunction with a US Hedge Fund named Coast Capital. The strategy was to build up a substantial stake in FirstGroup plc to then encourage the management of FirstGroup plc to rationalise its operations and, in particular, to sell various parts of its operations and thereby increase the value to shareholders.

16. In a compulsory 'Notification of Major Holdings' dated 28 November 2019 Mr Tchenguiz notified the Stock Exchange that he held 5.08% of the voting rights in FirstGroup plc of which 5.06% were held through spread betting positions.

17. In addressing the facts relevant to the Re-categorisation Issue below, I explain in detail how, on 11 December 2019, Mr Tchenguiz opened his account with IG as a retail client and then shortly thereafter applied for and (after an initial refusal) obtained EPC status. On 17 December 2019 he changed his account to a 'Select Account'.

18. His witness statement explained that between 11 December 2019 and 16 March 2020 he had invested some £39m of his own money in taking open spread betting positions with a number of other spread betting firms equivalent to about 62 million shares in FirstGroup: 8.75m shares with RJ O'Brien, 45m shares with InterTrader, 3m shares with CMC, 4.25m with Spreadex and 2m shares with ETX. By the time IG closed out his account in March 2020, his spread bets with IG related to nearly 16.5m million shares in FirstGroup.

19. Mr Tchenguiz's spread betting upon the share price of FirstGroup is already a matter of public record. In *CMC Spreadbet Plc v Robert Tchenguiz* [2022] EWHC 1640 (Comm) ('**the *CMC Spreadbet* case**') Mr David Elvin QC, sitting as a Deputy High Court Judge, said at [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 [spread betting firms] in total equivalent to about 81m shares in First Group including the position taken with CMC which is the subject matter of these proceedings."

20. Mr Tchenguiz had opened his account with CMC on 17 December 2019, six days after he opened his account with IG. In the litigation with CMC he also challenged CMC's categorisation of him as an EPC and also alleged that CMC had breached obligations in relation to the closing out of his account. He failed in both lines of defence; though the judge's finding that CMC did not act in breach of COBS obviously does not assist me in determining the Re-categorisation Issue between Mr Tchenguiz and IG. Even allowing for the inference that IG would have been one of "*the other companies*" mentioned by the judge at [59], I make the same observation about what is said in that same paragraph about Mr Tchenguiz's candid acceptance in cross-examination that he was warned, was therefore aware and understood the consequences of losing NBP as a result of being classified as a professional client; and that being so classified enabled him to trade on a highly leveraged basis with each of those spread betting firms.

21. Mr Tchenguiz's bets on the shares price in FirstGroup were "buy" bets, with him betting that FirstGroup's share price would rise. In fact, having reached £1.34 in February 2020, the share price then started to drop as a result of the Covid-19 pandemic. The share price had fallen to 86 pence by 13 March 2020 and progressively decreased thereafter.

22. The progressive fall in FirstGroup's share price meant that between 5 March and 16 March 2020 he faced margin calls on his account. On 16 March 2020, Mr Tchenguiz breached the liquidation level on his account. The liquidation level on his account was set at £0.00. This meant that if the net equity on his account (any cash balance plus or minus any unrealised profits or losses) fell to zero then IG had the right to liquidate his open positions. The effect of his EPC status was that Mr Tchenguiz benefited (potentially) from a liquidation level set at zero and also a £250,000 waiver of margin cover. Had he remained a retail customer (by which I mean, had IG been treating him as such in early 2020) then these terms would not have applied and his account would have been closed out sooner. That said, the bets he in fact made as an EPC would not have been made by him on the same terms had he remained a retail customer.

23. IG had hedged its own position on Mr Tchenguiz's bets by buying equity swaps through its brokers in an equivalent number of shares in FirstGroup as the bets themselves (and with the brokers hedging their own exposure under that derivative transaction by acquiring the underlying stock). The closing out of Mr Tchenguiz's account led IG to unwind its own hedging positions with the brokers' onward hedge being unwound by trades in the shares themselves.

24. As mentioned, by his recent Amended Defence, Mr Tchenguiz had made a complaint about IG unwinding its hedging position by selling its equity swaps in relation to the majority of shares (12.5m of them) to Coast Capital at 29.2p per share on 19 March 2020. IG's evidence showed the remainder had in the 3 days before been sold in stages – using a Volume in Line Algorithm ('VIL') designed to avoid the market price being depressed by sales in a number not proportionately in line with volume of trades in the underlying market - at either 41.91p, 30.69p, or 27.45p. Those prices, with a slight discount, were then booked to Mr Tchenguiz's spread betting account to produce the balance due on the closing out of the account of £6,549,430.34.

25. However, the defence relating to close-out issues having been abandoned, Mr Tchenguiz does not challenge the close out balance, or some part of it. Instead, his defence is that, there being no funds in his account at close-out, he is not liable for any of that balance on the basis that he remained a retail client with the benefit of NBP.

26. The spread bets which produced the balance of £6.549m were in fact placed by Mr Tchenguiz as an EPC.

27. The risks involved in spread betting have been highlighted in a number of previous cases, including the *CMC Spreadbet* case mentioned above.

28. Rather than cross-refer to the corresponding paragraph in the *CMC Spreadbet* case, in the interests of self-containment I now set out the same passages from the

decision of Rix LJ in *Spreadex Limited v Dr Vijay Ram Battu* [2005] EWCA Civ 855 (as quoted by Mr Elvin QC in that case) which highlight the key features of spread betting:

> "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."

29. The upsides and downsides for the spread better, highlighted by those paragraphs and outcome of Mr Tchenguiz's spread bets, apply to both retail and professional clients of spread betting firms.

30. However, in Section D below, I refer to the measures of protection for retail clients engaging in contracts for difference ('**CFDs**', of which a spread bet is a certain type) which have been introduced more recently by EU law and which were implemented in COBS by the time Mr Tchenguiz opened his account with IG in December 2019. As I explain below, the protection introduced by COBS in August 2019 for retail investors included NBP, margin close-out protection and initial margin protection.

31. Although Mr Tchenguiz's counsel emphasised the importance of all three measures, and their background in the Europe-wide concern amongst regulators about how CFDs were being marketed to retail clients, only the NBP Defence (under those protective measures) is advanced in response to the claim. As explained above, whereas the "application" of the other protective measures might involve a more nuanced approach to the financial effect of bets in fact undertaken on an EPC basis, the NBP defence (if a good one) provides an answer to the entirety of IG's claim.

32. Ms Barton KC and Mr Lewis represented Mr Tchenguiz, in the *CMC Spreadbet* case as they did before me. In that case, as appears from paragraph 6 of the judgment, they also advanced the NBP Defence as a result of alleged breaches of COBS by CMC in re-categorising him as an EPC. The judge did not need to address the NBP Defence because he found there was no such breach: see paragraphs 90 and 91 of the judgment.

33. Ms Barton KC told me that Mr Tchenguiz appealed the decision in the *CMC Spreadbet* case but the appeal was compromised on terms before the appeal was heard.

C. The Customer Agreement

34. In Section E below I explain how, on 11 December 2019, Mr Tchenguiz signed up to the terms of IG's Spread Betting Customer Agreement ("**the Customer Agreement**"). There is no dispute about that, or about the terms of the Customer Agreement.

35. IG's claim is a straightforward contractual claim arising out of the proper implementation of the terms of the Customer Agreement. The Particulars of Claim set out in full the terms relied upon in seeking the principal sum and interest. The material provisions of the Customer Agreement are:

> "8. CLOSING A BET
>
> …….
>
> (12) Upon closing a Bet, subject to any Applicable Regulations:

(a) you will pay us the difference between the Opening Level of the Bet and the Closing Level of the Bet multiplied by the Stake if the Bet is:

(i) ……..

(ii) an Up Bet and the Closing Level of the Bet is lower than the Opening Level of the Bet;

…….

Unless we agree otherwise, all sums payable by you pursuant to Term 8(12)(a) and Term 4(1) are due and payable immediately upon the Closing Level of your Bet being determined by us and will be paid in accordance with Term 16. Sums payable by us pursuant to Term 8(12)(b) will be settled in accordance with Term 16(5)."

"15. MARGIN

INITIAL MARGIN

(1) Upon opening a Bet you will be required to pay us the Margin for that Bet, as calculated by us ("Initial Margin)". Note that the Initial Margin for certain Bets (for example, Bets on Shares) will be based on a percentage of the notional value of the Bet and therefore the Initial Margin due for such Bets will fluctuate in accordance with the notional value of the Bet. Initial Margin is due and payable to us immediately upon opening the Bet (and for Bets that have a fluctuating Initial Margin based on a percentage of the notional value of the Bet, immediately on opening the Bet and thereafter immediately on any increase in the notional value of the Bet taking place) unless:

(a) ……..

(b) we have categorised you as a Professional Client and we have expressly agreed to reduce or waive all or part of the Margin that we would otherwise require you to pay us in respect of a Bet. The period of such waiver or reduction may be temporary or may be in place until further notice. Any such waiver or reduction must be agreed in writing (including by email) by a director, an authorised signatory or relationship manager of ours or a member of our credit or risk departments (each an "Authorised Employee") in order to be effective. Any such agreement does not limit, fetter or restrict our rights to seek further Margin from you in respect of the Bet at any time thereafter; or

(c) ……

MARGIN

(2) Where we have categorised you as a Professional Client, you also have a variation Margin obligation to us to ensure that at all times during which you

have open Bets, you ensure that your account balance, taking into account all realised and/or unrealised profits and losses ("P&L) " on your account, is equal to at least the Initial Margin that we require you to have paid to us for all of your total open Bets. If there is any shortfall between your account balance (taking into account P&L) and your total Initial Margin requirement, you will be required to deposit additional funds into your account. These funds will be due and payable to us for our own account, immediately on your account balance (taking into account P&L) falling below your Initial Margin requirement unless:

(a) ……

(b) we have expressly agreed to reduce or waive all or part of the Margin that we would otherwise require you to pay us in respect of your Bet(s). The period of such waiver or reduction may be temporary or may be in place until further notified. Any such waiver or reduction must be agreed by an Authorised Employee in writing (including by email) in order to be effective. Any such agreement does not limit, fetter or restrict our rights to seek further Margin from you in respect of the Bet at any time thereafter;

(c) ……

……..

(4) Details of Margin amounts paid and owing by you are available by logging on to our Electronic Betting Services or by telephoning one of our employees. You acknowledge: (a) that it is your responsibility to be aware of, and further that you agree to pay, the Margin required at all times for all Bets that you open with us; (b) that your obligation to pay Margin will exist whether or not we contact you regarding an outstanding Margin obligation; and (c) that your failure to pay any Margin required in relation to your Bets will be regarded as an Event of Default for the purposes of Term 17.

……..

……..

(7) We are not under any obligation to keep you informed of your account balance and Margin required (i.e. to make a 'Margin call') however if we do so the Margin call may be made by telephone call, post, email, text message or through an Electronic Betting Service. The Margin call will be deemed to have been made as soon as you are deemed to have received such notice in accordance with Term 14(10). We will also be deemed to have made a demand on you if: (a) we have left a message requesting you to contact us and you have not done so within a reasonable time after we have left such a message; or (b) if we are unable to leave such a message and have used reasonable endeavours to attempt to contact you by telephone (at the telephone number last notified to us by you) but have been unable to contact you at such number. Any message that we leave for you requesting you to contact us should be regarded by you as extremely urgent unless we specify to the contrary when we leave the message. You acknowledge and accept that

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

"16.PAYMENTS, CURRENCY CONVERSION AND SET-OFF

……

…….

INTEREST

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

[At all times material to this claim, IG's reference rate has been the daily LIBOR and then SONIA rate.]

17. DEFAULT AND DEFAULT REMEDIES

(1) Each of the following constitutes an "Event of Default":

> (a) your failure to make any payment (including any payment of Margin) to us or to any Associated Company of ours in accordance with the conditions set out in Terms 15 and 16;
>
> (b) your failure to perform any obligation due to us;
>
> (c) where any Bet or combination of Bets or any realised or unrealised losses on any Bet or combination of Bets opened by you results in you exceeding any credit or other limit placed on your dealings with us;

(2) If an Event of Default occurs in relation to your account(s) with us or in relation to any account(s) held by you with any Associated Company of ours, we may, at our absolute discretion at any time and without prior notice take any one or any number of the below steps:

> (a) close, part-close or amend all or any of your Bets at a Closing Level based on the then prevailing quotations or prices in the relevant Underlying Markets or, if none, at such levels as we consider fair and reasonable and/or delete or place any Order on your account with the aim of reducing your exposure and the level of Margin or other funds owed by you to us;
>
> ……
>
> ……
>
> (3) If we take any action under Term 17(2), we may, where reasonably possible, take steps to notify you before exercising such rights. However, we are not obliged to do so and any failure on our part to take such steps will not invalidate the action taken by us under Term 17(2).
>
> (4) If an Event of Default occurs, we are not obliged to take any steps set out in Term 17(2) and we may, at our discretion, allow you to continue to place Bets with us, or allow your open Bets to remain open.
>
> (5) You acknowledge that, if we allow you to continue to place Bets or to allow your open Bets to remain open under Term 17(4), this may result in you incurring further losses.
>
> (6) You acknowledge and agree that, in closing out Bets under this Term 17, it may be necessary for us to 'work' the order. This may have the result that your Bet is closed out in tranches at different bid prices (in the case of Sells) or offer prices (in the case of Buys), resulting in an aggregate closing level for your Bet that results in further losses being incurred on your account. You acknowledge and agree that we shall not have any liability to you as a result of any such working of your Bets."

36. However, on his argument on the Re-categorisation Issue, Mr Tchenguiz says the claim based upon these contractual terms (specifically clause 8(12)) is met by the NBP Defence. As noted above, he advances this defence by relying upon COBS 22.5.17R. Although I did not understand his counsel to rely upon the particular phrase in clause 8(12) (the Amended Defence instead took a broader approach of denying the relevance of the terms to this claim) it amounts to him saying that the debt on close-out is subject to the "Applicable Regulation" in COBS 22.5.17R. The definition of 'Regulations' in clause 32 of the Customer Agreement includes 'the FCA Rules'.

D. COBS

37. It is necessary to set out the provisions of COBS which are relevant to the Re-categorisation Issue and appropriate to consider them before turning to the factual

account of how Mr Tchenguiz became a client of IG and then quickly had his EPC status approved.

38. The provisions of COBS relevant to this case are those in force when Mr Tchenguiz opened his account with IG in December 2019.

COBS 3.4

39. COBS 3.4 is headed 'Retail clients' and provides, simply, that a retail client is a client who is not a professional client or an eligible counterparty.

40. There being no question that Mr Tchenguiz was an 'eligible counterparty' (as defined in COBS 3.6) it is this provision which is at the heart of Mr Tchenguiz's case that if he was not (or should not have become) a professional client (because his re-categorisation as an EPC involved a breach of the rules) then he remained a retail client.

COBS 3.5 and 10A

41. The provisions of COBS 3.5 are more comprehensive than COBS 3.4. Those which concern Mr Tchenguiz's re-categorisation as an EPC are found in COBS 3.5.3R, 3.5.6R and 10A.2.6. The "R" denotes that the provision is a 'rule' made by the FCA for the purposes of sections 138D and 138E of FSMA (addressed in Section F below: the NBP Defence).

42. COBS 3.5.3R (in force from 3 January 2018) provides as follows (with me highlighting in bold the two definitional terms which identify the two tests mentioned in COBS 3.5.6R):

> "**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.

(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."

43. COBS 3.5.6R (also in force from 3 January 2018) provides as follows:

"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."

I refer to those tests below as the '**Qualitative Test**' and the '**Quantitative Test**' respectively.

44. COBS 10A - the relevant provisions of which incorporate either those found in '**MiFID II**' (Directive 2014/65/EU) or the '**MiFIR**' (the MiFID II Delegated Regulation (EU) 2017/565) - is also material to the Re-categorisation Issue.

45. COBS 10A.2.1R provides:

> "A firm must ask the client to provide information regarding that client's knowledge and experience in the investment field relevant to the specific types of product or service offered or demanded to enable the firm to assess whether the service or product envisaged is appropriate for the client."

46. COBS 10A.2.6 provides:

> "**Reliance on information: MiFID business**
>
> An investment firm shall be entitled to rely on the information provided by its clients or potential clients unless it is aware or ought to be aware that the information is manifestly out of date, inaccurate or incomplete."

47. The focus in this case has been upon the Qualitative Test (COBS 3.5.3(1)) and the third limb of the Quantitative Test (COBS 3.5.3(2)(c)). Mr Tchenguiz says that IG did not take all reasonable steps to ensure that he satisfied those before accepting his request to be treated as an EPC. I address the competing arguments more fully in Section E below. At this stage I note that he says that IG approached the qualitative test in a rudimentary and inadequate way (in simply applying the 'MiFID score' given to him at account opening). In relation to the third limb of the Quantitative Test, he says that IG took account of his position as a beneficiary of a family trust, as opposed to his own expertise, experience and knowledge, and failed to verify with him the understanding which IG says it gleaned from what was said about him (and that family trust) in a reported court judgment.

COBS 22.5

48. The provisions of COBS 22.5 were introduced with effect from 1 August 2019 by the Conduct of Business (Contracts for Difference) Instrument 2019 ("**the 2019 Instrument**") made by the FCA. Paragraph A of the 2019 Instrument stated that it was made by the FCA in the exercise of five different rule-making powers under FSMA. I return to the point about the rule-making source of COBS 22.5 in Section G below.

49. The 2019 Instrument defined 'restricted speculative investments' within the meaning of the provisions identified below as including leveraged CFDs and leveraged spread bets (but only where such investments are 'financial instruments', thus excluding sports spread bets).

50. The key provision in COBS 22.5 (for the purposes of the NBP Defence) is COBS 22.5.17R:

> "**Negative balance protection**
>
> The liability of a retail client for all restricted speculative investments connected to the retail client's account is limited to the funds in that account."

51. Mr Tchenguiz's counsel also relied upon COBS 22.5.6R (also introduced by the 2019 Instrument but with effect from 1 September 2019) which relates to standardised risk warnings to retail clients in relation to restricted speculative investments:

52. COBS 22.5.6R(1) provides:

> "(1) Subject to COBS 22.5.7R and COBS 22.5.7AR, a firm must not:
>
> (a) market, publish, provide or communicate in any other way any communication or information in a durable medium or on a webpage or website to a retail client, or in such a way that it is likely to be received by a retail client;
>
> (b) approve or communicate a financial promotion in a durable medium or on a webpage or website; or (c) disseminate such a communication, information or financial promotion to a retail client, or in such a way that it is likely to be received by a retail client,
>
> unless the firm includes one of the following risk warnings, as appropriate.
>
> (1A) Subject to 1B, if a firm markets, distributes or sells:
>
> (a) ……..
>
> (b) leveraged spread bets; or
>
> (c) ……
>
> the firm must include the following risk warning:
>
> "CFDs are complex instruments and come with a high risk of losing money rapidly due to leverage. **[insert percentage per provider]% 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."

