

The complaint

Mr W complains that system failings of Trading 212 UK Limited ("Trading 212") delayed the execution and cancellation of orders and that Trading 212 caused him losses by executing a market-sell order for shares he didn't own and then executing a buy order to reverse this 'short-selling' at a price he says caused significant loss. He seeks redress for this loss.

What happened

Trading 212 has said that on a day in June 2021 there was a delay in the reporting and execution of sell orders. It says this was due to a service disruption experienced at the intermediary that executes Trading 212's orders.

Trading 212 says this issue affected a stop-loss order Mr W had in place for 3120 shares set at \$17 a share. Trading 212's app didn't show Mr W's stop-loss as having been executed and his shares sold when the share price fell below the stop loss level. Instead it continued to show the shares as being held by Mr W and his account as continuing to fall or rise in value in line with falls or rises in the share price.

During that time, Mr W submitted a request to cancel his stop-loss order. He also entered a market-sell order for the 3120 shares. But Trading 212's system continued to show the shares as being held by Mr W and his account as continuing to fluctuate in value in line with changes in the share price.

During this time Trading 212 says it placed an alert on its platform as soon as it established there was an issue with its intermediary. Mr W also contacted Trading 212 on its online chat facility. Mr W said his order wasn't processing and Trading 212 told him it was aware of "*the delay in order cancellation*". Around ten minutes later Trading 212 told him: "*The orders will be cancelled and you will be able to place a new one*". Around 30 minutes later, according to the chat record, Mr W saw his account update to show the transactions that had taken place. Mr W says this was an hour after the shares fell below his stop-loss and he had been unable to do anything during that time. Shortly afterwards Mr W asked Trading 212 to look into the result and compensate him.

That result was that 3120 shares had been sold for Mr W as a result of his stop-loss order, which Mr W says sold for \$16.99 per share, and a sale for 3120 shares was made for him, which Mr W says was for \$16.61 per share, as a result of his market-sell order. Mr W didn't own the shares needed for his market-sell order because his stop-loss order had already sold the 3120 shares he owned, so Trading 212 also created and executed for Mr W an order to buy 3120 shares. Mr W says this buy order was executed at \$21.87 per share.

The trades Mr W says Trading 212 shouldn't have carried out were the sale of 3120 shares he no longer owned at \$16.61 per share and then the purchase at \$21.87 per share of 3120 shares to make up the 3120 shares Trading 212 had sold that Mr W didn't own. The result of those trades on the day itself was a loss of £11536 plus currency conversion costs of £127.

Mr W's view is Trading 212 shouldn't have accepted his market-sell order when its effect would be to sell shares he didn't own, given he wasn't permitted to do this. So he thinks it

isn't fair for him to have to bear the losses resulting from such an order. Those losses crystallised when the buy order Trading 212 initiated was executed to correct the position.

Mr W has said that, prior to the incident here, his experience was that it wasn't possible to sell more shares than he owned. His position is that the risks he agreed to take when accepting Trading 212's terms and its provisions - including its exclusion clauses relating to the fact that it wouldn't be able to provide a service that would always be working or without error - didn't in his view include a risk of Trading 212 selling shares he didn't own.

Our investigators agreed this wasn't a risk of the kind Mr W was aware he was running when using Trading 212's service. They didn't think that when Mr W agreed to Trading 212's terms, it was in his reasonable contemplation that Trading 212's disclaimers relating to technical errors could cover a situation in which Trading 212 accepted an order from him to sell shares he didn't own. They didn't think the disclaimers in Trading 212's terms covered this situation adequately enough for it to be fair for Mr W to bear the liability rather than Trading 212. They thought Trading 212 should've had measures in place to protect Mr W from this sort of thing happening and they didn't think it fair that he should bear the losses.

Our investigators thought it noteworthy that when Mr W placed his market-sell order, he had tried to cancel his stop loss order and it wasn't clear - to him or Trading 212 at the time - whether the technical error being experienced would mean his pending orders would be executed but reported with a delay or executed but after a delay or not executed at all.

