

The complaint

Mrs M, as the executor of the estate of Mr M, complains on behalf of the estate that Fortrade Limited wrongly allowed Mr M to trade Contracts for Differences (“CFDs”) through the execution only account it opened for him.

What happened

In December 2017 Mr M applied for an execution account with Fortrade so that he could trade CFDs which it opened based on the information he provided about his past trading experience. He traded CFDs between December 2017 and December 2019 during which time he paid a total of \$102,934 into his account. Mr M died in December 2019, at which point he had withdrawn a total of \$30,036 from his account and had suffered a loss of around \$72,898.

Mrs M complained that Fortrade should not have allowed Mr M to trade CFDs because he was doing so to fund a kidney transplant and it was aware that he was on dialysis. She also raised issues about the sales tactics used to persuade Mr M to open his account and argued that the account wasn't suitable for him and that he was allowed to fund his account both from savings and credit cards.

Fortrade didn't uphold the complaint. In summary it said that it had no reason to reject or restrict Mr M's account based on the information he provided on account opening – which included that he had traded CFDs daily for one to two years and had accounts with other brokers. It said Mr M didn't seem vulnerable and his medical conditions didn't appear to affect his trading and the first time there was mention of him using money from his trading to fund medical treatment was in February 2019.

Mrs M referred her complaint to us and it was considered by one of our investigators who upheld it in part. He didn't think Fortrade had done anything wrong in opening the account based on the information Mr M had provided to and said his medical condition wasn't a reason for it not to allow him to trade. However, he thought that Fortrade should have acted on being told by Mr M on 27 February 2019 that he needed money for a kidney transplant and said it should repay to the estate the net deposits made by Mr M after that date together with simple interest at 8% on the amount payable.

Fortrade accepted the investigator's opinion but Mrs M didn't agree with the investigator's opinion and it was referred to me for review. I issued a provisional decision upholding the complaint but on a different basis to the investigator. I accepted that Fortrade was entitled to rely on the information provided on account opening which indicated Mr M had previous CFD trading experience, although I didn't think it had obtained all the information required by the rules as it didn't ask for details of volume of trades.

I found that subsequent telephone discussions, in particular one on 21 December 2017 in which Mr M raised a query as to leverage, put Fortrade on notice that he didn't have previous experience of CFD trading, contrary to the information he had provided on account opening. I thought this should have led Fortrade to reconsider whether the account was appropriate and conclude it wasn't and issue the required warning about this. I wasn't

satisfied Mr M would have proceeded with opening the account if he had been given such a warning.

Fortrade didn't agree with my provisional decision and said that there wasn't any basis for concluding that Mr M didn't have experience of trading CFDs. It pointed to the information he provided on account opening about daily trading. It said that whilst he did raise some questions about leverage this couldn't be taken to mean that he didn't understand CFD trading.

It said it was possible that his questions could simply have been him trying to understand the leverage arrangements it offered rather than him being unaware of the concept of leverage. It also said the fact he didn't want to fully utilise the leverage offered didn't mean CFDs weren't appropriate.

Fortrade said that it is clear from many other communications with Mr M that he had knowledge and experience of CFD trading and that it is important to have regard to his trading history. It said he started with lots of relatively small trades - which it said suggests he was testing its trading system – and then increased the size of his trades and dealt in a range of products.

It said his trading behaviour wasn't indicative of someone who had never traded CFDs but is consistent with him having trading daily previously, as stated in the account opening form. It said it was important to note Mr M had a large number of profitable trades, which totalled more than \$360,000.

It said it didn't have an ongoing duty to review appropriateness and referred to guidance provided in the case of *Quinn v IG Index* (2018) EWHC 2478 (Ch) ("Quinn") which had previously been accepted by our service.

I asked the investigator to make enquiries of e-Toro about any account Mr M had held and it provided the information recorded at the time Mr M opened his account with it in July 2017 stating that after the first month Mr M was trading using leverage of 50. And that he traded from August 2017 until September 2019.

I then issued a second provisional decision the findings from which I set out below.

"The evidence from e-Toro makes it clear that, contrary to the finding in my first provisional decision - that Mr M had not traded CFDs before opening his account with Fortrade - he had done so at least for several months beforehand if not longer given e-Toro opened an account on the basis he already had relevant experience. I have no reason to question what it has told me about this.

The finding I made in my first provisional decision about Mr M not having previous experience of trading CFDs was obviously wrong and I now need to consider this complaint on the basis that he did have relevant experience.

I have firstly considered whether Fortrade should have opened an account for Mr M. In short, to open an account Fortrade need to be satisfied that such an account is appropriate for the client. If it is determined that it is not appropriate this doesn't automatically prevent Fortrade from opening an account. However, it can only do so after providing a warning to the client that the account is not appropriate with the client then saying they want to go ahead despite the warning. Even then it should still consider whether to open an account.

