Heading:

Investment house had no authority to transfer funds to another provider that subsequently went into liquidation. Complaint partly upheld.

A v K [2013] FDRS June 2013

1. Issue

The Customer had a trading relationship with the Scheme Member via two accounts. The Scheme Member sold its customer base to [investment company name] (Company B), and the Customer's accounts were transferred […]. There is a dispute as to whether the Customer had in fact consented to the transfer of one of the accounts to Company B. Company B went into liquidation around a year later.

The Customer has brought a complaint to FDR against [Scheme Member name] seeking to recover losses resulting from the Company B liquidation.

2. Background

I summarise the background as follows.

- The Customer is based in [location], and had an online trading relationship with [Scheme Member name]. This was by way of two accounts, being:
    - a personal account, and
    - an aggregated trading account under the name of [Account name (the Aggregated Account)].The Aggregated Account was managed by Mr [Account Manager name] by way of an ordinary Power of Attorney, but otherwise it was in the Customer's name.
- On 4 October 2012[1], [Scheme Member name] sent an email to the Customer advising they were entering into a strategic alliance with Company B. The Customer was given an option to close his account, or have the account transferred to Company B. The Customer was given 1 week to elect which option he preferred. If the Customer did not elect to transfer to Company B the default position was that the account would otherwise be closed. The email states:

    > *"In our ever increasing pursuit to provide our clients with market leading trading services [Scheme Member name] is proud to announce a strategic alliance with Company B. As a result of this new alliance – [Scheme Member name]*

[1] New Zealand date.

is now able to offer Margin FX and commodity trading directly through Company B […]

Company B is an international brokerage firm with offices in [offshore locations], which offer institutional level liquidity to retail and professional traders globally. Company B will now be providing these prices direct to you.

[Scheme Member name] will continue to provide deliverable foreign exchange and global payment services at the best rates, and as always with no fees.

We do need you to take some action as a result of this change. *There are only two quick steps to take advantage of this offer. Firstly, you will need to review and accept the terms and conditions by following the link below. You will also need to update your version of [Brandname trading platform] by following the same link, but it is important to note that login details, and option positions will all remain unchanged.*

[link provided]

…

It is important that you click on this Link and read the information, as we require you to respond by October 12, 2012. *If we don't hear from you, we will be legally obliged to have your account closed and your funds returned to you (we don't want to do this. We want you to enjoy all the benefits of this great new service – so please click on the above link for more details!)*

Should you have any questions about your account or the details above, please don't hesitate to get in touch via email or on one of the number below."

- On 5 October 2012, The Scheme Member provided [Account Manager name] with contact details for Company B management. The Scheme Member states that in October and November 2012, [Account Manager name] had various telephone conversations with a range of people at Company B
- At some stage, the Customer's personal account and funds were transferred from [Scheme Member name] to Company B.
- The Scheme Member reports that on 12 November 2012, [Account Manager name] confirmed that the accounts should be transferred to Company B
- Company B went into liquidation on 25 September 2013.
- The Customer lodged a formal complaint with [Scheme Member name] relating to the loss of funds, who provided a number of formal responses.
- The Customer was dissatisfied with the formal responses, and pursued a complaint via FDR.

3. Position of the Parties

Customer's position

The Customer has advanced his complaint on a number of grounds, which I summarise as follows:

- In relation to the 4 October 2012 email offering the transfer to Company B. The Customer states in his 'chronological order of events', that:

  > *"I do not remember whether I clicked this link but the accounts (both my personal and [Aggregated] Account were transferred across to Company B regardless"*

  Similarly, in a response dated 28 March 2014, The Customer states:

  > *"I am not disputing the transfer of my personal trading account as I can't remember whether I clicked on the link or not. However I received no information regarding the [Aggregated] Account and the LPoA did not allow my account to be sold to another broker in a different country".*

- The Customer confirms that he received log in details for Company B but disputes receiving any other documentation from them.
- The Customer states he had only been asked whether he wished to transfer his personal account, not the [Aggregated] Account.
- The Power of Attorney, under which [Account Manager name] was managing the [Aggregated] Account, would not have been sufficient to allow a transfer of the [Aggregated] Account from [Scheme Member name] to Company B
- He had not made any trades with Company B via his personal account.
- The Customer thought he was dealing with a company based in the UK, and therefore the UK financial protections should have applied. The Customer considers that consent should have been obtained before moving the account from the UK to another jurisdiction.
- [Scheme Member name] held a duty of care to the Customer in relation to the offer to transfer to Company B which has been breached.
- There were a number of failed '[Company B]' companies internationally, as well as allegations [concerning Company B Director name]which should have put [Scheme Member name] on notice that Company B would not be a reputable company to transfer the Scheme Member accounts to.

