

## The complaint

Mr O complains to Tickmill UK Ltd about delays incurred when attempting to add funds to his trading account. As a result of the delays, several of his positions were closed, crystallising losses which he says he would otherwise have been financially able to withstand. Mr O has said he is now in a difficult financial situation – he seeks compensation for the losses and for missed profit had the positions been reinstated at the time.

## What happened

Mr O has had a leveraged trading account with Tickmill since February 2017. In June 2018, he was reclassified as a professional client.

On 9 September 2020, Mr O's account was on margin call due to the equity falling below the margin requirements. He tried a number of times to deposit money to his account to avoid his open positions being closed out.

At 9:17am, Mr O deposited \$2,490 – but this didn't clear until later that day at 6:15pm. He made another nine attempts to fund the account. One was successful, with him adding \$1,000 at 9:57am – but this didn't clear until after 9am the next day. The remaining eight attempts were all unsuccessful. These were:

- 9:24am - \$1,290
- 9:38am - \$2,100
- 9:40am - \$1,600
- 9:44am - \$1,700
- 9:47am - \$1,500
- 9:50am - \$1,000
- 10:02am - \$ 900
- 2:36pm - \$ 750

As Mr O's payments were unsuccessful, and with the market moving against him, once his margin requirement was breached Tickmill began closing some of his positions out to reduce his exposure. This continued throughout the afternoon in various phases.

Mr O discussed the situation with Tickmill that afternoon, and a complaint was later raised. Tickmill looked into what he'd said, but ultimately felt they were right to close his positions given he hadn't funded his account.

Remaining unhappy with this, Mr O asked for our help. One of our investigators considered the complaint but didn't think that Tickmill had done anything wrong. She said that the payments weren't approved by Mr O's card provider and Tickmill's terms had noted that such issues can occur. She also noted that it remained Mr O's responsibility to ensure his account had a sufficient balance to maintain his positions.

Mr O remained unhappy. He's sent us a lot of correspondence since our investigator issued her view and he's also shared some of his personal circumstances with us too. Some of the main points Mr O has raised are:

- Tickmill hadn't asked him to sign any contract, nor will they be able to show a date for the contract as it does not exist. He signed up with Tickmill on 14 February 2017 – this was important to note as Tickmill were trying to associate contracts with him that have nothing to do with him – notably the one shared was dated June 2017, which was therefore after he'd signed up.
- While our investigator had pointed to a risk document, this wasn't relevant to what he'd experienced.
- The issue was that his money wasn't instantly credited to his account – he felt it was a trap for Tickmill customers.
- He hadn't had any problems when he had a smaller account balance – problems only occurred when he had more money to lose, so he felt Tickmill had caused funding issues on purpose.
- If Tickmill refunded his losses, they wouldn't be losing any money as they'd made a lot more from him overall.
- Tickmill hadn't denied they'd made a mistake – instead, they have suggested him opening further positions confused things.
- He shared examples of two decisions issued by our service – one was an example of a business being asked to refund losses to a consumer who couldn't close a trade placed when the market was closed, and the other was an example of a payment provider being asked to refund a transfer which had not reached its intended destination.
- He later shared another decision issued by our service where a consumer had problems funding a trading account and some compensation had been awarded. Mr O asked me to consider this as he felt it helped his case, where money taken from his card had intentionally not been added to his account.
- He'd been on our website and considered the spread betting and contracts for difference guidance page for businesses – he said Tickmill hadn't required him to maintain margin and that he'd deposited money to stop positions being closed but Tickmill had prevented him from doing so.
- That he'd been in touch with the regulator, the FCA, about his case and they'd pointed him to the Principles within their handbook, namely Principle Six which says, *"[a] firm must pay due regard to the interests of its customers and treat them fairly."* Mr O doesn't think Tickmill have adhered to Principle Six and asks that I consider it.
- And he reiterated the difficulties he was experiencing as a result of what had happened – the economic situation in his country means inflation is making it even harder to service his debts. He'd tried to get support with his finances, but said no one had been able to help, so the outcome of his case is extremely important to him.

