

Heading:

Decision concerning cancelled trades - Forex trading platform - Complaint not upheld

A v H [2013] FDRS Mar 2013

1. **Issue**

The dispute relates to the Complainant's alleged loss when trading with the Scheme Member on 16 May 2012.

On the day in question, the Complainant was engaging in online foreign exchange trading, and made a profit of 43,405.00 USD. These profits were however not credited to his account.

2. **Background**

The Complainant has a registered trading account with the Scheme Member. He has been a customer of said company since 31 May 2011.

On 16 May 2012, at about 12:30 local time, the Complainant started trading via the Scheme Member with an initial amount of 1,030.00 USD.

The Complainant states that after nine trades he made a profit of about 600 USD. On his account the statement showed 1,600.00 USD.

Shortly thereafter, the Complainant received an introductory email from the Scheme Member, introducing his new Senior Relationship Manager, and offering the Complainant assistance if required. Nothing further was said in the email.

The Complainant states that he continued to trade until 18:28 hours and at that point his account showed 44,544.92 USD.

When he returned to his computer and opened the Scheme Members application at 19:45 hours he was shocked to see that his account only showed a balance of 998.00 USD. This was almost the same amount he started the day with.

The Complainant then made another two trades to check whether the system was working properly. The Complainant states that these two trades were all that was left by the Scheme Member in the log file of his trades of that day.

The Complainant contends that he subsequently had difficulty getting feedback from the Scheme Member after sending a screen shot of his account for the day. He received a reply on 6 June 2012.

The Scheme Member advised that there occurred a malfunction of the system and that some trading orders were executed at incorrect prices, which prices were unrelated to actual trading prices on the day. The Scheme Member explained that the erroneous prices were supplied by one of its liquidity providers - which name could not be disclosed.

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

3. Position of the parties

Complainant's position

The Complainant's position is that it is rather peculiar that after he had made a profit it had been deleted without any sign of the log file of his trades for that day. He received no prior notice.

It is also peculiar that unprofitable trades made later on in the day had been preserved.

The Complainant is not satisfied with the Scheme Members explanation and would like his transactions on the day to be reinstated.

The Complainant is also highly disappointed with the Relationship Manager who earlier in the day introduced herself to be available to attend to any problems, but neglected to warn him that there was a technical issue on the day.

The Complainant suspects foul play on the part of the Scheme Member and would like FDR to widen its investigations to conduct a full survey of the day to include all of the Scheme Member's customers, and an investigation into the Scheme Member's business practices.

Scheme Members position

The Scheme Member's position is that erroneous transactions occurred due to technical problems experienced on the day of trading. This led to the execution of orders on the Complainant's account at prices, which did not correspond to actual trading prices. While the Scheme Member's trading system implements a filter earmarked for detecting out-of-market prices and removing them from the system's price-feed, the program did not perform its functions properly.

The technical issues were caused by the fact that The Scheme Member had been receiving erroneous prices from one of its liquidity providers. As per the company's standard risk management procedure the trading system automatically blocked the liquidity provider delivering incorrect values, and also removed the incorrect values from the system.

In adjusting the execution price to bring it to conformity with the actual trading prices available at the time, the Scheme Member was acting in compliance with its Customer Agreement and Terms of Business. These agreements regulate matters pertaining to trading with the Scheme Member.

The Scheme Member contends that the results achieved in the account of the Complainant were obtained only because of technological errors, and did not reflect fair trade.

The Scheme Member submits that all the trades, which had been executed at incorrect prices, were avoided as per clause 6 of the Customer Agreement.

The Scheme Member contends that as per the standard [name] account opening procedure, the Complainant was fully informed of the risks associated with trading in Forex on a leverage basis. He expressly accepted these risks by agreeing to the account opening documentation.

The Scheme Member has provided an example of one of the trades executed on the Complainant's account on 16 May 2012. When real prices existing on the market were applied, a loss instead of a profit is shown. The Scheme Member has also shown that when it adjusted the positions held on the account of the Complainant on the day in accordance with actual prices of the liquidity pool, it resulted in a negative balance on the account of -\$1,800.00. As a gesture of goodwill, the Scheme Member restored the balance of the Complainant to zero – effectively absorbing the loss amount.

The Scheme Member contends that the Complainant must have suspected his orders were being executed to his advantage at erroneous prices. That would explain why the Complainant immediately increased the volume of his transactions. The Scheme Member notes that from the

time the Complainant started trading with the Scheme Member up until the period in question, he had never used such an aggressive and risky strategy. The Complainant's history shows no similar periods of successful trading.

The Scheme Member respectfully suggests that the Complainant's actions' clearly shows an intention to generate profit from a system malfunction. This constitutes an express breach of the Complainant's agreement, and constitutes a circumvention of fair trading practices accepted in the industry.

The Scheme Member submits that it acted in full conformity with its contractual rights and obligations, more specifically, as per clauses 6, 13 and 14 of the Customer Agreement for ECN/STP types of accounts.

