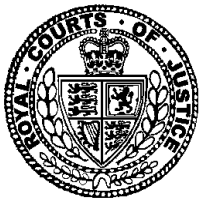

Neutral Citation Number: [2023] EWHC 1349 (Comm)

Case No: LM-2021-000149

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT

The Rolls Building
Royal Courts of Justice

Date: 07/06/2023

Before :

HIS HONOUR JUDGE BIRD SITTING AS A JUDGE OF THIS COURT

- -

Between :

ROBERT DAY **Claimant**

- and –

FOREX CAPITAL MARKETS LIMITED **Defendant**

- -
- -

Mr Neil Levy and Mr Bertram Beor-Roberts (instructed by **Grosvenor Law**) for the **Claimant**
Daniel Warents and Emma Hughes (instructed by **Keystone Law**) for the **Defendant**

- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Wednesday 7th June 2023.

His Honour Judge Bird :

A. Introduction

1. The claimant lost £1,863,383.61 in a 70 day period between 10 February 2020 and 20 April 2020 as a result of spread bets he placed on an online platform operated by the Defendant ("FXCM"). By this action he seeks to recoup those losses and recover substantial damages. The bets (or contracts for difference – CFDs) concerned the price of oil, more particularly the price of the West Texas Intermediate ("WTI") futures contract traded on the New York Mercantile Exchange ("NYME").

2. The period over which the losses were suffered was dominated by the covid-19 epidemic. The slowdown in global travel, production and general commerce over that time meant that demand for oil fell and so prices slumped. The resultant market volatility made this both a fertile and dangerous time for speculators. Mr Day was prepared to risk close to £2 million on oil prices rising. Unfortunately for him the risk did not pay off and he was proved wrong.

3. Mr Levy, who appears for Mr Day with Mr Beor-Roberts, submits that Mr Day's losses were caused by FXCM's breach of contract and statutory duty in failing to comply with its terms of business and the Conduct of Business Sourcebook section of the Financial Conduct Authority Handbook. In particular, FXCM (i) did not do enough to carry out the required "appropriateness assessment" and wrongly assessed that its service was appropriate for him; (ii) failed to provide confirmation in a durable medium of the expiry dates of his USOIL contracts and to honour the advertised expiry date of 18 May 2020, and (iii) failed to give prior notice that its system could not handle trading in USOil and that it would close USOil contracts if the market price was zero or negative. If FXCM had honoured its advertised expiry date, Mr Day says he would have made a profit, not a loss. If FXCM had assessed that its service was not appropriate for him or had not given him misleading expiry date information, Mr Day says he would not have traded and suffered loss as he did.

B. The parties and the evidence

B.1 The Parties

4. Mr Day is 43 years old. He has no formal qualifications at all but is by any measure a financially successful businessman. He was made bankrupt in 2006 on his own petition and discharged from bankruptcy in normal course. In late January 2020, at the time he opened the trading account with FXCM he ran and controlled 3 substantial businesses: a courier business with an annual turnover of around £23.7 million and an annual gross profit of around £1 million and 2 garage businesses. He describes himself as an "*entirely self-made man who has achieved success without the benefit of any inheritance or formal education*". Even after the losses sustained in 2020, he remained in a solid financial position. When his brother expressed concerns about the size of the losses in a WhatsApp chat on 21 April 2020, Mr Day's response was: "*….calm down, I still have £3m in the bank*". Before opening his FXCM account in 2020 he had previous trading experience and on any view was familiar with the complexities and mechanics of online trading.

5. FXCM advertises itself as a "*leading provider of online exchange (FX) trading, CFD trading, spread betting and related services*". It operates an online spread betting platform. It provides a range of some 500 complex financial products to retail and professional clients, including CFDs linked to both commodities (oil, gas and metals) and to treasury products. The FXCM product linked to WTI was known as "USOil". FXCM is a limited company registered in England and Wales and is subject to regulation by the Financial Conduct Authority ("FCA").

In accordance with its FCA obligations it was required to assess if its products were appropriate for Mr Day.

B.2 The evidence

6. I heard evidence from the claimant and from his brother Kieron Day.

7. For FXCM I heard from Byron Spencer (Senior Vice-President of Marketing Web Technology), Craig Mischel (a product manager) and Juan Café (a director and Chief Operating Officer of FXCM).

8. I heard also from 2 experts. Mr Cox on behalf of the claimant and Mr Bird on behalf of the Defendant. The experts each prepared reports and there is a joint report. Mr Cox provided a follow-up report.

9. In addition I have had the benefit of contemporaneous discussions via WhatsApp between Mr Day and his brother.

10. Save for the experts (whose reports with exhibits covered some 540 pages), I found all of the evidence helpful. The experts were instructed to provide a view on 3 issues which can be summarised as follows: how would a regulated firm approach the issue of appropriateness? What information should a regulated firm have provided to Mr Day after his orders had been executed, and to what extent was it anticipated that there would be volatility in WTI Light Sweet Crude Oil Futures?

