

ENGLAND AND WALES / JUDGMENT

Spreadex Ltd v Cochrane

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Neutral Citation Number: [2012] EWHC 1290 (Comm) IN THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION COMMERCIAL COURT Claim no. 2011 Folio 626 Date: 18 May 2012 Before: David Donaldson Q. C. (sitting as a Deputy High Court Judge)

- ----- BETWEEN: SPREADEX LIMITED Claimant. -and- COLIN COCHRANE
Defendant
- -----
- ----- Mr Richard Richie (instructed by Spreadex Legal) for the Claimant The
Defendant in person
- -----

Judgment

The claimant is a spread betting bookmaker, offering to accept bets on movements in the prices of, among other things, stocks, shares, and commodities and their associated indexes, and authorised and regulated for that purpose by the Financial Services Authority. Though it is possible to place and close out trades with the claimant by telephone, much of that activity takes place on line through the claimant's interactive web-site. On 21 October 2010 the defendant visited that site. After seeking brief details of his employment, gross income, and savings, and whether he was a property owner, it asked him to specify a password, a memorable question and answer, and a bank account number. Finally, it instructed him to: "Click on "View" to read our US based policy, Client Declaration, Customer Agreement, Risk Warning Notice and Order Execution Policy. Once read and understood, please click on "Agree" to signify your agreement to the terms. It then added: Please call us on 0800 if you have any questions. Thank you for taking the time to complete the application." This was followed by a "button" marked "Submit". Having complied with the various requests and pressed the indicated buttons, the defendant would -as I was told - have been able to trade immediately, though in the event he did not do so until 9 November 2010. After a few initial trades he moved mainly to contracts in silver and gold, and an occasional foray into crude oil, with a significant number of trades each month. He appears to have had considerable success and by the beginning of May 2011 had built up a credit balance of more than ,60,000. On 2 May 2011 he went on line in the morning. It was a Bank holiday and as he told the court in his witness statement he was in the house of his girlfriend together with her and her young son, whom I will refer to shortly as C. As he made his trades, he explained it to C as a kind of guessing game. At about 2.15 p.m., were he made his last trade, leaving only two trades open, a

matching buy and a sell in gold with a loss of about £9,000. He then left the house to drive his car to a garage for servicing and thereafter to spend the afternoon with a male friend. In the event, because the friend was not feeling well, he stayed two days in his house, during which time - as the friend has confirmed - he did not use a computer. When he picked up his car and recharged his mobile telephone, he found a message from the claimant asking him to ring. On doing so, he was told that his account was by almost ,50,000: almost immediately he instructed the claimant to close out all his open positions. Returning to his girlfriend's house and going on line he found that there had been numerous trades in his absence, not only in gold and silver but also in crude oil. His girl friend said that his computer had been used by C, and C told him that he had been playing games on it. The defendant promptly explained to the claimant by telephone and email what he said had happened. The claimant's complaints department, responding on 23 May 2011, rejected his entreaties and insisted on immediate payment, indicating only that he could within six months ask the Financial Services Ombudsman to decide the dispute. Within one day however the claimant had started the present action. The claimant seeks summary judgment on its claim, contending that the defendant has no arguable defence. In doing so, it concedes for the purpose of the present application that the court must accept the accuracy of the defendant's account of the events of 2 to 4 May 2012, and of the supporting evidence of three other witnesses (not including C), and that the claimant cannot establish that any of the trades after 2.15 p.m. on 2 May 2011 were made either by the defendant himself or by any other person actually or ostensibly authorised by him to place them. Indeed, it is the claimant's case that any such questions are irrelevant to its right of recovery. This is said to be the result of its standard conditions contained in the Customer Agreement to which the defendant had assented by his click online on 21 October 2010. For this purpose the claimant relies primarily on Clause 10 of the Customer Agreement, which, having indicated that the customer can conduct his trading via the claimant's online trading platform at www.spreadex.com, states in sub-clause (3) that 1 It has an alternative argument based on another clause, which I will consider later. "Your password must be declared, together with your account number, when you wish to access your account. You will be deemed to have authorised all trading under your account number..." Counsel for the claimant suggested that the second sentence would only apply where a password had been declared. Had this been intended, however, one would expect it to be stated expressly. Though unclearly articulated, Counsel's argument appeared to suggest that the second sentence was conditional on the first sentence. This cannot however be so, since the first sentence addresses a situation where the customer himself is intending to trade and there can therefore be no lack of actual authorisation. The essential issue in this case is whether Clause 10(3) can be invoked by the claimant to replace the lack of actual or ostensible authority which for the purpose of the hearing before me I am required to assume. It involves two linked sub-questions. It is the claimant's contention that they can be determined by the court without the need for a trial. Consistently, it accepts that it is also open to the court on the present hearing to determine them against the claimant, and through its counsel expressly waived the need for a formal cross-application by the defendant for summary judgment. Firstly, Clause 10(3) can only assist the claimant if it is binding upon the customer because it forms part of a contract. That necessitates the identification of the contract on which the claimant relies. In its application, the claimant simply referred to the Customer Agreement,

