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Case No: 2010 Folio 221

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

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings, London EC4A 1NL

Date: Thursday 15 March 2012

Before :

MRS JUSTICE GLOSTER, DBE

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Between :

Europtíon Strategic Fund Limited	**Claimant**
- and -	
Skandinaviska Enskilda Banken AB	**Defendant**

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- -

Sharif Shivji Esq (instructed by **Stewarts Law LLP**) for the **Claimant**
Daniel Toledano Esq, QC & Sam O'Leary Esq
(instructed by **Clifford Chance LLP**) for the **Defendant**
Hearing dates: 18th-22nd July 2011; and 25th, 26th and 29th July 2011
Further written submissions received on 2nd August 2011

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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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MRS JUSTICE GLOSTER, DBE

Mrs Justice Gloster DBE:

Introduction

1. The claimant, Euroption Strategic Fund Limited ("Euroption"), is an investment fund incorporated in the British Virgin Islands. Its principal trading activity at the material time was options trading on European exchanges, including the London International Financial Futures Exchange ("LIFFE"). In particular, at the material time, Euroption traded European equity options.

2. At all material times, Option Strategist Limited ("OSL"), a company also incorporated in the British Virgin Islands, acted as its investment manager. This role was in fact performed by Stefano Scattolon ("Mr. Scattolon"), a trading advisor employed by Alternative Strategies Trading SA, a company incorporated in Switzerland and which acted as trading advisor to OSL. Effectively, Mr. Scattolon was Euroption's principal trader.

3. The Defendant, Skandinaviska Enskilda Banken AB ("SEB"), is a Swedish investment bank, which has a branch in London and significant operations in the United Kingdom. SEB acted as Euroption's clearing broker between May and October 2008 pursuant to an Exchange Traded Futures & Options Mandate entered into on 12 May 2008 ("the Mandate"). Settlement of exchange-traded derivatives takes place through a clearing house associated with a particular exchange. Only clearing members of an exchange (such as SEB) can enter into contracts with the clearing house. Therefore, non-members, such as Euroption, had to contract with a clearing member, such as SEB, which in turn held an equivalent contract with the clearing house.

4. Clause 11 of the Mandate obliged Euroption to pay margin when asked to do so by SEB to support the exposure on Euroption's portfolio. Pursuant to clause 11, where Euroption at any time failed to provide sufficient margin or other payment due in respect of any transaction as required, SEB was entitled "to close out [Euroption's] open contracts at any time without reference to [Euroption]". SEB was also entitled, at its discretion, to close out Euroption's positions having made reasonable efforts to contact Euroption, *inter alia*, "at any time SEB deem[ed] it necessary for its own protection".

5. Euroption employed an execution broker called Tavira Securities Limited ("TSL"). When Euroption had identified a trade that it wished to enter into, such trades were executed by TSL and given up to SEB for clearing. The result was a contract between Euroption and SEB as principals and a back-to-back contract between SEB and the relevant clearing house.

6. In the action Euroption sues SEB in respect of what Euroption alleges was SEB's negligent conduct of a forced liquidation or close out of Euroption's portfolio of equity index options in October 2008, following several missed margin calls by Euroption. Originally Euroption claimed damages for breach of contract, negligence and/or breach of fiduciary duty, but by the end of the trial the breach of fiduciary duty claim had been withdrawn. Euroption complains that the person SEB appointed to conduct the close out appeared to have no real understanding of options trading or the

risks faced by the portfolio in volatile markets and that, in the circumstances, the close out was slow, disorganised and often misdirected.

7. The period in question was a time of great turbulence in the financial markets. The crisis caused a massive increase in volatility in the markets in which Europtïon had positions. It also caused markets to fall heavily. It was common ground that, at the start of the week of 6 October 2008, Europtïon had enormous open positions which, taken as a whole, were weighted heavily towards what amounted to a bet that markets would rise. It was also common ground that, as a result, Europtïon's margin commitments on its open positions had dramatically increased over a short period of time and that Europtïon could not meet those commitments. After the close of the European markets on 9 October 2008, markets around the world plummeted.

8. From 7 October 2008, SEB made calls for Europtïon to pay margin to cover this exposure which Europtïon did not meet or respond to. At the same time, the clearing house was making margin calls on SEB in respect of the back-to-back contracts referred to above. SEB was obliged to meet, and did meet, those margin calls.

9. SEB gave Europtïon the opportunity to meet its margin obligations and/or reduce its positions between 7 and 9 October but Europtïon did not take that opportunity. While some positions were closed out, many new positions were opened.

10. It is common ground that, in the circumstances, SEB was contractually entitled to conduct a close out of Europtïon's account and to choose the moment when it exercised that right (subject to its overriding regulatory obligations). It was also common ground that SEB exercised its right to close out Europtïon's portfolio, although the date on which it exercised that right and began the close out was one of the principal issues in dispute in the litigation. The entire close out process took less than 3 or 4 days in total, depending on whether it started on Thursday, 9 October (Europtïon's case) or Friday, 10 October (SEB's case). It continued on Monday, 13 October and part of Tuesday, 14 October by which time all the positions had been closed out. In the end, SEB was able to return to Europtïon a final positive ledger balance of €2,049,437.29.

Europtïon's case

11. By the time of its closing submissions, Europtïon's case was articulated by Mr. Sharif Shivji, counsel appearing on behalf of Europtïon, as follows:

SEB's duties

i) Having exercised its right to close out, at the time it chose to do so, SEB had a duty to conduct the close-out in a manner that was not arbitrary, capricious, perverse and/or irrational; see *Socimer International Bank Ltd (in Liquidation) v Standard Bank London Ltd (No 2)* [2008] 1 Lloyd's Rep 558; *Paragon Finance Plc (formerly National Home Loans Corp) v Nash* [2002] 1 WLR 685.

ii) In addition, or in the alternative, SEB had a contractual and/or tortious duty of care to conduct the close out exercise competently and with reasonable care.

iii) The contract conferred no discretion on SEB as to how to carry out the forced liquidation of the portfolio once it had decided to do so; clause 11 was a narrow clause requiring SEB to close out the entire portfolio with no delay; it had no contractual entitlement to put on new positions or to manage the portfolio over any period of time; in circumstances where SEB breached that obligation, and "stepped outside" what it was entitled to do under the contract, it assumed a tortious responsibility to Euroption.

SEB's breaches of duty

iv) SEB was in breach of all three duties in its conduct of the close out of the portfolio. Euroption's complaints about such breaches were articulated under three different heads of claim:

a) Claim 1: that SEB, having begun the close out at, or around, 12:44 on 9 October 2008, negligently, and in breach of its duty not to act in an arbitrary, capricious, perverse and/or irrational manner, delayed in the close out of the portfolio. All the positions could and should have been closed out by close of business on 9 October. However, Claim 1 was not contingent on Euroption showing that the entire close out could and should have been completed by the end of 9-10 October, since Euroption alleged that closure of some of the positions on 9-10 would still have yielded a better return for Euroption. (However if, as Euroption contended, the portfolio could and should have been closed out in its entirety by the close of business on 9 October 2008, then there would have been no need to put on any new trades on 10 October 2008, which was the subject matter of Claim 2.)

b) Claim 2: that SEB opened new "combination" positions without contractual or other authority on 10 October 2008 which caused loss to the portfolio. Claim 2 only arose for consideration if, contrary to Euroption's position under Claim 1, there would still have been positions left on the books on 10 October.

c) Claim 3: in the event that SEB had begun the forced liquidation on 10 October 2008 or that positions were left open on that date, that SEB negligently, and in breach of its duty not to act in an arbitrary, capricious, perverse and/or irrational manner, delayed the closure of five short call positions which should have been closed on 10 October (but were only closed on 13 or 14 October) and one short call position which should have been closed on the morning of 13 October 2008 (instead of in the afternoon), which caused Euroption loss. (This claim was an alternative claim to Claim 1).

Quantum

v) The quantum of Euroption's claim in respect of the direct losses (namely the difference between the value of the positions as closed out compared to their value if they had been closed out by close of business on 9 October 2008) allegedly suffered in respect of Claim 1, as a result of SEB's alleged delay in the close out of the portfolio, varied between approximately €31 and €6.2

million (depending on whether the Court were to find that all or just some part of the positions should have been closed out on 9 October 2008), subject to an appropriate deduction to reflect:

a) the need for Euroption to pay a bid/offer spread to close the positions; and

b) the effects of "slippage" (namely, the extent to which the market might have been moved as a result of a very large open position being closed out).

vi) The quantum of Euroption's claim in respect of the direct losses allegedly suffered under Claim 2 was €666,700 and £1,072,224.

vii) The quantum of Euroption's claim in respect of the direct losses allegedly suffered under Claim 3 was:

€40,460	
€6,547	
€214,750	
	£247,887
	£104,060
	(£165,000) (credit)
€261,757	**£186,947**

viii) In addition to its claim for diminution in the value of its fund as a result of the close out, Euroption claimed damages for consequential loss of profits. Euroption contended that, if the Fund had been liquidated at close of business on 9 October, it would have had a value of €36.1 million on that date; that sum would have been re-invested and employed as part of the Fund's trading strategy, as part of a larger fund. Accordingly, Euroption claims damages in respect of the profits, which it alleges that the Fund would have earned had the value of the Fund not been damaged by SEB's actions, calculated by reference both to the Fund's historical performance prior to October 2008 and its actual performance thereafter.

ix) At the start of the trial, based on Euroption's expert report, the quantum of the claim for consequential loss of profits appeared to be in the region of about €135m. In his closing submissions, Mr. Shivji, suggested that, if I were minded to accede to the loss of profits claim, then I should rule on certain points of principle relating to quantum (namely: (a) average monthly percentage growth (b) time period (c) percentage level of redemptions as at October 2008) with a view to the parties themselves carrying out the appropriate calculation.

SEB's defence

12. SEB's case, as presented by Mr. Daniel Toledano QC and Mr. Sam O'Leary, leading and junior counsel appearing on behalf of SEB, was that, under clause 11 of the Mandate, SEB had a wide and unfettered discretion in relation to the conduct of the close out once it had begun. The close out could be effected in a number of ways which would require further decisions to be made by SEB (ranging from whether to close out by sale of the whole book or by individual trade and, if by individual trade, what trades to do and when). The Mandate did not seek to dictate what conclusions SEB reached on each of those decisions. It followed that the only limit on SEB's close out right was that such decisions should be made honestly, in good faith and not arbitrarily, capriciously, perversely or irrationally. That approach was supported by the principles that emerged from *Paragon v Nash* and other authorities such as *Socimer International Bank Ltd (In Liquidation) v Standard Bank London Ltd (No 2)* (*supra*), see in particular Rix LJ at paragraph 66.

13. Accordingly, SEB submitted that each of Euroption's arguments in relation to duty was misconceived; there was no statutory implied term relevant to the close out and no contractual or tortious duty of care.

14. SEB further contended that the evidence did not establish any breach of SEB's admitted duty to act honestly, in good faith and not arbitrarily, capriciously, perversely or irrationally, nor (if it existed) any breach of a contractual or tortious duty to act competently or with reasonable care.

15. In relation to Claim 1, SEB contended that it exercised its contractual right to close out Euroption's positions on 10 October, not 9 October and that it was Euroption itself which made the trading decisions on 9 October. Further, SEB contended that, even if Euroption could establish that the close out began on 9 October, Euroption had not established a case that SEB's conduct on that day was negligent (let alone irrational). There was nothing that SEB should have done differently on that day.

16. In relation to Claim 2, SEB submitted that Euroption's case, viz. that there was no authority to make the relevant trades, was "hopeless", since, SEB contended, Euroption's own expert had agreed that such combination trades were a legitimate (if relatively unattractive) means of closing out an options position. SEB also submitted that the evidence showed that both combination trades on 10 October were expressly authorised by Mr. Scattolon, and that, on any basis, one combination trade had been made on his instruction and without the knowledge of SEB. There was no basis for Euroption's criticism of the strategy, if and so far as it was said it was in breach of the duty to act rationally, or in breach of a duty to take care.

17. In relation to Claim 3, SEB's position was also that there was no factual basis for Euroption's alternative case that SEB was in breach of duty by virtue of delay in closing out the short calls and that Euroption's expert had himself accepted that the strategy adopted by SEB was reasonable.

18. SEB submitted that, in relation to the calculation of the quantum of Euroption's direct losses, the court should adopt the methodology advanced by its, SEB's, expert. So far as Euroption's claim for consequential loss of profits was concerned, the claim was for pure economic loss and not recoverable as a matter of law. In any event, such

damages were plainly too remote and the alleged loss of an opportunity to trade was too speculative to be capable of having any monetary value placed upon it or to enable Europtiion to satisfy the burden of proof.

Issues that arise for determination

19. In the circumstances, the following issues arise for the Court's determination:

Duty

i) Did SEB have a contractual and/or tortious duty of care to conduct the close out exercise competently and with reasonable care or was its only duty to act honestly, in good faith and not arbitrarily, capriciously, perversely or irrationally? (I define this latter duty as "the duty to act rationally".)

ii) If SEB had a duty of care to conduct the close out exercise competently and with reasonable care, what was the scope of that duty?

iii) What, if any, discretion did SEB have as to the conduct of the close out once it had decided to liquidate Europtiion's portfolio? In particular was SEB contractually entitled, as part of the close out process, to execute further trades?

Breach

iv) Claim 1:

a) When did SEB begin to exercise its right to close out Europtiion's positions?

b) If SEB exercised this right on 9 October, did SEB carry out the close out in breach of its duty of care and/or to act rationally on that day?

c) In particular, should SEB have closed out all, or at least some, of Europtiion's positions on 9 October?

v) Claim 2:

a) Did SEB have authority under clause 11 of the Mandate to execute new "combination" trades?

b) Did Europtiion in any event give instructions for one of the combination trades and expressly authorise/ratify the other?

c) In any event, were the combination trades in breach of any relevant duty of care or to act rationally?

vi) Claim 3: Was SEB in breach of its duty of care and/or to act rationally by virtue of delay in closing out the short calls?

Damages

vii) What was the quantum of Euroption's claim in respect of its alleged direct losses?

viii) Was Euroption entitled as a matter of law to claim consequential loss of profits?

ix) Were the damages claimed too remote and too speculative to be capable of having any monetary value placed upon them?

x) If not, what was the quantum of such losses?

20. As I explain below, my determination of the relevant issues does not strictly follow the order set out above. Nor, in the light of my determination of certain issues, has it been necessary to determine all the issues identified above.

Order of determination of the issues

21. Both sides were agreed that Euroption's primary case was to a large extent dependent upon it establishing that, as Euroption contended, and SEB denied, SEB had indeed exercised its rights under the Mandate to close out Euroption's positions on Thursday, 9 October 2008. Likewise it appeared to me that any discussion or determination of the scope of the duties owed by SEB, needed to be addressed in the context of what actually happened, rather than in a factual vacuum. Accordingly, after setting out relevant background facts which were not, or were not substantially, in dispute, I summarise my relevant factual findings in relation to, and then determine, the issue as to when SEB first began to exercise its right to close out Euroption's positions, before determining the subsequent issues including those relating to the scope of SEB's duties.

Relevant background facts

Equity index options

22. With effect from May 2008, TSL executed equity index options on various global financial exchanges on behalf of Euroption. An equity index option is an option whose underlying instrument is a particular exchange equity index, for example the UK FTSE 100. Other indices traded on behalf of Euroption on exchanges were the CAC 40 index (a weighted average of the leading 40 shares listed on the Paris Bourse (now Euronext Paris)), the DAX 30 index (a weighted average of the leading 30 shares listed on the Frankfurt stock exchange) and the Eurostoxx 50 index (a weighted average of the leading 50 Eurozone shares listed on various Eurozone stock exchanges). The trades that were executed by TSL on behalf of Euroption were then given up to SEB for clearing.

23. Exchange traded derivatives based on equity indices essentially fall into two categories, linear and non-linear. The most common form of linear derivative is a futures contract based on an equity index. Such a contract is in essence an agreement between two counterparties to exchange payments based on the value of the specific index reached on a specific date - the expiration date. Such a contract is linear first

because the profits and losses are entirely symmetric; and second because there is a one for one relationship between the movement in the level of the index and the level of profit or loss attributable to the counterparties.