11. Broadly speaking, Mr Cox adopts a protective and interventionist approach whereas Mr Bird adopts a light touch approach. I formed the impression that Mr Cox (as is hinted at in the passage cited above) expected FXCM to do more than COBS required. He clearly regards COBS as setting out a minimum viable standard so that compliance with that standard would not in his view be good enough.

12. In my view, as far as the experts deal with relevant issues, Mr Bird's approach is to be preferred. Section 138D of FSMA makes it plain that a breach of the rules may be actionable. The case pleaded against FXCM relies on breaches of COBs and breaches of contract.

C. CFDs in general and USOil in particular

13. The precise mechanics of spread betting are explained by Rix LJ in *Spreadex v Battu* [2005] EWCA Civ 855 at paragraphs 2 and 3 and by His Honour Judge Pelling KC in *Quinn v IG Index* [2018] EWHC 2478 (Ch) at paragraphs 3 to 11. I gratefully adopt those explanations. This section of the judgment deals with some further general explanation of CFDs and some specific explanation of relevant features of USOil CFDs.

C.1 CFDs in general

14. By way of overview, and as explained in a Key Information Document ("KID") produced for CFD customers by FXCM, a CFD:

"*….allows you to obtain an indirect exposure to an underlying asset such as a security, commodity or index. This means you will never own the underlying asset; you will make gains or suffer losses as a result of price movements in the underlying asset to which you have the indirect exposure*".

15. Here the underlying asset is a commodity, namely the WTI futures contract. If the customer wants to bet on the price of the futures contract going up, they will elect to "buy" CFDs ("go long"). If the customer wants to bet on the price falling, they will elect to "sell" CFDs ("go short"). Gains and losses are fixed when a position is closed. At closure, the price of the CFD

is compared to the price when the position was opened. If the price has moved in the direction predicted by the customer, then the customer will gain. If the price has moved the opposite way, there will be losses.

16. A CFD is a leveraged product. In their consultation paper of December 2016 the FCA describe trading with leverage in this way:

"*trading with leverage means that investors are only required to deposit a small percentage (margin) of the total value of the investment when opening a position…. the client's profits or losses are based on changes in value of the total investment. This means leverage magnifies a client's profit or loss on a position compared to the funds deposited as margin*."

C.2 Leverage, USOil margins and the how losses and gains are worked out

17. FXCM's KID explained margin and leverage in this way:

"CFD trading requires you to maintain a certain level of funds in your account to keep your positions open. This is called margin. You will be able to open a position by depositing only a small portion of the notional value of the position, creating a leveraged position. Leverage can significantly magnify your gains and losses."

18. A customer would need to have £20 available in their trading account for each USOil CFD the customer wanted to open. That amount (the "entry margin") was fixed, and not dependent on the advertised price of USOil. Once a position was opened the opening margin would cease to be treated as available equity.

19. As the price of USOil fluctuated, the customer stood to lose or gain (depending on whether the position opened was long or short and on whether the market rose or fell) $0.10 for every $0.01 in price change on each contract held (the "pip cost"). If the client did not maintain sufficient equity in his account to cover the entry margin, FXCM had a discretion to close positions. If the client did not maintain sufficient equity to cover the "liquidation margin" (set at 50% of the entry margin) FXCM was obliged to close down open positions.

20. The CFD Product Guide produced by FXCM ("the Product Guide") explains the pip cost and provides a link to a pdf which sets out margin requirements.

C3. Expiry

21. With the exception of gold and silver CFDs, all commodity CFDs offered by FXCM (including USOil) had an expiry point. A customer trading in USOil would therefore need to be mindful that open positions would be closed (and losses and gains crystallised) at expiry.

22. The USOil expiry dates were set out in a PDF ("the expiry PDF") clearly signposted by the both the Product Guide and the KID.

23. Under the heading "Term" the KID (which deals with CFDs generally) provides as follows:

"*FXCM's Gold (XAU/USD) and Silver (XAG/USD) CFDs have no maturity date or minimum holding period. You decide when to open and close your positions. All other Treasury and Commodity CFD's have a periodic expiration (in most cases Monthly or Quarterly). FXCM expiration dates are located in the FXCM CFD Expiration PDF*." (underlined words are hyperlinked in the KID).

24. The Product Guide (in the section dealing specifically with USOil) provides a link to the expiry PDF under the heading "*trading hours and expiration*":

"Refer to the FXCM CFD Trading Hours PDF at:

https://docs.fxcorporate.com/user-guide/FXCMCFDTradingHours.pdf

Please note, however, that hours are subject to change based on Daylight Savings Time. FXCM CFDs will not be open for trading during holidays in which the reference markets are closed. FXCM expiration dates for USOIL are located in the FXCM CFD Expiration PDF.

