DRN-4689873

The complaint

Mr B complains that CMC Spreadbet Plc put pressure on him to be categorised as an elective professional client – this has exposed him to additional risks and has resulted in a considerable negative balance on his account.

What happened

Mr B has a spread betting account with CMC which he opened in July 2017. In April 2018, his client categorisation changed from that of a retail client, to a professional client.

On Friday 6 March 2020, Mr B opened a position in crude oil and had around £20,000 credit on account. But following dramatic market movement, when the market reopened in the evening of Sunday 8 March, Mr B's oil positions were closed out. And the next morning, other positions were closed too. As Mr B lost over £88,000, not only did this mean he lost his c£20,000 balance, it also left him owing more than £66,500 to CMC.

On 11 March, CMC called Mr B to let him know about the negative balance and left a voicemail. Mr B says he emailed CMC the next day as he was surprised to hear he was an elective professional client – as far as he was concerned, he was a retail client with negative balance protection so he shouldn't be owing them money. Mr B says he'd have closed the positions ahead of the weekend had he been aware he was considered to be a professional client.

Mr B's concerns were treated as a complaint. CMC looked into what he'd said and issued their final response letter. They said Mr B had applied to become a professional client in April 2018, that he met the criteria to do so and they'd told him what protections he'd lose – negative balance protection being one of them. So they didn't agree they'd done anything wrong.

Unhappy with this, Mr B asked for our help. He told us he'd been suffering from extreme anxiety about what had happened – which had only been worsened by the pandemic and the impact it was having on his business. He told us he'd always traded to ensure his maximum exposure was the balance on account, and that as a retail investor he understood that negative balance protection would cover any further losses.

Though Mr B could see his professional status, this was a surprise. He continued to question it as he didn't think he'd received any of the benefits associated with the status, such as an account manager. He also said that another of the incentives – early access to new markets – wouldn't have been of interest to him.

Mr B told us he felt misled into upgrading his account to professional status and wasn't ever made aware of the risks involved. He shared an email from CMC in April 2018 which explained some of the changes the European Securities and Markets Authority (ESMA) were making to the industry – this briefly referred to leverage restrictions, a ban on countdowns and negative balance protection – and said "[t]*o avoid these changes, you may wish to apply to become a professional client*".

Mr B says he must have applied in panic and felt he might be financially penalised by not acting immediately. He feels the email was extremely misleading. He also felt CMC's email confirming his professional status was misleading too as it said there would be "*no change to your level of money protection*" so he felt he still had negative balance protection. Mr B also felt the application process was concerning as he wasn't asked to provide supporting documentation – he disputes that he'd have met the criteria to have been considered a professional.

One of our investigators had a look into what had happened, but didn't agree CMC had done anything wrong. He thought Mr B had met the criteria to be classified as an elective professional and that the trading losses stemmed from extreme market volatility as positions were fairly closed when margin wasn't met.

As an agreement wasn't reached, the case was passed to me for a decision. I reviewed Mr B's complaint and issued provisional findings.

I didn't agree that CMC had pressured Mr B into changing his account from retail to professional. But I was concerned about whether he'd met the criteria required to have been considered a professional – in particular, because I couldn't see he'd placed enough trades of significant size. I still thought Mr B would have placed the oil trades in March 2020, but had he have done so as a retail client its likely he'd have lost his deposit but not had the debt he does now.

Mr B welcomed my provisional findings. He also shared some further communication with us where CMC had mistakenly told him that our service had concluded work on his case and to chase the debt he owed – he said the unwarranted, factually incorrect message caused him further upset and psychological anguish.

CMC didn't accept my provisional findings. They explained Mr B's trades were larger than I'd considered as I'd looked at them by trade reference, rather than order reference – CMC explained that an order was often fulfilled by way of executing a series of individual trades, so the true trade sizes were larger and showed Mr B did have the trading frequency and volume required to satisfy the relevant criteria.

Our investigator shared this with Mr B for comment – he was concerned about CMC altering data but ultimately didn't think it was meaningful or enough to affect my provisional decision – he said he felt CMC had demonstrated appalling client conduct and had caused severe mental health issues.

