

The complaint

Mr L complained about Gain Capital UK Limited (trading as Galvan Derivative Trading “Galvan”). He said Galvan made recommendations to him to trade contracts for difference with maximum leverage and excessive frequency and this was to his detriment.

Mr L would like Galvan to pay compensation including refunding his losses plus interest and a payment for distress and inconvenience he said it has caused him.

Mr L has been represented through-out in his complaint by a firm of solicitors. I have referred to this firm as Mr L’s representative in my decision.

What happened

Mr L contacted Galvan in January 2012 to request an investment report. On 27 March 2012 Galvan conducted a suitability assessment and deemed Mr L suitable for its services. On 10 September 2012 Mr L agreed to sign up for Galvan’s contracts for difference (CFD) advisory service. The parties then opened a trading account for Mr L with a third party. Mr L then proceeded to trade CFDs on an advisory basis between 10 September 2012 and 24 June 2016. Mr L incurred overall a loss in this period of £31,150.

Mr L’s representative said he has been the victim of mis-selling and professional negligence. He said Galvan made recommendations to him to trade with excessive frequency and this caused him detriment. Mr L’s representative said it was to Galvan’s benefit that Mr L agreed to trade in frequency and that a large part of Mr L’s losses came from its commission and other charges. It said of the £31,150 losses incurred by Mr L, around £16,433 was in relation to fees and charges.

Mr L’s representative said Galvan failed in its duty of care and did not act in Mr L’s best interests. Mr L complained to Galvan about this.

Galvan said in response that it had limited documentation due to the time that had passed. It initially said Mr L’s complaint could not be looked into by our service as he had not referred his complaint to us within six months of it issuing a final response the first time, he complained about these issues in 2016.

Galvan then went on to say that it was unable to conclude there was any lack of professionalism or that it hadn’t treated Mr L fairly. It said Mr L’s losses were down to adverse movements in the stock market. It said it was not upholding his complaint. It added it went to great lengths to explain the high-risk nature of CFDs and Mr L was aware of the risks associated and accepted this in the hope of achieving his investment objectives.

Mr L’s representative was not happy with Galvan’s response and referred Mr L’s complaint to our service.

An investigator looked into Mr L’s complaint. He first of all addressed Galvan’s comment that Mr L didn’t refer his complaint in time to us. He said Mr L originally complained to Galvan about the same issues in 2016, but when Galvan issued its final response, it didn’t provide

all of the referral information it ought to have done as prescribed by the regulator, the FCA in its handbook. He concluded because of this reason, Galvan's response to Mr L wasn't a valid one, in relation to the rules that prescribe what is required to refer a complaint to us.

The investigator went on to conclude that, the six-month time limit did not start in 2016, but conversely Mr L's complaint had been made to Galvan in time. So, when Mr L's complaint was subsequently referred to us in 2023, his complaint to Galvan had been made in time, in 2016, and he wasn't out of time to refer his complaint to us, because Galvan hadn't put all of the referral information it should have done on its letter in 2016. So, the investigator concluded that he could look at Mr L's complaint.

Galvan responded and said on 26 September 2023 that it accepted the investigator's view and asked him to proceed to look at the merits of Mr L's complaint.

The investigator then went on to consider the merits of Mr L's complaint. He said based on the rules stated within the FCA's handbook, Galvan needed to ensure from the outset that an advisory trading service was suitable for Mr L.

The investigator went on to summarise Mr L's circumstances, based on what he had in front of him, and concluded he was not persuaded it was reasonable for Galvan to assess him as a suitable client for its services. He said this because he could see Mr L had described his attitude to risk as medium and he didn't have the financial capacity or time to make up any losses that he incurred. The investigator also concluded that he could not see that Mr L had any experience or knowledge of leveraged based trading at that time either.

The investigator upheld Mr L's complaint as he didn't think Galvan's services were suitable for him. He asked Galvan to put things right by paying compensation along with interest and a payment for distress and inconvenience.