When USOIL expires, all pending Entry orders and Stop/Limit orders that are associated with the expiring contract will be cancelled. Clients will need to re-establish another position if desired after the expiration and reinsert Stop and Limit orders to the new open position." (underlined words are hyperlinked in the Guide)

25. Between January 2020 and May 2020, the expiry PDF listed CFD expiry dates for 7 products, including USOil. At that time, 14 expiry dates were shown for USOil, one in each month from November 2019 to December 2020. The PDF sets out the following at its foot:

"*important notes regarding expirations…. open positions on the "FXCM expiration" date will be closed…. At approximately 17:00 EST…all pending entry orders and stop/limit orders that are associated with the expiring contract will be cancelled*.".

26. The precise expiry point of a USOil contract could be clearly identified from the PDF. It was simply a question of identifying the next expiry point to occur after a position had been opened. Generally that process would involve identifying the next occurring expiry date. If the position was opened on an expiry date, but before 17.00 EST, the expiry would happen at 17.00 EST on that day. There is no suggestion that Mr Day was unable to read and understand the expiry PDF. His complaints relate not to that document, but to a webpage, not referred to in any of the relevant contractual documentation, which displayed expiry dates.

D. Regulation

D.1 Financial Services and Markets Act 2000

27. FXCM is regulated by the FCA. The FCA is a statutory body. By section 1B of the Financial Services and Markets Act 2000 (FSMA) it is directed to act in a way which advances one or more of its various statutory operational objectives. One operational objective (see sect.1B(3), sect.1C(1) and sect.1C(2)(d)) is to secure "*an appropriate degree of protection for consumers*". When assessing what degree of protection is appropriate, the FCA must have regard to "*the general principle that consumers should take responsibility for their decisions*". This is an important provision which ensures that the FCA acts with due deference to the important right of autonomy.

28. Section 137A of FSMA authorises the FCA to make rules dealing with how authorised persons (such as FXCM) carry on regulated activities.

29. Section 138D of FSMA provides as follows:

A contravention by an authorised person of a rule made by the FCA is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty.

D.2 COBS

30. FXCM is bound by the FCA's Conduct of Business Sourcebook rules (COBS). These are the rules made pursuant to the power set out at FSMA section 137A. All COBS provisions relevant to the present claim are set out in the appendix to this judgment. COBS are divided into a number of categories which are explained in the FCA's handbook. The main categories

are Rules – which are made under FSMA and are binding. Guidance – which is made under section 139A of FSMA and is used to explain the implications of other provisions, indicate possible means of compliance and set out recommendations. Guidance is not binding and need not be followed to achieve compliance with the relevant rule or requirement. However, compliance with guidance will be sufficient to satisfy the rule to which it relates. EU – which are derived from EU legislative material.

D.3 MIFID II

31. COBS were revised as a result of changes introduced by EU Directive 2014/65/EU and EU Regulation 2017/565 on markets in financial instruments. This legislation is known as MIFID II. One change was to introduce a new COBS 10A to deal with appropriateness assessments. The former appropriateness regime was set out in COBS 10 (see for example *Quinn v IG Index* cited below).

32. Mr Day relies on COBS 2.1.1R(1):

A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).

33. The headline rules on appropriateness are as follows:

10A.2.1R *A firm must ask the client to provide information regarding that client's knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded to enable the firm to assess whether the service or product envisaged is appropriate for the client.*

10A.2.3EU *Investment firms shall determine whether that client has the necessary experience and knowledge in order to understand the risks involved in relation to the product or investment service offered or demanded when assessing whether an investment service…. is appropriate for a client.*

10A.2.*4EU Investment firms shall ensure that the information regarding a client's or potential client's knowledge and experience in the investment field includes the following, to the extent appropriate to the nature of the client, the nature and extent of the service to be provided and the type of product or transaction envisaged, including their complexity and the risks involved:*

(a) the types of service, transaction and financial instrument with which the client is familiar.

(b) the nature, volume, and frequency of the client's transactions in financial instruments and the period over which they have been carried out.

(c) the level of education, and profession or relevant former profession of the client or potential client.

10A.2.6EU *An investment firm shall be entitled to rely on the information provided by its clients or potential clients unless it is aware or ought to be aware that the information is manifestly out of date, inaccurate or incomplete.*

10A.2.8G *Depending on the circumstances, a firm may be satisfied that the client's knowledge alone is sufficient for him to understand the risks involved in a product or service. Where reasonable, a firm may infer knowledge from experience.*

10A.3.1R
(1) If a firm considers, on the basis of information received to enable it to assess appropriateness, that the product or service is not appropriate for the client, the firm must warn the client.
(2) This warning may be provided in a standardised format.

