DRN-2245529

The complaint

Mr O says Global Markets Group Limited ('GMG') is responsible for financial losses incurred in his trading account (the 'account'). He claims compensation for financial loss (including commission payments) and for the trouble and upset the matter has caused him.

GMG disputes the complaint. It says it holds no responsibility for the trading activities in the account and no responsibility for the outcome of those activities.

What happened

Mr O's case has been set out in detailed submissions made by a professional representative – coupled with annexes and appendices of documents presented as relevant and/or supporting evidence. In the main, the submissions say the following:

- Mr O previously held the account with another firm; in March 2017 he was induced by his main contact at that firm to transfer his account to GMG; that person was leaving the firm to become Chief Executive Officer (CEO) at GMG; and he was told by this CEO-to-be that the account would be transferred into GMG through a third party firm called Plus Trades Limited ('PTL'), that PTL was a representative of GMG and that his account would have all relevant regulatory protection provided by the Financial Conduct Authority ('FCA').
- In April 2017 Mr O transferred the account to GMG and deposited 42,000 Euros directly into GMG's UK bank account.
- The arrangement set up by GMG was that the account would be traded, on Mr O's behalf, by PTL; this is what happened after the transfer; Mr O never traded directly in the account and never received any trading statements; all trading was conducted by PTL and the feedback he received was that trading outcomes were successful.
- When Mr O sought to withdraw funds from the account, he was told no funds existed in the account and that it had been closed.
- Overall, 2,501 trades were made in the account; 1,128 trades made profits, 1,106 trades made losses and there were 267 zero profit trades; a total of around 20,000 Euros was incurred in commission for all the trades; and net profit from all the trades should have been around 62,000 Euros, which conflicts with GMG's claim that no funds were in the account at the point of closure.
- Mr O seeks recovery of his deposit and the net profit earned in the account.
- GMG is responsible for breaches of the FCA's regulations for the following reasons – giving PTL access to the account without Mr O's authority to do so; allowing PTL to manage the account despite not being regulated to conduct such an activity; and allowing PTL to exploit a conflict of interest by being the Introducing Broker ('IB') and the account's manager.
- GMG is also responsible for false accounting within the account and for falsifying documents related to the opening of the account.

GMG mainly says as follows:

- The person Mr O refers to as the CEO was employed as Director of GMG, effective from 1 October 2017; he was registered with the regulator, in the role of Director of GMG, on 28 September 2017; the employment contract evidence it has submitted supports the former and the regulator's records for the person supports the latter. The person had no prior payroll-based connection with GMG.
- It does not dispute that PTL was an IB for GMG in 2017 but that was the full extent of their relationship, and it has had no business with PTL since January 2018. PTL was never permitted to manage any account at GMG. PTL was the IB for the opening of Mr O's account, it was no more than that and it was not given access to the account.
- Access to the account (and access related information) was given automatically, directly and only to Mr O following approval of his online account application. No individual in GMG and no third party was sent this communication and there is evidence of correspondence from Mr O in April 2017 showing that he received this communication and showing his enquiry about downloading the trading platform. Trading in the execution only account was Mr O's responsibility, it was also his responsibility to keep the account's access details safe and to himself. GMG cannot fairly be liable if he chose to share access (and access details) with a third party.
- Evidence of Mr O's application for the account and the appropriateness assessment conducted (and passed) as part of the account opening process has been shared with this service.
- Mr O's account included a portal facility from which he could view account activities and balances. He could create statements and reports from these whenever he wished.
- By January 2018 the funds in Mr O's account had been depleted. GMG is not responsible for anything to the contrary that he was told by PTL. GMG only earned commission from trading in the account. Over a year later, in May 2019, he contacted GMG to seek information about PTL. Then in September 2019 he submitted his complaint about GMG.