Mr O also shared comments from a friend working in the relevant legal field. They said, in short, that the delay in adding funds was Tickmill's issue – them asking Mr O to have informed them doesn't excuse their system failure. And that while Tickmill's terms may have said Mr O needed to notify them of the issue, the terms we'd relied on weren't a legally binding document.

Mr O's complaint was referred for decision and passed to me. I issued provisional findings in May and said:

*I recognise how important the outcome of this complaint is to Mr O, given the difficulties he's shared with us. I also recognise that delays have added to his distress, but I must assure him that the work I have been doing to establish the facts has been to ensure the outcome he receives is fair and reasonable given all the circumstances.*

*The crux of Mr O's complaint is that Tickmill didn't accept the payments he was making and when they later did, it was too late to prevent the closing of his trading positions. In order to consider this for him, I've thought about the terms of his account, looked at his payment attempts and at his account equity on the day in question. I've also considered the regulator's rules and guidance, the guidance on our website and the other decisions Mr O considers relevant. And I've kept his personal circumstances in mind, recognising the impact this complaint has on his situation. Having done so, I have also considered Mr O's categorisation as a professional client.*

#### *Concerns about the terms and conditions*

*Opening an account of this nature with Tickmill will have required Mr O to have agreed to their terms and conditions. I appreciate Mr O doesn't remember doing so and he's pointed out concerns about the date of the contract which had been relied on. But I note our investigator shared terms and conditions dated April 2016 which were in force when Mr O opened his account in February 2017. Though I appreciate Mr O's concerns and understand he may not remember the steps involved in the account opening process given it was some time ago, I don't think it's likely he'd have opened his account without agreeing to Tickmill's terms and conditions. So on balance, I think they apply here.*

#### *Issues with depositing money*

*As mentioned, Mr O tried to fund his account ten times on 9 September 2020 – only two of these attempts were successful. I've considered the eight failed attempts – most were in the morning, with one in the afternoon. Our investigator looked into this, but all Tickmill could tell us is that the payments failed with an error of 'do not honour'. This is an error on Mr O's side of the transaction – whether it be his bank or another party such as a payment services firm – and not an error on Tickmill's side. So they've not been able to share further details as to why the payments were not honoured.*

*I've thought carefully about this, but I don't agree Tickmill ought to be accountable for failures they're not responsible for. So I don't agree they've done anything wrong with respect to these eight attempts.*

*Looking at the other two successful attempts, the first at 9:17am for \$2,490 cleared within a minute. But the second at 9:57am for \$1,000 didn't clear until the next morning, around 23 hours later.*

*I've looked into this as while Tickmill's term 21.7 says, "[i]f you make a payment by bank transfer, by credit card or any other method of electronic money transfer, we shall credit your Trading Account with the funds within one Business Day..." I take Mr O's point in that Tickmill's website instead says card payment processing times are instant.*

*However, having considered screenshots from Tickmill's systems, I can see that this payment did initially fail on Mr O's side of the transaction, however, a minute later the*

*provider created a new deposit attempt which was then successful. As this attempt had the same reference number, Tickmill's system had considered the payment a failure. And this wasn't recognised until Mr O called them later that day. As Mr O called after the funding team had finished for the day, the amount wasn't added to his account until the following morning.*

*Given I have seen evidence of the initial failure and that the subsequent reattempt was under the same reference, I can understand why the system didn't automatically recognise the transaction as successful – so I don't agree Tickmill unfairly delayed Mr O's deposit contribution. And while there is a disparity between the timeframes set on Tickmill's website and what's said in their terms, this wasn't the reason for the delay in Mr O's \$1,000 being credited to his account. So having considered the ten deposit attempts, I don't agree Tickmill prevented Mr O from funding his account as he alleges.*

*At 20.8, Tickmill's terms also say, "[i]t is your responsibility to notify us as soon as you believe that you will be unable to meet a Margin payment when due". I see Mr O made nine of the ten deposit attempts in the morning of 9 September 2020, but five hours passed before Tickmill first began closing positions on Mr O's account.*

