Neutral citation number: [2020] EWHC 3178 (Admin)

Case No: CO/4634/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 25 November 2020

Before:
HHJ KAREN WALDEN-SMITH, sitting as a Judge of the High Court

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Between:

THE QUEEN (ON THE APPLICATION OF TF GLOBAL MARKETS (UK) LIMITED (trading as THINKMARKETS)	**Claimant**
- and -	
FINANCIAL OMBUDSMAN SERVICE LIMITED	**Defendant**
- and –	
(1) Mr SAMUEL TAN **(2) MR GIANMARCO FEDELE** **(3) MS ELENE RIBERS**	**Interested Parties**

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GERARD McMEEL QC (instructed by **LOCKE LORD (UK) LLP**) for the **Claimant**
BENJAMIN TANKEL (instructed by **FINANCIAL OMBUDSMAN SERVICE**) for the **Defendant**

Hearing date: 10 November 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ KAREN WALDEN-SMITH, sitting as a Judge of the High Court

Introduction

1. In these judicial review proceedings the Claimant, TF Global Markets (UK) Limited trading as ThinkMarkets ("TF") seeks an order quashing the decisions of the Financial Ombudsman Service Limited ("FOS") with respect to the determinations made upholding the complaints of the three Interested Parties on 28 June 2019, 10 July 2019, and 11 September 2019. I am extremely grateful to both Mr McMeel QC and Mr Tankel for their helpful written and oral submissions, delivered with great expedition.

2. This challenge is not a usual area for the Administrative Court in that it is concerned with allegations of abusive behaviour on a financial trading platform, and the use of algorithms and what are referred to as "hedge-faking scalper robots".

3. TF operates an online platform for dealing in investments, including foreign exchange ("forex") trading and derivatives. Each of the Interested Parties, Mr Samuel Tan, Mr Gianmarco Fedele and Ms Elene Rivers ("the Interested Parties") had been engaged in forex trading on TF's trading platform.

4. The prices displayed on TF's platform can sometimes lag fractionally behind those in the market generally. These fractional time-lags are an inherent feature of the technology which cannot transmit information with perfect simultaneity. "Price latency and arbitrage opportunities" refers to the practice of using algorithms or robots to identify these differences in order to exploit them to generate profit.

5. Purportedly pursuant to its contractual terms of trading, in November 2017 TF purported to suspend thirty accounts, including the accounts of the Interested Parties. TF additionally withheld the sums of €70,000 from Mr Tan, €14,000 from Mr Fedele and £18,000 from Ms Rivers on the basis that it was suspected that they had each taken advantage of the price latency or had been engaged in market manipulation in that their accounts exhibited evidence of arbitrage trading and, in some instances, exhibited evidence of collusion between a number of clients to take advantage of price latency. TF contend that the Interested Parties had been exploiting a vulnerability in their platform where positions could be closed more quickly than they could be opened which was exploited by the use of an algorithm allowing them to consistently earn small profits which gradually built up.

6. The complaints of the three Interested Parties to the FOS were about those decisions of TF to close accounts and withhold the profits. Those complaints were upheld by the Ombudsman in his final decision letters.

7. Permission to bring judicial review proceedings challenging the Ombudsman's final decision letters was granted by Dan Squires QC, sitting as a Deputy High Court Judge, on 21 January 2020 on the basis that it is arguable that TF's interpretation of its contracts with the Interested Parties was correct and that the FOS erred in upholding the complaints.

The Terms and Conditions of Trading

8. Each of the Interested Parties had accepted the Client Terms and Conditions in order to enter into transactions on TF's platform.

9. TF contend that the relevant provisions of the terms of business for the purpose of this issue are Clauses 7.8, 7.10 and Clause 18.2, relating to Market Abuse. It is said on behalf of TF that the purpose of these provisions of the terms of business is to prohibit arbitrage based on price latency and that while exploiting price latency is not unlawful in the United Kingdom, it is regarded by TF and others as being unfair. The FOS contend that TF were relying upon clause 7.10 in closing or suspending these accounts and withholding the profits and it is only that clause which is of relevance.