24. Options, on the other hand, are non-linear. They are either "put" options or "call" options. A put option gives the holder of the option the right (but not an obligation) to sell the underlying asset (i.e. the index) at a specified price (called the "strike price") at a specified date in the future (called the "expiry date"). A call option gives the holder of the option the right (but not the obligation) to buy the underlying asset (i.e. the index) at the strike price of the option at a specified date in the future.

25. In the case of equity index options, the underlying instrument is the equity index (e.g. the FTSE 100). On the exercise of a FTSE 100 option, the instrument is cash settled on the basis of the difference between the strike price and the level of the index at the point of expiry. Thus, for example, on the exercise of a FTSE 100 option, if the level of the FTSE 100 on expiry is above the strike price, the buyer of the call option receives from the seller a sum representing the difference between the two. Conversely, if the level of the FTSE 100 on expiry is below the strike price, the buyer of a put option receives a sum from the seller representing the difference between the two. In the circumstances, the price of an option, and for that matter the future, is correlated to the performance of the underlying index. Of course, it is also open to the holder of the option to sell his option at any point up to exercise, at the market price.

26. Where the market price of the underlying instrument exceeds the strike price of the call option, or is below the strike price of a put option, the option is referred to as being "in the money", since if prices remain unchanged, the exercise of the option will yield a return. Where the market price of the underlying instrument equals the strike price of the option, the option is referred to as being "at the money". Where the market price of the underlying instrument is below the strike price of the call option, or is above the strike price of a put option, the option is referred to as being "out of the money".

27. The non-linearity of option derivatives arises because an option is a right and not an obligation. The owner of an option can abandon it if the right to buy or sell is not worth using. The maximum loss which the owner of an option experiences is the original premium (or price) which he has paid to buy the option, no matter how much the index goes down (in the case of a call option) or how much the index goes up (in the case of a put option). By contrast there is no limit to the profits that can be earned by a buyer of an option in the event that the index goes up (in the case of a call option) or the index goes down (in the case of a put option). Thus the buyer of an option has a strictly limited loss and a potentially unlimited gain.

28. By contrast, since the seller of an equity index option, (also known as the "writer" of an option), has an obligation to fulfil the contract, his maximum gain is limited to the premium received from the buyer. But his losses are potentially unlimited. Thus, on a call option, the theoretical risk to the option seller is unlimited, because the price of the underlying equity index (for example, the FTSE 100) could potentially go to infinity. Similarly, the theoretical risk on a put option is equally substantial, as the index could fall to zero.

29. Options, by their nature, are complex financial instruments. The price of an option, known as the premium, is made up of a number of different elements.

    i) The intrinsic value: This is the difference between the strike price and the market price of the underlying instrument. The ratio between changes in the value of the underlying instrument and changes in the option price is measured using a concept called "delta". The delta of an option is dynamic, such that the delta changes as the price of the underlying instruments moves in comparison to the strike price. The ratio of a change in the delta of an option compared to a change in the value of the underlying asset is measured using a concept called "gamma".

    ii) The volatility of the underlying instrument: in the case of the more volatile instruments, the price of the option tends to be higher because there is an increased chance that on any one day the market in the underlying instrument will move sharply, so that the option is in the money for a period of time. Volatility is measured using a concept called "vega". The vega applicable to an option will fluctuate over the life of the option.

    iii) The period of time remaining before expiry of the option: the longer the period remaining before expiry of the option, the more valuable the option will be. This is because there is a greater chance that, over the life of the option, the market in the underlying instrument will move sharply so that the option is in the money for a period of time. This is measured using a concept called "theta". The value of theta falls over the life of the option.

    iv) The impact of a one percent change in either the interest rate or the dividend yield on the price of an option; this is measured using a concept called "rho".

30. Not surprisingly, these methods of calculating option price sensitivities are referred to as "the Greeks".

31. Since the price of an option is driven by the above factors, all of which change over time, there is no single correct answer in the pricing of an option, and the precise value of an option can be very subjective, albeit within a narrow bandwith. While there are certain industry-accepted option pricing models, the most well-known being the Black-Scholes model, and these models are generally used as the underlying engine behind a trader's approach to pricing, most option traders will take their own, bespoke, approach to pricing, in that they will want to deviate, in a subtle, but nonetheless significant, way, from the results predicted by such models.

32. Traditionally, hedge funds, like Euroption, manage these risks by entering into opposing trades that eliminate or reduce much of the risk associated with the initial position. These trades are known as "hedging" trades, or "hedges", and the process of putting on these trades is called "hedging". Owing to the dynamic nature of option pricing and risks, professional option traders usually use sophisticated mathematical models to monitor the risks associated with the options in which they trade, to ensure that they are minimising their risks and maximising their profits.

33. In order to manage the risks associated with trading in derivatives, such as futures and options, the international financial exchanges insist that their members deposit margin

in cash, with the clearing house, to reflect the potential risk of an adverse move in their members' positions. Margin is generally calculated on a daily basis, and is the proportion of the total market value of the contract which the member must pay in cash to cover its exposure.

34. For an option contract, the margin requirement is set by the relevant clearing house. Volatility is a significant factor in a clearing house's calculation of margin requirements. The higher the level of volatility, the greater the possibility of loss, and therefore the greater the margin requirement.

Euroption's strategy

35. During the relevant period, leading up to October 2008, Euroption's principal trading strategy was short selling of options, i.e. Euroption was a net seller of options. This strategy included the sale of short strangles, whereby a put option was sold with a low strike price, and a call option was sold with a higher strike price. Such a strategy is profitable where the markets are stable, i.e. where volatility is minimal.

36. However, such a strategy involves unlimited exposure to increases in volatility in the market, and a sudden and substantial movement in the market can turn a short strangle into a large and unlimited loss. In opening and closing its positions, Euroption executed outright purchases and sales (referred to as "naked trades") as well as "combination trade" or "combos", where the option was traded as part of a package with another. In essence, selling short calls exposed Euroption to upside risk (i.e. losses in a rising market), whereas selling short puts exposed Euroption to downside risk (i.e. losses in a falling market).

37. In very general terms, Euroption's trading strategy was to sell fairly short-term, deep out-of-the-money options. This meant that the option's strike price was sufficiently distant from the current price of the underlying asset to suggest that it would not be likely to be profitable for the option holder to exercise the option. The intrinsic value of the option was therefore very low. Provided that the volatility of the underlying assets remained at or around the levels that Euroption was expecting, and there were no significant movements in the market, the option would become progressively cheaper as the time value component decayed, hopefully expiring worthless. In the meantime, Euroption benefitted from the premium it received when it first sold the option.

The relevant terms of the Mandate

38. The relevant terms of the Mandate provided as follows:

    i) OSL was defined as "the Fund Manager";

    ii) Recital (a) provided: "SEB carries on investment business, including that relating to exchange traded futures and options";

    iii) Recital (b) provided: "SEB is willing to settle and/or execute exchange traded futures and options, and settle OTC futures and options that are cleared via an exchange on behalf of the Client subject to the terms and conditions set out herein";

iv) Under clause 2, "margined transaction" was defined as:

> "… a contract under the terms of which a customer will be, or may be, liable to make deposits in cash or collateral to secure performance of obligations under the contact".

v) Clause 3 provided so far as material:

> "SEB is a Swedish bank and authorised to conduct securities business under Swedish law. Finansinspektionen in Sweden is the home-country supervisor of SEB. However, in relation to its exchange traded futures and options at the London branch, SEB is also regulated by the FSA."

vi) Clause 4 provided:

> "4. APPOINTMENT OF A FUND MANAGER
>
> (a) The client has appointed the Fund Manager as its agent to enter into transactions with SEB under this Agreement on its behalf.
>
> (b) The Client authorises and requests that SEB accepts and acts upon any instructions or communications from, enters into transactions with, and makes and receives payments to and from the Fund Manager (including any person who SEB believes in good faith to be the Fund Manager's authorised representative) in each case on the Client's behalf. The Client also authorises SEB to communicate all details concerning its account with SEB and any transactions under this Agreement to the Fund Manager.
>
> (c) SEB shall be entitled to presume the continuing authority of the Fund Manager and its representatives until it receives written notification to the contrary."

vii) Clause 6 provided that:

> "[Euroption] will make all trade decisions. The services SEB will provide are, subject to the restrictions contained in Clause 7 below [best execution], advisory services regarding dealing in exchange traded futures and options (and securities where the securities transaction in question is ancillary to a transaction in the foregoing) or such other services as may be agreed from time to time between SEB and [Euroption] in writing.
>
> SEB will contract only as a principal in respect of contracts in the terms of an Exchange Contract. In respect of every contract made between SEB and the Client, SEB shall have made an

equivalent contract on the relevant market either by open outcry or in the electronically traded market.

These services may include preparing and executing margined transactions in the investments referred to above. SEB may at any time impose or alter limits applicable to the Clients activities under this Agreement."

viii) Clause 11 provided:

"11. MARGIN PAYMENT

Where SEB effects transactions for the Client pursuant to Clause 6 above, the Client must, immediately upon SEB's request, transfer to SEB a margin payment of an amount specified by SEB and representing at least the amount stipulated for the transaction by the relevant exchange on which the transaction is to be carried out. The Client will be required to supplement that payment at any time when the Client's account with SEB shows a debit balance or an increase in the Client's margin requirement. Time shall be of the essence with respect to margin payments from the Client to SEB.

Margin transfer must be made in cash unless otherwise agreed between the Client and SEB.

The parties agree that all right, title and interest in and to any margin (whether cash or other property) will, at the time of transfer, vest in SEB free and clear of any liens, claims, charges or encumbrances or any other interest. Each transfer of margin will be made so as to constitute or result in a valid and legally effective transfer of all legal and beneficial title to SEB.

The parties do not intend to create in favour of SEB any mortgage, charge, lien, pledge, encumbrance or other security interest in any cash or other property transferred as margin.

The Client is warned that, if at any time it has failed to provide sufficient margin or other payment or delivery due in respect of any transaction as required, SEB shall be entitled to close out the Client's open contracts at any time without reference to the Client. Furthermore, it is an FSA requirement that where clients' margin calls are not met within five business days, all positions must be closed out. Any sum due to SEB as a result of closing out those contracts will be payable by the Client to SEB immediately.

SEB also reserves the right, at its discretion, to close out the Client's position having made reasonable efforts to contact the Client in the event of the Client's insolvency, or in the event of the Client having a winding-up, bankruptcy, administration or similar order made against it, or in the event of any failure by the Client to meet any obligations, whether in this Agreement or otherwise, or in the event that the Client makes any misrepresentation to SEB, or at any time SEB deems it necessary for its own protection.

In addition, the Client authorises SEB to transfer any funds which SEB may be holding on the Client's behalf as may be necessary to meet any of the Client's obligations, including the obligation to make margin payments, in respect of the Client's dealings with SEB.

In some instances the original securities or the original type of securities may not be returned to the Client and where the securities have matured, the Client will be credited with the equivalent value of the collateral."

ix) Clause 12 (c) provided:

"SEB may at its absolute discretion refuse any instruction given in accordance with this Clause".

Regulatory provisions

39. In addition to its obligations under the Mandate, SEB was regulated in this jurisdiction by the FSA and subject to the rules of the exchanges to which it was a member. Euroption relied on various LIFFE Rules as relevant to its case. These imposed obligations on SEB in relation to the collection of margin payments and provided as follows:

"3.27 Margin Liability of Clients

3.27.1 Not less often than once each Business Day a Member shall calculate or recalculate the liability for Margin of each of his clients, including clients who are Members, in respect of open positions in his books. The amount of such liability shall on each occasion be calculated to be no less than the amount of a Clearing Member's liability to the Clearing House for Margin in respect of the same open positions if they, and no other positions, were at that time registered with the Clearing House in his name.

3.27.2 Subject to LIFFE Rule 3.27.4, Margin shall be promptly collected in full from a client whenever the

calculation made under LIFFE Rule 3.27.1 shows that a new or increased liability for Margin has arisen on the part of the client. Subject further to LIFFE Rule 9.2.5, a Member shall take all steps reasonably necessary and available to ensure such collection or, in the event of the client's default, such steps as are open to him to reduce the client's liability.

...

3.27.4 A Member shall not be obliged to collect Margin arising from open positions in full promptly from a client pursuant to LIFFE Rule 3.27.2 provided that such Member's decision not to collect Margin in full promptly is made pursuant to prudent management policies and procedures which satisfy any criteria which may be specified by the Board from time to time".

40. Under LIFFE General Notice No 2296, a member (such as SEB) is deemed to have "prudent management policies and procedures" in the event that it is authorised by the FSA and has an Adequate Credit Management Policy ("ACMP") as defined by the FSA Rules.

Events leading up to SEB's close out of Euroption's positions

41. On 15 August 2008, following the placing into public ownership of the US Federal National Mortgage Association and Federal Home Loan Mortgage Corporation, Lehman Brothers collapsed. In the days following there was unprecedented volatility in global financial markets.

42. This resulted in SEB making substantial margin calls on Euroption on 17, 18 and 19 September. TSL, on behalf of Euroption, assured SEB that funds would be transferred to SEB to meet the margin calls. However only €3 million was transferred leaving an outstanding unpaid balance of approximately €18 million. These calls went unpaid, which gave rise to considerable disquiet on SEB's part. However on the afternoon of 19 September 2008 the majority of the short options in Euroption's portfolio expired worthless, thereby reducing the contingent liabilities on Euroption's account, leaving a positive ledger balance of €54,369,914.54 by close of business and removing the need for the posting of additional margin. The evidence at trial showed that, although a Mr. Gary Caldon, a director of TSL, had informed SEB that Euroption had arranged for the money to be transferred to SEB with a value date of 22nd September, but had then cancelled the instruction once the market rallied and the options expired worthless, Euroption in fact did not have €18 million to remit to SEB by way of margin. At trial Mr. Scattolon gave evidence to the effect that he was not aware until after the commencement of proceedings that Mr. Caldon had so informed SEB, and that Mr. Caldon was well aware that Euroption did not have the necessary €18 million of funds with which to meet the margin call and was not intending to do so. Whether or not this was the case, it was clear that Mr. Steve Martin, the Head of SEB Futures Clearing (London), and the person responsible for overseeing the close out of Euroption's open positions, was dissatisfied with Euroption's failure to meet its

margin calls in September 2008. In an e-mail dated 19 September he told Mr. Caldon:

> "can we meet face-to-face to discuss? Early next week please. If we are unable to trust clients to meet calls we really don't want them as clients".

In fact no such meeting took place, but no doubt SEB's confidence in Euroption's ability to meet margin calls had been undermined as a result of this incident.

43. Throughout the remaining days of September 2008 large financial institutions in various countries collapsed and had to be supported by government intervention. This led to a series of major movements on the global financial markets and a substantial increase in volatility. By early October 2008, global financial markets were in turmoil and experiencing a major liquidity crisis. During the week beginning 6 October 2008 the Dow Jones index fell by around 21% and the FTSE 100 suffered two of its worst ever daily performances. In short, market conditions were both exceptionally difficult and volatile.

44. At the beginning of October 2008, Euroption had a large number of open equity index option positions within its portfolio at SEB, including a mixture of short calls and short puts. The increased volatility of the relevant markets had had a dramatic impact on the price of out of the money options (which made up a substantial amount of Euroption's short portfolio) which led to significant increases in the margin requirements on Euroption's account.

45. As at close of business on 6 October 2008 Euroption had a negative Ledger balance of €36,803,445.21. On Tuesday, 7 October SEB issued a margin call in that amount sent by e-mail at approximately 07:31 to Euroption with a copy to TSL. Mr. Caldon of TSL instructed Mr. Scattolon and others at Euroption not to respond to any e-mails from SEB, saying that TSL would liaise directly with SEB.