*While I appreciate that he doesn't think this changes anything, it does show Mr O had time to contact Tickmill to let them know he was trying to manage his margin. I can see he was trading on his account that day, so he was monitoring the account – and trying to trade to manage things – but there's nothing to show he contacted Tickmill for help before the positions were closed. Though we cannot be sure whether Tickmill could have helped or the outcome would ultimately have been different, the \$1,000 could have been identified sooner and credited.*

#### *Margin requirement*

*Within the terms, section 20 covered margin requirements. At 20.1, it said:*  
*Where applicable, you shall provide and maintain the Initial Margin and/or Necessary Margin in such sums as we, in our sole discretion, may require from time to time under the Agreement. It is your responsibility to ensure that you understand how Margin is calculated. If you have any doubt about the Margin requirement for a particular Order, please contact our client services team.*

*So while Mr O pointed to the guidance on our website and felt Tickmill didn't require margin from him – they did.*

*At 20.7, it said:*

*You undertake to provide us with and maintain on your Account at all times, sufficient cleared funds in order to meet the Margin requirement for your transactions. You agree that a failure to meet the Margin requirement at any time will result in the closing out of some or all of your open positions without prior notice to you. This process is automatically triggered when your Trading Account's ratio of Equity to Margin falls below 30%. The position with the greatest negative balance will be closed first and so on until the Trading Account's ratio has reached parity.*

*So it was for Mr O to manage his margin, with Tickmill able to close positions if this fell below 30%. I've considered Mr O's account equity on 9 September 2020. Mr O had several positions open that day, and Tickmill closed positions in two phases, just before 3pm and again just before 4pm:*

- at 2:53pm, the required margin was \$3,536.10, but Mr O's account equity was \$1,058.60. As this was 29.93% of the requirement, I see why Tickmill began closing positions*

- at 3:56pm, the required margin was \$3,207.90, but Mr O's account equity had fallen to \$944.80. This was 29.5% of the required margin, so I again see why Tickmill began closing out positions.

*From what I've seen, I'm satisfied Tickmill had the right to close positions, and that they exercised that right appropriately as Mr O's account equity had fallen below 30%.*

#### *Mr O's other points*

*Mr O has said he feels the deposit issues were intentionally caused by Tickmill given he had a larger account balance and more to lose. But as explained above, I can't see evidence to support this. The majority of the attempts failed on Mr O's side of the transaction, such as his card provider rejecting the requests. Precisely why this happened isn't clear, it could have happened for many different reasons. But, any decision to prevent the payment wasn't something Tickmill could've had any involvement or influence over. As such I can't say Tickmill is responsible for the problems Mr O had trying to add funds to his trading account.*

*I've considered the decisions Mr O has highlighted, but I don't agree they change the outcome of his complaint – while those cases involved trading and transfers, the circumstances are not the same. I have also considered the guidance Mr O pointed to, but I don't agree this changes things either. I'd also like to confirm that I've also thought about Principle Six, however I don't agree there's evidence to show Tickmill haven't had regard for Mr O's interests or that they haven't treated him fairly in relation to the deposit attempts and close out.*

*I don't think Tickmill are responsible for the eight failed deposits, or with regards to the delayed deposit – on the whole, the issues were outside of Tickmill's control and the account could only be credited where payments were successful. I also don't think Tickmill did anything wrong when closing some of the positions – the terms Mr O agreed to clearly stated that managing his balance was his responsibility, so as cleared funds weren't available, Tickmill haven't treated him unfairly by closing the positions they did in these circumstances.*

#### *Mr O's categorisation as professional client*

*Our service has an inquisitorial remit when considering complaints – this means we're able to look at what's relevant to a complaint, even if it hasn't been specifically outlined by the consumer, in order to consider what would be a fair and reasonable conclusion. I say this because in the course of investigating the deposit issue Mr O complained about, Tickmill shared information with us about his multiple trading accounts and his status as a professional client. Given Mr O's circumstances and what he's told us about the losses he's faced, I think how he came to be a professional client is relevant so I've considered his this further.*

*The Conduct of Business Sourcebook (COBS) set out the tests which Tickmill needed to apply when deciding whether it was appropriate for Mr O to trade leveraged products (COBS 10). The answers Mr O gave to the appropriateness assessment which Tickmill carried out in 2017 allowed him to open an account given he'd indicated he had enough experience with leveraged products to understand the risks involved.*