10. Clause 7.8 of the terms of business provide:

> "We reserve the right to refuse any trades placed by you that we judge to be clearly outside the prevailing market price such that they may be deemed non-market price Transactions, whether due to manifest error or stale, incorrect or broken price feeds. Where we have opened or closed a trade before becoming aware of the price disparity, we may at our absolute discretion either treat that trade as void"

It appears that the word "either" in the last sentence of the clause is otiose and ought to be deleted to make sense of the clause. It may be from an earlier iteration of the clause, but it is clearly a drafting error that it remained in the final form of the terms and conditions. To correct that obvious mistake is consistent with the decisions of the House of Lords in both *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] UKHL 19 and *Investors Compensation Scheme v West Bromwich Building Society* [1997] UKHL 28. It is similarly appropriate to remove the otiose comma after the first word in clause 7.10

11. Clause 7.10 of the terms of the business provides:

> "Internet[,] connectivity delays, and price feed errors may create a situation where the prices displaced on the trading platform do not accurately reflect market rates. ThinkMarkets does not permit the practice of arbitrage, nor does it allow Client to take advantage of price latency. Transactions that rely on price latency or arbitrage opportunities may be revoked at our discretion. ThinkMarkets reserves the right to make the necessary corrections or adjustments on the Account(s) involved, including, but not limited to, withholding any profits may be Client while using these trading tactics. Accounts that rely on arbitrage strategies may at the sole discretion of ThinkMarkets be subject to ThinkMarkets be subject to ThinkMarket's intervention and approval of any Transactions."

12. The relevant passages of the Client's Warranties set out in Clause 18 of TF's terms and conditions provide as follows:

> "18.2.1 When ThinkMarkets executes a Transaction on the Client's behalf, ThinkMarkets may buy or sell on securities exchanges or directly form (sic.) or to another financial institution shares or units in the relevant instrument. The result is that when the Client places Transactions with ThinkMarkets the Client's Transactions can have an impact on the external market for that instrument in addition to the impact it might have on ThinkMarket's price. This creates a possibility of market abuse.
>
> 18.2.2 You represent and warrant to ThinkMarkets and agree that each such representation and warranty is deemed repeated each time you open and close a Transaction and each time you place or cancel an Order that:
>
> (a) You will not place and have not placed a Transaction with ThinkMarkets or otherwise behaved, nor will you behave in a manner that would amount to market abuse and/or market manipulation by you (or by you acting jointly or in collusion with other persons).
>
> (b) You will not have placed a Transaction or order that contravenes any primary or secondary legislation or other law or regulatory rule including in relation to insider dealing or any corporate finance activity.
>
> 18.2.3 In the event that you place any Transaction or order in breach of any of the representations or warranties given above, or ThinkMarkets has grounds for suspecting that you have done so, ThinkMarkets may in our absolute discretion (and with or without giving you notice): (i) close the Transaction or order and any other Transaction or orders that you may have open at the time; (ii) enforce the Transaction against you; or (iii) treat all your Transactions as void, unless and until you produce conclusive evidence that you in fact have not committed the breach of the representations and warranties above.
>
> 18.2.4 The exercise by ThinkMarkets of its rights under this clause shall not affect any other right of ThinkMarkets, under this Agreement or law, whether in respect of that Transaction or order, or any other Transaction or order."

13. By clause 24.1 of the Terms and Conditions, the Agreement comes into force on the day it is completed by the Client and continues in force until it is terminated either by the Client or TF. Either party is entitled to terminate the Agreement by written notice to the other to take effect immediately or on such date as may be specified in such notice. Any termination is without prejudice to the completion of any Transaction or Transactions already initiated or outstanding at the time of the termination (clause

24.1.1) and without prejudice to any outstanding obligations or accrued rights (clause 24.1.2).

Statutory Framework

14. TF is regulated by the Financial Conduct Authority ("FCA") pursuant to the provisions of the Financial Services and Markets Act 2000 ("FSMA 2000"). Dealing in investments is a regulated activity under FSMA 2000. The FCA's rules for the conduct of business implements in the UK the EU Markets in Financial Instruments Directive ("MiFID") which provides detailed rules for, amongst other things, the execution of transactions. In operating its trading platform, TF has high level obligations to its customers pursuant to the scheme of the FSMA 2000 both to act with integrity and to treat those customers fairly.

