

The complaint

Mr A complains that TMS Capital Limited (TMS) didn't apply stop-loss orders to limit his losses while trading derivatives on his behalf. He says that caused him a financial loss and he wants to be reimbursed.

What happened

On 25 April 2014 Mr A signed an investment management agreement with TMS. Amongst other things the agreement included that Mr A agreed to open a margined account with a third party, that Mr A authorised TMS to manage the account, and that TMS would trade futures and commodity futures on Mr A's behalf. The investment agreement contained various warnings about risk including the following:

- *'A high degree of "gearing" and "leverage" is associated with Dealing Services. This stems from the margining system applicable to Dealing Services, which generally involves a comparatively modest deposit of the overall contract value to open a margined transaction. This can work for or against you. A small price movement in your favour can result in a high return on the money placed on deposit; however, a small price movement against you may result in substantial losses, possibly more than the money placed on deposit. Prices can move quickly.'*
- *'Trading margined products can quickly lead to large losses as well as gains. For further details read the Risk Warning notice towards the end of this agreement ...'*
- *'In certain circumstances your losses in connection with Dealing Services may be unlimited ...'*
- *'Should losses in the Account exceed 50% of the Total Trading Level as at the end of any trading day ... TMS will liquidate any and all open positions as soon as possible, cease trading in the Account and confer with the client about further action. However, TMS cannot guarantee in any capacity that this risk threshold will not be exceeded by any financial amount with due consideration to fast moving market conditions and 'slippage' over which TMS may have no material control...'*
- *'The client herewith confirms that trading in any of the Investment Programs/Accounts aforementioned involves a considerable degree of risk of loss and is suitable only for persons who can assume such risk.'*

Before it began trading for Mr A TMS gathered some information about him. Amongst other things the information he provided included that he had frequent investment experience of shares, bonds, CFDs and spread betting, and he'd traded them for speculation in sizes of £10,000 to £15,000 per trade.

Below I've summarised the relevant correspondence I've seen between Mr A and TMS from the time Mr A was using the services of TMS.

On 1 August 2014 TMS emailed Mr A saying it had had a bad trading day which *'resulted in having positions that weren't hedged and lost significantly more than planned before they could be exited'*.

On 2 August 2014 Mr A emailed TMS saying he was disappointed and angry about losses to his investment with TMS. Amongst other things he asked, *'Why was there no manual forcing out of spreads or stop loss in place?'*

On 19 May 2015 TMS emailed Mr A saying Mr A's investment had suffered a loss of about 17%.

On 1 July 2015 TMS emailed Mr A saying his investment had suffered a loss of about 21%.

On 2 July 2015 Mr A asked TMS why it wasn't trading with stop losses, or whether it was positioning the stop losses *'too far out'*. TMS said in response that, *'The spread positions that we trade make it impossible to work a stop on either an individual trade or on a daily basis'*. But it said it had still been able to generate good profits generally, even without being able to use stop losses.

On 27 July 2015 TMS told Mr A it had found software that could automatically prevent or minimise loss. TMS explained this to Mr A as follows:

'Over the last few weeks I have been testing a third party software programme which will automatically exit all trades once our planned intraday loss level is reached – 'Autorisk'. I do believe that the speed and consistency with which it will act will mean that large losing days such as today will be a thing of the past.'

TMS also wrote to its customers as a group on 27 July 2015, saying the following:

'Many of you have asked about stop losses and increasing automated risk management. As most of you know, for the last few months we have been searching for a risk management product ... that can exit all orders & open positions in milliseconds, once a daily stop loss level has been touched.

... Using automatic stop losses for intra-day spread trading is far tougher than it may sound, but we have found and been testing 'Autorisk' on a simulated TT account for the past weeks. Autorisk does exactly what we want it to do and a bit more on top. The system can trail the stop if Profit and Loss benchmarks are hit (intratrade which is the only problem for spreads), so if the strategy is up 2% then it can bring the daily stop loss to -0.5%, allowing Rob room to run trades (something which has been hard to do to date), hopefully building to larger daily profits while limiting risk further.

... The programme enables our compliance to monitor and set the risk limits. Traders will not be able to override the limits, our compliance director will be the only person with the password for the system and will set an intraday total loss level at 2.5%.

After tests we have found the functionality of Autorisk to be invaluable and quicker than we could have hoped, cutting all positions in milliseconds ... The risk management system should make a huge difference to our Profit & Loss over time, ridding us from these very frustrating large down days.

We have suspended trading on the Active Futures strategy until the system has been fully implemented and is live.'