But at that point, Mr O was considered a retail client. It was in June 2018 that Mr O became an elective professional client. COBS 3.5.3 set out what Tickmill needed to consider in order to reclassify Mr O. At the time, the relevant rules said:

**COBS 3.5.3R**

A firm may treat a client other than a local public authority or municipality as an elective professional client if it complies with (1) and (3) and, where applicable, (2):

(1) the firm undertakes an adequate assessment of the expertise, experience and knowledge of the client that gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the client is capable of making his own investment decisions and understanding the risks involved (the "qualitative test");

(2) in relation to MiFID or equivalent third country business in the course of that assessment, at least two of the following criteria are satisfied:

(a) the client has carried out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters;

(b) the size of the client's financial instrument portfolio, defined as including cash deposits and financial instruments, exceeds EUR 500,000;

(c) the client works or has worked in the financial sector for at least one year in a professional position, which requires knowledge of the transactions or services envisaged;

(the "quantitative test"); and

(3) the following procedure is followed:

(a) the client must state in writing to the firm that it wishes to be treated as a professional client either generally or in respect of a particular service or transaction or type of transaction or product;

(b) the firm must give the client a clear written warning of the protections and investor compensation rights the client may lose; and

(c) the client must state in writing, in a separate document from the contract, that it is aware of the consequences of losing such protections.

...

**COBS 3.5.6R**

Before deciding to accept a request for re-categorisation as an elective professional client a firm must take all reasonable steps to ensure that the client requesting to be treated as an elective professional client satisfies the qualitative test and, where applicable, the relevant quantitative test.

So Tickmill needed to take all reasonable steps when considering the qualitative and quantitative tests. I asked Tickmill what they did with regards to this – they shared what they'd considered in relation to COBS 3.5.3 (2).

Mr O had answered questions about the size and frequency of his trades, as well as the value of his investment portfolio – the questions were, 'was the average number of significant trades you have made per quarter over the last year greater than 10?' and 'is the current value of your investment portfolio greater than or equal to 500,000 EUR?'. Both of Mr O's answers were simply 'yes'. Mr O then clicked to confirm he understood the implications of reclassification.

Tickmill have confirmed that Mr O's trading history allowed them to consider he met COBS 3.5.3 (2) (a) and that they could see he had carried out transactions, in

*significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters. But with regards to his answer to 3.5.3 (2) (b) they said they'd relied on his self-assessment – and that this was acceptable given that the changes to the rules brought about by the European Securities and Markets Authority (ESMA) weren't in force until August that year.*

*I've thought carefully about what Tickmill have said. But regardless of the new ESMA rules (which Tickmill will have known about at the time), COBS from not only early 2018 but also 2007 still required Tickmill to take all reasonable steps. And in my view, the requirement to take reasonable steps extended further than allowing Mr O to tick some boxes and to effectively self-certify himself as an elective professional.*

*On this point, I note the ESMA Q&A document was updated in May 2018 – before Mr O's reclassification – and the client categorisation section clarified the meaning of taking reasonable steps, warning against self-certification:*

*In addition, in accordance with the second paragraph of Section II.2, investment firms are expected to take all reasonable steps to ensure that a retail client that requested to be treated as a professional client meets the requirements of Section II.1. Whilst investment firms should use their discretion to determine the reasonable steps needed, they should avoid relying solely on self-certification by the client and should consider obtaining further evidence to support assertions that the client meets the identification criteria at that point in time, notably when they consider that the documents or statements received from the clients are not sufficiently conclusive.*

*Here there is no evidence to show Tickmill considered documents or statements, let alone as to whether they were sufficiently conclusive or not. Instead, they relied on Mr O's self-certification which was not in the spirit or intention of the rules.*

*The rules were clear in that the requirement on Tickmill of assessing the professional nature of Mr O was a higher bar than what they needed to do when allowing him to open the account in the first place – this is because in choosing to be treated as an elective professional client, Mr O gave up protections like increased margin requirement and negative balance protection which would reduce the possibility of significant financial losses.*

