Neutral Citation Number: [2025] EWHC 3125 (Ch)

Case No: CR-2025-005034

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF ARGENTEX LLP (IN SPECIAL ADMINISTRATION)

AND IN THE MATTER OF THE PAYMENT AND ELECTRONIC MONEY INSTITUTION INSOLVENCY REGULATIONS 2021

AND IN THE MATTER OF THE PAYMENT AND ELECTRONIC MONEY INSTITUTION INSOLVENCY (ENGLAND AND WALES) RULES 2021

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27 November 2025

Before:

ICC JUDGE AGNELLO KC

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BETWEEN:

(1) DANIEL CONWAY
(2) TONY WRIGHT
(3) DAVID HUDSON
(In their capacity as Joint Special Administrators of Argentex LLP (in Special Administration))

Applicants

-and-

(1) MATTHEW PLASS
(2) ALPHA DEVELOPMENT EUROPE LTD
(3) WELL-SAFE SOLUTIONS LIMITED
(4) CZARNIKOW GROUP LIMITED
(5) DAWN CAPITAL LLP
(6) SEASALT LIMITED

Respondents

Mr Christopher Boardman KC and Ms Kate Rogers (instructed by Bird and Bird LLP) for the Applicants
Mr Marcus Haywood (instructed by Macfarlanes LLP) for the First to the Fifth Respondents
Mr Richard Fisher KC (instructed by DLA Piper LLP) for the Sixth Respondent

Hearing date: 16 October 2025

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JUDGMENT

ICC Judge Agnello KC:

Introduction

1. This is the judgment in relation to directions sought by the Joint Special Administrators (the JAs) of the above named LLP (the Firm or Argentex) in relation to the construction of the contractual provisions as between Argentex and its customers. On 15 October 2025, I handed down judgment which related to whether the proposed action or inaction of the JAs in relation to the terms of the contracts were capable of being treated as administration expenses.

2. The current judgment relates to whether the JAs are entitled, under the general terms and/or the MiFID terms (being the terms pursuant to the Markets in Financial Instruments Directive II as implemented under UK law), to trigger the 'close out' provisions of the contracts. This effectively enables the JAs to wind down the future trades at a time when a large number of customers would be liable, under the contractual winding up provisions, to pay sums to Argentex. The JAs assert that the construction of the general terms and/or the MiFID terms enable them to trigger the 'close out' provisions now. Certain customers (defined as the 'OTM customers') argue that no such contractual entitlement exists and that effectively Argentex remains liable to perform its obligations under the terms of the contracts between it and the customers.

3. Argentex was placed into special administration on 21 July 2025. By application notice dated 12 August 2025, the JAs seek directions from the court pursuant to paragraph 63 of Schedule B1 of the Insolvency Act 1986, as applicable by Regulation 37 of the Payment and Electronic Money Institution Insolvency Regulations 2021 ("the **2021 Regulations**").

4. As set out in paragraph 3 of the amended application notice, the directions specifically sought before me are as follows:-

"a direction as to whether clauses 13 and 26 of the LLP's 'Terms & Conditions' and clause 11 of the LLP's 'Terms applicable to the provision of MiFID II Services', permit the Joint Special Administrators, in the circumstances that have arisen, to -

a. close out some or all of the customer contracts that make up the Trading Book;
b. terminate some or all of the Services agreements made with customers; and
c. enforce some or all of the debts that arise under the terms of those contracts".

5. In accordance with the order dated 4 September 2025 of ICC Judge Greenwood, the First to Fifth Respondents act in a representative capacity, representing the 'ITM Customers' and the Sixth Respondent acts as representative of the 'OTM Customers', as defined in that order and also below in this judgment. The Financial Conduct Authority (FCA) has been given notice of this hearing but took no part in the hearing before me.

Factual Background

6. The summary background facts are not in dispute for the purpose of the direction, but there are differences between the JAs and the OTM Customers in relation to the position and grounds relied upon by the JAs as justifying the exercise of the entitlement to close off and terminate the contracts. I take some of the background facts from my judgment dated 15 October 2025**.** The Firm's specialist business was in payment services offered together with currency conversions. The Firm was authorised by the FCA as both: (i) an Electronic Money Institution under the

Electronic Money Regulations 2011 (with permission to carry out certain associated payment transactions); and (ii) a MiFID investment firm under Part 4A of the Financial Services and Markets Act 2000.

7. The Firm offered spot, forward, and option foreign exchange contracts to its customers. It did not have the capital or authorisation to take market risk and, as such, the Firm states that it 'backed off' each contract sold to a customer by taking out a hedging contract with one of its banking partners. That hedging contract enabled Argentex to seek to hedge its risk on its customer contracts with counterparty banks. Its authorisation from the FCA expressly restricted Argentex's activities in this respect. The contracts purchased by customers (both forward contracts and options) are collectively referred to as the Trading Book.

8. A Trading Book contract is either 'in the money', if it has got a positive value against the current market price such that, if closed out at this point in time, the Firm would have a liability to the customer (the ITM Customers); or 'out of the money', being if it has got a negative value against the current market price such that, if closed out at this point in time, the customer would have a liability to the Firm (the OTM Customers). Mr Haywood represents those who are 'in the money' and Mr Fisher KC represents those who are 'out of the money'. His client, the Sixth Respondent ('Seasalt') acts as a representative participant for all customers who entered into relevant contracts with Argentex and who hold market positions pursuant to the Trading Book which are 'out of the money'. Likewise, Mr Haywood's client, also acts in a representative capacity for those who are 'in the money'. The positions of the customers as being in or out of the money can change over a period of time. Currently, those who are represented by Mr Fisher are out of the money but in so far as the contracts with Argentex continue until maturity, that position may well change.

9. The underlying forwards and options in the Trading Book are governed either: (a) solely by Argentex's general terms of conditions (the General Terms); or (b) by the General Terms and also Argentex's MiFID II services terms and conditions, which are supplemental to the General Terms (the MiFID Terms). In case of a conflict, the MiFID Terms take precedence.

10. Seasalt is a multi -national fashion designer and retailer. According to the evidence, its business model involves purchasing apparel from overseas. It requires USD for this purpose and entered into the contracts with Argentex. This provided to Seasalt certainty as to the price it would pay for the relevant currency as at the time when the contract matured. The JAs do not assert that the customers of Argentex, in general, were different from that of Seasalt, being businesses which required foreign currency at certain times for the purpose of their businesses. The contracts entered into by the OTM customers are not necessarily identical. The parties before me all agreed that either the General Terms and/or the MiFID Terms applied to the OTM contracts but that certain customers negotiated variations.

11. Seasalt's agreements with Argentex are a form of forward contract on a 'zero margin' basis governed by the General Terms and the MiFID Terms. Seasalt negotiated bespoke modifications to the terms governing the agreements between it and Argentex which excluded any entitlement to Argentex to margin payments either at the start or during the duration of the contract. Clause 12 of MiFID Terms stated that Argentex may agree with parties an entitlement to margin payments, but this was clearly a matter to be negotiated as between the respective parties.

12. As is set out in the JAs proposals dated 11 September 2025 (the FRP Report), Argentex had a large value of 'zero zero' contracts, effectively being the zero contract referred to above in relation to Seasalt. This meant that any shortfall due to market volatility needed to be met by Argentex. It is assumed that Argentex would have priced its zero margin contracts to take account of the future risk of market volatility and also protected itself via its hedging contracts with the banks, in accordance with the terms of its FCA licence. No margin calls could be made to these customers under the terms of the contracts agreed between them and Argentex.

13. According to the FRP report, the nature of the Firm's trades as well as the contract terms with the customers (being the zero term) meant that Argentex was heavily exposed to the US Dollar exchange rate volatility following announcement by the US President of his tariff policies in April 2025. As a result of the weakening of the US dollar, Argentex was subject to significant margin calls from its hedging banks without having the ability, under the zero contracts, to make any margin calls on its customers under the terms of the contracts with them. The liquidity position of the Firm rapidly and significantly deteriorated resulting in a net outflow of £17.5 million in margin call payments to the counterparty banks between 2 April and 22 April 2025.