15. TF submits to the compulsory jurisdiction of the FOS pursuant to the provisions of Part XVI of the FSMA 2000. The FOS was established in order to provide an independent and informal complaint resolution procedure for the financial services industry without the need to resort to the courts. Section 225(1) of the FSMA 2000 sets out that:

> "This Part provides for a scheme under which certain disputes may be resolved quickly and with minimum formality by an independent person."

16. Section 225(4) and paragraphs 13 and 14 of Schedule 17 to the FSMA 2000 provide for the making of rules covering the operation and jurisdiction. These rules are set out in the FCA Handbook under the section entitled "Dispute Resolution: Complaints ("DISP"). These rules set out the procedures to be followed and matters to be taken into account by the Ombudsman when determining a complaint. DISP 3.6.4R (R denoting a rule) sets out the statutory duty contained within section 228 of the FSMA 2000 that complaints to the FOS are determined

> "by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case"

17. DISP 3.6.4R of the FCA Handbook provides:

> "In considering what is fair and reasonable in all the circumstances of the case, the Ombudsman will take into account:
>
> (1) relevant
>
> (a) law and regulations;
>
> (b) regulators' rules, guidance and standards;
>
> (c) codes of practice; and
>
> (2) (where appropriate) what he considers to have been good industry practice at the relevant time."

18. There is an iterative process in determining a complaint with successive rounds of representations leading to a desk-based decision. There is a statute-based lack of formality in the process which does not require disclosure or the provision of witness statements.

The Complaints

19. Mr Tan, the first Interested Party, complained to TF about the withholding of profits of €70,000. The initial complaint was considered by TF pursuant to its internal complaints handling scheme and on 23 January 2018 the complaint was rejected.

20. Mr Tan then complained to the FOS. The determination of complaints to the FOS is an iterative process. An adjudicator initially rejected the complaint finding that it was more likely than not that Mr Tan was operating in collusion with other accounts using a latency arbitrage system and that he had not been acting in good faith.

21. Mr Tan did not accept the determination of the adjudicator and the complaint was referred to an Ombudsman, Mr Roy Kuku. Pursuant to the provisions of DISP 3.5.4R (2) and (3) the assessment of a case worker is a provisional assessment and an Ombudsman may also issue a provisional decision, which is what happened in Mr Tan's case. DISP 3.5.4R provides:

> "If the Ombudsman decides that an investigation is necessary, he will then:
>
> (1) ensure both parties have been given an opportunity of making representations;
>
> (2) send both parties a provisional assessment, setting out his reasons and a time limit within which either party must respond; and
>
> (3) if either party indicates disagreement with the provisional assessment within that time limit, proceed to determination"

22. The Ombudsman's Provisional Decision was that the complaint should be upheld and that Mr Tan's profits together with interest and an award of £250 should be paid to him by TF. Further representations were made by TF in response to the Provisional Decision. Upon reaching a final determination on a complaint, the Ombudsman is obliged by virtue of section 228(3) of the FSMA 2000 to provide a written statement of his determination to both parties. That statement must give the Ombudsman's reasons for his determination and require the person making the complaint, in this case, Mr Tan, to notify whether he accepts or rejects the determination. If there is acceptance of the determination within the specified time, the Final Decision is binding upon both parties. These provisions are set out in section 228(4) and (5) of the FSMA 2000.

23. On 11 September 2019 the Final Decision was issued, it being held that it was no more than a possibility that Mr Tan had conducted abusive trading, applying a balance of probabilities test.

24. The complaints from Mr Fedele and Ms Rivers, respectively the second and third Interested Parties, followed much the same course. Mr Fedele complained about the withholding of €14,000 in profits, Ms Rivers complained about the withholding of £18,000. In both cases the complaints were rejected by TF's internal complaints procedure and on complaint to the FOS an adjudicator initially rejected both complaints.