*In my view, Tickmill didn't do enough to satisfy themselves Mr O met the criteria to be considered as an elective professional client. And from what we now know about Mr O's financial situation, it seems more likely than not that he would not have met the requirements – in particular, he did not have a large enough portfolio and was not employed in a role or profession which conferred on him specific knowledge of leveraged products. By incorrectly classifying him as a professional, Tickmill exposed Mr O to risks which he ought not to have been exposed to and treated him unfairly, so we must consider what the impact of these was.*

*Putting things right*

*As I don't think Mr O should have been allowed to trade as a professional client, I have thought about how we could put him back into the position he would have been in had his professional client application been declined.*

*From everything I've seen, I still think Mr O would have continued to trade with Tickmill as a retail client. And I've nothing to suggest he wouldn't have traded with similar frequency and interest in the same instruments. So I don't think it would be right to ask Tickmill to refund all of the losses he's made, as those losses were a*

*result of his trading decisions which he is likely to have still made – albeit perhaps on a smaller scale – as a retail client.*

*Instead, what needs to be considered is the difference between the losses Mr O did make, and the losses he would instead have made as a retail client. These are likely to be less given he wouldn't have had access to higher leverage and may have been stopped out sooner than he was. I think it's fair and reasonable for Tickmill to consider this difference given they enabled Mr O to lose more money than he otherwise would have been able to.*

*In my view the fairest way of putting things right in this case is for Tickmill rework the trades Mr O made after 12 June 2018 as if he had placed them as a retail client. Tickmill should then compare the total Mr O would've lost as a retail client, with the total he lost as a professional client. If there is a difference, it ought to pay this to him. But there should be no interest on any compensation sum given we can see Mr O carried on trading.*

*Due to the volume of trades Mr O placed during this period, it would be reasonable for Tickmill to group the trades by instrument in order to work out the additional losses suffered.*

*Lastly, if Mr O's account is still active Tickmill ought to reclassify him as a retail client.*

Following my provisional decision, in July I issued a follow up statement to both parties with further thoughts on redress. I said:

*I am grateful to both Mr O and Tickmill for their responses to my provisional decision issued in May. I write today to share further thought on the approach we may take in order to fairly compensate Mr O.*

*Looking back to my findings, I said:*

*As I don't think Mr O should have been allowed to trade as a professional client, I have thought about how we could put him back into the position he would have been in had his professional client application been declined.*

*From everything I've seen, I still think Mr O would have continued to trade with Tickmill as a retail client. And I've nothing to suggest he wouldn't have traded with similar frequency and interest in the same instruments. So I don't think it would be right to ask Tickmill to refund all of the losses he's made, as those losses were a result of his trading decisions which he is likely to have still made – albeit perhaps on a smaller scale – as a retail client.*

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*Due to the volume of trades Mr O placed during this period, it would be reasonable for Tickmill to group the trades by instrument in order to work out the additional losses suffered.*

*Lastly, if Mr O's account is still active Tickmill ought to reclassify him as a retail client.*

*The key part was that I asked Tickmill to rework Mr O's account as if he'd been trading as a retail client, rather than a professional client. That would likely, to some extent, have limited his losses given things like reduced leverage and earlier close outs.*

*In response, Tickmill have emphasised the difficulties they have in trying to implement these instructions. I take their point and recognise that reworking the account is far from straightforward – for example, it's likely Mr O wouldn't have been able to place as many trades as he did, or at the sizes he did. And it's likely Mr O would've been stopped out sooner than he was. It is difficult to look back at the trades and decide which would have been made, at what size, and to work out when they'd have been stopped. Picking certain trades out for either going ahead or not going ahead risks not only being tainted with hindsight but would also be inaccurate. I have also thought about Mr O's responses and I appreciate the difficulty he has in trying to establish what position he ought to be in, and that he might need the help of an expert to assure him a calculation is correct.*

*Having thought about what both parties have said, I propose to amend how I intend on asking Tickmill to redress Mr O's case. Rather than reworking his account (which appears to involve around 40,000 trades and around 1,000 pages of statements), I instead ask Tickmill to take a broader approach by considering how they might otherwise reduce Mr O's overall losses down to what he may have instead experienced as a retail investor.*