though in argument its counsel accepted that the matter required a much more precise focus. Secondly, since the defendant in the present case is plainly a consumer within the meaning of the Unfair Terms in Consumer Contracts Regulations, 1999 ("UTCCR") and Clause 10(3) was not individually negotiated, I have to determine whether it is "unfair" and therefore not binding on the defendant (see regulation 8(1)). That involves an assessment as to whether "contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations, to the detriment of the consumer." (reg. 5(1). Consideration of this question necessarily presupposes that the claimant has established the existence of a contract containing Clause 10(3) and that the rights and obligations of the parties under it have been identified. In very large part the document entitled "Customer Agreement" does no more than set out the terms which will form part of each individual contract which will be later created if and when the customer makes an offer for a particular trade and the claimant accepts it. In the present case however one is concerned not with the terms of a particular trade (or a number of them) but with whether a contract for such a trade ever came into existence. Clause 10(3) can therefore be of no assistance to the claimant unless it is shown to form part of some binding contract which pre-exists the individual trades on which the claimant contends that the defendant is liable. In seeking to identify such a pre-existing contract counsel for the claimant faced significant difficulties. In particular he was unable to point to any promise or commitment by the claimant which might form part of such a contract and provide the consideration necessary to make it legally binding. Unsurprisingly, counsel for the claimant did not suggest that it had an obligation to enter into any trade, and indeed Clause 29(1) explicitly states that: "We have the right at our absolute discretion to refuse to accept part or all of any bet." Counsel submitted that the necessary contractual consideration could be found in the grant of access to the on-line platform, but this submission ignored Clause 10(15) which provides that: "We reserve the right to reduce or remove altogether our online service at any time." The same would apply more generally to the maintenance of an account in the name of the customer (including the provision of an account number and the registration of a password), since under Clause 29(2): "We reserve the right to close or suspend your account at any time." The consideration necessary to support a contract can of course be found in conduct alone, even if not required by a contractual obligation, if it is a benefit provided or a detriment suffered. That test is, however, in my view not satisfied by arrangements which merely facilitate the making by the two parties of ad hoc contracts in the form of the individual trades. The provision of an on-line interactive platform is in effect simply a more modern equivalent of the expressed readiness of a potential contracting party (also covered in the Consumer Agreement) to enter into contracts by receiving and responding orally to telephone calls. Accordingly, the claimant has failed to establish the existence of any legal contract to host and give binding effect to Clause 10(3) so as to supplant the need for the individual trades to be concluded or authorised by the defendant. Even if the provision of the on-line platform were, as the claimant submits, to be treated as consideration for the claimant's suggested contract, its argument faces further problems under the UTCCR. Most fundamentally, regulation 5(1) is concerned with the balance between rights and obligations. And, under the claimant's suggested pre-trade contract it would assume no obligations and, correlatively, the customer would have no rights. By contrast, under Clause 10(3) the customer would be made liable for any trade on the

