

Heading:

Decision concerning customers alleged losses when trading - Forex platform - Complaint upheld

A v Q [2015] FDRS Jan 2015

Issue

The dispute relates to the Complainant's alleged loss when trading with the Scheme Member on 18 April 2014.

On the day in question, the Complainant was trading in online "gold instrument" when a profit made on the trade was not reimbursed by the Scheme Member, after the Complainant requested a withdrawal from his account. The Complainant's account was subsequently closed by the Scheme Member.

The Complainant considers that he has suffered a loss of profit made in the amount of \$7,184.26USD due to the actions of the Scheme Member, which he demands the Scheme Member should reimburse.

Background

The Complainant and Scheme Member have an online trading relationship via the Scheme Members [Brandname] platform. There is no written agreement between the parties, as the account was opened online.

There are two limited liability companies of relevance, both registered as [trading name]. One is registered in New Zealand ([Company Name] NZ) and a second in [other location] ([Company name Offshore]). Only [Company Name] NZ is a Scheme Member. [Trading name] was previously the name of [Company name Offshore]. The Complainant considers that he is owed money by [Trading name] (whichever company that may be) which the Scheme Member refuses to pay.

On the day in question, the Complainant was trading in online gold instrument when the profit made on the trade was not reimbursed by the Scheme Member after the Complainant requested a withdrawal from his account.

The Scheme Member deducted the transaction fee from the Complainant's trading account, but the Complainant did not receive the withdrawal. The Complainant was advised that the Scheme Member suspected that the account was used for money laundering and that the Complainant was required to provide evidence for clarification. The Complainant followed up the request and sent the information, but did not receive any outcome from the Scheme Member or receive the withdrawal to the his personal account.

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

Positions of the parties

The Complainant's position

The Complainant has provided evidence that the [trading name] website refers to the "provider" being a member of the FDRS. A brochure has also been provided with the FDRS logo and emails from the director of the Scheme Member indicating that the provider was within the FDRS Scheme.

The Complainant has also provided evidence of the trade in question and the amount of the loss suffered. He therefore considers he is entitled to be reimbursed by the Scheme Member for his loss.

Scheme Member's Position

The Scheme Member's initial position was that any of the Complainant's funds have not been deposited with [Company Name] NZ and that trading has only been with [Company name Offshore]. The Scheme Member therefore disputes there is jurisdiction for FDRs to consider the dispute on the basis that

any relationship, which exists is between the Complainant and [Company name Offshore].

It has also been submitted that one of the Scheme Member's directors were in hospital during the time that the Complainant alleges doing business with [Company Name] NZ and that without any business set up or staff for that company, it is an impossible claim.

The Scheme Member's position is also that it would have been impossible for the Complainant to have been able to transfer any funds for depository purposes into [Company Name] NZ, as during the months of January and March its' director was hospitalised with a life threatening illness. It was therefore not possible for the Scheme Member to have approved any client under [Company Name] NZ, nor could funds be deposited as there was no bank account open. Therefore, due to the sole director at the time being hospitalised there could have been no bank account opened for the Scheme Member in order to on-board clients to request any bank transfers to be made into the Scheme Member entity but customers or from any other sources.

The website has been for [Company name Offshore] and was set up for that entity two years ago. The Scheme Member had not had access to the website, paid for the website or requested information to be added to the website nor has the director of the Scheme Member ever accessed it for any reason. There had been no request from the Scheme Member to add information on to the site either. The director of the Scheme Member does however accept that any document stating that the Scheme Member was a member would be correct.

The Scheme Member contends that the Complainant's came on board first as an IB under [Company name Offshore] and were going to transfer to a Corporate agreement in March via [separate entity name] and then move under [Company Name] NZ.

During the time the Scheme Member's director was in hospital i.e. 4 January to mid-March there was a pattern of opening accounts at a time with only two funding via a payment system, which takes three weeks for funds to land.

The Complainants would then make a withdrawal the following day 20 days before the Scheme Member received the funds, or they would make one or two trades then withdraw – again a long time before the Scheme Member received their funds.

Stolen credit cards were also used and due to the method of the setup/transaction/withdrawals the Scheme Member thought it was suspicious (withdrawals had been sent before the director of the Scheme Member had been discharged from hospital. These withdrew and did not fund again. At the time the director of the Scheme Member had asked the IB if they would not be moving to a [Brandname] account as agreed which they agreed to but did not actually do.

