complaint

Mr G's complaint is about his contracts for differences (CFD) trading account with Gain Capital UK Limited (trading as City Index). He says City Index did as follows:

- Closed, without his consent, three specific trades on 31 May 2018.
- Unfairly declined his request for a goodwill waiver of his trading losses based on his serious illness.
- Responded to his request by unfairly closing his account and crystalizing his losses. It was aware of his serious ill health since 2015, at the latest. It took no step to close his account until 2018, by which time his losses had worsened.
- Gave him advice, contrary to its assertion that it did not.

background

City Index did not uphold Mr G's complaint. Its position, in the main and based on evidence presented to this service, is as follows:

- It says Mr G opened the relevant account in 2009; that this service determined an earlier complaint from him and concluded in 2015 that the account was appropriate for him; that on 22 May 2018 he was upgraded to a professional elective account, which it considered appropriate for him based on his application for the account; that on 8 June 2018 Mr G submitted an email request for a waiver of his losses based on his serious ill health and its effect on his trading; that it declined his request and it considers it was/is entitled to do so based on the terms of the account and based on the absence of an obligation to grant it; that nevertheless it reacted to the notice of his difficulties by closing the account on 18 June 2018 on the grounds of his serious ill health; and that it was not obliged to close his account earlier than when it did.
- It says the complaint about closing the account in 2018 conflicts with the complaint about its alleged failure to close the account earlier (around 2015).
- It says its terms are clear in confirming that its service did not include "advice".
- It says there is evidence that the three trades which Mr G claims to have been closed without his consent were not closed by City Index, but were closed online by him from an Internet Protocol (IP) address used for other trades on the day.
- It says it made a goodwill offer of £150 to Mr G for its delay – of around four weeks – in logging his complaint of 18 June 2018.

Mr G disputed City Index's assertions. In the main, he said notice about his serious ill health was given to City Index as early as his previous complaint letter in November 2013 and was repeated in communication from him in 2015; that there is inherent merit in saying the duty that City Index displayed in closing his account on the grounds of his serious ill health in 2018 means the same duty existed between 2013 and 2015 when it was aware of the same serious ill health grounds; that the unfairness in the 2018 closure arises from the fact that it came after substantial losses since 2013 (or 2015), and increased exposure to losses when his account was upgraded in 2018, that could have been avoided if the account was closed in 2013 (or 2015); that he rejects the suggestion that he closed the three trades he has complained about, he complained about them on the same day they were closed; and that overall City Index has failed to uphold its express *duty of care* mission statement.

The matter was referred to this service and considered by one of our investigators. He concluded as follows:

- The complaint should not be upheld but City Index's delay in logging Mr G's complaint could have been avoided, so its offer of £150 in this respect is reasonable.
- The terms and conditions of the account entitled City Index to close it in the manner that it did and with the notice period it gave.
- Guidance from the Court of Appeal case of EHRENTREU v IG INDEX LIMITED [2018] ("the Ehrentreu case") says in the absence of strong contractual wording to the effect, there is not a general duty of care upon firms to protect a client from self-inflicted financial harm. No such wording is within the terms and conditions for Mr G's account so City Index had no such duty towards him.
- In his previous complaint to this service we concluded that the account was appropriate for Mr G when it was opened in 2009 and evidence suggests it had not become inappropriate for him thereafter.
- City Index was made aware of Mr G's serious ill health in 2015, but that does not alter the effect of its contractual discretion to close the account.
- Evidence of what Mr G refers to as advice in 2013 amounts to no more than a suggestion – not advice – by a City Index official about administration of the account.

Mr G disagreed with the investigator's views. He retained his core arguments and asked for an ombudsman's decision. He also asked this service to note that his "… *argument is not based on being a problem gambler but one on health grounds, as this is why City Index closed* [his] *account.*" The matter was then referred to an ombudsman.

my findings

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

Delay in logging Mr G's complaint

In straightforward terms, I agree that City Index's offer of £150 is reasonable. I consider that it caters for the trouble and upset caused to Mr G by the delay in logging his complaint and that it is broadly consistent with what this service would award for the matter.

