

Heading:

Decision concerning alleged misrepresentation of product - Forex trading platform - Complaint not upheld

A v H [2013] FDRS April 2013

### **Issue**

The matter before FDR relates to a complaint regarding online Forex trading activity between the Complainant and the Scheme Member.

In particular, the Complainant has alleged that trading via a “[Brandname] Account” with the Scheme Member implies that it was an account not exposed to market fluctuations, and also that the Scheme Member has misled him by specifying an incorrect range of the “spread” (the point difference between the bid and ask price) on its website when trading US Dollar/Swiss Franc (USD/CHF) on 6 April 2012.

This resulted in the Complainant suffering an alleged loss in the amount of \$1,954.23, which he demands the Scheme Member should reimburse.

### **1. Background**

The Complainant and Scheme Member have an online trading relationship via the Scheme Member’s MT4 platform. This relates to a “[Brandname] Account” that the Complainant opened with the Scheme Member on 11 March 2012.

Trading on the “[Brandname] Account” is between the Scheme Member and the Complainant and is governed by the rules set out in the Client Agreement.

On 6 April 2012, the Complainant traded with the Scheme Member for USD/CHF. According to the Complainant, the specifications on the Scheme Member's website of the value of the average spread values on the currency pair USD/CHF on the day was 0.7 - 1.8. The Complainant states that at about 12:29, two of his orders were closed at 0.92122 when the 'stop out' (closure of order due to lack of funds) had been reached. The maximum price for these orders was recorded as 0.92041.

The Complainant states that he had assumed that there was a technical fault, because the difference between the closing price and maximum price was 8.1 points (the fifth decimal is called one point i.e. 0.00001), where the average spread was indicated to be 0.7 – 1.8.

The Complainant has subsequently brought a complaint to FDR on the basis that if there was not a technical failure of the Scheme Member's system, he believes he was misled by the Scheme Member. This is because the Scheme Member then specified an incorrect range of the spread on the day of trading, and did not notify him of any increase in the value spread.

## **2. Position of the parties**

### **Complainant's position**

The Complainant's position is that if there was not a technical failure of the Scheme Member's system on the day of trading, then the Scheme Member misled him by specifying an incorrect range of the spread in the currency pair traded on the day. Simply put, the customer rejects that there could reasonably have been an 8.1 points gap between the price displayed at stop outs and the maximum price, where the average spread was 0.7-1.8.

The Complainant contends that as per the terms in the agreement between the parties, the Scheme Member should have warned the complainant, as a client, of a possible increase in the value of spread. The Complainant states that if he was advised of this by the Scheme Member he would have added funds to the account, which would have resulted in the stop loss not occurring.

The Complainant further contends that also in terms of the agreement between the parties, the Scheme Member must provide complete information about the tools of the trade. The Complainant believes that the Scheme Member did not provide full information on the tools of the trade for the currency pair USD/CHF, and was therefore misled as a client.

The complainant therefore considers that the Scheme Member should compensate him for his financial loss.

### **Scheme Member's position**

The Scheme Member contends that there were no technical problems with any of its services on the day of trading. Therefore, the spread widening was influenced by several simultaneous news items on USD on the day of trading, not by technical problems.

The Scheme Member notes that average spread of USD/CHF for “[Brandname] Accounts” is approximately 0.8 - 2.2 points. Further, the Scheme Member provides the highest dynamic spreads and its performance can exceed the average by 4-5 times.

The Scheme Member further contends that it expressly warned clients on a number of occasions, by way of its disclaimer on the website; and also the Forex's specification page and Appendix 1 to the Client Agreement, regarding the risks involved with Forex Trading. The warnings indicate that transactions with financial instruments may result in losses.

The Scheme Member states that it does not provide fix spread accounts, because there is no fix spreads on the interbank market. The same applies to the maximum spread i.e. it cannot be fixed at any amount of point, because the Scheme Member's liquidity providers (also any other banks or financial institutions) cannot guarantee the Scheme Member any reasonable maximum value of spread.

