

Heading:

**On Line Forex Provider not entitled to modify trade on basis of contract or of what is fair and reasonable. Complaint upheld**

A v R [2015] FDRS Mar 2015

## **Issue**

The dispute relates to the Complainant's alleged loss when trading with the Scheme Member on 24 July 2014.

On the day in question, the Complainant placed 10 buy orders on AUS/USD currency pairing and made a profit on the trades of \$105,950.00 USD. The following day, however, the Complainant noticed a reduction in the profit down to \$17,950.00 USD. The Scheme Member had modified the original opening price of the orders.

The issue is whether the Scheme Member was authorised to modify the Complainant's orders on the basis that the price requested by the Complainant was not representative of the market price received by the Scheme Member.

The Complainant considers that he has suffered a loss of profit of \$88,000.00 USD, due to the actions of the Scheme Member.

## **Background**

The Complainant and Scheme Member has had an online trading relationship via the Scheme Members 'MT4' web based platform since 23 June 2014.

On 24 July 2014, the Complainant was trading via the Scheme Member's platform. He placed 10 buy orders on AUS/USD currency pairing at the price of 0.9442, and closed his position at the prices between 0.9464 and 0.9467. According to the Complainant these orders were accepted, and the orders closed without any intervention from the Scheme Member; and the Complainant made a profit of

\$105,950.00 USD from the trades. However, the following day, the Complainant noticed a reduction of \$88,000.00 USD in the profit. The Scheme Member had modified the Complainant's original opening price of 0.9442 to 0.9462.

The Scheme Member advised the Complainant that by using an arbitrage Expert Advisor (EA), all the accounts, which were opened at 1:45:00 on 24 July 2014, had been adjusted to the real market price of 0.9462. The Scheme Member advised that the Complainant's EA had opened all these trades at a non-market price at 0.9442, which actually is the quote at 1:44:59 according to the Scheme Member's tick history.

The Complainant has subsequently brought a complaint to FDRs on the basis that he was not satisfied with the Scheme Member's explanation and requesting that he be reimbursed for his loss i.e. all profits made on the day of trading.

## **Positions of the parties**

### **The Complainant's position**

The Complainant's position is that the Scheme Member was not authorised to reduce the profits and therefore is bound to add it back. The Scheme Member offered a price and the Complainant traded at such price.

Further, no provision in the contract between the parties allows the Scheme Member to modify already accepted trades. No Buy or Sell Orders were declined and these orders were confirmed in the account statement. Once an order is filled, it can only be subsequently voided.

The contract between the parties envisages that the Scheme Member either 'voids' or 'declines' client orders; both in very special circumstances. Such contractual provision alone should establish that the Scheme Member was not entitled to reduce the profits. In any event, there were no grounds to either void or delete the orders. The trade was a regular one and the prices were representative of the market. The closing prices of all 10 positions on 24 July 2014 were reflective of Bloomberg prices.

They were either completely identical or differed by only 1 pip (fourth digit after the decimal i.e. 0.0001).

Evidence has been produced to show that the price was representative of the market. In contrast, the Scheme Member did not provide any evidence to support its position. Therefore, it should be concluded that the prices were representative of the market.

The Scheme Member's tick history shows that between 1:45:00:001 and 1:45:00:999 the price was between 0.9441 and 0.9466 (the Bloomberg prices showed the prices between 0.9440 and 0.9462). The opening price was therefore available during that timeframe. Further, it is common cause between the parties that it was a time of high volatility. Despite such volatility, the Scheme Member's prices between 1:44:57.542 and 1:45:00:036 remained the same, to the fifth decimal. Then, in one millisecond, the price changed by 6 pips and remained the same for another 266 milliseconds. From then onward, i.e. 1:45:00:309, the prices fluctuated normally again.

The Bloomberg prices' relevance should prevail over the Scheme Member's history ticks in establishing the correct price, as it has always been the correct source of information in all of the past dealings with the Scheme Member. Furthermore, this practice is widely used by other brokers when determining whether a quoted price is correct or not.

It is submitted that the prices were not wrong. However, should the Adjudicator find that the prices were wrong it is common cause between the parties that the Scheme Member can prevent orders from executing at wrong prices. The contractual framework envisages this and in such a case, the Scheme Member is allowed to decline the orders.