Alleged advice

The terms and conditions of the account support City Index's assertion that its service did not include advice. Nevertheless, evidence of an investment advice activity could potentially suggest otherwise. The main evidence upon which Mr G relies appears to be as described by the investigator – that is, it depicts a suggestion from City Index more than it does advice. It features email correspondence between Mr G and City Index in June 2013, in which he sought its goodwill in reversing some trades. In response the relevant official said the reversal could not be done on that occasion and that Mr G would be better off opening a new position.

Considered in the context of the exchange, I am not persuaded that the official intended to give Mr G investment advice or that such advice was given. Investment advice would normally involve advice on the merits of a particular investment in its own right. The exchange summarised above had a different basis. Mr G sought to mitigate a situation in his account and made a specific request. In response, City Index said it could not accommodate his request and in doing so the official appears to have suggested an alternative. Overall and on balance, I am not persuaded that this is evidence of investment advice.

Closure of the three trades on 31 May 2018

I agree with the investigator's conclusion on this matter. Spreadsheet evidence presented by City Index, of Mr G's account trading activity for the three specific trades, supports its rebuttal of the allegation and the investigator's conclusion. It refers to closures of the trades online from an IP address that appears for other trades (on the same date) in the spreadsheet. There does not appear to be a complaint about those other trades. The suggestion is that the other trades belonged and were familiar to Mr G. I acknowledge that Mr G has not complained about any other trades besides the three he specified, but the conclusion that follows is that available evidence does not support his assertion that those trades were closed by City Index, because they were closed from an IP address used for other trades (which are not in dispute).

Closure of Mr G's account

Under this sub heading I will address the key matters related to the closure of Mr G's account – that is, his assertion that it should have been done in 2015 (or earlier) on the same grounds that it was done in 2018, his assertion that it was unfair to close the account in 2018 and crystalize his losses in the process and the suggestion that the CFD account was inappropriate for him during the period relevant to the complaint.

The investigator's reference to and interpretation of the guidance from the Ehrentreu case is relevant. The facts of that case involved what could be described as a spread betting account holder's gambling problem and the argument that the firm ought to have closed the account before the problem caused the account holder the financial harm which eventually occurred. I have noted Mr G's point that his case does not relate to a gambling problem. Nevertheless, it does relate to the same argument as in the Ehrentreu case about a firm supposedly having a duty of care to protect a client from *self-inflicted financial harm*. In the Ehrentreu case the basis for the financial harm was a gambling problem and in Mr G's case it is his serious ill health.

I do not consider that I can add to the investigator's application of guidance from the Ehrentreu case. As he said, and in a nutshell, in the absence of an express and strongly worded contractual duty of care to give such protection the default position that applies is that City Index was not obliged to give such protection – arguably irrespective of the financial harm being cause by a gambling problem or by ill health.

Guidance from another case, which is relatively recent (October 2018) and which followed (and made reference to) the Ehrentreu case, could assist further in this complaint. In QUINN v IG INDEX [2018] ("the Quinn case") the High Court suggested that there "… *may be a more narrowly cast duty not to encourage [trading] where a service provider knows or ought to have known that the bet placer [in other words, the client] was … losing in excess of what he or she could afford to lose.*"

Evidence is that this service made City Index aware of Mr G's serious ill health around 2015, in the course of addressing his previous complaint. That awareness is relevant to the *narrowly cast duty* suggested in the Quinn case, however it must be considered further in the context of how the duty is described. The suggested duty hinges on a firm's awareness that a client is losing in excess of what he or she can afford to lose. Mr G's email to City Index in June 2018 refers to his serious ill health and says it has affected his trading. It also refers to the financial loss in the account and his need for it to be waived. If the suggested duty is applied, I consider this email was enough to make City Index aware that he was losing more

than he could afford to lose, particularly in the context of his serious ill health. However, City Index arguably acted correctly by closing the account around a fortnight later – which was not particularly delayed and which stopped the loss from continuing or increasing.

We have been provided evidence that suggests a history in which Mr G made a number of requests at different times, including 2013, for City Index's goodwill in adjusting or reinstating particular trades. References were made to sizable losses in some of the correspondence shared with us, however they were done in the context of Mr G seemingly having made mistakes in some trades – so he asked for City Index's goodwill to repair those mistakes. His requests were based on him being a *long standing client*.