My provisional findings

I then issued further provisional findings which I will quote. I said:

> As I explained in my earlier provisional decision, in 2018, ESMA introduced restrictions on the way contracts for differences (CFD) and binary options were marketed, distributed and sold in order to increase protection for investors. In short, the changes involved leverage limits, margin close out rules, negative balance protection, prevention of the use of incentives and a firm specific risk warning delivered in a standardised way.
>
> Mr B had a spread betting account and financial spread bets were included under the CFD umbrella as a cash settled derivative contract giving exposure to fluctuations in the price, level or value of an underlying asset or market. Mr B's account was opened in 2017, so he received an email in April 2018 from CMC who were letting their

clients know about the changes. As a result of the email, Mr B applied to 'opt up' and be considered as an elective professional client.

The conduct of business rules (COBS) set out the tests CMC had to apply to consider Mr B's eligibility for professional status. COBS 3.5.3R said:

> *A firm may treat a client other than a local public authority or municipality as an elective professional client if it complies with (1) and (3) and, where applicable, (2):*
>
> *(1) the firm undertakes an adequate assessment of the expertise, experience and knowledge of the client that gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the client is capable of making his own investment decisions and understanding the risks involved (the "qualitative test");*
>
> *(2) in relation to MiFID or equivalent third country business in the course of that assessment, at least two of the following criteria are satisfied:*
>
> *(a) the client has carried out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters;*
>
> *(b) the size of the client's financial instrument portfolio, defined as including cash deposits and financial instruments, exceeds EUR 500,000;*
>
> *(c) the client works or has worked in the financial sector for at least one year in a professional position, which requires knowledge of the transactions or services envisaged;*
>
> *(the "quantitative test")…*

COBS 3.5.3(3) then set out the process for categorisation to happen. In addition, COBS 3.5.6R said:

> *Before deciding to accept a request for re-categorisation as an elective professional client a firm must take all reasonable steps to ensure that the client requesting to be treated as an elective professional client satisfies the qualitative test and, where applicable, the quantitative test.*

So the rules set out a qualitative test, a quantitative test and a procedure to follow. Mr B's application form from April 2018 confirmed that he met all three criteria required of the quantitative test. The questions and his answers were:

- ***Overview of your transactions***
  We need to know that you regularly place leveraged trades of significant size. How many times have you traded on average over the last four quarters?

  There were two options to choose from: 'less than 10' or '10 or more'.

  Mr B answered "10 or more".

- ***Overview of your financial instrument portfolio***
  You have confirmed that the size of your financial instrument portfolio, defined

as including cash deposits and financial instruments, exceeds €500,000. Taking the examples into account, what is the current value of your portfolio?

There were three options to choose from: '0 - €499k', '€500k - €1m' and '> €1m'.

Mr B answered "> €1m".

- ***Overview of your financial experience***
  You have confirmed you work or have worked in the financial sector eg banking, insurance and investment services, for at least one year in a professional position, which requires knowledge of the transactions or services envisaged.

  There were three boxes to complete which asked of the name of the most relevant employer, the job title held and to share any other details to help verify the information.

  Mr B noted the name of bank he'd worked for and said he'd been a 'government bond market maker'. In the additional information box, Mr B said he'd been employed as a trader for 15 years and had been a professional investor for 20 years.

In line with 3.5.6R, CMC had to check what Mr B had said. As two of the three criteria needed to be met, CMC decided to verify Mr B's answers to the first and third questions.

CMC were able to review Mr B's trading activity with them – he'd had two accounts open which spanned the relevant period they needed to consider. And from what they saw, they thought his trades qualified both on frequency and size. CMC also checked the regulator's register and confirmed Mr B's employment history. CMC were satisfied with the answers to these two questions, so Mr B was opted up to professional status.