Galvan was not in agreement with the investigator's view. It supplied new documents at this point, including samples of sales documents that it would have used in 2012. It said it was not convinced by the investigators assumptions and that Mr L was provided with a clear explanation as to how leveraged products worked. It said Mr L had some experience with trading in financial instruments and was within their target market group in relation to his circumstances at that time. It said overall it disagreed as Mr L agreed to open an account, passed its suitability assessment, and signed an agreement, to say he was aware of the risk he was taking on.

I issued a provisional decision on this complaint on xx 2024. Both parties have received a copy of that provisional decision, but for completeness I include an extract from the decision below. I said;

"Galvan initially challenged our jurisdiction to look at Mr L's complaint on the grounds he referred his complaint to us too late. The investigator concluded we could look into Mr L's complaint and Galvan agreed with his view. It gave its permission for us to proceed. As this is the case, I see no reason to make any further comments about this. I have instead focussed my review on the merits of Mr L's complaint."

The events complained about here, are from a long time ago, this being around 12 years in the past. Galvan has not been able to provide all the information that it initially did have at the time. It has understandably not kept everything, so I have not been able to listen to, for example, call recordings of what was said between the parties. However, I have been able to rely on contemporary call notes left by Galvan's sales representative and then latterly its adviser. I have also been able to see some of the documentation completed at the time between the parties such as the power of attorney. I have also read through an earlier final

response from 2016 from Galvan that provides some details as to what happened. We have also been able to obtain transaction spreadsheets from the third party that Mr L and Galvan used to carry out trading with. So, I have been able to gather information that I have been able to rely on, when I have looked to build a picture of what happened.

That being said, where there's conflicting information about what happened and gaps in what we know, my role is to weigh the evidence we do have and to decide on the balance of probabilities and in light of the wider circumstances, what's mostly likely to have happened.

Further, I've not provided a detailed response to each, and every point raised. Ours is an informal service for resolving disputes between financial businesses and their customers. While I've taken account of all the submissions and points made by the parties, I've concentrated my findings on what I think is relevant and at the crux of the complaint.

There are three parts that I consider are the crux of Mr L's complaint. Firstly, his representative said Galvan carried out an unnecessary number of trades and did so with a view to making more commission. It said Galvan tried to churn Mr L's account for this purpose. Secondly, I also went on to consider whether Galvan's trading advisory service was suitable for Mr L in the first place. Our investigator looked at this and didn't think it was. Thirdly, I then looked into what happened after Mr L opened an account and signed up for Galvan's services.

Mr L's representative's comments about churning

Mr L's representative said Galvan induced Mr L into a series of transactions, made with frequency to his detriment. It said Galvan recommended to Mr L a significant number of trades and did so with maximal leverage and excessive frequency. It said Galvan did this to generate fees and commission for itself. It said Mr L was subjected to churning of his account.

I have looked through the documentation gathered and had a look to see if there is anything that supports Mr L's representative's claim here that Galvan tried to induce Mr L to make frequent trades for its own benefit. First of all, Mr L needed to agree to the recommendations made by Galvan, before the trades were to be carried out. I can see, after reading the call notes made by the adviser, that Mr L didn't take up Galvan's recommendations that much, and based on these notes, seemed early on to be coming up with his own ideas, and making his own decisions about what to trade in.

With that being said I have looked at the rules that the regulator the FCA, provides guidance on with regard to churning. In its conduct of business (COBS) rules and in particular in 9.3.2 (1) it says it is 'a series of transactions that are each suitable when viewed in isolation may be unsuitable if the recommendation or the decisions to trade are made with a frequency that is not in the best interests of the client.' So, I have looked again at the statement of transactions for the account that Galvan held a power of attorney on and have considered this, in light of what the rules have said, this being whether the recommendations carried out by Galvan, that were taken up by Mr L, were recommended in his best interests.

In doing this, I have needed to consider the nature of CFD trading, something that involves speculating on short-term price movements. As a result, it is not unusual to involve a large number of trades in a relatively short period of time. This does, as it is the case with Mr L's trades, result in more commission and fees for the third party and for Galvan on the occasion that Mr L has accepted a recommendation.

