

The complaint

Mr G complains about Fortrade Limited's decision to allow him to trade Contracts for Differences (CFDs).

What happened

In March 2020 Mr G opened an account with Fortrade. Before allowing Mr G to trade CFDs, Fortrade needed to satisfy itself that Mr G had the necessary knowledge and experience to understand the risks involved in the service he was demanding – namely the ability to trade CFDs. He was therefore required to complete an appropriateness assessment, which he did while he was on the telephone with a representative from Fortrade.

As part of this assessment, Mr G declared that:

- He had less than \$5,000 in savings and investments, but an annual income of more than \$250,000.
- He was self-employed as a taxi driver.
- He had no knowledge of trading generally, and no knowledge of CFDs.

Fortrade then explained that it didn't matter that he no knowledge of trading because Mr G would be 'taught' how to trade, and would be allocated a 'mentor' who would help him place the right trades. Fortrade gave an example of how this would happen, explaining that if a given stock was crashing he'd be sent an email telling him to 'sell' in order to take advantage and 'make money'.

Mr G explained that he wasn't very educated which is why he had never got involved with this type of investment. But the representative from Fortrade said that he didn't know anything about this either, but the people he worked with were experts and that's how he made '£100 every single day Monday to Friday'. And he explained that if Mr G made money, Fortrade made money.

He said that his mentor would explain everything step by step, including what trades to open and close and how to take profit. And Fortrade also explained that there was no tax on any profits – and gave Mr G examples of what would happen when he made £500 in his first month, and after one month £1,000 as he would understand the investment more.

During this conversation Fortrade gave some brief details about the trades Mr G would place and how to do so – but explained that he didn't need 'think about all this' because Fortrade would send him reports via email which would tell him what to do. The representative said that Fortrade would 'predict what's going to happen in the market' and then tell him how to take advantage.

He was sent an email 'explaining how CFDs work' because he had disclosed that he had no

experience trading CFDs.

The next day Mr G had a number of calls with Fortrade. During the first of these calls he was introduced to his 'senior account manager'. Mr G disclosed again that he was a taxi driver, earning on average £4,000 a month with no other investments or income. He confirmed again that he had no experience trading or with CFDs.

The account manager asked Mr G how much he was looking to make by trading CFDs, and Mr G explained that he was looking to make £2,000 a month. He was told that this was a 'very realistic' and 'achievable' number, particularly if Mr G was willing to deposit £20,000, which he confirmed he would. He also confirmed that he'd been using the demo account since the previous day.

Mr G went on to have several calls with Fortrade during which trades, losses and a number of other matters were discussed. In the following two weeks he deposited over £40,000 and placed around 20 trades. On 3 April 2020 he received an email from Fortrade. This said:

'Based on the information you supplied in the Financial Questionnaire regarding your investment objectives and trading experience, we consider that CFDs may not be suitable or appropriate for you.'

CFDs are complex instruments and come with a high risk of losing money due to leverage. This means that potential profits and losses are magnified. You should consider whether you understand how CFDs work and whether you can afford to take the high risk of losing your money. These products may not be suitable for all clients. Therefore please ensure that you understand the risks and seek independent advice. 74% of retail investor accounts lose money when trading CFDs with this provider'.

After receiving this warning, Mr G continued to trade and regularly speak with Fortrade about what trades to place and how much.

At the end of April 2020 Mr G complained. In short, he complained that he shouldn't have been allowed to trade given his low income, lack of knowledge and limited English. He also complained that he was frequently given advice by unqualified individuals, and that he was promised he could make profits.

Fortrade looked into his complaint but didn't think it had done anything wrong. It said that he had disclosed he was earning over \$250,000 and said it was his responsibility to be truthful. It said that he had been given training materials after he opened his account to address his lack of knowledge, and was given risk warnings about the percentage of customers who lost money trading CFDs. It said that 'after monitoring the large accumulated amount of deposits', its compliance department decided to send him 'an additional risk warning' to ensure Mr G 'still fully understood that CFD trading carries a high level of risk'. It emphasised that Mr G was never promised any profits nor was he ever given advice, and that all trades were made based on his decision making.

Mr G didn't agree with Fortrade's response, and so referred it to this service. One of our investigators looked into Mr G's complaint.

