

## **The complaint**

Mr A complains, through his solicitors, about the service provided by Fortrade Limited. In short the solicitors complain that it:

- Was negligent in mis-representing the risks involved in trading Contracts for Difference (“CFD”).
- Misled Mr A about the extent of commissions taken and executed trades on a daily basis to generate commission.
- Carried out a series of transactions which were not suitable for Mr A and were not in his best interests.
- Failed to identify, manage, and mitigate potential conflicts of interest.
- Consistently put its interests above that of Mr A.

## **What happened**

In March 2020 Mr A completed an application to open an execution only account with Fortrade through which he could trade CFDs. His account was verified on 1 April 2020 after which he placed numerous trades over the course of around a month through which he lost around £39,000.

In the complaint then made by his solicitors they made reference to the High Level Principles (“the Principles”) the Financial Conduct Authority (“FCA”) expect firms to adhere to as well as various rules set out in the Conduct of Business Sourcebook (“COBS”) which I will make reference to where appropriate.

In response to the complaint Fortrade said that it had complied with its regulatory obligations and complied with Principle 2 of the Principles and as such had acted with due skill, care, and diligence. It also said that it had provided Mr A with clear, fair, and not misleading information and paid due regard to his interests and treated him fairly, in line with its own ethical duty and Principles 6 and 7 of the Principles.

Fortrade said that as an execution only broker it was only required to assess appropriateness of a trading account for a client in line with COBS 10.2, which it said it did. It said it had provided Mr A with multiple warnings, beyond what was expected by COBS 10.3 and that he had the opportunity of reviewing these when he went through the account application process. It said its warnings are highlighted on its website and the wording is prescribed by the FCA and includes the percentage of clients who lose.

Fortrade said that during the registration process Mr A had to acknowledge he had read the risk warning and wanted to proceed with his application. It then provided the wording of the risk warning it was referring to. It also referred to an educational email sent to Mr A on 31 March 2020 with further information on CFDs which it said included a link to Key Information Documents. It said all warnings were received by Mr A before he placed his first trade and as such it had complied with its duties under COBS 10.3.

Fortrade said that as an order execution only brokerage it doesn’t charge commission on trades and only charges a spread for every position opened on its platform. It pointed out

that all trading decisions are made by the client not by Fortrade and as such it denied it engaged in churning.

The matter was then referred to our service. One of our investigators considered the complaint and thought it should be upheld. His key findings were that:

- The information Mr A provided on account opening about his knowledge and experience doesn't suggest someone for whom leveraged trading would be considered appropriate.
- The account registration summary ("ARS") refers to an appropriateness warning having been received but there is no record of this.
- Fortrade allowed Mr A to trade without informing him that the account was inappropriate.
- Redress should be calculated on the basis that the money Mr A put into his account would have remained as savings instead.

Fortrade didn't agree with the investigator. It said at the time Mr A became a customer its account opening process was structured in a way that he could not have opened his account without receiving a tailored appropriateness warning.

Fortrade provided screenshots of the relevant parts of release notes for an update to its system in August 2017. It said these showed that an appropriateness warning would have been given where a customer indicated they had no experience of CFDs and that the customer would have to indicate acceptance of this to proceed further with account opening.

Fortrade said that this process was in place before August 2017 and had been reviewed by the FCA both in July 2016 and May 2017 - when it had opened an account to review Fortrade's appropriateness assessment.

The investigator requested a copy of the appropriateness assessment and queried why Fortrade would open an account for Mr A based on what it knew about him. In response Fortrade said that as a matter of policy it doesn't consider a lack of experience is a sufficient reason to refuse a customer access to its services and that this is effectively designed into the account opening process.

It said it was important to note that Mr A wanted to open an account and chose to do so despite receiving an appropriateness warning and numerous risk warnings and that there is no basis for saying he shouldn't have been allowed to open an account.

The matter was then referred to me for review. I issued a provisional decision upholding the complaint. The findings from my provisional decision are set out below in italics.