The Complainant accepted the Client Agreement when he registered his account with the Scheme Member. This contains full information of the risks involved and the terms between the parties when trading in Forex online.

It is the Scheme Member's position that the complainant's financial losses were caused by a sequence of dangerous trading strategies under abnormal market conditions. The Scheme Member cannot be held liable for a client's trading strategy.

The Scheme Member contends that the actions taken were in accordance with the Scheme Member's regulations, and the Complainant's claim is therefore denied.

### **3. Jurisdiction**

I am satisfied that FDR holds jurisdiction to consider this complaint, and jurisdiction is not disputed by the parties.

### **4. Relevant Terms**

The Client Agreement between the parties reads:

1.2 According to the Client Agreement (Agreement hereafter) one party - The Company is liable to give to another party – the client information about instruments state and calculate variational margin using the formula given below taking into

account Client subsequent orders and add it or deduct from Client subsequent orders and add it and deduct from Client trading account which was rendered to him information with good faith and open positions in Company terminal (terminal hereafter).

9.3 The client must understand that if the market moves in the opposite direction of the open positions, the possibility of losses, which amount to the sum of the initial deposit, taking into account additional funds for the maintenance of open positions, is very high.

9.4 Responsibility for use of own resources, as well as the risks, fully borne by the Client.

The Scheme Member's Terms of Business reads:

2.1 The Company provides quotes to the Client in concordance with General Business Terms.

2.2 The Company determines spread for each instrument in the contract specification. Spreads displayed on the webpage of the Company are standard (average), value of standard lot may widen and shorten what depends on the liquidity of the market. The Company is entitled to change spread without prior written notice of the Client.

## **5. Proposed Decision**

I have perused the available information and have also taken note of what information is provided on the Scheme Member's website.

My role as an Adjudicator is to consider matters in light of what is 'fair and reasonable'. That which is fair and reasonable applies to both the Scheme Member and the Complainant.

The Scheme Member has made it clear on its website that it is in business for profit. It is also common sense that it is in the nature of Forex trading that there are some inherent risks, but also a promise of reward. Accordingly, the Complainant must accept some

responsibility on his own part for the risks he took, which are inherent in Forex trading he wished to engage in.

Having said that, the Scheme Member also needs to appreciate that its' clients are members of the public. If the Scheme Member wishes to engage in trade for profit with members of the public, then such trade also carries with it some risks, and responsibilities. It has the duty to ensure that its clients are afforded the kind of protection that members of the New Zealand public is legally entitled to; and it carries the risk that if it fails in this responsibility, then there may be adverse consequences. Put differently, the Scheme Member must assume some form of a duty of care towards its consumers.

The question is how far does this duty extend? Because of the inherent nature of Forex trading, I do not believe it can be reasonably argued that the duty of care extends to include a duty to prevent the Complainant suffering a loss, or even a significant loss.

The duty does however extend to include that the Complainant should be clearly informed of the risks involved in the activity; that the Complainant is at all times provided with all necessary and reasonable information and "tools" to ensure that the Complainant can evaluate and appreciate the potential consequences of his actions; that the information is clear and precise; and that the Complainant will be treated fairly; and not be exploited.

This duty I find has been sufficiently complied with by the Scheme Member in this case.

Returning to the merits of the issue before me, I note that it was well explained in the available documents that the value of "spread" is not a fixed quantity, and its' size is determined depending on the situation on the market. I can therefore understand that there will be fluctuations in market rates between various providers; and also that the exact rates at which liquidation will occur is that set by the broker – in this case the Scheme Member.

Further, the Terms of Agreement between the parties clearly sets out the right of the Scheme Member to change the value of spreads without prior notice to the client. The Terms of the Agreement are clear in this regard.