On 1 September 2015 Mr A emailed TMS saying the following:

'Just a quick email regarding the trading performance over the last few weeks.'

I am really pleased that you have implemented a stop loss system into the trading to stop the 15-20% loss days, but I am concerned that the recent trading has nearly all been down days.'

TMS told Mr A, 'Our compliance director has set the daily stop loss at -2.75% based on the last four years of trading...' And it said it would email him later that day with more detail.

On Friday 23 October 2015 TMS emailed Mr A saying his investment had suffered a drop in value of about 6%.

On 25 October 2015 Mr A asked TMS how that was possible if it had put stops in place as it had described. On Monday 26 October TMS asked to speak to Mr A by phone to discuss his concerns.

In December 2015 Mr A withdrew some funds from TMS. In February 2016 TMS recorded that Mr A had asked it to stop trading on his behalf but that it would leave his current positions to 'run'. TMS apologised to Mr A for a bad day's trading that day.

Mr A complained to TMS. He said TMS had misled him into believing it had stop losses in place and he wouldn't have used the service if he'd known there were no stop losses. As evidence of that he referred to conversations with TMS and emails between himself and TMS in 2014 and 2015. He said he wanted TMS to pay him the difference between the funds he originally invested with TMS and the amount he had left when TMS finished trading on his behalf. And he wanted interest paid on that.

In response to the complaint TMS said, in summary, the following:

- TMS could find no evidence it had given Mr A assurances about a stop loss.
- The investment agreement Mr A signed said TMS couldn't guarantee that its efforts to limit losses would always be effective.
- There was nothing in the investment agreement or Mr A's correspondence with TMS which should've led Mr A to believe effective stop-losses were in place.

Mr A referred his complaint to this service.

TMS told this service Mr A's complaint was out of jurisdiction because Mr A was a professional client and so wasn't an eligible complainant under the rules that apply to this service, and the events Mr A complained about had occurred in 2014 which meant he was out of time to refer his complaint to this service under the rules that apply to this service. This service considered whether Mr A's complaint was within our jurisdiction. We concluded it was in jurisdiction. That was because Mr A's classification as a professional client was wrong and so shouldn't stop him being an eligible complainant. And, because Mr A had complained to TMS in 2014 but TMS hadn't treated his complaint as a complaint, Mr A wasn't out of time to refer his complaint to this service. On the same basis I'm satisfied Mr A's complaint is one I can look at and make a decision on.

One of our investigators looked into the merits of Mr A's complaint. She thought TMS had treated Mr A unfairly by telling him it was implementing a stop loss. In summary she said the following:

- Documents from around the time Mr A opened his account and began trading show

TMS accurately described the service it would provide and Mr A understood that service, and this included that he could experience substantial losses.

- TMS didn't have a duty of care to protect Mr A's assets in the way he asserted because that wasn't part of the service it offered and in fact it had warned him he could experience substantial losses.
- There was no evidence TMS told Mr A around the time he opened his account that it would put stop losses in place on his account.
- A stop loss wasn't in place until 1 September 2015 and there's no evidence one had been promised to Mr A before then.
- TMS had promised a stop loss of a maximum of 2.75% per day from 1 September 2015.
- Leading up to 1 September 2015 Mr A had been becoming increasingly unsettled by the lack of stop loss. So it was likely he would've withdrawn his funds earlier than December 2015 and before 23 October 2015 (when he lost 6%) if TMS hadn't told him daily losses would now be limited.
- TMS should refund Mr A the amount by which any daily losses exceeded 2.75% since 1 September 2015, plus 8% simple interest on any amount paid.
- TMS should pay Mr A £50 for distress and inconvenience. This took into account that Mr A was a very experienced trader and TMS was trading with only a small proportion of his overall assets.
- The product Mr A used from TMS was available to retail clients as well as professional clients.

TMS didn't agree with the investigator's view. It said the mechanism to prevent loss was in place on a non-guaranteed basis and Mr A knew it was usually only activated when markets were moving very quickly. TMS said that, allowing for slippage, it would be fairer to pay Mr A compensation for any losses over 3% instead of 2.75%. The investigator didn't agree with the suggestion from TMS because Mr A had been told the stop loss would be set at 2.75% and he might've withdrawn his money if he'd been told it would be 3%. TMS then said it would accept the investigator's recommendation.