Scheme Member's position

The Scheme Member's position is as follows:

- FDR should decline to consider the complaint on the basis that it is convoluted and vexatious. Furthermore, the Customer may be intending on pursuing the complaint in other forums, or making public any communications in the course of the complaint.
- The Customer relationship with the Scheme Member was with [Scheme Member name] Limited, not the [Scheme Member name] International.
- The Customer must have known that they had commenced trading with Company B as that was the website they would have used to undertake the trades, and also any payments made would have been to Company B.
- The Customer elected to transfer funds to Company B voluntarily, and therefore [Scheme Member name] cannot be liable for any losses.
- The Customer had traded with Company B for around a year, and therefore had a good opportunity to evaluate their services personally, and withdraw funds if he were not satisfied.
- The Customer had acknowledged in the contract entered into with [Scheme Member name], that [Scheme Member name] would not provide investment advice.
- Prior to the transfer, [Scheme Member name] had confirmed that Company B had been an Australian registered company (since August 2010), and also held an Australian Financial Service Licence.
- There have not technically been any losses incurred by the Customer at this time, as Company B is currently undergoing liquidation, and therefore some funds may yet be returned.

4. Jurisdiction

The Scheme Member has submitted that this complaint should not be considered by FDR, on the basis that the complaint is convoluted and vexatious.

While I accept that the complaint is brought on a board range of grounds, I am not of the view that it is unclear or convoluted. FDR has not had any difficulty in understanding and following the Customer's complaint and reasoning.

A vexatious action is one which is brought to annoy the opponent, and with no reasonable prospect of success. For the reasons as discussed below, I find that the Customer's complaint has some merit, and indeed the proposed decision is partly in the Customer's favour. I find this complaint is certainly not vexatious.

I am satisfied this complaint does fall within FDR's jurisdiction to consider.

5. Discussion

There is no dispute between the parties that The Scheme Member held the Customer's funds in two accounts, being the personal and The Aggregated Account accounts.

The Scheme Member determined that it wished to exit the online CFD trading business, and sold its customer book to Company B for a negotiated amount. Putting aside the issue of whether the book should have been sold to Company B specifically, there is nothing unusual in the fact of the sale of the book to another provider.

Once the sale of the customer book had been made, the process which applied in this case was that the Customers then needed to consent to the transfer of their accounts from [Scheme Member name] to Company B. This process for obtaining consent was initiated by way of an email from [Scheme Member name] to its customers on 4 October 2012. That email, as recited above, told Customers that they could transfer to Company B by clicking on a particular link. Alternatively the default position would be that the Customer's account would be closed.

As I understand matters, if the Customer clicked on the link consenting to the transfer, the Customer would be transferred to the Company B website for that transfer to be completed.

Based on the plain wording of the 4 October 2012 email, if the customer did not transfer (via the link), then their accounts would be closed as of 12 October 2012, and their funds returned.

In the Customer case, the considerations which apply to the personal and [Aggregated] accounts are materially different, and I will discuss each separately:

1. [Aggregated] account

The Customers evidence and submission was that he did not consent to the transfer of the [Aggregated] account to Company B and therefore the transfer should not have taken place.

The [Aggregated] account was in the Customers name, but managed by [Account manager name] by way of an ordinary Power of Attorney. As the Attorney [Account manager name] could only administer the account to the extent of his authority under the Power of Attorney. Similarly, The Scheme Member could only accept [Account manager name] instructions to the extent of that authority.

The Scheme Member says that the transfer of the [Aggregated] account to Company B was made following approval by [Account manager name], on the basis of the Power of Attorney. That Power of Attorney document has been provided, and holds:

1….