The Scheme Member then requested a statement from the complainant to show the origin of the funds, as the Scheme Member was of the view that it possibly looked like money laundering, especially with the method of payment and immediate withdrawals. In addition, the Scheme Member also received false information on transfer amounts coming in. The Scheme Member contends that it had not received any information requested on where the Complainant had transferred money to.

The Scheme Member's last position is that it does not know the Complainant, thereby denying that there was ever any contractual relationship between the parties.

Proposed Decision

I have perused the available information and have taken note of the case made by each party.

The purpose of the FDRs scheme was designed with consumer protection in mind. Therefore, 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. However, when considering this, I am not bound by strict legal forms or technicalities.

Before it can be determined whether the Scheme Member was responsible for the Complainant's loss, it must first be established whether the Complainant had in fact contracted with the Scheme Member and not [Company name Offshore]; and whether there was any misrepresentation on the part of either of the Companies.

Was there misrepresentation by [Company name Offshore] or [Company name] NZ?

It is evident from the information provided by the Complainant that the [trading name] website referred to the "provider" being a member of FDRs. A brochure provided to the Complainant at the time showed the FDRs logo and emails from the Scheme Member indicating that the provider was within the FDRs Scheme. Therefore, for all intents and purposes, it would not have been unreasonable of the Complainant to have believed that he was in fact contracting with [Company name] NZ. The Complainant had opened his account online, based on this information provided to him.

In my view, the Scheme Member had indeed represented to the Complainant that it was part of the FDRs scheme; and had allowed such representation to be repeated in promotional material relating to an associated company ([Company name Offshore]). There was no distinguishing made between the Scheme Member and [Company name Offshore] on the information provided. The insinuation was therefore that both companies were part of the scheme – or that the company with which the Complainant would be dealing (whichever one that may have been) was in fact a Scheme Member. Such conduct constituted a misrepresentation of the correct fact to the Complainant. I need not determine whether such misrepresentation was intentionally or negligently made.

The Scheme Member contends that the relevant funds were in fact banked through [Company name Offshore], and not [Company name] NZ, and that a bank account was never opened for [Company name] NZ. Same begs the question why the Scheme Member was then advertising on its website that it was a member of the FDRs scheme.

The Scheme Member has further referred to an Agency Agreement (allows agents to act as independent brokers to refer new business to [Trading name] in return for a commission) entitled 'Referral Agreement', in which the Scheme Member's [Offshore] details are recorded. No reference is made to NZ or FDRs. In terms of the agreement, the agents only held an agency to refer clients to [Company name Offshore]. I can accept that without authority to refer clients to [Company name] NZ, it is difficult to see how the Complainant would have become a client of the Scheme Member, as the agreement is also governed by the law of [Offshore location]. However, this is an agreement between [Company name Offshore] and the agents, and not the Complainant. Whatever the Scheme Member and the complainant did thereafter, had nothing to do with the agency agreement, and the relevance of the evidence is therefore unclear to me.

At the relevant time of the events, which form the subject matter of this dispute, [Company name] NZ was still a registered Scheme Member. However, [Company name] NZ has since deregistered as a financial service provider on [date] 2014 under section 18(2) of the Financial Service Providers (Registration and Dispute Resolution) Act 2008.

In my view the Complainant acted reasonably by relying on the Scheme Member's representation that the relationship between the parties was governed by the FDRs scheme. Such reliance led the Complainant to believe he was contracting with a registered Scheme Member, which in this case is [Company name] NZ.

The Scheme Member has not provided adequate evidence to show that it had not misrepresented the correct position to the Complainant; or that the Complainant could not reasonably have relied on the representations made. The Scheme Member is invited to provide additional evidence, if any, to prove the contrary.

Is the Scheme Member responsible for the Complainant's loss?

Again, from the limited information available, I cannot find any substantiated reason why the Scheme Member could have refused reimbursing the Complainant with the profit he made, when the withdrawal request was made.

The Complainant has provided a spreadsheet of the trades on the day in question, and proof of the amount of his loss. The Scheme Member has not provided any evidence to challenge the accuracy of the information provided by the Complainant. Without any contrary evidence, I must find that the Complainant has proven his case on the balance of probabilities.

Proposed outcome

If no further information can be provided by the Scheme Member or any further clarity on the issues raised, the current view taken by FDRs in this case is that the Complainant's case is upheld.