Trading 212 didn't agree with our investigators' proposed outcome. It has said, in brief summary:

- When accepting Trading 212's terms, Mr W might not have reasonably contemplated that the technical error clause could cover a scenario where he was able to sell shares he didn't own. But that logic if extended would undermine the whole basis of the contract as other terms could be countered because a client might have misunderstood or simply not contemplated a particular scenario arising, which would clearly be unreasonable.
- Mr W accepted Trading 212's terms, including the "technical error" clause. If that clause intended to exclude only particular errors or scenarios, it would've listed them. It didn't have a list which clearly means it applies to any technical error. A view that the clause doesn't cover the situation here because it was not the kind of risk Mr W was aware he was running, undermines the clause and is like expecting every client to foresee every potential technical error which might occur, which clearly is an unreasonable assumption.
- Mr W's previous experience was the system wouldn't allow him to sell shares he didn't own, which is correct, but the present scenario was entirely different because Mr W's orders had not been filled, were pending and not confirmed as completed.
- Trading 212 fully agrees it should have measures in place to prevent the sort of thing that happened in this case – and ordinarily it wasn't possible to short-sell, as Mr W's experience confirms. But there was a technical error and the status of Mr W's attempted trades was unclear, so the prudent stance for Mr W to have taken would've been to await confirmation of the position and completion of the orders/instructions.
- Mr W's attempt to cancel his stop loss order meant it wasn't clear whether that order would be executed but reported with a delay, executed after a delay or not executed at all. While the technical issue was being investigated it was too uncertain for Mr W to assume his trade had not been filled (or cancelled). In those circumstances, attempting to duplicate the trade carried the potential for short-selling to occur.

- Term 10.16 explicitly says short-selling is not permitted, even if it doesn't explain what will happen if an instruction for short-selling can be given and is then carried out.
- Term 10.15 says *"Market conditions can cause temporary delays to the execution of Orders"*. Trading 212 knows the situation here wasn't caused by *"Market conditions"*, but it didn't know this at the time and, more importantly, neither did Mr W. Market conditions are stated as a possible cause for a temporary delay, but the intention is clear and it is not unreasonable to expect a client to take note of the wording which follows as it makes it abundantly clear that *"It is the client's obligation to make sure that any earlier pending Order/s is/are cancelled before placing a new Order in the same Investment."* The term clearly places the responsibility on clients to ensure any pending orders are cancelled before placing a new order.
- The ombudsman acknowledged that term 10.15 appears intended to hold a customer to an order which, in its full reading, has similarities with the events relating to Mr W - although not being entirely the same.
- The terms and conditions explain the situations in which Trading 212 doesn't accept responsibility for client losses. They set out the basis of the contract, are explicit, are not flawed or unclear and where wider explanation is not provided it follows that they are intended to apply literally. The more detailed terms are, the less likely people are to read them all. It is unreasonable to not to be persuaded that the terms relating to third party errors and technical faults make it fair for Mr W to bear the losses that arose.
- In summary, Mr W accepted that there could be technical errors with the system and that Trading 212 said it would not be held liable in such situations, whether due solely or partly to a third party. He accepted there was an obligation to make sure earlier pending orders were cancelled before new ones were placed and that short-selling was not permitted. A technical error occurred, so to determine that Trading 212 cannot seek to rely on these clauses in this particular instance because Mr W might not have foreseen this exact technical error or the risk posed by it, would be unreasonable.

For reference, terms in the agreement Trading 212 has referred to include the following (but I have considered all of the terms):

- 6.4: *"...in the event of downtime of the Trading Platform You shall waive any claims against Trading 212 of missed profits and/or claims that You would have executed an order on a specific price during the downtime. You acknowledge that sometimes there may be technical issues or faults with the Trading Platform."*
- 10.15: *"Market conditions can cause temporary delays to the execution of Orders. It is the client's obligation to make sure that any earlier pending Order(s) is/are cancelled before placing a new Order in the same Investment. We do not accept any liability for any actual or potential loss you may suffer if this occurs."*
- 10.16: *"You are not permitted to Short Sell. This means that you cannot give us an Instruction to sell an Investment that you do not own at the time of the sale and that is not held on your account, whether settled or unsettled at the time of sale."*
- 25: *"25.1. ...we shall incur no liability whatsoever for any partial or full default of our obligations by reason of any cause or event beyond our reasonable control, including but not limited to any communications, systems or computer failure... and we shall not be held liable for any loss you may incur as a result. In addition... the above... shall include... any material change in economic conditions or any other event, that is beyond the reasonable control and whose effects could not be avoided by reasonable measure."*

25.2. [this] shall include... the failure of any of our suppliers, and if applicable our intermediate broker, agent or principal, dealer... for any reason, to perform its obligations..."