53. Counsel also referred to the requirements of COBS 4.5A.1R and 4.5A.3 (applying article 44 of the 'MiFID Org Regulation': Commission Delegated Regulation (EU) 2017/565 of 25 April 2016) concerning the provision of information and nature of

communications which relate to a firm's MiFID business. The latter provision includes the following conditions for any information provided to a client:

> "Investment firm shall ensure that the information referred to in paragraph 1 complies with the following conditions:
>
> ……
>
> (b) the information is accurate and always gives a fair and prominent indication of any relevant risks when referencing any potential benefits of an investment service or financial instrument,
>
> (c) the information uses a font size in the indication of relevant risks that is at least equal to the predominant font size used throughout the information provided, as well as a layout ensuring such indication is prominent,
>
> (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
>
> ……."

E. THE RE-CATEGORISATION ISSUE

54. Mr Mayall for IG said there were three distinct stages to the contractual arrangements between IG and Mr Tchenguiz: (1) the opening of his account on 11 December 2019; (2) his re-categorisation as an EPC later that same day; and (3) his change to Select Account terms on 17 December 2019.

55. Whereas the implications of that third stage are potentially relevant to the competing arguments over the NBP Defence, only the events of 11 December 2019 are material to the Re-categorisation Issue; and in particular those between the opening of his account at 11:34 and an email from IG timed at 15:01 informing him that he was now classed as a professional client.

56. It is appropriate first to consider what the contemporaneous documents record in relation to Mr Tchenguiz's re-categorisation as an EPC before turning to what the witnesses at trial said about that process and, after that, to provide a summary of the parties' rival arguments.

The Documents

57. Mr Tchenguiz was introduced to Peter Ward, then Head of the Premium Client Sales Division at IG, by an email dated 10 December 2019 from Daniel Pittack, an existing client of IG. Mr Ward sent an email to Mr Tchenguiz later that day

suggesting that they have a telephone call the following morning. At the start of the trial an issue arose about the late disclosure by IG of recordings and transcripts of telephone calls relating to Mr Pittack's introduction of Mr Tchenguiz. It had been flagged by Ms Barton KC and Mr Lewis in their written opening. The disclosure did not bear upon the issues to be determined by me. Mr Ward was asked some questions about Mr Pittack's introduction in cross-examination and re-examination. I directed that the claimant's solicitors should prepare a witness statement addressing this late disclosure, and one was made by Ms Rutnah of Dentons by the end of the trial.

58. Between the times of those two emails Mr Ward had spoken to his colleague Robert Pike, then IG's Head of Premium Client Management, about Mr Tchenguiz. Mr Pike told Mr Ward that he had previously had dealings with Mr Tchenguiz when he (Mr Pike) worked at Spreadex. At 15:59 of 10 December 2019, Mr Pike sent an email to Ellen Rogers, then IG's Head of Compliance Assurance (copying in Mr Ward) saying:

> *"This is a HNW individual that wants to open an Account with us. On discussion with Tom he suggested running some initial background screening since the client has recently been involved in a (now settled) court case. Would you mind getting someone to look into this before we get him to open and probably proceed to ERC for Credit etc. He is a well known property mogul and used to do business with Spreadex years ago, I'd like to make sure we are all happy before beginning the process with him since we will only get one go at onboarding him and getting his business. If possible please can we look into this asap….client has already contacted Pete."*

59. In response, Ms Rogers sent an email at 9:33PM to Amol Thapa of IG based in Bangalore which said:

> *"Hiya,*
>
> *Would you be able to look into the below for us overnight? Finscan (Dow Jones)/ RDC /Google?*
>
> *Thank you!*
>
> *Ellen"*

60. Mr Thapa replied on the 11 December at 06:01 as follows:

> *"Hi Ellen,*
>
> *I have done a bit of background check on the client and here are his details*
> *- Born in 9 September 1960 Tehran, Iran. Currently residing in the UK*
>
> *- Occupation - Property investor*

- Source of wealth – real estate, has stakes in some of Britain's biggest companies, such as Sainsbury's, House of Fraser and pub group Mitchells & Butlers.

- As per RDC/Finscan and web search - "he was arrested in 2011 in a raid conducted by the UK Serious Fraud Office (SFO) in relation to an investigation into the collapse of Kaupthing Bank in 2008, according to public media sources. He was charged with fraud and market manipulation. In 2012, the charges against him were however dropped by the SFO citing lack of evidence against him and he was awarded £1.5 million in 2014 to settle wrongful arrest claims."

The search results are attached to this email. Please do let me know if you need any further details.

Thanks,

Amol".

61. The 'Riskography' section in the attached search results involved Mr Thapa highlighting that the Serious Fraud Office had dropped those charges.

62. Ms Rogers then sent an email at 10:19 on 11 December to Mr Pike, Mr Ward and another colleague (copying Mr Thapa) which said:

"Hi,

Please find attached the background results. As suspected a messy history, but he's since being cleared of charges and resolved the related lawsuits so would not be blocked for an account in principle. Just FYI @Tom Leyhane.

As the checks will still be run again by AO, I'd suggest forwarding this chain when you know the App has come in, so they can mark the client as a confirmed match and record that the risk has been accepted, otherwise there will likely be some back and forth delay. Given what we know about the client, please sense check that any details we store on source of wealth are sensible and representative of the true figures and sources.

Thanks

Ellen"

63. By an email timed at 11:13 on 11 December Mr Ward invited Mr Tchenguiz to complete the online application to open an account. Mr Tchenguiz immediately responded by email to say thank you and that he would do so that day. Within the following few minutes Mr Tchenguiz then sent an email to David Hills, Legal Counsel of R20 Advisory Limited ('**R20 Advisory'**), asking him to open the

account and Mr Hills replied to say "*Will do it now*". R20 Advisory is a company of which Mr Tchenguiz had been a director since its incorporation in 2010.

64. Before the account was opened Mr Ward sent Mr Tchenguiz a further email at 11:18 by way of a follow-up on the one he had sent 5 minutes earlier. He said:

> *"P.s*
>
> *In order to get the account set up in the most margin efficient manner, and to ensure you can earn a volume based rebate each month. It is worth upgrading your account to "Professional" status.*
>
> *In order to do this you need to satisfy 2 out of 3 criteria (ESMA Regulation).*
>
> *1. Have over 500K in liquid funds (We can pass that one already)*
>
> *2. Have traded leverage over the past 12 months, over 40 trades. If you have traded elsewhere over the last year, please send me an annual statement or monthly statements etc.*
>
> *3. Worked in a professional capacity dealing in derivative products for clients.*
>
> *I am hopeful you will pass the above on points 1 and 2. As I say we can forgo point 1, but would it be possible to show past evidence of leveraged trading at all.*
>
> *All the best.*
>
> *Pete"*

65. IG's internal records show that the account opening process (undertaken by Mr Hills on Mr Tchenguiz's behalf) was started at 11:24 and completed at 11:33 on 11 December 2019.

66. The material parts of the application form ('**the Account Opening Application'**) were completed as follows (I have italicised the answers):

> RELEVANT EXPERIENCE
>
> Over the past three years, to what extent have you traded the following products?
>
> Shares and bonds
>
> *< 10 times*
>
> Exchange-traded derivatives
>
> *> 20 times*
>
> OTC Derivatives

< 10 times

How have you mostly traded these products?

ndependently [sic] or with advice

PROFESSIONAL & EDUCATIONAL EXPERIENCE

Do you have any experience or qualifications relevant to the understanding of our products?

Yes, from a relevant role in a financial institution

FINANCIAL DETAILS

Annual Income

£1,000,000 - £4,999,999

Value of Savings and Investments £2,500,000 - £5,000,000

Source of Funds

Employment, Savings and Investment

EMPLOYMENT

Employment Status

Employed

Occupation

Director

Industry

Finance

67. In response to the question on the form "*Which type of account would you like to open?*" the answer was "*Both spread betting and CFD trading*".

68. The material parts of IG's record of the 'MIFID Section' of Mr Tchenguiz's successful application to open his account recorded the following information:

MifidQuestions		MifidTotalPoints 100
MifidRiskUnderstood		MifidTradeSense
Shares and Bonds	*Rarely / Never*	Risk Warning
		Risk Disclosure
		Notice ☑
		Customer Agreement ☑
Exchange Traded		
Derivatives	*Frequently*	
OTC Derivatives	*Rarely / Never*	
Trade Management	*I make my own trading decisions*	
	and/or take advice	
Investment	*Yes, Working in a financial institution*	
Knowledge		

69. The basis of Mr Tchenguiz's MiFID points score of 100 was explained in the evidence of Sarah Gore Langton addressed below.

70. The Risk Disclosure Notice and the Customer Agreement (Mr Tchenguiz's acknowledgement of their terms being confirmed by the ticks on the Account Opening Application) were addressed by a 'declaration' in the following terms:

> "I understand the risks of spread betting and CFD trading and I have read the Risk Disclosure Notice, which I agree is provided to me on the IG website.
>
> 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 can lose more than they deposit.
>
> I have read, understood and agree to be bound by the Spread Betting and CFD Customer Agreements, which I agree is provided to me on the IG website. I confirm that I am a non-professional user for market data purposes or if I am a professional user I confirm that I will immediately contact newaccounts.uk@ig.com. I certify that the information given by me in this form is true and correct."

71. Mr Tchenguiz was informed by email at 11:34 on 11 December 2019 that his account had been opened. As well as referring to other matters (including a 'Risk statement' about the high degree of risk carried by IG's services and his need to understand his exposure) it informed Mr Tchenguiz as follows:

> "**Client classification**
>
> We've classified you as a retail client, giving you the highest level of protection under the regulatory system.
>
> Your account includes negative balance protection, which means we won't allow your balance to remain below zero. Should your account fall into debit, you don't need to do anything – we'll adjust the balance to zero."

72. Mr Tchenguiz made the first payment into his account of £300,000 at about 12:04 that day. He then sent Mr Ward an email asking when he could begin trading.

73. Following his email sent at 11:18, and responding to say "*I will call you when the money lands*", Mr Ward sent Mr Tchenguiz another email at 12:10 on 11 December, saying:

> *"On the "Professional" upgrade element, do you want to explore that? If so, I can help you."*

74. Mr Tchenguiz immediately (within the minute) replied "*Yes please*" and within a further three minutes Mr Ward had sent him the details of how to apply for 'Professional account' status.

75. IG's online application form ('**the EPC Application'**) informed the applicant for a professional account of the benefits, as a professional client, of not being subject to retail margin rates and the availability of a greater range of products. The form referred to the restrictions announced by the European regulators on the sale of certain product to retail clients and to minimum staring margin rates on CFDs and spread bets of between 3.33% and 20% (depending on asset class). It also included the following:

> "**But, you will waive some FCA protections as a professional client such as:**
>
> - Negative balance protection: As a professional client you will have an obligation to make additional payments should your account fall into a negative balance.
>
> - Restrictions on CFD's, spread bets and binaries: The regulator has imposed leverage restrictions and other measures such as standardised risk warnings as a way of protecting retail clients. If you choose to be a professional client we will not be obliged to restrict your account in this way, so these protections would not apply to you.

- Communication: When talking to our retail clients we need to use clear language, and be very balanced when talking about the risks and benefits of leveraged trading. We can use more sophisticated language when talking to our professional clients.

- ……"

76. Mr Tchenguiz (probably through Mr Hills) then completed the EPC Application. The penultimate page of the online form included this wording:

> "**Professional Account**
>
> **First, confirm that you want to be treated as a professional client of IG**.
>
> I wish to be treated as a professional client by IG Markets and IG Index (together "IG") in respect of my existing account(s) (if any) and all future accounts held with IG. It is your responsibility to let us know if anything changes that might affect your eligibility to be classified as a professional client.
>
> By clicking "confirm and continue", I understand that IG will treat this as a written request from me to be treated as an elective professional client."

77. The final page of the form concluded with a section headed: "**Confirm you understand the consequences of the changes to your FCA protection**." The first consequence which the applicant was required to acknowledge, and to confirm his understanding of, was:

> "As a professional client, I will have an obligation to make additional payments should my account fall into negative balance."

78. The final step in the application process was for the applicant to tick the box stating: "*I have read the written warning and would like to proceed*".

79. The loss of NBP in the event of Mr Tchenguiz becoming a professional client was therefore flagged by IG in the application form.

80. I do not here set out the answers given by Tchenguiz in that first application because, save in the one respect noted in paragraph 92 below, they were identical to those given in the application which led successfully (as a matter of form) to him becoming an EPC. The relevant answers in that second application are set out in paragraphs 89 and 90 below.

81. Mr Tchenguiz's (first) EPC Application was completed at 12:48 on 11 December 2019.

82. An automated email response from the IG Client Services Helpdesk immediately acknowledged receipt of the application, said that he would be informed within 24 hours whether or not he was eligible to be classified as a professional client and said *"in some cases you may need to provide additional documentation or supporting evidence, but we will let you known if this is the case.*"

83. In the event, Mr Tchenguiz's application (which was reviewed by Chris Seeney in IG's Credit Team) was rejected within 30 minutes without resort to him. By an email sent at 13:18 he was informed his application had been unsuccessful. The message said:

> *"Based on the information you have provided in your assessment, we have determined that you don't meet the FCA's criteria to be classified as a professional client. This means your application has been unsuccessful on this occasion, and you are still a retail client.*
>
> *If your circumstances change, you're welcome to reapply by logging in and going to 'settings' tab in My IG or on the IG trading app. If you think there's been a mistake and you should be classified as a professional client, please get in touch with us on details below and we will be happy to look into this. ……."*

84. Mr Ward (to whom Mr Tchenguiz had just sent an email saying his funds should be with IG within an hour or so) followed up this message with an email to Mr Tchenguiz at 13:36, which said:

> *"Thanks and thanks for applying for the Pro status online. Frustratingly the chap on Credit rejected it rather than first asking me to collate more information on R20 Advisory.*
>
> *Please re-apply when you get a spare moment. I have asked that they park the application if we need more information as opposed to rejecting it.*
>
> *I have to run to a meeting with a client now, but I have copied in my colleague Az who is aware of your account number and someone will call you once the money has arrived to take a trade."*

85. Mr Ward sent an email to his colleague Mr Seeney, referring to Mr Tchenguiz's recently opened account, asking to be informed when his money had arrived, and saying "*he sent in a Pro app which I hear was rejected straight away. Any chance I can know why we didn't park whilst we asked for more info?*". Mr Seeney replied saying: "*The research I did online indicated that he is in property and the employer listed is a management consultancy firm. Couldn't find him on the FCA register or LinkedIn.*"

86. Mr Tchenguiz (again, he says, through Mr Hills) renewed his application for a professional client account by completing EPC Application for a second time at 13:34 on 11 December 2019.

87. In the electronic trial bundle IG's questions and Mr Tchenguiz's answers on the EPC Application appeared in different places and the two therefore required cross-referencing.

88. However, in their closing submissions Ms Barton KC and Mr Lewis very helpfully compiled the tables below from which the questions (with cross referencing to the relevant page in the trial bundle) and answers can be seen in one place.

89. IG's focus was upon the Quantitative Test in COBS 3.5.3R and, as the applicant for a professional account, Mr Tchenguiz was informed that "[T]o qualify, you need to meet at least two of the three FCA criteria below." He completed the EPC Application as follows:

Questions	**Answers**
"Relevant experience *Over the past three years, to what extent have you traded the following products?"* Shares and bonds Exchange-traded derivatives OTC Derivatives <u>Alternative answers in drop-down menu</u> [C1/94]: - More than 20 times - 10 to 20 times - Less than 10 times	 < 10 times > 20 times < 10 times
"How have you mostly traded these products?" <u>Alternative answers in drop-down menu</u> [C1/94]: - Independently or with advice - Using managed funds - Never traded	Independently or with advice
"Professional & Educational Experience *Do you have any experience or qualifications relevant to the understanding of our products?"* <u>Alternative answers in drop-down menu</u> [C1/94]: - Yes, from a relevant role in a financial institution - Yes, a relevant professional qualification or education - Yes, both of above - No	 Yes, from a relevant role in a financial institution.

90. The next section of the EPC Application was completed as follows.

Questions	**Answers**
"Overview of your financial services experience *We need to know that you have worked for at least one year in the financial sector, in a position that has given you knowledge of the leveraged products that you trade with us.* *What is the name of your most relevant employer?"*	*"R20 Advisory"*
"In this employer regulated by a financial regulatory body?" - Yes - No	*"No"*
"Which of these best describes your role with this employer?" Does not show alternatives in drop-down menu. Ms Rogers evidence on this at 92:16-18, *"I imagine things like "employee", "owner", perhaps"*. *"If other, please specify"*	*"Other-Director"*
"How has this role given you knowledge of CFDs, spread bets or forex?"	*"R20 advises on investments in both public and private companies, i.e. in the venture capital and private equity sector, and across various asset classes including equities, fixed income and other money market instruments including margined products".*

91. It will be noted that no drop-down options appeared under the description of employment roles and that in her evidence Ms Ellen Rogers (IG's Head of Financial Crime Compliance) made some suggestions as to what those options would be. On behalf of Mr Tchenguiz, Ms Barton KC suggested it was more likely to reflect the 'White List' of occupations (such as 'trader' or 'manager' according to the financial sector in question), and possibly also the 'Grey List' and/or 'Black List', set out in IG's process document for online upgrades mentioned below.

92. These answers given by Tchenguiz in this second EPC Application were the same as those given in the previous unsuccessful application, save for those additional, final three words: *"… including margined products*."

93. Mr Tchenguiz also answered a section under the heading '*Declared Investments*' that the current value of his savings and investments was greater than £1m. This meant, as Mr Ward's first email (sent at 11:18) in relation to the upgrade to EPC status recognised ("*We can pass that one already*"), that one of the three criteria under COBS 3.5.3R was met. Although the Amended Defence says IG failed to take all reasonable steps to ensure that COBS 3.5.3(2)(b) was satisfied, it is not in dispute that the criterion was satisfied.

94. So far as the first of those criteria was concerned (see the terms of COBS 3.5.3(2) set out in paragraph 42 above), as with the first application, no answer was given to the question "*How many significantly sized trades have you done on average per quarter in the last year?*". Accordingly, IG did not and do not now rely upon that criterion having been satisfied.

95. This explains how the Re-Categorisation Issue focuses upon IG's alleged failure to comply with the Qualitative Test by reference to the third limb of the Quantitative Test: "*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.*"

96. This EPC Application by Mr Tchenguiz was referred to Ms Kelsey O'Connor (then a Senior Credit Controller within IG's Credit Department).