In the present case, the Scheme Member argues that the price was wrong, but it did not decline the order. It either means that the price was correct and the Scheme Member subsequently manipulated its prices, or the prices were wrong, in which case the Scheme Member had no authority to void or modify the trades, as it could only have declined the orders, as per its Terms of Business.

## The Scheme Member's position

The Scheme Member's position is that its actions were in accordance with the Scheme Member's "Order Execution Policy"; "Best Execution Criteria and Relevant Elements"; "Speed and Likelihood of Execution"; and its' Risk Disclosure "Internet Trading Risks", and associated regulations. The Scheme Member reserved the right to void orders in the event of (but not only in the event of) software, hardware and internet connection failures; and in cases when the price requested by a client is not representative of the market price received by the Scheme Member.

The contractual provisions allow the Scheme Member to decline a client order, if the price requested by the client is not representative of the market price received by the Scheme Member.

Additionally, as part of the Scheme Member's Risk Disclosure, the Complainant was informed - and agreed - that the Scheme Member reserved the right to void orders in the event of (but not only in the event of) software; hardware; and internet connection failures. This is pointed out on the Scheme Member's website.

The Complainant's trade had been executed at an incorrect price. The Scheme Member would have been entitled to void the trades, but instead opted to only modify the trades. Such actions allowed the Complainant the benefit of the profitable trade. This was fair and just, as it was evident at the time of the Scheme Member's intervention that had the Complainant been able to execute at the correct prices he would still have made a profit anyway, albeit a smaller profit. Such action was fair to the Complainant in the circumstances.

If the trade had been voided by the Scheme Member the Complainant would have had no claim to any profits. The Scheme Member acted in the Complainant's best interest, which he is now trying to use against the Scheme Member. Therefore, the Complainant's actions would instead appear to be in conflict with the principles of equity.

Further, the Complainant cannot impose third party prices on the Scheme Member after having accepted the Terms of Business of the Scheme Member to honour the quotes of the Scheme Member, and not of any other company.

The Complainant was trading on a fixed spread account where the difference between the Buy Price and the Sell Price is maintained constant by the Scheme Member under normal circumstances. Therefore, trying to compare the feed of his account with the floating-spread quotes displayed by Bloomberg is incorrect, as the two are different by definition. Using a third party feed is both biased and irrelevant to the present dispute and is neither fair nor just.

The Complainant's requested quote was not valid at the point in time when his trade was requested. The Scheme Member has already provided quote logs, which demonstrate that the prices requested by the Complainant were no longer available.

With regards to the Complainant's claims as to when his orders were made, it is noted that in the Complainants-Orders-vs-Quote-Feed.pdf, the right-hand side shows when the orders were received by the Scheme Member's server. An order is received by the company when it reaches the companies server, not when the Complainant makes it on his computer.

The requests to open the disputed orders were sent from several different locations via automated software within a time-interval of 0.031 seconds. The positions were requested not by the Complainant directly, but by his software. The Scheme Member and the manufacturers of their trading systems ([Brandname]) have never given any warranties whether such third-party software will integrate and function correctly with their system without causing trouble.

Further, it must be noted that the term 'Orders' does not refer only to trades that have not yet been executed. Trades that have not yet been executed in the Meta Trader 4 Platform (the most popular and widely used FX Trading standard software) offered by the Scheme Member are generally labelled as 'Pending orders' and then separated into an additional four sub-types.

A Screenshot of the Interface of the [Brandname] Platform will show that currently working positions (opened on the market, but not yet closed and currently generating profit/loss) are referred to as 'Orders'.

The Complainant is arguing that he should be awarded wind-fall profits as compensation for the fact that his broker acted in his best interest, instead of voiding

his orders, as it was entitled to. This argument is neither fair nor just and in itself is an abuse.

The Scheme Member has more than sufficiently demonstrated that the Complainant's arguments are biased and speculative in nature, and that those arguments can easily work both ways depending on which third-party price feed one would choose to show.

The Complainant claimed that the Scheme Member re-quoted one of his positions, and therefore the companies systems were therefore able to prevent his trades from opening at wrong prices. That claim is incorrect and once again highly speculative. It only proves that the system had been able to prevent one order from executing at the wrong prices. This does not prove that a malfunction or a breach is impossible.