One of our investigators looked into the matter and, in the main, concluded as follows:

- She had not seen evidence of a relationship between Mr O and the Director of GMG prior to the opening of his GMG account and had not seen evidence that GMG made any arrangement between him and PTL to open the account.
- There is evidence of GMG sending account login details directly to Mr O but no evidence that it provided those details to anyone else.
- She was not persuaded by Mr O's argument that PTL's access to and trading in the account should have been evident to GMG through login information associated with the account. She noted that the execution only service basis for the account means GMG would not have been expected to monitor the account in such a way, unless it had cause to do so.
- She had not seen evidence that GMG knew about PTL's involvement in trading within the account prior to 23 October 2017. On this date, PTL contacted GMG and sought to increase the trading leverage settings for the account; GMG declined the request given the absence of authority from Mr O; this incident ought reasonably to have made GMG aware of PTL's involvement in trading within the account; in response, and given that PTL was not regulated and did not have authority for such involvement, GMG ought to have investigated and addressed the matter at the time.
- GMG failed to safeguard Mr O's best interests from 23 October 2017 and onwards, contrary to its regulatory duty to have done so. The complaint is upheld on this specific basis and GMG should put the matter right for Mr O by paying him all losses (including any commission) incurred in the account from 23 October 2017 onwards and £250 for the trouble and upset he has been caused in the matter.

GMG welcomed most of the investigator's findings but disagreed with her conclusion about its liability from 23 October 2017. It said it understood at the time that Mr O had requested the change of leverage settings through PTL's customer service function, as that function provided such a service at the time; so it is not fair to conclude that the incident should have been cause for it to investigate further.

Mr O considered the investigator's findings and conclusion on compensation to be insufficient. He retained the original claim for compensation in the full amounts presented in his complaint submissions. He mainly said:

- Technical forensic evidence he and his representative submitted shows conclusively that he never traded in the account – the findings do not give enough weight to this.
- The same body of evidence shows that the Internet Protocol ('IP') address used to access his account and the trading platform, and used for trading in the account, belonged to PTL – the findings also do not give enough weight to this.
- The rules within the FCA's Senior Management Arrangements, Systems and Controls Sourcebook ('SYSC') require brokers like GMG to have systems which are fit for purpose and which are monitored and reported on routinely (daily); so the point at which GMG ought to have been aware of the activities in his account pre-date 23 October 2017; such awareness ought to have been at the account's inception and it ought to have continued thereafter. He accepts that firms do not have to monitor trading *decisions* within an account, but he argues that they are obliged to monitor "… *WHO, WHEN, HOW trades are being placed* …" and this applies to GMG.
- He should be entitled to interest on his compensation at the rate of 8% from the date the account was opened, up to the date of settlement.

The matter was referred to an ombudsman.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I have given due consideration to the information available in this case. I assure both parties of this and of my understanding of their respective positions. However, considering the investigator's findings – which I consider to be reliable – and both parties' comments on those findings, the issues that remain in dispute can be distilled to the following:

- Whether (or not) no redress should be due to Mr O because the complaint should not be upheld and/or because of the argument that GMG did not know and ought not reasonably to have known, at any relevant time, that PTL was trading in the account.
- Whether (or not) redress for Mr O should be calculated from the outset of the account (and should include all losses he incurred in the account) because the complaint should be upheld and because of the argument that GMG either knew or ought reasonably to have known, at all relevant times, that PTL was trading in the account.
- Whether (or not) the investigator's proposed outcome – or any other outcome – should apply.

I do not dismiss – and I remain mindful of – the individual arguments made by the parties which they might consider to be missing from the above summary. However, the main points arising from the complaint are that Mr O seeks recovery of his losses (and, it appears, lost profit) and he seeks a refund of the commission payments he incurred – so, in broad terms, all arguments and counter arguments essentially relate to this desired outcome. The same applies to the debate between the parties about how Mr O's GMG account was opened, and

the roles played by GMG, its Director and PTL in that respect – this debate also relates, ultimately, to Mr O's desired outcome and I address it below.