2. *The Attorney is empowered to, in the name of the Principal and on their behalf:*

   (a) *buy, sell (including 'short' sales) and trade (on margin or otherwise) in financial products issued or otherwise dealt with by* [Scheme Member name] *for the Principal's account and risk and in the Principal's name or number on [Scheme Member name]'s books, in accordance with [Scheme Member name]'s terms and conditions from time to time ('Transactions');*

   (b) *enter into and execute (whether as a deed or any other document) any document, or make any other form of communication, which effects or evidences a Transaction;*

   (c) *completes any blanks in any document relating to a Transaction;*

   (d) *amend or vary any Transaction or any document relating to a Transaction;*

   (e) *In relation to a Transaction, receive disclosure and information material relating to the financial product or products to which the Transaction relates (including any product disclosure material required to be provided to the Principal pursuant to the terms of [Scheme Member name]'s futures dealers authorisation under the Securities Markets Act 1988); and*

   (f) *do anything which, in the opinion of the Attorney, is considered necessary, expedient or incidental to or in any way relates to a Transaction or any related document or communication.*

3. *The Principal agrees that [Scheme Member name] is authorised to follow the instructions of the Attorney in every respect concerning the operation of the Principals account with The Scheme Member Trade pursuant to this Power of Attorney…"*

In short, the Power of Attorney provides the Attorney [Account Manager name] with authority to manage the Customer's account as it relates to trading of financial products issued or dealt with by The Scheme Member. There is nothing in paragraph 2 of that document which could be interpreted as providing the Attorney with the power to consent to the transfer of the Customer's account to another provider.

Given the Power of Attorney was on a document supplied by the Scheme Member, the Scheme Member should have been well aware of the extent to which that authority applied, and that the authority would not have extended to [Account Manager name] agreeing to the transfer of the account elsewhere.

What The Scheme Member should have done, was to put the request to transfer the account to the Customer, and only transferred the account with the Customer's express approval. The Customers consistent evidence has been that he had not received a request from the Scheme Member to transfer the account to Company B and that he did not approve the transfer.

Accordingly then, if the Customer did not approve the transfer, his funds should have remained in his The Scheme Member account, or been refunded.

While I accept that the Customer did not receive the 4 October 2012 email with respect to the The Aggregated Account account, I consider it reasonable to apply the dates which would have applied in that email, when considering the outcome which should apply. Under the 4 October 2012 email, if the Customer had not approved the transfer of the account by 12 October 2012, then the Customers account was to be closed.

FDR's preliminary view is that the Scheme Member must refund the Customer's funds held in the The Aggregated Account account, as of 5:00pm on 12 October 2012 New Zealand standard time.

2. Personal account

The circumstances for the personal account are materially different, in that the Customer has not disputed that he agreed to transfer that account to Company B unlike the [Aggregated] account. While the Customer states that he did not trade on the personal account, he has not denied that he agreed to transfer the account willingly, albeit he has also stated that he could not recall specifically.

Given consent for the transfer of the personal account has not been disputed, the ground upon which FDR made the above finding for the [Aggregated] account, cannot apply to the personal account.

The Customer submitted that he had been led to be believe, based on the information provided on the [Scheme Member name] website and correspondence, that his accounts would be based in the UK, when they were in fact based in a different jurisdiction – New Zealand.

I find this aspect of the complaint has not been established. No compelling evidence has been presented which would suggest that the Scheme Member represented to the Customer that his funds would remain in the UK and be administered in that location.

The reality of electronic commerce is that a customer and supplier can be located anywhere in the world. The fact that funds were deposited in the UK does not under New Zealand law (which the FDR applies), hold that the principle account must be domiciled or managed in the UK, and therefore any protections which apply must be those of the jurisdiction in which the deposit was paid.

Equally, the fact of using web addresses that do not end in .nz is not evidence of the jurisdiction which will apply. Similar considerations apply to email addresses.

I would also make the observation that this line of argument from the Customer may not be of assistance to his case. If I were to have found

that the transactions did not occur in New Zealand, then it would be arguable whether FDR would have any jurisdiction to consider the complaint in the first instance. The Scheme Member accepts that the transactions did arise in New Zealand, and I equally find that is the case.