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:

[Company name] NZ was opened by [Trading name] Group at the request of [Director name] due to his requirement to place certain corporate clients under this jurisdiction. However none of these clients ever materialized though [Trading name] Group was informed by [Director name] that the clients wanted to wait for six months before depositing funds. Due to this there was never any trading platform, employees or website for this New Zealand entity, and certainly no client depository account – for all intents and purposes it was a shell with a license—it would remain this way until corporate clients expressed interest to work with this company.

Shortly after opening this entity there was also a request to open a third subsidiary of [Trading name] Group (actually a subsidiary of [Company name] NZ. [...] [Trading name] Group was informed that this entity was to be used by a specific client of [Director Name] and this entity would sit underneath [Company name] NZ. [Trading name] Group was informed that both New Zealand companies required 2 Directors minimum and so [Director 2 name] agreed to act

as second Director until a suitable replacement was found by [Director name] (which would in fact be his client).

[Trading name] Group was never informed that [Director name] had removed himself as a Director of both companies six days after establishing Capital One FX in New Zealand. There was no notification from any Government body nor any correspondence from [Director name] regarding this. We only established this through the adjudicator pointing this out in recent correspondence. In fact we can clearly see the person he used to do this '[name]' was his old Personal Assistant from a previous company.

[Trading name] Group was shocked at how these two entities can be established with [Director name] as the initiator and then secretly removing himself as a Director – six days after a company is established. This is extremely suspicious indeed.

...

[Director 2 name] was hospitalized from January 4th with a life threatening illness (as has already been established) and incapacitated until around June/July. Therefore as the sole Director of [Company name] NZ it is impossible that this entity could have conducted any form of business during this time (or indeed after).

As has been noted, [Trading name] Group requested [Director name] to submit financial reports for both New Zealand and Offshore entities (as [Trading name] Group assumed that he was still a sitting director in New Zealand). [Director name] failed to send a single financial report for any of the companies.

...

[Trading name] Group requested that [Director name] provide documentary evidence of the [Nationality] complainant's existence. He was unable to provide any LIVE trading statements or records of any deposits into [Trading name] Group (none of its companies) nor any identification of the complainants. As may be seen with the correspondence in possession of the adjudicator, correspondence was requested on multiple occasions from the complainants as there is not a single record or trace of them which [Trading name] Group could find.

In addition to the above we can clearly see [Director name] responding to the adjudicator and the FDR in general stating that these clients are under [Company name Offshore], again we find no record of them.

At this stage we believed that we found [Director name] claiming that the clients were under [Company name Offshore] and the clients stating that they were under New Zealand. However, as above there is no physical record of these clients' bank transfers nor anything provided by [Director name] to suggest that these clients are under [Company name Offshore].

We trust that this explains why [Trading name] Group or any of its subsidiaries cannot provide documents pertaining to the complainants nor can provide any evidence of them being clients under any entity linked to [Trading name] Group.

...

[Trading name] Group's position is that any email correspondence may have been doctored and in addition [Trading name] Group has had no access to the website which has been solely operated by [Director name].

Our attorney advised us only to provide documentary and not email evidence to the adjudicator as anything on email may have been doctored. There are certainly no records of any brochures or contracts being sent to any of the [Offshore location] claimants.

...

It is [Trading name] Group's belief that the [Offshore location] claimants may have used this or another payment system which [Director name] fraudulently created under the guise of being a current Company Name NZ] Director. This is certainly not a system known to or created by [Trading name] Group or any subsidiaries.

There was also an email sent by [Director name] pertaining to a trading event which cost [Company name Offshore] a substantial amount of money – he also later stated (months later) that he had transferred \$19,000 without permission to unknown persons who had made claims about their own losses during this time. In order to clarify these amounts [Trading name] Group contacted [Company name Offshore] Prime Broker to ascertain the exact amount and reasons for the trading event – the Prime Broker stated that there was no such event. Due to this a minimum of \$19,000 has disappeared from company accounts – which have never been sent by [Director name] despite numerous professional requests from both [Trading name] Group and personal requests from its other two shareholders.

Due to the above, [Trading name] Group also requested the Prime Broker to disclose the full amount of deposits which it was holding under the [Company name Offshore] trading account – the total was lower than even the [Offshore location] claimants are stating – thus their funds could not have been used to trade in a LIVE trading environment which explains why there is no evidence of their accounts. [Trading name] Group has asked [Director name] to provide the claimants account statements yet has not done so over a number of months.

[...]

It is the view of [Trading name] Group that the [Offshore location] claimants have certainly not been clients of [Trading name] Group or its subsidiaries, but in fact clients of [Director name] who has been fraudulently claiming to be a Director of [Company Name] NZ which is effectively a shell company.