14. As a result of these liquidity issues, the parent company Argentex PLC suspended trading its shares. The PLC obtained a secured bridging loan from IFX UK Limited of £6.5 million as well as a further £4 million to be made available by 30 April 2025. Those loans were drawn down and used by the Firm. A revolving credit facility of £20 million was made available to PLC but all the cash was held and utilised by Argentex. The FCA notified the Firm that its obligatory liquidity thresholds had been breached and on 24 June 2025 a first ' voluntary requirement' (VREQ) was agreed with the FCA. This imposed trading limits and restrictions on new options/MiFID business and a new £23.6 m liquidity requirement.

15. As the liquidity position of the Firm remained of concern, a second VREQ was entered into which restricted asset disposals and payments to senior stakeholders without FCA consent. Further funding was agreed with IFX but on 16 July 2025, IFX withdrew further funding. As Argentex had failed to meet its liquidity requirement by 16 July 2025, its trading operations were suspended. By a third VREQ, all Firm trading was halted. Argentex was unable to obtain further funding from IFX and there were no other sources of finance sufficient to meet liquidity requirements or pay liabilities falling due. At this time, the counterparty banks closed out the hedging contracts. There is no evidence that the closing out by the banks of the hedging contracts was in some way in breach of the terms of the hedging contracts and therefore I assume the banks were entitled to close out the hedging contracts under the terms of those contracts. This left Argentex's position unhedged. As such, the Trading Book is no longer hedged and according to some

of the earlier witness statements filed on behalf of the JAs, the Firm no longer had the same ability of performing its customer contracts at maturity.

16. On 16 July 2025, as a result of the events summarised in the FRP report, the executive committee of Argentex concluded that it was insolvent and it needed to take immediate steps to protect the position of creditors and customers by preparing for an application for special administration. The application for special administration was made on 18 July 2025 on the grounds that Argentex was or was likely to become unable to pay its debts and that it was fair to place it into special administration. The order was granted on 21 July 2025 by the Court.

17. Since their appointment, the JAs have been reviewing the portfolio of customers of the Firm, working to reconcile the funds held by the Firm against its records and pool such funds, and identifying the accounts holding 'relevant funds' pursuant to the Electronic Money Regulations 2011 and the accounts holding client money pursuant to Chapter 7 and 7A of the client assets sourcebook of the FCA Handbook, amongst other tasks. This is set out in the witness statements filed on behalf of the JAs.

18. After the JAs concluded that sale of the Trading Book was not possible, they considered that it would be desirable, if contractually entitled to do so, for Argentex is to terminate the services agreements between the Firm and its customers, close out some or all of the customer contracts that make up the Trading Book and pursue the debts which arise thereunder in order to achieve a return for creditors of the Firm, as well as, according to the JAs, to achieve certainty for all concerned. The JAs assert that under the terms of the contracts between the Firm and the customers (for current purposes the OTM customers) it can close out the position on the contracts and terminate, even though under their terms, the contracts have not reached the relevant maturity date. By closing

out and terminating, Argentex can avoid having to carry out its obligations under the terms of the customer contracts and also seek to enforce debts which it asserts will be owed by the OTM customers to Argentex by a close out and termination now.

19. Mr Daniel Conway, one of the JAs, set out details of the Trading Book in one of his witness statements. This included a total of 3,346 open transactions for 302 customers. The maturity date of the underlying forwards and options divided up as follows, 33% within 2025, 45% within 2026 and 22% in 2027-2028. At paragraph 26 of his first witness statement, Mr Conway states that by reason of the Trading Book being unhedged and unprotected as well as due to the restrictions placed on continued trading by the third VREQ (and for other non-specified reasons), the Firm has not been fulfilling its obligations regarding Trading Book transactions that reached their maturity dates in the period following the dates of the VREQ.

20. As set out in his fourth witness statement dated 11 September 2025, Mr Daniel Conway, one of the JAs, states as follows:-

'21.At or around the time of the Special Administration commencing, all Hedging Trades were liquidated by Argentex's bank counterparties and it would have been extremely difficult if not impossible, to arrange any kind of replacement hedging by virtue of Argentex's circumstances. This means that:
(a)all currency fluctuation risk on all open customer contracts falls on Argentex and Argentex does not have a balance sheet which enables it to absorb any such exposure;
(b) Argentex does not have a source of funds to enable it to perform its currency delivery obligations in respect of any transaction when it matures meaning that the customer will not receive the benefit that it has contracted for and may incur substantial losses in respect of which it will seek recovery from Argentex; and
(c) in respect of MiFID contracts, allowing such contracts to remain unterminated would result in Argentex being expressly in breach of the limitation on its authorisation referred to above, therefore calling

into question the legality of this course of action.

22. Accordingly, for the following reasons, Argentex finds itself in a position where there is currently no realistic possibility of continuing to trade on:
22.1 Argentex is insolvent and in special administration. Despite efforts on the part of the Special Administrators, it has not been possible to progress a sale of the Trading Book, and the Special Administrators do not believe that Argentex can be saved as a going concern.
22.2 As explained above, it is a condition of Argentex's regulatory authorisation, given by the FCA, that regulated transactions within the Trading Book be supported with Hedging Trades. As referred to in paragraph 21, the Trading Book is now unhedged, which presents the difficulty explained above.
22.3 As at the date of writing, Argentex remains subject to the VREQ which restricts Argentex from (without prior written FCA consent) carrying out any regulated activities and requires Argentex to stop incoming payments from customers (see page 17 of DC4).
22.4 Argentex is not a risk-taking business. The Trading Book is currently unhedged and there is no realistic prospect of entering into alternative hedging arrangements. Even if it was permissible to trade unhedged under the terms of Argentex's authorisation, in light of the volatility of the foreign exchange markets, the Special Administrators would not, in any event, risk doing so.
23. The Special Administrators also have a concern that, to the extent that outstanding customer transactions are not terminated but are allowed to continue in full force and effect, this might result in obligations of Argentex in respect of those transactions becoming liabilities of the administration and therefore obtain a ranking which places them inappropriately above other creditors of Argentex.

21. At paragraph 25, Mr Conway states :-

> *'In the present context of the special administration, the interests of Argentex (and in parallel the duties of the Special Administrators) consist of realising a maximum amount for the insolvent estate and minimising liabilities to the estate. It is Argentex's interests (taken in the above context) that require "protection" for the purposes of clauses 13.2(h) of the General Terms and 11.4(c) of the MiFID Terms.'*

22. In his fifth witness statement, Mr Conway approached the JAs' position as follows. At paragraph 38 he stated :-

''38. If it is determined the Special Administrators are entitled to close-out the transactions within the Trading Book, then this will protect Argentex for the following reasons:
38.1 any mark-to-market gains or losses on any transaction with any Customer can be crystallised into a present asset or liability of Argentex;

38.2 Argentex will accordingly no longer be exposed to significant risk of loss on the Trading Book by virtue of potential future fluctuations in the currency markets;
38.3 it will be possible to effect an orderly close down of the Trading Book rather than the contracts within the book running on to maturity, which in some cases, as per paragraph 12.3 of my Second Statement, will not be until 2027/28; this should in turn make it possible to conclude the Special Administration and achieve returns to creditors and Customers sooner than would otherwise be the case, thereby minimising costs to the insolvent estate; and
38.4 it will be possible for Argentex to realise the amounts to which it is contractually entitled in respect of transactions within the Trading Book which, at the time of the close-out are OTM from the Customer's perspective, without being required to make delivery of its side of the relevant currency pair on the maturity date (noting what is said below in relation to such delivery)'

23. Mr Conway also states that the closing out of the transactions will provide customers with 'much needed certainty' as to their positions. That view is not shared by the OTM customers in that by closing now and terminating, well before the maturity date, would mean that sums are due from the OTM customers to Argentex. If the contracts continue and mature in accordance with their terms, then effectively the OTM customers may well not be creditors of Argentex. As Mr Fisher submitted, the customers are not at fault and certainly, in my judgment, as is set out in the earlier witness statements of Mr Conway, Argentex's insolvency made it unlikely to perform the contracts. At paragraphs 40 and 41 of his fifth witness statement, Mr Conway states that Argentex could carry out its obligations under the contracts, but it would prefer not to.

