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Banking loss

Stock market fluctuation and hypothetical gain

Par Célian Hirsch le 1 October 2021

How can you prove your loss when a bank does not execute the order to buy shares ? ATF 147 III 463 (Federal Court decision 4A_606/2020, intended for publication) provides some welcome clarification.

A client asked his bank to purchase 25,000 Twitter shares at a price of USD 25 when the company went public on 7 November 2013. The bank confirmed the purchase of these shares on 6 November. However, on 11 November, the bank informed the client that it had not been able to purchase the shares and that the previous confirmation had been erroneous.

On 12 November, the client demanded that the bank provide him with the share certificates and a certificate of purchase for the shares. On 18 November, he informed the bank that he had not taken any further steps to obtain the desired shares because of its confirmation of 6 November. The bank replied that it would in any case have been too late to acquire the Twitter shares on the primary market and that he would only have been able to acquire them at the opening of the secondary market at a price of USD 45.10. The bank finally explained that it had not been able to obtain any Twitter shares because demand during the IPO exceeded supply by a factor of thirty.

On 31 March 2014, the client closed his account. He then took the case to the Geneva Court of First Instance, seeking an order that the bank hand over the 25,000 shares to him. Alternatively, he is claiming the difference between the price of the shares according to the purchase order (USD 25 per share) and the value on 11 November (USD 42.90 per share) – when he learned that the bank had been unable to execute the required purchase – i.e. USD 447,500.

As the Twitter share price had since fallen below USD 25, the bank expressly drew the client's attention to this development and reminded him of his obligation to mitigate his loss.

After the client's death and the takeover of the shares by his heirs, the latter withdrew the main claim in execution – the delivery of the shares – and made the claim for damages the main claim.

The Court limits the proceedings to the question of damages. In its judgement, it considers in particular that the client has not alleged that he intended to sell his shares on 11 November 2013 or on another date. He would thus have failed to prove his damage. Alternatively, he would have violated his obligation to minimise his damage by not buying the shares when the price was below USD 25 on several occasions in 2015. Therefore, the Court rejects the heirs' claim.

The Court of Justice also dismissed the claim. From a procedural point of view, the Court considered inadmissible the new allegations that the client had intended to resell the shares in the short term. In essence, the Court accepted that the client would have suffered damage if he had actually proceeded to purchase the Twitter shares on the secondary market when he learned that the bank had been unable to execute his order. However, he did not do so. Nor did he indicate that he would have resold the securities on 11 November 2013. Therefore, he would not have suffered any damage.

Seized by the heirs, the Federal Court began by recalling some theoretical considerations on the concept of damage.

Damage consists of the involuntary reduction of net wealth. In principle, it is determined according to the difference theory. Nevertheless, in the case of stock market transactions, the court can calculate the damage according to the loss suffered. For a sale, this is determined at the time when the transaction should have taken place. For a purchase order, the damage consists of a loss of profit (*lucrum cessans*).

In the case in point, the Federal Supreme Court emphasises, like the Geneva courts, that the client did not buy the Twitter shares when he learned that his bank had not been able to acquire them. Nor did he give an order to sell his shares (which he believed he had at the time). The client was therefore unable to prove certain damage, but only a hypothetical and random gain.

Therefore, due to the absence of damage, the Federal Court rejected the appeal.

One may first wonder whether the withdrawal of the main conclusion, namely the surrender of the shares, was justified. Indeed, if it had been maintained, it might have made it possible to avoid the problem of proving (sometimes difficult) banking damage. In our opinion, the conclusion would have been valid only if the bank had been obliged to achieve a result – to hand over the securities to the client – and not to use its best efforts *to* acquire the shares.

Furthermore, one wonders if the evolution of the Twitter share price influenced the judges' decision. Indeed, the withdrawal of the main conclusions took place precisely when the Twitter share price was at its lowest (less than USD 17). The plaintiffs may regret this move, as the share had since risen to over USD 67.

In practice, the client who complains of a failure to execute a buy order should be advised to buy the securities in question if he discovers that he does not have them, or to inform his bank that he wishes to sell them if the bank had executed the order correctly. The damage can thus be established.

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