Mr A didn't accept the investigator's view. In summary he said the following:

- The stop loss was in place before 1 September 2015. This was shown by references TMS had made to '*stops*' in various communications.
- Mr A used stop losses himself and expected TMS to use them. If he'd known from the outset that TMS wouldn't use stop losses, he wouldn't have signed up to the service.
- Mr A believed trades were placed using the new stop loss system before 1 September 2015.
- TMS did have a duty of care to protect his assets. This was shown by its email of September 2014 which said '*our aim for October, November & beyond is to protect capital and show consistency in returns for clients*'.

- The instruments traded and the risks and leverage weren't appropriate for a retail consumer. TMS acknowledged that in its August 2021 response to Mr A's complaint. It said its classification of him as a retail client had been a mistake because the service was highly speculative and wouldn't be appropriate for a retail client. And this service acknowledged that TMS was wrong to classify Mr A as a professional client.

The investigator said, in response, the following:

- Having considered the comments and further evidence from Mr A she hadn't changed her view on the complaint or on how to put things right for Mr A.
- The emails Mr A had referred to didn't show TMS had stop losses in place before the investigator had said it did.
- TMS's stated aim of protecting capital through its investment strategy wasn't the same as a duty of care to protect Mr A's assets.
- Page 3 of the investment management agreement said '*This product is available to Retail Clients and Professional Clients*'.

TMS also made further comments, including the following:

- Mr A knew stop losses couldn't be attached to positions in a spread trading strategy. Risk management entailed daily loss targets rather than stop losses. If the daily loss target was hit, trades would be closed on a best endeavours and non-guaranteed basis, which meant loss levels could extend in fast moving markets, especially in reaction to economic data.
- When TMS referred to '*triggering other stops*' it meant stop loss orders of other market participants which would be triggered when price movement went above or below a support or resistance level.
- When TMS referred to a '*2% stop*' it meant daily target loss, not a stop loss.
- TMS wasn't aware of any evidence that stop losses were promised.
- The email of 27 July 2015 referred to a system that could dynamically monitor positions so that if an account loss of 2.75% was hit the system would immediately activate market orders to close open positions, thereby seeking to stop the loss on an account, and close open trades for the manager on a best endeavours and non-guaranteed basis. This type of order isn't generally available, hence TMS looked for specialist software to help with risk management. Again – stop loss orders couldn't be used in spread trading because they were attached to individual trades not the running profit/loss on the basket/spread that was being traded.

Because no agreement could be reached, the complaint was passed to me to review afresh and make a decision.

Before I made a final decision on Mr A's complaint I issued a provisional decision in which I said was minded to partly uphold the complaint. I provisionally found that TMS had misled Mr A by telling him its new technical solution would operate as a stop loss. But I didn't provisionally find that Mr A would've acted differently if TMS hadn't misled him in that way. So I thought TMS should pay Mr A £50 for distress and inconvenience. But I didn't think TMS should pay Mr A any compensation for any investment losses. I said I'd consider any further comments or evidence from Mr A and TMS before making my final decision.

TMS said it had nothing to add. Mr A didn't accept my provisional decision. In summary Mr A said the following:

- TMS failed to gather information about Mr A's investment objectives, knowledge and experience. And it failed to ensure the investments it made were suitable for Mr A.
- TMS didn't take all reasonable steps to ensure Mr A was made aware of the risks of the investment. And it failed to provide clear warnings.
- Mr A accepted there were questions over why he allowed the situation to continue and didn't take steps sooner, but he had '*very little visibility of the ongoing position of [his] account*'. *He had limited statements issued and no online access*'.
- An email of 1 July 2015 said losses had been incurred which were '*vastly in excess of our planned -2% stop*'. Mentioning a stop was misleading if no stop loss was in place.
- It was unfair for me not to award the compensation the investigator had recommended because TMS had agreed to pay it and I had provisionally found that TMS had misled Mr A and that this would've caused him '*a degree of distress and inconvenience*'.
- Mr A had strong feelings about his complaint.

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'm partly upholding the complaint. I'll explain why.

The purpose of this decision is to set out my findings on what's fair and reasonable, and explain my reasons for reaching those findings, not to offer a point-by-point response to every submission made by the parties to the complaint. And so, while I've considered all the submissions by both parties, I've focussed here on the points I believe to be key to my decision on what's fair and reasonable in the circumstances.

In this decision I'm not making any finding about whether TMS failed to ensure Mr A's investments were suitable for him. That's because those points didn't form part of the complaint Mr A brought to TMS or to this service. So they're outside the scope of my decision. For the same reason Mr A's comments about risk warnings are outside the scope of this decision, except so far as they relate to whether TMS led Mr A to believe it would use stop losses in its trading for him.