Following my earlier provisional decision, I have reconsidered what steps CMC took when satisfying COBS 3.5.3R and 3.5.6R. Firstly, I'm satisfied Mr B fulfilled the 'qualitative test', namely that he was capable of making his own investment decisions and understanding the risks involved. The evidence showed Mr B was an experienced trader, who knew what markets he wanted to trade on and how much he wanted to invest. But in order to comply with the rules, CMC also needed to satisfy itself that Mr B also met at least two of the three 'quantitative' criteria. I'll deal with each of these again.

significant size trades required by COBS 3.5.3R (2) (a)

Relevant at the time and unchanged until now, this rule says, "*the client has carried out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters".*

This issue was something I deliberated on in my previous provisional decision – while I'd seen Mr B had placed a considerable number of trades, some with higher notional values, I was concerned about the impact of leverage and that Mr B only needed to have 10% equity to have traded these markets. But as explained above, CMC shared further information with us to illustrate the fact that Mr B's trades were larger than

they seemed, given order instructions were often achieved by the firm executing more than one trade.

The effect of this is that Mr B's transactions were larger than first seemed. Considering the four quarters in turn (by full month for ease of reading):

- During the first quarter – May to July 2017 – Mr B's largest notional trade values were all over £100,000.
- During the second quarter – August to October 2017 – the notional values of Mr B's ten largest trades were all over £14,000, including three of almost £20,000 and three around £25,000.
- During the third quarter – November to January 2018 – the range of the notional values of Mr B's ten largest trades widened with one of £17,000, one of £25,000 and one of £40,000 – the remainder ranged from £8,000 to £13,000.
- And during the fourth quarter – February to April 2018 – the notional values of Mr B's ten largest trades were all over £12,000 – with three around £18,000, two at nearly £22,000 and one nearly £32,000.

Having considered this carefully, and as previously indicated to Mr B, my view is that it was fair and reasonable for CMC to have considered his trading over the quarters preceding his application to have demonstrated the frequency and size required here. That said, Mr B's trading history alone wasn't enough to have allowed CMC to recategorise him as a professional client – another of the three criteria had to be met.

financial instrument portfolio size required by COBS 3.5.3R (2) (b)

Relevant at the time and unchanged until now, COBS 3.5.3R requires, "*the size of the client's financial instrument portfolio, defined as including cash deposits and financial instruments, exceeds EUR 500,000".* As I noted above, Mr B said his investible assets were "> €1m". This answer wasn't something CMC checked at the time, given they'd been satisfied Mr B had met two of the three criteria.

When we asked Mr B more about his answer, he told us that what he said wasn't accurate as he panicked and rushed the application – he says he wrongly included the value of his rental property within his investment portfolio.

In capital letters CMC's application form explained the financial instrument portfolio "*DOES NOT include property portfolios, direct commodity ownership or notional values of leveraged instruments*". Though Mr B's answer here went against the direction CMC had given him, this doesn't absolve them from fulfilling their requirements. COBS 3.5.6R needed CMC to take all reasonable steps to ensure he'd satisfied the criteria if it was something they were going to be able to rely on. Though they didn't feel they needed to rely on it at the time, this in turns means it's harder for it to be something we can rely on now.

That said, I have looked to see if it's something we can indeed rely on with hindsight, but it's not something I've been able to verify. Mr B tells us he didn't have a financial portfolio exceeding EUR 500,000 and shared some bank statements, an ISA statement and his trading statement to confirm this. For this reason, I'm satisfied on balance that it's more likely than not that Mr B would not have met the criteria at COBS 3.5.3 R (2) (b).

professional background required by COBS 3.5.3R (2) (c)

Relevant at the time and unchanged until now, this rule says "*the client works or has worked in the financial sector for at least one year in a professional position, which requires knowledge of the transactions or services envisaged".*

As I noted above, Mr B told CMC the name of bank he worked for and that he'd been a 'government bond market maker'. In the additional information box, Mr B said he'd been employed as a trader for 15 years and had been a professional investor for 20 years. CMC checked the regulator's register and confirmed Mr B's employment history. CMC were satisfied with the answers to these two questions.