97. Ms O'Connor dealt with the Qualitative Test element of the EPC Application herself. This she did by taking Mr Tchenguiz's MiFID score of 100, at account opening, and applying what was said in IG's document titled 'Process document for online upgrades to Professional' ('**the EPC Process Document**', as revised in September 2019). The EPC Process Document stated that a MiFID score of 100 satisfied the Qualitative Test.

98. However, Ms O'Connor referred the Quantitative Test element of the application (i.e. the third limb) to Ms Rogers. She sent Ms Rogers an email at 14:10 (copied to Mr Ward and also Azman Hoq) in which she said:

> *"I believe you were involved in the approval for opening an account for the above client.*
>
> *The client is looking to become professional and applied under his experience and investments.*
>
> *This is what was declared on the application. Pete* [Ward] *has stated he used to be a Securities broker, which I'm struggling to find any evidence of online (given the many articles surrounding court cases etc)*
>
> *I have however found the below link regarding the court case which highlights Tchenguiz Discretionary Trust (TDT) trading CFD's.*
>
> *Do you think this would be sufficient to meet the professional experience criteria? Or we would need to gather more information from the client to satisfy."*

99. The email provided a link to the judgment of Sir John Thomas P. in *R. (Tchenguiz and another) v Director of the Serious Fraud Office and others* [2012] EWHC 2254 ('**the SFO Judgment'**). Ms O'Connor had also highlighted and quoted paragraphs 5 and 13 of the SFO Judgment.

100. Ms Rogers responded to Ms O'Connor (copying Mr Ward and Mr Hoq) by an email at 14:54 to say:

> *"I'm* [sic] *be happy to use the experience you highlight in the extract below (para 13). I believe Rob Pike also has some historic context that the client traded CFDs heavily at Spreadex (which we couldn't use on it's own) but it's helpful context to validate the below.*
>
> *When going through the upgrade coms please confirm with the client @Peter Ward (or whoever is owning the coms) that the description used in the Pro upgrade form doesn't sound like it would qualify on its own (given that trading in derivatives is not mentioned), but we understand that he was/is one of the beneficial owners of TDT which traded in derivative products and CFDs as a matter of course and it's this that we have used to assess the account."*

101. Before she sent that email, Mr Hoq had sent one to Mr Ward, at 14:35, saying Mr Tchenguiz had re-applied for a professional account and saying:

> "*Getting final compliance approval to go Pro using a docs we found online.*
>
> *Should be sorted soon.*"

102. Ms O'Connor continued the email chain with Ms Rogers by sending a message at 15:00 saying Mr Tchenguiz's application had been approved.

103. An email from IG Client Services Helpdesk to Mr Tchenguiz timed at 15:01 informed him: "*We're pleased to confirm that following your assessment, your application has been approved and you are now classified as a professional client.*" The message informed him of a number of changes to his account, including his ability to trade with professional margin rates. Under the heading 'Important Information' it also informed him that, as a professional client, he would waive some FCA protections, including:

> "As a professional client, negative balance protections will not apply to you. You will have an obligation to make additional payments should your account fall into a negative balance."

104. The message continued:

> "Remember, it's your responsibility to let us know if anything occurs that might affect your eligibility to be classed as a professional. Should you wish to be recategorised as a retail client, please get in touch using the details below."

105. Therefore, in just under 3½ hours from opening his account with IG, Mr Tchenguiz had acquired EPC status.

106. By an email from Mr Hoq of IG to Mr Tchenguiz, sent at 15:11, he confirmed that change and explained:

> *"Just a note for records, the description used in the Pro upgrade form didn't qualify on its own, however we understand you were one of the beneficial owners of TDT which traded in derivative products and CFD's as a matter of course and it is this we used to assess the application."*

107. He made his first spread bet on the account at 11:45 on 12 December 2019.

108. On 17 December 2019 Mr Tchenguiz applied to change the nature of his account to a Select Account. This was the result of telephone conversations that day between Mr Ward and Mr Tchenguiz about setting the liquidation level on the account at zero and an increase in the margin ceiling from 25% to 35% if his bets with IG in FirstGroup shares increased from 5m to 12m (including the move to IG of existing trades with RJ O'Brien). Mr Ward had already raised this possibility with IG's Credit Risk team, saying in an email dated 12 December (08:05): "*My chap opened up yesterday and funded 300K, he is now also Pro. Please can you move to select margin rates, he is worth over £1bn and will be taking some decent sizes on equities*". In a later call on 17 December, Mr Ward said he had discussed matters with that team and "[*T]hey came back to me and said we could do the 12 million at 30% but we can't go any lower though but we will review the concession every now and then ….*".

109. Mr Ward and Mr Tchenguiz also discussed a 'waived deposit limit' of £250,000. In an email to him of 16 December 2019 (16:50) Mr Ward had said:

> "The additional setting we can add is a Waived Margin, this is money put on your account by IG to help cover a portion of your margin.
>
> I suggest we start with a margin cover of £250K. This money would offset your first 250K in margin requirement **but does not cover any p/l**.
>
> We can then utilise the spare funds on the account to cover your running p/l, rather than take up a large portion in margin requirement."

110. Before upgrading to the Select Account (with the liquidation level set at zero), at 11:52 on 17 December, Mr Tchenguiz had received a margin call as a consequence of the trades made by him that day.

111. The terms attaching to this type of account were set out in Mr Ward's email to Mr Tchenguiz of 17 December (at 14.29) headed 'Select Account Offer'. The terms were as follows:

> We are writing to you regarding your request to upgrade your account ending **Y38 to a Select Account with credit facilities. Please confirm by reply to this email that you agree to the terms mentioned below and we will proceed upgrading your account. We will confirm by email once the changes have been made.
>
> If your account becomes marginable you will have until 3pm the next business day to supply sufficient cleared funds into your account. We may

contact you in this event, but we are under no obligation to do so. Please be aware that if we do not hear from you or receive payment your positions will be at risk of being cut back or closed out to cover the margin call, and therefore you may suffer losses greater than the funds on your account.

If you are in any doubt as to the action required to keep your positions open, we urge you to contact us. Where we believe it reasonably necessary, for example where your position gets significantly worse, we reserve the right to request immediate payment or close you out immediately (that is, before 3pm on the following business day). We also reserve the right to extend your payment terms.

Please note that it is your responsibility to monitor your account and ensure that your balance, considering all realised and unrealised profits and losses, is equal to at least the total initial and variation margin that we require you to have paid to us.

Credit facilities requested:

We will apply a Waived Deposit Limit (WDL) of £250,000. This allows you to open trades to this value without the need to deposit funds. Any additional margin incurred above this figure will need to be covered by depositing cash into your account. Please be aware that if you have a negative cash balance on your account you may be restricted from opening new positions until the balance has been cleared.

We will a set a Liquidation Level on your account of £0. This means that if your net equity (cash balance +/- unrealised profits/losses) falls to this level (equity of £0), we reserve the right to immediately liquidate all of your positions, irrespective of any margin deadlines you were previously given. We are under no obligation to contact you if this Liquidation Level is breached. Please note that this liquidation level is the point at which we will start closing positions and is the not maximum amount that you could lose. Losses may exceed this amount.

Essentially, you should monitor your account to cover potential adverse market moves. This can be managed by adding extra funds to your balance or by using Stop Orders to help limit any potential losses on your trading positions.

……..

The Liquidation Level has been set based on various factors, including, but not limited to, evidence you may have provided of your financial circumstances. Please note that IG reserves the right to revoke or amend the characteristics and features of your account at its discretion without prior notice (for example your Liquidation Level, different margining procedures, margin rates, trading and deposit limits and risk protection features). Upon request, you may be required to provide additional evidence of funds to maintain your account type and credit facilities.

> Interest may be charged on any debit balance incurred on this account that is not cleared within 30 days of the last trade date. This is solely at IG's discretion and will be communicated to you in writing before any action is taken. Any interest charged in this way will be done in accordance with Terms 16(4) and 22 of your customer agreement with us.
>
> IG also reserves the right to downgrade this account with due notice if we deem that the account is no longer appropriate.
>
> These terms are in addition, and supplemental, to your customer agreement with us. These terms shall be governed, construed and interpreted in accordance with English law and the courts of England and Wales will have non-exclusive jurisdiction to settle any legal action or proceedings arising out of or in connection with these terms, including any non-contractual disputes and claims.
>
> ……..".

112. The footer to the message containing those terms began with a warning that all trading involves risks and also stated "*Professional clients can lose more than they deposit*".

113. Mr Tchenguiz responded by an email at 14:53 saying: "*Thank you, I am ok with this.*"

114. By an email sent at 14:54, Mr Ward forwarded to Mr Tchenguiz IG's agreement on the margin rate:

> "Dear Mr Tchenguiz,
>
> Following a review of your IG account ("TXY38"), this is to confirm that you have been approved a **maximum equity *margin rate* of 30% on your Account**.
>
> **The maximum equity margin rate controls the margin for your equity positions at a maximum of 30%.**
>
> The margin concession is at IG's discretion and is subject to regular reviews. A review considers a wide variety of factors, which includes but is not limited to, liquidity, volatility, concentration and notional value. You will however be notified of any changes. We endeavour to give 2 weeks' notice but the notification period may be less if the risk profile of the account significantly changes.
>
> Please contact us if you have any questions regarding the margin concession."

115. The Select Account was only available to Mr Tchenguiz as an EPC. It is clear from the terms quoted in Section C above (both generally and in relation to contractual interest) that the terms formed part of the Customer Agreement. Accordingly, the

Select Account terms fed into the operation of clauses 8, 15 and 17 of the Customer Agreement as set out in paragraph 35 above. The setting of the liquidation level at zero (by reference to the 'net equity' explained in the Select Account terms) meant that Mr Tchenguiz was given greater leeway before his bets were automatically closed out. Without that, even as a professional client, he would have become exposed to being closed out when his funds fell below 50% of the margin (as provided for by clause 15 of the Customer Agreement and subject to any waived margin) needed to maintain open positions.

The Witnesses

116. IG called four witnesses at the trial. Mr Tchenguiz did not give evidence and did not call any witnesses.

Peter Ward

117. Mr Ward is Head of Premium Clients at IG. He was in 2019 head of the Premium Client Sales Division and was Mr Tchenguiz's point of contact within IG.

118. Mr Ward gave straightforward and credible evidence. His account of how Mr Tchenguiz's account was opened, upgraded to EPC status, and then to a Select Account, and how his positions in First Group were closed out was not challenged on behalf of Mr Tchenguiz. Mr Ward confirmed that he did not see a copy of either of Mr Tchenguiz's EPC Applications.

119. He explained that the upgrading of Mr Tchenguiz to the status of an EPC and then as a Select Account client was "*all part of the same process*" in circumstances where he knew the client would want to trade on preferential terms. In my judgment, that observation was justified given that EPC status was secured in about 3½ hours. He said that Mr Pittack, who had introduced him, said Mr Tchenguiz would wish to be set up as a professional as he himself was. Mr Ward said: "*I was just hoping to be helpful and efficient, and effectively have him set up as he was with other providers*". He went on to say:

> *"It's a part and parcel of setting up the account in a way that I deemed that he would want it to be from the introduction that I had, and also on the basis of what I knew about the client and trading elsewhere and such. So I was being -- yes, I was basically saying what I knew from him was once the money was in, he would want to trade, but he would want to be on preferential terms."*

120. Because of his impression that "*things were wanting to move at a certain speed or efficiency*" Mr Ward confirmed that he had told Mr Tchenguiz that the Credit Team might wish to ask for evidence of trades done elsewhere and, if so, they would

request a statement. In fact, the first EPC Application had been rejected without any such request.

121. Mr Ward did accept in response to questions from Ms Barton KC that his email of 11 December 2019 at 11.18) recommending an upgrade to professional status had not included warnings of the corresponding risks (specifically the loss of NBP). He said: "*I didn't in this email, no. I was reliant on the documentation that you then do when you self – you now, you apply*" and *"… all of that's in the documentation …*".

122. Mr Ward confirmed that the Select Account upgrade was only available to professional clients. The advantages of Mr Tchenguiz becoming an EPC were addressed by him in cross-examination as follows:

> "*Q. And the benefits that you specifically mention are that you say it's the most margin efficient manner; do you see that?*
>
> *A. Yes. With professional you get the lower margin rate.*
>
> *Q. And that he can earn a volume-based rebate each month as well?*
>
> *A. Yes, that's correct.*
>
> *Q. In your paragraph 12, you also say that: "... certain advantages for Mr Tchenguiz would follow." Do you see the end of that first sentence? And that's the advantages that you were referring to, is it, different margin rates?*
>
> *A. That's correct, yes. Better margin rates and different cost structures. Which only a professional client would be able to access."*

Kelsey O'Connor

123. Ms O'Connor is IG's Senior Payments Excellence SME ('SME' denoting "subject matter expertise") and in December 2019 was employed as a Senior Credit Controller. As appears above, she reviewed and (having referred one aspect of it to Ellen Rogers, IG's Head of Compliance Assurance) finally approved the second EPC Application.

124. Ms O'Connor explained that she was responsible for applying the Qualitative Test to the second EPC Application and also considering whether Mr Tchenguiz satisfied the financial resources limb (COBS 3.5.3(2)(b)) of the Quantitative Test.

125. Ms O'Connor was asked about the EPC Process Document and confirmed this was used by her team in determining applications for EPC status. She said that at the time IG determined the Qualitative Test solely by reference to its MiFID scoring system. An applicant for EPC status needed to have a MiFID score of at least 100 and Mr Tchenguiz had scored 100 when he had opened his account earlier that day. IG's 'Retail to Professional Procedure' ('**the Online Procedure**', v. 1.1, revised in March 2018) which was contained within the firm's 'COM Guide' said the same about the 100 points required. "COM" stands for Close Out Monitor (part of the

firm's Internet Monitor that allows it to manually close positions that the automatic system was unable to close) and the Online Procedure was to be used by employees dealing with the categorisation of clients from retail to professional status. Ms O'Connor said she could see that Mr Tchenguiz's MiFID score appeared on the details of his account and she saw he had the 100 points which the Online Procedure said was required to meet the Qualitative Test.

126. In cross-examination, Ms O'Connor was asked about this as follows:

> *"Q. So in respect of your assessment of qualitative test for Mr Tchenguiz, the process was, without wishing to denigrate it, it was as simple as saying: I can see a MiFID score of 100, I know 100 passes for present purposes --*
>
> *A. Yes, that would be correct."*

127. In relation to Mr Tchenguiz's financial resources, she said she did an internet search to check the accuracy of what Mr Tchenguiz had said about his wealth. She had recorded "*Declared savings fine and plenty or articles regarding client's wealth on line*."

128. Ms O'Connor explained that she had referred the third limb of the Quantitative Test (the professional experience relied upon by Mr Tchenguiz) to Ms Rogers because she had dealt with the opening of the account and his position was not as straightforward as for other job roles, so she wanted a second opinion. Referring to what Mr Tchenguiz had said about his directorship of R20 Advisory, she said that in her own initial searches she " *.... had tried to search for the history of the client, but given there was numerous articles about different trials it was hard to pinpoint anything that would support what had been written*."

129. She then exchanged the emails with Ms Rogers on 11 December 2019 including the email sent at 14:10, quoted in paragraph 98 above, in which she had cut and pasted Mr Tchenguiz's declaration of his professional experience in the First EPC Application, the two extracts from the SFO Judgment and a hyperlink to the entire judgment. The terms of Ms Rogers' reply (at 14:54) are set out in paragraph 100 above. Ms O'Connor relied upon what Ms Rogers said in that email when completing her approval of Mr Tchenguiz as an EPC.

130. Ms O'Connor made the note on IG's system that the second EPC Application had been approved and the basis for approval.

131. In relation to the third limb of the Quantitative Test, she stated her own understanding that COBS did not impose any 'cut-off' for considering a client's investment expertise, in terms of the staleness of any past professional involvement in the relevant financial sector. She considered that a year's experience 20 years ago might be sufficient to establish it. That answer must be considered alongside the provisions of COBS 10A.2.6 (see paragraph 46 above) which says a firm should not rely upon information which the firm is aware or ought to be aware is manifestly out of date. However, whether or not that could be said of the

information provided by Mr Tchenguiz, Ms O'Connor was not responsible for the decision as to whether Mr Tchenguiz passed that limb of the Quantitative Test.

132. I accept the evidence of Ms O'Connor which was not the subject of serious challenge. It demonstrates that, in assessing Mr Tchenguiz against the Qualitative Test, she applied IG's policy under the EPC Process Document.

Sarah Gore Langton

133. Ms Gore Langton is IG's Chief Risks Officer, having previously been the firm's Chief Compliance Officer at the time Mr Tchenguiz became a client of IG. She was not involved in Mr Tchenguiz's application to become a client and then to upgrade to EPC status but she spoke to IG's policies and procedures in relation to that process. She explained that she holds the firm's FCA-designated senior management functions of SMF 16 (the compliance oversight function) and SMF 17 (the money laundering reporting function). What Ms Gore Langton said was not challenged on behalf of Mr Tchenguiz who instead argued that her evidence revealed IG's procedure under COBS 3.5.3R to be inadequate.

134. Ms Gore Langton was asked about the MiFID scoring system, initially applied at the account opening stage, for determining whether an applicant passed the Qualitative Test by reference to IG's policy at the time (as applied by Ms O'Connor) for upgrading to a professional account.

135. Ms Gore-Langton explained that the primary purpose of IG's MiFID scoring system was to assess whether the products and services available in the retail CFD or spread betting account are appropriate for the client in accordance with COBS 10A. It was to establish whether the retail client had the necessary knowledge or experience to understand the risks involved in relation to the product or service offered. She explained that, for the purposes of this appropriateness test at account opening, applicants were asked about their trading over the last 3 years because "*at the time we believed that the three year point was industry practice for an appropriateness assessment*."

136. She confirmed that the scoring system was internally designed and went on to say:

> *"In terms of the design of this scoring, I would have had heavy -- I did have heavy involvement in reviewing that scoring based on FCA guidance particularly related to the appropriateness assessments in the CFD sector for example and in considering whether or not there was an appropriate application of the MiFID score to this procedure."*

137. She also explained, by reference to IG's policy, that whereas the retail client account of the kind Mr Tchenguiz initially opened required a MiFID score of at least 40 (and a wealth score of 2), the EPC account opened by him required a MiFID score of at least 100 (and a wealth score of 3). This score was determined

in accordance with an assessment of the relevant experience over the past 3 years. Ms Gore Langton said:

> *"In the way that IG has undertaken its adequate assessment, we believe that more recent trading experience is typically more relevant to the qualitative test."*

138. Although she was not involved in Mr Tchenguiz's applications in December 2019, Ms Gore Langton explained by reference to the scoring system how he had obtained a MiFID score of 100 when he opened his account. He obtained 40 points for his stated trading experience in derivatives which was doubled to 80 points for trading independently or with advice (because this indicated he was the decision-maker on the trades whether or not he had received advice beforehand) and 20 points for his professional experience through being a director in the finance industry. She explained that 20 points for such broader experience (based not upon past trading but having a role in a financial institution or a professional qualification, or possibly both) was a cap which reflected IG's policy intention that a client seeking EPC status should not get to the required 100 points without experience of trading in derivatives.