He considered that it should be upheld. He said that it wasn't in dispute that trading CFDs was not appropriate for Mr G. He said this meant Fortrade needed to warn Mr G to that effect. He said that he saw an account registration document that said the appropriateness warning had been given, but he wasn't persuaded that the brief mention of a warning in Mr G's telephone call on 18 March was sufficient. He said that he thought Mr G was 'coached' through the application process, and wasn't given the time to properly consider

any warnings he was being provided with – particularly given that all this was done over the phone.

The investigator acknowledged that a more complete warning was sent on 3 April 2020 – however Mr G had already been trading for around two weeks by that stage. The investigator thought that this ought to have been sent to Mr G at the time he opened his account, and therefore interrupted the account opening process.

The investigator also considered that Fortrade ought to have used its discretion in COBS 10A.3.3 to stop Mr G from opening the account as it was not in his best interests. He thought there were clearly some discrepancies in Mr G's form which potentially showed he wouldn't be able to afford any losses – and the investigator considered that on at least two phone calls shortly after opening his account, Mr G made clear what his income and profession was. The investigator therefore concluded that Fortrade needed to compensate Mr G.

Fortrade didn't agree. It said:

- There was nothing in COBS 10A.3.1 that prevented 'a valid appropriateness warning from being sent after an earlier trade has been conducted'. It said that 'there may be circumstances where one trade is deemed appropriate, but a latter trade is not'. It said that it therefore had to be possible to 'send a valid appropriateness warning at any time in relation to any trade or set of trades'. It said that Mr G was sent such a warning and it was 'applicable to all subsequent trading conducted by him'.
- It said it was wrong to suggest that the timing of the warning rendered it invalid. It said that the purpose of the appropriateness warning was to inform the customer that the firm had concluded that trading is inappropriate for that customer. It said that it wasn't correct to suggest that such a warning was ineffective 'simply because the customer has already traded'. It said that there was nothing in the 'relevant regulatory rules or guidance to support such an assertion'.
- It said that in relation to the guidance at COBS 10A.3.3 it was 'entirely within the discretion of the firm' whether to allow a consumer to trade. It said that it wasn't right that this service could override that discretion and to do so 'would redefine the regulatory requirements in respect of appropriateness'. It said that was not fair and reasonable. It also said that this was a fundamental point and that the investigator's proposed approach 'of retrospectively replacing the firm's decision would create huge uncertainty and seriously undermine the proper functioning of the regulatory regime in this area'.

As agreement couldn't be reached, the case was passed to me decide.

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.

The relevant rules and standards

All firms regulated by the Financial Conduct Authority (FCA) need to comply with the standards it sets out in the FCA Handbook – and in particular the Conduct of Business rules (COBS). For the avoidance of doubt, all standards quoted were in force at the time of the events complained about in March and April 2020.

COBS 2.1.1 says that ‘a firm must act honestly, fairly and professionally in accordance with the best interests of its client (the clients bests interests rule)’.

COBS 4.2.1 says that a ‘firm must ensure that a communication [...] is fair, clear and not misleading’.

COBS 10A.2 ‘Assessing appropriateness’ sets out the rules which Fortrade needed to follow when Mr G first decided to open a CFD trading account with it. In short, it needed to ‘determine whether that client has the necessary experience and knowledge in order to understand the risks involved in relation to the product or investment service offered or demanded when assessing whether an investment service [...] is appropriate for a client’.

In the event that a firm considers that the service being demanded or the investment is not appropriate for the client, COBS 10A.3.1 requires it to issue a warning that ‘on the basis of information received to enable it to assess appropriateness, [...] the product or service is not appropriate for the client’.

COBS 10A.3.3 explains that 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’.

All firms regulated by the FCA also need to comply with its high level principles – including Prin 6: *‘A firm must pay due regard to the interests of its customers and treat them fairly’*.

The FCA has issued a number of statements about how these rules need to be applied in the context of trading CFDs. In 2017 it published a review on how firms carried out appropriateness assessments. In this review it said that that firms were providing ‘inadequate warnings to prospective clients who fail appropriateness assessments’. It said the risk warnings ‘should be designed to interrupt the application process’ and 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’. It said that this should contain a ‘clear recommendation against proceeding with the transaction’.