25. Mr Fedele did not accept the determination of the adjudicator and Mr Fedele's complaint was also referred to the Ombudsman, Mr Roy Kuku whose Provisional and Final Decision was that applying a balance of probabilities test, it was no more than a possibility that Mr Fedele had conducted abusive trading. The Final Decision that Mr Fedele should have his profits released together with interest and £250 was issued on 10 July 2019.

26. Similarly, Ms Rivers did not accept the determination of the adjudicator and her complaint was also referred to the same Ombudsman, Mr Roy Kuku. His Provisional and Final Decision was that, on applying a balance of probabilities test, it was no more than a possibility that Ms Rivers had conducted abusive trading. The Final Decision that Ms Rivers should have his profits released together with interest and a £250 award was issued on 28 June 2019.

27. The Final Decisions became binding upon TF upon the acceptance of those decisions by the complainants. The only means of challenge is through judicial review.

28. The application to review the final decisions of the Ombudsman was not made until 22 November 2019. None of the applications were made promptly within the rules and, save for the application for permission to review the Final Decision made for Mr Tan, the applications were outside three months' time period for bringing a judicial review challenge. In granting permission to bring this judicial review challenge, an extension of time was given for the challenges to the Final Decision made for Mr Fedele and Ms Rivers on the grounds that the three decisions turn on the same issue.

Contractual construction

29. This judicial review rests upon the correct construction of TF's terms and conditions which governs the relationship between TF and each of the Interested Parties. In summary, TF contends that its terms and conditions allows it to exercise a judgment as to whether arbitrage based upon price latency has taken place, the only constraint on the exercise of that contractual discretion being that it is not to be used arbitrarily, capriciously or unreasonably as the principle identified in *Braganza v BP Shipping Limited* [2015] UKSC 17 ("the Braganza duty").

30. The Ombudsman contends that TF's contractual discretion only arises if arbitrage based upon price latency had in fact taken place which required a determination of fact rather than an exercise of judgment and it was consequently for the Ombudsman to determine on the balance of probabilities whether arbitrage had taken place. TF contend that in undertaking that role the Ombudsman has wrongly construed the terms of the contract and has exceeded the constraints of his role. TF contend that the reasonable suspicion that the Interested Parties were using algorithms in order to unfairly make use of the price latency was sufficient.

31. It is agreed by the parties that the leading authority with respect to the principles engaged in the interpretation of contracts is the speech of Lord Hodge in *Wood v Capital Insurance Services Limited* [2017] UKSC 24, where in paragraph 10 he set out:

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning."

and further, in paragraphs 11, 12 and 13:

> "Interpretation is, as Lord Clarke stated in *Rainy Sky* (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause…; and it must also be alive to the possibility that one side may agree to something which with hindsight did not service his interest… Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that negotiators were not able to agree more precise terms.
>
> This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated…To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each
>
> Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement."

32. A fundamental area of dispute between TF and the FOS is whether TF were relying, and were obliged to rely, upon clause 7.10 of the terms and conditions in order to be

able to close the accounts and withhold the profits, as the FOS now seek to say. If it were the case that TF could only rely upon clause 7.10 to suspend the accounts and withhold the profits of the Interested Parties then FOS contend that the wording of that clause requires TF to have been satisfied, on the balance of probabilities, that the Interested Parties had been operating the practice of arbitrage by taking advantage of price latency.

33. In construing the Ombudsman's final decision letters it is plainly important that they are *"read as a whole and in a common sense, and certainly not in a legalistic, way"* see *R (Garrison Investment Analysis) v FOS* [2006] EWHC 2466 (Admin.). As Irwin J (as he then was) held in *R (Williams) v FOS* [2008] EWHC 2142 (Admin.) the decision letters of the Ombudsman *"are reports, not pleadings. A party to a complaint must know why he has won, or perhaps more importantly why he has lost, in clear and comprehensible terms. That is the requirement, but that is the only requirement and it can be met in a reasonably flexible way"* and Thirlwall J (as she then was) in *Westcott Financial Services Ltd v FOS* [2014] EWHC 2972 held *"Decision letters are not statutes. They are not legal documents. They set out decisions and explain them. They are to be read and interpreted in a common sense way."*