The Customer also submitted there had been a breach of a duty of care held by the Scheme Member, with respect to the offer to sell the Customer's account to Company B In particular, it was submitted that had the Scheme Member undertaken sufficient due diligence, it would not have pursued the sale of the customer book to Company B.

The term 'duty of care' is a tort law concept, which relates to a legal obligation held by one party to another, requiring a reasonable standard of care so as to avoid foreseeable harm. In order to establish a claim of negligence (which is in effect being proposed by the Customer), the existence of a duty of care must first be established.

A duty of care can be established in two ways. It can be shown to exist where there is a recognised or statutory duty of care; or otherwise, it can be established in common law.

I am satisfied there is no recognised or statutory duty of care which arises with respect to the offer made to the Customer to transfer to Company B Certainly there was a statutory responsibility while the Scheme Member was executing trades, which would fall within the Financial Advisors Act 2008 (FAA). However I am satisfied that the sale of the customer book does not relate to the broking activities for which section 77K of the Financial Advisors Act 2008 would have applied[2].

The question then becomes whether a common law duty of care arises. The Courts have developed a three-part test which considers:

1. Was the harm reasonably foreseeable?
2. Was there a requisite degree of proximity between the parties?
3. Is it fair, just and reasonable to impose a duty of care?

I consider the claim must fail because the first part of the three-part test, which requires the harm to be reasonably foreseeable, has not been established.

While it is a technical point, it must be recognised that the Scheme Member customer book was not sold to [Company B Director name], it was sold to a company - Company B

I am also minded that there is a second director of Company B Accountant [name], who was a director from incorporation of the company on 24 August 2010, until 23 September 2013. A director has duties to ensure the company complies with its legal obligations. There is no suggestion that [Accountant name] was not a reliable director of Company B

Company B was a registered financial provider in Australia, which, as in New Zealand, carries with it requirements for any applicant to establish

[2] 77K of the FAA provides a duty on the broker to "exercise care, diligence, and skill" when undertaking a broking activity. Section 77K relates, in my view, to the broking service provided within the contact. Sale of the customer book is not a broking activity.

they are a reputable provider. The fact of carrying an ASIC licence would have given the Scheme Member a prima facie assurance that Company B was a reliable financial provider.

The only compelling evidence before FDR, establishes that Company B went into liquidation when its trading losses exceeded its available capital. As far as I am aware, the liquidator of Company B has not brought an action against the directors of Company B or claimed that the funds have been lost as a result of fraud or misfeasance. I acknowledge accusations and inferences have been made against one of the directors and the company itself, but they are no more than that.

There is no evidence before FDR which establishes that it would have been reasonably foreseeable to The Scheme Member that at some future time significant trading losses would occur so as to result in the liquidation of Company B I cannot see how that situation could have been reasonably foreseeable to the Scheme Member.

The result must be that as the subsequent liquidation of Company B could not have been reasonably foreseeable to The Scheme Member, no common law duty of care can be found to have arisen.

The Customer also submits that insufficient time had been allowed to consider the offer to transfer to Company B

The email from the Scheme Member to the Customer providing the offer to transfer was sent on 4 October 2012. That email requested that the Customer make an election to transfer by 12 October 2012, otherwise the [Scheme Member name] account would be closed.

I accept the period of time to consider the offer was short. However if the Customer did not wish to accept the offer of transfer because he could not have undertaken his own due diligence, he could have declined the transfer offer. Furthermore, once the transfer had occurred, the Customer could have applied to Company B to cancel the account and withdraw funds, but there is no evidence that that occurred.

For the reasons set out above, I find the Customer's complaint as it relates to his personal account has not been established.

6. Proposed Decision

Given the above findings, the proposed outcome is to uphold the complaint as it relates to the [Aggregated] account, and rule that those funds must be reimbursed by the Scheme Member to the Customer.

I direct the funds to be reimbursed be calculated on the account balance as of 5:00pm (New Zealand Standard Time) on 12 October 2012. When the Scheme Member provides a response to this proposed decision, I request that they also provide the balance as of that date and time. If FDR determine the proposed decision should be confirmed as the final decision, then FDR will confirm with the Customer that he agrees the amount stated was correct, as the final decision would specify the amount to be reimbursed.