139. The 40 points (before doubling) for trading experience reflected the fact that Mr Tchenguiz had said he had traded frequently (more than 20 times) in exchange traded derivatives. Ms Gore Langton said such products have a level of complexity compared to, say, a "*vanilla share dealing account*". She said (of the client applicant):

> *"I think you will have an understanding that they traded derivative products which contained significant complexity. That could be leverage, it could be transparency, it could be counterparty risk, it could be complexity of pricing."*

140. Mr Gore Langton explained how the same standardised table used by IG for scoring on the appropriateness test (COBS 10A) was used in testing eligibility for an upgrade to a professional account. She said that an understanding of the client's trading experience was a key element in the qualitative assessment undertaken by IG, whether the information was gathered at account opening or through the client's subsequent trading with IG. One relevant passage in her cross-examination was as follows:

> *"Q. Okay. You can see there there's another table called "Relevant Experience". And the first point, question 1: "Over the last three years, how many times have you traded the following products?" And, as you say, that's because you consider that more recent experience tends to be more relevant experience in general terms?*

A. For the appropriateness assessment, that's certainly true. As when we look at whether this information is relevant to the professional case, we're using the same table, we're using the same standardised table, yes.

Q. I see. And we can see that the way that this table works, in broad terms, is that points are attributed for particular frequencies of dealing with particular different categories of product; is that correct?

A. Yes.

Q. So if you have traded OTC derivatives -- which includes spread bets, effectively, doesn't it? -- more than 20 times in the last three years, you'll get the magic number of 100, and be instantly entitled to open an account as a professional; is that correct?

A. I wouldn't say you would be "instantly entitled".

Q. Okay, sorry. For MiFID score purposes. I'm not trying to trick you into something --

A. The application of the standardised test, I agree with, that if you have traded -- if in June 2018 you had traded OTC derivatives more than 20 times in the last three years, that would be enough to get a MiFID score of 100.

Q. Okay. And the three-year cut-off point, is that because -- you say that's an internal view that's been taken by IG. Is that because, with the passage of time, you think the familiarity with products fades?

A. Not necessarily. I believe the three-year point is -- I believe that at the time we believed that the three-year point was industry practice for an appropriateness assessment. There had been various guidance issued on appropriateness assessments by the FCA.

Q. Okay. Well, there's an obligation in 10A, isn't there, to use information that's not manifestly out of date, inaccurate, or incomplete, isn't there?

A. Yes.

Q. So do you think it might be based on that?

A. I imagine so, yes."

141. Ms Barton KC suggested to Ms Gore Langton that the appropriateness test under COBS 10A was less exacting than the test for re-categorisation as an EPC under COBS 3.5.3R. She responded:

"*I don't know that I agree that it's less exacting. I think the language in COBS 10A, particularly lower down, is very prescriptive about the type of information which a firm is required to gather to assess knowledge and experience for appropriateness. Whereas in the professional rules in 3.5.3,*

> *there is more subjectivity given to a firm as to what they may consider is the relevant knowledge, experience and expertise.*
>
> *What I do think is that, given the different nature of the products, you would assume a higher bar is required to understand increased risks, because the two accounts have different risks."*

142. Ms Gore Langton then clarified that by "*exacting*" she meant what was covered in IG's table (covering the nature, duration and frequency of trading) from the perspective of what the FCA prescribed. She accepted that IG's assessment under COBS 3.5.3R was a further process which required IG to "*ensure that our assessment is adequate to get reasonable assurance compared to the way that we could standardise the appropriateness assessment.*" She said:

> *"IG makes use of the information that it has gathered through the appropriateness assessment in its adequate assessment as required in COBS 3.5, that's true."*

143. So far as the latter assessment is concerned, she said:

> *"…. the policy intention, which remains true, and was true at the time, was that when we considered the language in COBS 3.5.3 that you should make an assessment of expertise, knowledge and experience, there are various ways you could do that. That could include simply asking a client "Do you understand?""*
>
> *"IG's position was, and still is, that you should apply more weight to experience, because that is a more helpful measure, typically, of whether a client really understands those risks because they may have experienced it."*
>
> *"So levels of practical experience we believe were more important than self-certification that you had knowledge."*
>
> and
>
> *"Our view was that -- our view was that, and remains, experience is more relevant than someone being able to simply confirm they understand the risks. Obviously a client is saying they understand the risks is still something the firm can take into account."*

Ellen Rogers

144. Ms Rogers is IG's Head of Financial Crime Compliance. In December 2019 she was Head of Compliance Assurance. As appears above, she had been involved in the opening of Mr Tchenguiz's account with IG. Ms O'Connor referred to her Mr Tchenguiz's second EPC Application in relation to the third limb of the

Quantitative Test: his professional experience requiring knowledge of the transactions envisaged.

145. As that third limb of the Quantitative Test is central to the dispute between the parties on the Re-Categorisation Issue (including the Qualitative Test which rests upon at least two of the three limbs being satisfied) and Ms O'Connor relied upon what Ms Rogers had said about that in her email of 11 December 2019 (14:54), Ms Rogers' testimony was the most significant of all.

146. In cross-examination, Ms Rogers said she had picked up Ms O'Connor's email quite quickly as her colleague Mr Pike had alerted her to the need to prioritise it.

147. She said her approach to such applications is quite conservative and risk averse.

148. Although she had no express recollection of doing so, she was confident that, when considering the application for a professional account, she would have looked at the information provided by Mr Tchenguiz in the Account Opening Application, including his statement "*I make my own trading decisions and/or take advice*." She said this would have reflected her general practice.

149. When the EPC Application was referred to her she says she noticed that the extracts of the SFO Judgment produced by Ms O'Connor referred specifically to CFDs and other forms of derivative contract.

150. Ms Rogers said that those extracts, in isolation, did not contain sufficient evidence of Mr Tchenguiz's professional experience. In her witness statement (referring to one of two earlier statements she had made in another set of proceedings connected with the present dispute and arising out of IG's service of a statutory demand upon Mr Tchenguiz), she said this:

> *"In my previous witness statement of 14 April 2021 I stated that I opened the judgment itself and considered it in some detail in addition to the extracts. I do not now expressly recall doing this but it is highly likely that I would have done so because: (a) as a matter of general practice, and in line with my general approach outlined above, I always check the primary source of any information provided to me; and (b) my recollection as at the time of preparing my statement of 14 April 2021 was that I did do this and I specifically recall the paragraphs explaining Mr Tchenguiz's dealing on behalf of his family through R20 Limited and references to contracts for differences."*

151. She went on to say that, given the 44 minutes which elapsed between Ms O'Connor's email of 14:10 and her response at 14:54, it is unlikely that she read the entire SFO Judgment. However, Ms Rogers said, from her initial involvement in the opening of the account, she was aware of Mr Tchenguiz's dealing with the SFO and that the first few pages of the judgment "*provide a very detailed account of Mr Tchenguiz's background and experience which I would certainly have considered well within the 44 minutes. I may have skim read other parts of the judgment, but I cannot now say for certain*."

152. In cross-examination (including upon her earlier witness statements made in the statutory demand proceedings) Ms Rogers said she would have been looking at the SFO Judgment "*for key information that connected Mr Tchenguiz to a role in a professional context that gave him knowledge*." She specifically recalled the paragraphs explaining Mr Tchenguiz's dealings on behalf of his family trust through R20 Limited ('**R20**', which is not the same company as R20 Advisory) and the references to CFDs. Noting the reference to CFDs in paragraph 13 of the SFO Judgment (which Ms O'Connor had quoted, alongside paragraph 5), she said: "*It is. I believe it's also mentioned throughout the document as well. And within the intervening paragraphs between those two paragraphs.*" In re-examination, Ms Rogers identified paragraph 7 of the judgment as describing the role of R20 and Mr Tchenguiz.

153. Ms Rogers confirmed that she was not under any time pressure to consider the application and, but for the fact that the Defence had raised a point about it, would not have had a concern that her approval of the third limb of the Quantitative Test took 44 minutes.

154. Explaining her approach to the application and the language of her email in response to Ms O'Connor, at 14:54, Ms Rogers gave the following answers:

> "Yes. I think again, thinking of the way that I approach things, the email from Kelsey with the extracts at the end don't necessarily make a lot of sense in isolation -- I used that word again -- so you would have needed to refer to the whole document to actually understand what it is you were looking at. Possibly not the whole document, but at least to get a flavour of what it was trying -- what it said."
>
> "So I think if you ... sorry, if you look at the two extracts, I think it's sort of piecing the pieces of the puzzle together, making sure that the whole story is consistent. So you have the fact that, in paragraph 5, RT operated the businesses. That doesn't actually tell you what he did exactly, but on his application form he is telling us that he was a director of certain entities, including R20 entities."
>
> And:
>
> "So I'm sorry, I'm quite confused. I'm not sure I'm saying that it wasn't sufficient. I'm saying that it was part of the rationale to conclude that, alongside 6 his attestation he had professional experience, including the fact that he was an employee of R20, alongside this judgment which specifically said he operated businesses -- and I'm paraphrasing – he operated businesses that had exposure to products including CFDs. And I think, for me, the context of the SFO judgment, being that it was such a pivotal moment in his life, let's say, that would have been enough for him to really understand the effect of a CFD contract."

155. Ms Rogers accepted that the SFO Judgment concerned R20 and not R20 Advisory (the company identified by Mr Tchenguiz in his application). The relevant passage in her cross-examination is as follows:

> "A. It's what he believes, filling in that application form, is the most relevant to him.
>
> Q. Most relevant employer.
>
> A. Yes, indeed.
>
> Q. And when it comes to the actual trading of the CFDs, although you make reference to Mr Tchenguiz having operated the businesses, which at its centre have the Tchenguiz Discretionary Trust, which is my paraphrasing of paragraph 5, but I hope you find it fair, a good summary of what that's telling you as a reader is the summary that Ms O'Connor gives at the bottom of page 590, which is it's a court case which highlights Tchenguiz Discretionary Trust trading CFDs, isn't it?
>
> A. Yes.
>
> Q. So you're going an extra stage and saying that because he had a position as a director of R20, that that's sufficient experience in the context of the rest of that judgment for you to understand that the trading by the trust is attributable professional experience to Mr Tchenguiz; is that correct?
>
> A. So it's not necessarily relevant to me who placed the trades, which I think is part of your question. The only thing that matters to me is whatever happened within this very complex structure. Was it enough to give our client knowledge of CFDs and the risks of trading CFDs? And that's how I formed my judgement."

156. In a later answer, which recognised that the SFO Judgment showed Investec was a professional trustee of the Tchenguiz Discretionary Trust, Ms Rogers said:

> *"According to the judgment I believe that's the case. But I think the key thing here is that Mr Tchenguiz had involvement in companies that gave him interests within CFDs. I think it's quite reasonable to assume that would have given him sufficient knowledge."*

157. In cross-examination, Ms Rogers also said it was "*possible*" and, by a later answer, "*likely*" that she had read the SFO Judgment (by which, I think it is fair to infer, she meant she had considered it generally given its subject matter and length) before Ms O'Connor referred her to it. She had not mentioned this in her witness statement (or either of the earlier statements made by her). Ms Rogers accepted that she had no recollection of doing so but gave those answers because of her email exchanges with Mr Thapa (see paragraphs 59 and 60 above) before Mr Tchenguiz was accepted as a client: "*It is likely, given the context of my initial reason for being involved*."

158. Ms Rogers was asked questions about the EPC Process Document to which Ms O'Connor had referred. She said that Mr Tchenguiz would have fallen within the 'white list' (as opposed to the grey list and black list) of roles which provide in depth knowledge of the intended products. Although that list referred to "or directors/managers of those teams" - (i.e the previously listed roles of portfolio management, trader and derivative analysis) - she said she would have "*taken 'or directors' to have meant directors in the sense of Mr Tchenguiz's employment*."

159. Ms Rogers also said in her witness statement that, if the information provided to her on 11 December 2019 had not been sufficient to satisfy the third limb of the Quantitative Test, then she considered it "*highly likely*" that IG would have unearthed additional information relating to Mr Tchenguiz which would have satisfied the first limb of that test: the carrying out of transactions, on significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters. The relevant market was leveraged over-the-counter derivatives (such as CFDs or spread bets) and to be of a 'significant' size the trade had to have a notional value of at least £10,000 by reference to the underlying equity product. She referred to Mr Tchenguiz's Stock Exchange 'Notification of Major Holdings' on 28 November 2019. As appeared from disclosure in these proceedings (and the discussion of him moving RJ O'Brien business to IG upon the agreement of Select Account terms) his 2019 trading activity with InterTrader and RJ O'Brien was significant.

160. However, those were not matters taken into account in the course of IG's assessment of the EPC application and IG's Re-Amended Reply made it clear that IG does not rely upon COBS 3.5.3(2)(a) being satisfied (even though IG denies any suggestion it would not have been).

161. Ms Barton KC and Mr Lewis urged me treat Ms Rogers' evidence with some caution. In their closing submissions they highlighted the point that, until she gave evidence, she had not suggested she may already have considered the SFO Judgment before Ms O'Connor provided the link to it. They also referred to her recognising that IG's lawyers may have been responsible for the language of one particular paragraph in her witness statement which rolled up, in the style of a pleading, a number of references to earlier paragraphs in support of her conclusion that Mr Tchenguiz satisfied the third limb of the Quantitative Test. Mr Tchenguiz's counsel said her answers in relation to the suggested significance of the matters in some of those paragraphs were evasive. They also referred Ms Rogers' acceptance that she had received some witness preparation training, though she said this was "*only to the sort of very high level*", such as how to address the court and to stick to the facts rather than (as I understood the thrust of her answers) anything approaching a dress rehearsal.

162. On my assessment of her evidence, Ms Rogers did provide a reliable account of how she acted upon Ms O'Connor's email of 14:10 on 11 December 2019. However, I find that email was the first prompt for her to consider the SFO Judgment despite the suggestion she may have done so in response to Mr Thapa's mention of it. That was a suggestion made rather tentatively for the first time in the witness box. She had no clear recollection of having done so and, given that the inquiry at that stage was into the proposed client's reputation rather than his trading experience, there is no reason why she would have needed to look beyond

Mr Thapa's summary of the outcome of the SFO Judgment. Given the time at which he sent his email from India, there would have been little opportunity for Ms Rogers to have considered the judgment before she forwarded on Mr Thapa's findings and no incentive to do so before Ms O'Connor's email of 14:10.

163. Nevertheless, I accept Ms Rogers' evidence that, before reverting to Ms O'Connor, she considered the first few pages of the SFO Judgment to put paragraphs 5 and 13 (screenshotted by Ms O'Connor) in context. I therefore accept her further reading included paragraph 7 and other intervening paragraphs of the judgment. The statements in her email at 14:54 that she was "*happy to use the experience*" Ms O'Connor had highlighted in paragraph 13 and "*we understand that he was/is one of the beneficial owners of TDT which traded in derivative products and CFDs as a matter of course and it's this that we have used to assess the account*" are consistent with her having done so.

164. However, my assessment of her evidence does not support the conclusion that she read beyond the first few pages before she reverted to Ms O'Connor by her email of 14:54. In his closing submissions Mr Mayall accepted that Ms Rogers could not recall reading the further paragraphs of the SFO Judgment (identified in paragraph 171 below) about Mr Tchenguiz's trading activity.

The Re-categorisation Issue: the Rival Arguments

The Significance of the SFO Judgment

165. The SFO Judgment is an important document for the purposes of the parties' rival arguments as to whether IG complied with its duty under COBS 3.5.6R so far as the third limb of the Quantitative Test is concerned. As appears from Ms Rogers' evidence, and the terms of her email to Ms O'Connor of 11 December (14:54), she relied upon it in concluding that limb of the test was met. Her email identified paragraph 13 of the judgment (which Ms O'Connor had quoted) and the trading by the Tchenguiz Discretionary Trust and her evidence referred to its first few pages.

166. It is therefore appropriate to set out first the extracts of the SFO Judgment which Ms O'Connor forwarded to Ms Rogers before summarising what the parties say about them.

167. Under the link to the judgment, Ms O'Connor quoted paragraphs 5 and 13 (with her yellow highlighting in the latter) as follows:

> "5. Like many very wealthy businessmen, RT operated the businesses in which he had an interest through a complex structure based in an offshore location for fiscal reasons. At its centre from 26 M arch 2007 was the Tchenguiz Discretionary Trust (TDT) of which RT and his family were the principal beneficiaries."
>
> "13. By the late autumn of 2007, the interests of RT through the TDT, with the substantial financial support of Kaupthing, had built up a significant share and property portfolio. It is apparent from contemporaneous documents that

> by that stage TDT held significant positions in Sainsbury plc and in Mitchells & Butlers. A significant part of the interests in Sainsbury plc and Mitchells & Butlers plc was held under CFDs (contracts for difference) and other forms of derivative contract; Kaupthing had from at least February 2007 provided some finance for these CFDs. At some stage its subsidiaries became counterparties to the CFDs and other derivatives. We set these matters out in more detail at paragraphs 121 and following."

168. The intervening paragraphs (concerning Mr Tchenguiz and his interests as opposed to his brother's), including paragraph 7 identified by Ms Rogers in her evidence, read:

> "6. As is not uncommon, a professional trustee company was chosen to act as the trustees of the TDT. The company chosen was Investec Trust (Guernsey) Ltd and its associated company Bayeux Trustees Ltd (to whom we will jointly refer as Investec), part of the large and well- known Investec group of companies, listed on the London and Johannesburg Stock Exchanges. Investec remained the trustees until the summer of 2010 when the role of the trustees was transferred to Rawlinson & Hunter SA (Rawlinson & Hunter), another international company specialising in the provision of private client services to the very wealthy. Rawlinson & Hunter are the claimants in the first of these judicial review proceedings. We return to the role of Investec at paragraph 107 below.
>
> 7. Again, as is common in this sort of arrangement, although the lawyers and other advisors in relation to complex transactions would be retained by the trustees, the trustees would need to know how the investments and transactions by the TDT were to be made in the interests of RT and his family. R20 Limited (R20), the second claimant in the second judicial review proceedings is a UK company owned by the TDT and based in London of which RT was a Director. R20 was the entity through which the trustees were instructed as to how RT and the beneficiaries wanted the investments made and which transactions should be effected. It is important to point out that although the trustees were not bound to do what they were told to do by R20, they would almost always do so. For fiscal and other reasons, such structures are premised on the understanding that trustees make the ultimate decision, that they are not bound to do what they are told to do by the beneficiaries and, of paramount importance for these proceedings, the trustees are responsible for satisfying themselves as to the lawfulness of all transactions they enter into.
>
> 8. Thus instructions by the beneficiaries to the trustees are for these reasons usually termed "advice" even though the instructions are almost invariably acted upon. Trustees of independent stature are normally scrupulous to ensure that the lawyers retained on complex transactions formally advise them. A consultancy agreement was made between Investec and R20 in October 2007 which formally set out these arrangements for such "advice".