For the above reasons, I too have focused on Mr O's desired outcome and on the facts, evidence and issues related to it. Overall and on balance, I am satisfied that the three issues summarised above capture what needs to be determined. Before addressing them, the following preliminary findings provide helpful context:

- I accept Mr O's claim that PTL traded in and managed his account. The balance of available evidence supports this finding. In addition, neither party appears to dispute the fact that PTL was the IB for the account – so, at the very least, GMG was aware of PTL's existence and of the role it played in the opening of the account.
- The regulator's records do not show that PTL was a regulated firm, so it had no regulatory authority to manage Mr O's trading account. This is emphasised by the regulator's records for GMG which do not show that PTL was its Appointed Representative ('AR'). As such, PTL could not have been operating under GMG's regulatory authority. Even if it was an AR, and if its activities in the account amounted to *investment management*, the Appointed Representatives Regulations 2001 do not include investment management in the list of functions an AR can perform.
- As the investigator found, if and/or whenever GMG became aware of PTL's presence in Mr O's account it would have been obliged to investigate into and address the matter in order to safeguard his interests. Based on the preliminary findings above, it would have been obliged to stop PTL from having any further presence in the account. It is a fact that GMG took no such step, so the case turns on if and/or when it was obliged to do so.

Whether (or not) no redress should be due to Mr O because the complaint should not be upheld and/or because of the argument that GMG did not know and ought not reasonably to have known, at any relevant time, that PTL was trading in the account.

The fact that PTL was the IB for the account does not mean GMG would have been aware that it proceeded to manage the account. An IB's role is usually limited to the introduction of a client to a firm – for the purpose of opening an account for the client. I have not seen evidence of anything, at the time Mr O opened his account, that ought to have indicated to GMG that PTL would have a continuing presence in the account.

In this respect, I note Mr O's claim that it was GMG's (or its Director's) arrangement for PTL to manage the account. I do not have enough evidence to determine this claim. Mr O's assertion of it appears to be sincere but the same can be said of GMG's denial of it. There does not appear to be reliable independent evidence to tip the balance one way or the other.

GMG is correct in saying its Director had not been appointed in April 2017 – the employment contract evidence it presented and the regulator's records show that the individual's appointment (and regulatory registration) happened no earlier than September 2017. However, I accept that this does not automatically mean that the individual did not play the role described by Mr O. Overall, I repeat that there is a lack of evidence to determine his claim that GMG arranged PTL's management of his account.

Having said the above, I am satisfied that GMG cannot reasonably claim to have been unaware of PTL's presence in the account prior to the complaint (or prior to Mr O's enquiry about the account). There is evidence of correspondence between GMG and PTL with regards to the latter's pursuit to increase the leverage settings in the account. This is the communication of 23 October 2017 highlighted by the investigator.

I do not accept GMG's argument that it considered PTL was acting on Mr O's request. PTL expressly said to GMG – within the correspondence – that Mr O was unaware of the pursuit; and – within the correspondence – GMG declined PTL's request precisely because Mr O was unaware of it and had not authorised it.

The nature of the request was such that GMG either knew or ought reasonably to have known PTL was involved in trading within the account. It would have had no other incentive to ask for an increase in leverage settings and, on balance, I consider that the expressions within the correspondence were enough to indicate that PTL was trading in the account.

With such awareness, with knowledge that PTL did not have its authority to trade in the account and with knowledge that Mr O had not declared giving such authority to PTL, GMG's obligation to protect Mr O's interests was triggered at this point, on 23 October 2017 – and it failed to discharge this obligation. On this basis, at least, the complaint (and redress for it) should be upheld.

Whether (or not) redress for Mr O should be calculated from the outset of the account (and should include all losses he incurred in the account) because the complaint should be upheld and because of the argument that GMG either knew or ought reasonably to have known, at all relevant times, that PTL was trading in the account.

I have addressed part of this issue within my findings above, in relation to the opening of the account. The same applies to my finding that GMG's liability begins from 23 October 2017. What remains to be addressed is whether (or not) GMG should have been aware of PTL's presence in the account during the period after its opening and before 23 October 2017.

Production and presentation of Mr O's forensic evidence post-date the complaint events. His argument is that comparable evidence and analysis should have been conducted by GMG within complaint events – under its SYSC duties and under a duty to monitor "… *WHO, WHEN, HOW trades are being placed* …" He says, had this been done GMG would have known PTL was trading in the account, so it is responsible for the consequences if it did not do so. I have not seen evidence that GMG conducted such monitoring in the account.