'40.In relation to paragraph 38.4 above, I refer back to paragraph 21(b) of my Fourth Statement in respect of which an inference has been drawn in paragraph 14 of Couch 1 which I believe goes further than is justified. In that paragraph of my Fourth Statement, I note that, whilst any transaction within the Trading Book was supported by a Hedging Trade, the currency delivery on the maturity of that Hedging Trade would provide Argentex with a source of the amount of foreign currency required to be delivered to the Customer in respect of the relevant Trading Book transaction. That is not, as Ms Couch has apparently inferred, the same as my saying that the absence of such an immediate and direct source of that currency would render it impossible for the Special Administrators to cause Argentex to perform the relevant customer transaction. In particular:
40.1 Argentex has liquid assets which could be used to purchase the relevant delivery currency (and the currency to be delivered by the Customer under the

relevant transaction could then be converted to replace the liquid assets utilised); or
40.2 arrangements could be set up to borrow the currency required for delivery (to be repaid principally or entirely from the customer funds delivery).
41. It is fair to acknowledge that the Special Administrators would prefer not to have to envisage:
41.1 the expense of putting such arrangements in place; and
41.2 the continuation of the Special Administration throughout the run-off of the Trading Book, that this would likely require (again, a key reason for wanting to terminate/close-out all transactions constituting the Trading Book), but this is not at all the same thing as saying that we could not do so.'

24. Mr Boardman KC appearing on behalf of the JAs with Ms Rogers, submitted that the above passage from Mr Conway's fifth witness statement needs to be placed into context as it was a reply to assertions of unfairness made by Ms Couch on behalf of Seasalt in her witness statement. In my judgment, it is clear from what is set out in paragraphs 40 and 41 above that the position is that Argentex is able to carry out its obligations under the terms of the contracts but it would prefer not to do so. The language used in those two paragraphs are, in my judgment, clear and unambiguous. This somewhat alters the position taken by Mr Conway in his fourth witness statement being that the insolvency position of Argentex and its regulatory issues prevented Argentex from carrying out its obligations under the terms of the customer contracts.

25. As already indicated above, the JAs state that currently the Trading Book is positive in that the Firm will be owed more than it owes. Accordingly, by closing out now, the JAs can realise a profit of the Trading Book with such profit not being available if Argentex is unable to rely on an ability to close out and terminate now. Clearly the OTM customers object to the close out and termination now. It is only at the maturity date that either party can see if the particular contract is a bad bargain for one or the other. That position was, in my judgment, apparent to both parties as at the time that the contracts were entered into.

26. According to the evidence filed on behalf of the JAs, as they have been unable to sell the Trading Book, they have a duty to recover sums which they consider are owing to the Firm. They state that the only way they can viably do that is by closing out the OTM contracts and enforcing any resulting debt that arises against the customers. The JAs state that their preference is to close out all of the customers contracts being both ITM and OTM contracts, and terminate all of the service agreements between the customers and the Firm.

27. Mr Fisher raised the issue of an anticipatory repudiatory breach of contract. He makes the point that clearly OTM customers are not in breach of the contracts by reason of their conduct and that it is the insolvency of Argentex and its inability to perform the contracts which has created the breach by Argentex. This is not accepted by Argentex. Seasalt as well as other customers assert that Argentex is in repudiatory breach of contract which has been accepted by Seasalt and probably by other OTM customers. The parties accept that this issue does not fall to be determined by me, but the issue may well be relevant at a later stage. I turn now to deal with the legal principles relating to construction of contracts, the opposing submission and thereafter my determination.

Legal principles

28. The parties are agreed, in general, as to the relevant principles which are applicable, although there are differing emphasis placed on the construction based on the facts of the case itself. The Court must seek to identify the intention of the parties by interpreting the words used in the documentary, factual and commercial

context. This is an objective exercise as set out by Lord Hamblen in Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd [2023] UKSC 2 at [29]:

> *"(1) The contract must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean.*
> *(2) The court must consider the contract as a whole and, depending on the nature, formality and quality of its drafting, give more or less weight to elements of the wider context in reaching its view as to its objective meaning.*
> *(3) Interpretation is a unitary exercise which involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its implications and consequences are investigated"*

29. This is explained by Lord Neuberger in the well known passage from Arnold v Britton [2015] A.C. 1619 at [15] *(omitting citations):*

> *"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", ... And it does so by focusing on the meaning of the relevant words ... in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provision of [the contract], (iii) the overall purpose of the clause and the [contract], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."*

30. Whilst the principles are essentially agreed, it is useful to set out the following principles set out in *Arnold v Brittain* :-

"17 First, the reliance placed in some cases on commercial common sense and surrounding circumstances (e g in Chartbrook [2009] AC 1101, paras 16—26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that

meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specially focussing on the issue covered by the provision when agreeing the wording of that provision.

18 Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

19 The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in Wickman Machine Tools Sales Ltd v L Schuler AG [1974] AC 235, 251 and Lord Diplock in Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios) [1985] AC 191, 201, quoted by Lord Carnwath JSC at para 110, have to be read and applied bearing that important point in mind.

20 Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even

ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

21 The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.

22 Sixthly, in some cases, an event subsequently occurs which was

plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is Aberdeen City Council v Stewart Milne Group Ltd 2012 SC (UKSC) 240, where the court concluded that any . . . approach other than that which was adopted would defeat the parties clear objectives , but the conclusion was based on what the parties had in mind when they entered into the contract: see paras 21 and 22.
23 Seventhly, reference was made in argument to service charge clauses being construed restrictively . I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation. Even if (which it is unnecessary to decide) a landlord may have simpler remedies than a tenant to enforce service charge provisions, that is not relevant to the issue of how one interprets the contractual machinery for assessing the tenant s contribution. The origin of the adverb was in a judgment of Rix LJ in McHale v Earl Cadogan [2010] HLR 412, para 17. What he was saying, quite correctly, was that the court should not bring within the general words of a service charge clause anything which does not clearly belong there . However, that does not help resolve the sort of issue of interpretation raised in this case."

31. Where a contract allocates only to one party a discretion to make decisions under the contract which may affect both parties, by necessary implication, the decision maker's power is limited by concepts of honesty, good faith and genuineness and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. Reference is made to *Socimer Bank Ltd v Standard Bank Ltd* [2008] Bus LR 1304.

"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 is 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 was deployed. Laws LJ 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 decisionmaker, whereas on entirely objective criteria of reasonableness the decision-maker becomes the court itself. A similar distinction was highlighted by Potter LJ in Horkulak [2005] ICR 402, para 51. For the sake of convenience and clarity I will therefore use the expression rationality instead of Wednesbury-type reasonableness, and con ne reasonableness to the situation where the arbiter on entirely objective criteria is the court itself."

32. There is a difference, as will be seen below in relation to the discretion exercisable pursuant to the MiFID Terms and under the General Terms. That is dealt with, in so far as relevant, below.

33. Mr Haywood provided a useful set of principles derived from the above but, highlighting, in my judgment, the correct approach :-

    (1) The Court is required not simply to focus solely on the wording of the particular clause in question but must consider the contract as a whole (*Wood v Capital Insurance Services Ltd [2017] A.C. 1173* at [10] and [11] per Lord Hodge). Accordingly, in *Re Sigma Finance* [2010] BCC 40, the Supreme Court held that Sales J (at first instance) and the Court of Appeal had fallen into error in placing too much weight on what they saw as the natural meaning of the words "*so far as possible*", divorced from their contractual context which meant that they were to be read "*so far as possible consistent with the pari passu principle*".