46. Thereafter Mr. Martin was involved in regular dialogue (by telephone and e-mail) with Mr. Caldon. Mr. Martin requested that Euroption should take immediate steps to pay the margin calls and close out its positions so as to reduce the amount of risk on its account. At about 09:30 Mr. Caldon told Mr. Martin over the telephone that Euroption wasn't in a position to "send that sort of money" but was aggressively cutting positions. There were a number of phone calls and e-mails during the day between the two men, with Mr. Martin seeking an update on the progress Euroption was making. The fact that Mr. Martin was communicating with Euroption through the agency of Mr. Caldon and TSL, and not directly with Euroption, was consistent with the way in which the relationship between the parties had been conducted from the outset. Indeed Euroption had been introduced to SEB by TSL.

47. During the course of trading on 7 October, Euroption took various steps to reduce its exposure. This, combined with movements in the markets, meant that, by 17:03 that day, Mr. Martin took the view (which he communicated to his superior, Ms Ulla Nilsson, then the Global Product Head of SEB Futures) that the margin call would be zero or a negligible amount at the opening of trading. In his oral evidence Mr. Martin described the progress which Euroption had made in the reduction of its positions as follows:

> "… they'd reduced their margin call by €33 million, so I was in a far more comfortable position"

48. On the same day, Mr. Martin and his colleagues formed an SEB Futures "crisis team" comprising senior members of the SEB Futures business, together with Ms Nilsson and Mr. Fredrik Barnekow (then SEB's Head of Securities Finance Department (Stockholm)). The crisis team was formed for the purposes of managing the problems relating to several of SEB's customers arising as a result of the financial crisis. Euroption was not the only customer of SEB in relation to which problems had arisen.

49. Euroption's debit Ledger balance at the close of business on Tuesday, 7 October was €3,822,856.15. At 08:22 SEB made a margin call in the sum of €3.8m (as compared with €36.8 million the previous day). During the course of the day Mr. Martin communicated on several occasions to Mr. Caldon, insisting not only on the provision of margin in cash but also in the reduction of Euroption's Positions.

50. At 10:18 TSL, by Mr. Caldon, represented to Euroption that, absent full payment of the margin call SEB would liquidate the account:

> "… won't help I'm afraid. They want the whole amount, or liquidation. We have to show them that we are closing some positions. Again, this is about buying you more time. So let's decide what to cover. SEB are expecting constant updates".

51. Mr. Martin denied that, at this point, he had communicated any such ultimatum to TSL. In his oral evidence he explained that although the prospects of the margin call being covered by cash were fading, he continued to employ a dual strategy of pursuing both a cash payment and margin reducing trades:

> "A. I wanted cash and I wanted positions cut, and, you know, at this stage I didn't know I was getting cash, but I don't think I'd ever said to anybody that I was going to liquidate the portfolio at this stage."

52. Subsequently, in a telephone conversation with Mr. Caldon at 10:26 Mr. Martin said:

> "Mr. Martin: We need to do these in parallel. You get the positions out and I want to know if the client's got any cash because if he hasn't I'll take some action. So I need to know.
>
> Mr. Caldon: Well, OK. What are you talking about "taking action"?
>
> Mr. Martin: I'll take the whole lot out."

According to Mr. Martin's own evidence, the reference to "… take the whole lot out." was a reference to a forced liquidation of the portfolio.

53. At the relevant time SEB used a trade matching engine (referred to as "MarketWatch") to clear trades on behalf of its customers. It was possible to set rules within MarketWatch to govern the way in which trades were to be cleared on behalf of that particular customer. One such rule was the "carte blanche acceptance" rule, which meant that trades which were given up to SEB for clearing on behalf of a particular customer would be automatically accepted for clearing and booked to the customer's account, without the need for any further action by SEB staff. At 09:06 on the morning of 8 October, Mr. Martin e-mailed his colleagues and suggested to them that they should lift the carte blanche acceptance rule for a number of customers, including Euroption. The effect of so doing would be that any new trades that were given up to the clearing bank by the executing broker on behalf of one of those customers would need to be manually reviewed before they were cleared. By turning off the rule, both Mr. Martin and his colleagues at SEB would be able to keep a much closer eye on the trades which were being undertaken by certain customers. That would have the effect of assisting SEB staff in monitoring their portfolios, the extent of any margin deficit and whether steps were being taken to reduce the deficit.

54. At 09:34 instructions were given by Mr. Martin to Martin Ward, Head of SEB's operations in London at the time, to lift the carte blanche rule in relation to Euroption. Thereafter, trades that were given up to SEB by TSL on behalf of Euroption were reviewed, either by Mr. Martin or by a member of SEB's Futures Client Services team. Mr. Martin's evidence was that the key principle to which they were working was to consider whether a particular trade reduced risk on the portfolio. If it did it would be accepted; if it did not, it would be brought to his attention so that he was aware of what was going on.

55. At 13:21 on 8 October, Simon Mason of TSL informed Euroption that SEB had put limits on the account, "… SEB won't let us increase the positions until the account is off call". Mr. Martin's evidence was that, at no time on 8 October, did he actually impose a limit on Euroption's account or tell TSL or Euroption that SEB was not letting Euroption increase positions. However Mr. Martin accepted that, because of the pressure Mr. Martin was putting on Mr. Mason to cut positions, the latter may have got the impression that SEB was not letting Euroption increase its positions.

56. Although the trades Euroption carried out in the morning of 8 October were relatively small and risk reducing, a series of trades given up later that day involved a large roll-down of positions (meaning that a position in an expiring contract in one option series had been closed whilst a position in a later expiring contract had been opened). By 13:00 on 8 October, the only trades given up to SEB were (a) the buying back of 3,250 FTSE 4100 October puts and (b) the sale of 1,000 FTSE 4900 October calls. The remainder of the FTSE trades that were carried out that day were not given up to SEB until after trading had closed on the relevant exchanges. Because of these late give-ups, SEB was unable to see until after trading had closed the extent to which Euroption had been opening new positions as part of roll-down or combination trades (rather than merely closing positions). The net trades which were given up late to SEB involved Euroption buying back 15,108 short puts (which reduced downside risk), but also selling 12,433 new puts (increasing risk on the downside) and selling 9,995 new calls (increasing risk on the upside).

57. All of Euroption's trades on 8 October were spread trades or combination trades (i.e. the closure of short positions, accompanied by the opening of a new position).

Critically, however, the reports that TSL were giving to Mr. Martin only identified the closure of short positions and failed to mention the opening of the new positions. This gave Mr. Martin the misleading impression during the day that around 17,658 short option contracts were being closed out naked.

58. Between 16:37 and 18:14 on the evening of 8 October several trades were given up to SEB that were executed much earlier in the day, some as much as seven hours earlier. Mr. Martin's evidence was that under normal circumstances he would expect a trade to be given up anytime from a few seconds to within 30 or 40 minutes of execution. The trades given up to SEB that evening revealed to Mr. Martin that all the closing trades Mr. Caldon had reported to him throughout the day were in fact spread or combination trades. Further, Mr. Caldon had not reported anything at all about Europtión rolling 5,000 FTSE 5800 call options down to 5200, 600 points closer to the money, or the CAC 3000/3400 put spread.

59. In his evidence Mr. Martin accepted that he had subsequently discovered that he was being told of closing positions but not the opening of new positions, and that he was cross (he described it as "a bit grumpy", but it was probably more than that) when he discovered the additional trades including the fact that Europtión had sold a further 23,358 options on that day.

60. Whether or not he spoke to Mr. Caldon that evening, Mr. Martin was clearly concerned early on the morning of 9 October when he reviewed the trades which had been given up on behalf of Europtión during the course of the previous day. By that time, the markets had moved heavily against Europtión. At 08:13 SEB issued a margin call for €57 million.

61. I turn now to determine the first issue, namely the date on which SEB began to exercise its right to close out Europtión's positions.

Issue 1: when did SEB begin to exercise its right to close out Europtión's positions?

The evidence

62. The principal witness who gave contemporaneous evidence in relation to this issue was Mr. Martin. Europtión accepted that he was an honest witness, and did not suggest otherwise. However, Mr. Shivji submitted that his recollection of key events was vague, imprecise and sometimes unreliable, and that, given the pressures on him during the second week of October 2008, it was perhaps unsurprising that he did not have a clear recollection. I disagree. I found Mr. Martin to be a careful witness who clearly had a genuine independent recollection of the critical week in October 2008, which was supported by contemporaneous documentation. He convincingly rejected the suggestion that he had no independent recollection of the relevant events, whilst readily and realistically conceding that, in certain limited and unimportant respects, he was unable to remember precise details of what occurred. I have no hesitation in accepting Mr. Martin's evidence, which he gave in a straightforward fashion, to the effect that he took the decision to close out Europtión's position on the morning of 10 October and not on the afternoon of 9 October. To the extent that he was challenged in his recollection by Mr. Shivji, Mr. Martin was clear in adhering to his evidence that the decision was indeed taken that day.

63. Mr. Scattalon, the only witness called by Euroption, was also an honest witness, but, by his own admission, his direct, independent recollection of relevant events was limited, and largely derived from or reconstructed by his subsequent reading of contemporaneous documents and Skype messages as between himself and TSL. He could add very little to these. Insofar as he sought to suggest, in his witness statement, that SEB began to close out Euroption's position on the morning of 9 October, and that this was reflected in the trades carried out that day, I reject his evidence. The evidence at trial clearly showed that it was Mr. Scattalon, not Mr. Martin at SEB, who gave the instructions for the trades which TSL entered into on 9 October. Moreover, it was clear from answers which Mr. Scattalon gave in cross-examination, that many paragraphs of his witness statement had been drafted by Euroption's lawyers, in an attempt to construct a case from a retrospective analysis of the documents, some of which Mr. Scattalon had not read at the time of his statement.

64. Mr. Shivji complained that SEB had not called witnesses from TSL, despite the fact that SEB's case management information sheet had indicated an intention to do so on SEB's part, and that accordingly, I should draw an adverse inference against SEB for failing to do so. In a letter sent shortly before the start of the trial, SEB indicated that it was not proposing to call the TSL witnesses. I draw no adverse inference against SEB. Until the time of SEB's decision to close out, TSL was acting as Euroption's execution broker. In such circumstances, I see no reason why there was any evidential burden on SEB to call Euroption's own agents. It was, of course, open to Euroption to call such witnesses. I do not propose to draw any adverse inference against SEB in this respect.

65. Mr. Shivji also criticised SEB's "failure" to call a Mr. Fredrik Barnekow from SEB Stockholm, to whom Ms Ulla Nilsson, Mr. Martin's superior, reported. SEB did however call a Mr. Olof Westring, a senior specialist in the Securities Finance Department of SEB, who assisted and reported to Mr. Barnekow in providing a high-level oversight of the close out of Euroption's open positions. Mr. Westring was in a position to provide evidence as to the suitability of Mr. Martin and SEB's satisfaction with Mr. Martin's close out of the portfolio. In my judgment, there was nothing in Euroption's criticism of the alleged failure to call Mr. Barnekow or other witnesses at SEB. It was a matter for SEB whom it called as witnesses. There was no evidential burden imposed on it as a result of evidence adduced by Euroption that required SEB to call such persons.

66. In addition to contemporaneous emails and other documents, there were in evidence: (i) transcripts of telephone conversations between Mr. Martin and Mr. Caldon of TSL in the relevant period; and (ii) transcript of Skype messages between Mr. Scattalon and Mr. Caldon and other employees of TSL. Euroption persisted at trial in complaints about alleged failures on the part of SEB to make adequate disclosure. I did not find these to be borne out, in the light of the full explanation which was given by Clifford Chance as to the manner in which SEB had discharged its disclosure obligations.

67. Euroption's contention is that the evidence shows that SEB began the forced liquidation of Euroption's portfolio by no later than 12:44 on the afternoon of the 9 October. It contends that an e-mail sent by SEB to TSL at that time and TSL's subsequent conduct clearly indicated that the latter reasonably understood the 12:44

email to be an instruction to commence a forced liquidation of the account. Mr. Shivji supported this contention with the following submissions:

i) Mr. Martin's own established practice in relation to margin calls dictated that he would have taken the decision to close out Europtium's positions by 12:44 on the 9 October 2008;

ii) whether or not Mr. Martin intended to commence a close out of Europtium's open positions, TSL's conduct indicated that it understood the e-mail to be such an instruction;

iii) under the terms of the Mandate a close out commenced when, at 12:44, Mr. Martin assumed responsibility for making trade decisions on Europtium's account;

iv) under the relevant regulatory framework, as Mr. Martin understood it to operate, SEB was bound to commence the close out on 9 October 2008.

68. I do not accept this analysis of the evidence. It is contrary to the evidence given by Mr. Martin, the evidence given by Mr. Scattolon at trial and the contents of the contemporaneous documents.

69. As I have already said, on the morning of 9 October at 08:13 SEB issued a margin call for €57 million. Mr. Martin subsequently spoke to a former administrator of Europtium, a Mr. van Willigenberg, in relation to the ability of Europtium to transfer margin call into its account with SEB that day. Mr. van Willigenberg seemed unaware of the margin deficit. Mr. Martin said nothing about closing out Europtium's positions.

70. In the course of the morning of 9 October Mr. Martin, in his e-mails and telephone conversations with Mr. Caldon, put pressure on Europtium via TSL to reduce its positions. Mr. Martin made it clear that he wanted the absolute number of trades down. For example at 12:13 Mr. Martin e-mailed Mr. Caldon to say that Europtium's absolute exposure had to be reduced and that every opportunity had to be taken to wind down Europtium's open positions to a more manageable size. It was clear however that, under the terms of the Mandate, SEB was entitled to give instructions, and impose limits without at the same time exercising its right to close out.

71. At 12:44 Mr. Martin e-mailed Mr. Caldon saying:

> "Sorry. I have not been explicit about this, but I guess you are working on this assumption anyway. No new positions on this account whatsoever until further notice. We are working to close only"

72. In his evidence Mr. Martin explained that by this e-mail he was imposing a limit on Europtium's trading, such that the only trades which could be conducted on the account were naked buybacks. In other words, the only trades that could be executed were close out trades, the last sentence of the e-mail merely restating the limit imposed by the second sentence. In cross-examination Mr. Shivji suggested to Mr. Martin that the words "working to close only" were a reference to the closure of

the entire account and that there was a distinction between the concept of "reducing" or "cutting" the positions and the concept of "closure" of the positions. Mr. Martin convincingly rejected the suggestion explaining that this was an instruction to Mr. Caldon at TSL to say to Euroption:

> "no new positions, working to close positions only. Not close the entire portfolio, not shut it down, but the third line relates to the second line. So your interpretation of that e-mail I'm afraid is one hundred percent incorrect."

73. I accept Mr. Martin's evidence on this issue. In my judgment, the e-mail cannot be construed as the decision by Mr. Martin communicated to TSL to close out the entirety of Euroption's portfolio. Mr. Caldon's response in an e-mail timed 12:56 does not contain anything to suggest that Mr. Caldon for one moment thought that TSL was now being instructed to close out the entire account. Nor do the further series of e-mails between the two men on that day suggest that SEB itself was giving specific instructions for a close out. It was clear that SEB had attempted to limit the trading on Euroption's account, without itself taking over the conduct of the trading.

74. Other evidence supports this analysis. First of all, an examination of all of the trades carried out on 9 October demonstrated that it was Mr. Scattolon, and not SEB, who gave the instructions for the trades which TSL entered into on that date. These five sets of trades, numbered A to E (as set out in a chart on A3 paper) were meticulously reviewed in evidence and in the course of argument. In cross-examination Mr. Scattolon effectively accepted that he had given instructions for these trades.

75. Second, I conclude from the evidence which he gave about his trading on 9 October and his communications with TSL, that Mr. Scattolon himself knew that the close out had not started on that date. Thus he acknowledged that from 7 October he was given warnings by TSL that SEB wanted the positions cut; and that he knew that he was being given an opportunity to cut positions himself but that if he did not do that then SEB might step in at some point themselves. On the morning of 9 October Mr. Trimming of TSL told Mr. Scattolon "SEB are already demanding we close everything … we are trying to stop them doing it themselves." Mr. Scattolon replied, "Thank you Steve, today the market will bounce!" Mr. Trimming explained:

> "It doesn't matter. Our only chance is to show SEB that we are closing positions from the open. We have to start with the CAC. If SEB decide we are not closing fast enough, they will take over."