*"The solicitor's letter of complaint raised various issues but I think the main issue in this complaint is whether Fortrade did what it should have done when opening Mr A's account, and this is what I have concentrated on.*

*The rules require firms to obtain information about a client's knowledge and experience that allows them to assess whether a product or service is appropriate for the client. Under COBS 10A.2.10 if a firm is satisfied that the client has the necessary experience and knowledge to understand the risks involved in relation to the service it can simply proceed without informing the client of this.*

*However, if a firm considers that the product or service is not appropriate, then it must provide a warning, as set out in COBS 10A.3.1R, which states:*

*“(1) If a firm considers, on the basis of information received to enable it to assess appropriateness, that the product or service is not appropriate for the client, the firm must warn the client.*

*(2) This warning may be provided in a standardised format.*

*[Note: article 25(3) of MiFID, second paragraph of article 30(2) of the IDD]”*

*The information that Fortrade obtained from Mr A is shown in the Account Registration Summary (“ARS”) it has provided. In short this shows Mr A had no online trading experience in CFD - or anything else.*

*Based on the information provided I think it was clear that the account was not appropriate for Mr A and as such a warning under COBS 10A.3.1R needed to be given.*

*In its FRL Fortrade did refer to Mr A being provided with a warning during the account registration process which it said he had to acknowledge to proceed. It said the wording of the warning was as follows:*

*“I have read the warning below and wish to proceed. Be aware  
CFDs are complex instruments and come with a high risk of losing money rapidly due to leverage.  
You can lose all, but not more than the balance of your Trading Account.  
78% of retail investor accounts lose money when trading CFDs with this provider.  
.....”*

*COBS 10A.3.1 does not set out the wording that has to be used by firms. However I am not satisfied the above amounted to an appropriateness warning as required by the rule. The wording amounts to a general risk warning about the high-risk nature of CFDs and is clearly not a specific warning to Mr A that the account is not appropriate.*

*Fortrade said to us that it had provided multiple risk warnings to Mr A both during his application and during subsequent trading and that it was satisfied that it had complied with its obligations under COBS 10.3 to warn the client of the associated risks. However, the requirement - where a product or service is assessed as not appropriate - is to state the account is not appropriate not warn the client of the risks.*

*Fortrade also said that it believed the client was appropriate to trade. This suggests that it didn't assess the account as being inappropriate and as such no warning would have been necessary.*

*The investigator queried why Fortrade thought the account was appropriate to which it provided no response. The investigator gave his opinion based on the available information including what Fortrade had said about the account being appropriate for Mr A.*

*In response to the investigator's opinion Fortrade then said that Mr A would have been provided with a tailored appropriateness warning. It enclosed a copy of release notes for a system upgrade in August 2017 which it said showed the warning provided.*

*The screenshots of the release notes show that in the answer box for “please select duration of your FX and CFD trading experience” the answer “I have no experience” has been selected and for the answer box for “Please select the duration of your online trading experience” the response shown is “I have no experience in trading online”. Underneath this is the following statement:*

*“Based on the information supplied in the Financial Questionnaire regarding your trading experience we consider that CFDs are not appropriate products for you”*

*And this is the warning that Fortrade say would have been provided to Mr A based on the information about his experience shown in the ARS.*

*I acknowledge the screenshots appear to show that if a client states they have no experience of FX and CFD and no online trading experience – as the ARS indicates Mr A stated – a warning would be generated. However, I don't find this evidence persuasive for a couple of reasons.*

*Firstly what the release notes show is not consistent with what Fortrade has previously explained happened before the investigator gave his opinion. Secondly, if a warning was given to Mr A Fortrade should have a record of this given COBS 10A.7.2EU requires it to have such a record. In the circumstances the fact that it has not been able to provide a record of the warning it now says Mr A was given does not support what it has said and release notes.*

*So, based on the evidence I have seen to date I am not satisfied that Fortrade did provide a warning to Mr A in accordance with COBS 10A.3.1R as I think it should have done. However, I have also considered whether the warning shown in the release notes would have been enough for Fortrade to have complied with its obligations if I am wrong about this not being provided to Mr A at the time of opening his account.*

*There is nothing in the rules themselves that sets out how a warning should be provided or what wording should be used. However, the FCA did provide guidance to firms about how it expected them to deal with appropriateness assessments in its Dear CEO letter to CFD firms in 2016 and its subsequent June 2017 ‘Review of appropriateness assessments for sale of CFD products’.*

*In the 2017 review the FCA said the following:*

*“In line with ESMA Q&As, risk warnings should be designed to interrupt the application process. They should use clear language to communicate that a specific product or service is not appropriate for the applicant because the applicant's answers lead the firm to the view that the applicant does not have the knowledge and experience to properly understand the risks involved, with a clear recommendation against proceeding with the transaction.*