With what I have said in mind, I don't think churning is an automatic conclusion to be drawn from evidence of frequent trading – it is even less likely a conclusion in Mr L's case, where it seems many of the trades that took place on the account were not Galvan's ideas.

Without persuasive evidence of particular trades or batches of trades made on Galvan's recommendation, made on unreasonable advice, and made contrary to Mr L's best interests, I am not upholding Mr L's complaint in this regard. I have not seen any evidence to support what Mr L's representative has said.

Suitability of Galvan's trading advisory service for Mr L

Galvan were at the time, a regulated firm. It was subject to the rules set out by the regulator, the FCA within its handbook. Mr L held an agreement with Galvan that it would advise him on CFD trading, and he would choose whether or not to proceed with the recommendations given. So, as this was the case, Galvan needed to make sure from the outset that its services were suitable for Mr L and his circumstances at that time. To do this it needed to assess such things as his financial situation, investment objectives, attitude to risk and experience with investing.

I can see there was a period of time between when Mr L first approached Galvan for an investment report in January 2012, to when he was assessed by it in March 2012. I can see a note recorded by a representative from Galvan that said Mr L was keen to take up the service but was holding fire for now. I think this shows Mr L considered carefully whether to and when to invest.

As I said, the parties discussed Mr L taking up Galvan's services in March 2012. It was at this point that Galvan carried out its suitability assessment with Mr L. The conduct of business (COBS) rules on suitability explained that firms needed to take 'reasonable steps to ensure that a personal recommendation, or a decision to trade, is suitable for its client' (COBS 9.2.1).

The rules explain that (COBS 9.2.2):

- (1) A firm must obtain from the client such information as is necessary for the firm to understand the essential facts about him and have a reasonable basis for believing, given due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into the course of managing:*
 - a. Meets his investment objectives;*
 - b. Is such that he is able financially to bear any related investment risks consistent with his investment objectives; and*
 - c. Is such that he has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio.*

At the time Galvan completed its suitability assessment with Mr L he told it he was employed full time, aged 58 and single, with a yearly income of £43,000 – made up of £40,000 salary and £3000 in dividend income. He told it he had disposable income every year of £35,560 and held liquid assets of around £80,900, this being a mixture of shares and cash. He told Galvan he held a medium attitude to risk and picked this option out of a scale of five risk categories described by it. He told Galvan he was looking for Growth on his capital. He also told Galvan he had been trading shares for around 10 years and did so fairly regularly up to that point.

Now I appreciate Mr L through his representative is saying they weren't his circumstances at the time and that although his income was roughly about that, his expenditure was higher, he hadn't any shares at that time, and he wanted capital growth with low risk. But that isn't what Galvan recorded down as Mr L's circumstances at that time. It said it based its assessment on what Mr L told it. I think Galvan were entitled to rely on what Mr L told it when it carried out its suitability assessment and consider whether its services were suitable for him based on his answers. I also don't think Mr L told it anything at that time, that would have been cause for concern or that it needed to ask for further information from Mr L to support what he told it.

As I said, Mr L was recorded as having a 'medium' risk profile and was looking for growth. He was initially prepared to invest up to £10,000, this being around 12% of his stated liquid assets at that time and Galvan set a maximum account size limited to half Mr L's stated level of liquid assets. It was at this stage, in September 2012 that the account was funded.

From the information Galvan obtained about Mr L's circumstances, I think it was reasonable for it to suggest he open a CFD trading account with a third party and receive its trading advice, on the terms I have just described. Mr L stated to it that he had over £32,000 disposable income a year as well as his other liquid assets to rely on, so I am persuaded he had the financial capacity to deal with any losses he would potentially incur as well as have enough in reserve for any unexpected cost or emergency. He also, I think on balance, had enough disposable income to be able to replenish any potential losses.