And at 12:08 on 9 October, Mr. Trimming expressed concern that:

> "SEB are really increasing the pressure on us Stefano. They have told us that we are not reducing exposure fast enough. I am worried that they will start covering some positions themselves."

76. However Mr. Scattolon's evidence did not go further than complaining that he did not have "full control" of Euroption's trading on 9 October. He acknowledged that he was given the message at 12:08 on 9 October that if he reduced his risk, then he

would be able to stop SEB from stepping in. He also – significantly - acknowledged that at no point after that on 9 October did anyone from TSL tell him that the position had been changed or that SEB had taken him out of the loop and taken control. On Euroption's case, one would have expected to find something in the Skype messages from TSL at or shortly after 12:44 indicating to Mr. Scattolon that SEB had began a close out. Yet there is nothing at all in the Skype messages to support this proposition. The first time that there is anything in the Skype messages to indicate that a close out has commenced was at 08:05 on 10 October, when Mr. Mason of TSL informed Mr. Scattolon that SEB had ordered TSL to liquidate the account. Moreover, Mr. Scattolon did not go so far as to say that SEB had already started closing out positions on 9 October. The highest he put it was to say that some of his instructions were not followed on that day. This was consistent with the fact that Mr. Martin had placed limits on Euroption's ability to open new positions and was placing heavy pressure on Euroption to close positions. But it does not predicate that SEB had already commenced the close out. Mr. Scattolon acknowledged that on 9 October he had it within his power to close positions to remove the pressure coming from SEB but decided not to do so. None of this evidence suggested that SEB had already begun its close out.

77. Thus, although Euroption had made some close out trades on October, it had failed, in Mr. Martin's view, to implement an appropriate close out strategy, choosing instead to close out some positions whilst keeping other positions open and/or rolling them forward. As at close of business on 9 October, Euroption still had massive open option positions on its portfolio. According to Mr. Martin, Euroption had a potential exposure on its positions as at close of business of nearly €94 million while its portfolio liquidation value was only €36 million. Prior to the significant drop in the markets that occurred overnight on 9 October 2008, SEB was therefore facing, using clearing house calculations, a potential loss of over €50 million.

78. On the evening of 9 October, the Dow Jones index fell nearly 700 points. Before the opening of business in Europe on Friday, 10 October, the Asian markets also fell sharply. In addition, the level of volatility in the financial markets had continued to increase significantly since 8 October 2008. Dr. Fitzgerald described it as "… a period of almost unparalleled volatility, and enormous downward pressure on markets". Accordingly, the European markets were also expected to fall sharply. The expected fall in the markets meant that Euroption faced very substantial risks on its open put positions which together constituted a substantial bet that the markets would not fall. The portfolio was "long delta", meaning that Euroption would benefit from a market rally, not a market fall. As described above, there was a significant imbalance in the directional exposure of Euroption's positions.

79. The status of Euroption's portfolio just prior to the European markets opening on 10 October 2008 presented SEB with a major concern. Euroption was positioned to benefit from a market rally, and yet the overnight movements and the pre-opening bids and offers pointed to the likelihood that the European markets would face significant falls. Mr. Martin's evidence was that his focus was to make sure that, if the markets did fall significantly, SEB was protected as far as possible against its potential substantial losses.

80. Once the markets opened it was clear that his concerns were justified. Because of the fall in the markets overnight (the FTSE opened about 1.2% down before full trading

and was very soon about 11.3% down), Europtiion's portfolio liquidation value (i.e. the value of the assets in the portfolio if all open positions had been closed at the previous day's settlement values) of around €36m as at close of business on 9 October had been reduced by around €28m by the time the markets opened on 10 October. That left the portfolio liquidation value at approximately €8 million. Accordingly, as at the opening of the markets on 10 October, there was a real risk that SEB could be left facing a loss of many millions after the close out of positions was complete, especially in light of the extremely volatile market conditions and the very large positions that needed to be unwound.

81. It was against this background that Mr. Martin stated in his evidence that he decided early in the morning on 10 October to close out Europtiion's positions. In an e-mail timed at 07:07 he requested Mr. Caldon to telephone him as soon as he arrived at the office. When Mr. Caldon replied that he would telephone Mr. Martin in 20 minutes, Mr. Martin sent Mr. Caldon a further e-mail at 07:20 which stated "ASAP please!!!" At 07:30 Mr. Martin spoke to Mr. Caldon on the telephone to give him instructions about specific positions which he wanted TSL to concentrate on closing. As Mr. Martin accepted in his witness statement and in his oral evidence, the transcript of the telephone call does not contain a specific or express instruction to close out. In his witness statement Mr. Martin said:

> "Looking back at the transcript of that call now, I think that I did not feel it was necessary at the time to spell out that SEB would be giving the instructions in relation to the portfolio from this point onwards. Mr. Caldon and I are both professionals, and we had both seen the carnage on the markets from the opening of trading on 10 October 2008. My sense at the time was that it would have been absolutely clear that Europtiion's trading of its portfolio was over and that SEB would be calling the shots from then on."

82. That does indeed appear to have been the case since at 08:15 a Mr. Mason at TSL informed Mr. Scattolon that "SEB have ordered us to liquidate the account". On that date Europtiion was also called for €26.173m in margin.

83. I accept Mr. Martin's evidence that the decision to close out was taken, and the instructions to close out were given, on 10 October.

84. In addition to the evidence to which I have already referred, Mr. Martin's account is supported by a memorandum entitled "Europtiion …. Close out time line", which Mr. Martin prepared on 22 October 2008, only a week after the close out, and sent to Mr. Martin's superiors including Ms Nilsson and a Mr. David Lockie. This memorandum also strongly supported the analysis that SEB's close out did not start until 10 October. In relation to Wednesday, 8 October, Thursday, 9 October and Friday, 10 October Mr. Martin wrote:

> "**Wednesday 8th October**
>
> The client was called for Euro 3,822,856.15, and again there was no response to our call. Tavira were called again and advised us that the client could not meet the margin call.

Tavira were instructed to immediately commence cutting the clients positions.

The client cut

[details of trades]

Although these were cutting existing positions, the client had rolled a number of positions to position himself further down the market. New positions given up on the day were.

[details of trades]

Further increased volatility hurt the client on the overnight revaluation. As at COB Wednesday October 8th the client had negative free cash of Euro 57,002,822.39 and Equity balance of Euro 71,294,333.02 and a portfolio liquidation value of Euro 31,529,928.

Thursday October 9th

The client was called for Euro 57,002,882.39, the call was not responded to. Tavira were advised that SEB wanted naked positions cut aggressively. The market conditions were exceptionally volatile with liquidity hard to come by in any serious size.

We believed that Tavira were best placed to execute the closing trades, as they knew the clients, and the market makers. Executing close out instructions in these indexes via a fixed income desk, was considered to be too risky.

<u>The client along with Tavira closed</u>

[details of trades]

However, again a lot of these were closed by rolling positions further down the price curve and further out the time line.

The combo trades tied to the closures resulted in the following new positions

[details of various call and put options]

<u>It was clear to us that the client was managing the position as opposed to cutting the position.</u>

<u>Although the client's actions improved the cash position slightly</u> as at COB Thursday 9th October the client had a negative cash balance of Euro 26,173,887.52 and Equity balance of Euro 67,715,510 and a portfolio liquidation value of Euro 35,684,966.

Friday October 10th

Friday October 10th opened with stock markets in full rout mode. Heavy overnight losses in Asia transferred to large opening losses on the European indices and another significant volatility spike.

Mindful of the clients reluctance to close naked positions, and also aware of the rapidly reducing liquidation value of the client, Tavira were instructed to close only in accordance with SEB instructions.

The client was taken out of the loop and we commenced cutting positions ourselves. Again given Tavira's knowledge of the markets and the clients positions it was considered sensible to work the closing orders through their broking desk.

Although our aim was to liquidate the entire portfolio as quickly as possible we were mindful of market conditions. We concentrated on liquidating the closest to the money strikes, in either direction first.

By close of the markets we had closed

[details of various put options]

The vast majority of these we had managed to close naked, however in some cases we had to pick up a little upside exposure to get the trades away.

New positions taken on were

S1300 November Eurostox 2650 Calls (traded against some of the 2350 puts that were closed)

S2083 November FTSE 4600 Calls (traded against some of the 3600 puts that were closed)

Friday 10th October closed with record falls in most major European Stock Indices, and volatility at records levels.

Despite aggressive cutting of close to the money positions, the clients account with SEB Futures remained on call.

As at COB Friday 10th October the client had negative free cash of Euro 58,580,816.39, a positive equity balance of Euro 38,562,715, but portfolio liquidation value that was Euro 7,636,594 negative." (Emphasis supplied)

85. As can be seen, in his memorandum, Mr. Martin specifically identified 10 October as the date when the close out began. TSL was:

> "… instructed to close only in accordance with SEB instructions. The client was taken out of the loop and we commenced cutting positions ourselves".

The memorandum was written at a time when the start date of the close out was not known to have any legal significance.

86. Mr. Shivji suggested to Mr. Martin in cross-examination that the memorandum was a self-serving document prepared by the latter to appease Mr. Martin's superiors at SEB. I reject that criticism and accept Mr. Martin's explanation that the document was prepared in anticipation of a possible claim by Euroption rather than as a back-protecting exercise. There was no evidence to suggest that SEB's senior management was concerned about Mr. Martin's handling of the Euroption account or the close out.

87. Other criticisms made by Mr. Shivji in cross-examination were to the effect that the memorandum contained a few specific minor inaccuracies and that the memorandum excluded reference to certain facts. There was no substance in any of these. Mr. Martin told the court that the memorandum was prepared during the course of the morning and relied upon his memory and the relevant account statements, and that he had not conducted a review of e-mails and telephone transcripts to prepare the document. Finally, it was not suggested to Mr. Martin that he had not been telling the truth when he recorded in the memorandum that the close out had begun on 10 October. In my judgment, it supports his evidence on the issue.

88. Further, Mr. Martin's account that the close out only began on 10 October is supported by a comparison of the trades made on 9 October with (a) trades made by Euroption on 8 October and (b) trades made by SEB on 10 October. This matter was also the subject of expert evidence given by Mr. W A Beagles on behalf of Euroption and Dr. M. Desmond Fitzgerald on behalf of SEB.

89. The trading of Euroption's positions on 9 October continued to follow the same basic pattern as on 8 October. This was not a strategy that aimed to close out Euroption's positions but one which rather looked to reduce risks while opening new positions. By contrast, the trading of Euroption's positions on 10 October had a completely different profile. Trades were closed naked wherever possible with the exception of the two combination trades (one of which Mr. Martin saw as a necessary evil to buy back the relevant position and the other of which was made pursuant to Mr. Scattolon's instructions and without Mr. Martin's knowledge or approval). This supported SEB's case that Mr. Scattolon remained in control of trading on 9 October (albeit with a "gun to his head") and was inconsistent with Euroption's case that SEB was already closing out Euroption's positions on 9 October.

90. The evidence showed that Mr. Scattolon's general approach to trading on 8 October was to enter into combination trades and diagonal put spreads (which reduced risk while maintaining a level of open positions) in the hope that it might be enough to meet the margin call. Mr. Scattolon suggested in his witness statement (paragraph 55) that on 8 October he had:

> "… continued to close out put options (especially the Eurostoxx 2600 puts and FTSE 4000 and 4100 puts)".

91. However under cross-examination, Mr. Scattolon rightly acknowledged that his witness statement had given a misleading and incomplete account of this trading in that what EuroptION was actually doing was closing and opening positions at the same time. Mr. Scattolon acknowledged that on 8 October EuroptION had rolled down the positions by buying back October puts and selling November puts in a "diagonal spread". Mr. Scattolon said that this reduced the fund's exposure to vega, delta and gamma (thus reducing the margin call by a small amount) but acknowledged that this left the fund exposed to downside risk.

92. He explained that part of his strategy was based on his hope that there would be a market rally so that he would be able to buy back the November puts at a profit. He was also trying to generate premium by selling new positions to cover the fund's trading losses. To achieve this, Mr. Scattolon sold a large number of FTSE October calls on 8 October, which increased EuroptION's exposure to a market rise. He also considered selling foreign exchange options with the same purpose in mind.

93. The trading on 9 October continued this pattern. Although some positions were bought back naked, the bulk of trading involved diagonal spreads (i.e. the buy back of October puts together with the sale of November puts) and combination trades (i.e. the buy back of puts funded by the sale of calls). Mr. Scattolon acknowledged that this was the same strategy he had used on 8 October. What he was doing on 8 and 9 October were trades that were the best he could do in the circumstances while he waited until SEB might take the decision to close out.

94. This was particularly so in the afternoon of 9 October where (as Mr. Beagles acknowledged) Sets C and D (as shown in the chart) involved diagonal put spreads which rolled the risk down from October to November. Mr. Beagles agreed that these were not the sort of trades that would usually be found if a clearing member was effecting a close out. Although the total trade reduced risk, the new positions opened were large and risky. If instead of carrying out diagonal put spreads, EuroptION had bought the October FTSE puts back naked, EuroptION would have substantially reduced its margin call at close of business on 9 October. Mr. Beagles also acknowledged that, inasmuch as diagonal put spreads were involved, the trading pattern on the afternoon of 9 October was the same as or broadly similar to the trading pattern on 8 October.

95. Mr. Beagles agreed that, unlike on 8 and 9 October, there were no diagonal put spreads traded on EuroptION's account on 10 October. The trades carried out on 10 October in Sets F, G, I, K and L (as likewise shown in the chart) involved the naked buying back of puts. Mr. Beagles accepted that these were the types of trade that he would ordinarily expect to see if a clearing member was closing out a position. Indeed, he said they would be his first choice for closing out a position. In the case of Set H and Set J, part of the position was bought back naked and part was bought back against the sale of calls. Mr. Beagles accepted that the naked part of H and J would also be what one would expect to see if a clearing member was effecting a close out.

96. Finally the communications on 9 and 10 October between Mr. Scattolon and TSL, as compared with the communications between SEB and TSL on the same date (as conveniently set out in a spreadsheet for my use), demonstrated the reality that on 9 October it was Mr. Scattolon who was exercising control over the trades that were

being executed, whereas on 10 October such control was clearly being exercised by SEB.

97. Euroption sought to support its argument that the close out began on 9 October by reference to statements made by Mr. Martin in a letter dated 16 March 2009. In opening, Euroption also relied on a letter from Clifford Chance dated 6 August 2009. That letter sets out a "sequence of events" and is essentially consistent with the letter of 16 March. I was not persuaded by this argument. It is not necessary to engage in a detailed analysis of the two letters. Although neither the 16 March letter nor the 6 August letter expressly pinpoints the morning of 10 October as the point in time when the close out was commenced, I accept Mr. Toledano's submission that those letters are consistent with (a) that proposition; (b) Mr. Martin's evidence; (c) Mr. Martin's 22 October memorandum; and (d) SEB's case. Moreover, the significance of the 9/10 October point did not emerge until service of the Particulars of Claim on 24 February 2010, when Euroption asserted specifically for the first time that SEB began closing out on the 9 October. SEB then pleaded in its Defence that the close-out began on 10 October and joined issue on that topic. Interestingly a note in Euroption's audited accounts for the year ended 31 December 2010 in relation to "Litigations and claims" also refers to the closeout taking place "from October 10 to October 17, 2008". However Mr. Toledano did not seek to rely on this point.

98. It follows that I reject Mr. Shivji's submission that Mr. Martin's own established practice in relation to margin calls (based on his earlier conduct in September), or the terms of the Mandate, or the relevant regulatory framework, as Mr. Martin understood it to operate, predicated that he would have taken the decision to close out Euroption's positions by 12:44 on the 9 October 2008. Not only am I satisfied that the evidence does not establish this but also I disagree with the assertion that either the terms of the Mandate or the relevant regulatory framework required SEB to begin the close out on that date.

99. First, as Mr. Toledano submitted, the right to impose limits on SEB's trading or to refuse instructions given by Euroption or TSL were rights conferred by clause 6 and clause 12(c) respectively, which were separate from the right conferred by clause 11 to close out. The fact that SEB exercised the former did not amount to an exercise of the right to close out.