> 9. Again, as is common, the TDT used offshore companies, including companies or other entities known as Special Purpose Vehicles (SPV), for individual transactions. Principal amongst the companies from December 2007 onwards was a group of companies controlled by Oscatello Investments Ltd (Oscatello), a British Virgin Islands (BVI) company, owned by the trustees of the TDT."
>
> …….
>
> "(iii) Kaupthing Bank and its relations with RT
>
> 11. Kaupthing, at the time the largest bank in Iceland, was one of the Icelandic banks that made significant loans for the purposes of the acquisition of assets outside Iceland to companies and individuals who had little connection with Iceland. It had subsidiaries in Luxembourg and London, including Kaupthing Singer and Friedlander.
>
> 12. It appears that the first business transacted between Kaupthing Bank and the interests of RT was in 2004 when RT's interests purchased, with the financial support of Kaupthing, the Odeon Cinema chain in the UK. There then followed a number of other transactions, including the purchase with Barclay s Capital Ltd and a private equity group, of Somerfield plc, a supermarket chain in the UK and the purchase of other strategic holdings including holdings in J Sainsbury plc, in Mitchells & Butlers plc, in Kaupthing and a 5% stake in Exista Hf (Kaupthing's largest shareholder with 25% of its equity)."

169. It is therefore paragraph 7 of the SFO Judgment which stated that, as one would expect, the CFD transactions were entered into by the legal owner of the assets of the TDT (the professional trustee) but allowing for the trustee's fiduciary obligations to the trust and any relevant contractual rights under the consultancy agreement mentioned in its paragraph 8, the investment decisions were taken by R20. Mr Tchenguiz was a director of that company (and the only director identified in those paragraphs).

170. Ms Barton KC said in her closing submissions that paragraph 7 of the SFO Judgment is the sort of paragraph that "*makes trusts lawyers feel slightly unwell*", in that it appears to contemplate an unlawful delegation of the trustee's investment powers. I am not sure I read it that way (and Ms Barton acknowledged that the passage recognised that the ultimate decision-making lay with the trustees) but, in any event, and in a situation which I believe most trust lawyers would recognise as quite common for offshore trusts, it does record the investment activity of R20 acting by Mr Tchenguiz as a director. Whatever the possible implications might be as a matter of trusts law, the potential significance of this on the application of COBS 3.5.3(2)(c) is obvious.

171. It is clear from paragraph 6 of the SFO Judgment (referring to paragraph 107) that there were other passages in the judgment which touched upon the role of Mr

Tchenguiz and R20. In paragraph 107, the court referred to the role of Investec and continued:

> "108. The Information" – (i.e. the presentation made to the judge in the Central Criminal Court for the issue of search warrants) – "referred to Investec as a trustee of the TDT and explained its role as follows:
>
> > "Each trust is managed by Trustees and Joint Trustees appointed to operate the business of the trusts. Nominee company directors are appointed by the trustees to manage the day to day activities of the multiple holding companies and Special Purpose Vehicles (SPV) set up to perform specific activities within the structure. The brothers retain, respectively, the UK R20 and [Consensus] to advise and provide instructions to the nominee directors."
>
> A little later, the Information stated:
>
> > "The Trustee companies set up to operate the TDT were: Investec Trust (Guernsey) Ltd, Bayeaux Trustees Ltd. Both above Trustee Companies acting as trustees for both TFT and TDT."
>
> The statement that Investec was set up to operate the TDT was repeated elsewhere in the Information.
>
> 109. The Information did not explain the role of Investec in any of the transactions or that it was part of a well-known financial group. As we shall set out, in some of the transactions, Investec, although instructed by RT through R20 to enter into the transactions, took advice and then had to decide for itself, under the arrangements which we have described, whether to enter into the transactions.
>
> 110. We accept that obviously the fact that a trustee company is interposed in a transaction does not mean that there can be no criminality; as Mr Eadie put it: "It is not a crime cut out". We also accept there was powerful material that showed that the actual deal making between Kaupthing and TDT was done by RT, as would be usual in this type of arrangement. However, in a case where suspected criminality is alleged in a transaction and a trustee is formally the party who enters into the transaction and signs the documents, often after taking his own advice, it is plainly material that the role the trustee perform s is explained, particularly when the trustee is a well-known trustee company."

172. However, although these further statements in the SFO judgment, about Mr Tchenguiz being the deal-maker through R20, were available to IG, I have found that the evidence of Ms Rogers does not support the conclusion that she read them at the time.

Mr Tchenguiz's Argument

173. Mr Tchenguiz says the information he provided in his second, successful application to open a professional account did not support his re-categorisation as an EPC. He says that whether or not he satisfied the Qualitative Test and Quantitative Test is a question to be determined objectively, by reference to the actual evidence that IG took into account in re-categorising him as an EPC.

174. I have explained above, by reference to the answers he provided in his application form, how the focus is upon the Qualitative Test and the third limb of the Quantitative Test.

175. Mr Tchenguiz's argument that IG failed to take all reasonable steps (per COBS 3.5.6R) to ensure he satisfied the Qualitative Test is not confined to IG's alleged failure in respect of that third limb. He says (in paragraph 21B of the Amended Defence) that IG also failed to take any sufficient steps to ascertain his ability (in respect of spread bets) to (i) understand the risks involved or (ii) make his own investment decisions. He says the information he provided (in the application to open the account) as to his use of advice in contrast to making his own decisions was equivocal. Further, that information was provided in the context of '*rarely / never*' trading OTC derivatives. It did not therefore suggest sufficient expertise, experience and knowledge of risk, understanding or investment decision-making in respect of spread bets.

176. Mr Tchenguiz says the MiFID point-scoring assessment (by which IG simply applied the score of 100, on the opening of his retail account, to the application of the Qualitative Test) was inappropriate. It provided no evidence of his experience in spread betting so as to provide the necessary assurance as to his understanding of the risks involved in that activity. Ms Barton KC and Mr Lewis pointed out that a score of 100 could be achieved without any knowledge of OTC derivatives (as Mr Tchenguiz had achieved it despite his 'rarely/never' answer in relation to investing in such instruments). They described IG's approach to the Qualitative Test as a "*watered-down version of the Quantitative Test*" so that it was difficult to envisage a circumstance where, if the Quantitative Test was satisfied, the Qualitative Test would not also be met.

177. In relation to the Quantitative Test, Mr Tchenguiz says the SFO Judgment made the difference between the rejection of the first application for EPC status and the approval of the second. IG had obtained access to the SFO Judgment through their own inquiries. Mr Tchenguiz's counsel said it was clear from what Ms Rogers had said her 11 December 2019 email to Ms O'Connor (at 14:54) and what Mr Hoq had said in his email to Mr Tchenguiz (at 15:11) that the SFO Judgment made the difference when the description he had given in his application form would not have qualified on its own.

178. They submitted that the SFO Judgment provided no evidence that Mr Tchenguiz had worked in the financial sector for at least one year in a professional position, which required knowledge of the transactions envisaged. They said the SFO Judgment:

(1) contains no references to Mr Tchenguiz himself making any investment decisions in relation to the TDT whether in paragraph 13 or as a whole;

(2) strongly suggests the contrary by emphasising throughout the decision-making role of the TDT's professional trustees, and the use of reputable advisors and the lack of evidence of decision-making by Mr Tchenguiz;

(3) referred to Mr Tchenguiz's directorship of R20, which is a different company to R20 Advisory (identified by Mr Tchenguiz in his EPC Application);

(4) therefore contains evidence of experience of TDT (rather than Mr Tchenguiz), which is irrelevant. COBS 3.2.3R (headed 'Who is the client?') explains that a beneficiary of a trust is not a client where services are provided by a firm to a trust; and

(5) was manifestly out of date by the time IG came to rely upon it.

179. Counsel also observed that IG took no steps to make any further enquiries of Mr Tchenguiz, in the case of any doubt, despite it having been a simple task to ask for further information of Mr Tchenguiz.

180. Mr Tchenguiz also says that IG failed to comply with COBS 3.5.3(3) in that (per paragraph 23 of the Amended Defence) IG "*provided no sufficiently* "*clear written warning of the protections and investor compensation rights" he might lose for the purposes of COBS 3.5.3(3)(b) in light of COBS 4.5A, or at all*." The Amended Defence particularises the respects in which IG's email communications and online forms were allegedly deficient in this respect. The reference in IG's application form to the loss of NBP is said to be insufficient because it did not clearly explain that the liability of a retail client for all restricted speculative investments connected to the retail client's account is limited to the funds in that account (per COBS 22.5.17) and reference to an "*obligation to make additional payments*" does not explain that, without NBP, a professional client is exposed to unlimited losses.

181. More generally, his counsel argued, the form was deficient because it did not include the mandatory risk wording that was required in a communication to a retail client (COBS 22.5.6) and it did not explain the relationship between margin (the extent to which an account is leveraged) and the client's exposure to risk, absent which the relative benefit of NBP (or risk its loss) could not properly be understood.

IG's Argument

182. On behalf of IG, Mr Mayall said this inquiry about Mr Tchenguiz satisfying the Qualitative Test and the Quantitative Test was taking place in what he described as this "*wholly unreal*" situation. Mr Tchenguiz's experience of spread betting (at

the relevant time) appeared from the terms of the CMC Spreadbet judgment. Paragraph 5 of IG's Amended Particulars of Claim relied upon what had been said in the skeleton argument of leading counsel (not Ms Barton KC) who appeared for Mr Tchenguiz in the statutory demand proceedings in saying: "*It has further been asserted on behalf of the Defendant that the Defendant was no mere speculator but an experienced investor pursuing a considered, coherent and long-term investment strategy in FirstGroup plc*."

183. Mr Mayall referred to the 'Questions and Answers' document published by the ESMA in relation to investor protection under MiFID II and MiFIR ('**the ESMA Guidance'**). ESMA performs a role in the harmonisation of financial markets, after the global financial crisis, by Regulation (EU) No 1095/2010 and it made a number of Decisions which came to be reflected in COBS 22.5. Mr Ward had referred to "ESMA Regulation" in his email to Mr Tchenguiz of 11 December 2019 (11:18) recommending the upgrade to a professional account.

184. The ESMA Guidance was published to promote common supervisory approaches and practices in the application of those legislative instruments and to provide competent regulatory authorities and firms with clarity over their requirements. Section 11 of the ESMA Guidance (last updated 25 May 2018 for present purposes) addressed how a firm should assess whether a private individual investor may be treated as a professional client.

185. Mr Mayall highlighted the following aspects of the ESMA Guidance in that document:

a) satisfying the Quantitative Test (i.e. two of the criteria in COBS 3.5.3(2)) is an indication that the client may be treated as a professional client. However, it may not be sufficient. "*Depending on the circumstances (e.g. the category of products the client intends to trade), a more thorough analysis of the client's expertise, experience and knowledge may be required*.";

b) firms should use their discretion to use the reasonable steps needed. They should "*avoid relying solely on self-certification by the client and should consider obtaining further evidence to support assertions that the client meets the identification criteria at that point in time, notably when they consider that the documents or statements received from the clients are not sufficiently conclusive*."

c) "*For instance, when assessing whether a client meets the criteria set out under the third limb*" [of COBS 3.5.3(2)] "*investment firms must ensure that the position was professional in nature and held in a field that allowed the client to acquire knowledge of transactions or services that have comparable features and a comparable level of complexity to the transactions or services envisaged.*"

186. Mr Mayall stressed that the guidance in relation to the "*knowledge of the transactions or services envisaged*" (per the third limb) could be acquired through client involvement in transactions with comparable features and a comparable level of complexity. For present purposes, Mr Tchenguiz's experience (as IG suggests it was) in trading in CFDs would be sufficient even if they were not spread bets.

187. IG makes the point that a spread bet is a type of CFD. The FCA Handbook defines a CFD as follows:

> "a contract for differences that is a gaming contract, whether or not section 412 of the Act (Gaming contracts) applies to the contract; in this definition, "gaming" has the meaning given in the Gaming Act 1968, which is in summary: the playing of a game of chance for winnings in money or money's worth, whether any person playing the game is at risk of losing any money or money's worth or not".

188. Mr Mayall submitted that IG's approach to the Qualitative Test using the MiFID score at account opening was an entirely reasonable way of assessing whether Mr Tchenguiz was capable of making his own investment decisions and understanding the risks involved in spread betting. He made the point that Mr Tchenguiz had applied to open an account with IG for both spread bets and CFD trading and the answer he gave in response the question about his experience or qualifications relevant to his understanding of those products was that he had this "*from a relevant role in a financial institution*". Mr Tchenguiz had confirmed his understanding (see paragraph 70 above) that spread bets and CFDs are complex instruments which come with a high risk of losing money rapidly due to leverage.

189. IG says that using the MiFID score of 100 to conclude the Qualitative Test was satisfied was entirely reasonable when 80 of those points were earned through Mr Tchenguiz trading (independently or with advice) in exchange-traded derivatives. Those were transactions with features and a level of complexity comparable to spread bets for the purposes of the ESMA Guidance. The remaining 20 points were attributable to Mr Tchenguiz referring to his directorship within the finance industry. The answers he gave earlier that day on the opening of the account were sufficient to provide IG with the reasonable assurance required by the application of that test.

190. In relation to the third limb of the Quantitative Test, IG makes the obvious point that, in response to the question the firm asked Mr Tchenguiz as to how his role with R20 Advisory had given him knowledge of CFDs, spread bets or forex, he gave an answer, which amplified that given on the previous unsuccessful application to become an EPC, by also referring to "*margined products*". Mr Tchenguiz was therefore certifying that his role as a director of R20 Advisory had given him that knowledge when, Mr Mayall observed, if it had not done so, he would have responded along the lines "*it has not*".

191. Although IG says Mr Tchenguiz's position on the Re-categorisation Issue is a technical one or, as Mr Mayall also put it, "*totally unmeritorious in the real world*", the objective nature of the inquiry under COBS 3.5.3(2)(c) does require the court to focus upon the material obtained by IG in the course of its assessment of his eligibility to be treated as a professional client.

192. Mr Mayall submitted that the task of the court is to determine whether the relevant criteria under the Quantitative Test were satisfied. In other words, that is a narrower inquiry than one involved in a decision as to whether Mr Tchenguiz met or did not

meet the requirements to become an EPC (and narrower also than the assessment by IG required on the application of the Qualitative Test). The approach, Mr Mayall contended, is different from that under the Qualitative Test, which requires an assessment by the firm, and, therefore, on any later review of that assessment by the court involves the court looking at what the firm then took into account. By contrast, he said, consideration of the relevant limb of the Quantitative Test simply requires the court to consider whether the evidence, obtained by IG in the course of the assessment required by the Qualitative Test, showed that Mr Tchenguiz had worked in the financial sector for at least one year in a professional position which required knowledge of CFDs.

193. He relied upon the paragraphs in the SFO Judgment set out in paragraphs 167 and 168 above as evidence that, not as a beneficiary of the TDT but, as a director of R20, Mr Tchenguiz was advising the trustees what to do and he was advising them to purchase huge stakes in companies by way of CFDs and other types of derivative investments. Ms Barton told me that R20 was now dormant. Mr Mayall said R20 Advisory is the successor company to R20 and took over its role in around 2010. This was not challenged on behalf of Mr Tchenguiz and, although his witness statement did not form part of the evidence at trial, it appears unlikely there would have been grounds for doing so. In the judgment in the *CMC Spreadbet* case, at [38], the judge referred to what Mr Tchenguiz had said in his application to CMC (to become an EPC) about R20 Advisory taking over in 2010 the asset management, corporate finance and consulting services provided by R20 prior to that date.

194. In relation to the requirement under COBS 3.5.3(2)(c) that the work in the financial sector in a professional position should be "*for at least one year*", IG says the SFO Judgment showed that to be case. Mr Mayall said the SFO Judgment evidenced that and, adopting an objective approach to that "evidence" (for that limb of the Quantitative Test) in these proceedings, that was so regardless of whether or not Ms Rogers had read beyond its paragraphs 5 and 13. The evidence within the judgment about Mr Tchenguiz's professional role was not in any sense out of date. The language of COBS 3.5.3(2)(c) ("*works or has worked*") shows that past work qualifies. COBS 10A.2.6, which precludes a firm from relying on information which it is aware or ought to be aware is manifestly out of date, relates to information provided by the client. The SFO Judgment was, by contrast, a matter of public record. As the Divisional Court had said what it said, there was no purpose in reverting to Mr Tchenguiz with further enquiries about what the court had said about him and R20.

195. IG's position is that the third limb of the Quantitative Test was satisfied simply by reference to the SFO Judgment but, even without it, it was satisfied by what Mr Tchenguiz had said about his directorship of R20 Advisory in the part of his application to become an EPC which responded to the question based upon that part of the test.

196. Mr Mayall said that Mr Tchenguiz's allegation that IG had breached COBS 3.5.3(3) – what he described as "*the process arguments*" because that part of the rule prescribes the procedure on categorisation of an EPC – were hopeless.

197. He pointed out that the email which Mr Ward sent to Mr Tchenguiz on 11 December 2019 (at 12:10) inviting him to apply to open an account, contained (within what is a rather dense block of uniform text in a footer running to some 29 lines) the following warning:

> "Spread bets and CFDs are complex instruments and come with a high risk of losing money rapidly due to leverage. 76% of retail investor accounts lose money when trading Spread bets and 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 can lose more than they deposit."

198. The same footer appeared on IG's subsequent emails sent to Mr Tchenguiz. In fact, in other emails, such as the two sent to him confirming his account with IG had been opened (so at the time he was a retail client), the warnings stood out a little more clearly, as follows:

> "All trading involves risk.
>
> 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 Spread bets and 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 can lose more than they deposit."

199. Mr Mayall highlighted the warnings about loss of NBP contained in the EPC Application form which Mr Tchenguiz confirmed he understood: see paragraphs 75 to 78 above.

