

NET TRADING SERVICES FIRM FOUND LIABLE FOR A CUSTOMER'S LOSS

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CASE REPORT CANADA

Wei Zhu v. Merrill Lynch HSBC, 2002 BCPC 0535

Facts

The Claimant is a software engineer who is knowledgeable in the field of investment, with a portfolio of \$250,000.00 CAD. The Claimant alleged that he used the Defendant's NetTrader, an Internet trading platform allowing on-line trading of stock, to sell 4000 XYBR shares at 2:47 p.m. on May 23, 2001 and that he cancelled that trade order immediately thereafter. The Claimant alleged that he received confirmation that by the time he cancelled his trade order, 200 of the 4000 shares had already been sold, and that the sale of the remaining 3800 shares had been cancelled. The Claimant alleged that he waited five minutes and then placed a second trade order to sell the remaining 3800 shares.

However, in reality, the cancellation order had not been completed, which resulted in a duplicate sell order of the same shares. The Defendant requested that the Claimant buy back 3800 shares to make up his "short" position. By then, the price for those shares were \$5.26 USD, up from the initial \$3.70 USD price. The Claimant is seeking compensation from the Defendant for his loss of \$9,768.12 CAD resulting from the duplicate sell order and related buy-back.

The evidence showed that when the Claimant made his cancellation order, a message containing the following statements appeared on his computer

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screen: *"Below is a confirmation that your trade cancellation request has been sent. Please note that all cancel and change requests are subject to prior fill. Your trade was cancelled at (time of cancellation)".*

In essence, the Claimant's position is that this message was a confirmation of his cancellation, while the Defendant claims that the message "all cancel and change requests are subject to prior fill" indicates that the cancellation is not confirmed.

As part of his defence, the Defendant entered into evidence a "Disclaimer", contending that all his clients were bound by same. However, nothing in the evidence suggested that the Claimant was ever provided with a copy of such a disclaimer.

The Defendant also entered into evidence the "Terms and Conditions" of use of NetTrader, a 36-page document set out in fine print. The Defendant alleged that it was the contract between the parties, while the Claimant argued that he never saw the document before the Defendant provided him with a copy, after the loss. The Court noted that no copy of the document executed by the Claimant had been produced at trial.

Transcripts of excerpts of two telephone conversations between the Claimant and Defendant's representatives following the loss were also entered into evidence.

Issues

Does the "Legal Disclaimer" and "Disclaimer" sections in the "Terms and Conditions" document in Defendant's web site have any legal effect?

Is the Defendant liable for the Claimant's loss resulting from the duplicate sell order?

Has the Claimant mitigated his loss?

Findings

On the issue of the enforceability of disclaimers, the Court found that the "Legal Disclaimer" and the "Disclaimer" in the "Terms and Conditions" document on the Defendant's web site had no significance on the basis that they were seeking to virtually eliminate the Defendant's liability for inaccuracy in the performance of the services contracted for by the customer, and could be construed as exonerating the Defendant from acts of gross negligence.

The Court considered a prior case, *Robert v. Versus Brokerage Services Inc.* (2001) O.J. No. 1341, as relevant on that particular issue.

In addition, the Court opined that the nature of the Defendant's brokering services required a greater duty of care than usually expected in providing such services because of a customer's monetary risks.

On the issue of the Defendant's liability for the Claimant's loss, the Court found that the Defendant was liable. The Defendant's contention that the message on the Claimant's screen suggested a warning that the cancellation may not have been completed, was deemed unacceptable by the Court which stated "the Defendant's system could easily have issued a prompt saying *cancellation pending or please wait until advised that cancellation is completed before placing another order.*" In the Court's view, to hold otherwise would amount to allowing the Defendant to ascribe meanings to a computer prompt which are contrary to its plain meaning.

Hence, the Court found that the Claimant could assume that his order was in fact cancelled following the prompt on his computer screen. Given that the attractiveness of the services lied in the fact that they were provided on-line, it was unreasonable to expect of a client to make a phone call inquiring as to whether or not cancellations of his orders were completed: "(t)he nature of the services offered implies that the prompts on the computer screens should suffice."

On the issue of mitigation of loss, the Court found that the Claimant was entitled to hold off from buying back the stock until the price at least approached the price at which he sold it, since the loss was due to the faultiness of the Defendant's system and the nature of stock trading.

Accordingly, the Court ordered that the Claimant was entitled to receive compensation for the agreed upon damages.

Comments

In this case, the Defendant was not able to establish that the Claimant had received a copy of and agreed to be bound by the Defendants' disclaimers. In addition, the disclaimers could be construed as exonerating the Defendant from acts of gross negligence. Finally, the Defendant's screen prompts were viewed as not accurately reflecting the true status of the order, which, in turn, lead to its liability for the loss.

Therefore, suppliers of wares and services offered on-line, especially with real-time or near real-time transactional systems, should carefully review the

language of the screen prompts and disclaimers used in association with their on-line activities to ensure that they do not contain any language that could make them unenforceable.

Generally speaking, suppliers who want the specific terms and conditions of their agreements with clients to be enforceable should have the means to establish that their clients did receive a copy of the agreement or have read it and agreed to be bound by its content. Ideally, the agreements' format, length and size of the print provided in electronic form should be such that one may reasonably expect that clients have read the content. Otherwise, the Court may be reluctant to find that the terms and conditions specified in the agreement were binding upon the customers in the event of a dispute.

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