[Trading name] Group attorney suggests that the information and evidence above (as well as statements from [Trading name] Group and others) be added to the FDR cases of the [Offshore location] claimants and criminal charges filed in New Zealand against [Director name], and in addition to inform ASIC about his actions.

The attorney is also discussing with [Trading name] Group on the way forward to open a criminal case against [Director name] in [offshore location] having it seems established a Ponzi scheme.

[Trading name] Group believes it to be in its and FDR's best interests to collaborate and ensure [Director name] repays everyone in full. Our company accounts have been wiped dry by [Director name] and our name and reputation tarnished severely by his actions.

...

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, it had been established that the Scheme Member had not acted in accordance with the contractual provisions set out in the agreement between the parties, and 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. I accept that the Scheme Member has a strong view that the Complainant has not sufficiently explained its connection with [Company name] NZ, but a strong view on the matter is not sufficient. I find that the Complainant has provided sufficient evidence of unlawful or unreasonable conduct on the part of the Scheme Member.

It is clear that when reading the Scheme Member's submissions that there was internal conflict between the Directors of the [Trading name] Group, however that does not detract from the fact that the Complainant had suffered

a loss when contracting with the Scheme Member, whether it might have been [Company name Offshore] or [Company name] NZ. The Complainant made a profit to which he was entitled to as a result of a regular and profitable trade. Does it mean because there was internal conflict amongst the Directors that this absolves the Company from its responsibilities towards its' clients? Who should then be responsible for reimbursing the Complainant's profit?

The Scheme Member has not in my view adequately explained why it was not responsible in the circumstances for payment of the Complainant's profit. No steps were taken to rectify the situation in compliance with the agreed terms between the parties. In fact, there were limited or no communication from the Scheme Member at the time, which left the Complainant with limited options to recover his profit made. The contrary argument provided by the Scheme Member is insufficient to show no irregular activity on its part. To the contrary, the allegations that a "rogue" director was allowed to trade in New Zealand under the name and style of the company, while using the company's trading platform and business model, while misrepresenting the company, only serves to confirm the responsibility of the Scheme Member to the Complainant. The purpose of consumer protection legislation is to protect consumers against such occurrence. It is no defence to claim a lack of internal control within the company, which was the Scheme Member.

The Scheme Member stated:

[Trading name] Group was informed that both New Zealand companies required 2 Directors minimum and so [Director 2 name] agreed to act as second Director until a suitable replacement was found by [Director name]...

This approach by the Scheme Member is not acceptable. In New Zealand any Director of any company carries the same statutory and common law duties (including fiduciary duties) and a director cannot be heard to say he was only standing in temporarily.

Further, nowhere in the Scheme Member's written submission has it denied that the Complainant had in fact made a profit from his trade.

I am not satisfied that the Scheme Member had sufficiently shown on the balance of probabilities a contrary view why the *bona fide* Complainant would have contracted, or thought he was contracting with [Company name Offshore] in the circumstances, rather than Tarsier FX NZ.

As noted in the proposed decision above, when considering what was advertised or marketed on the Scheme Member's website and brochure, a reasonable person would have been under the impression that the agreement and contractual relationship was with [Company name] NZ, rather than [Company name Offshore].

The Scheme Member had in my view intentionally or unintentionally acted unreasonably or unlawfully by not reimbursing the Complainant's request for the withdrawal of the profit.

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, and also that it acted unreasonably; or unlawfully.

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.

In my view, the Scheme Member's failure cannot be described as having been fair and reasonable in all the circumstances, having regard to; the law; relevant industry codes of practice; and good industry practice.

There is insufficient contrary evidence that the Complainant's loss had not resulted from any actions by the Scheme Member. If anything, the submissions provided by the Scheme Member indicates it is more probable that not that the Scheme Member allowed the Complainant to suffer a loss, due to the actions of an unsupervised (by the Scheme Member) and uncontrolled employee and/or director.

Lastly, I take note of the Scheme Member's request to proceed to investigate the other Director of the Scheme Member at the time, or to do a more in depth criminal investigation into the other Directors' dealings. However, it is not within FDR's jurisdiction to widen its investigation for those purposes. The Regulations only allow FDRs to investigate individual complaints within the statutory framework. FDRs does not have inherent jurisdiction to pursue other matters.

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 \$7,184.26USD.

Mrs E Vögel
FDRs Adjudicator

January 2015