It also said that firms ‘did not give meaningful consideration to whether the applicant should still be permitted to proceed’. It quoted the European Securities and Markets Authority (ESMA) when it said that ‘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 [...] the best practice would be for the firm to not allow the client to proceed’.

My findings

In this case, it isn’t in dispute that trading CFDs was not appropriate for Mr G. It’s clear that he had no knowledge and experience of trading CFDs, and had virtually no other investment experience at all. This means that Mr G ought to have been warned to that effect.

Fortrade has attempted to argue that such a warning could've been provided after he had begun trading, and there was 'nothing' in the rules which prevented this. I disagree entirely.

The rules clearly envisage the warning being provided before the service being offered. I say this for a number of reasons:

- It is self-evident that the purpose of the rule is to ensure that consumers are aware of the risks of the investment or service they are looking to invest in – this purpose would not be achieved if the assessment wasn't carried out before such an investment.
- It's clear that Fortrade agree with this – because it did carry out this assessment before Mr G began trading.
- Having carried out an assessment which demonstrated that trading CFD was not appropriate for Mr G, it cannot have been in his best interests not to let him know the outcome of that assessment immediately.
- The warning which COBS 10A envisages firms providing to clients is obviously designed to equip consumers with the knowledge that they are about to embark on something which the firm itself has concluded is not appropriate for them. Clearly such a warning is designed to limit as much as possible the risk of consumer harm caused by consumers investing in complex and high risk products they have insufficient knowledge and experience of. Such harm would not be avoided if the warning could be provided at some point in the future once the consumer has already invested and potentially lost money.
- The guidance at COBS 10A.3.3 makes no sense if a warning could be provided at any point. The guidance clearly requires firm to consider, having provided the warning, whether to let the consumer go ahead with the service or investment.

This only makes sense if a consumer is warned before investing – otherwise there would be no discretion to exercise since the consumer would already be trading.

- The comment that that one trade might be appropriate and another might not is without merit in Mr G's case. He was not buying shares. He was trading CFDs – and there was no difference between the positions which he opened when he first created his account, and the positions he opened later.
- The FCA has been clear that the warning is designed to interrupt the process – and clearly this cannot be achieved if the consumer has already begun trading.

In looking at the evidence, I'm satisfied that such a warning was not provided to Mr G at the time he opened his account. I can see he received an email shortly after opening the account that directed him to some materials in order for him to understand CFD trading – but he was not warned that, in Fortrade's opinion, CFD trading was not appropriate for him.

Furthermore, he was not provided such a warning during his telephone conversation with Fortrade on 18 March 2020 either.

In fact, during this call he was told that the representative he was speaking to was making £100 a day despite not knowing anything about trading CFDs – and this was all done thanks to his colleagues producing analyses and reports. I don't make a finding on whether that claim was true or not (though I highly doubt it was), but it's clear that this isn't typical of Fortrade's customers, since at the time the vast majority of its customers were losing money

trading CFDs.

Therefore, in order to comply with COBS 4.2.1, Mr G should at the very least have been told that the representative's experience was not typical and it would be unlikely in Mr G's case.

This communication gave Mr G information which was not consistent with Fortrade's regulatory obligations, nor the reality of trading CFDs:

- He was not warned that trading CFDs was not appropriate for him and there was a high likelihood that he would lose his money.
- He was told that making profits was 'easy' and could be done with no knowledge and experience at all – and this was misleading. It's clear that the majority of Fortrade's clients were losing money trading CFDs – and I'm not persuaded it was fair, clear and not misleading to suggest to Mr G that his lack of knowledge and experience would have no impact on his ability to make money.
- He was given a misleading impression of Fortrade's customers and how many were making money, despite Fortrade having to disclose on its website that the vast majority of its clients lost money trading CFDs.