Despite all this, Trading 212 said it would pay Mr W £1111 - which it said was *"the exact amount of the negative result of the short position itself"*. In essence I understand this is the extra Mr W would've got if his market-sell order is adjusted to the prices his stop-loss order got. Trading 212 has explained that it made this offer because it couldn't locate relevant evidence for *"one of the pending orders involved"* and so it wasn't sure whether issues with that order were due to *"the issue experienced at the time"* with its broker *"or if it is something else"*. It also told us it thought £300 for distress, suggested by the investigators, was too high but it agreed to pay it anyway. Trading 212 has already paid these sums to Mr W.

Mr W wasn't satisfied with Trading 212's redress payment. As the complaint couldn't be resolved informally, it is one on which I must make a final decision.

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 arrived at the same outcome as our investigators for broadly the same reasons.

In brief, I think it fair and reasonable that Trading 212 compensates Mr W for the loss that arose when it facilitated on his account the sale of shares he didn't own and then corrected this by buying shares on his account. I've explained my reasons briefly below.

I've carefully considered whether Trading 212 ought to have accepted Mr W's market-sell order which resulted, due to the execution of the earlier stop-loss order, in the sale of shares Mr W didn't own. It isn't disputed that such a sale of such shares (and without Mr W having borrowed them or taken any steps to do so) was a sale that wasn't permitted. The account terms didn't permit short-selling, and so wouldn't have permitted the sale even if Mr W had borrowed the shares being sold. I also note Mr W's past experience was that Trading 212 didn't accept orders whose effect would be to sell shares he didn't own. Trading 212 agrees this was the position. So Trading 212 wouldn't usually have accepted or otherwise facilitated Mr W's market-sell order. My view is Trading 212 shouldn't have done so here either.

The market-sell order led to the buy order that corrected the share shortfall and to the loss Mr W now complains of. In deciding whether it is fair and reasonable for Trading 212 to compensate him for that loss, I've considered Trading 212's terms and in particular those explaining how Trading 212 wouldn't be liable to Mr W for losses arising from failings in its service to him, including failures to provide that service and technical errors.

There are terms in Mr W's agreement with Trading 212 that make clear that once an order is accepted by Trading 212 the scope to change it will be very limited indeed. For present purposes I accept this was the case, so I've not detailed those terms above. Also I've not detailed the terms in the agreement that limit or exclude liability where Trading 212 decides not to accept an order - because Trading 212 did accept the order complained of here.

Further above I detailed terms that did explicitly seek to exempt Trading 212 from liability for losses. I note that these refer to losses suffered if market conditions cause delays and to a waiver of claims where particular transactions can't be made due to the system being down and, lastly, to losses arising from matters outside of Trading 212's reasonable control. In Mr W's case there were delays - to either the execution of orders or the reporting of them or

both - but this wasn't due to market conditions. Also in Mr W's case there was a technical issue that affected the availability, or at least the proper functioning, of Trading 212's system for a time, but Mr W's claim isn't about transactions this prevented him from being able to carry out – it is about transactions that were carried out that he doesn't think should've been.

Trading 212 suggests terms about delays caused by market conditions, given what they also say about Mr W's responsibility for cancelling and so not duplicating orders, ought to apply to Mr W's situation even though it wasn't one caused by market conditions - and that this was the clear intention of those terms.

I agree Mr W didn't follow the stipulation in those terms to ensure his stop-loss order was cancelled before placing his market-sell order. But it still seems to me that Trading 212's suggestion, that those terms be extended to cover Mr W's situation, is an invitation to extend those terms rather than to apply them strictly. I don't believe that would be the right approach to these sorts of terms, bearing in mind their nature. I'm not persuaded this would be fair and reasonable either - bearing in mind the transaction that caused loss wasn't, at least according to Mr W's experience or what Trading 212 has said should and usually would've taken place or what was permitted, a possible outcome of the failing detailed in those terms. Also, a distinction can of course be drawn between market conditions, which are part and parcel of any market transaction, and system errors, which are not.