100. Second, so far as the point relating to the regulatory framework was concerned, in cross-examination, a line of questions was put to Mr. Martin regarding SEB's obligation under LIFFE rule 3.27.2 (when faced with a client in default of its margin obligations) as set out above "to take such steps as are open to him to reduce the client's liability". It was suggested to him that in order to comply with its obligation Mr. Martin had no alternative other than to close out immediately. In response to this, Mr. Martin set out an outline of what he thought such steps would generally involve. Mr. Martin said that the first thing to do was to call the client for money. Once the client was on margin call, there were then a further three general steps that a broker would go through, namely: (i) to try to get the money in and to try to increase pressure on the client to reduce its positions willingly; (ii) to restrict the client (if possible) in what it can do; and (iii) only when that has failed to "go hostile" on the client. The main reason a broker will be reluctant to take this final step is that "when you go hostile, whatever you do, you're wrong". He pointed out that every

circumstance was different and that there might be many reasons "why the bank would wait one, two, three days".

101. Mr. Beagles agreed that it was reasonable for a broker to provide a grace period to a client that had not paid margin call in order to enable them to close positions themselves. The length of the grace period was not set in stone: it would depend on the circumstances and would vary from case to case. During that grace period, he said he would expect the clearing member to encourage the client to close positions itself.

102. The point which was taken by Euroption in relation to LIFFE rule 3.27.4 was irrelevant. Rule 3.27.4 provides an exception to rule 3.27.2 and sets out the circumstances in which a clearing member may be entitled to decide not to insist on the prompt collection of margin from its clients. However in this case the sub-rule was not applicable since there had been no decision by SEB not to insist on the prompt collection of margin from Euroption. In this case SEB had decided to collect margin from its client and had endeavoured to do so on each day during the relevant period. Accordingly, I do not consider that the LIFFE rule can shed any light on the factual issue as to when the close out began.

103. I also reject Mr. Shivji's further submission that, whether or not Mr. Martin intended to commence a close out of Euroption's open positions, TSL's conduct indicated that it understood the e-mail timed 12:44 on 9 October to be such an instruction. There was nothing in the trading pattern or the Skype messages that supported such a conclusion and, moreover, Mr. Mason's Skype message timed at 08:15 on 10 October to which I have already referred, is to contrary effect.

104. Accordingly, I determine Issue I in SEB's favour. All that SEB attempted to do on 9 October was to impose conditions on, or limit, Euroption's trades. However Mr. Scattolon retained control of directing Euroption's trades. It was only on 10 October 2008 that SEB itself took control of the Euroption portfolio and began to close out its positions.

Issue II: did SEB owe Euroption contractual or tortious duties to conduct SEB's close out of Euroption's positions with reasonable care and skill?

105. It was common ground between the parties that, having exercised its right to close out, SEB had a duty to act honestly, in good faith and not arbitrarily, capriciously, perversely or irrationally; see *Paragon v Nash* (*supra*); *Socimer International Bank Ltd (In Liquidation) v Standard Bank London Ltd (No 2)* (*supra*). I refer to this duty as the duty to act rationally. No issue of want of good faith arose in the present case. What was in contention was whether SEB had any contractual or tortious duty of care to conduct the close out exercise competently and with reasonable care, and, if so, what was the scope of that duty.

106. As paragraph 66 (quoted below) of the judgment of Rix LJ in *Socimer* makes clear, if the court is considering the issue of rationality alone, the decision remains that of the decision maker; if, on the other hand, the court is considering whether there has been compliance with an obligation to act competently and take reasonable care, the arbiter is the court itself, based on entirely objective criteria. Effectively, if a duty of care were to exist in the present case, SEB's conduct of the close out would fall to be

subjected to the scrutiny of a retrospective, hindsight analysis of the trades which SEB entered into, in order to enable the court to determine whether, by reference to (necessarily uncertain) objective criteria applying to this particular close out situation, it had complied with its obligation to take reasonable care and act competently.

107. I turn first to consider whether the contract between Europtìon and SEB imposed such an obligation on SEB in relation to the close out.

108. Mr. Shivji's first argument was that the Mandate contained an implied term pursuant to section 13 of the Supply of Goods and Services Act 1982 ("the Act") to the effect that SEB had a duty to provide its services with reasonable care and skill and that this covered a situation where SEB was providing the service of conducting a forced liquidation of Europtìon's portfolio. This, Mr. Shivji submitted, was not surprising, since the eventuality that the bank might liquidate the portfolio following a missed margin call was something that was expressly contemplated by the contract. Accordingly, he submitted, given the commercial context a client might well choose its clearing bank based on its perception of the bank's standing and presence in the market, and having regard to its ability to preserve value in the event of a forced liquidation.

109. Second, he argued that the terms of the Mandate were very different from those in *Socimer*. In that case, the power to sell or retain the relevant assets was described as being in the seller's "sole and absolute discretion ... at such price as it deems reasonable and appropriate". Such explicit wording, Mr. Shivji submitted, was notably absent from the Mandate in the present case; the Mandate in this case was a standard form agreement put forward by SEB; if SEB had intended that it should have discretion over the conduct of the close out, as well as the timing, then it would have been straightforward for this to have been included into the contract. In this regard, the contract should be read *contra proferentem* and as being subject to an implied term that any close out should be conducted competently and with reasonable care.

110. For the reasons largely advanced by Mr. Toledano, I reject Europtìon's arguments that the Mandate should be read as subject to an implied term that the close out would be conducted competently and with reasonable care, whether by reason of section 13 of the Act or otherwise.

111. In my judgment, SEB's rights under the Mandate to impose limits on Europtìon's activities under clause 6, to close out Europtìon's positions under clause 11, or to refuse instructions under clause 12 (c) cannot be characterised as "services" within the definition contained in section 12 (1) of the Act. The definition in section 12(1) of "contract for the supply of a service" is (subject to exclusions) "a contract under which a person ('the supplier') agrees to carry out a service". Thus the "implied term about care and skill" imposed by section 13 of the Act only applies to services agreed to be provided under a contract for services and not to all rights and obligations under such a contract. Section 13 provides:

> "In <u>a contract for the supply of a service</u> where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out <u>the service</u> with reasonable care and skill." [Emphasis supplied.]

112. The Mandate contemplated that two types of services might be provided by SEB. These were set out at clause 6 (subject to the provisions of clause 7) as follows:

  i) advisory services regarding dealing in exchange traded futures and options (and securities where the securities transaction in question was ancillary to a transaction in futures or options); and

  ii) settlement and exchange services whereby SEB acted as clearing broker for trades executed by or on behalf of Europtision.

  These services were to be provided in the course of SEB's business and, accordingly, section 13 of the Act would have applied to the provision of them.

113. However, there is no basis in the Act or otherwise to suggest that a similar implied term applied to SEB's right to impose limits, its right to refuse instructions, or its right to close out, since these were not on any basis services which SEB had agreed to carry out under the Mandate. First, it is difficult to see how, in ordinary language, the exercise of such rights by SEB, at its discretion, for the purposes of protecting its own position, could be characterised as a "service" being provided "to" Europtision. Even if, contrary to my view, the exercise of such rights could arguably be so characterised, since SEB had not agreed under the Mandate, to provide any such "service", it is difficult to see how rights exercisable at SEB's discretion could be said to be "services" for the purpose of section 13.

114. As Mr. Toledano submitted, Europtision's case not only fails to have regard to the actual wording of section 13, but also fails to have regard to the distinction drawn in the relevant authorities between the situation before and after a default. Following default, the broker is entitled to put its own interests first and is primarily carrying out the forced liquidation of the portfolio in order to reduce and ultimately eliminate the risk (i.e. the exposure on its back-to-back contracts with the clearing house) to which it had been exposed by its client's failure to provide margin. This is fundamentally different from providing services under the contract prior to a default.

115. In *Socimer* (*supra*), the Court of Appeal had to consider, in the context of trading between banks in forward sales of emerging markets securities, the exercise of a right by one counterparty bank, following a default by the other bank, to determine the value of a portfolio. The agreement expressly permitted the defendant enforcing bank an "absolute discretion" whether to liquidate or retain the portfolio to satisfy the amount due to it, but obliged it to carry out an immediate valuation of the portfolio as at the date of transmission and to credit the resultant amount to the claimant. The question for the court was whether the defendant's contractual obligation was to conduct an honest but otherwise subjective valuation of the retained assets, or whether, as a matter of contractual implication, or, alternatively, as a matter of equity by analogy with the duties of a mortgagee with a power of sale, the defendant was under a duty to take reasonable care to determine their true market value.

116. The Court of Appeal held that:

  i) When a contract allocated only to one party a power to make decisions under the contract which might have an effect on both parties, a decision maker's discretion was limited, as a matter of necessary implication, by concepts of

honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern was that the discretion should not be abused. Although terms such as "reasonableness and unreasonableness" were also concepts deployed in the context of a duty to act rationally, those words were not being used in that context in the same sense as when speaking of a duty to take reasonable care.

ii) In the circumstances of the case, no term was to be implied to the effect that an objective valuation or one which complied with a duty to take reasonable care, was required. Such an implied term was not necessary or sufficiently certain.

117. In his judgment (with which the other members of the court agreed), Rix LJ emphasised that the court does not replace the view of the broker conducting a close out as to what was reasonable in the circumstances, with the court's own view. It was the closing out broker's decision to make, in its own interest, as to how to conduct the close out, provided that the broker did not step outside the bounds of its duty of acting honestly, in good faith and not arbitrarily, capriciously, perversely or irrationally. At paragraphs 66 and 112, he said:

> "66. It is plain from these authorities that a decision maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern was that the discretion should not be abused. Reasonableness and unreasonableness are also concepts deployed in this context, but only in a sense analogous to *Wednesbury* unreasonableness, not in the sense in which that expression is used when speaking of the duty to take reasonable care, or when otherwise deploying entirely objective criteria; as for instance when there might be an implication of a term requiring the fixing of a reasonable price, or a reasonable time. In the latter class of case, the concept of reasonableness is intended to be entirely mutual and thus guided by objective criteria. Gloster J was therefore, in my judgment, right to put to Mr Millett in the passage cited at para 57 above the question whether a distinction should be made between the duty to take reasonable care and the duty not to be unreasonable in a *Wednesbury* sense; and Mr Millett was in my judgment wrong to submit that it made no difference which test you deployed. Lord Justice Laws in the course of argument put the matter accurately, if I may respectfully agree, when he said that pursuant to the *Wednesbury* rationality test, the decision remains that of the decision-maker, whereas on entirely objective criteria of reasonableness the decision maker becomes the court itself. A similar distinction was highlighted by Potter LJ in para 51 of

his judgment in *Cantor Fitzgerald*. For the sake of convenience and clarity I will therefore use the expression 'rationality' instead of *Wednesbury*-type reasonableness, and confine 'reasonableness' to the situation where the arbiter on entirely objective criteria is the court itself.

…

112. Thus in the specific context of a default and a forced - retention of designated assets, Standard is compelled by its buyer's default to retain what it never sought, save to the extent that it can immediately liquidate the assets on the termination date. The question whether it can sensibly in the interests of either party liquidate on the termination date is part of the complex uncertainties of this emergency situation. If it decides not to liquidate, it is forced to retain. If in that context it has to value the assets, why should it not be entitled to value them at a value which reflects the value of such assets to itself? It may dislike the risk they pose, in terms of the nature of the particular asset, its currency and/or nationality and so on. The decisions have to be taken very quickly, namely, 'on the date of termination' …. Once the asset is not immediately sold, the risk of retention is entirely transferred to Standard. In theory and sometimes in practice anything may happen the next day, or within the time in which a sale might become possible. The difficulty multiplies if the asset is relatively or entirely illiquid. Then there is no market price by which the value can be set on the relevant day. Who knows at what price the asset can be sold when a buyer appears? In such circumstances, Standard is entitled, it may be said, to consult its own interests, subject of course to the requirements of good faith and rationality. Those factors include both subjective and objective elements, but the essence of that construction is that the decision remains that of Standard, not of the market or the court, and that in coming to its assessment, subject to the limitations of good faith and rationality, it is entitled primarily to consult its own interests."

118. Similar types of considerations were taken into account by David Steel J and Blair J respectively in declining to find closing brokers guilty of negligence in *ED & F Man Commodity Advisers Ltd & Another v Fluxo-Cane Overseas Ltd & Another* [2010] EWHC 212 (Comm), *Sucden Financial Limited v Fluxo-Cane Overseas Limited* [2010] EWHC 2133 (Comm) and *Marex Financial Ltd* v *Fluxo-Cane Overseas Ltd* [2010] EWHC 2690. Perhaps surprisingly, no reference was made to *Socimer* in any of these cases. However, although rejecting arguments that specific standard terms of

business applied to impose a duty of care, David Steel J and Blair J respectively proceeded on the basis that there was, or least assumed to be (see e.g. per Blair J at paragraph 65 of *Sucden Financial Limited v Fluxo-Cane Overseas Limited*), a duty of care to act reasonably and to conduct the liquidation to the highest possible professional standards required in the circumstances. Thus they actually considered whether there had been any negligence by the closing out broker rather than the antecedent issue as to whether such broker was subject to a contractual or tortious duty of care.

119. In the first case, the defendant, Fluxo-Cane, had traded sugar futures and options and, as a result, had a substantial short position. This resulted in the claimant broker, MCA, exercising its right to conduct a forced liquidation of Fluxo-Cane's position. One of the issues which arose was whether the forced liquidation was conducted by MCA in a proper fashion. It was argued by Fluxo-Cane that MCA had an obligation under the relevant FSA New Conduct of Business Sourcebook ("COBS") to act "in accordance with the client's best interests". In rejecting this argument David Steel J said (at paragraph 76 of his judgment):

> "COBS 2.1.1 provides: 'A firm must act honestly, fairly and professionally in accordance with the client's best interest' but COBS 2 is also excluded from counterparty business. Even if applicable, it is not suggested as such that MCA acted other then [sic] honestly, fairly and professionally. As regards the best interests of the client, this is a difficult concept in circumstances where the client is refusing to pay margin and expecting MCA to close out as best it can. MCA was in effect trading on its own account. Furthermore, the interests of MCA were in common with FCO namely to limit the loss that might be sustained as a result of the liquidation. Thus I reject the suggestion if it be made that MCA were obliged by COBS 2.1.1 to manage FCO's position as if still acting as FCO's broker but at its own risk and without the provision of margin."

120. In *Sucden* similar submissions were made by Fluxo-Cane to the effect that the broker, Sucden, had conducted the liquidation negligently and in breach of its duties of care. Again reliance was placed on COBS to support an argument that the broker had a duty to act in the best interests of its client and subject to a best execution obligation. Blair J (at paragraph 53 of his judgment) agreed with David Steel J's approach. He said:

> "53. However, I am equally satisfied that the COBS (and the annex to the letter of 26 October 2007 so far as it creates an independent obligation) do not apply when the broker is liquidating the customer's account pursuant to an Event of Default. That is because these rules apply when the broker is executing its customer's orders, which is not the case in a liquidation. It is not correct either that in those circumstances the firm has to act in the best interest of its client. It cannot ignore the client's interests, but as the present case shows, the firm has interests of its own to consider. Here,

> liquidation was required to eliminate Sucden's own exposure with its counterparty. It was, in my judgment, entitled to put its own interest ahead of that of its client in that regard, although in practice both parties had a mutual interest in liquidation on the best terms possible. This conclusion is the same as that reached in *ED & F Man* at [75] and [76]. There David Steel J rejected the suggestion that the claimant was obliged to manage the defendant's position as if it was still acting as the defendant's broker, but (as he put it) at its own risk and without the provision of margin."

121. Blair J then went on to consider what standard did apply to the conduct of a liquidation of the position in circumstances where, under the relevant Terms of Business ("TOB") between the parties, the broker was not liable for losses suffered by the customer "unless arising directly from our gross negligence, wilful default or fraud". He approached the question:

> "… by asking whether Fluxo-Cane can demonstrate negligence, because unless it can, it will clearly be unable to demonstrate gross negligence. It is not suggested that this is the case of wilful default or fraud."