None of this was put right once Mr G was contacted by his account manager – because those calls were equally misleading. For example in his very first call he was told that it was entirely 'realistic' and 'easily achievable' that Mr G, with no experience or knowledge, could 'make 10% of his invested money just by following Fortrade's reports on the market. But this claim seems incompatible with both the high risk nature of CFDs and, importantly, the experience of the vast majority of Fortrade's clients at the time. In my view this misled Mr G into believing that trading CFDs was a safe and reliable way to make the additional income he was after, when the reality was that trading CFDs was high risk and complex – and there was a strong likelihood that Mr G would probably not make his desired income, and likely lose some or all of his capital instead.

And furthermore, it was equally misleading to suggest that Fortrade was able to 'predict market movements' and that all Mr G needed to do was read reports in order to know what trades to open and close. The reality, as Fortrade knows too well, is that the vast majority of its clients lose money trading CFDs – and this would not be the case if Fortrade could 'predict' market movements.

Mr G's subsequent conversations with Fortrade continued to be unhelpful in this way. There was a focus on the profits Mr G could make and on encouraging Mr G to deposit more money – and yet on each call it ought to have been abundantly clear that Mr G should not be trading CFDs at all. He was unaware of how profits and losses were calculated and how leverage affected this, and he was also unclear about certain charges that were being applied for positions that were rolled over. Almost every call Mr G had with Fortrade showed how limited his knowledge was. This means that Mr G was consistently given a significantly unbalanced view of the comparative risk and reward of the service Fortrade was offering him. Mr G ought to have been given information that was accurate and gave a fair and prominent indication of any relevant risks when referencing any potential benefits of an investment service or financial instrument (COBS 4.5A.3) – and yet this was consistently not done by Fortrade.

Taking all this into account, I'm satisfied that Fortrade did not treat Mr G fairly, and did not pay sufficient regard to its obligations under COBS 10A.

I'm also not persuaded it paid due regard to its obligations under COBS 2.1. In all these

communications, I'm satisfied Fortrade was not considering Mr G's best interests.

It was not weighing up his desire to invest in CFDs, with his total lack of any knowledge and experience, his limited income and, equally importantly, his ability to understand complex concepts in a language that he was not fully fluent in. In my view had it done this, far from encouraging him to invest more, it ought to have been explaining just how likely it was that he would lose money.

And its communications were not fair, clear and not misleading. They deliberately painted a picture to Mr G that led him to think that there was good chance he'd make money trading with Fortrade, and his lack of any experience or knowledge would not have a bearing on this. This was clearly misleading. I acknowledge that in writing Fortrade was required to point out the risks of trading CFDs, and the percentage of its customers that lost money. But in the particular circumstances of Mr G's case, I'm satisfied he was clearly entirely reliant on the telephone contact he was having with Fortrade, and on what he was being told verbally. And I'm satisfied that it was Fortrade's responsibility to ensure that it did not give Mr G mixed messages about such a high risk and complex investment, and instead ensure that its communications were fair, clear and not misleading.

Overall, given everything I've said above, I'm satisfied that Fortrade did not fairly and reasonably apply the rules in COBS 10A because it did not warn Mr G, before allowing him to trade, that trading CFDs was not appropriate for him. And, furthermore, because it actively misled Mr G into believing that there was a realistic and likely chance he'd make money investing in CFDs through Fortrade, when it knew or should've known, that wasn't the case.

However, before deciding what impact these failings had on Mr G, I need to consider the warning which Fortrade did send to Mr G on 3 April 2020. I say this because on receipt of this warning, Mr G continued to trade with Fortrade for around two weeks.

To be clear, I'm satisfied that this communication was intended by Fortrade to be an appropriateness warning following the answers Mr G gave when he opened his account. I'm satisfied that Fortrade sent this warning on the basis that it had omitted to do so previously, and recognised that Mr G needed to receive such a warning. I say this because the warning specifically says that it was being sent following the answers Mr G gave on his account opening questionnaire – and does not suggest it was being sent for another reason (for example as Fortrade alleges in its final response letter, because of Mr G's substantial deposits).

Fortrade has indicated in broad terms that Mr G's decision to continue trading after this warning shows that he would've done so even if the warning had been provided to him at the outset. And it has said, in response to the investigator's assessment, that it's not for this service to exercise the discretion the FCA gave firms in COBS 10A.3.3 to allow a consumer to carry on with the transaction or service despite a warning being given.