34. In reading the Ombudsman's final decision letters for the Interested Parties in a common sense way, and not with the requirements of a legal opinion, it is clear that the Ombudsman was aware from the papers submitted by TF that TF did not limit themselves to relying only upon clause 7.10. Reference is made by the Ombudsman to the legal advice document relied upon by TF which highlights the terms and conditions relevant to the three complaints as being clauses 7.3, 7.4, 7.8, 7.10, 11.1 and 11.2; the warranties contained in 18.1 and 18.2; and the indemnity provisions contained in clauses 17.2, 17.4, and 17.5 and a concluding section in that legal advice that TF could rely especially on clauses 7 and 18.

35. It is also clear from a common sense reading of his final decision letters, that the Ombudsman came to a conclusion that clause 7.10 required TF to be satisfied that the prohibited trading was more probable than not rather than just a possibility. He did not consider the relevance of clause 7.8 and concluded that while clause 18.2.3 allowed TF to take action upon a suspicion of prohibited colluded trading, that he did *"consider that clause 18.2.3 could reasonably have the effect of diluting the standard in clause 7.10"*.

36. It is argued on behalf of the FOS that clause 7.8 cannot be relied upon by TF as it is concerned with obvious mistakes made by TF or its agents with respect to price whereas clause 7.10 is concerned with marginal delays in prices which are not mistakes but as a consequence of natural limitations of the technology. As is set out in paragraph 9 above, clause 7.8 gives TF a discretion to "refuse any trades placed by you that we judge to be clearly outside the prevailing market price such that they may be deemed non-market price Transactions, whether due to manifest error or stale, incorrect or broken price feeds..." Manifest error is defined as follows:

> "**Manifest Error**. An error, omission or misquote (including any misquote by our dealer) which by fault of either of us or any third party is materially and clearly incorrect when taking into account market conditions and quotes in Markets or

> Underlying Instruments in the prevailing market at that time. It may include an incorrect price, date, time Market or currency pair or any error or lack of clarity of any information, source, commentator, official result or pronouncement."

37. It is, in my judgment, for TF to determine whether there has been a trade which is judged by TF to be clearly outside the prevailing market price. The FOS rely upon the determination of HHJ Waksman QC (as he then was) in *Shurbanova v Forex Capital Market Limited* [2017] EWHC 2133 where he found that a trade which had relied upon price latency could not *"sensibly, rationally or fairly be described as a Manifest Error"* given that the trading platform in that case was specifically designed so that the prices changed relatively slowly and it could not be said that any error was manifest *"... It is not like putting a decimal point in the wrong place or mistakenly quoting silver instead of gold."* While there are undoubted similarities between the terms and conditions relevant in *Shurbanova v Forex* there are distinct and important differences in the words used in the two different contracts. Pursuant to the terms and conditions of the contract entered into by the Interested Parties in this case TF do not need to rely upon there being a manifest error in order to refuse a trade pursuant to clause 7.8. There is a very important disjunctive "or" in clause 7.8 so that the deemed non-market price transactions can be due to manifest error or *"stale, incorrect or broken price feeds."* Price latency as a consequence of the delays in the technology creates an incorrect or broken price feed and pursuant to the provisions of clause 7.8, TF are entitled to refuse any trade that TF, within its properly exercised contractual discretion, judge to be outside the prevailing market price. While the comparison with the reasoning in *Shurbanova* is initially attractive, HHJ Waksman QC was construing a differently worded clause which had a different meaning.

38. It is notable that, while being careful not to subject the Ombudsman's final decision letter to the same level of scrutiny that a legal opinion or judgment would be subjected to, it is clear from the face of the decision letter that the Ombudsman mentions clause 7.8, thereby acknowledging that clause 7.8 was being relied upon by TF, but does not then proceed to analyse it. He sets out that he mentions clause 7.8 because *"ThinkMarkets* [TF] *says it was justified to withhold Mr T's funds because there were earned from his prohibited trading – under sections 7.8 and 7.10 of the terms for his account."* It is not correct that TF should be limited to clause 7.10 and whether a true construction of that clause permitted TF to close accounts and withhold profits.