    (2) When construing a document, the Court is entitled to look at the evidence of the objective factual background (the factual matrix). However that

factual matrix must be known to the parties or reasonably available to them at or before the date of the contract *Lewison*, *The Interpretation of Contracts* (8th ed), para 3.158 to 163

(3) Where there are rival meanings to a contract the Court is entitled to prefer the meaning which is more consistent with business common sense. In *Wood v Capita Insurance Services Ltd* [2017] A.C. 1173 at [27] and [28] Lord Hodge said that:

> *"27. Interpretation is, as Lord Clarke JSC stated in the Rainy Sky[1] case, a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest. ...*
>
> *28. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated."*

(4) A useful summary of relevant principles relating to the construction of contracts were helpfully summarised by Popplewell J in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd* [2018] EWHC 163 (Comm) at [8] in the following terms:

> "*The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.*

[1] *Rainy Sky SA v Kookmin Bank* [2011] 1 W.L.R. 2900.

Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

34. Mr Boardman on behalf of the JAs, also submitted that in construing clauses in a contract, termination clauses were not to be treated differently from the construction of other terms of the contract.

Contractual provisions

35. Of the total 3,346 open transactions in the Trading Book, 1,133 appear to be governed solely by the General Terms and the remaining 2,213 transactions by the General Terms and the MiFID Terms. The parties before me did not consider that there was a distinction to be drawn on the issue of construction as to whether Argentex was entitled to close out and terminate under the General Terms or the MiFID terms save on the issue of the width of the discretion to be exercised.

36. The General Terms set out the following :-

"4.2 Argentex will make available, upon request, details of the currencies the Client may hold in a Currency Account, the currencies which may be purchased and sold and the currencies which may be used as collateral to satisfy requirements for Initial Margin and Variation Margin.
4.3 Argentex will only enter into a Forward Contract with the Client, pursuant to these Terms, for the purpose of:
(a) facilitating a means of payment for identifiable goods and/or services; or
(b) direct investment.

The Forward Contract must be physically settled unless otherwise permissible under Applicable Regulations

4.4 Argentex cannot enter into a Forward Contract with the Client if the Client is seeking to profit by pure speculation on foreign exchange movements. Argentex has sole discretion to decide whether the purpose of a Forward Contract is for the purchase of identifiable goods and/or services or direct investment."

37. There are extensive provisions relating to the client obligations and representations :-

"The Client hereby represents, undertakes and warrants to Argentex on the date of these Terms and on a continuing basis that:
5.1 Save where agreed otherwise in writing, the Client confirms that it is acting as principal (and not on behalf of anyone else) and has full power and authority within the law to enter into these Terms and any Contracts with Argentex and gives Instructions and acknowledges that Argentex is also acting as principal in relation to each and every Contract.
5.2 The Client confirms that all information provided to Argentex by the Client is true and accurate in all material respects and the Client will provide Argentex with any information which it reasonably requests in connection with any Contract or Payment.
5.3 The Client confirms that it relies on its own judgement when entering into Contracts with Argentex and will not rely on any view or opinion expressed by Argentex, its officers, directors or a member of its staff.
5.4 The Client confirms that it:
(a) has or will have the Sell Currency under its control and will either arrange for the electronic transfer of the Sell Currency to Argentex by the Value Date or instruct Argentex to deduct the Sell Currency from the Client's Currency Account on the Value Date, pursuant to the terms of the relevant FX Contract;
(b) will accept delivery of the full amount of the Buy Currency and will either:
(i) accept payment into a bank account or Currency Account belonging to the Client; or
(ii) instruct Argentex to make a Payment of the Buy Currency to a Beneficiary Account on the Value Date for the relevant FX Contract."

38. Under the General Terms, customers were under certain obligations to provide information about their finances at certain times. Clauses 6.1 and 6.1 state as follows :

"6.1 The Client agrees to make available and provide information and documentation which Argentex reasonably request at any time in order for Argentex to comply with Applicable Regulations and/or make decisions as to whether or not to accept or continue with a Contract, including the financial health or status of the Client, its parent or any associated or group companies

6.2 The Client agrees to notify Argentex of material changes to any information it provides to Argentex. This includes information about financial health, status, Authorised Persons, officers, directors, parties, shareholders, registered address, bankers, regulatory status and any other significant information which might reasonably affect Argentex's decisions relating to the Client. Failure to notify Argentex of any adverse changes to the financial status of the Client is a material breach of these Terms."

39. Clause 8 expressly contemplates the insolvency of Argentex.

"8.1 Argentex holds all funds received into the Client's Currency Account in Safeguarded Accounts with a reputable bank and confirms that:
(a)At no time whatsoever are funds in the Safeguarded Account combined with Argentex's own funds and all funds held in Safeguarded Accounts are legally recognised as belonging to Argentex's Clients only, subject to clause 8.3 below;
(b) The bank is not entitled to combine Safeguarded Accounts with any other account or to exercise any right of set-off or counterclaim against money in these accounts; and
(c) The purpose of keeping Client funds in Safeguarded Accounts is to ensure that in the event of Argentex's insolvency or if a financial claim is made against Argentex, no creditor or claimant can claim funds held in these accounts. No lien is held over funds in Safeguarded Accounts and therefore no other person or institution will have any right or interest over the funds in these accounts."

40. Customers have no entitlement under the terms of the contracts to close out the contracts save with the consent of Argentex.

"9.6 The Client does not have any right to cancel an FX Contract. However, the Client may, with our consent, close out an FX Contract prior to the Value Date by giving notice in writing. In such an event, the Client will be liable for all of the costs, expenses and losses arising from the unwinding of the FX Contract."

41. Clause 23 sets out the ability of Argentex to make margin calls. It states as follows:-

"23.1 The Client must transfer to the specified Account the Initial Margin (as instructed by Argentex) within one Working Day of the Contract Date.

23.2Where Argentex makes a Margin Call, the Client must transfer to the specified Account the Variation Margin within one Working Day of Argentex first communicating the Margin Call

23.3The Client confirms that any Initial Margin and Variation Margin paid to Argentex is not subject to any charge, lien or other encumbrance, and that it will remain free from any such charge, lien or encumbrance for so long as it is held by Argentex.

23.4 Argentex reserves the right to make a Margin Call at any time and on any number of occasions where there is either:

(a) An Adverse Market Movement, or economic, socio- political and/or fundamental market conditions which lead Argentex to believe that there may be an Adverse Market Movement; or

(b) Argentex, acting reasonably, is concerned as to the ability of the Client to settle the Sell Currency in full."

42. The relevant provisions of the General Terms concerning close out and termination are clauses 13.2(h), 13.3, 13.5 to 13.7, 26.3 and 26.6.

Clause 13.2

"13.2 Argentex may close-out, cancel or void any or all FX Contracts, Limit Orders or Stop Loss Orders with the Client if either:
(a) the Client fails to make any payment when due to Argentex under these Terms for any FX Contract;
(b) the Client fails to provide any information Argentex reasonably requested in order to comply with Applicable Regulations;
(c) the Client fails to provide any information Argentex reasonably requested pertaining to the financial health of the Client, its parent, subsidiaries or group companies;
(d) the Client suffers any form of Insolvency or Argentex reasonably considers that this is likely to occur;
(e) the Client fails to comply with any of its obligations under these Terms and/or the MiFID Terms (as applicable);
(f) Argentex has reasonable grounds to suspect that the Client is attempting to speculate or is otherwise entering into an Forward Contract for reasons other than those set out in clause 4.3;
(g) Argentex is requested to do so by any regulatory body;
(h) Argentex reasonably considers it necessary for its own protection."

43. The consequences of closing out an FX Contract (as defined in the General Terms), and the mechanism for calculating any sums due (either from the client to

Argentex or from Argentex to the client) as a result, are set out in clauses 13.3 and 13.5 to 13.7. Specifically:

(a) Clause 13.5 provides that :"*If any of the circumstances in clause 13.2 occur and Argentex elects to close-out all FX Contracts, Limit Orders or Stop Loss Orders, Argentex will, by notice, specify a date to the Client, which may be immediate, for the termination of all such transactions in accordance with clause 13.6*."