The rule asked CMC to assess whether Mr B's professional position allowed him to obtain knowledge of transactions or services envisaged – but upon further reflection my concern here is that Mr B's role gave him knowledge of a different product and market with different features to the leveraged trading account he held with CMC. I note that around the time ESMA's Q&As dwelled on this point – at 11 'Client categorisation' Question 3 it said, in part:

> *… when assessing whether a client meets the criteria set out under the third limb of the fifth paragraph of Section II.1 of Annex II, investment firms must ensure that the position was professional in nature and held in a field that allowed the client to acquire knowledge of transactions or services that have comparable features and a comparable level of complexity to the transactions or services envisaged. Consequently, knowledge gathered in relation to simple products may not be relied upon where a private individual investor requests to be treated as a professional client in respect of more complex products (e.g. knowledge related to vanilla government bonds should not be relevant with respect to envisaged transactions in complex derivatives).*

The example ESMA gave here pointed out that government bonds weren't relevant when the envisaged transactions were in complex derivatives. And the example is particularly relevant in Mr B's case given he tells he tells us he worked with government bonds and traded derivatives with CMC. We asked him more about his role and he explained:

> *"… My role at [bank] was as a government bill Repo financing within the Fixed Income Division. I financed the firm's European Government Bill inventory traded by the firm's cash traders mainly on a short term basis as directed by management. I only financed the firm's European government bill inventory as well as provided internal repo levels to the firm's sales force. I had no professional knowledge of any derivative products and never traded any form of leverage products. My role solely covered Fixed income bills, and as such, never traded or had experience in any commodity or Equity. I never traded and did not have the expertise, experience or knowledge of any leverage product or derivative. The reason why I stated I was a professional investor was that I had worked for an investment bank therefore that was my profession."*

I've thought carefully about what Mr B has told us and recognise his role was a little more complex than simply trading government bonds – Mr B was arranging short-term finance against the bank's assets. This said, I can't see the role will have given him the knowledge of the derivative products he went on to trade with CMC – and this is what the rule asked, that the role required knowledge of the transactions or services envisaged. CFDs are derivatives trading on the price of an underlying asset

or index. In principle, they have nothing in common with what Mr B did professionally. They're traded using margin, so that the notional value of the trade is much larger than the deposit – thereby small swings in the price of the underlying asset or index can have a significant impact on a consumer's deposit. Again, this wasn't something Mr B's employment exposed him to. And as a professional client, Mr B could access far greater leverage than as a retail client, as well as the possibility of losing more than his deposit.

While I appreciate the Q&As were updated just after Mr B was opted up, they were not a change in approach. For this reason, I am concerned Mr B's professional experience wasn't enough for CMC to rely on when opting him up so it does not appear Mr B met the criteria at COBS 3.5.3 R (2) (c).

provisional conclusions

Through his elective professional client application, Mr B was asking CMC to treat him as a client that was capable of foregoing protections that were afforded to retail clients, in an already high-risk type of trading. It was an entirely foreseeable consequence that by not carrying out this assessment fairly and reasonably, CMC would be exposing Mr B to the possibility of significantly larger losses.

Though CMC might have seen enough significantly sized trades to satisfy themselves Mr B met COBS 3.5.3R (2) (a), I can't see what they knew about (b) and (c) was enough – nor that if they'd have found out more either condition could've been met. I'm mindful that we shouldn't look at each test in isolation and should holistically consider the decision CMC made at the time. But even if I overlay this, and what CMC knew about Mr B, I'm still not persuaded this means CMC did enough. They didn't ask Mr B more about his employment – had they have done so they'd have recognised his experience was with a different product within a market with different features and didn't require knowledge of the transactions or services envisaged. And they didn't ask Mr B about his portfolio size – had they have done so they'd have recognised the error he made in including his rental property. And though Mr B did make inaccurate disclosures, I don't think CMC are entitled to rely on COBS 10.2.4R here as in respect of this recategorization – COBS 3.5.6R required them to have taken *all reasonable steps* and for the reasons explained, I'm not satisfied they did.

And as I said before, though the Q&As were changed around the time Mr B became an elective professional, this wasn't something CMC ought not to have thought carefully about at the time, nor is it something I am looking to apply today's standards retrospectively to. I say that because not only do I think the rules and expectations were clear, but the regulator also flagged this possible problem to CMC. I note the FCA's February 2016 'Dear CEO' letter concerning CFDs highlighted concern about incorrect classification of professionals, and the January 2018 'Dear CEO' built on this further when noting within the 'summary observations' that "…*firms had problems with their processes and the criteria they consider acceptable when categorising clients as elective professionals*" before expanding on this within 'client categorisation':