39. The Ombudsman concentrates upon clause 7.10, making the determination that clause 7.10 requires more than a suspicion and therefore does not engage the contractual discretion. As the Ombudsman did not analyse clause 7.8 it is not apparent as to why he decided that it did not apply other than he considered clause 7.10 was more directed towards the prohibition of transactions that rely on price latency. I agree that clause 7.10 is more specifically directed towards price latency caused by delays in internet connectivity and the prohibition on the practice of arbitrage, but that does not in my judgment prohibit TF being also able to rely upon clause 7.8 to refuse trades for price latency, subject to its obligation to act fairly in a way which is not arbitrary, capricious or irrational (the Braganza Duty). In interpreting clause 7.8 in this way does not result in clause 7.10 being otiose or redundant. Clause 7.10 is a specific example of trades being undertaken which are outside the prevailing market price.

This interrelationship between clauses 7.8 and 7.10 assists in the correct interpretation of clause 7.10.

40. As I have already set out, the Ombudsman concentrated in his final decision letter upon the wording of clause 7.10 and, in particular, the sentence *"Transactions <u>that</u>* [his emphasis] *rely on price latency or arbitrage opportunities may be revoked at our discretion."* Clearly TF have a discretion whether or not to revoke transactions based on price latency or arbitrage opportunities because of the words "may be revoked at our discretion". The issue between FOS and TF is whether, in order to be able to exercise that discretion, TF have to be satisfied (on the balance of probabilities) that there has been an advantage taken with respect to the price latency or arbitrage, or whether it is sufficient that TF has a reasonable suspicion that there has been arbitrage.

41. The Ombudsman construed clause 7.10 as follows:

> "Anti-market abuse of anti-trade abuse terms/clauses are not uncommon within the terms of service for platform or brokering services in the sector. However, their wordings sometime differ. Some trigger the firm's right to action on the basis of suspicion or possibility of market abuse, where market abuse may have taken place. Others can require proof of more than a possibility before the firm's right to action is triggered and I consider that ThinkMarkets' terms are in this category.
>
> The quote above refers to the revocation of transactions "that" rely on price latency or arbitrage – not transactions that *may have* or *possibly* relied on price latency or arbitrage. It also refers to withholding profits made by clients "while using" such tactics –not clients who *may have* or *possibly* use such tactics. Overally, I consider that ThinkMarkets terms requires it to satisfy itself that prohibited trading suspected in any case was more than a possibility and that it was more probable than not."

42. In my judgment, the Ombudsman erred in his construction of clause 7.10 as he failed to read the clause in the context of the entire contract. While it is possible to say that the meaning of the words "that rely on" means that in order for the discretion to come into play, there must first be a determination on the balance of probabilities that there have been transactions that rely on price latency or arbitrage, by concentrating solely on the words in clause 7.10 and giving those words a literal meaning, the Ombudsman has fallen into error. As Lord Hodge said in *Wood "The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement…the court must consider the contract as a whole."*

43. In this case, TF have set out in clause 7.8 that it reserves the right, in other words has a contractual discretion, to refuse trades that TF judges is outside the prevailing market price. In clause 7.10 where reference is expressly made to transactions that rely on price latency or arbitrage, the same contractual discretion applies as price latency or arbitrage is a specific example of trading outside the prevailing market price. To limit TF's ability to prohibit such trading by reason of a literal

interpretation of the word "that" and an elevation of the importance of that one word goes against the principles of the interpretation of contracts.

44. The words in the clause that transactions that rely on price latency or arbitrage opportunities "may be revoked at our discretion", while relied upon by the FOS as showing a clear distinction in language do, in my judgment, support a reading of the clause that what was envisaged was a discretionary right to intervene if there was a suspicion of such trading. Such an interpretation is in keeping with the rest of the contract.