Overall and on balance, I am not persuaded that these events were quite enough to create awareness, on City Index's part, that he was losing in excess of what he could afford. He was losing significant sums at the time, but that would not have been unknown or unusual to City Index, given the nature of CFD trading. That also did not automatically mean he was trading beyond what he could afford – that is, a gambling problem. As Mr G has affirmed, his case is not about him having a gambling problem. I have considered whether (or not) his requests for goodwill suggested he was trading beyond what he could afford. I do not consider that they did. They suggest a client who sought assistance (goodwill) for trades that had gone wrong – not necessarily a client who was trading beyond his means.

In 2015 the contents of a letter (and, it appears, an email) in which Mr G referred to his serious ill health was conveyed to City Index. Those contents referred to the gravity of his ill health, procedures he underwent in 2014 and therapy he was having in 2015. The purpose of the letter was to explain, to this service, why his previous complaint to us was submitted late – essentially, addressing his serious ill health was understandably the priority before sending his complaint to us. Unlike his email in 2018, the letter in 2015 does not appear to draw any connection between Mr G's serious ill health and an effect on his trading. It is also more likely (than not) that City Index considered it in the context of his referral of a complaint to us and the question of whether (or not) the referral was in time.

Overall and on balance, I am not persuaded that these events in 2015 were quite enough to inform City Index that Mr G was trading beyond his means – or beyond his capability. The letter in 2015 is not as comparable to the letter in 2018 as he asserts. It is debatable that City Index might or could have considered information about his ill health in a wider sense, beyond the complaint we were addressing at the time, but it is arguably quite a stretch to say it should have formed knowledge of him trading beyond his means when the letter did not state this. In terms of trading beyond his capability, this could be said to be an extension of the suggested duty in the Quinn case that the court did not intend – the court referred to affordability not capability. However, even if such an extension is applied to Mr G's case it must be noted that the letter in 2015 said "… *everything else was put aside …*" in order to prioritise treatment of his serious ill health. It would not have been unreasonable for City Index to conclude from this that Mr G had already taken measures to avoid trading because of his incapability and that it did not need to offer any form of additional protection. Mr G continued to trade after 2015 but City Index could also have reasonably concluded that he did so having self-determined that he had the requisite capability.

I consider that the notice in 2018 drew an express connection between Mr G's serious ill health, its detrimental effect on his trading and his losses being beyond his means. I am not persuaded that there is enough evidence that earlier correspondence or notification to City Index did the same.

Appropriateness

The appropriateness of Mr G's account at the outset (in 2009) appears to have been addressed by this service in his previous complaint. We concluded that it was appropriate. The regulator's rules at COBS 10.4.2 (R) say a firm "… *is not required to make a new assessment* [of appropriateness] *on the occasion of each separate transaction* …" by its client(s), and that a firm that conducts a regulated service complies with the rules for assessing appropriateness "… *provided that it makes the necessary appropriateness assessment before beginning that service.*" The effect is that, but for the exception I address below, City Index was not obliged to monitor or review appropriateness of the account for Mr G after it concluded *the necessary appropriateness assessment* at the outset.

Moving Mr G to a professional elective account arguably involved a change in service. The duty to assess appropriateness must be discharged by a firm at the outset of a service so it follows that a change in service prompts the duty to reassess or review appropriateness for the client. City Index has presented evidence of its appropriateness assessment for the professional elective account. I am not persuaded to doubt its conclusion that the account upgrade was appropriate for Mr G – given that he had been trading CFDs since 2009.

The upgrade also took place on 22 May 2018, around two weeks before his email of 8 June and around four weeks before City Index closed the account (in response to the email). Even if the account upgrade was inappropriate for Mr G, I do not consider that it could have been because of the information in the email of 8 June – that email was sent after the upgrade, City Index reacted to it and essentially reversed its appropriateness conclusion by closing the account. If the account upgrade was inappropriate I also do not consider, on balance, that any meaningful damage arose from it in the four weeks that followed, before the account was closed. Mr G's losses were, in the main, already in place when the upgrade happened.

my final decision

For the reasons given above, I do not uphold Mr G's complaint. I invite him to consider accepting, if he has not already done so, the offer of £150 made to him for the delaying in having his complaint logged. Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 4 April 2019.

Roy Kuku
ombudsman