I remain of the view that, whilst the caller didn't deal with the call as I think she should have done, what Mr M said during the call, in relation to his health, wasn't a reason for Fortrade

not to open the account.

I asked Fortrade to provide further information to satisfy myself that the record it had provided of the information Mr M gave about previous trading experience was accurate which it has done. I now also have the evidence from e-Toro showing he traded CFDs through it beforehand and informed it of previous relevant experience that allowed it to open an account.

In the circumstances I don't think there is any reason to think the record Fortrade has provided as to the information Mr M gave on account opening doesn't reflect the information he provided about his previous trading experience.

Under COBS 10.2.4R Fortrade was entitled to accept at face value the information Mr M provided unless it had reason to think that the information was manifestly out of date, inaccurate, or incomplete. The only issue is that the information it obtained didn't provide information about the volume of CFD trades Mr M had carried out.

I said in my first provisional decision that if it had sought further information about this from him he wouldn't necessarily have provided this. However, this was based on my finding that he had not previously traded CFDs, which finding I now know to have been wrong. Given the evidence from e-Toro there is no reason to think that Mr M wouldn't have provided necessary information about the volume of his CFD trades.

In my first provisional decision I found that Fortrade should have looked again at the appropriateness of the account because of the telephone discussion that took place on 21 December 2017. Fortrade has argued there was no requirement on it to review appropriateness and relies on the case of Quinn in this regard. I don't necessarily agree with what it has said but I don't think I need to make a finding on that.

This is because the finding I made in my first provisional decision that the outcome of a review would have been a conclusion that the account wasn't appropriate was based on Mr M having no previous CFD trading experience. As the evidence now shows that he did have previous experience there is now no basis for me finding that a review following the telephone call of 21 December 2017 would have resulted in Fortrade concluding the account wasn't appropriate.

So, in summary I don't think Fortrade did anything wrong in opening the account for Mr M without any warning and allowing him to trade CFDs and I also don't think there was anything wrong with it continuing to allow him to use the account after the telephone discussion on 21 December 2017.

However, I do think there is merit to the investigator's conclusion Fortrade didn't treat Mr M fairly once he made reference to his need to fund an operation, which was in a telephone call on 27 February 2019. I agree with the investigator that what Mr M said should reasonably have led Fortrade to make further enquiries with Mr M at the time because it should have been aware from the conversation that he was potentially vulnerable. Instead, and again as the investigator noted, the account manager arguably encouraged him to keep trading, suggesting that he could earn more for his operation.

I acknowledge it is not possible to know with any certainty what the outcome would have been if Fortrade had discussed the situation with Mr M. It is possible that it would have continued to provide a service to him and he would have carried out the trades he subsequently carried out. However, I am not persuaded it is more likely than not this would have been the outcome of a discussion with Mr M at the time and I think it is reasonable to base redress on the account being stopped as at the date of the call."

I again gave the parties the opportunity of responding to my provisional decision. Mrs M responded and said that further information should be obtained from e-Toro. She raised various questions about the conclusions I have reached in my second provisional decision and requested further information be sought from e-Toro. I agreed to Mrs M's request and sought some further information from e-Toro about the information Mr M had provided to it on account opening. This was provided and sent on to Mrs M to allow her the opportunity of making any further comments she wished to make.

Mrs M pointed to inconsistencies between information provided by Mr M to e-Toro in July 2017 and information provided to it in January 2018 which she has said shows he wasn't thinking clearly at the time. She asked for confirmation of what trades had been carried out by Mr M with e-Toro and Fortrade and whether these were currency trades. Mrs M also noted inconsistencies between what Mr M told Fortrade about having one to two years of experience and the five months he traded with e-Toro. She raised other queries she thought should be put to e-Toro.

What I've decided – and why

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

I have considered everything that Mrs M has said in response to my second provisional decision. She has throughout this complaint provided reasoned arguments in support of what she has said at a very upsetting time for her. However, I am not persuaded I should change the basis on which I upheld the complaint as set out in my second provisional decision, which I know will be very disappointing for her.

I have noted what Mrs M has said following receipt of the information that was provided by us to her from e-Toro and the further queries she feels should be put to it. I understand why she thinks that further information would help me decide this complaint. But I am not persuaded that I need further information from e-Toro, or from anyone else, to come to a fair and reasonable decision in this complaint.

The findings in my first provisional decision were based on me thinking that Mr M was someone who had never traded before, that he was in effect a complete novice. The information from e-Toro shows this wasn't the case. The fact that Mr M already had an account through which he could make leveraged trades puts a very different light on this complaint.