*To do this requires considering how much money Mr O lost – it is my understanding that after 12 June 2018, Mr O deposited just over \$160,000 across his Tickmill accounts. It is also my understanding that just over \$102,000 was withdrawn from the accounts. Though this highlights Mr O lost around \$58,000, the figure is actually higher – at as there was already money in his account which had been deposited before 12 June 2018 – and it appears his loss was instead \$70,089.98. So this is the starting point.*

*Tickmill have then assessed Mr O's average daily utilisation of equity and margin since June 2018 – they say this was 1:90. They also say that a retail client would average 1:30 – so had Mr O have traded as a retail client (and bearing in mind I still think he'd have traded and is likely to have followed similar trading strategy as to positions and timing, just perhaps not size) it seems likely he'd have only lost around a third of the c\$70,000 – being around \$23,300. Instead of offering to refund Mr O the other two-thirds of his losses (being c\$46,700), Tickmill have instead offered to settle by paying half of this amount – \$23,000. They say this is due to the administration associated with running his accounts and their need to make profit as a relatively small firm.*

*I've thought carefully about what I've seen, but I'm not persuaded the two-thirds, nor the half of the two-thirds would be fair. Taking the two-thirds point first; the new rules say the maximum leverage for retail clients can be 1:30, so I think Mr O's average is likely to be lower than this. That's because although I can see he traded major currency pairs, he also had gold positions and S&P500 (1:20) and there may be*

*others warranting lower leverage. So I would ask Tickmill to consider this again to check what Mr O's retail exposure ought to have been.*

*I also don't think refunding half of whatever figure we arrive at to be fair either. Though I appreciate Tickmill have costs, these ought not to have a bearing on the outcome for Mr O given the findings are that he should not have been opted-up. It's Tickmill's commercial discretion as to how they run their business – such as the decision to use more expensive payment service providers – so if Mr O was simply accessing the features available to him I don't agree he should be penalised for this. Mr O also shouldn't have been able to trade as much (whether that be size or frequency) as he did, so it isn't right Tickmill benefit from these additional earnings from him as they ought not to have facilitated trading over and above the retail exposure.*

*Tickmill have also explained that they earned \$42,000 from Mr O's trades and they've used this as a basis for getting to another counter offer of \$14,000 – but I'm not persuaded that Mr O should only have a third of these costs returned as this methodology would not be in the spirit of the decision.*

*My current thinking is that it would be fair for us to consider Mr O's total losses, and to consider what those might have been reduced to had he only have traded as a retail client. But I remain of the view that no further reduction applies thereafter.*

*I ask that both parties reconsider this amendment to my provisional findings and let me know if they have any further comments. More specifically:*

- should Mr O have evidence to show that the figures provided by Tickmill – being his deposits, withdrawals or losses – are not correct, I invite him to share that evidence with me*
- and I invite Tickmill to evidence their leverage assessment to me – that is both to support the fact that Mr O's average leverage was 1:90, as well as what his retail average leverage on similar trades would have been (likely to be less than 1:30 but I'd like to review the assessment done), so that I can review the proposed reduction percentage of losses*

In response to my provisional findings and revised thoughts on redress, Tickmill weren't happy with my reference to them having to take reasonable steps as per COBS 3.5.6R, or with why I'd considered Mr O's client categorisation given it was widening the complaint he'd made. They pointed out that Mr O had requested to be opted-up and that he hadn't been forthcoming about changes with his personal situation.

This aside, to assist with developing the approach to redress they shared details of Mr O's deposits and withdrawals from June 2018 onwards. They also shared a spreadsheet showing Mr O's leverage and equity utilisation. They said he'd lost around \$70,000 but had he have been a retail client, this would only have been around \$16,000. So they suggested fair redress might be around \$54,000.

Mr O didn't agree with my provisional findings and revised thoughts on redress either. He commented a number of times and some of his points were, in summary:

- He was grateful for me looking into his professional status but thought his complaint should be split – with one complaint covering the failed deposit issue and another to look at his categorisation.
- He had concerns about the account opening process and whether the terms Tickmill were seeking to enforce now applied to him and cited unfair contract terms.