He then went on to consider whether the forced liquidation had been conducted negligently and concluded that it had not. At paragraph 65 he emphasised that it was important to resist the temptation of hindsight when judging the reasonableness of the broker's actions. He said:

> "65. I have discussed the evidence in this respect in some detail already. There are two principal reasons why in my judgment Fluxo-Cane's submissions cannot be accepted. The first, I have already referred to, and is that it was not negligent to wait until after the meeting of 29 January 2008 in Sao Paulo before finally liquidating the account. On the contrary, this was (I am satisfied) a reasonable course to take. The other is that I am quite satisfied that Dr Fitzgerald is correct to express the view that it is only with the benefit of hindsight that it can be seen that liquidation during the period 22 to 25 January 2008 would have been most advantageous. The market might have risen, as Mr Levy thought it would, or Mr Garcia might have been proved correct in his conviction that the market would fall. I am satisfied that following the action taken by the Exchange, the liquidation of Fluxo-Cane's positions was going to be extremely problematic, as indeed both Mr Garcia and Mr Overlander foresaw. I very much doubt in these circumstances whether there is a single template by reference to which it can be said that liquidation was, or was not, negligent. Be that as it may, I am satisfied in this case that the criticisms made

of Sucden's conduct of the liquidation are unfounded. The highest Fluxo-Cane puts the required standard is that Sucden was under a duty of care to act reasonably and to conduct the liquidation to the highest possible professional standards required in the circumstances. Even if that is correct as a matter of law, which is not something which I need to decide in this case, I do not consider that the duty has been breached. Negligence has not been established, let alone gross negligence."

122. In the third of the series of cases, *Marex Financial Ltd v Fluxo-Cane Overseas Ltd*, David Steel J again had to consider whether there was any liability for negligence on the part of the clearing broker which was closing out Fluxo-Cane's position. At paragraphs 88 and following he said:

> "88. Further, under the new client classification that applied from 1 November 2007, FCO was not a retail client, but was either an eligible counterparty or a professional client. If an eligible counterparty, the exemption referred to above would have applied, and if a professional client, Marex's Order Execution Policy (which was incorporated by reference in the letter dated 8 October 2007) expressly provided that the duty of best execution owed by Marex to professional clients only applied 'where we execute orders on your behalf and where we receive and transmit client orders'. Since however, the close out of FCO's positions under clause 14.1 (or clause 15.1) was in Marex's discretion pursuant to its independent right to close out rather than pursuant to FCO's orders, it follows that the duty of best execution (or COBS 11.2.1) was inapplicable anyhow.
>
> 89. Indeed, the distinction between executing FCO's orders and exercising a right to close out upon FCO's default was, in my respectful judgment, rightly relied upon by Blair J in the *Sucden* proceedings in support of the general proposition that 'the COBS ... do not apply when the broker is liquidating the customer's account pursuant to an Event of Default ... because these rules apply when the broker is executing its customer's orders, which is not the case in a liquidation' (para. 53 of the *Sucden* judgment).
>
> 90. Such an approach is consistent with general market understanding, which is described by Dr Fitzgerald as follows:
>
> '[The] general market understanding [is] that best execution and best interests obligations do not apply in a situation where a broker is liquidating positions on behalf of a client who is in a state of default'

'... Moreover, in my view, the requirements of best execution and bests interests would cease to apply if the client is deemed to be in default, when I believe the broker would have a wide discretion in limiting and closing down the set of positions, which could now constitute a direct risk exposure for the broker itself.'

91. Moreover, as I held in the *Man* proceedings, the application of COBS 2.1.1 (where there is no issue as to the honesty, fairness and professionalism of the broker, but a question as to whether he has acted in the client's best interests) is a difficult one:

[and he quoted paragraph 76 already cited above]

92. I conclude that the correct approach has to be that the only relevant standard applicable to Marex's close out of FCO's positions was that resulting from clause 15.1 of the Terms of Business (or clause 17.1 of the New Terms of Business), namely, that Marex would not be liable to FCO save in respect of losses 'arising directly from [Marex's] gross negligence, wilful default or fraud'. Since there is no suggestion by FCO that there was any wilful default or fraud on the part of Marex, the relevant question is whether Marex conducted the close out with 'gross negligence'.

93. Quite what the epithet 'gross' adds is not at all clear. For the moment it is sufficient to consider Marex whether has made out its case that it conducted the close out in a professional and competent manner. For this purpose, it is important to bear in mind that a broker's liquidation or close out of its client's positions when the client is in default is an exercise in risk reduction or elimination. The broker's primary interest in that situation is (rightly) to reduce or eliminate risk since any resulting losses could end up being borne by the broker. As Dr Fitzgerald put it:

'2.6 ... It needs to be recognised that futures and options brokers are not normally in the business of taking outright risk positions, since they generally have neither the market expertise nor the level of capital required to do so. ...

2.7 It is also worth pointing out that a broker left with client positions is generally in a more risky situation than a client, such as Fluxo, who is classified as a hedging client. Such a client has the potential to delivery physical commodities against its derivatives positions, and the derivatives losses if any will be offset by profits on the physical positions. The broker by contrast

will only have one side of the client's position, and thus end up with a purely speculative position of someone else's choosing. In my view, a reasonable broker in such circumstances would be concerned to eliminate the risks as quickly as possible.'

94. It is important to resist the temptation of hindsight when judging the reasonableness of the broker's actions. Blair J was well aware of that temptation. As he put it at para. 65 of the *Sucden* judgment:

[which Steel J then quoted]

95. Indeed the natural reaction of a broker, anxious to mitigate his exposure (and indeed the liability of his client) would be to close out the position quickly, liquidating as much as possible, as soon as possible, even if in the event the exposure was enhanced. This is precisely what Marex did. That such was the only sensible course is reinforced by the following considerations:

i) the persistent failure on the part of Mr Garcia to pay margin or give orders to buy;

ii) the extraordinary and unprecedented intervention of ICE in respect of FCO's positions;

iii) the severe impact that such intervention had had on the market on 16 January 2008;

iv) the continuing and significant upward trend in prices throughout 17 January 2008 (rising from 11.77 to 12.57 ct/lb between 6.30 a.m. and 6.30 p.m.);

v) the sheer number of brokers who held FCO's positions and were affected by the problems of unpaid margin and need to reduce positions;

vi) the uncertainty as to whether any co-ordinated way forward would be possible, failing which mass liquidation was likely to follow;

vii) the general uncertainty, speculation and panic that was rife throughout the market at that time.

96. The liquidation process was handled by the joint Heads of Agriculture at Marex. They were senior members of Marex's management with a long history of experience in the commodities markets. The proposition that people

> of that experience and calibre grossly (or even negligently) mismanaged the close out is difficult to conceive, all the more so in circumstances in which the broker's interest in risk reduction or elimination in this context would be expected to be aligned with the client's interest. I reject the allegation."

123. He accordingly concluded that Marex was not liable in negligence. Dr. Fitzgerald, whose evidence was accepted, was also a witness in all three cases.

124. It is, however, right to say that, in each of the *Fluxo-Cane* cases, the court considered the issue whether whether there had been negligence on the part of the broker, because of the apparent assumption that the exclusion clause implied the existence of a duty of care. As can be seen from the passage cited from paragraph 65 of his judgment above Blair J specifically stated in *Sucden* that there was no need for him to decide the issue as to whether a duty of care in the terms asserted existed.

125. I do not accept Mr. Shivji's argument that the approach in *Socimer* can be distinguished because of the attachment in that case of the words "in the seller's sole and absolute discretion … at such price at as it deems reasonable and appropriate" to the power to sell or retain the relevant assets on default, and their absence in the present case. In *Socimer* the relevant power under consideration was in fact a power to determine the value of the Designated Assets on the date of termination, to which no express words of discretion were attached.

126. Of course, in each case, the implication, or otherwise, of a term that a party to a contract will exercise reasonable care and/or act competently in discharging a contractual function will depend on the particular terms of the contract in question and the relevant contractual context. As I have already said, I see no basis for the implication of a term pursuant to section 13 of the Act. Likewise, I see no justification in the present case for the implication of such a term on any other grounds.

127. In *Socimer* Rix LJ, at paragraph 105 of his judgment, referred to the case of *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 as "… a useful and authoritative modern restatement of the relevant principles upon which terms may be implied and the rationale of so doing or not doing so." He quoted extensively from the judgment of the court given by Sir Thomas Bingham MR. at pages 480 to 482.

128. I see no reason why, applying those well-recognised principles, it is appropriate to imply a term into the Mandate that SEB would conduct the close out using reasonable care and to a suitably professional standard. Such a term was not necessary to give business efficacy to the contract; it was uncertain how such a duty could be defined, given that the closing broker was acting in its own interest urgently to protect its own position; it was far from clear how, given the highly volatile market, and the extremely difficult trading conditions applying in the period 10 to 14 October, where it was not possible to forecast what might happen, objective criteria could be retrospectively applied by a court to determine whether the closing broker had satisfied the relevant standard; as Blair J put it in *Sucden,* it is almost impossible to see how the court could apply "a single template by reference to which it can be said

that liquidation was, or was not, negligent". Nor would the implication of such a term be so obvious that "it goes without saying".

129. On the contrary, all the circumstances of a close out in the type of conditions that were pertaining in October 2008 and the need for a closing broker in the position of SEB to act urgently in its own interests, suggest that it would be far from obvious that any closing broker would agree to the assumption of a duty that would retrospectively subject its conduct to a minute analysis of every single trading decision, measured against every available alternative, which was effectively the exercise that was conducted at trial by Mr. Shivji on Euroption's behalf. As Mr. Toledano put it in his closing submissions, in terms of risk allocation, why would a broker providing clearing services for a modest commission per trade (and not holding itself out as an expert options trader) put itself at risk of having its trading decisions second guessed in this way when faced with an unwanted portfolio as a result of a customer default? I agree. I see no reason why the contract contained in the Mandate should be subjected to the implication of a term imposing a duty of care on the closing broker. In my judgment, the right to close out after a customer default as contained in the Mandate must afford the broker considerable discretion and be subject to limitations of good faith and rationality only.

130. For similar reasons, I reject Euroption's argument that SEB owed it a tortious duty to take reasonable care in the conduct of the close out. I can accept that, if SEB acted in the conduct of the close out in a manner that was not contractually authorised (e.g. entered into trades which were not authorised by the Mandate), then SEB might well be regarded as having assumed a responsibility in tort towards Euroption, and be subject to a duty to take reasonable care. In any event, in such a situation SEB would be liable for breach of contract, having acted in excess of its powers, and liable to compensate Euroption for any damage it suffered as a result. Whether or not SEB acted in excess of its contractual powers is one of the issues that arise for determination under Claim 2 below. However, apart from the particular situation of acting in excess of its powers, in my judgment SEB owed no duty of care to Euroption in tort.

131. Mr. Shivji relied upon the decision of the House of Lords in *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181 in support of his argument that SEB was subject to a tortious duty of care. He referred to the three tests which can be used to consider whether a duty of care arises in the context of purely economic loss, namely: (a) the assumption of responsibility test, (b) the threefold "fair, just and reasonable" test, and (c) the incremental test.

132. However, once Euroption's case on implied statutory or contractual term fails, there is in my judgment no room for the imposition of a tortious duty of care, which is more extensive than that which was provided for under the Mandate; see e.g. *Tai Hing Cotton Mill Ltd. v Liu Chong Hing Bank Ltd* [1986] A.C. 80, per Lord Scarman 107; as explained in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, Lord Goff at 186; *Downsview Nominees Ltd v First City Corporation Ltd* [1993] 1 AC 295 per Lord Templeman at 316; and *Chitty on Contracts*, 30th Edition, at paragraph 1-147. As Lord Templeman said in *Downsview*:

> "The House of Lords has warned against the danger of extending the ambit of negligence so as to supplant or

> supplement other torts, contractual obligations, statutory duties or equitable rules in relation to every kind of damage including economic loss: see *C.B.S. Songs Ltd. v Amstrad Consumer Electronics Plc* [1988] AC 1013, 1059; *Caparo Industries Plc v Dickman* [1990] 2 AC 605 and *Murphy v Brentwood District Council* [1991] 1 AC 398. … There will always be expert witnesses ready to testify with the benefit of hindsight that they would have acted differently and fared better."

133. But even on the assumption that Euroption could overcome this hurdle, and whether one approaches the question on the basis of assumption of responsibility or by reference to the question whether it would be fair, just and reasonable to impose a duty on SEB in this context, I see no justification for the imposition of a duty of care on a clearing broker closing out a client's positions under the terms of the Mandate. As Mr. Toledano submitted:

i) This was not a case where the basis of the relationship involved Euroption relying on SEB to make sensible trading decisions with care and skill. Euroption was the specialist options trader and had responsibility (in the usual course of events) for making all trading decisions.

ii) Although SEB acted voluntarily, it did so only because of the difficult position it had been put in by Euroption.

iii) It was within Euroption's power to avoid SEB taking over by complying with its obligations to make margin payments, but Euroption did not take the steps which would have allowed it to retain complete control over the trading decisions.

iv) Euroption was in the business of taking high risks for high rewards. Euroption ought to have made sure that it was in a position to manage the risks. By contrast, SEB was providing an administrative clearing service that did not involve taking such risks.

v) The parties expressly agreed that, in circumstances where Euroption failed to pay margin, SEB could act to protect itself by closing out Euroption's positions. To hold that, in doing so, SEB assumed a responsibility to Euroption, would, in effect, be to turn that agreement on its head.

vi) On Euroption's case, the result would be that Euroption could, by defaulting on its margin, place the responsibility for ensuring the careful management of its portfolio in a highly volatile market onto SEB's shoulders. This was not something that Euroption had contracted for. If Euroption had contracted for SEB to assume such responsibility, the contract would have looked very different.

vii) The imposition of a duty of care would be inconsistent with the nature of a clearing broker's right in a close-out context to take whatever steps it considers appropriate in order to protect its own interests.

134. Likewise, in relation to the incremental test, Mr. Toledano submitted that the imposition of a duty of care in the present case would involve expanding the law into a new context, namely that of a clearing broker conducting a close out. This was not an appropriate relationship for a duty of care to be imposed. Euroption also seeks to recover in respect of what would be, in the law of negligence, a new type of loss: the loss of hypothetical investment opportunities. This would involve an expansion of the law of negligence beyond the normal heads of damage (an award of interest has previously been held sufficient to compensate a claimant for being kept out of its judgment sum).

135. I found these submissions compelling. Accordingly, I reject Euroption's submission that SEB owed it a tortious duty of care.

Issue III - Claim 2: were the combination trades: (a) in breach of the Mandate as being in excess of SEB's contractual authority; and/or (b) in breach of its duty to take reasonable care or act rationally?

136. Under Claim 2 Euroption complains about two combination trades executed by SEB on 10 October 2008. These combination trades involved the purchase of put options to close part of the existing short put positions and the simultaneous sale of further out of the money call option positions. The quantum of Euroption's claim in respect of the direct losses allegedly suffered under Claim 2 was €666,700 and £1,072,224.

137. The two combination trades carried out on 10 October were:

i) the Set H trades (as described on the chart) which involved the purchase of 1,300 Eurostoxx November 2350 puts and the sale of 1,300 Eurostoxx November 2650 calls; and

ii) the Set J trades (as described on the chart) which involved the purchase of 2,083 FTSE 100 November 3600 puts and the sale of 2,083 FTSE 100 November 4600 calls;

138. Euroption's complaint relates to the call leg of the two combination trades. It alleges that there was liquidity in the put leg of both combination trades and that SEB could have closed these positions naked (i.e. without opening a new trade); but that, instead, SEB authorised TSL to use combination trades (purchase of a put and sale of a call) as part of the forced close out. TSL executed trade J (the FTSE combination trade) for SEB and, as Euroption admits, following instruction from Mr. Scattolon, executed trade H (the Eurostoxx combination trade). Euroption complains that SEB took both trades without demur and made no effort to close the call leg of either trade; and that consequently, when the market rallied on 13 October further losses were sustained. Euroption contends that there was no authority in clause 11 (or anywhere else in the contract) to open new positions in the forced liquidation and that, even if there was such authority, the trades were a breach of SEB's duties of reasonable care and skill.