(b) Clauses 13.6(a), (b) and (c) make provision for the calculation by Argentex of a "*Close-Out Amount*" (being the loss or gain resulting from the close out) on or as soon as reasonably practicable after the date specified by Argentex in clause 13.5. The calculation of the "*Close-Out Amount*" replaces the parties' prior obligations to make payments or deliveries.

(c) Clause 13.6- 13.7 provides that:

"13.6 *If the Close-Out Amount is a positive amount, the Client shall pay the Close-Out Amount to Argentex and, if it is a negative amount, Argentex shall, subject to clause 13.6, pay an amount equal to the absolute value of the Close-Out Amount to the Client. Argentex shall notify the Client of the Close-Out Amount, and by whom it is payable, as soon as reasonably practicable after the calculation of such amount.*"

"13.7 If the Close-Out Amount is a positive amount, the Client shall pay the Close-Out Amount to Argentex and, if it isa negative amount, Argentex shall, subject to clause 13.6, pay an amount equal to the absolute value of the Close-Out Amount to the Client. Argentex shall notify the Client of the Close-Out Amount, and by whom it is payable, as soon as reasonably practicable after the calculation of such amount. The amount payable by a party to the other party pursuant to this clause 13.7 shall be payable by the close of business on the Working Day immediately following the day on which notice of such Close-Out Amount is given, and shall bear interest at a rate of 4% above the base rate, from time to time in force, of the Bank of England from the Due Date and shall be compounded monthly. Argentex will be entitled to take money from the Client's Currency Account to pay for the Close-Out Amount, where such amount is owed to Argentex."

44. The rights of both Argentex and the customer to terminate the Services Agreement in its entirety is set out in clause 26 which links back to clause 13.

45. Clause 26 provides (in so far as is relevant):

> **"***26.2 The Client may terminate this agreement or any of the Services (including closing the Client's Currency Account) by providing one month's notice. The Client may do this in writing by email or by telephone at any time using the contact details set out in clause 2.1.*
>
> "
>
> *26.3 Argentex may terminate this agreement or any of the Services:*
>
> *(a) immediately without advance notice if any of the circumstances set out in clause 13.2 arise;*
>
> *(b) by providing one month's advance notice in relation to the Foreign Exchange Services; or*
>
> *(c) by providing two months' advance notice in relation to closing the Client's Currency Account and ending the Electronic Money Services and Payment Services. ..."*
>
> *26.6 If Argentex terminates this agreement or any of the Services in accordance with clause 26.3(a), Argentex may close-out, cancel, void or settle any or all FX Contracts that will remain open on the termination date in accordance with clause 13 and any sums due to Argentex as a result of Argentex taking such action must be paid to Argentex by the Client in accordance with clause 13.*"

46. The MiFID Terms apply to all options, and also to forwards save where the forward was entered for the purpose of a means of payment within the meaning of regulation 10(1)(b) of the MiFID Organisational Regulation[2] (for example, to enable the payment of an invoice falling due in a foreign currency at the maturity date), as opposed to for some other purpose (for example, obtaining currency as an investment). According to clause 4.1 of MiFID Terms, the OTM customers entered into particular contracts following advice from Argentex.

47. The relevant MiFID Terms, which prevail over the General terms (pursuant to clause 1.7) are set out below :-

[2] Commission Delegated Regulation (EU) 2017/565.

"Clause 2.1 - For the avoidance of doubt, Argentex's obligations under any Applicable Regulations and Applicable Investment Regulations are strictly regulatory and no reference to such obligations in these MiFID Terms will create any contractual obligation owed by Argentex to the Client with respect to such regulatory obligations.
Clause 2.2 *The Client agrees to provide Argentex with 30 business days' prior written notice if it intends to:*
(a) change its country of incorporation;
(b) move its business operations to another country; or
(c) transact or attempt to transact products in or from another jurisdiction."

Clause 4.11 states:- "*Argentex may engage in hedging or other positioning activity for its own account before or after the provision of a price to the Client for a transaction in order to manage Argentex's exposure under that transaction, Argentex's market risk or other trading activities. This may require Argentex to execute trades in such instrument and related instruments"*

Pursuant to clause 8.5, the Clients agreed to provide "*to Argentex on request such information regarding the Client's financial or business affairs as Argentex may reasonably require in order to comply with Argentex's obligations under the FCA Handbook and to comply with Argentex's regulatory reporting obligations*."

48. Clause 12 creates a regime for margin payments, where this is applicable.

"Clause 12.1 Where permissioned to do so, Argentex may enter into transactions in options, forwards, futures or NDFs which may result in the Client having to provide margin payments, that is to say, a deposit of cash as security for unrealised losses which have occurred or may occur in relation to the Client's transactions. Payments may be required both on entering into a transaction and on a daily basis throughout the life of the transaction if the value of the transaction moves against the Client. The movement in the market price of the Client's transaction will therefore affect the amount of margin payment the Client will be required to make.

Clause 12.2 Margin shall be provided in the form of cash only."

Clause 12.3 "*If the Client fails to provide margin when required to do so Argentex (or any applicable exchange, central clearing house or counterparty) will have the right to close out the Client's positions and exercise the rights described in Clause 15 (Rights over Client's assets) below.*"

49. The relevant provisions of the MiFID Terms governing Argentex's ability to close out transactions prior to their maturity date is clause 11.

"11.2 In the event of any dispute regarding any transaction, Argentex may in its absolute discretion cancel, terminate, reverse or close out the whole or part of any position resulting from and/or relating to such transaction.

11.4 *Without prejudice to Argentex's other rights, Argentex reserves the right, at its cost and expense, to sell or realise MiFID II investments which it holds for the Client or is entitled to receive from the Client, to purchase investments, to make delivery on its behalf and to cancel, close or hedge any outstanding transactions or positions without prior notice and at whatever price and in whatever manner it thinks fit, if:*

(a) the Client has failed for any reason to settle a transaction or the Client is otherwise in breach of these Terms;

(b) we otherwise become entitled to terminate these Terms forthwith without notice;

(c) we consider, in Argentex's absolute discretion, that such action is necessary to protect Argentex's interests or those of any Affiliate(s).'

50. The consequences of closing out, cancelling or voiding an FX Contract (as defined in the General Terms), and the mechanism for calculating any sums due as a result, are set out in clauses 11.3 and 11.5 of the MiFID Terms as follows:

"*11.3 Subject to clause 13 of the Terms & Conditions (Settlement and Closeout of FX Contracts), if a transaction is terminated, following a default by either the Client or Argentex or otherwise in accordance with the terms of the transaction, the early termination value of such transaction will be determined by reference to the early termination provisions set out in the contract between the Client and Argentex with respect to such transaction. The early termination value will be likely to differ from the most recent valuation and may be more unfavourable to the Client. ...*

11.5 Any proceeds arising from such actions or disposals will be applied to reduce or discharge the Client's liabilities or indebtedness to Argentex. The Client will be liable to Argentex and shall indemnify Argentex on demand against all liabilities, costs, losses, claims and expenses incurred by Argentex in respect of any action taken pursuant to this clause."

51. I was also referred to clause 14.2 relating to Argentex's right to suspend services.

"Right to suspend services: Argentex reserves the right to refuse, suspend or delay any payments, orders, instructions or settlements or to withdraw any services, without giving notice, where:

(a) Argentex reasonably believes that such payment, order, instruction, settlement or service would contravene any Applicable Investment Regulations;

(b) it is a consequence of checks carried out as part of the proper operation of Argentex's payment processing systems; or in Argentex's reasonable opinion, it is prudent to do so in the interests of complying with sanctions or Applicable Investment Regulations."