45. In construing the contract, it is for the court to ascertain the objective meaning of the language used. It is essential for the court not to engage in a "literalist exercise" focusing on the wording of a particular clause and it is clear from the reading of the contract as a whole and the regular use of discretionary words through the contract, such as "which we judge" (used in clause 7.8) or "in our absolute discretion" (used in clause 11.1.4) or "acting in our reasonable sole discretion" (clause 12.3.7), that this contract was drafted to give TF contractual discretion. I do not consider that the wording of clause 7.10 contains ambiguity which would engage the *contra proferentum* rule.

46. TF also rely upon the warranty contained in clause 18.2 under the heading "Market Abuse" and, in particular, that

> "18.2.2 (a)You will not place and have not placed a Transaction with ThinkMarkets or otherwise behaved, nor will you behave in a manner that would amount to market abuse and/or market manipulation by you (or by you acting jointly or in collusion with other persons).
>
> 18.2.2(b) …
>
> 18.2.3 In the event that you place any Transaction or order in breach of any of the representations or warranties given above, or ThinkMarkets has grounds for suspecting that you have done so, ThinkMarkets may in our absolute discretion (and with or without giving you notice): (i) close the Transaction or order and any other Transaction or orders that you may have open at the time, (ii) enforce the Transaction against you; or (iii) treat all your Transactions as void, unless and until you produce conclusive evidence that you in fact have not committed the reach of the representations and warranties above."

47. Clause 18.2 contains a contractual discretion, which TF must not exercise arbitrarily, capriciously or unreasonably, to treat all transactions as void, which would entitle TF to close an account and retain profits made on any such transaction. The Ombudsman set out in his final decision letters that he acknowledges that clause 18.2.3 *"allows ThinkMarkets to take action upon suspicion of prohibited colluded trading"* but does not agree that the balance of probabilities does not relate to this issue as *"The core issues remain ThinkMarkets revocation of Mr T's trades and withholding his funds under clause 7.10. I do not consider that clause 18.2.3 could reasonably have the effect of diluting the standard in clause 7.10."*

48. Again, without falling into the error of scrutinising the final decision letter as if it were a legal document, this analysis fails to consider the contract as a whole and concentrates on the wording of clause 7.10 without taking into account that by virtue of clause 18.2.2, the customer provides a warranty with each transaction not to behave in a manner that amounts to market manipulation. While the FOS relies upon the introductory clause in 18.2 and the heading "market abuse" it is clear from a reading of the entirety of clause 18.2 that "market abuse" is to be interpreted as including "market manipulation". Insofar as this is relevant, it is consistent with recital 7 of the "Market Abuse Regulation" (Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 which provides that:

> "Market abuse is a concept that encompasses unlawful behaviour in the financial markets and, for the purposes of this Regulation, it should be understood to consist of insider dealing, unlawful disclosure of inside information and market manipulation"

49. There is nothing within clause 18.2 to suggest that market manipulation is limited to that which has an artificially distorting consequence on an external market. TF do not suggest that the behaviour they suspected fell into the category of distorting an external market, but it is said that arbitrage or the taking advantage of price latency is a manipulation of the market. While "market abuse" has a specific technical meaning, that does not apply to market manipulation and in my judgment the Ombudsman erred in finding that TF were not entitled to rely upon the warranty contained in clause 18.2.

Conclusion

50. In light of the findings above with respect to the correct construction of the terms and conditions, the Ombudsman erred in his final decision with respect to each of the Interested Parties in deciding on the balance of probabilities that the Interested Parties had not been trading by taking advantage of price latency or being engaged in arbitrage. As a consequence, his three final decision letters dated 28 June 2019, 10 July 2019 and 11 September 2019 will be quashed.

51. It is not for this court to determine whether TF exercised its discretion reasonably and this matter will need to be remitted to the Ombudsman. The Ombudsman will need to consider in each individual case whether TF exercised its discretion reasonably, that is not arbitrarily, capriciously or unreasonably. This will require the Ombudsman to give detailed consideration to the evidence available to TF at the time of making the decision to close the accounts and withhold the profits of each of the individuals.

52. This review is therefore allowed and the Final Decision letters are quashed.