F. ANALYSIS AND DETERMINATION OF THE RE-CATEGORISATION ISSUE

The effect of COBS 3.5.3R and 3.5.6R

200. The relevant provisions of COBS are set out in Section D above.

201. COBS 3.5.3R sets out the procedure to be complied before a firm may treat a client as an EPC. Although only COBS 3.5.3(3) uses the word "procedure" (and that part of the rule focuses upon certain requirements in relation to the relevant account opening documentation and provisions which Mr Mayall therefore described as giving rise to "*the process arguments*") COBS 3.5.3(1) describes a procedure for an assessment aimed at establishing, by reference to a certain standard of investor competence, the eligibility of the client to be treated as an EPC. COBS 3.5.3(2) says what that assessment involves in relation to MiFID business.

202. COBS 3.5.6R makes further provision in relation to that assessment and, again, makes it clear that a client may only be treated as an EPC (the language is *"[b]efore deciding to accept a request for re-categorisation*") if, in relation to such business, the procedure in relation to the Qualitative Test and the Quantitative Test is first observed.

203. COBS 3.5.6R does not address the requirements of COBS 3.5.3(3) in relation to the necessary request, warnings and acknowledgment of consequences within the relevant documentation. If an issue subsequently arises over a firm's compliance with any of them, then the documents will speak for themselves without the need for further elaboration in the rules by reference to "*all reasonable steps*".

204. In relation to the Qualitative Test and (where applicable, as here) the Quantitative Test, the effect of COBS 3.5.3R and COBS 3.5.6R, working in combination, is that the firm must "*take all reasonable steps to ensure*" (per COBS 3.5.6R) that the client satisfies the tests.

205. So far as the Qualitative Test is concerned, that means the firm must take all reasonable steps to ensure it "*undertakes an adequate assessment of the expertise, experience and knowledge of the client that gives reasonable assurance ..... that the client is capable of making his own investment decisions and understanding the risks involved*". The words omitted from that quote show that such capability and understanding is to be assessed (to the benchmark level of the assessment providing reasonable assurance of both) "*in light of the nature of the transactions or services envisaged*."

206. I am speculating when saying use of the phrase "*the nature of the transactions envisaged*" may well reflect consideration of the likely difficulties, and possible unintended consequences, of attempting to define with greater specificity the actual transactions which the would-be EPC would like to undertake. In any event, the ESMA Guidance relied upon by Mr Mayall (addressing equivalent language in the Quantitative Test) confirms that the language used does not mean that the firm needs to establish that the applicant already has a level of expertise, experience or knowledge acquired through entering into transactions of exactly the same type. Instead, the focus is upon him having acquired such through transactions having comparable features and a comparable level of complexity: see paragraph 185 above. Neither the Qualitative Test nor the Quantitative Test (see below) requires the applicant for EPC status to have an established track record of investing in transactions of the same particular *type* as he wishes to trade as an EPC (even assuming, as I do at least for the purposes of this observation, that a spread bet with NBP is to be categorised as the same type of transaction as one without NBP).

207. Therefore, the effect of the two rules working in combination is that the duty upon the firm is to take "*all reasonable steps*" to ensure that the client has what (in summary of the Qualitative Test) I have described in summary as the requisite level of investor competence. Although the word "*ensure*" in COBS 3.5.6R imports a requirement of certainty, the language of the Qualitative Test does not require some objective benchmark (or score) to be reached. Instead, the application of that test is aimed at producing a result which gives (or does not give) the firm "*reasonable assurance*" as to the investor's competence. There is an element of subjectivity in

this test aimed at the firm's assessment of the investor's competence, though any assurance it gets in that regard has to be a reasonable one.

208. Within the application of that test there is, however, an element of grading or scoring: the Quantitative Test. The Quantitative Test (as its name implies) does import an objective, criterial element to the assessment. The Quantitative Test is an objective one.

209. That said, the third limb of the Quantitative Test in issue in this case, is the least purely 'quantitative' of the three. It does require the objective facts of working in a professional position in the financial sector for at least one year to be established but the investment knowledge which that work "*requires*", and which, as I read COBS 3.5.3(2)(c), the firm may therefore *assume* was knowledge the applicant in fact had by virtue of that professional position, is expressed in terms broadly equivalent to the standard of investor competence (as I have summarised it) identified by the Quantitative Test.

210. I recognise that any employer or client of the professional, during that year, may well have needed more than a "*reasonable assurance*" of such competence, to have wanted more concrete as opposed to abstract evidence of the professional's knowledge of the relevant transactions than that indicated by the test, and to have known as much about the benefits as "*the risks involved*" in them. However, there is otherwise a substantial overlap between this limb and the more subjective Qualitative Test. Clearly, on its language, COBS 3.5.3(2)(c) does *not* stipulate that the applicant's (presumed) knowledge should have been deployed within that year in initiating, approving or concluding transactions of a specified number, magnitude or type; and the ESMA Guidance makes it clear (with my emphasis) that the position must have been "*professional in nature and held in a field that allowed the client to acquire knowledge of transactions or services that have comparable features and a comparable level of complexity*."

211. Despite the objective elements of the Quantitative Test, it is less obvious that Mr Mayall is correct to say that it is enough that the evidence which satisfied this contentious limb of it (COBS 3.5.3(2)(c)) was obtained by IG in the course of the assessment even though (which IG of course disputes) IG did not rely upon that part of the evidence which established as much. In exchanges with counsel, I used the perhaps uncomfortable analogy of a judge reaching the wrong conclusion on the evidence actually relied upon by him/her even though there was other evidence before the court, not in fact referred to or relied upon, which would have supported the judge's conclusion. The judge's conclusion would be vulnerable to challenge on an appellate review. Ms Barton KC said that would indeed be so, subject to any respondent's notice to uphold the decision on different grounds.

212. The uncertainty over Mr Mayall's submission, as I perceive it to be, arises out of the introductory words of the Quantitative Test: *"…. in the course of that assessment, at least two of the criteria are satisfied ….*" The language of the test does not refer to evidence, as such, and therefore it does not grapple with the question of whether it is sufficient to obtain such evidence, before accepting the client as an EPC, or whether it must be obtained and reviewed before such acceptance.

213. Although this point calls for greater analysis than one resting upon a simple comparison, I note that there is some support for Mr Mayall's interpretation of the rule in the stance adopted by Tchenguiz on the second of the three criteria (within the Quantitative Test) which IG relied upon.

214. I have already mentioned that the Amended Defence (paragraph 20) says IG failed to take all reasonable steps to satisfy itself that Mr Tchenguiz's financial instrument portfolio exceeded €500,000 (per COBS 3.5.3(2)(b)) even though Mr Tchenguiz accepts it did exceed that amount. In other words, the point was made that IG had in that respect failed to take all reasonable steps, as required by COBS 3.5.6R, and it was for IG to establish otherwise. In the event, however, this was not an issue for trial. In their written opening for trial (paragraph 71) his counsel confirmed:

> "On the basis of Mr Tchenguiz's statement as to his wealth, IG was entitled to treat this requirement as satisfied."

215. As Mr Mayall observed, if IG had indicated they were proposing to reject the EPC application by reference to the wealth requirement then Mr Tchenguiz would have responded by backing the application with evidence of his cash and investments. In my judgment, a similar point can be made about the issue between the parties over COBS 3.5.3(2)(c)), so far as the significance of the SFO Judgment on the inquiry into Mr Tchenguiz's professional experience is concerned.

216. If a more leisurely and prolonged reading of the terms of that judgment than that undertaken by Ms Rogers on 11 December 2019 (including the paragraphs identified in paragraph 171 above which I have found she did not read on the day) supports the conclusion that Mr Tchenguiz did in fact satisfy that limb of the Quantitative Test then his challenge that IG did not find out more about his professional experience (including by reading on to those later paragraphs in the judgment) is somewhat blunted.

217. I say that because paragraphs 109 and 110 of the SFO Judgment make it clear that Mr Tchenguiz, through his directorship of R20, was responsible for the decision-making on the deals in the CFDs and other derivative transactions entered into by the trustees of the TDT. Because he was applying to become an EPC, and Mr Ward had flagged the regulatory requirements for that, the court can and should assume that Mr Tchenguiz would (if IG had asked for further information about the value of his financial instrument portfolio, as his Defence suggests he should have been) have corroborated the information given in the Account Opening Application and the EPC Application which was relevant to COBS 3.5.3(2)(b). Likewise, if, on the basis of what Ms Rogers had read, IG had formed the preliminary view that the SFO Judgment had the limitations suggested by his counsel (see paragraph 178 above) then the court can assume that Mr Tchenguiz would have wished to draw attention to what was said elsewhere about his decision-making.

218. As the EPC Application had identified R20 Advisory (as opposed to R20) as his "*most relevant employer*", I think I may also assume that it is likely that any such further exchanges between IG and Mr Tchenguiz, over the COBS 3.5.3(2)(c) requirement, would have cast further light over the relationship between that

company and the one mentioned in the SFO Judgment. As it is, there were none. Although there has been no direct evidence on this point, it does appear that R20 Advisory took over role of R20. I have already noted that Mr Mayall told me that R20 Advisory took over its role in around 2010. The deal-making activity of R20 appears from the SFO Judgment and the equivalent activity of R20 Advisory was summarised by Mr Tchenguiz in the EPC Application. He was a director of both companies.

219. Nevertheless, on the point about the degree of objectivity within the Quantitative Test, I have concluded that if a firm is to rely upon it having obtained evidence to support a client's claim that a particular limb of the test is satisfied then it needs also to have reviewed and relied upon that evidence in the course of its assessment.

220. That is what one would expect as part of an assessment undertaken to establish the client's competence as an investor in transactions of the nature he would like to undertake as an EPC. Addressing the situation where the firm should avoid relying solely upon the client's self-certification, the ESMA Guidance refers to the firm "*obtaining further evidence to support assertions*". Evidence is generally of no value if the relevant decision maker does not rely upon it; the firm in this situation undertaking its own objective assessment of the client's own subjective view as to his expertise, knowledge and experience.

221. COBS 3.5.6R requires a firm to take "*all reasonable steps*" to ensure the client satisfies the Quantitative Test and, in my judgment, that means that if the firm obtained the evidence in fulfilment of that obligation then it is reasonable to expect it to have considered it in the application of the test. To be more precise, the firm would fall short of that obligation (i.e. would not have taken *all* reasonable steps) if it obtained the evidence but did not consider it "*before deciding to accept*" the client's request for categorisation as an EPC. On any review of the firm's decision by the court, there ought not to be scope for an argument which has the flavour of a respondent's notice on an appeal (and which some of the argument about the significance of the SFO Judgment perhaps had).

222. This interpretation of the Quantitative Test, pointing to the need for a clearer audit trail of the firm's decision, is supported by the language of COBS 3.8.2(2)(c) which requires the firm to make (and keep for 5 years) a record of its categorisation of the client "*including sufficient information to support that categorisation*."

223. My interpretation is also consistent with the decision of Flaux J (as he then was) in *Bank Leumi (UK) Plc v Wachner* [2011] EWHC 656 (Comm). In that case the court was concerned with rules in the then Conduct of Business Rules (in COB 4.1R) which required a firm to take reasonable care in determining that a client had sufficient experience and understanding to be classified as an intermediate customer. The judge was addressing the client's claim for damages for breach of statutory duty (then under section 150(1) of FSMA) based upon an alleged contravention of that rule. He recognised (at [213]-[220]) that previous cases emphasised that the client classification rules were process driven. Their focus was upon the firm's compliance with procedural requirements rather than it arriving at an objectively correct classification of the client. Flaux J said this of the rules under consideration (with his emphasis) at [214]:

> "In other words, before conducting designated investment business with or for a client, the firm must take reasonable steps to establish whether the client is an intermediate customer and it will only be if the firm has taken those reasonable steps that it is entitled to classify that client as an intermediate customer. ……."

Did IG comply with COBS 3.5.3R and 3.5.6R?

224. In my judgment, the evidence shows that IG complied with both of these rules. In my findings below, I also express matters in terms of Mr Tchenguiz having failed to prove the relevant contravention. In expressing myself that way I recognise that there is no counterclaim and that it is for IG (relying on a contract with him on EPC terms) to prove its case in debt. Nevertheless, it is Mr Tchenguiz who is impugning the contract, by reference to the alleged contraventions which undermine his EPC status and (as the flow of the parties' pleaded cases bears out) he is the party making allegations which undermine his EPC status.

The Qualitative Test

225. The evidence shows how IG in fact approached the Qualitative Test on what might be said to be a 'quantitative' basis: the firm applied Mr Tchenguiz's MiFID score of 100 at account opening to conclude, in accordance with the EPC Process Document and Online Procedure, that he satisfied the test.

226. However, it does not follow, as was suggested on behalf of Mr Tchenguiz, that IG's approach to the Qualitative Test therefore fell short of what was required under that test.

227. For me to decide that it did fall short would involve a finding that the firm's policy set out in EPC Process Document and Online Procedure (which Ms O'Connor applied) was somehow wrongly targeted and/or deficient. In my judgment, there is no basis for such a finding.

228. The Online Procedure was created in November 2017 and revised in March 2018 by Lauren Lamarque, a Compliance Officer who Ms Gore Langton explained formed part of the UK compliance team. It is clear from its terms that IG considered the procedure "*shows how IG takes 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 quantitative test.*"

229. IG's belief that it shows that does not of course mean that the belief is well-founded. However, there can be no suggestion that IG's policy did not have the requirements of the Qualitative Test clearly in mind. The Online Procedure clearly stated that actual trading experience was the only measure IG would use on the qualitative test (and that the client's self-certification of an understanding of the risks or any theoretical knowledge would not be considered) and that:

> "IG's policy is that a client must have direct experience of trading (including leveraged derivative trading) to equate 100 points in the appropriateness assessment to be considered to have sufficient understanding to be a professional client."

230. Ms Gore Langton, IG's Chief Compliance Officer at the time of the EPC Application, explained and effectively vouched for the scoring system which resulted in Mr Tchenguiz achieving the required 100 points. She gave a rational and convincing answer as to why, under the scoring system set out in the Online Procedure, Mr Tchenguiz achieved 40 points (before doubling for him trading them independently or with advice) for the number of his recent trades in exchange-traded derivatives.

231. That point score was by reference to the relative complexity of such products; a point illustrated by a scoring system which produced the same number of points where the client trades in either ETDs or OTC derivatives (the category in which Ms Gore Langton would place spread bets) was between 10 and 20 in number. Ms Gore Langton recognised that Mr Tchenguiz obtained no points for trading OTC derivatives fewer than 10 times but the policy of awarding some points for his ETD trading (albeit only 40 compared with the 100 he would have obtained had he traded that number of OTC derivatives) is entirely consistent with what the ESMA Guidance says about assessing the client's experience by reference to transactions with comparable features and a comparable level of complexity.

232. The information given by Mr Tchenguiz about his trades in the last 3 years, upon which the score was based, and his position with R20 Advisory (which his answer in the EPC Application – "*R20 advises*" - indicated was an ongoing role) was plainly not "*manifestly out of date*" within the meaning of COBS 10A.2.6.

233. In my judgment, Mr Tchenguiz has failed to establish that IG's use of the MiFID score in determining the Qualitative Test was inappropriate. Many perhaps most assessments are calculable (cf. the Quantitative Test which forms part of it) and he has not made out any good reason for saying IG's scoring system was flawed. Any argument that it was somehow inherently flawed would of course have required the court to consider not only whether particular marks awarded by IG were too generous but also perhaps not generous enough (when measured against the benchmark score required of an EPC) and/or that the benchmark of 100 for an EPC was set at the wrong level. The evidence adduced by IG, which I accept, undermines such an argument.

234. IG's adherence to the Online Procedure, as explained by Ms Gore Langton, shows that IG took all reasonable steps in its assessment of Mr Tchenguiz's competence to trade spread bets as an EPC. The answers he gave provided IG with the reasonable assurance required by the Qualitative Test.

235. Mr Tchenguiz has therefore failed to prove that IG contravened COBS 3.5.3(1) (or, as a consequence, COBS 3.5.6R).

The Quantitative Test

236. I have explained my reasons above for concluding that the key question to be addressed under COBS 3.5.3(2)(c) is whether IG both obtained and, before categorising Mr Tchenguiz as an EPC, reviewed evidence which showed that he had worked in the financial sector for at least one year in a professional position which required knowledge of transactions having features and a level of complexity comparable to spread bets.

237. IG's evidence shows that the answer to that question turns on what the passages in the SFO Judgment read by Ms Rogers (before she reverted to Ms O'Connor by her email of 14:54 on 11 December) showed in that regard.

238. I have expressed my finding that Ms Rogers read the passages in the SFO Judgment set out in paragraphs 167 and 168 above, though not those set out in paragraph 171.

239. Her email of 14:54 on 11 December2019 in fact referred to Mr Tchenguiz's experience and position as a beneficiary of the TDT. However, it is important to note (as the language of the email, responding to Ms O'Connor's highlighting in paragraph 13 of the SFO judgment, makes clear with its references to derivatives and CFDs) the language of that email, so far as COBS 3.5.3(2)(c) is concerned, appears to focus upon the subject matter of his "knowledge" rather than the "professional position" which required it.

240. So far as the latter was concerned, paragraph 7 of the SFO Judgment confirmed that Mr Tchenguiz was during the period identified in those early paragraphs of the judgment (2007 to 2010) a director of R20 which gave instructions to the trustee of the TDT in relation to CFDs and other forms of derivative contract. The evidence within the judgment did not have the limitations suggested by his counsel. It showed that Mr Tchenguiz had significant experience of CFDs and, consistent with the ESMA Guidance, IG were entitled to act upon that in concluding he had the required knowledge to trade products of comparable complexity as those identified in the Account Opening Application: "*both spread betting and CFDs*".

241. I accept Mr Mayall's submission that the SFO Judgment was not in any sense out of date (when the language of the test expressly contemplates past as well and continuing professional work in the financial sector) and, in that particular respect and more generally, the judgment corroborated what Mr Tchenguiz said in the EPC Application. In that application he identified R20 Advisory, not R20, as his most relevant employer but that did not diminish the corroborative effect of the SFO Judgment by reference to his other directorship. There is no dispute that a directorship of R20 (given what the SFO Judgment says about its activity in the financial sector) or R20 Advisory (given what Mr Tchenguiz said about that company in the EPC Application) was/is a professional position within the meaning of COBS 3.5.3(2)(c). He said his directorship of R20 Advisory gave him knowledge of spread bets and CFDs as the company's activities extended to advising on investments in margined products.

242. There was no reasonable basis for IG to conclude that what Mr Tchenguiz said in the EPC Application was manifestly out of date, incomplete or inaccurate and they were therefore entitled to rely on it in accordance with COBS 10A.2.6. By

obtaining the SFO Judgment IG looked beyond Mr Tchenguiz's self-certification, as the ESMA Guidance suggests should be done where there is reason to doubt its conclusiveness on the point, and the terms of the judgment supported what he said.