The point is that the Scheme Member could not have stopped the Complainant's trades with respect to the fact that if a system fails, then human intervention is the next line of defence. The Complainant's orders were executed in such a short time-frame, that a human could not have physically spotted them and prevented them from executing.

The Scheme Member submits that it acted fair and just, and in full conformity with its contractual rights and obligations.

## **Jurisdiction**

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

## **Relevant Terms**

In the Scheme Member's 'Order Execution Policy' the following is noted under sub-headings, which I re-produce hereunder, in part:

### **Scope and Application**

[Scheme member name] will always act as principle when executing transactions for the clients. The Policy will apply whenever [Scheme member name] executes transactions on behalf of professional and retail clients.

[Scheme member name] does not however guarantee that execution at our price will be more favourable than one which might have been available elsewhere.

### **Price**

...[Scheme member name] receives price feeds from some of the world's leading liquidity providers to ensure our clients receive the best possible price quotes. Trade order accepted by [Scheme member name] will be executed at the price requested by the client and at no other price, assuming there are no "slippage" and that the required price is still available.

### **Speed and likelihood of execution**

...If the price requested is not available in the market, the order will not be filled...

...the client's order may be declined by [Scheme member name] if the price requested by the client is not representative of the market price received by [Scheme member name].

### **Slippage**

...[Scheme member name] reserves the rights to void any positions opened and was subsequently closed within 1 minute. Any profit, loss and/or commission fees made through these transactions may be deemed invalid.

## **Proposed Decision**

I have perused the available information and the written submissions made by both parties. I have also taken note of what appears on the Scheme Member's website, and specifically, the contractual terms between the parties.

My role as Adjudicator is to consider matters in light of what is fair and reasonable, as well as what is provided for in the contract and general law. That which is fair and reasonable applies to both the Scheme Member and the Complainant.

It is obvious from the agreement between the parties that the intention of the parties were that the Scheme Member would provide the Complainant with an online platform on which the Complainant could engage in Forex trading. The intention of

the parties was that such trades would be executed at market trends similar to the international market - with the rates tied to its particular liquidity pool.

It is also true that the Scheme Member is in business for profit. It is common sense that it is in the nature of online trading (and computerised systems generally) 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.

The Scheme Member, in turn has the duty to ensure that its clients are afforded the kind of protection that members of the New Zealand public are legally entitled to, and it carries the risk that if it fails in this responsibility then there may be adverse consequences.

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.

**Was the opening price available at the time the Complainant placed his orders? Was the opening price requested by the Complainant representative of the market price received by the Scheme Member?**

Returning to the merits of the issue before me: - on the Scheme Member's website, the various factors that can affect the execution of the financial instruments offered by the Scheme Member are explained. It is also specifically noted that the Scheme Member does not guarantee that execution of a trade at its prices will be more favourable than one which might have been available elsewhere. The Scheme



Member is therefore not bound to use and offer the rates quoted by third parties (such as Bloomberg) to its clients.

However, of concern is that nowhere is it explained to clients that an order is only received by the Scheme Member when it reaches the companies server, and not when the Complainant makes it on his computer.

The Scheme Member contends that the requests to open the disputed orders were sent from several different locations via automated software within a time-interval of 0.031 seconds, and therefore by the time the orders were received by the Scheme Member's server the 0.9442 opening price was no longer available. However, even if the Scheme Member contends that an order is only received by the company when it reaches the companies server and not when the Complainant makes it on his computer, why were the profits only modified the following day?

I accept that according to the Scheme Member's tick history the 0.9442 opening price was no longer available to the Complainant at the time the order reached the companies server, and at that time the price had varied by 6 pips, as noted by the Complainant.

The Scheme Member also notes that the manufacturers of its' trading systems ([Brandname]) have never given any warranties whether such third-party software will integrate and function correctly with their system without causing trouble. However, this is not stipulated on the Scheme Member's website or noted in the contractual terms. In fact, the [Brandname] platform is praised for its reliability, and for having EA features, which traders can develop to automate their trading strategies.