139. I should mention that, at the post-judgment hearing, Mr. Shivji sought to persuade me, by reference to his opening and closing submissions, that Euroption had not sought to argue that such trades were in breach of the alleged duty to take reasonable care or act rationally. If that was the case, I had certainly been under the impression, from

Mr. Shivji's cross-examination of Dr. Fitzgerald and Mr. Martin, and paragraph 13.1 of the Particulars of Claim, that such an allegation was indeed being made. Mr. Toledano informed me that he was likewise under such an impression. For that reason, I have addressed the point in this judgment.

140. In relation to this issue I had assistance from the two experts, Mr. Beagles and Dr. Fitzgerald. Both experts had considerable experience in the trading of derivatives, including equity index futures and options, in risk management, of execution and clearing arrangements on futures and options exchanges and of the process of liquidating complex derivatives positions. Likewise they both had extensive experience of the relevant markets. Both experts did their best to assist the court in giving their evidence. Where they differed, I tended to prefer the evidence of Dr. Fitzgerald, who was less dogmatic and technical than Mr. Beagles, and who adopted what appeared to me to be a more market-orientated and realistic approach to the issue of close out in highly difficult and volatile market conditions. On occasions Mr. Beagles had a tendency to be over-partisan.

141. Although Mr. Beagles in his expert report referred to the call trades in the combinations as "entirely new option positions", I regard this as an unhelpful description since, as Dr. Fitzgerald explains, the call trades were mapped entirely into the put option purchases.

142. Both experts agreed in their reports that a combination trade was indeed a recognised means of closing out an open position, although Mr. Beagles considered that other alternative strategies should be exhausted first before deciding to do a combination trade. However in cross-examination he agreed that he was not suggesting that there was a fixed and inflexible hierarchy that had to be adhered to in every situation. He took the view that it was reasonable for a clearing member closing out to explore the best choices first before using combination trades. Dr. Fitzgerald's evidence, which I accept, is that there are a wide variety of strategies and timings that a clearing member in the position of SEB could adopt in liquidating or closing out a client's position on a forced basis. Such strategies might involve hedging the continuing exposures with futures or combination trades or, where it was not possible to close out all positions, by retaining an unhedged position. Necessarily what was appropriate for the particular clearing member in any situation was heavily fact-dependent.

143. Dr. Fitzgerald characterised close-out trades in three categories: Category 1 was the simplest; such trades would involve the immediate closing out of customer positions by transacting equal and opposite transactions in the same contract; Category 2 trades would be those in closely related contracts which eliminated or almost eliminated the risks of existing positions; by way of example he gave a trader closing out the risk of a short FTSE 100 put with a strike of 6000 by buying another FTSE 100 put with a strike of 6025; Category 3 trades were those which might not be specifically related to the set of positions originally existing in the customer's account, but where the effect of introducing the new trades into the book was to reduce significantly the price or volatility risks of the overall position. Dr. Fitzgerald regarded the use of such trades, if the clearing member determined in good faith that this was the best and most timely way of bringing the overall risk under control, as a normal and reasonable business practice. In their joint report both experts agreed that the combination trades entered into on 10 October fell within Dr. Fitzgerald's Category 3.

144. In my judgment, Clause 11 of the Mandate, which gave SEB power "to close out" Euroption's open contracts, permitted SEB to do so in a manner which both experts agreed was a recognised market method of closing out an open position as part of a forced liquidation process. As Mr. Toledano submitted, it would be surprising if the Mandate did not cover a recognised means of closing out trades, in circumstances where clause 11 was clearly designed to protect the interests of the broker and to give the broker a degree of flexibility. There is nothing in the clause, or indeed in the Mandate itself, which would indicate any limitation excluding new trades. As Dr. Fitzgerald's three categories indicate, even in the simplest type of close out trade, Category 1, a new trade is written. Accordingly, I conclude that, as a matter of interpretation of the Mandate, SEB had power to execute combination trades of the kind in question. It is not necessary to imply a term into the contract, since all the court is doing is determining the meaning of the words "close out" in their relevant context, assisted by expert evidence as to the market understanding of the term.

145. But even if I were wrong in this conclusion, the evidence showed that Mr. Scattolon gave the instructions for one of the combination trades and expressly authorised/ratified the other.

146. Thus in relation to Set H, the trades involved the buy back of 4,000 Eurostoxx 2350 November puts. 2,700 were bought back naked and 1,300 were bought back in combination with the sale of 1,300 November Eurostoxx 2650 calls. At 11:03 on 10 October, Mr. Scattolon wrote to TSL by Skype, "please work a combo for the esx [i.e. Eurostoxx]". Mr. Trimming or TSL replied at 11:17 "We have already bought 2700 of the ESX total today". Mr. Scattolon asked, "2700 lots on which average?" and Mr. Trimming replied "199". Since 2,700 puts had already been closed naked, there remained a further 1,300 which needed to be closed. Mr. Scattolon then gave a specific instruction, "please work some combos for the 1,300 esx lots". Mr. Trimming responded at 11:23, "I will try" to which Mr. Scattolon replied, "thank you". At 11:41, Mr. Neild reported back to Mr. Scattolon, "Eurostks combo filled 1,300 times". Moreover, Mr. Scattolon agreed in cross-examination that he had indeed given the trading instruction for this combination trade. At 13:00 that day, Mr. Caldon provided Mr. Martin with an update on the status of the close out, and informed him for the first time that this combination trade had been carried out as part of the close out of the 4,000 Eurostoxx 2350 puts.

147. Likewise in relation to Set J, the trades involved the buy back of 6,483 November FTSE 3600 puts. 4,400 of these were closed out naked and 2,083 were closed out in combination with the sale of 2,083 November FTSE 4600 calls. At 09:58, Mr. Caldon explained to Mr. Martin that TSL was having trouble closing the 3600 puts due to the size of the position and the fact that the market was dropping by 10 points every time they tried to bid for those positions. Mr. Caldon said that they could "combo" those positions "… into a 4700 Call or something and still pay about 50" but that the market was otherwise quiet. Mr. Caldon said that if they just tried to close the whole position then it could push the price too far. Mr. Martin approved the buy back of half of the 3600 puts in combination but added, "… then we'd best start working at buying those Calls back". In his witness statement Mr. Martin said that, in his view, Mr. Caldon had made it clear that there was no market for a naked purchase of those puts at an acceptable price. In his oral evidence, Mr. Martin acknowledged that he authorised the FTSE combination trades. He also acknowledged that every position

could be closed at a price but he was not prepared to spend any kind of money just to get out of a position. He also accepted that he didn't consider prior to authorising the combination trade whether it was possible to buy back a FTSE put at a similar but not identical strike price.

148. At around 10:30, 502 of the 3600 puts were bought back and 400 of the 4600 calls were sold but there was then a break in TSL's trading of this position until 11:35. During that one hour window (with only 400 of the 4600 calls sold), Mr. Trimming spoke to Mr. Scattolon about this trade. At 10:40, Mr. Scattolon asked for an update and Mr. Trimming told him:

> "We're covering 37 Puts, we are trying to work a combo on the 36 Puts against 46 Calls, and covering the rest of the ESX. The market is so thin it is very very difficult."

Mr. Scattolon replied, "thank you please work all the combos you can". Mr. Scattolon confirmed in cross-examination that he wanted a combination trade to be done in relation to the 3600 puts and the 4600 calls. A further 1,683 lots were then sold with Mr. Scattolon's express authorisation.

149. In the circumstances, I hold that it was not open to Europtiion to complain that SEB executed the trades without authority or in excess of the powers which it had to close out under the Mandate.

150. It follows from this conclusion that Europtiion cannot contend that the combination trades imposed a tortious duty of care on SEB on the grounds that, to use Mr. Shivji's words, SEB had "strayed outside the territory of clause 11 of the contract".

151. It was also difficult to see how in the circumstances Europtiion could complain that, even on the assumption that such trades were contractually permitted under clause 11, such a strategy was in breach of SEB's duty of care (if, contrary to my conclusion under Issue II above, one existed), or was in breach of SEB's duty not to act irrationally. As formulated in Mr. Shivji's closing submissions, the complaint appeared to be that Mr. Scattolon:

> "… was in the dark about precisely what was going on at the time (SEB not having given notice to Europtiion of the close out) and was interested (unlike SEB) in rolling out the strike prices so that the portfolio could survive the period of volatility"

and therefore could not be said to have authorised the trades or waived any breach of duty on SEB's part; and that Mr. Martin was negligent/irrational in accepting these trades without demur in circumstances where the combination trades "substantially increased the exposure of the portfolio to upward movements in the market"; see Particulars of Claim, paragraph 13.1.

152. On the facts, as I find them, I reject Europtiion's claim under this head (if, indeed, any such claim was made) that such a strategy was negligent or in breach of SEB's duty of care (if one existed), or was in breach of SEB's duty not to act irrationally. First of all, as I have already found, Mr. Scattolon was aware on 10 October that SEB was

conducting a close out. Second, even on the assumption that SEB had a duty of care in relation to the close out, as opposed to merely a duty not to act irrationally, I am satisfied that the execution of these combination trades was neither negligent nor irrational.

153. First of all I cannot accept the assertion that the combination trades "substantially increased the exposure of the portfolio to upward movements in the market". As the expert and non-expert evidence showed, as at 10 October, Europtiion and SEB remained excessively exposed to downward movements in the market, and SEB's aim was to reduce this risk. Dr. Fitzgerald's opinion (which I accept) was that it was completely reasonable for a clearing member in the position of SEB to accept a modest increase in upside risk to achieve a much more substantial reduction in downside risk (which is exactly what this trade achieved). The combined effect of the combination trades was a reduction in downside risk of €12,281,138 and an increase in upside risk of €1,485,394. In Dr. Fitzgerald's opinion, any clearing member in the position of SEB, bearing in mind the then market circumstances and with a weekend ahead, would have regarded that risk impact as "highly satisfactory".

154. However SEB did not simply ignore the upside risk presented by the new short call positions. In his call with Mr. Caldon at 10:12 on 10 October, Mr. Martin stated that "... we'd best start working at buying those Calls back". At 11:14, Mr. Martin said to Mr. Caldon that:

> "… I've now got to get rid of those 46 … I've now got to get rid of 4600 calls as well. Look I don't want any risk on this … account over the weekend."

Mr. Martin therefore made it absolutely clear that he wished to exit these new calls (and indeed all remaining positions) as soon as possible.

155. In his report, Mr. Beagles criticised SEB's decision to allow TSL to carry out the combination trades on the ground that, even when faced with an absence of liquidity, it should have exhausted all of the alternative strategies before resorting to such a method. Mr. Beagles asserted that, "… it is surely the case that simply shifting risk in this way is less desirable than removing or mitigating risk by an alternative method." Such alternatives included, he states, "… selling the position as a whole to another bank, closing out the open positions expeditiously, delta hedging with relevant futures etc…". Thus Europtiion's case appeared to be that in failing to take these steps, SEB was in breach of duty.

156. In his report, Dr. Fitzgerald explained that it was not a question of exhausting other strategies: there was no strict and inflexible hierarchy of options. It was a question of SEB doing the trades that were available at the time and that were advantageous from a risk reduction point of view. If there was inadequate liquidity at sensible prices to close the position naked, it was to be expected that the positions would be closed in whatever manner could be achieved in the prevailing market conditions.

157. In cross-examination, in relation to Set J, Mr. Beagles said he had no reason not to take at face value what Mr. Caldon told Mr. Martin about the market for the 3600 puts, at the time when he suggested the FTSE combination trade; in other words the absence of liquidity. Mr. Beagles did not suggest that SEB, as a reasonable clearing

member, should not have taken into account what Mr. Caldon was saying. Indeed Mr. Beagles said that he thought liquidity was "a very real consideration". Mr. Beagles also said that the impact of liquidity on price was a consideration to be taken into account, inasmuch as it was sensible not to do too much at one time and to try only to do what the market could stand (because otherwise one was in danger of moving the price). Mr. Beagles also accepted that, if it was possible to buy back the 3600 puts as part of a combination trade at a significantly better price than could be obtained if one was doing the trade naked, that might be one factor that one would take into account when deciding what to do in the close out. Mr. Beagles commented that his theory was that it would be highly unlikely that the price would be significantly better, but conceded that this was not based on any concrete evidence from trading on 10 October. He accepted that, taking it at face value, TSL was clearly indicating to SEB that there might well be an advantage in doing the trade as a combination trade.

158. In cross-examination, Mr. Beagles also repeated his view that other alternatives should be exhausted before a broker decides to do a combination trade. The focus seemed to be on so called Category 2 trades (i.e. options with a strike price similar to the option in the portfolio). While Mr. Beagles referred to a hierarchy of options, he said that he was not suggesting that there was a fixed and inflexible hierarchy that everyone has to adhere to in a fixed and inflexible way.

159. According to Dr. Fitzgerald, there was no "sequential order of preference". As Mr. Toledano submitted, Dr. Fitzgerald's evidence on this point reflects the entitlement of a clearing member to give priority to its own interests in the course of a close out and the flexibility afforded to such a clearing member to determine how those interests are best served.

160. Mr. Beagles also accepted that the combination trades were beneficial so far as the directional risk exposure on 10 October was concerned. Although he attempted to qualify this by adding "but to a limited extent", he said that he accepted Dr. Fitzgerald's conclusion that the FTSE combination trade resulted in a very substantial reduction in the positive delta of the order of €64m and a reduction in the negative gamma of around €600,000.

161. Dr. Fitzgerald said that he might have been "quite tempted by the combination trade" because of its impact on the portfolio's long delta. The trades "knocked out" a significant amount of downside risk at the price of putting on a small amount of upside risk. He also accepted that "potentially" an even more preferable approach would have been to execute the combination trade, buy back the call and sell futures equivalent to the delta of the call.

162. In my judgment, Europtiion has failed to demonstrate any grounds to support its claim under this head that SEB was negligent or irrational in executing the combination trades as part of the close out. If and to the extent that Mr. Beagles was suggesting that a clearing member must adhere in some way to his hierarchy of preferred trades, in order to be considered to be acting reasonably, I reject that evidence. I find the evidence of Dr. Fitzgerald far more realistic. A clearing member conducting a close out in its own interests in circumstances such as those prevailing on 10 October was under no obligation to consider every possible alternative trade at every moment on that day. The fact that it might have been possible to structure a group of trades

which included options and futures, which might have been even more beneficial from a risk reduction perspective than the trades that were done, did not mean that the trades which were done did not themselves have very substantial benefits or that it was anything other than reasonable to execute such trades.

163. I accept Dr. Fitzgerald's evidence that a clearing member in the position of SEB must, for practical reasons, have a good deal of flexibility in carrying out the close out process, choosing the sequence of trades in order to achieve it and deciding on the timing of those trades. I accept Dr. Fitzgerald's view that a clearing member must have the unquestioned right to carry out its own assessment of the risks of the client's positions and choose that order and timing of trades which it deems most effective in reducing those risks, in the light of market conditions and liquidity. Indeed such an approach is supported by the authorities to which I refer below

164. In the present case, the combination trades were reported by TSL and accepted by SEB for perfectly good reasons, which were supported by the expert evidence. Indeed it was not put to Mr. Martin in cross-examination that he could or should have executed an alternative trade instead of the FTSE combination trades (Set J). Nor was it clear from the evidence whether any of Euroption's hypothetical alternatives could have been executed on 10 October or that, if executed, they would have improved Euroption's position given, for example, the cost of such alternative trades and the need to unwind them in due course.

165. Accordingly, I reject Euroption's Claim 2 on the facts, even if I were wrong in my conclusion that as a matter of law and in the circumstances no contractual or tortious duty of care existed.

Issue IV: Claim 3: Was SEB in breach of any duty of care and/or to act rationally by virtue of delay in closing out certain short calls?

166. Euroption's complaint under this head is that, on the assumption that the close out began on 10 October, SEB delayed in the buying back of certain short call positions. Specifically Euroption complains that

   i) 200 November 2650 Eurostoxx calls were not closed out (i.e. bought back) until the afternoon of 13 October, even though the rest of the position (1100 lots) had been closed out early on 13 October;

   ii) 1,760 October 3800 CAC40 calls were not closed out (i.e. bought back) until 13 October, when they should have been closed out on 10 October;

   iii) 2,000 November 4200 CAC40 calls were not closed out (i.e. bought back) until 13 October, when they should have been closed out on 10 October;

   iv) 2,725 October 4800 FTSE 100 calls, 2,200 October 4900 FTSE 100 calls and 11,000 October 5200 FTSE 100 calls were not closed out (i.e. bought back) until 14 October 2008, when they should have been closed out on 10 October.