*As such, when presenting a risk warning, applicants should not be asked to confirm an intention to proceed with a transaction as the next step in the application process. Examples of good practice in this regard include implementation of a mandatory "cooling off" period after the risk warning, and/or requiring the applicant to submit or respond to a separate communication in which they must acknowledge the risk warning, such that they do not have the option to proceed immediately.”*

*I think the key points from what the FCA said in its review are firstly its expectation that the warning should interrupt the application process with a recommendation not to proceed and secondly that the client shouldn't be asked to confirm they want to proceed as the next step in the application process.*

*I think it is clear from the release notes that the appropriateness warning did nothing to interrupt the application process but was rather just another step in the process and that to proceed with the application all that was required was that the tick box next to the warning is completed.*

*In short, Fortrade paid no regard to the guidance provided by the FCA in its June 2017 review. In fact I think it would be fair to say that in contrast to the guidance provided its process made it as simple as possible for clients to open an account in the face of an appropriateness warning.*

*I think in failing to take account of what the FCA said in its review and providing a warning as shown in the release notes Fortrade failed to comply with its obligations under COBS 10A.3.1R. Furthermore, I think its failure to implement any of the guidance from the FCA review into its process means it was also in breach of its obligations under COBS 2.1.1R(1), which states:*

*“A firm must act honestly, fairly and professionally in accordance with the best interests of its clients (the clients best interest rule).”*

*The question then arises as to what would have happened if it had implemented the sort of process that was indicated by the FCA in the review. In other words if Mr A had been provided with a warning with a recommendation not to proceed and time to consider that before proceeding with opening his account would this have led to him not going ahead?*

*It is difficult to say with any certainty what Mr A might have done in that scenario. However, I think being told that a service is not appropriate with the firm recommending the account not be opened and time to consider this would make it far more likely a client would decide not to go ahead compared to the position where all that is required is to tick the box next to the warning – which is more likely to be seen as just another part of the account opening process.*

*Mr A’s solicitors said that Fortrade approached Mr A to open his account. If that is right then if it subsequently informed him he shouldn’t open the account I can see no reason he would have ignored this. However, even if it was Mr A who approached Fortrade to open an account I think it is more likely than not he would have decided not to go ahead if he had been given a warning in line with what the FCA had set out in its 2017 review.*

*Even if I am wrong about that, and Mr A would have chosen to go ahead in any event I am not satisfied that Fortrade should have allowed him to open an account.*

*COBS 10A.3.3G states:*

*“If a client asks a firm to go ahead with a transaction, despite being given a warning by the firm, it is for the firm to consider whether to do so having regard to the circumstances.”*

*The FCA made clear the importance of firms doing this in its Dear CEO letter of 2016. One of the issues it identified in the letter was that many firms hadn’t established a process to assess whether clients who failed the appropriateness assessment, but still wanted to trade CFDs, should be allowed to proceed.*

*The FCA made further reference to this in its 2017 review under the heading ‘Failure to evaluate whether failed applicants should be allowed to make CFD transactions’. It said: “In most cases, firms did not give meaningful consideration to whether the applicant should*

*still be permitted to proceed. This allowed prospective clients to override the appropriateness assessment and risk warning and proceed to trade without substantive deliberation.”*

*It referred to ESMA’s Q&A which stated:*

*“taking into account the complex nature of CFDs and other speculative products and the*

*best interests of the client, in cases where the assessment of appropriateness indicates that the product or service is not appropriate for a retail client or where insufficient information is available to assess appropriateness, the best practice would be for the firm to not allow the client to proceed."*

*And it said that as such firms may be failing to comply with customers best interest under COBS 2.1.1R and Principle 6 as well as acting contrary to the guidance in COBS 10A.3.3G.*

*From the information I have seen it appears that Fortrade had no process in place to evaluate whether someone who was given an appropriateness warning should be permitted to open an account. In short, based on what I have seen it acted contrary to the guidance in COBS 10A.3.3G and failed to take account of what the FCA said in its Dear CEO letter and 2017 review.*

*I think the failure to consider whether it should open an account for Mr A was a breach of COBS 10A.3.3G as well as COBS 2.1.1R and Principle 6, as the FCA indicated may be the case.*