4. Jurisdiction

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

5. Relevant Terms

The Scheme Member's Terms of Business for ECN/STP types of accounts reads at article 8.6:

"The Company may resolve all Disputes:

- (a) By crediting/debiting the Customer's Trading Account;
- (b) By re-opening erroneously closed positions;
- (c) By deleting erroneously open positions or placed orders.

The Customer Agreement for ECN/STP types of accounts reads at clause:

6. BUSTED TRADES: The Scheme Member shall have the right to annul and/or reverse any trades which are deemed untrue or opened at a fictitious price not existing on the market at the time of opening.

13. THE SCHEME MEMBER'S RESPONSIBILITIES: The Scheme Member will make all possible endeavours to execute trading orders placed by the Customer. The Customer hereby understands that The Scheme Member is unable to guarantee the execution of the Customer's orders or requests and that the Customer will not hold The Scheme Member liable for any failure in the execution process. The Scheme Member shall not be liable to the Customer for any claims, losses, damages, costs or expenses, including attorney's fees, caused, directly or indirectly by any events actions or omissions, including, without limitation, claims, losses, damages, costs or expenses, including attorney's fees, resulting from... market conditions, inability to communicate with any relevant person or any delay, disruption, failure or malfunction of any transmissions or communication system or computer facility, whether belonging to The Scheme Member, the Customer, any market, or any settlement or clearing system The Scheme Member will not be responsible for delays in the transmission of orders due to a breakdown or failure of transmission or communication facilities, electrical power outage or for any other cause beyond The Scheme Member's control or anticipation. The Scheme Member shall not be liable for losses arising from the default of any agent or any other party used by The Scheme Member under this agreement.

14. THE SCHEME MEMBER'S RIGHTS: A customer acknowledges that The Scheme Member has the following rights:

- To reject any order or instruction the customer may place.
- To cancel or adjust the transaction of the customer.
- To provide the customer's account with any trade requested or deemed necessary by The Scheme Member.
- Notwithstanding any other provisions of this agreement, The Scheme Member shall be entitled to restrict access to, impose limits on, suspend, stop, or cancel trading in the [name] ECN marketplace trading system (including, without limitation, discontinuing the customer's use of the API) other generally or of particular currency pairs, transactions or customers, or to discontinue transmission of any or all information. The Scheme Member

may refuse to facilitate or proceed with any transactions or refuse access to the [name] ECN marketplace trading system at the Scheme Member's sole discretion, as a result of any of the following:

- Full or partial failure of the [name] ECN marketplace trading system, including failure of the technology constituting the marketplace trading system or any other communications linked to the [name] ECN marketplace trading system and the customer and/or any of the counter parties, or any other circumstance which is deemed impractical to use the [name] ECN marketplace trading system.
- ...
- Any such actions taken by The Scheme Member in accordance with this section, shall continue for such a time period as The Scheme Member reasonably determines it to be necessary.”

6. Proposed Decision

It is clear from the terms of the agreement quoted above that the contract between the parties has been drafted heavily in favour of the Scheme Member.

In my view the purpose of the FDR scheme was designed with consumer protection in mind. Therefore, I have to consider principles of what is 'fair and reasonable' in the circumstances and am not bound by strict legal forms or technicalities. I must apply the Financial Service Provider – Reserve Scheme Rules 2010. Rule 25 sets out the “basis for final decisions under reserve scheme”, and holds:

(1)A scheme adjudicator must make any final decision on a complaint in light of what is fair and reasonable in all the circumstances and having regard to:

- (a) the law; and
- (b) relevant industry codes of practice; and

(c) good industry practice

(2) However, the scheme adjudicator is not bound to give effect to strict legal rights or obligations or to legal forms or technicalities.

From the available evidence, it appears that the Scheme Member experienced a malfunction or technical issue on its system on the day of trading.

Whether or not the Complainant suspected an issue, the fact is he carried on trading, until eventually closing his last trade for the day on or about 18:28, as per the screen shot provided.

Another two trades were made after the system was corrected, as noted by the Complainant, in order to check whether the system was working.

Although it is not clear how long the system malfunction lasted, or how or when, it realised that the prices obtained from one of its liquidity providers were erroneous on the day, the Scheme Member had placed the Complainant back to his starting position for that day, as per the Customer Agreement, and he was therefore not left in a less favourable position than he was prior to the day's trading.

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, even with the rates tied to its particular liquidity pool.

It is clear from the terms of the agreement that both parties foresaw when they entered into the agreement, the possible risk of system malfunctions. The parties agreed that such malfunctions could be corrected unilaterally by the Scheme Member, if such malfunction led to trading at non-market related prices.

There was no basis, in contract or fairness, upon which it can be argued that the Complainant would be entitled to profit from system malfunctions.

There were few options open to the Scheme Member to correct the situation once the error occurred. Therefore, in the circumstances and taking into account the agreed terms and conditions between the Complainant and the Scheme Member, I find that placing the Complainant back into the position before trading commenced on that day is 'fair and reasonable'.