I note what Mrs M has said about the discrepancies in the information provided to e-Toro in July 2017 and January 2018 showing that Mr M wasn't thinking clearly. I think this must have been a very difficult time for both Mr M and Mrs M given his illness. However, whilst Fortrade were aware that Mr M was receiving treatment three times a week and that on these days he couldn't cope with telephone calls, it didn't have information that suggested he wasn't generally able to make decisions to trade.

I asked for information from e-Toro prior to my second provisional decision because I had made a finding in my first provisional decision that the telephone call of 21 December 2017 suggested that Mr M didn't understand leverage which made me think he was a novice trader. I thought Fortrade should have looked again at the appropriateness of the account because of Mr M's apparent lack of understanding of leverage.

However, e-Toro has confirmed that Mr M had started trading with it in August 2017 using a leverage level of one before then increasing this to 50 after the first month. I acknowledge what Mrs M has said about his health at the time and that he hadn't been thinking clearly for

a long period before his death in December 2019.

However, there is no persuasive evidence he wasn't thinking clearly when he decided to increase his leverage level at e-Toro - or when placing trades with Fortrade. I think it is more likely than not Mr M's decision to change his leverage level at e-Toro to 50 was a conscious decision on his part and one that I think he was unlikely to have made without having some understanding of what he was doing. I think the fact that he then made leveraged trades with both e-Toro and Fortrade for two years is also supportive of a finding that he knew what leveraged trading involved.

Mrs M wants further details to be obtained from e-Toro to establish whether he was trading CFDs through his account with it or not. However, as all positions with leverage at e-Toro are CFD trades, and it has confirmed he traded with leverage of 50 after the first month, it follows that he was trading CFDs. In the circumstances I don't think I need further information about this.

Furthermore, even if Mr M hadn't traded CFDs through e-Toro but some other leveraged product, the fact he had an existing account with it through which he could make leveraged trades changes what I think would have happened if Fortrade had assessed that his account with it wasn't appropriate for him – as I explain further below.

I note that Mrs M has referred to the discrepancy between the one to two years of previous CFD trading Mr M identified he had done when opening his account with Fortrade and the few months he traded with e-Toro. Fortrade obviously wasn't aware of this at the time and had no reason to question what Mr M had put about previous CFD trading experience.

The only information that Fortrade didn't have was the volume of trades that Mr M has previously carried out, as I noted in my first provisional decision. I haven't asked e-Toro to provide information on the volume of trades Mr M carried out through it, as I don't think this would help me reach a fair and reasonable decision.

If Fortrade had made enquiries of Mr M as to the volume of trades he had previously carried out I don't know what the outcome of such enquiries would have been and whether this would have been consistent with his trading through e-Toro. I say this because on the face of it he already provided information about his previous CFD trading which doesn't fit with the evidence now available - Mrs M has referred to the one to two years previous experience he indicated on account opening with Fortrade when his account with e-Toro had only been opened in August 2017.

Furthermore, even if further enquiries had led to Mr M indicating he hadn't traded for one to two years and/or that he hadn't carried out CFD trades in any significant volume which had led Fortrade to conclude that the account wasn't appropriate for Mr M, all this means is that Fortrade would have had to provide a warning to him that the account wasn't appropriate - in accordance with COBS 10.3.1R.

In my first provisional decision I concluded that if such a warning had been given then it was more likely than not Mr M wouldn't have proceeded with opening an account. However, this conclusion was based on my thinking that this was the first time that Mr M had used a broker such as Fortrade and that he hadn't come across leveraged trading before.

I now know that when he opened his account with Fortrade Mr M had already opened an account with e-Toro through which he could place leveraged trades. This is a very different position to what I thought was the case at the time of my first provisional decision. Contrary to what I had thought, Mr M wasn't a complete novice and had come across leveraged trading before through e-Toro.

Given Mr M had already opened an account with e-Toro through which he was placing leveraged trades, there is no reason to think he would have decided not to proceed with his account with Fortrade if an appropriateness warning had been given. In short, there is no reason to think that Mr M would have been put off from trading through Fortrade when he was already trading with e-Toro.

I am also no longer of the view that Fortrade shouldn't have allowed him to proceed with his account in the face of Mr M wanting to go ahead, given he was already making leveraged trades with another broker.

Putting things right

I think Fortrade should repay to the estate of Mr M the losses incurred on his account after he raised his need for money to fund an operation on 27 February 2019. It should pay simple interest of 8% each year on the amount calculated to be payable from the date such loss was incurred to the date of settlement.

I note that in previous correspondence Fortrade calculated the amount due as \$5,294.08 plus \$32.19 being the remaining balance on the account and it should provide simple details to show how it arrived at that figure.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mr M to accept or reject my decision before 29 June 2023.

Philip Gibbons
Ombudsman