*Fortrade may argue that had it put in place a process to consider whether it should open an account for Mr A it would still have concluded it should do so. It has inferred this would have been the case in saying that as a matter of policy it doesn't consider a lack of experience means a client shouldn't have access to its service.*

*Again, this indicates it has paid no regard to what the FCA said in its 2017 review in which it quoted the ESMA Q&A which stated that best practice would be not to proceed where a service or product wasn't appropriate. Fortrade's stated 'policy' completely disregards what the FCA said and its concern that CFDs were "reaching a wider target market than is likely appropriate."*

*I think this failure to take note of what the FCA said would amount to a breach of Principle 2 of the FCA's Principles – "A firm must conduct its business with due skill, care and diligence". More specifically I think this would be a breach of its obligations under COBS 2.1.1 – the client best interest rules.*

*The ARS shows Mr A had no previous experience of trading online in relation to any product, he was in effect a novice trader. His solicitors said he has no previous investment experience of any sort.*

*In the circumstances I am not satisfied that if Fortrade had put in place a process to decide whether it should open an account for Mr A it could reasonably have concluded it should do so when taking account of what the FCA said in its review.*

*I have taken into account what Fortrade has said about the FCA visiting in 2016 and May 2017 and reviewed its appropriateness assessment. It has not provided any evidence in relation to this on which I could make any relevant findings.*

*However, I think it is worth noting that the May 2017 visit was before the FCA review of June 2017 through which it raised various concerns about appropriateness assessments, as I have already referred to."*

*I then summarised my findings and awarded redress on the basis that Fortrade pay to Mr A the £39,000 he deposited in his account together with simple interest at 8% on that amount and £500 for the distress and inconvenience caused.*

*I gave both parties the opportunity of responding and providing any further information they*

wanted me to take into account before issuing my final decision.

The solicitors for Mr B said that he had nothing further he wanted to add. Fortrade also responded and said it had no further comments other than it was disappointed with the provisional decision and were so concerned about the unfairness of it that it had considered whether to challenge it further.

However, it then went on to say that it was minded to settle the complaint on the terms I had proposed, although wanted to agree the amount with Mr A without a final decision being required. I confirmed that simply agreeing to pay what I had awarded was not a basis for me not to issue a final decision and it said it had nothing to add and would await the final determination.

### **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 note the suggestion by Fortrade that my findings are unfair but it has chosen not to address the various failings I identified in my provisional decision and explain in what way they are unfair. For the avoidance of any doubt I am satisfied that my findings are fair and reasonable based on the information provided by the parties and that this complaint should be upheld.

Given I have been provided with no new information there is no basis for me to depart from the findings set out in my provisional decision, as set out above and which, in summary, are as follows:

- Based on the information Mr A provided the account Fortrade opened was not appropriate for him and as such a warning under COBS 10A.3.1R needed to be given.
- I am not satisfied that such a warning was given based on the available evidence.
- If I am wrong about that and a warning was given I am not satisfied that the warning complied with the requirements of COBS 10A.3.1R in any event, given what the FCA had said about such warnings in its June 2017 review of 'appropriateness assessments for the sale of CFD products'.
- Fortrade's failure to take account of what the FCA had said in the review was also a breach of COBS 2.1.1R(1).
- If Mr A had been given the warning he should have been it is more likely than not he would have decided not to go ahead with opening the account.
- If I am wrong about that and Mr A would have gone ahead in any event, Fortrade should have had a process in place to decide whether to allow him to do so and it didn't, which was a breach of COBS 10A.3.3G, COBS 2.1.1R and Principle 6.
- If Fortrade had such a process in place it could not reasonably have concluded it should open an account based on the information it had and taking account of what the FCA had said in its 2017 review.

### **Putting things right**

It does not appear that Mr A funded his account with money from the sale of other investments and I have seen nothing that makes me think he would instead have invested in something else. In the circumstances I think Fortrade should repay Mr A the £39,000 he deposited in his account which he lost and pay simple interest at 8% each year on this amount from the date he closed his account to the date of payment.

I also think Mr A would have been caused distress and inconvenience resulting from losing

such a significant amount of his savings in the short period he used his account. I think an award of £500 is reasonable for this in the circumstances.

### **My final decision**

I uphold this complaint for the reasons I have explained. Fortrade Limited must calculate and pay redress as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 23 September 2022.

Philip Gibbons  
**Ombudsman**