Mr L's representatives said Mr L hadn't traded in CFDs before, and when he was assessed by Galvin in March 2012, I agree this seemed to be the case. But I don't think the fact he hadn't invested in this way previously meant he should never do so, or that in some way because he said he had a medium attitude to risk that he shouldn't either. Mr L was entitled to take some higher risk with a proportion of his funds by investing in the way he wanted to. I don't think on this occasion, in Mr L's circumstances that his lack of experience about CFD's or his risk rating at that time, meant that the service offered by Galvin was unsuitable. The evidence I have seen, especially within the recorded notes, show that he had capacity to invest a proportion of his liquid funds into CFD trading, was interested in risking some of it for growth and was keen to do so.

Galvan said it would have given Mr L a full explanation of the risks associated with trading CFDs when it discussed its services on the phone. As I have already said, I haven't got any of the phone calls from that time. But I can see from what Galvan has said in its submissions and within a brochure that it said it would have provided, that it more likely than not make clear the risks of trading CFDs at the time.

I've also read notes from the time the assessment was carried out and leading up to Mr L depositing funds into the account and can see that from the outset he had his own ideas about trades, as well as those that he would potentially be presented to by Galvin. On the whole, I think Mr L was made aware of the risk of investing in CFD's and was comfortable with this type of investment. So, it follows based on all I have found that I haven't been able to find that the trading advisory service was unsuitable for Mr L when he agreed to have it in 2012.

The trading advisory service provided by Galvan to Mr L

Finally, I have also looked into how things panned out between Mr L and Galvan. This is because I can see Mr L incurred over £31,000 in losses. This is beyond the initial £10,000 Mr L staked when he opened the account and agreed to receive advice from Galvan. So, I have looked at what happened after the account was opened to see how the losses were

incurred and whether Galvan ought to have intervened or assessed at any stage that its services were no longer suitable for Mr L.

In doing so, I don't think Galvan on this occasion could have done anymore that it did. I can see that it carried out a six-month review of Mr L's circumstances in May 2013. Galvan said it reviewed Mr L's continued suitability to receive investment advice and trade CFDs. It said it could see there were no material changes. At this stage, I can't see that there was anything else Galvan ought to have done or responded to.

I can see the adviser contacted Mr L on a regular basis throughout and from his notes, it is clear to me that Mr L increasingly as time went on decided to trade his own investments and make his own decisions, on an execution only basis. The adviser records early on that Mr L traded a mixture of Galvan recommended and his own execution only ideas. He also noted that Mr L preferred to trade without stop loss limits being placed on positions.

There are several notes of a similar nature, where the adviser stated Mr L carried out his own trades and that he warned him of the risks of removing stop losses. These notes also coincided with Mr L opening a separate account with the third party in April 2013 and depositing funds to carry out trades, on an execution only basis there too.

When I see this, and what has been said by the adviser in his notes, along with what I can see from the transaction statements by the third party, I think on balance, over time Mr L was carrying out his own trades and only occasionally taking advice by Galvan on its recommendations. I am also persuaded by what has been recorded in the notes about Mr L removing stop losses too. When I consider the losses incurred by Mr L over the time in question, I don't think I could hold Galvan to account for most of it anyway. I can see Mr L carried out most of the trades on his account he took out with Galvan, on an execution only basis and I can see it looks like he was removing or trading without stop losses himself.

I have also looked through the transactions statement for the account, and can see Mr L carried on trading, and has done so for several years after his agreement with Galvan ended, and indeed after he first complained to Galvan about the account being unsuitable for him.

In summary, I am currently minded to conclude there is not enough evidence to support what Mr L's representatives have said about churning. I am currently persuaded Galvan's trading advisory service was suitable for Mr L based on his circumstances at the time. In addition, I can see Mr L carried out many of the trades on his account he held with Galvan on an execution only basis anyway, and he didn't take up its recommendations that often."

I asked both parties to let me have any comments, or additional evidence, in response to my provisional decision.

Mr L and his representatives have not responded to my provisional decision by the deadline I set.

Galvan responded on 31 July 2024 and said it agreed with the outcome.

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.

Neither party has anything further to add that I feel I need to comment on or that will change the outcome of this complaint. So, because of this, I don't see any reason to depart from my findings within my provisional decision. So, I don't uphold Mr L's complaint.

My final decision

My final decision is that I don't uphold Mr L's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 26 September 2024.

Mark Richardson
Ombudsman