The first question is then whether the Scheme Member's actions were justified, and at the same time fair and reasonable in the circumstances. To consider this, it has to be determined whether the opening positions were generally reflective of the market? In this regard, I am of the view that a 6 pips difference between opening prices in online forex trading between quoted and actually executed market prices is not an uncommon feature in certain fast moving market conditions.

The fact remains that the Complainant had agreed to the Scheme Member's Terms of Business to honour the quotes of the Scheme Member, and not of any other company. I therefore consider that the opening price at the time the Scheme Member's server received the order was representative of the market price received by the Scheme Member.

I am not satisfied however that the Scheme Member has shown why re-quoting did not occur in this instance, if there was a delay. The concept of a 're-quote' would have allowed the Scheme Member to change the requested price to a counter-offer when it realised that the requested price was no longer correct. In terms of the Scheme Member's contractual terms, if a price is not available on the market an order will not be filled. In this matter the order was filled.

The price could instead have been re-quoted due to slow connectivity or declined by the Scheme Member, if the price requested was not representative of the market. This did not happen.

**Was the Scheme Member justified in terms of its contract to modify the trades in the circumstances?**

I am of the view that the Complainant's strict interpretation of the contract to exclude 'modifying' any orders does not take the matter any further. The Scheme Member's right to, in certain circumstances delete or void any trades would not in my view preclude the Scheme Member to modify a trade, if the circumstances are justified, such as when, due to a malfunction, a price is not reflective of the market or the price is not representative of the market price received by the Scheme Member.

Although I accept that the Complainant agreed to the Scheme Member's Terms of Business in return for the use of its online platform, in my view such contractual terms are drafted quite heavily in favour of the Scheme Member.

In determining the outcome of the matter, I am not bound to adhere to the strict interpretation of the contract between parties. I must also give consideration to what would generally be regarded as what is fair and reasonable.

It is true that if the trade had been voided by the Scheme Member the Complainant would have had no claim to any profits. However, the Scheme Member has made out no case to show that it would have been entitled to void the trades either.

The Scheme Member has for instance not demonstrated that a computer glitch or software problem had occurred, which may have entitled it to change the order earlier. As noted by the Complainant, it is perfectly possible for the computer to void or delete an order within, or under a minute. Why did this not happen in this case?

In my view the Scheme Member has two difficulties. The *first* is that even on a strict interpretation of the contractual terms, it could only refuse to honour a trade if it was voided, due to technical difficulties (such as a computer error), or if a trade was received late – in which instance, it had to be re-quoted. Neither of these two scenarios occurred. The *second* is that I find it difficult to see how it can be regarded as fair and reasonable to New Zealand consumers, that the Scheme Member should be able to refuse to honour a trade, a day after it was made, simply because its own computerised systems happened to work in a manner that was not intended. The responsibility should be with the Scheme Member to ensure that, when it wishes to make profit from dealing with consumers that its systems work in a fair and transparent manner.

The Scheme Member is invited to address the issues raised in the decision, which will enable me to come to a fair and just outcome.

## **Proposed Outcome**

Pending further responses from the Scheme Member, my preliminary view is that the complaint be upheld based on what is fair and reasonable.

## **Final Determination**

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

The Complainant provided its acceptance of the proposed decision.

The Scheme Member advised that it disagreed with the proposed decision, and provided the following submissions, which I reproduce, in part:

...a requote would have led to the same result under the circumstances therefore there was no practical difference between what the company did and the requote...

...the 100% bonus promotion provisions allowed the company to void all trades of a client based on the company's discretion if a client used an "Expert Advisor" together with the 100% Bonus.

...when electronic systems fail then the last line of intervention is human intervention and there are a multitude of factors which then have an effect on the timing and speed of such intervention...

...we believe the dispute is not over 6 pips – the dispute is over 20 pips. ...

...The requiting did not occur because the complainant's use of a "Expert Advisor" caused the companies server to "think" that everything was correct with the requested price at the time.

There was no general malfunction in respect of the companies system in that no other client who traded on the specific news event executed a trade at a delayed quote.

The logs kept by the company's server of a client's activity – or in this case the "Expert Advisors" activity clearly indicate that the clients Expert Advisor was searching for latency opportunities...