167. Euroption contends that these call positions ("the Claim 3 calls") could, and should, have been closed at an earlier stage; that the markets were continuing to fall on 10 October; and that removing the portfolio's upside risk would have been prudent and

could have been effected with significant costs savings in a falling market. In its reply Europtin criticised SEB for having "overlooked the short call positions" on 10 October. Europtin contended that the delay in closing the Claim 3 calls amounted to a breach of SEB's duty of care and its duty to act rationally. As already mentioned, the quantum of Europtin's claim for direct losses under Claim 3 was:

€261,757	**£186,947**

168. I received a meticulous and micro analysis of the strategy which Europtin contended that SEB should have adopted in relation to closing out the Claim 3 calls, both from Mr. Beagles and from Mr. Shivji in his closing submissions. Added to Europtin's complaints about the actual strategy, were allegations that:

    i) Mr. Martin was a wholly unsuitable person to conduct or supervise the close out because, in particular, he did not have an advanced understanding of "the Greeks";

    ii) SEB failed adequately to consider and discuss the possibility of selling the entire portfolio to a single market maker or equity prop (i.e. proprietary) desk;

    iii) if closing trades naked was not possible, SEB ought to have given more consideration to the possibility of delta hedging the portfolio by selling futures;

    iv) in the event of it not having been possible to close options naked, SEB ought to have sought to carry out "Category 2" trades so as to create put and call spreads;

    v) SEB should not have used or relied upon TSL as the execution broker for the close out.

169. The detail with which Europtin conducted this retrospective analysis demonstrated the difficulties which a court faces if indeed it is required to conduct its own objective assessment of a close out by reference to so-called objective criteria. Indeed Mr. Shivji effectively invited the court, by reference to suggested alternate trading strategies and asseOted market considerations, to re-run the entire close out from 10 to 13 October. Europtin's case relied upon a forensic comparison between various trading options which ignored the practical reality of close-out trading. As Dr. Fitzgerald said in cross-examination:

> "I think these close-outs, actually, if I can just make a general point, are not done in this kind of scientific modelling way that you're trying to imply. I think the main point is, as I've said, to get rid of positions quickly."

170. On the basis of Mr. Martin's, Mr. Scattolon's and Mr. Westring's evidence and the expert evidence which I received from both Mr. Beagles and Dr. Fitzgerald, I am satisfied that even if, contrary to my conclusion, SEB was subject to a duty to take reasonable care, Europtin's complaints that SEB was in breach of that duty or in breach of its duties of rationality were unfounded. As Mr. Toledano, based upon Dr. Fitzgerald's evidence, submitted, it is important to step back from the minutiae of

alternative trading decisions that Euroption put forward as the basis of its case. There are always likely to be matters that the trader could look back on and say that a different strategy could have been adopted. Dr. Fitzgerald rightly referred to the fact that there are an "… infinite variety of [ways of] closing out a given set of positions". The decisions have to be taken quickly against the background of a client default and in difficult market conditions. Thus, the issue for the Court is not the relative strengths and weaknesses of another strategy compared with the strategy in fact adopted but whether the decisions actually taken were within the bounds of reasonableness and flexibility that brokers put in this position have.

171. The relevant facts were that, as a result of Euroption's failure to pay margin in breach of contract, and as a result of Euroption's trading strategy, which continued up to and including 9 October, SEB found itself having to close a massive portfolio of options on a day of unparalleled volatility and huge downward movements in world markets. Despite the extraordinary conditions, SEB managed to carry out on 10 October a series of closing trades on Euroption's account which Mr. Beagles accepted achieved a very substantial reduction in market risks on the portfolio.

172. Once the close out began on 10 October, all but two of the put positions were closed on that day. The two that were left were the 3300 and 3400 November puts. Mr. Beagles accepted that if those two positions had been bought back sooner, Euroption would actually have been worse off, not better off, because of the market rally over the weekend. Mr. Beagles accepted that, if there was to be some criticism about the fact that these particular puts were not closed on 10 October but were closed on 13 October, then that delay would actually have benefited Euroption as opposed to causing a loss. Not surprisingly, in its closing submissions Euroption made no complaint about this delay.

173. SEB decided that it would concentrate first on removing downside risk in the portfolio. Having considered a range of other possible approaches for removing delta, Mr. Martin determined that the only viable option available to SEB was to buy back naked as many of Euroption's short put positions as possible. SEB chose to start by closing, in an orderly manner, those puts that were closest to expiry and those with the strike price closest to the market price (or "nearest to the money"), as these produced the highest delta. Both experts agreed that this was a reasonable approach to take. Mr. Beagles accepted that it was reasonable for SEB, on 10 October, to focus first on the puts because they were presenting the greatest risk to the portfolio, until the directional exposure switched to the upside. He also agreed that, looking at the risks from an overall portfolio basis (which Mr. Beagles accepted was not unreasonable), the risk did not switch to the upside until the morning of 13 October. I conclude therefore that it was reasonable for SEB not to commence the close out of the calls until 13 October, by which time SEB was focusing on closing out the remaining puts as well as the calls.

174. Mr. Beagles' only real criticism of SEB's conduct of the close out in relation to the alternative case, was that it "… failed to focus on the calls when the directional risk changed". Mr. Beagles repeated this in cross-examination, going so far as to say that "… the evidence suggests to me that SEB ignored the upside risk. They weren't trying to close the out of the money calls". However, this is difficult to accept since the directional risk on the Euroption portfolio did not switch to the upside until sometime during the course of trading on 13 October. Dr. Fitzgerald's opinion was

that the portfolio remained heavily exposed to the downside at the close of trading on 10 October and that the short call positions that remained open offered protection in the event of a further fall in the markets. Mr. Scattolon also agreed that the directional exposure of the portfolio shifted to the upside at some time early on 13 October. It was certainly a reasonable view for SEB to take that it was not until 13 October that it became sensible to close any of the short call positions, and that, had any of the short call positions been closed on 10 October, the closure would have added to the long delta of the portfolio and therefore increased the imbalance in the directional exposure. Indeed Mr. Beagles accepted that if one knew that the risk had not yet switched to the upside at close of business on 10 October, it was reasonable not to be seeking to buy back the calls on the afternoon of the 10 October.

175. Mr. Martin said that the portfolio had become short delta at some time on Monday 13 October but that he had not known the exact time when it did so. Whether or not he knew the precise moment of the change in directional exposure is beside the point, since he began closing out the calls on the morning of 13 October as the delta switched.

176. There was real difficulty in Europtíon's claim, since the first step in its analysis required all of the puts to have been closed on 10 October instead of partly on 10 October and partly (as regards the 3300 November FTSE puts and the remaining 3400 November FTSE puts) on 13 October. But the closure of the outstanding puts on 13 October actually benefited Europtíon because of the market rally over the weekend. Had these puts been closed out on 10 October, the additional loss to Europtíon would have more than wiped out any benefit to Europtíon from the closure of some or all of the calls on 10 October. But Europtíon's approach effectively required the court to cherry pick those trades which were disadvantageous to Europtíon and exclude from consideration those which were advantageous. This seemed to me to be a flawed approach to a critique of SEB's strategy.

177. Moreover, on the evidence the two likely explanations for any alleged delay in closing out calls between 10 October and 13 October were the absence of liquidity in the market and Mr. Scattolon's own conduct. Thus the evidence demonstrated that there was a general lack of liquidity and real concerns about downward pressure on the indices as a result of the large positions which SEB was having to trade out of. The other factor which might have caused delay was Mr. Scattolon's persistent attempts to have TSL slow down the close out as the contemporaneous communications demonstrated.

178. Accordingly, I cannot accept that Europtíon has demonstrated any breach of duty to take reasonable care (on the assumption that such a duty existed), let alone any breach of its duty to act rationally, in relation to the delay in closing out the calls between 10 and 13 October.

179. Europtíon had a different complaint in relation to the close out of the final 200 Eurostoxx 2650 calls on the afternoon of 13 October. This position was opened on 10 October on the instructions of Mr. Scattolon (the "Eurostoxx combination trade" or Set H). The bulk of the position was closed out on the morning of 13 October and Mr. Martin was wrongly notified by TSL that everything had been closed, when in fact 200 positions remained open. Mr. Martin did not realise at the time that 200

positions had only been closed later that day and Euroption did not raise the matter at the time either.

180. It was unclear on the evidence why the 200 call options were left to the afternoon of 13 October and only closed out then. Euroption's case appeared to be that it was a mistake by TSL for which SEB should be held accountable. Although the delay may have been TSL's fault, there may well have been another explanation. In any event, the Eurostoxx combination trade had been opened by Euroption on 10 October during the course of the close out after Mr. Scattolon knew the close out was taking place.

181. In the circumstances I see no reason why SEB should be liable for the financial consequences of the trade having been closed out on the afternoon of the 13 October rather than in the morning. Given the pressures operating on Mr. Martin to conduct and complete the close out not only of Euroption's portfolio, but also those of SEB's other clients, it was perhaps not surprising that one set of trades was overlooked – if indeed that was the case rather than an absence of liquidity or something similar, which prevented the close out of the 200 calls being concluded earlier in the morning of the 13 October. Euroption has not established that the failure to do so was negligent, let alone that it demonstrated a breach of SEB's duties of rationality.

182. I should, for the sake of completeness, add that the evidence did not establish any supportable basis for Euroption's additional complaints as itemised in paragraph 167 above. Mr. Westring and Dr. Fitzgerald gave convincing evidence as to Mr. Martin's suitability to conduct or supervise the close out. There was nothing in the complaint that, because he did not have an advanced understanding of "the Greeks" he was unable to do the job of closing out the portfolio. Not only did he have an understanding of the relevant concepts based on his experience over the course of a long career in SEB Futures, but, as was indeed obvious, he recognised that the portfolio was long delta and short volatility at the time when the close out began on 10 October. His decision-making process did not require detailed modelling of the portfolio risk, given its massive over exposure to increases in volatility in the market. As Mr. Westring pointed out, the risk profile of the portfolio "was readily apparent to the naked eye". Mr. Martin had appropriate systems and methodologies available to him and was able to provide adequate information to the members of SEB's management to whom he was reporting. The evidence also showed that Mr. Martin did indeed consider and discuss the possibility of selling the entire portfolio but decided not to do so. He also said that SEB considered the possibility of delta hedging the portfolio by selling futures, but that that course was discounted for various reasons. Dr. Fitzgerald gave evidence (which I accept) that, in all the circumstances then prevailing, the decision whether to delta hedge was not clear-cut, and that although he might well have done so, it was not unreasonable for a clearing member to take a different view. Likewise Dr. Fitzgerald expressed the view (in relation to Euroption's allegation that SEB ought to have sought to carry out "Category 2" trades so as to create put and call spreads, if it was not possible to close options naked), that, although this was one of the routes that a competent bank might follow, it was not necessarily a preferable course to selling calls. Although Mr. Beagles criticised the appointment of TSL as execution broker, even he accepted that its appointment was within the degree of flexibility that was accorded to a clearer in the course of undertaking a close out. Dr. Fitzgerald believed that the choice of TSL as executing broker was reasonable notwithstanding it had previously acted as

Europtión's executing broker, and not in conflict with market practice. Moreover, it was not suggested that any of these particular complaints was directly causative of any particular loss. In my judgment, there was no foundation to any of these criticisms. They were decisions that were well within the discretion of a clearing member closing out a client's position after default in the provision of margin. They could not be characterised as either negligent or irrational.

183. Accordingly, I reject Europtión's Claim 3.

Issue V: What is the quantum of Europtión's direct claim for damages under Claims 2 and 3?

184. In the circumstances quantum and causation issues do not arise for consideration, since I have rejected Europtión's claims 1, 2 and 3.

185. However, even if I were wrong in this determination, on the basis of Dr. Fitzgerald's evidence, I am not satisfied that Europtión has established that it did indeed suffer any loss in relation to Claim 2 - the combination trades. Europtión's claim in respect of the straight losses on the two call positions which were opened as part of the two combination trades on 10 October, does not take into account what the downside risk of Europtión's book would have been at the close of business on 10 October had either or both of the combinations not been carried out.

186. As set out at paragraphs 3.17 - 3.20 of Dr. Fitzgerald's first report, the combination trades had a favourable impact on the risk profile of Europtión's book, reducing downside risk by €12,281,138 at the expense of increasing upside risk by €1,485,394. I accept his view that, accordingly, it was not appropriate to consider the call positions within the combination trades in isolation, and that they had to be considered in the context of the impact of the closure of the puts on the downside risk of Europtión's portfolio. Dr. Fitzgerald expressed the view in paragraphs 4.33 and 4.34 of his report that there was no ready way to modify the directly calculable losses on the closure of the calls to account (or give credit) for the risk effects of closing the puts. I accept Mr. Toledano's submission that, in the circumstances, Europtión has not established a quantifiable loss arising out of the combination trades. Looked at in their context, the combination trades produced an advantageous impact for Europtión at the time that they were executed. The fact that the calls were subsequently bought back for a higher price than they were sold does not produce a recoverable loss.

187. As for Europtión's suggested alternatives to combination trades, there was no evidence before the Court that these would have produced a better result than the trades that were actually executed. By way of example, if SEB had executed the combination trades and then bought back the calls and replaced them with an equivalent short futures position (as suggested to Dr. Fitzgerald in cross-examination), then the short futures positions would have had to be bought back at some point. Had it been bought back on 13 October after the market rally, it is likely to have produced a loss. Whether this loss would have been more or less than the loss sustained by the calls was not established by Europtión.

188. In relation to Europtión's Claim 3 (the alleged delayed close out of the Claim 3 calls), I likewise find that Europtión has not established the quantum of its claim for direct losses. In formulating this claim, Europtión "cherry-picked" a sub-set of six of the

positions that were still open at the close of business on 10 October 2008. In particular (and as accepted by Mr. Beagles), Europtions's claim excluded the 15,421 November 3300 FTSE 100 puts and the 2,200 November 3400 FTSE 100 puts, which were two positions that were also not closed on 10 October; they were in fact closed on 13 October.

189. Dr. Fitzgerald's evidence is that the "delayed" closing of the 15,421 November FTSE 3300 puts from 10 to 13 October 2008 resulted in a better price being achieved for the closure of those puts than the mid-price that was available for a closure taking place on 10 October 2008 (see Dr. Fitzgerald's first report, paragraph 4.38). The price difference in relation to the November FTSE 3300 puts resulted in a saving of £1,526,679 or €1,925,295.

190. Mr. Beagles accepted that there was a gain of nearly €2 million to Europtions as a result of the November FTSE 3300 puts not being closed until 13 October, compared to what would have happened had they been closed on 10 October. Mr. Beagles also accepted that, if the gist of Europtions's alternative claim is that the closure of certain positions was delayed until 13 - 14 October, when closure should have occurred on 10 October, it would be right and proper for Europtions to include in its calculation all of the positions that were still open at the close of business on 10 October, rather than rely on a sub-set of them. If Europtions's analysis for its alternative claim should have included the November 3300 FTSE 100 puts and the November 3400 FTSE 100 puts, the more favourable prices that were (in fact) achieved through closure on 13 October would eliminate the losses that Europtions complained of under its claim. Accordingly, in my judgment, Europtions has not established that it suffered any loss in respect of Claim 3.

Issue VI: does Europtions have any claim for loss of investment opportunity damages?

191. Europtions also sought to recover damages for profits that it says it would have made had the fund not been depleted as a result of SEB's alleged breach of contract or negligence. In the light of my rejection of Europtions's claims 1, 2 and 3, this issue does not arise for determination. All I need say, in the circumstances, is that from both a factual and a legal viewpoint, I regarded this claim for damages for pure economic loss with considerable scepticism.

Disposition

192. Accordingly, I dismiss Europtions's claim.

193. I am very grateful to leading and junior counsel and the respective firms of solicitors for the considerable assistance which I have received from both sides' written and oral submissions.