It is apparent that the delay to the execution or reporting of Mr W's orders did deny him the chance to reinvest the sale proceeds for a time – but I note Mr W hasn't asked for redress for that. In my view such a claim would be covered by the terms above that exclude liability where particular transactions can't be carried out during a period when the system is down, so Mr W was in my view right not to seek to claim for this.

Turning to whether the losses were outside Trading 212's reasonable control, I do accept Trading 212 couldn't reasonably control the problems at its intermediary. Also it's clear Mr W wouldn't have placed a request to cancel his stop-loss order or placed his market-sell order if it hadn't been for the problem at the intermediary that delayed the execution and/or reporting of his stop-loss order. If his stop-loss order had been executed and reported in the usual way, he'd have had no reason to try to cancel it or to try to sell his shares in a different way.

To that extent Mr W's losses are linked to the problems at Trading 212's intermediary. But these problems weren't bound to lead to the loss Mr W complains of. The loss still wouldn't have happened if Trading 212 hadn't accepted and facilitated Mr W's market-sell order. Our investigator made this point and we have invited Trading 212 to respond a number of times since. On balance what Trading 212 has sent us doesn't make me think its acceptance and facilitation of Mr W's market-sell order and its failure to prevent the sale of more shares than he owned, was a direct and inevitable result of the technical fault at its intermediary. Indeed to my mind what Trading 212 has sent us doesn't say or show that the technical problems at its intermediary directly or inevitably left Trading 212 unable to stop Mr W's market-sell order or the sale for him of more shares than he owned.

I note also the uncertainty expressed by Trading 212 as to whether one of the orders at the time was actually impacted by *"the issue experienced at the time"* at its intermediary *"or if it is something else"*. This uncertainty doesn't lend itself to the conclusion that what occurred was a direct result of or purely because of the problems at Trading 212's intermediary.

I note what Trading 212 has said about missing records. I don't overlook that it might usually have been able to send us more about a situation like this. But I must decide the complaint based on the information that has been made available and presented by the parties.

I note also that Trading 212 has said the situation here was totally different to those in Mr W's past, because his orders here had not been filled, were pending and not confirmed as completed. I accept the situation may have been different and its intermediary's problems may have been an important part of that difference. But I don't see that this shows that these problems were bound to lead directly to Trading 212 accepting and allowing an order to sell more shares than Mr W owned or the failure of its usual approach to stopping such orders.

Even if the third-party error contributed in some way to Trading 212's acceptance of Mr W's market sell order, it doesn't follow that it contributed in a way that makes it fair to regard the result, and the sale of shares Mr W didn't own, as outside Trading 212's reasonable control. Or that Trading 212 shouldn't still have been able to stop the acceptance and execution of the order like it normally would have. In short it doesn't follow that this wouldn't be more properly viewed as a fault on Trading 212's part rather than the result of third-party error. On balance, in light of all I've said above, I find the loss wasn't caused by the third-party error and didn't arise from a matter outside Trading 212's reasonable control.

That said, I've considered what Trading 212 has said about Mr W's actions and whether, in light of what is said in the terms and the warnings contained there, these mean it wouldn't be fair and reasonable for Trading 212 to compensate him for his loss in all the circumstances.

Mr W's order led to the sale of shares he didn't own, but he didn't intend this or realise this was a possible outcome of the orders he had placed (and ordinarily it wouldn't have been). There is clear evidence of this in the online chat records available from before the outcome of the orders was known. This isn't why I've found Trading 212 at fault or why I've reached the other conclusions I've reached above, but it is a reason why I haven't come to a different outcome in the face of those findings. If Mr W had been aware his actions might lead to the sale of shares he didn't own, then my view on his complaint might well have been different.

The terms of Mr W's agreement with Trading 212 made clear it was for him to cancel the existing order if a new order were taking its place. Mr W didn't do this. If he had held enough shares to satisfy both orders and both had been executed, it seems to me Mr W would have had no grounds to object and this would've been covered by the terms I've outlined above. That Mr W was running a risk of both orders being executed even though he didn't own enough shares for both, is apparent from the fact that this did happen. But he didn't foresee this and I don't think he is at fault for not doing so or that he ought reasonably to have anticipated he would be running this risk – given short selling wasn't permitted and all I've said above about his previous experiences of this and Trading 212's normal practice.