52. By Clause 14.1, a delivery versus payment condition is created i.e. that settlement of transaction is on a delivery versus payment basis and not a net calculation of the difference:-

"DvP: Unless Argentex has agreed otherwise in writing, settlement of transactions shall be on a delivery versus payment basis. All payments and all certificates and other documents required to settle the Client's transactions must be delivered by the Client in time to enable Argentex to complete settlement promptly. Where documents and cleared funds are not held by us, Argentex is not obliged to settle any transaction. If the Client defaults in paying any amount when it is due to us, then (unless otherwise agreed)interest will be payable to Argentex at a rate of Argentex's cost of funding plus 1%. Argentex may purchase financial instruments to cover the Client's liability to deliver to Argentex and may debit any of the Client's accounts with any losses Argentex suffer thereby. Argentex shall notify the Client of the same."

53. Clauses 18.3(c) and 18.4 (dealing with client money), expressly cater for Argentex failing or becoming insolvent and the consequences thereof in relation to funds held by Argentex:-

"18.3 The Client hereby acknowledges and agrees that, in respect of money held in connection with MiFID II related business:
(a) such money will be held in accordance with the FCA (Client Money Rules) and will be subject to its protections;
(b) such money will be segregated from Argentex's own money and will not be used by Argentex in the course of its business;
(c) in the event that Argentex fails or becomes insolvent, the Client Money Distribution and Transfer Rules (as defined by the FCA Handbook) will apply to such money and the Client will be entitled to share any distribution under those rules.

18.4 Where Argentex is required by the Client Money Rules in the FCA Handbook to hold money for the Client, such money will be held:
(a) in a segregated account separate from Argentex's own funds with a central bank, a CRD credit institution or a bank authorised outside of the UK (Client Bank Account) in accordance with the Client Money Rules; and
(b) in general Client Bank Accounts on an omnibus basis for all clients.

This means that in the event of the failure of Argentex or its affiliates, any shortfall would be borne by all clients rateably in accordance with their entitlements in respect of the Client Money held for such clients on such basis. Argentex has no responsibility or liability for any insolvency, acts or omission of any bank, credit institution or other third party to whom Argentex may pass Client Money received from the Client."

The opposing submissions

54. The JAs' case is that pursuant to clause 13.2(h) of the General Terms and clause 11.4(c) of the MiFID Terms, Argentex is entitled to terminate the contracts as that is necessary for its own protection and/or necessary to protect Argentex's interests. The JAs submit, pursuant to the General Terms, this provides them with an express contractual right to terminate the services agreements and close out the FX Contracts where Argentex reasonably considers that this is necessary for its own protection. The JAs submit that this is the Firm's subjective assessment, not the Court's objective assessment but they accept that the assessment must be a reasonable one. As set out above in *Socimer Bank*, they submit that the reasonable test here is one of rationality rather than objective reasonableness.

55. Mr Boardman also submits that it is up to the firm to determine whether termination and/or closing out is 'necessary' for its own protection. He submits that the issue is whether Argentex has rationally considered it is necessary for its own protection. He also submits that Argentex is entitled to have regard to its own commercial and economic interests. That submission is apparent from the grounds relied upon by Mr Conway which, in my judgment, deal with Argentex's financial or economic position and seeking to utilise these clauses to obtain a profit from close out before maturity dates.

56. He submits that the decision to close out the contracts is a rational decision taken in the following circumstances:-

(1) The JAs cannot avoid the risk of movement in the FX markets without closing out the contracts. If the contracts are not closed out, then the Firm is at risk of its potential profits being eroded and that profit becoming a loss or the loss increasing. That profit exists if the contracts can be closed out, but may not exist if Argentex needs to meet its obligations at the time of maturity of each contract in accordance with their terms.

(2) The JAs have no business or appetite to take such a market risk. It is submitted that the business model for Argentex did not involve the taking of market risk. Mr Boardman submitted that Argentex was merely broker as between the customers and the banks providing the hedging contracts.

(3) According to the terms of the FCA licence, Argentex is only licensed to act on a 'matched basis' which is by way of a hedged contract and therefore Argentex is not authorised to take market risk. Mr Boardman also submitted that parties to the contracts were aware of the position of Argentex due to the published licence restrictions. The banks have closed out the hedging contracts.

(4) Termination and closing out will allow the Firm to realise amounts it asserts are properly due to it under the terms of the contracts and this is for the benefit of creditors. It will also it submits crystallise the debts and minimise its liability to creditors.

57. In relation to the MiFID Terms, Mr Boardman submits that clause 11.4 provides Argentex with an unqualified right to close out contracts in the Trading Book in its absolute discretion. He submits that closing out is needed to protect the Firm's own interests as set out above. The rationality test does not apply and the test to be applied is purely subjective, subject only to the Court being satisfied that the JAs have reached this decision after consideration.

58. Mr Boardman submits that the language of the terms both under the General Terms and the MiFID Terms are clear and unambiguous. It creates a contractual entitlement for the Firm to exercise the right of termination. The only restriction in relation to the MiFID Terms is, he submits, one of the entitlement being to exercise the power in good faith and that there is no suggestion that the Firm would be acting in breach of good faith by exercising clause 11 of the MiFID Terms. It is objectively reasonable in his submission for the Firm to close out the contracts in circumstances where its hedging contracts have been closed out by its banking counterparties leaving it exposed to unlimited market risk.

59. Mr Haywood, on behalf of the ITM customers, agrees with the JAs' approach in this respect. He submitted that on the facts of this case, the JAs are entitled to exercise the powers to terminate under the General Terms or MiFID Terms (as applicable).

60. Both Mr Haywood and Mr Boardman accept that their construction is one which is applicable, in their submissions, regardless whether Argentex is in an insolvency process, insolvent, in a special administration or solvent and trading but seeking to protect its own interest by exercising the power pursuant to clause 11.4 of MiFID Terms and clause 13.2 of the General Terms. Its own protection in

any of these scenarios can include, in their submissions, its own economic interest and commercial interests. I have set out above the grounds relied upon by the JAs as set out both in the passages from Mr Conway's witness statements and from Mr Boardman's submissions. Mr Boardman relies heavily on the market volatility and the loss of the counterparty hedging contracts as enabling the JAs to seek to exercise the power pursuant to clauses 11.4 MiFID Terms and clause 13.2 General Terms. As to the insolvency position of Argentex, I note, as I have set out above, that the JAs accept that Argentex can perform the contracts despite the insolvency position. In his earlier witness statements, Mr Conway asserted an inability for Argentex to perform the contracts and expressly referred to Argentex's insolvent position.

61. Mr Fisher invited me to consider clause 13.2 as clause 26 refers back to clause 13.2. He made a number of observations:-

    (1) Clause 13.2 enables Argentex to "*close-out, cancel or void any or all FX Contracts, Limit Orders of Stop Loss Orders*." This, he submits, is a wide power because it enables Argentex to cancel or void the relevant FX Contract going beyond clause 13.5. He submits that effectively such a wide power needs to be considered in a narrow sense.

    (2) All of the clauses 13.2(a)-(f) are focussed on the actions and status of the Client/Customer and a failure to comply with the requirements of the General Terms. Under the General Terms, as is set out above, the customer is obliged to provide information relating to its status and ability to perform. The power provided by these subparagraphs thereby enables Argentex to act on the basis of the information provided by the customer. This, he submits

lends support to clause 13.2(h) being aligned to the purpose behind clauses 13.2(a) - (f) in that they all relate to the position of the customer and effectively its ability to perform the contract. Viewed in this way, clause 13.2(h) must also, he submits, be referable to the contract and the position of both the customers and Argentex in relation to the contracts rather than relating to external factors.

(3) Clause 13.2(d) expressly identifies any form of insolvency or likely insolvency of the client as a basis on which Argentex can rely on clause 13.2 and close out. There are no equivalent provisions relating to the effect on the terms of the contracts in relation to the insolvency of Argentex. Clause 13.2 does not provide for Argentex to have any entitlement to terminate the contracts on the basis of its own insolvency. As this has been expressly left out of the terms of the contracts, the JAs' construction is an attempt to bring such a power to terminate into the contract.