The account was based on an execution only service, so – and as Mr O concedes – GMG was not responsible for monitoring trading decisions within it. Based on the terms for the account, GMG also had no advisory or management responsibilities in the account; and there are no provisions within the terms which say it was responsible for daily monitoring of the account on the "who, when and how" basis that Mr O has argued.

It is also noteworthy that even if GMG had information about the IP address(es) used to access the account, I am not satisfied that Mr O's argument establishes how this would have led directly to specific awareness that PTL was trading in the account – as opposed to any other conclusion. If he argues that GMG could have performed the forensic analysis that he and/or his representative performed, the questions that arise are why GMG would have done so without cause and whether (or not) such analysis was required within its execution only service. Prior to 23 October 2017 I do not consider that GMG had cause to perform a forensic investigation into the log-ins for and activities in the account. I address the SYSC based argument separately below, but with regards to the terms of the account's execution only service there was no call for such analysis.

As its full title suggests, the SYSC sourcebook relates to a firm's and its management's regulatory compliance arrangements. In broad and summary terms, its purpose is to ensure that firms apply appropriate (and prescribed) systems, governance and compliance arrangements under which its activities are conducted; and to allocate responsibility for these amongst its senior management.

I do not suggest that monitoring elements do not exist within this sourcebook – they do, and there are such elements related to, for example, risk management and money laundering. However, I do not consider that they exist in the manner argued by Mr O – that is, an obligation upon a firm like GMG to monitor, daily, "… *WHO, WHEN, HOW trades are being placed* …" in an execution only trading account. Neither he nor his representative appears to have cited a specific regulatory rule to support this argument. Overall and on balance, I do not consider that GMG was obliged, under SYSC, to conduct the sort of monitoring and/or forensic analysis that Mr O has argued; and I do not consider that it should have been aware of PTL's presence in his account before 23 October 2017.

Whether (or not) the investigator's proposed outcome – or any other outcome – should apply.

My treatment of the above two issues essentially confirms my agreement with the investigator's proposed outcome and I do not consider that any other outcome should apply.

Putting things right

In straightforward terms, GMG should have blocked Mr O's account on 23 October 2017 in response to the request made by PTL and in response to the indication from that request that PTL had an unauthorised presence in the account. At the very least, this should have been done to safeguard the account (and Mr O's interests) and to initiate an investigation.

It is more likely (than not) that such investigation would have uncovered the details of PTL's management of the account and would have led to an end to it. It follows that all the subsequent loss of funds (including commission payments) incurred by Mr O could and would have been avoided if GMG had properly reacted (as above). There enough evidence to suggest that Mr O did not intend to trade in the account personally, so it appears more likely (than not) that he would not have continued with the account thereafter – and would have withdrawn the balance of his funds.

The above essentially means the total of Mr O's account balance as of 23 October 2017 – which appears to have been lost in the course of PTL's trading (and commission associated with that trading) thereafter – should be returned to him. I am mindful that trading outcomes (both profits and losses) prior to this date were affected by the fact that PTL was unlawfully conducting the trading. An argument could be that redress should treat this too – in terms of ensuring Mr O is not unjustly enriched by the profits and/or is not unfairly burdened by the losses. However, on balance, in the context of resolving his complaint against GMG and given my finding that GMG has no responsibility in the matter prior to 23 October 2017 I do not consider it appropriate to do so.

I order GMG to pay Mr O compensation in the form of his total account balance as of 23 October 2017; to pay him interest on the compensation amount at the rate of 8% simple per year from 24 October 2017 to the date of settlement [this is to reflect Mr O being deprived of the account balance since 24 October 2017]; and to pay him £250 for the trouble and upset the matter has caused him.

My final decision

For the reasons given above, I uphold Mr O's complaint. I order Global Markets Group Limited to pay him compensation as set out above and to provide him with a calculation of the compensation in a clear and simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O to accept or

reject my decision before 13 November 2020.

Roy Kuku
Ombudsman