The Scheme Member provided The Scheme Member's trading server logs showing one of the trades executed on the account of the Complainant. When real prices existing on the market were applied a loss instead of a profit is shown.

The Scheme Member has also shown that when it adjusted the positions held on the account of the Complainant on the day in accordance with actual prices of the liquidity pool, it resulted in a negative balance on the account of -\$1,800.00. The Complainant has not provided anything substantial to the contrary to disprove this contention.

Without any further evidence, there is no proof of foul play on the part of the Scheme Member.

I take note of the Complainant's request to also investigate other similar complainants, or to do a more in depth criminal investigation into the Scheme Members dealings. It is not within FDR's jurisdiction to widen its investigation for those purposes. The Regulations only allow FDR to investigate individual complaints within the statutory framework. FDR does not have inherent jurisdiction to pursue other matters.

I find that the Scheme Member has adequately justified its actions in accordance with the contractual provisions as set out above.

7. Proposed Outcome

For those reasons, the complaint is 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 19 February 2013. The Scheme Member provided its written acceptance of the proposed decision, but made the following note:

There was never "foul" play or any criminality as is being suggested - what is and has always been the issue is a disgruntled client making false and defamatory allegations without any proof to back up those allegations - the fact that this was even mentioned in the decision concerns us. For that reason we would like the offending references and paragraphs removed from the decision.

I have noted the Scheme Member's objection to the wording "foul play". The fact is that the Complainant has used this term as part of its complaint to FDR.

It is not a phrase that FDR chose to use. FDR was tasked with investigating the complaint as phrased by the Complainant, and it is unavoidable that the complaint as phrased by the Complainant had to be repeated. It would defeat the purpose of the Act, if FDR were to re-phrase complaints in a manner that suited the Scheme Member. Accordingly, the wording of the determination cannot be amended.

The Complainant provided further comments in reply to the proposed decision on 5 March 2013, and noted that he is not accepting the

proposed decision. I summarise the Complainant's reply, in part, as follows:

- a) ...
- b) The Scheme Member fails to show the source of these "true" market prices. If they were those of the liquidity provider, then I kindly ask you to disregard these as evidence.
- c) For comparison, I would like to see price quotes from a respectable third party in the international FX market for each relevant point in time when the trades were opened and closed.
- d) In the absence of such relevant data, the prices made available by the liquidity provider at the time of the trades should be regarded as "true" market prices – just as they were treated by the [sic] me at the time of my trade sessions. ...

I do continue to maintain that the trading practices, as well as the IT system and infrastructure of The Scheme Member should be the subject of a thorough and comprehensive investigation by the relevant authorities. ...

... I still claim that this company is totally unsuitable to operate in the international financial market. ...

On the same day, the Complainant also provided the following further comment:

In the world of FX **there is no such a thing as exact to the pip market prices.** The reason for this is basically that these prices are not quoted on a certain **single** price setter exchange, like shares for instance, but rather OTC (over the counter), which means that there is no centralised price setter entity, but rather each individual ECN type broker, such as The Scheme Member, sets its own in-house prices. This is clearly shown if a trader subscribes to many service providers: at any given point of time the prices can vary in a great extent from broker to broker, sometimes many pips. For this reason the customer has no means to determin [sic] what the "true" market price is at any given time.

Consequently, when selecting a broker, the choice made by the customer is not determined by what "market price" it gives, but much more important is what **spread** between the bid and offer prices it applies. Obviously, there are other criteria, such as speed, reliability, reputation, etc. as well.

On the basis of this very fact **the prices given by each individual house are treated by the customer as "true" market prices with respect towards the opening and closing of a certain trade via this broker at all times.**

What is the real meaning of this argument? This means that **every single broker has to bear the consequences for the prices it quotes to the customer**, whatever is their relation to other quoted prices in the general market.

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.

The primary reason FDR reached that view was that on the evidence available, it had not 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 any default on the part of the Scheme Member.

I accept that the Complainant has a strong view that the Scheme Member has not sufficiently explained its actions on the day of trading, but a strong view on the matter is not sufficient. I find that the Complainant has provided insufficient contrary evidence. Although, as noted above, the contract between the parties has been drafted, in my view, heavily in favour of the Scheme Member, the Complainant was well aware of the terms when he entered into this contract with the Scheme Member. Further, it has not been sufficiently shown that the Scheme Member has not acted in accordance with these agreed terms in this circumstance.

I have noted what the Complainant has stated about the meaning of the “true” market price, but this has not taken his case any further. The issue remains whether the Scheme Member was acting in compliance with its Customer Agreement and Terms of Business.

The Scheme Member has adequately explained how the error of the prices occurred and what steps were taken to rectify the situation in compliance with the agreed terms between the parties. The contrary

arguments provided by the Complainant do not amount to evidence, and is not sufficient to show any irregular activity on the part of the Scheme Member.

The applicable onus of proof used by FDR 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 acted in accordance with the provisions of the agreement between the parties, and also that it acted reasonably and fairly.

Possibility is insufficient. Probability is required. There is insufficient evidence that the Complainant's loss resulted from any actions 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

March 2013