...the client was aware that an order needs to travel to the server of the company in order to be processed. Sending a large number of requests to a server within a short time-interval can and will increase the load on the said Server and can ultimately cause it to start performing outside normal parameters. ...

The above methods of measuring latency, combined with the fact that the client's EA has been working from several Geographical locations at the same time, indicates quite strongly that the Client's software was able to detect latency opportunities in the Company's server. The method of exploiting [Brandname] systems has been publically known since 2012.

...the client is making the same accusations publically against two other Companies at the same time. We believe that this demonstrates that it is more than likely the complainant is a professional exploring and exploiting wind-fall profit opportunities. ...

I have considered these further submissions.

## **Discussion**

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

The primary reason FDRs reached that view was that on the evidence available, the Scheme Member had not sufficiently shown that it would have been entitled to modify or void the trades in accordance with the contractual provisions set out in the agreement between the parties. There was insufficient evidence to support that the Scheme Member had not caused the Complainant's loss.

The additional arguments presented by the Scheme Member do not change FDRs' proposed decision. While I accept that any client using an online platform would of course also reap the rewards of participating in online trading, and that the Complainant was aware of the implications of agreeing to the 'terms and conditions' between the parties, I am not satisfied that the Scheme Member has sufficiently explained why it was not responsible in these circumstances for payment of the Complainant's profit made from the trades.

The Scheme Member has still not adequately addressed, how it could have modified the trades in the circumstances, and how it could have, should the Scheme Member have chosen to do so voided the trade, due to technical difficulties (such as a computer error), if the trade was received late – in which instance, it had to be re-quoted. The fact remains that neither of these two scenarios occurred. Irrespective of the Scheme Member's contention that the Complainant's software must have been able to detect latency opportunities in the Scheme Member's server, and thereby causing the Scheme Member's server to 'think' that everything was correct. There was no real 'error', for voiding or modifying a trade as allowed for in the contractual terms between the parties.

Therefore, although I take note of the Scheme Member's submission that because the Complainant had used an EA, it had the right to void the Complainant's positions, I do not agree that the circumstances existed in terms of the agreement between the parties that would have entitled the Scheme Member to void or modify the trades. The Scheme Member has also not explained the reasons, which would have entitled it to void the transaction. Having a right to do something in certain circumstances,

only allows one to exercise such right if the said circumstances prevail. In the absence of the required circumstances the right cannot be exercised.

Further, I find it difficult to accept on grounds of what is fair and reasonable that the Scheme Member should be able to refuse to honour a trade, a day after it was made, simply because its own computerised systems happened to work in a manner that was not intended.

The Complainant made an offer to purchase at a particular price point, and that was accepted by the Scheme Member when the trade was executed (albeit at a different price). This caused there to be a contractual obligation on the part of the Scheme Member for what the Complainant accepted, price wise. When applying the principles of contract law, a contract was formed. The Scheme Member breached such contract. Therefore, it is not really of great importance whether there were a 6 pips or 20 pips difference.

Therefore, whether one considers this matter on a strict interpretation of the contract between the parties or on what can be considered fair and reasonable, I can only conclude that the Scheme Member's actions were not justified in the circumstances, and therefore it naturally follows that the Complainant is to be reimbursed for the profits made on the day of trading. I do not consider that there were any misunderstanding about the terms and conditions imposed.

If this is a recurring exercise or occurrence with clients as alleged by the Scheme Member, perhaps it is time for the Scheme Member to address this issue with its' systems administrator.

The applicable onus of proof used by FDRs is the accepted standard of the balance of probabilities. That means, in the Complainant's case, 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. There is insufficient contrary evidence that the Complainant's loss had not resulted from any actions by the Scheme Member.

For the reasons stated above, FDRs must therefore conclude the claim from the Complainant has been sufficiently proven (and not refuted by the Scheme Member), and the complaint to FDRs is upheld.

Accordingly, the Scheme Member is directed to reimburse the Complainant's loss suffered in the amount of \$105,950.00USD. If the reduced profit amount of \$17,950.00 has already been paid by the Scheme Member, then the balance of \$88,000.00USD is to be reimbursed to the Complainant by the Scheme Member.

Mrs E Vögel

FDRs Adjudicator

March 2015