I bear in mind that if Mr W's stop-loss order had failed due to a system error, not placing his market-sell order when he did would've left him exposed for longer to potentially negative price movements from which he might otherwise have been protected – and the terms would not have given him any recourse against Trading 212 for this. So I don't agree that this was obviously a more prudent course for Mr W to have taken. So even with the account terms in mind, I don't see that Mr W ought to have known that the best course was to rely on an order that appeared to have failed, rather than placing a new one. The fact Trading 212 speculated at the time - in its chat exchanges – incorrectly that Mr W might be able to cancel and place a new order once the issue was resolved, in my view reinforces that it was not at all obvious what had happened or what Mr W should have been doing about it at the time. So I accept the status of Mr W's attempted trades was unclear, like Trading 212 says. But I don't agree that in the circumstances the only prudent course was to await confirmation of the position and completion of the orders or instructions.

I agree that had Mr W taken a course of action that was plainly unreasonable in all the circumstances, that would be a relevant consideration and might affect the outcome here - but I'm not persuaded Mr W did act unreasonably.

In conclusion Mr W's loss arose after Trading 212 allowed and enabled a transaction it shouldn't have accepted. Also, there was no good reason to accept or facilitate an order whose result would be the sale of shares Mr W didn't own – particularly given he wasn't borrowing the shares either. The terms of Mr W's agreement with Trading 212 don't in my view exempt Trading 212 from liability for the losses Mr W suffered as a result – nor would it be fair and reasonable in my view to exempt Trading 212 in the way it has suggested.

So for the reasons I've given and to the extent I've explained, I uphold Mr W's complaint. I've told the parties that records I've seen show a £11663 loss on the day of the trades (£11536 being the difference between the market-sell and the buy trades plus currency conversion costs of £127). Neither party has sent anything to dispute this or to suggest a different figure.

I'd add that I don't agree that if a particular exclusion clause doesn't validly cover a particular situation – whether contemplated by the parties at the time the contract was made or not - this undermines the whole basis of the contractual relationship. But I'd add that looking at the contractual relationship as a whole, and in the context of what I've said above about the terms I've discussed, I don't agree that it would be fair to construe and apply the exclusions and exemptions to the present situation in the way Trading 212 has suggested. And I do think that the fact such a construction was not in my view contemplated by the parties at the outset is a consideration relevant to that conclusion but, as I've discussed above, it isn't the only consideration or reason for it.

The live chat records Trading 212 has sent show Mr W suffered distress. My award here takes no account of the distress suffered by Mr W during the delay to his orders, as this was due to a technical problem for which Trading 212 wasn't at fault. Problems of that kind were ones Mr W had to be willing to tolerate, given what the terms said about technical problems outside Trading 212's control. In its chat exchanges Trading 212 tried to provide Mr W with as much support as it could during the delay, as noted by at least one of our investigators. But I share our investigators' view that Mr W did suffer distress due to Trading 212's error once he became aware of the result of his orders. The financial result was no doubt more distressing because it arose from an outcome Mr W hadn't thought possible until it occurred.

So I share the view that an award for distress and inconvenience is appropriate and in all the circumstances I reach the view on balance that £300 is fair and reasonable redress for this.

So, in light of all I've said above, I uphold Mr W's complaint.

Putting things right

Trading 212 UK Limited should pay Mr W £11663 plus simple interest on this sum at the rate of 8% per year from the date this loss first arose in June 2021 until the date of this decision. Any amount already paid by Trading 212 UK Limited as redress for this complaint may be deducted by Trading 212 UK Limited from the total due as and when that amount was paid.

Trading 212 UK Limited should also pay Mr W £300 for distress caused to him by the failings I've outlined. Trading 212 has already paid Mr W this, so it doesn't need to do more for this.

If Trading 212 UK Limited pays my award to Mr W later than one month after it receives from us notice of Mr W's acceptance of my award, Trading 212 UK Limited should also pay Mr W simple interest at the rate of 8% per year on my award from the date of my decision until the date Trading 212 UK Limited pays my award.

My final decision

For the reasons I've given and in light of all I've said above, I uphold Mr W's complaint.

Trading 212 UK Limited must put things right by doing what I've said above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 21 August 2023.

Richard Sheridan
Ombudsman