(4) Even if clause 13.2(h) would allow Argentex to close out when Argentex considers it to be in its interests to do so, the clause also requires it to be necessary to protect its own interest. Mr Fisher submits that this requires identification of what Argentex is seeking protection from, ie what is the harm against which it requires protection from. The earlier subparagraphs in clause 13 identify the harm against which protection is provided by an entitlement to terminate, including the insolvency or likely insolvency of the customer. Conversely, protecting the interest of Argentex on the grounds that it is unable to comply with its own obligations is not protecting its interest but rather protecting it from the effects of what may turn out to be a

bad deal for Argentex. Effectively Argentex's construction enables it to escape from the consequences of what it perceives later on to have been a bad deal for it or when market volatility makes a 'take the money and run now' a better, more profitable option for Argentex, than to await the maturity of the relevant contract in accordance with its other terms.

(5) The JAs are seeking is to rely upon 13.2(h) to be able to terminate the contracts because it is in the best interests of the Firm, as a matter of economic outcome, to close. Mr Fisher submits that 'necessary for its own protection' does not extend in the sense of Argentex seeking to maximise profit under the contract now, or becoming insolvent and being unable to perform the FX contract itself, or even being able to perform but preferring not to (for the reasons set out by Mr Conway in his fifth witness statement). Effectively, Mr Fisher submits that the clauses need to be construed on the basis of a risk of harm arising from matters external to Argentex's own performance or ability to perform the FX contract in accordance with its terms.

62. Mr Fisher submits that it is not reasonable in any sense to consider that the clause is to be construed as it being necessary to protect Argentex from the economic effect of entering into the FX contract itself nor from its own insolvency or in a case where it would prefer not to carry out its obligations under the terms of the contracts. This is a matter of business common sense.

63. In the case of Seasalt, additional points were made in relation to the construction of the clauses in the contracts. Firstly, Seasalt and Argentex had expressly agreed that no margin would be required either at the start or during the duration of the

contracts with clause 23 not applying. The construction which the JAs rely upon would have the effect of overriding the express exclusion by agreement between the parties of any margin being payable. Secondly, Seasalt agreed an express variation (the Vanilla Forwards) which allowed it to move backwards or forwards, at Seasalt's request, the maturity date. That flexibility which was expressly agreed between the parties is effectively lost or rendered nugatory because it is a matter for Argentex whether it wishes to perform the contract if it has the ability to force an early close out for its own economic interest in order to take advantage of a particular advantageous currency position.

64. Whilst the discretion which exists in wider in relation to the MiFID Terms, this does not alter how the power to exercise should be construed and even under the MiFID Terms, the clause cannot be construed as to allow Argentex to rely upon its own economic interests for the same reasons as set out in relation to the General terms.

Discussion

65. I agree with the parties that nothing really turns upon whether a contract is governed by the General Terms or the MiFID Terms in relation to construction. The precise terms may be relevant in relation to testing the decision taken by the JAs in so far as I determine that their construction is correct.

66. As is clear from the legal principles, in construing the words relied upon in particular clauses, they are to be considered in the context of the contracts as a whole and the factual matrix. The General Terms and the MiFID Terms are applicable in relation to forward contracts and FX contracts negotiated as between Argentex and its customers. However, the parties are able to negotiate particular

terms, such as excluding margin calls as well as Vanilla Forwards, allowing customers the flexibility to move forwards or backwards the maturity date. The JAs do not seek to argue that Argentex did not expressly agree such modifications, such as in the case of Seasalt.

67. Under these contracts, a customer such as Seasalt agrees with Argentex to purchase at a future date foreign currency at an agreed rate. Under the terms of the agreements between Argentex and the customer, the date fixed for maturity is when the customer makes the payment for the currency, unless varied by agreement between Argentex and the customer. Effectively, the customer seeks certainty in relation to the price it needs to pay for the currency at the maturity date. Argentex provides that certainty, which is reflected in the cost which the customer pays to Argentex. The terms of the contract provide extensive protections enabling Argentex to be entitled to terminate the contract prior to the maturity date. As is set out in 13.2(a) to (f) of the General Terms, as well as MiFID Terms 11.4(a) and (b), the purpose of these provisions is to provide protection to Argentex in the event the customer's financial position has changed such that Argentex is concerned about the customer's ability to carry out its obligations under the General Terms. There is an emphasis on the provision of financial information from the customer to Argentex. Clause 13.2(g) of the General Terms relates to an entitlement to terminate in the event that Argentex is requested to do so by a regulatory body. The conditions expressly provide an entitlement to terminate on the grounds of customer insolvency or where Argentex reasonably considers that insolvency is likely to occur.

68. There is no reference to an express entitlement for Argentex to terminate in the event that it is insolvent or likely to enter some insolvency process. In my judgment, the lack of an express reference to Argentex being able to terminate on the grounds of its insolvency or likely insolvency is significant in seeking to construe the relevant clauses. Mr Fisher is correct on this point.

69. At the time that the contracts were entered into, both parties were aware, in my judgment, that what the customers sought was forward contracts which provided them with a level of certainty in relation to the currency rates of futures trades. That level of certainty depended upon whether a customer negotiated a contract with no margin calls, the zero contracts, or with margin calls. The zero contracts provided, in my judgment, the certainty to customers that whatever they agreed to pay to Argentex being the futures price as well as its fee, that was all that the customer needed to pay. Argentex has extensive protections from the terms of the contracts which enabled it effectively to monitor the ability of the customers to perform the contracts at the maturity date.

70. The zero contracts clearly placed a higher risk upon Argentex in relation to market volatility. In my judgment, Argentex was clearly aware of the increased risk to its position when it entered into zero contracts. In so far as the business model of Argentex did not involve taking risks, then, in my judgment, Argentex would have hedged this increased risk in relation to zero contracts. In contracts where Argentex had agreed that it was able to make margin calls, the ability to make margin calls enabled Argentex to hedge the risk of market volatility with the benefit of future margin calls.

71. The JAs rely upon the terms of Argentex's restricted FCA licence as being part of the factual matrix, which it submitted the customers were aware of. However, whilst the existence of the restricted licence is part of the factual matrix, other factors are important. Firstly, it formed no part of the contract as between the customers and Argentex that the customers were aware of the terms of any hedging contracts entered into between Argentex and the counterparty banks. Customers would have no knowledge whether Argentex intended to or had actually expressly covered the risks of the zero contracts or the entirety of the risk under the terms of its hedging contracts.

72. As far as the customers were aware at the time that they entered into contracts with Argentex, hedging contracts may well have been contemplated or even been necessary under the terms of the FCA licence, but their terms were not known by the customers. In so far as Argentex agreed zero contracts with customers, then as far as the customers would have been aware, Argentex had the ability to cover this risk under its hedging contracts with counterparty banks. Those customers who had agreed margin calls would also be aware that Argentex could cover risk through its hedging contracts.

73. In fact, the FRP report states that substantial margin calls were made upon Argentex under the hedging contracts which caused Argentex's liquidity issues. As that same report states that a large number in value of contracts with customers were zero contracts, I am unable to place much weight on what Mr Boardman submitted was Argentex's business model. If its business model was not to take risks then it is surprising that the hedging contracts did not in some way cover the risk of zero contracts.

74. In my judgment, customers who entered into a contract with Argentex would have expected Argentex, in so far as it had a restricted licence, to have adequately hedged the risk. Equally in cases where Argentex expressly agreed zero contracts, customers would have expected Argentex to adequately hedge its risk. In my judgment, the purpose of the contracts between the customers and Argentex from the point of view of the customers, was to enable the customers to purchase the currency at a fixed rate in the future. The currency rate may go up and down before the maturity date, but the customer knew under the terms of the contract what it had to pay and what it was liable to pay. That is what it had agreed with Argentex. As already observed neither party would know whether the contract was a good or bad deal for either party until the maturity date. That, in my judgment, is in the very nature of these types of contracts.