- He didn't agree the failed deposits were issues with his bank – instead, there had been a system failure at Tickmill's end which was something they'd known about for some time but failed to fix. He'd spoken with his bank and they'd confirmed there wasn't a problem with his account or card on 9 September 2020 – he was welcome to us contacting them to check for ourselves.
- He'd had trouble accessing his trading activity given it'd been archived following the closure of the accounts – but once he'd accessed it, he provided his comments on the statements he'd reviewed. In short, he highlighted that there were inaccuracies, that his deposit and withdrawal figures were wrong and that his leverage had been 1:500, not 1:90. For this reason he considered his losses to be far greater than Tickmill had suggested.
- He sent various iterations of calculations he'd done to highlight the additional money he thought he'd lost as a result of being wrongly categorised – he said his losses might either be \$42066,79, \$145,283.85, or \$1,307,554.65 and £435,851.55.
- And he shared how his personal circumstances were worsening, and that he felt Tickmill were exploiting his weaknesses in settling matters.

### **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.

Having done so, I've not been persuaded to depart from my provisional findings. The reasoning as outlined above is incorporated into this final decision. The key findings, in summary, are that:

- I still think the terms and conditions dated April 2016 which were in force when Mr O opened his account in February 2017 applied given he wouldn't have been able to open his account without them. I can't see they were unfairly changed as he suggests.
- I don't agree there's evidence to show shortcomings on Tickmill's part in relation to the eight failed top-ups – the 'do not honour' error codes aren't something they could overcome, so I can't fairly say they're responsible.
- I don't agree the two successful top-ups were unreasonably delayed given the fact that the initial failures were followed by successful transactions with the same reference numbers. Though this was an internal issue for Tickmill, I also recognise Mr O had five hours to notify them of the issue in line with 20.8.
- I don't think Tickmill did anything wrong when closing some of the positions following a margin call – this was in line with the terms which explained managing his balance was Mr O's responsibility. As cleared funds weren't available, Tickmill didn't treat him unfairly by closing the positions they did in these circumstances.
- This aside, given their reliance on self-assessment I don't think Tickmill did enough to satisfy themselves Mr O met the criteria to be considered as an elective professional client. From what we now know about Mr O's financial situation, it seems more likely than not that had they have taken reasonable steps to verify his answers, he would not have met the requirements – in particular, he did not have a large enough

portfolio and was not employed in a role or profession which conferred on him specific knowledge of leveraged products.

I also don't agree there's a need to split Mr O's complaint into one about the deposit issues and one about his categorisation – though one point is a specific issue and another is a wider concern about the account, there is no reason for why we must split the issues. Both have been given due consideration in my decision.

I've again thought carefully about how we can put things right. It's clear both Tickmill and Mr O have put considerable thought and effort into how we may best approach the question of redress and I am thankful to them both for their time.

From everything I have seen, I've not been persuaded to depart from the revised position I shared in July where I said, in part:

*Rather than reworking his account (which appears to involve around 40,000 trades and around 1,000 pages of statements), I instead ask Tickmill to take a broader approach by considering how they might otherwise reduce Mr O's overall losses down to what he may have instead experienced as a retail investor.*

...  
*it would be fair for us to consider Mr O's total losses, and to consider what those might have been reduced to had he only have traded as a retail client.*

I remain satisfied that this approach would be a fair resolution to Mr O's complaint. In saying that, I appreciate there is disparity between how each party interprets the methodology. I say that because Tickmill consider Mr O's losses to be in the region of \$54,000 yet Mr O has submitted varying estimations of his losses between anything between \$40,000 and \$1,300,000. For this reason, I will clarify some of the key issues I have identified that have led to the disparity:

- In one of Mr O's calculations he totaled all of his losses on one of his accounts (c\$145,000) and compared this against what he thought he'd have lost as a retail client (c\$9,000) so thought his redress ought to be c\$136,000. But Mr O had separated his losses from his c\$133,000 in profits – so Mr O had lost around \$12,000 on that account as a professional, not \$145,000.