> *We identified a number of firms that accepted weak answers or asked inadequate questions to assess whether a client could opt up to elective professional status under the requirements set out in COBS 3.5.3R. In particular, firms asked clients poor 'qualitative' questions to assess, with a reasonable level of assurance, whether they had sufficient knowledge and experience. This raises concerns of potential non-compliance with this rule.*

> *We expect firms to go beyond asking clients for their own opinion of their knowledge and experience, as this is inevitably subjective and is unlikely to be reliable, at least on its own. Firms should request facts and information to support their assessment of a prospective client's expertise, knowledge and experience in ways that gives them reasonable assurance, given the nature of the planned transactions or services, that the client is capable of making their own investment decisions and understands the risks involved.*

> I said before that I disagreed with Mr B that he'd been pressured into applying to become a professional client and I still haven't seen evidence that CMC put any undue pressure on him, or made him rush the decision. But I am mindful of the language CMC used when emailing him to let him know about ESMA's changes. The email put the changes to Mr B as a product 'intervention' and suggested how he could 'avoid' the changes. But the changes being made were there to help and protect investors like Mr B – the changes weren't something most investors would particularly want to avoid given between 70% and 80% of investors lose money in trading of this nature.
>
> CMC also phrased the opt up as an 'upgrade' to the account, which elevated its status whereas in reality, opting up meant Mr B *lost* negative balance protection, rather than gained or maintained it as he thought. So although I understand CMC telling their clients about the changes, as a firm they did recognise the serious implications of recategorising someone as a professional and with this in mind, they knew all the more how important it was to assess an application thoroughly – especially when they'd prompted it to be made.
>
> From everything I've seen, I'm not satisfied that CMC took all reasonable steps to determine whether Mr B met the relevant criteria to be recategorised as an elective professional client. If they had done, I'm satisfied Mr B would not have met two out of the three criteria required by the quantitative test at COBS 3.5.3R (2). So for the reasons I've given, I'm not persuaded that it was fair and reasonable for CMC to have concluded, as they did, that Mr B could be recategorised as an elective professional client…

I then set out how I proposed things would be put right. Mr B accepted my findings once more and agreed he didn't meet the criteria. CMC didn't agree. In relation to COBS 3.5.3R (2) (b), regarding the size of the portfolio, they highlighted Mr B had provided inaccurate information twice – on both the account opening form and the professional form – and this was a breach of the declaration. In relation to COBS 3.5.3R (2) (c), regarding professional background, they did think they'd taken all reasonable steps to check this and they did think the criteria had been met. They shared two attachments to support this.

The first attachment was Mr B's account opening form from July 2017 where they highlighted the section titled 'knowledge and experience'. Mr B had indicated that he'd 'regularly' traded the following products within the prior three years; CFDs, spread bets, other leveraged products, shares and bonds. And when asked whether he had good knowledge and understanding of trading derivatives and leveraged trading, Mr B selected an answer which said '*yes, from working in a directly relevant role in financial services for at least 3 consecutive years (such as trader, investment analyst)'.* CMC highlighted this was in contrast to what Mr B now says about his role not giving him professional knowledge of derivatives or leverage. And it was something they relied on when opting Mr B up to professional.

The second attachment was Mr B's professional form from April 2018 where they highlighted the answer he'd given about his prior employment. Within this, Mr B told CMC the name of

bank he'd worked for and said he'd been a 'government bond market maker'. In the additional information box, Mr B said he'd been employed as a trader for 15 years and had been a professional investor for 20 years. CMC said they had checked the regulator's register and confirmed Mr B's employment history. They say this showed Mr B had been an approved person as CF26 and CF30 – customer trading functions of dealing and arranging investments as well as advising – and that this had been until 2012, a time where MiFID I and the client categorisation rules had been in place for a number of years.

CMC said it was unlikely that someone deemed appropriate for such approved functions would not have a good comprehension of the different categories of client and not be aware of the protections they were losing by electing for professional status – especially to then later make the claim that they thought they were retail.

They said they'd verified Mr B's previous employment so they'd taken all reasonable steps necessary. And they highlighted that the approved status signified that Mr B had been assessed by the regulator as passing the 'fit and proper' test which considered honesty, integrity, reputation, competence, capability, and financial soundness.