Further, I could not find any support for the Complainant's contention that a Scheme Member has a duty towards its clients to at least assume some responsibility of advising them of the volatility in the market when it occurs, especially in light of the risks explained to client's when engaging in online trading. A volatile market is one of the risks assumed by anybody engaging in trading.

I could also not find any support for the Complainant's contention that he was misled by the average spread value shown on the website for the particular currency pair on the day of trading. The Scheme Member noted that at 12:30 there was a sudden movement in the market on the day, which caused the stop out and the Complainant's two orders were closed. I understand that 8.1 points, (rather than 8.1 pips - fourth digit after the decimal i.e. 0.0001) between quoted and actually executed market prices is not an uncommon feature in certain fast moving market conditions.

I accept that the Scheme Member cannot show the maximum spread on any day of trading, as this is dependent on the prices received from the Scheme Member's liquidity providers, which in turn is tied to the interbank market.

Lastly, I could not find any support for the Complainant's contention that a "[Brandname] Account" is not exposed to market fluctuations, in light of what I have noted above.

There is insufficient evidence to support the Complainant's case on a balance of probabilities. The Complainant may wish to provide further comment as to these aspects in reply to this proposed decision.

The current view taken by FDR in this case is that the Complainant is unlikely to be successful, on the basis that the Complainant has not proven that the Scheme Member had misled him in any way, or had failed in its duty to inform him of changes in the market on the day of trading. What is clear is that the Complainant was fully informed by the Scheme Member of the risks involved when engaging in online trading.

## **7. Proposed Outcome**

Given my above findings, the proposed outcome is that the complaint be dismissed.

## **8. Final Determination**

I have recorded above FDR's proposed decision, which was provided to both the Complainant and the Scheme Member.

The Scheme Member provided a reply to the proposed decision on 27 March 2013 confirming its acceptance of the proposed decision.

The Complainant provided further comments in reply to the proposed decision on 20 March 2013, and noted that he is not accepting the proposed decision. I summarise the Complainant's reply, in part, as follows:

...

17. SOLUTIONS TO DISPUTABLE SITUATIONS ...

17.10. Any references to the quotes of other companies are not qualified and will not be considered.

...

All this suggests that [Scheme member name] establishes trade rules, and the risks are on the shoulders of the client. The client can not control the accuracy of the information provided. In fact,

trading takes place between the company and the customer by the rules of the company. Company according to the terms of use may be changed at any time and any options trading losses from these changes is only the client.

Spread this fee forex provider with trade customers.  
Spread set not by the market. Value of spread by company.

My requirement is that the company is fully described trading rules considered to be justified.  
Client should not bear all risks not having a clear trade rules.

I have considered these further comments.

### **Discussion**

The proposed decision as recorded above is that the Complainant, in the view of FDR, was unlikely to be successful.

I have taken note of what the Complainant has further stated. However, this does not add any new evidence or different perspective on the matter.

The Complainant concluded that in his view a client should not bear all risks not having clear trade rules. As noted above, I had found that the Complainant was clearly informed of the risks involved in the activity of online trading and at all times provided with all necessary and reasonable information and "tools" to ensure that he could evaluate and appreciate the potential consequences of his actions when trading online. I therefore cannot find that the Scheme Member had misled the Complainant in any way, or had failed in its duty to inform him of changes in the market on the day of trading.

My view remains that the Complainant was fully informed by the Scheme Member of the risks involved when engaging in online trading, and had acted in accordance with the agreed terms between the parties.

The applicable onus of proof used by FDR is the accepted standard of the balance of probabilities. That means, for the Complainant to succeed, the evidence must show it is

more likely than not that the Scheme Member had not acted in accordance with the provisions of the agreement between the parties, and also that it failed to act reasonably and fairly.

The Complainant was not successful in proving that he suffered any loss resulting from any actions, or inactions by the Scheme Member.

For the reasons stated above, FDR must conclude the claim from the Complainant has not been proven, and therefore the complaint to FDR must be dismissed.

Mrs E Vögel  
FDR Adjudicator

April 2013