But we must not only look at the money Mr O lost when thinking about the compensation he is now due, we must also think about the profits he made. That's because it wouldn't be fair to ask Tickmill to compensate him for only his losses, without looking at his profits too, as that would leave Mr O in a better position that he would have been as a retail client.

Instead, the approach of comparing total money in with total money out – followed by reducing the difference according to average leverage comparisons – will more accurately highlight Mr O's losses.

- We must also look across all of Mr O's accounts, rather than to take one as a sample. I say this because Mr O suggested we take the above loss figure of \$145,000 and multiply it by nine given he had nine accounts. But each account varied considerably, for example, one has less than 30 trades whereas another had in excess of 15,000 trades. So, I don't think taking an example and applying it across all accounts will provide us with a fair figure.
- It is right to consider what Mr O's average leverage usage was as although his account may have had the scope for him to trade up to 1:500, it may not be the case

that this full scope was used. It would therefore be reasonable to compare his average usage with what he'd have been able to access as a retail investor.

Tickmill told us Mr O's average leverage was 1:91.35. They also initially proposed to redress Mr O based on an average retail leverage of 1:30. However Mr O correctly highlighted that he traded asset classes with lower maximum leverage than this. Tickmill reconsidered the point and created a comparison between Mr O's 1:91.35 average and the leverage he could've applied had he have been a retail client – for example 1:20 on gold trades.

Comparing Mr O's average actual leverage use with what retail leverage he could have got on each asset class will be a more accurate approach.

- Though Mr O correctly points out he'd likely have been stopped out earlier on trades as a retail client, it is far from straightforward to unpick his c40,000 trades in order to reconsider each stop out, whether it would have happened sooner and if so, when and at what level.

It may have been the case that getting stopped out sooner might've contributed to smaller losses had the market had continued to move against Mr O. Equally, it might've contributed to bigger losses had a brief spike led to close out when Mr O would otherwise have ridden the movement out and ended up in profit.

It is for these reasons that I remain persuaded that the broader comparison approach is a fair and reasonable way of broadly putting Mr O back in the position he would've been as a retail client.

The final calculations shared have similarities in approach, but differences in outputs. For example, Mr O suggests he deposited just under \$266,000 and just over £39,000 into his accounts. He also suggests he withdrew just over \$193,000 and almost £18,000. So he seems to suggest his losses were almost \$73,000 and just over £21,000. But as I said above, in certain circumstances I have seen that Mr O's calculations haven't been accurate. Instead, Tickmill say his total loss was just under \$71,000 and I find that they have provided persuasive evidence of how they came to that figure. For this reason, if after this final decision Mr O disagrees with Tickmill's calculation, he will need to provide them with clear evidence of exactly how he arrives at a different figure.

If after Tickmill have presented the outcome of their loss calculation to Mr O in a clear and understandable way he considers that it does not follow the redress methodology set out in this decision, as a last resort he may refer the matter back to me for consideration. But I should emphasise to Mr O that there would be no further consideration of the merits of the case – only a broad consideration of how Tickmill had calculated redress. Also, he would need to show that Tickmill had not followed the redress approach set out in this decision and not simply that the outcome of the loss calculation, if carried out correctly, does not coincide with his view of the financial loss he believes he has made.

### **Putting things right**

As I don't think Mr O should have been allowed to trade as a professional client, I have thought about how we could put him back into the position he would have been in had his professional client application been declined.

From everything I've seen, I still think Mr O would have continued to trade with Tickmill as a retail client. And I've seen nothing to suggest he wouldn't have traded with similar frequency and interest in the same instruments.

Putting things right in this set of circumstances has been discussed at length above – the points I have considered shape the spirit of this redress direction and should be kept in mind by both parties when calculating redress. Fair compensation shall be the difference between the losses Mr O did make, and the losses he would instead have made as a retail client. Where there is a difference, this ought to be paid to him. But there should be no interest on any compensation sum given the nature of the trading. Lastly, if Mr O's account is still active Tickmill ought to reclassify him as a retail client.

### **My final decision**

For the reasons explained, uphold Mr O's complaint and direct Tickmill UK Ltd to compensate him as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O to accept or reject my decision before 7 October 2022.

Aimee Stanton  
**Ombudsman**