The complaint with respect to the personal account is dismissed.

7. Parties Reply to the Proposed Decision

Following receipt of the proposed decision, the Customer advised that the decision was accepted in full.

The Scheme Member declined to accept the proposed decision, and provided the following further submissions:

- The Customer must have known his accounts had been transferred to Company B including the [Aggregated] account.
- A screen shot has been provided of the Customer's account at Company B
- The Scheme Member has no record of the Customer requesting return of his funds prior to the transfer to Company B
- A portion of a legal opinion was provided, to the effect that the Attorney [Account Manager name] was able to do anything the Power of Attorney considered necessary to administer the account, which would have included a transfer to Company B. In the alternative, given the Customers personal account was transferred to Company B the Customer must have known the [Aggregated] account would have been transferred, therefore he had 'ratified' the transfer.
- The Scheme Member cannot confirm that the Customer in fact sustained any losses at all while at Company B
- Any decision as to compensation to be awarded, should await the outcome of any liquidation process.

The Customer provided a further reply to the substantial further submissions of the Scheme Member. The Customer's primary reply is that [Account Manager name] did not have authority under the Power of Attorney to agree to transfer the funds to Company B.

8. Discussion

I have considered the responses from both the Customer and Scheme Member in relation to the draft decision. Having done so, I see no reason to reach a different conclusion on the evidence.

As I found in the proposed decision, I can see no basis for finding that a breach of any obligation arose in relation to the transfer of the Customer's personal account to Company B. The Customer has not disputed that finding.

I do not accept the Scheme Member's submission that the Power of Attorney held by [Account Manager name] was of sufficient breadth to have allowed [Account Manager name] to transfer the account to an entirely different provider.

The portion of the legal advice provided by the Scheme Member in defence of the claim, refers to clause 2(f) of the Power of Attorney, and concludes that clause would provide the attorney with the authority to have approved the transfer to Company B. That clause of the Power of Attorney states:

> *"The Attorney is empowered to, in the name of the Principal and on their behalf:*
>
> *…*
>
> *(f) do anything which, in the opinion of the Attorney, is considered necessary, expedient or incidental to or in any way relates to a Transaction or any related document or communication."*

Importantly, that provision is restricted to the extent of the authority being in relation to a 'Transaction'. The term 'Transaction' is defined in clause 2(a) as follows:

> *"buy, sell (including 'short' sales) and trade (on margin or otherwise) in financial products issued or otherwise dealt with by [Scheme Member name] for the Principal's account and risk and in the Principal's name or number on [Scheme Member name]'s books, in accordance with [Scheme Member name]'s terms and conditions from time to time ('Transaction')"*

The only interpretation that could be made of the term 'Transaction' as defined in clause 2(a), is that a 'Transaction' relates to a trading activity within the [Scheme Member name] environment.

That is entirely consistent with the heading of the Power of Attorney document which is as follows:

> *"[Scheme Member name]*
>
> *Power of Attorney to Trade Financial Products"*

It would not be open to interpret the Power of Attorney to vest the attorney with the power to approve the transfer of the Customer's account to another provider.

The result is that I cannot see evidence supporting that [Scheme Member name] had a proper basis to transfer the Customer's [Aggregated] account to Company B as it did.

The Scheme Member submits that no order should be made until after the liquidation of Company B has been completed, on the basis that some funds may be returned to the Customer. Having found that the Customer's funds should not have been transferred from The Scheme Member to Company B I can see no reason in law or principle to deny the Customer recovery of those funds from the Scheme Member. I consider that the Customer funds should have been returned to the Customer on or about 12 October 2012, and the order from FDR returns the Customer to that position.

9. Final Decision

Given the above findings, the final outcome is to uphold the complaint.

I direct that the Customer's [Aggregated] funds of $11,165.00 USD be refunded by [Scheme Member name] to the Customer no later than 5:00pm on 13 June 2014 (NZST).

The exchange rate to be applied is the exchange rate as of 5:00pm (NZST) on 12 October 2012.

Mr R Woodhouse

FDR Scheme Adjudicator

June 2014