75. Again the position as at the time that the contracts were entered into was one where market volatility was anticipated and effectively expected. That is exactly what the customers sought to deal with by entering into contracts with Argentex. Equally, Argentex itself was aware of the market volatility risk as well as the terms of its licence requiring it to enter into hedging contracts. This is another important factor as part of the factual matrix because one of the grounds relied upon by Argentex is that the market volatility was such that it needed to protect its own financial interests and in particular its lack of liquidity due to market volatility. So in considering the construction relied upon by the JAs, I need to take into account that both parties were aware of market volatility and Argentex was able and under the terms of its licence, expected to cover this risk by hedging.

76. Mr Boardman submitted that in seeking to terminate pursuant to clauses 13.2.3(h) and 11.4, Argentex was not doing so on grounds of insolvency. In my judgment, that submission goes against what is set out in the FRP report as well as in Mr Conway's earlier witness statements. Mr Boardman also accepted that his construction effectively allowed Argentex to seek to terminate regardless of whether Argentex was solvent or insolvent. His construction was based on reliance upon it being necessary for the protection of Argentex's interest which included, he submitted, its economic interests.

77. There is, in my judgment, an inconsistency with a submission that clauses 13.2(h) of the General Terms and 11.4 of the MiFID Terms actually provided Argentex with an ability to alter the certainty which the customers contracted for in zero contracts. Mr Fisher submitted that the effect of such a construction was that customers were paying a margin call which they had expressly contracted out of such calls. Whilst the analogy is not entirely accurate, I accept the submission that there is an inconsistency for customers who contract upon certain terms which provide them with certainty that no further sums need to be paid by them with an ability for Argentex to revisit this by closing out the contract prior to the maturity date and thereby creating a margin type call on the customers.

78. The JAs' construction is also inconsistent with the lack of express clause allowing Argentex to terminate based on its own insolvency or likely insolvency. No such clause exists despite it being clear that the issue of insolvency or likely insolvency of a customer was a ground for termination. The parties did not agree a term relating to the effect of insolvency of Argentex on the contracts. Mr Fisher is correct on this point. The JAs construction would allow insolvency to be used as

a ground to terminate if it was for the protection of Argentex's interests. In my judgment, the clauses cannot be relied upon by Argentex to seek to close out and terminate on the ground of insolvency regardless as to whether such a decision to close out was for Argentex's protection, defined as being for its economic interest and in the interests of the creditors as a whole. Properly construed the clauses cannot be taken to have created an entitlement that Argentex could terminate the contracts on the grounds of its insolvency. No such express clause exists enabling termination on these grounds when there are clear clauses which deal with the effect of insolvency or likely insolvency of the customer as well as express terms relating to the effect of Argentex's insolvency on client money its holds.

79. Argentex submits that properly construed, the clauses enable it to terminate to protect its economic interest which requires protection due to its loss of hedging and market volatility. This is regardless as to whether Argentex is insolvent or not. Mr Conway stated in his fifth witness statement that Argentex was able to perform the contracts but would prefer not to and instead, in so far as it was entitled, to rely on the relevant clauses to terminate the contracts for its own protection. That means that in any case where Argentex considers its economic interest are best protected by terminating, it is entitled to terminate under these clauses.

80. Based on this construction, market volatility could be used as a ground to terminate the contracts. Mr Haywood sought to distinguish between the types of market volatility which would justify the entitlement to terminate, but such a distinction is not readily apparent from the words used in the clauses. Argentex also asserts that its loss of the hedging contracts is another ground as to why it is entitled to terminate in order to protect its interest.

81. In my judgment, the parties were well aware of market volatility at the time the contracts were entered into. The purpose of entering into these contracts for customers is provide certainty in relation to the currency rate at a certain date. That is, in my judgment, to protect against market volatility. In offering and agreeing forward contracts, Argentex was aware, as were the customers, that Argentex would need to assess and manage the risks of market volatility. This would have been assessed and managed by Argentex in the currency price and fee structure offered. Equally, in so far as Argentex was only licensed to act on a matched basis, then Argentex was also aware at the time that it entered into the contracts that it would need to match those contracts with its hedging contracts.

82. Effectively Argentex submits that the clauses permit it to protect its economic interest even if the economic position arises as a result of its own previous actions and the agreements it made. Argentex agreed zero contracts with its customers. Argentex agreed hedging contracts which allowed for margin calls to be made on it. In my judgment, a construction as that sought by the JAs effectively entitles Argentex to pull out of an agreement which ended up being a 'bad deal' economically for Argentex. Such a construction would also enable Argentex to pass on the risks, which it accepted by entering into the customer contracts and hedging contracts, to its customers by closing out when that would provide it with protection from the terms of the contracts.

83. In my judgment, a reasonable person with all the background knowledge as is set out in paragraphs 6-11 and 64-70 above which was reasonably available to the parties when they entered into the contract, would not have understood that the language of the relevant clauses would entitle Argentex to effectively terminate

for its own economic interests rather than being bound by the terms of the contracts to perform its obligations at the date of maturity. Such a construction is inconsistent with structure of the contracts and the ability of customers to exclude margin calls as well as the lack of express clause allowing Argentex to terminate by reason of its insolvency or likely insolvency. In my judgment, the proposed construction flouts business common sense. It would allow Argentex to seek to close out and terminate because of what it perceived was a bad deal or in circumstances where it wanted to realise a profit rather than awaiting the maturity date. Customers seeking future contracts would not have agreed that such contracts could be terminated by Argentex at any time that Argentex considered termination to be necessary for its own protection including its economic interests. The protection of its economic interest arises from its insolvency, its inability to meet margin calls and market volatility and loss of hedging contracts. These are all issues and factors which relate to Argentex and how it manages its affairs and what appears to be its inability to adequately cover its risk by its hedging contracts. It simply makes no business common sense that those factors can entitle Argentex to close out and terminate. It defeats the aim and purpose of the future contracts. Customers would not, in my judgment on an objective basis, agree to such a term as part of a futures contract where it sought a future currency trade at a fixed price with the ability to negotiate to prevent any margin calls.

84. Even if customers were aware that Argentex's licence was restricted, the customers were not parties to the hedging contracts and unaware of their terms. The terms of the hedging contracts formed no part of the customers' contracts with Argentex.

85. The alternative constructions proposed by Mr Fisher does not lead to flouting business common sense or even to inconsistencies in relation to the contract viewed as a whole. The protection is effectively from the risk of harm to Argentex's rights and interests arising, in my judgment, by reason of the conduct of the customer, directly or indirectly. It is restricted to Argentex's own interests which relate to the consumer contracts. It does not allow Argentex's own economic interest which arise from how Argentex conducted its own business and affairs to be relied upon as creating an ability to protect its economic interest. Its economic interest is external to the customer contracts. Its loss of hedging contracts or its inability to have sufficiently covered the risk of market volatility are not capable of falling within matters which can properly be relied upon by Argentex as enabling it to protect its own interest as a result of those factors. Argentex's insolvency is equally not 'an interest' to be protected under the language of the clause as properly construed. Furthermore, in my judgment, it cannot be part of its interests under the clauses to allow it to terminate to create an immediate profit which is asserted to be in the interest of the creditors as a whole. I agree with Mr Fisher that such an argument is in any event circular because the first question is whether Argentex is entitled to rely upon its economic interests under the clause. If it has no such entitlement under the clauses, as I have determined above, then creditors' interests do not create such an entitlement. Construing Argentex's own protection as encompassing its economic interests makes no business common sense for the reasons I have set out above. By not wishing to perform the contract freely entered into by Argentex, effectively it is trying to escape a bad bargain or what may be perceived as a bad bargain. The JAs' proposed construction is rejected as set out above.

86. On the basis of what I have set out above relating to the construction of the clauses, there is no need to consider issues relating to the discretion sought to be exercised by the JAs and whether it satisfies the reasonableness test in *Socimer* or whether it is in good faith for the purpose of the MiFID Terms.

87. Accordingly the reply to the directions sought by the JAs is in the negative in relation to (a) and (b). I will hear the parties if there need to any further directions.