account not made or authorised by him. The result is in my view, and most clearly, a significant imbalance in the parties' rights and obligations. There remains the further question whether that imbalance is "contrary to good faith". For this purpose the court is required by regulation 6(1) to take into account "the nature of the goods or services for which the contract was concluded" and to refer "to all the circumstances attending the conclusion of the contract and to all the other terms of the contract ..." A self-reminder is here appropriate that the relevant "services" to which the claimant's suggested contract would relate are the trading platform through which the individual trading contracts are made, not the services provided under those contracts if they come into being. Importantly, the Regulations do not operate by precluding reliance on the contractual term in cases where it would be unfair to do so. Their prescription is absolute and binary: the term is either unfair, and hence unenforceable, or not. Its unfairness must therefore be judged by reference to all situations in which it might potentially be applicable. It appears to me in practice improbable that trades would be made by a hacker, since there would be no benefit to him unless on later closure the trade turned out favourably and he was able to divert payment of the profit to some other bank account than that nominated by the customer. Other scenarios are however more easily conceivable. One such, and reflected in what the defendant says occurred here, is a case where a child succeeds without the customer's authorisation in accessing the account. It is arguable that some element of protection for the claimant may be consistent with fairness for the purpose of the judgment to be made under the UTCCR. A more appealing case might have been advanced if, for example, the clause had sought to fix the customer with liability for an unauthorised trade by a third party only if it is facilitated by the negligence of the customer, even perhaps with a reversed burden of proof requiring him to establish the contrary. Whether or not such a clause would have passed muster as "fair" under the UTCCR is a hypothetical question which it would be inappropriate for me to seek to determine, and on which I should not be treated as expressing any view. I am however clear that without at least such limitations the inclusion of the second sentence of Clause 10(3) undoubtedly resulted not only in a significant imbalance in the parties' rights and obligations but one which viewed overall is unfair within the meaning of the UTCCR. A further, and compounding, factor to be taken into account is the manner in which the clause was incorporated into any contract (if there was one). As I described earlier, the potential customer was told that four documents, including the Customer Agreement, could be viewed elsewhere on-line by clicking "View". Many, one might suspect most, would have passed up on that invitation and proceeded directly to click on "Agree", even though it was suggested that they should do so only when they had read and understood the documents. Even if, exceptionally, the defendant in fact chose to look at the documents, he would have been faced in the Customer Agreement alone with 49 pages containing the same number of closely printed and complex paragraphs. It would have come close to a miracle if he had read the second sentence of Clause 10(3), let alone appreciated its purport or implications, and it would have been quite irrational for the claimant to assume that he had². This was an entirely inadequate way to seek to make the customer liable for any potential trades which he did not authorise, and is a further factor rendering the second sentence of Clause 10(3) an unfair term. The claimant sought in the alternative to rely on Clause 13(5) of the Customer Agreement, which forms part of a Clause headed "Communications" and reads: 2 In

most cases, the limited time spent on the on-line application would in any event probably preclude any serious perusal of the documents. "You acknowledge and agree that any communication transmitted by you or on your behalf is made at your risk and you authorise us to rely and act on, and treat as fully authorised and binding upon you, any communication (whether or not in writing) that we reasonably believe to have been made or transmitted by you or on your behalf by any agent or intermediary whom we reasonably believe to have been duly authorised by you. You acknowledge that we will rely on your account number and/or password to identify you and agree that you will not disclose these details to any person who is not duly authorised by you. If you suspect that your account number and/or password has been learnt or may be used by any other person then you must notify us immediately." The word "communication" is not the most natural description for the making of a trade via an online platform. Trading online is also specifically covered, and at length, by Clause 10, with the question of authority being addressed in Clause 10(3). And, unlike Clause 10(3), Clause 13(5) is expressly qualified by the need for reasonable belief: parallel applicability of the two clauses would therefore lead to contradictory tests. I do not therefore consider that Clause 13 - and in particular Clause 13(5) - is applicable to a trade effected through the online platform. Counsel for the claimant sought to circumvent this problem by suggesting that once Clause 10(3) had been "knocked out" by the UTCCR, Clause 13(5) could be interpreted free of Clause 10(3)'s competing existence. This is fallacious. The UTCCR does not remove a term from a contract: it only specifies that it is not effective. If that were wrong and Clause 13(5) were applicable to on-line trading, it would be necessary to address the question of reasonable belief in that context. The second sentence suggests that it would be reasonable for the claimant to treat as authorised any communication accompanied by either the account number or the password. This was also the sense of the claimant's submissions, subject to the caveat that there might be some extraneous feature - such as an unusual number of failed prior attempts to log-on or oddities in the pattern of trading - which could render the belief unreasonable. So interpreted, Clause 13(5) would in its application be (if at all) only slightly more favourable to the customer than Clause 10(3). The difference would not lead me to alter the conclusions in paragraphs 17 to 21 above. In consequence, I refuse to order the summary judgment sought by the claimant. I will also make a declaration to the effect that the claimant cannot recover save in respect of any trades which it shows to have been effected by (a) the defendant or (b) any other person acting with the actual or ostensible authority of the defendant. In doing so, I must not be taken as accepting that a claim advanced on that basis is encompassed within the proceedings as presently formulated. It may therefore be that in the absence of a suitable amendment, if permitted by a future order of the court, the action would fall to be dismissed.

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