Given the register verified what Mr B had said, CMC felt they'd seen sufficient evidence and there'd been no reasonable grounds to make further enquiries. CMC also felt transactions as a 'government bond market maker' were not involving 'simple products'.

When reviewing what other reasonable steps they could have taken to verify Mr B's professional role, CMC said the only option would have been to ask the former employer for a written statement to confirm the previous job role / responsibilities, and its relevance to derivatives and leveraged trading. CMC said this would have been impractical since Mr B had left one of the roles six years ago and the other was at an institution that was no longer a going concern.

Lastly, CMC asked that I make substantive comment on Mr B's original account opening form and allow them to respond before I proceeded, so they could better understand my expectations in relation to what 'all reasonable steps' might've been.

What I've decided – and why

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

I've thought very carefully about CMC's response to my findings. I thank them for their commentary and evidence, and I do note their request for further comment ahead of a decision. But having reviewed the file afresh, I've not felt this has been necessary as I've not been persuaded to deviate from the key reasoning already shared within my provisional decision. I'll explain why.

CMC have stressed the importance of the first attachment they shared – Mr B's retail account opening form from July 2017. I agree this shows Mr B ticked a box to say he'd worked for at least three years in a *directly relevant role in financial services*. But I don't think this additional piece of evidence means CMC did enough to satisfy COBS 3.5.3 R (2) (c).

Within the professional client form from April 2018, CMC asked Mr B for an overview of his financial experience and said "*You have confirmed you work or have worked in the financial sector eg banking, insurance and investment services, for at least one year in a professional position, which requires knowledge of the transactions or services envisaged. Please provide further details*:" before going on to ask the name of the most relevant employer, the job title and for details to help verify the information provided. Mr B told CMC the name of the

bank he'd worked for, gave the job title as 'government bond market maker' and in the *other details* section said he'd been employed as a trader for 15 years and had been a professional investor for 20 years.

This gave CMC more detail than the July 2017 form they point to now. And while CMC emphasise that Mr B said he'd worked in a directly relevant role, it wasn't until the April 2018 professional form that they got some more detail on what that role was. This is why I don't think what they've shared now adds anything to what we've seen before – what CMC got from Mr B in 2018 built on what he'd said in 2017.

Focussing back on the fairness and reasonableness of CMC's assessment, COBS 3.5.3 R (2) (c) asked them to consider whether Mr B's professional position required him to have knowledge of the transactions or services envisaged. While I do agree CMC were able to establish Mr B had a professional role in the financial sector – which is what part of their question asked – the issue remains that this role had to require knowledge of the transactions or services envisaged.

Mr B's role gave him knowledge of a different product and market with different features to the leveraged trading account he held with CMC. While CMC might have used the regulator's register to verify Mr B's previous employment with two financial institutions, they were verifying he'd been a 'government bond market maker' and that job title didn't suggest any involvement with derivatives or leveraged trading, which were the specific services here.

On the face of it, the job title didn't have anything to do with the service CMC were offering Mr B professional status for. As I said in my provisional findings quoted above, around the time ESMA's Q&A said knowledge related to vanilla government bonds should not be relevant with respect to envisaged transactions in complex derivatives – and while Mr B's role might've been more than simply trading government bonds (given he was arranging financing using them), I still can't see it'd have involved or required knowledge of derivatives. Indeed, when asked, he has confirmed the role didn't require knowledge of CFDs or derivative trading.

Again, as I said before CFDs are derivatives trading on the price of an underlying asset or index. They're traded using margin, so that the notional value of the trade is much larger than the deposit – thereby small swings in the price of the underlying asset or index can have a significant impact on a consumer's deposit, especially for professional clients as they could lose more than their deposit. It is this impact of leverage that made the specific service here quite different – and on the face of his job title, I don't think CMC could satisfy themselves Mr B's role sufficed, so simply verifying this employment didn't give them the assurance they needed.