243. In my judgment, IG took all reasonable steps to ensure that Mr Tchenguiz satisfied this limb of the Quantitative Test.

244. Mr Tchenguiz has therefore failed to prove that IG contravened COBS 3.5.3(2)(c) (or, as a consequence, COBS 3.5.6R).

The 'Process' Arguments

245. I have by that heading adopted Mr Mayall's description of Mr Tchenguiz's argument based upon a breach of COBS 3.5.3(3).

246. I agree with him that Mr Tchenguiz's argument on this part of the Re-categorisation Issue is hopeless.

247. Ms Barton KC and Mr Lewis submitted that IG's warnings of the loss of NBP were inadequately expressed and, in IG's email footers, did not appear with sufficient prominence.

248. Mr Ward's evidence was that he was relying upon the documentation for the EPC Application, rather than his own email footers, to provide the necessary warning to Mr Tchenguiz that he would lose NBP.

249. In my judgment, Mr Tchenguiz's case that he was not given adequate warning of the loss of that protection cannot stand in the face of his own acknowledgment of the risk in the EPC Application (see paragraph 77 above) and what was said in the email informing him his second EPC Application had been successful (paragraph 103 above).

250. In the *CMC Spreadbet* case, the court considered the requirements of COBS 4.5A.3, the material parts of which I have set out in paragraph 53 above. The deputy judge, Mr Elvin QC, said this:

> "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."

And, later, after reviewing the professional account opening documentation in that case:

> "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."

251. Mr Mayall relied upon the second paragraph as a statement of the law. Ms Barton KC said it was not, on a proper application of the rules, and I presume this would have been an issue for determination in the appeal from the judgment in that case which was later compromised.

252. In the present case, I think it safer to act only upon the requirement of COBS 4.5A.3(d): that the warning as to loss of NBP was "*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*."

253. Applying that test, there is no basis for concluding the warnings mentioned above were somehow deficient. By their very nature, they were directed to clients who (under IG's MiFID scoring system) had achieved at least 100 points for the purposes of the Qualitative Test. Mr Tchenguiz was (as IG established and I have recognised) a member of the group to whom the warning about loss of NBP was directed, namely clients eligible to become EPCs. It may be that he would have been held to a higher average level of understanding within that group (as he scored 100 points and no more) but the fact is that there has been no evidence from him that he did not understand them. Nor has there been any other evidence, or persuasive argument, as to why the average applicant for EPC status would not or might not have understood the warnings to mean what they appear to say.

254. I am satisfied on the evidence that IG complied with COBS 3.5.3(3).

255. Mr Tchenguiz has therefore failed to prove that IG contravened that rule.

G: THE NBP DEFENCE

Observations

256. Mr Tchenguiz cannot succeed on the NBP Defence in light of my conclusion on the Re-categorisation Issue.

257. Nevertheless, it is appropriate to address it when it was fully argued. Ms Barton KC submitted that it is plain that in the *CMC Spreadbet* case the deputy judge, despite finding against Mr Tchenguiz on the facts of that case in relation to his categorisation as an EPC, accepted that the legal analysis advanced by her and Mr Lewis (in that case) in relation to NBP was the correct analysis. Ms Barton told me that full submissions were made in that case (after the conclusion of the trial)

upon what I have described as the NBP Defence and, although the judgment did not address the rival analyses, she submitted it was clear that the judge would have found that, if Mr Tchenguiz had not properly been classified as an EPC, then the debt claimed by CMC would not have arisen.

258. However, I have already observed that the language of paragraphs 90 and 91 of the judgment in that case leaves open, for any subsequent decision, the legal analysis by which Mr Tchenguiz would have benefited from NBP had it "*applied*". I note from paragraphs 8, 9 and 19 of the judgment that Mr Tchenguiz had counterclaimed for damages under section 138D(2) of FSMA; though I recognise the counterclaim may only have been directed to the close-out issue which the judge went on to consider. In any event, the *CMC Spreadbet* case plainly does not assist with an analysis of the interrelationship of section 138D(2) and section 138E of FSMA so far as the NBP Defence is concerned.

259. The NBP Defence turns on a question of pure law.

260. I have set out the NBP conferred on retail clients by COBS 22.5.17 in paragraph 50 above. It clearly provides that a retail client cannot lose more than the funds in his account.

261. As the Guidance in the subsequent paragraphs of the FCA Handbook states, COBS 22.5.17R means that a retail client cannot lose more than the funds specifically dedicated to trading restricted speculative investments. For these purposes, the funds in a retail client's account are limited to the cash in the account and unrealised net profits from open positions. "*Unrealised net profits from open positions*" means the sum of unrealised gains and losses of all open positions recorded in the account. Any funds or other assets in the retail client's account for purposes other than trading restricted speculative investments should be disregarded.

262. Relying upon his case on the Re-Categorisation Issue Mr Tchenguiz says that IG's failure to comply with COBS 3.5.3R (and COBS 3.5.6R) means that IG was not entitled to classify him as an EPC and (in accordance with COBS 3.4) he remained a retail client with the benefit of NBP.

Sections 138D(2) and 138E of FSMA

263. Section 138D(2) of FSMA provides as follows:

> "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."

264. Section 138E of FSMA provides:

> "Limits on effect of contravening rules

(1) A person is not guilty of an offence by reason of a contravention of a rule made by either regulator.

(2) No such contravention makes any transaction void or unenforceable.

(3) Subsection (2) does not apply in relation to –

(a) rules made by the FCA under section 137C

(b) product intervention rules made by the FCA under section 137D

(c) rules made the FCA under section 137FBB

(d) rules made by the FCA under section 137FD"

The relevant rules

265. Mr Tchenguiz's case on the NBP Defence was based on a contravention of COBS 3.5.3R and 3.5.6R, meaning he did not lose NBP, though a looser analysis could be said to involve, as a consequence, IG contravening COBS 22.5.17R by disapplying NBP when it should not have done so.

266. As explained in COBS 1.2.1G (and the parenthetical note between them identifying the relevant article of MiFID II) COBS 3.5.3R and 3.5.6R each transposed provisions of MiFID. Nevertheless, they are rules (as defined by section 417(1) of FSMA) within the meaning of sections 138D and 138E. At the trial, the parties did not identify the relevant instrument or instrument by which the FCA made these rules. Regulatory developments over the years mean that the language (and primary legislative source) of the provisions has changed over the years, through the FCA making numerous instruments, so that would be no easy task.

267. In section B above I have noted that the argument has focused upon COBS 3.5.3R and COBS 3.5.6R introduced with effect from 3 January 2018 in implementation of MiFID II. However, a search of the FCA website indicates that the Qualitative Test and Quantitative Test were first introduced (in those rules) by the then Financial Services Authority under the Conduct of Business Sourcebook Instrument 2007, FSA 2007/33, the material provisions of which came into force on 1 November 2007. This was in implementation of MiFID: the Markets in Financial Instruments Directive 2004/39/EC. So far as the (more recent) rule-making powers of the FCA identified in section 138E(3) are concerned, none of those are identified in that 2007 instrument which was made first and foremost by reference to what was then the FSA's general rule-making power under section 138 of FSMA (which for the FCA is now found in section 137A).

268. I have mentioned in Section D above that COBS 22.5.17R was introduced by the 2019 Instrument. As I observed during counsel's closing submissions, the 2019 Instrument was made by the FCA in the exercise of five separate powers under FSMA. They included its power under section 137A to make general rules and also its power (within that wider one – see the language of section 137D(1)) to make general rules in relation to product intervention under section 137D. As

appears above, rules made by the FCA under section 137D are not covered by the provision which states that a contravention of the rule will not make a transaction void or unenforceable; though, as I explain below, the language of section 137D(7)(a) suggests it would be more accurate to say such rules *may* not be covered by the provision. If, however, the source of COBS 22.5.17 is the rule-making power under section 137A then section 138E(2) of FSMA will apply.

269. COBS 22.5.17R does not perhaps at first sight have the appearance of a product intervention rule. Section 137D(1) and (2) describe product intervention rules by reference to the prohibited things of "*entering into specified agreements with any person or specified person*", or doing so unless requirements specified in the rules have been satisfied, or doing anything that would or might result in the entering into specified agreements by persons. During closing submissions, in response to me focussing upon Section 137D and those quoted words, Mr Mayall drew my attention to section 137D(3) and (4) which provide that those terms take their meaning from what the FCA specifies in any general rules (as defined by section 137A(2)). Counsel were not able to identify any further reference to "*specified agreements*" or "*specified persons*" in the relevant parts of COBS.

270. The focus in closing submissions upon the reference in the 2019 Instrument to the FCA's rule-making power under section 137D prompted a debate between counsel about whether or not the reliance placed upon it by Ms Barton KC in closing submissions should have been foreshadowed in a statement of case or, as Mr Mayall remarked, at least in a skeleton argument. He had already made the wider point that his opponent had not addressed the impact of section 138E(2) either in a pleading or skeleton argument. IG had pleaded section 138D in the Re-Amended Reply (in saying that at most the contraventions alleged by Mr Tchenguiz would give rise to a claim for damages) though not section 138E(2). Subject to Ms Barton's point that IG had not pleaded reliance upon section 138E(2) in that Reply (though Mr Mayall had set out the subsection in his Note for CCMC dated 17 January 2023 and it did feature in his written opening for trial which her own and Mr Lewis's followed) I observed that the section 137D point appeared to be the stuff of a notional rejoinder.

271. Although hindsight reveals that it would have been preferable for the point to have been flushed out sooner than the last day of trial, it is a point of law (within a wider point of law) and, particularly in the light of my conclusion on the Re-categorisation Issue, I have felt able to proceed to determine it without asking counsel to supplement their oral observations on the point.

272. Again, searching the FCA website for the purposes of preparing this judgment, it seems to me most likely that the reference in the 2019 Instrument to the exercise of the power to make product intervention rules is referable to what was said in the FCA's Consultation Paper of December 2018 (CP 18/38) – titled 'Restricting contract for difference products sold to retail clients and a discussion of other retail derivative products' - which preceded the making of it.

273. In Chapter 3 of that Consultation Paper the FCA outlined its "*proposed product intervention measures*" and began by saying this:

> "We propose to permanently restrict the sale, marketing and distribution of CFDs and CFD-like options to retail clients. We propose doing this by requiring firms that carry out these activities in, or from, the UK to:
>
> • limit leverage to between 30:1 and 2:1 by collecting minimum margin as a percentage of the overall exposure that the CFD provides
>
> • close out a customer's position when their funds fall to 50% of the margin needed to maintain their open positions on their CFD account
>
> • provide protections that guarantee a client cannot lose more than the total funds in their CFD account
>
> • stop offering monetary and non-monetary inducements to encourage trading, and
>
> • provide a standardised risk warning, which requires firms to tell potential customers the percentage of their retail client accounts that make losses."

274. Those proposals were implemented in COBS 22.5 generally.

275. COBS 22.5.17R does <u>not</u> in terms say a firm cannot enter into a spread bet agreement without NBP with a retail client. Instead, it provides that the liability of a retail client under a spread bet is limited by NBP. However, the third bullet point in the quote above indicates that COBS 22.5.17R should be regarded as the result of the FCA's exercise of its power under section 137D of FSMA to make product intervention rules. In other words, in the light of what the FCA had said in CP 18/38 (and the recital of section 137D in the 2019 Instrument) the rule can, at least for the purposes of the present issue, be read as saying the sale of a spread bet without NBP (a "*specified agreement*") to a retail client (a "*specified person*") is indeed prohibited. The provisions of section 137D(6), which refers to requirements as to terms and conditions to be included in specified agreements, supports the categorisation of COBS 22.5.17 as a product intervention rule.

276. That said, a sale to an EPC (or other professional client) of a spread bet without NBP is obviously not prohibited – hence the very existence of this litigation – and that is why Mr Tchenguiz had to focus his case upon the alleged contravention of COBS 3.5.3R and COBS 3.5.6R so that, he argued, he remained at all times during his trading with IG a retail client. In this regard I note (with my emphasis in underlining) that section 137D(2)(b) of FSMA prohibits "*entering into specified agreements with any person or specified person <u>unless requirements specified in the rules have been satisfied</u>*".

277. Consistent with Mr Tchenguiz's pleaded case, therefore, the relevant contravention (if there had been one) would have been of those earlier rules in COBS without which the suggestion of a resulting contravention by IG of COBS 22.5.17R (through impermissible reliance upon it) simply has no basis. As I have explained, COBS 3.5.3R and 3.5.6R fall clearly within the language of section 138E(1) and (2) of FSMA, not section 138E(3).

278. In fact, as I observed during counsel's closing submissions, it is also clear that not every contravention of a product intervention rule made under section 137D leads to the contravening transaction being unenforceable. Section 137D(7) says that, in relation to contravention of product intervention rules, the rules *may* provide for a "*relevant agreement or obligation*" (as defined by s. 137D(8)) to be unenforceable against any person or specified person. The same subsection also says the rules may provide for the recovery of money or property transferred under it or for the payment of compensation. In other words, not *every* rule made under section 137D falls within the proviso in section 138E(3)(b) of FSMA.

279. No part of COBS relied upon in this case – not even COBS 22.5.17R - states that a contravention of the rule means that a spread bet (or a spread betting account) without NBP is *unenforceable* against a retail client. Perhaps because of the way the rule is expressed, COBS 22.5.17R is not a rule in relation to the contravention of which the FCA exercised its power under section 137D(7) to specify the consequence of unenforceability.

Analysis

280. That last point indicates that, even if I had found in favour of Mr Tchenguiz on the Re-categorisation Issue, his only defence to IG's debt claim would have been through a counterclaim for damages giving rise to an equitable set-off to extinguish or at least reduce that claim.

The Contract

281. I have already mentioned, in Section E above, Mr Mayall's analysis of the three distinct stages of the formation of the contract between IG and Mr Tchenguiz which led to him (as an EPC) becoming a Select Account customer on 17 December 2019. The effect of this was that Mr Tchenguiz made all his spread bets as an EPC, without NBP, and those made after 17 December 2019 were made with the benefit of the Select Account terms.

282. It is clear, as I have noted in Section E above in relation to the terms of the 'Select Account Offer', that the outcome of those three stages was that the contract between IG and Mr Tchenguiz was contained in the Customer Agreement as supplemented by the Select Account Terms. As also noted above in Section E, none of the spread bets were made by him on the basis that he benefited from NBP, as he made his first only after being categorised as an EPC. To put it another way, the operation of clause 8(12) of the Customer Agreement in relation to his liability upon the closing of a bet, was (at least at the time and prior to this litigation following the closure of his account) not subject to "*any Applicable Regulation(s)*" in the form of COBS 22.5.17.

283. Ms Barton KC and Mr Lewis accepted there was a single contract for the purposes of analysing the NBP Defence. As she put in closing submissions:

> *"So, my Lord, I think the proper analysis, contractually, is that there is one agreement, which is the original agreement, and it then, at a later date,*

> *incorporates these terms* [i.e. the Select Account terms] *additionally. Not that there are separate agreements.*
>
> *And that's probably how you get away with it* [i.e. the Select Account terms] *being quite pithy and short, not lots of definitions and the like, because it's intended to be read as part of the original contract."*

284. However, their submission on behalf of Mr Tchenguiz was that the second of Mr Mayall's three stages – his re-categorisation as an EPC – was part of a statutory process which, if not properly complied with by IG, meant he remained a retail client: the default position under COBS 3.4. In other words, the terms of the single contract (embodied in the Customer Agreement as supplemented by the Select Account terms) are capable of applying to both retail and professional clients but, if the re-categorisation from one to another was not in compliance with the statutory process, then only those applicable to retail clients (materially, NBP) will apply.

285. On this point of the contractual analysis, before considering the effect of section 138E(2) of FSMA, I have some difficulty in accepting that analysis. If the written terms of the contract had stopped with those in the Customer Agreement the analysis would be more straightforward. As I say, although counsel did not focus upon the phrase "*subject to any Applicable Regulations*" in clause 8(12) (as set out in Section C above and capable of applying to both retail clients and professional clients) the application of NBP under COBS 22.5.17 to the bet of a retail client dovetails with the opening language of that clause. However, the contract between IG and Mr Tchenguiz extended to the Select Account terms.

286. In closing submissions, I asked counsel whether the Select Account terms only applied to professional clients, as Mr Ward's evidence had suggested was the case. Ms Barton KC said it was not clear on their face whether they did or not. Mr Mayall's instructions were that they were only available to professional clients. I asked the question because, as I put it, some of the Select Account Terms (the Waived Deposit Limit of £250,000 and the Liquidation Level of £0) seemed to be anathema to the protective measures for retail clients (relied upon heavily by Ms Barton and Mr Lewis) first introduced by four of the successive ESMA Decisions, mentioned below, and then reflected in the 2019 Instrument: compare COBS 22.5.11 and 22.5.13 (in relation to margin requirements and margin close out requirements for retail clients). As Mr Mayall responded, the Select Account terms are *"completely incompatible with being a retail client*".

287. On the basis, therefore, that the Select Account terms only applied to professional clients I suggested to Ms Barton KC that, adopting the language of section 138E(2) of FSMA, Mr Tchenguiz's case must be that those terms are "unenforceable" against him.

288. Ms Barton KC responded by confirming that Mr Tchenguiz's case did not involve him saying that the single, entire contract between him and IG was void or unenforceable. Instead, she said where there is tension between the contractual

terms and a statute (or in this case COBS as secondary legislation made under FSMA) the statute will prevail.

Mr Tchenguiz's argument

289. Ms Barton KC and Mr Lewis submitted that the regulatory changes since 2018 have been such that the protection for retail clients (with accounts for spread betting or other forms of 'restricted speculative investment' being covered by the 2019 Instrument) are such that the court can look beyond what Section 138E(2) provides.

290. They referred me to four ESMA Decisions, made between 1 August 2018 and 1 May 2019 (and each effective for a period of 3 months): ESMA Decision (EU) 2018/796 effective from 1 August; ESMA Decision (EU) 2018/1636 effective from 1 November; ESMA Decision (EU) 2019/155 effective from 1 February; and ESMA decision (EU) 2019/679 effective from 1 May 2019. The Decisions of ESMA are EU Decisions within the meaning of Article 288 of the Treaty of the Functioning of the European Union. This means that they were of direct effect. Article 288 states:

> "A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them."

291. By the time Mr Tchenguiz opened his account with IG the last of the ESMA Decisions had lapsed, on 31 July 2019. Before that date, on 26 April 2019, the FCA issued a Statement in relation to its intended publication of final rules for CFDs and CFD-like options. The FCA referred to its Consultation Paper CP 18/38 and said that, although it had planned to publish the rules in April 2019, it was still considering the feedback so that publication would be in the summer of 2019 and:

> "Our final rules for CFDs would apply from the date the ESMA restrictions expire, if not earlier. …… Firms must continue to comply with ESMA's decision notice that imposes temporary restrictions on the marketing, distribution or sale of CFDs to retail clients. Should EU law cease to apply in the UK before ESMA's decision notice expires, ESMA's decisions will continue to apply as part of UK law."