I'm satisfied that when Mr A began using the service, TMS gave him information in its written agreement with him that made clear Mr A was at risk of large losses – the written information I've seen didn't say or suggest that TMS would trade using stop losses. I haven't seen any evidence on which I can conclude TMS gave Mr A to believe it would have stop losses in place from the outset.

Mr A has said TMS told him during phone calls during the application stage that TMS would use stop losses in the trading it did on his behalf. There's no evidence available to show what was said during those phone calls. Taking that into consideration, and given that TMS's documentation didn't include any reference to stop losses and instead warned that losses

could be substantial, I can't say it's likely, on balance, that TMS did tell Mr A it would use stop losses.

Furthermore, once TMS had begun trading for Mr A, I think the losses it incurred at various times would've made known to Mr A that TMS wasn't using a stop loss on its trades for him. Although TMS used words such as '*stops*' in some communication with Mr A, it has explained that it meant to refer to daily loss targets. And when looked at overall, the correspondence from TMS to Mr A during trading makes clear that losses weren't subject to stops – and certainly not guaranteed stops.

Having said that, the information TMS gave Mr A in July 2015 indicated strongly that TMS would soon have an automated system that would prevent losses from occurring beyond a certain set level. Although TMS has said it's not possible to use a stop loss on spread trading, the language it used in its communications about the new software it began using in 2015 gave the impression the software would be able to introduce a stop loss.

Although TMS has said its terms and conditions said it wouldn't always be able to limit losses, when TMS told Mr A about its new tool for doing so, it didn't make clear that the tool might sometimes *not* limit losses as intended. It presented the tool as a new feature which would change its trading for the better by automatically stopping losses from occurring over a certain amount. I haven't seen anything that TMS said to give Mr A to understand that the tool would operate on a non-guaranteed basis.

Despite having concluded that TMS gave Mr A misleading information in July 2015, I can't reasonably conclude Mr A would've withdrawn from TMS at any particular time if he hadn't been given that misleading information. I'll explain why.

Mr A knew by 25 October 2015 – after TMS again suffered large trading losses on Mr A's behalf – that the new system TMS had in place didn't amount to a guaranteed stop loss. So I would expect him to have withdrawn from TMS at that point if he felt – as he's asserted – that he could only use a service that offered a guaranteed stop loss. But Mr A didn't withdraw immediately – he withdrew some funds in December 2015, and TMS was still trading for him as late as February 2016. So I can't conclude that a guaranteed stop loss was indeed essential to Mr A, or that he wouldn't have used the service if he'd known there was no guaranteed stop loss. My view on this point is compounded by the fact that Mr A would've known by August 2014 that TMS didn't use a stop loss, but he didn't stop using TMS at that point either – or at any other points at which TMS made significant trading losses.

Mr A has said the reason he didn't take steps any sooner to withdraw from TMS was that he had limited information about the performance of his investments. But TMS made clear to Mr A on several occasions that it didn't use stop losses. And so even if Mr A didn't closely follow the performance of his investments on an ongoing basis, I think he knew at various points, and well before he withdrew in early 2016 that TMS didn't use stop losses. And so, again, I can't say he would've withdrawn from TMS any earlier than he did if TMS hadn't misled him when it did.

I find that the misleading information TMS gave Mr A would've caused him a degree of distress and inconvenience. But as our investigator said, he was an experienced trader and the funds traded by TMS on his behalf constituted a small proportion of his overall portfolio. So I think £50 is sufficient acknowledgement of the distress and inconvenience Mr A suffered. The amount is meant as an acknowledgment of the impact TMS had on Mr A. It's not compensation for any investment losses Mr A suffered because I haven't found that any losses he suffered were caused by any wrongdoing by TMS.

Mr A has said I should require TMS to pay the compensation for investment losses which the investigator recommended and which TMS agreed to pay. But I've reached a different conclusion from the investigator. I understand Mr A feels strongly about this complaint and I'm sorry to disappoint him. But it wouldn't be fair to require TMS to reimburse Mr A for any trading losses, because – although TMS misled him in July 2015 – I can't say that was what caused any losses that Mr A suffered.

Putting things right

To put things right for Mr A, TMS Capital Limited must pay Mr A £50 for the distress and inconvenience it caused him by giving him misleading information.

My final decision

For the reasons set out above my final decision is that I'm partly upholding the complaint. TMS Capital Limited must pay the amount set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 7 January 2025.

Lucinda Puls
Ombudsman