Though CMC ask what other reasonable steps they might have taken to verify Mr B's professional position, it's not for our service to prescribe what these might have been – indeed ESMA themselves left discretion to firms. CMC say they would have had to contact Mr B's previous employer – and that may well have been something they'd have chosen to do – but they could also have asked Mr B more about his role, as we have done now, to understand whether or not it did require knowledge of the transactions or services envisaged here. Had they have done so, considering the explanation Mr B has given us of his role, it's likely they'd have recognised it hadn't given him exposure to the intended services he was seeking, so couldn't attest to him having professional derivatives experience. CMC could also have declined the application, on the basis that his profession did not, on the face of it, show he met the relevant criteria in COBS.

I accept CMC's point that Mr B didn't simply buy and sell bonds and have a simple role – and I don't doubt the role was a professional one. But the question wasn't how senior or

complex in its own right Mr B's role was, or what level of skill it required or what complexities it presented – it wasn't the case that these sorts of things had to be commensurate with the trading foreseen. Instead, the criteria looked for him to have had professional experience that had required knowledge of the transactions or services envisaged – so we'd need to see there had at least been some sort of overlap with the intended trading. Mr B's role might have meant he could be considered a professional in relation to other sorts of investment product, such as the government bonds he focussed on. But it remains clear to me that in this case, the envisaged trading was a specific service involving derivatives, and there was nothing on the face of the job title that implied the role would require involvement in this space.

Overall, it is my view that CMC checking Mr B did the job he said he did wasn't enough because crucially, he hadn't suggested his role had required knowledge of the transactions or services envisaged. So I'm not satisfied that in the course of their assessment of Mr B's expertise, experience and knowledge, it was fair and reasonable for CMC to conclude, as they did, that he met the criteria to be an elective professional client. Had CMC have taken any further steps – which I don't think would have been unreasonable given the job title he stated – I'm not persuaded he'd have met COBS 3.5.3 R (2) (c).

Regarding the other criteria Mr B could have met – being portfolio size at COBS 3.5.3 R (2) (b) – I note CMC emphasise Mr B had given them inaccurate information on both his account opening form in 2017 and his professional form in 2018, but as I said before, I don't think they are entitled to rely on COBS 10.2.4R here as in respect of this recategorization – COBS 3.5.6R required them to have taken *all reasonable steps.* I can't see any further steps were taken here, but had they have done so, it's likely Mr B's error of including his rental property value would have been recognised and the criteria wouldn't have been met.

From everything I've seen, it follows that I remain of the view shared in my provisional findings, in that I'm not satisfied that CMC took all reasonable steps to determine whether Mr B met the relevant criteria to be recategorised as an elective professional client. If they had done, I'm satisfied Mr B would not have met two out of the three criteria required by the quantitative test at COBS 3.5.3R (2). So for the reasons I've given, I'm not persuaded that it was fair and reasonable for CMC to have concluded, as they did, that Mr B could be recategorised as an elective professional client, even if we try to look at the application holistically. I'll therefore direct how CMC put things right.

Putting things right

As I said in my provisional findings, before the re-categorisation Mr B was already engaged in a type of trading that carried with it a high risk of capital loss. It's clear to me that Mr B was very keen on leveraged trading and given his background, in my view he understood that this would involve a higher risk. From everything I've seen, had his application been declined I still think Mr B would have continued to trade with CMC as a retail client. And I've seen nothing to suggest he wouldn't have traded with similar frequency and interest in the same instruments.

Given the particular circumstances of Mr B's case, including his trading history, the way he traded and deposited after he became an elective professional client, I'm not persuaded it would be fair and reasonable to ask CMC to refund *all* of the losses he's made, as I'm satisfied those losses were a result of his trading decisions which he is likely to have still made. Sometimes where we consider a client was wrongly categorised, we can think about asking a business to compare their professional losses with what they might otherwise have lost as a retail client – but taking the particular circumstances of Mr B's case into account, I'm satisfied that his additional losses, on balance, amounted to the negative balance which he now owes CMC.

So as I explained before, the fair and reasonable way of putting things right for Mr B is to direct CMC to erase the debt he owes them. I say this because given the extreme volatility in the market at the time, even if Mr B had been a retail client I'm persuaded he'd have lost all of his funds anyway, so I consider this the fair way to resolve the complaint.

My final decision

For the reasons explained, I uphold Mr B's complaint and direct CMC Spreadbet Plc to write off the debt as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 15 April 2024.

Aimee Stanton
Ombudsman