292. As noted in Section D above, the 2019 Instrument introduced COBS 22.5 with effect from 1 August 2019. For the purposes of Mr Tchenguiz's argument, COBS 22.5 was the relevant legislation by the time he came to open his account with IG.

293. Nevertheless, his counsel point to the ESMA Decisions, and the regulatory objectives of retail client protection behind those decisions and the 2019 Instrument, to submit, as they did before HHJ Jarman KC on the summary judgment application, that this is a new regulatory regime which (had he succeeded

on the Re-categorisation Issue) gave Mr Tchenguiz NBP Defence under COBS 22.5.17, regardless of what Section 138E(2) says.

Addressing the argument

294. In my judgment, this argument is flawed.

295. At a general level, the difficulty with it is that it does amount to saying that the "transactions" which resulted in Mr Tchenguiz being categorised as an EPC, and then being extended the Select Account terms, are unenforceable within the meaning of section 138E(2). Likewise, it involves saying that clause 8(12) of the Customer Agreement cannot be relied upon (i.e. it is unenforceable) without the benefit of NBP. The Re-Amended Defence says he remained a retail client and, on that basis, he denies he owes the sum claimed by IG. Again, as a matter of basic contractual analysis, that can only be on the basis that the terms relied upon by IG are unenforceable.

296. Although counsel did not seek to present COBS 22.5.17 as an "implied term" of the contract (the express ones being agreed under each of the three stages identified by Mr Mayall) the argument is akin to suggesting that the Customer Agreement is subject to an implied term which directly contradicts what the parties have expressly agreed. Ms Barton KC submitted that statute often supplements or impacts upon what the parties have contractually agreed. She used the analogy of the Landlord and Tenant Act 1954 restricting the landlord's grounds for recovering possession under a business tenancy. However, that is on the basis that the subject matter of the parties' *agreement* can properly be identified as a business tenancy. If what the parties have in fact agreed is that it is a residential tenancy, and the subject matter of their agreement does not point to it being a colourable one, then the 1954 Act simply does not apply.

297. At the general level, therefore, the problem with the argument is that it produces a result which is directly contrary to what section 138E(2) provides. The essential requirement of a valid contract that its terms should be certain means that it is not generally permissible to carve it up into bits that are binding (and enforceable) and other that are not; or at least not when severing the unenforceable terms produces doubt as to whether what is left is any contract at all. That would seem to be the consequence in this case where all the bets between the parties under the contract (see below) were on the basis that all three stages of contractual agreement were legally effective.

298. Further, in my judgment, there are flaws in the underlying premise of the argument as well as that apparent in its suggested effect.

299. Had Mr Tchenguiz succeeded on the Re-categorisation Issue it would have been for contravention of rules (COBS 3.5.3R and COBS 3.5.6R) which are caught by section 138E(1) and (2), not section 138E(3). As explained above, the argument does not get to the stage of "contravention" of COBS 22.5.17R, without a relevant contravention of those other rules which sounds, if at all, only in a claim for damages under section 138D.

300. As also explained above, there is nothing particularly "new" about COBS 3.5.3R and COBS 3.5.6R so far as distinguishing older authority, by reference to the 2018-2019 ESMA Decisions and the 2019 Instrument, is concerned. Even taking account of the new (post-2018) regulatory regime relied upon by Ms Barton KC and Mr Lewis, these rules are clearly covered by section 138E(2) by reference to their date, source (in terms of the FSA's/FCA's general rule-making power) and language (in not mentioning unenforceability).

301. Not all of the same can be said about COBS 22.5.17R. However, even if Mr Tchenguiz had succeeded on the Re-Categorisation Issue (by establishing a breach of those other rules) I would have been unpersuaded that he would have succeeded in defending IG's claim without a counterclaim for damages to be set off against it. I say that for two, possibly three, reasons.

302. The first is that a counterclaim would have been required in respect of the contraventions (of COBS 3.5.3R and COBS 3.5.6R) which are the necessary stepping-stones to any contravention of COBS 22.5.17R.

303. The second is that CPBS 22.5.17R is not a rule where the FCA has chosen to specify the consequences of a contravention, as section 137D(7) of FSMA says *may* be done with a product intervention rule. This is quite possibly because COBS 22.5.17R (unlike those other rules) is not expressed in language which easily supports the notion of the firm "contravening" it and instead reads, where it applies, as if it is a statutorily implied term.

304. The third reason, picking up what I have said above and linked to the second, lies in the difficulty in carving up the Customer Agreement into parts which are enforceable and parts which are not. If that is a good point (and, again, see below in relation to the EPC/Select Account basis on which the bets were in fact made) then it indicates that the proper analysis is that Mr Tchenguiz should have proceeded on the basis that the Customer Agreement (as reached over the three stages) was enforceable but that he had a counterclaim for IG's breach of COBS 22.5.17R. As Mr Mayall suggested, even a retail client can agree a contractual term which excludes NBP even though he would, under section 138D(2) of FSMA, have a claim for damages amounting to a set-off if the firm relied upon it.

305. Of course, the contract between IG and Mr Tchenguiz (which is the higher-level "transaction" to which the parties have directed their submissions about sections 138D) was the umbrella agreement for the numerous spread bets placed by Mr Tchenguiz with IG. It is those bets which have resulted in the liability IG seeks to enforce.

306. The fact that he made those bets (themselves "transactions") as an EPC, and after 17 December 2019 did so on Select Account terms, is a further indication that his remedy for any wrongful categorisation of him as an EPC should take the form of a counterclaim for damages. Of course, the bets went very badly wrong for him but when he made them he did so on what he perceived and sought to be advantageous terms not available to him as a retail client.

307. Any such counterclaim, for a breach of COBS 3.5.3R and 3.5.6R would have been subject to the terms of section 138D(2) of FSMA. It would have been for him to

establish he had "*suffer[ed] loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty*".

308. The potential defences to a claim for damages for breach of statutory duty include arguments about causation (that the damage was caused both in fact and law by the defendant's breach of duty) and any contributory negligence on the part of the claimant. I recognise that, had Mr Tchenguiz remained a retail client, then any bets he made with IG (on retail client terms) would have been closed out sooner than was in fact the case by operation of the margin requirements and margin close out requirements for retail clients in COBS 22.5. However, questions as to what those bets would have been in the first place, and whether or not Mr Tchenguiz could or would have wanted to place them instead of those he in fact placed as an EPC, without NBP, would have been matters for investigation and analysis on a counterclaim.

309. At first sight, the inquiry on that counterclaim would have been considerably less straightforward than him simply claiming against IG the benefit of a 'stop loss' based upon NBP.

Authorities relevant to section 138E(2)

310. On the basis that the legal analysis of COBS does not support the novel point of law HHJ Jarman KC was persuaded might exist, by reference to the regulatory changes since 2018, it follows that I see no need to treat the authorities cited to him and me by Mr Mayall with caution. On the contrary, the same authorities cited at both hearings highlight clearly the reason why Mr Tchenguiz's defence cannot succeed. The answer is given by section 138E(2).

311. Mr Mayall cited three authorities in support of his submission that, however egregious a firm's breach of a rule might be, if the rule itself is within the scope of section 138E(2) then any agreement which results from it is not void or unenforceable. He made the same point in relation to the binding terms of any such agreement, however outrageous any particular term (such as one excluding NBP) might be perceived to be. The remedy for any deserving client lay in a claim for damages (if any are proved) under section 138D(2).

312. *IG Index Ltd v Ehrentreu* [2013] EWCA Civ 95 concerned a settlement agreement which the defendant, as a client of IG, had entered into to suspend legal action for the recovery of a debt incurred on his spread betting account by agreeing to pay it in instalments. IG had sought summary judgment against him relying on the settlement agreement. That application had been largely successful before the Master and wholly successful on a subsequent appeal to the judge. The defendant had argued that IG were in breach of the customer agreement, also in breach of its regulatory obligations in seeking to enforce the settlement agreement, and, alternatively, that he had a counterclaim for damages which he could set off against his liability to IG. At the time, the provisions now in section 138E(1)-(2) were contained in section 151(1)-(2) of FSMA.

313. On the defendant's further appeal, the Court of Appeal dismissed his appeal (saying the settlement agreement excluded the defence of set-off) but recognised he could pursue his counterclaim for damages. In relation to the defendant's challenge to the enforceability of the settlement agreement, Lewison LJ said, at [46]:

> "In my judgment the "transaction" with which we are concerned is the Settlement Agreement. It is plain from section 151 (1) that entry into the Settlement Agreement is not illegal in the sense of being a criminal offence. It is plain from section 151 (2) that it is not made unenforceable as a result of a contravention of a rule. Once Mr Gourgey's attention had been drawn to section 151 he rightly abandoned this line of argument."

314. In *Marshall v Barclays Bank plc* [2015] EWHC 2000 the court was concerned with the enforceability of an interest rate swap which the claimant alleged the bank had "mis-sold" to him. The bank applied for the striking out of the claim, or reverse summary judgment, and the claimant sought to amend his particulars of claim so as to further particularise existing allegations of mis-selling and to add new ones. The draft amended particulars of claim made a specific allegation of a breach of COBS 2. This was another case where the customer had entered into a settlement agreement, itself supplemented by a later agreement when he found he could not meet the payments under the first, in compromise of the bank's claim under the loan (the interest payable on it having been hedged by the swap).

315. The court refused permission to amend and struck out the claim. HHJ Judge Stephen Davies said:

> "50. It seems to me that illegality or other breach of public policy simply does not avail the claimant in this case. The reality is that either a claimant in the position of Mr. Marshall can rely on breaches of regulations which he can establish afford him a civil remedy, which here he could do so but for the effect of the general release, or he cannot, because the statutory framework does not, on its true construction, allow him to do so, and no amount of repeated reference to wholesale, systematic, deliberate or even dishonest breach of the regulations will alter that fundamental position.
>
> 51. Furthermore, even if I was wrong about that, it appears to me, despite what Mr. Hurst submitted, that the effect of what is now s.138E(2) of the Financial Services Act , which specifically provides that no such contravention — that is a contravention of a rule made by a regulator — makes any transaction void or unenforceable, quite clearly means that it is simply not possible to advance an argument that, even in the case of alleged wholesale, widespread, systematic, deliberate and even dishonest breaches of the regulations, the underlying transaction is rendered void. I was, I am afraid, not remotely convinced by Mr. Hurst's appeal to what he characterised as the golden rule approach to statutory construction, whereby one can adopt a non-literal meaning to a statutory provision in such cases."

316. Those passages were applied by Phillips J (as he then was) in *Marsden v Barclays Bank plc* [2016] EWHC 1601. The judge said, at [60], that he was in full agreement with the reasoning of HHJ Stephen Davies. That was another case where the bank applied for summary judgment against, alternatively the striking out of a claim made against it on the basis it had mis-sold two interest rate swaps to the claimant. Again, the circumstances included him having entered into a settlement agreement with the bank in compromise of the bank's claim under the loan hedged by those agreements. Alongside allegations of deceit and breach of contract, the claimant had sought to impugn the settlement agreement (and the swaps) by reference to what Phillips J summarised (at [57]) as his case on "*the Bank's massive mis-sale of interest rate hedging products [and] acting contrary to the principles, rules and guidance of the regulatory regime*."

317. The court granted the bank's application and dismissed the claim. Before citing with approval the above-quoted paragraphs from *Marshall*, Phillips J said this of the mis-selling argument:

> "The immediate difficulty facing the above argument is that the Swaps are private contracts, in respect of which the parties have well recognised rights and remedies, including recognised causes of action for breach of statutory duty. It is not arguable that regulatory failings, however widespread, entail that contracts are void or illegal,not least because the regulatory regime expressly provides to the contrary. What is now section 138D of the Financial Services & Markets Act 2000 provides a specified right of action for contravention of regulatory rules and what is now section 138E states that "*No [contravention of a rule made by the FSA/FCA] makes any transaction void or unenforceable*".

318. Therefore, to the extent any authority is needed once it is established that the relevant FCA rule is <u>not</u> one outside the scope of section 138E(2) of FSMA, these decisions show that there is no wriggle room for a party to suggest the court may find the consequence of its contravention to be otherwise than as stipulated by statute.

319. As to that, Mr Mayall cited the decision of the Court of Appeal in *Diag Human SE, Josef Stava v Volterra Fietta* (a Firm) [2023] EWCA Civ 1107 in an entirely different legislative context. In my judgment, this highlights the difficulty for Mr Tchenguiz in being unable to point to a relevant FCA rule which both as a matter of legislative source (cf. section 138E(3)) and as a matter of language (cf. section 137D(7)(a)) would, <u>if</u> contravened, not be caught by section 138E(2).

320. The decision in *Diag Human* concerned the enforceability of a conditional fee agreement. The claimants (or at least one of them) had agreed the CFA with the defendant solicitors. It was unenforceable because it included a success fee which could exceed 100% and it did not state the success fee percentage. It therefore failed to satisfy two of the three conditions specified by section 58 of the Courts and Legal Services Act 1990. Section 58 provided that a CFA which satisfied all

of the conditions "*shall not be unenforceable; but …. any other conditional fee agreement shall be unenforceable*." The solicitors recognised they could not recover the success fee but submitted the offending success fee could be severed so that they should recover fees for work done at the discounted rate, alternatively be entitled on a quantum meruit.

321. The Court of Appeal rejected that argument. Stuart-Smith LJ referred to the provisions of section 58 in relation to a "*compliant CFA*" no longer being regarded as contrary to the common law's public policy against champertous agreement being enforceable and said, at [21]:

> "The solicitors repeatedly emphasised the seriousness of the financial consequences for them if their appeal were to be rejected. This is not a new submission in cases involving challenges to CFAs. It was answered by Dyson LJ giving the judgment of the Court in *Garrett v Halton BC* [2006] EWCA Civ 1017, [2007] 1 WLR 554 at [27]-[30] where he said:
>
> > "27. … The starting point must be the language of section 58(1) and (3) of the 1990 Act . It is clear and uncompromising: if one or more of the applicable conditions is not satisfied, then the CFA is unenforceable. Parliament could have adopted a different model. It could, for example, have provided that where an applicable condition is not satisfied, the CFA will only be enforceable with the permission of the court or upon such terms as the court thinks fit. There is nothing inherently improbable in a statutory scheme which provides that, if the applicable conditions are not satisfied, the CFA shall be unenforceable with the consequence that the solicitor will not be entitled to payment for his services. Such a scheme can yield harsh results in certain circumstances, especially if the client has not suffered any actual loss as a result of the breach. It can also produce results which, at first sight, may seem odd: … . But the scheme is designed to protect clients and to encourage solicitors to comply with detailed statutory requirements which are clearly intended to achieve that purpose. The fact that it may produce harsh or surprising results in individual cases is not necessarily a good reason for construing the statutory provisions in such a way as will avoid such results.…
> >
> > 30 … To use the words of Lord Nicholls, Parliament was painting with a broad brush. It must be taken to have deliberately decided not to distinguish between cases of non-compliance which are innocent and those which are negligent or committed in bad faith, nor between those which cause prejudice (in the sense of actual loss) and those which do not. It would have been open to Parliament to distinguish between such cases, but it chose not to do so. The conditions stated in section 58(3)(c) and in particular the requirements prescribed in the 2000 Regulations are for the protection of solicitors' clients. Parliament considered that the need to safeguard the interests of clients was so important that it should be secured by providing that, if any of the conditions were not satisfied, the CFA would not be enforceable and the solicitor would not be paid. To use the words of Lord Nicholls again, this is an approach of punishing solicitors pour encourager les

> autres. Such a policy is tough, but it is not irrational. The public interest in protecting solicitors' clients required that the satisfaction of the statutory conditions was an essential prerequisite to the enforcement of CFAs.""

322. In this case, none of the rules in COBS relied upon by Mr Tchenguiz can be attributed to the FCA exercising its rule-making power in terms which, in specifying the consequences of breach, will firmly discourage other firms from flouting them. Instead, the rules are ones which show that the merits of any particular claim based upon their breach should be dealt with on a case-by-case basis. The facts of the present claim perhaps provide an indication as to why the FCA has decided that should be the position.

323. In that regard, Mr Mayall also referred to the decision of Flaux J in *Bank Leumi (UK) Plc v Wachner* (addressed in paragraph 223 above) where, in relation to the client classification rules alleged to have been contravened in that case, he said:

> "It seems to me that if there is a contravention of COB 4.1.9R because the firm has failed to take reasonable care, there will inevitably also be a contravention of COB 4.1.4R and those contraventions will give rise to a right to bring an action for damages under section 150 of FSMA 2000. Furthermore, section 150(2) of the Act contemplates that the entitlement to bring an action for damages for contravention of a Rule may be excluded if the relevant Rule so provides. There is nothing in section 4.1 of COB to suggest that the right to bring a claim for damages for breach of statutory duty in respect of contravention of the classification Rules has been excluded."

324. In that case, the client had brought a counterclaim for damages, which in the event was unsuccessful, and the focus was therefore upon whether or not the relevant rules in COB supported a claim for damages under what is now section 138D of FSMA. For present purposes, that authority does not assist much beyond me being able to say that there is nothing surprising about COBS 3.5.3R and 3.5.6R falling within the scope of section 138D(2) and section 138E(2) of FSMA, but not section 138E(3).

325. All of these cases demonstrate that section 138D(2) and 138E(2) and (3) mean what they say. Whether or not their application points to the client of a firm having an absolute defence to the firm's contractual claim or, instead, a counterclaim for damages (which might provide a defence of set-off, either full or pro tanto) will depend upon the correct categorisation of the rule(s) shown to have been contravened.

326. The short answer to Mr Tchenguiz's case on the NBP Defence, indeed his defence generally in the absence of a counterclaim, is that he is unable to point to a rule in COBS which is not caught by section 138E(2).

H. DISPOSAL

327. IG therefore succeeds on its claim against Mr Tchenguiz. He is liable to IG under clauses 8 and 16(4) of the Customer Agreement.

328. This judgment will be handed down remotely by email to the parties' legal representatives and uploading to The National Archives. The handing down will be adjourned for the purpose of preserving the time for filing any appellant's notice and, if permission to appeal is sought from me, I will make a direction in relation to the filing of any such notice under CPR 52.12 in my order reflecting this judgment. The terms of that order will reflect such matters as the parties are able to agree in the light of the judgment and any remaining matters which fall to be determined in the absence of agreement. In the first instance, I encourage the parties to agree the terms of the order which reflect what I have decided.