Before looking at the issue of Fortrade's exercise of its discretion at COBS 10A.3.3 I've considered whether the email it sent to Mr G on 3 April 2020 was enough to amount to an appropriateness warning. In deciding this, I've taken into account:

- The wording of the warning. In order for it to be effective, the warning needed to assert that based on the answers Mr G gave when opening his account, trading CFDs was not, in Fortrade's opinion, appropriate for him – not that it 'may not' be.
- The timing of the warning – he received this on 3 April 2020, two weeks after he had begun trading and after around 20 trading calls between Mr G and Fortrade.

- The content of the communications Mr G had received up until that point. In particular the telephone calls he'd had which painted a particular picture to Mr G about this investment and his prospects of making a return.

When taking all this into account, I'm satisfied the warning Mr G was sent on 3 April 2020 would not have been enough to outweigh what Mr G had consistently and repeatedly been told about Fortrade's service, and trading CFDs.

I say this firstly because I don't think the warning was strong enough – COBS 10A required the warning to assert that, based on its assessment of Mr G's knowledge and experience, trading CFDs was not appropriate for him. I don't agree that saying 'may not be appropriate' is the same – the warning was clearly only being provided because Fortrade had concluded it was not appropriate, and it should have therefore told Mr G this. I don't agree that the regulator envisaged the warning making any room for ambiguity about this. This is also consistent with guidance issued by the ESMA and the FCA. Furthermore, the warning asks Mr G to 'consider whether [he understood] how CFDs work' and whether he could take the 'high risk of losing your money'. But the whole purpose of the warning was to tell Mr G that Fortrade had concluded he did not.

I also agree with the investigator that the timing of the warning diluted its effectiveness. Not only was the language not strong enough, as I've said above, it was delivered after several telephone calls with Fortrade, during which Mr G was given the impression, as I've mentioned above, that he would make money from trading CFDs, and potentially as much as 10% per month of what he invested – despite his lack of knowledge and experience.

In my view, given the volume and consistency of the communications he had received, it was entirely reasonable that he did not place much reliance on a lukewarm warning he received some two weeks after opening the account, and after having opened several trades and deposited thousands of pounds.

I'm satisfied, taking all this into account, that Mr G only decided to trade and continue trading because Fortrade encouraged him to do so. I think it's clear that given his lack of experience and investment knowledge, Mr G was completely reliant on Fortrade as the regulated firm to ensure that it acted in his best interests. The phone calls are evidence of Mr G's desire to build a relationship with the individuals he was speaking to, and he was entirely candid on each occasion about what he didn't understand, his limited knowledge of English (which is why a number of the calls are also in a foreign language) and his lack of any trading experience.

In taking all this into account, and considering what Mr G would've done, I'm satisfied, given the telephone calls I've listened to, that if Mr G had been warned in clear and unequivocal terms, in writing and on the telephone, that there was a high risk of him losing his money, and that Fortrade did not believe trading CFDs was appropriate for him, Mr G would've chosen not to go ahead. I say this bearing in mind that he should not have been misled the way he was – and the absence of those communications would've made him even less likely to proceed had he been given an appropriate warning at the right time.

Putting things right

Given what I've said above, I'm therefore satisfied that Fortrade Limited needs to put things right for Mr G. And I agree with the investigator's approach. Fortrade needs to compare what Mr G deposited in his trading account, versus what he was eventually able to withdraw.

And it needs to pay him the difference.

I agree that Mr G has clearly been caused trouble and upset by Fortrade's actions, and the fact that it allowed him to be exposed to such a complex and high risk investment despite him not having sufficient knowledge and experience to understand the risks. I'm satisfied that £300 is fair and reasonable compensation for that.

I also agree that if Mr G had decided, at the outset, not to go ahead with investing in CFDs, his money would likely not have been invested. For this reason, I'm satisfied it is fair and reasonable not to award any additional interest.

My final decision

My final decision is that I uphold Mr G's complaint. Fortrade Limited must pay the compensation I've outlined above within 28 days of when we tell it Mr G has accepted this final decision. If it does not pay within this time frame, it'll need to add 8% per year simple interest on the awarded sum, from the date on which we told it Mr G accepted the decision, until the date of payment.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 8 April 2023.

Alessandro Pulzone
Ombudsman