10A.3.3G *If a client asks a firm to go ahead with a transaction, despite being given a warning by the firm, it is for the firm to consider whether to do so having regard to the circumstances.*

34. Mr Levy suggests that the main change brought about by MIFID II is that COBS 10A.2.6EU is wider than its predecessor COBS 10.2.4.R. The only material difference between the 2 is the addition of the words "or ought to be aware" (underlined below):

    a. The new rule is set out at 10A.2.6EU: *An investment firm shall be entitled to rely on the information provided by its clients or potential clients unless it is aware or ought to be aware that the information is manifestly out of date, inaccurate or incomplete.*

    b. The old rules at 10.2.4R: *A firm is entitled to rely on the information provided by a client unless it is aware that the information is manifestly out of date, inaccurate or incomplete.*

35. Mr Levy also points out that the former COBS 10.4.2R has been removed from COBS 10A entirely. It provided as follows:

If a client engages in a course of dealings involving a specific type of product or service through the services of a firm, the firm is not required to make a new assessment on the occasion of each separate transaction. A firm complies with the rules in this chapter provided that it makes the necessary appropriateness assessment before beginning that service.

36. When considering how these rules should be applied, it is helpful to understand the headline changes brought about by MIFID II which resulted in the need for COBS 10A. Those changes are helpfully set out in an FCA Discussion Paper of March 2015 (DP15/3). Dealing with appropriateness, the paper notes that: "*In a deliberate attempt to increase investor protection, MiFID II has restricted the types of products that are classified as 'non-complex'*" (para.11.5).

37. The effect of reducing the class of non-complex products was that appropriateness assessments were needed for more products (complex products) than had previously been the case. The paper goes on to suggest that "*Firms will want to consider the requirements of the appropriateness test and consider the sorts of knowledge and experience that may be appropriate for a firm to capture and assess when selling certain products. [FCA's] existing rules in COBS 10 provide guidance for firms on how they can ensure that they are meeting our requirements to assess the knowledge and experience of their customers*." (para.11.12 emphasis added).

38. It seems clear that whilst firms would need to conduct appropriateness assessments for a greater number of products as a result of MIFID II, the way that assessment was carried out would not fundamentally change. The "*existing rules*" continued to "*provide guidance*".

D.4 ESMA

39. The European Securities and Markets Authority ("ESMA") is required to play an active role in building a common structure for the supervision of certain financial activities across European states. To that end, it has published 2 helpful and relevant documents. In March 2017, a "*questions and answers*" document ("ESMA 2017") to help national competent authorities (like the FCA) understand if the firms they regulate were complying with pre-MIFID II regulations for CFDs and a "MIFID II supervisory briefing" on 4 April 2019 ("ESMA 2019").

40. ESMA 2017 makes the following relevant headline points in respect of the type of information that should be sought:

    a. It is bad practice to ask "overly broad questions" about knowledge and experience

b. It is good practice to give more weight to trading experience (by reference to frequency and period) and less to theoretical knowledge
c. When considering knowledge, "*academic…. experience that may demonstrate knowledge relevant to trading CFDs*…." may be relevant. This is to be compared to evidence of "*general education*" which is not relevant and should not be taken into account.
d. Experience of trading in CFDs and other speculative instruments including leveraged products (traded with margin)

41. ESMA 2019 emphasises that firms have "*a certain degree of flexibility*" about the information they obtain (para.12) and goes on to pose a series of questions designed to help national supervising bodies (such as the FCA) understand if firms are complying with MIFID II. The briefing includes questions about the arrangements a firm has to update information on a client's knowledge and experience. It raises the risk of "unjustified updates". It deals with the application of the clients' best interest rules where the firm has concluded that the product or service is not appropriate, a risk warning has been given but the client wishes to proceed. It notes that a firm should in that case consider the client's vulnerability before allowing the client to proceed.

D.5 FCA review

42. In June 2017, the FCA reviewed how 23 firms went about assessing appropriateness (under COBS 10). It referred to the ESMA 2017 document and concluded that firms were failing to assess potential clients appropriately. It expressed "serious concerns" about the distribution of CFDs to retail clients. Changes to COBS came after the publication of that review.

E. Dealings before 2020

43. In 2005 Mr Day opened an account with FXCM which he used to trade in rolling spot foreign exchange trades. Rolling spot FX trades are margin-based, leveraged, CFDs. His trading continued until 2007. The defendant's records show that a warning about inappropriateness (a High Risk Investment Notice or "HRIN") was issued to him at the time. Mr Day told me in evidence that he did not recall receiving it. His written evidence was "*my application resulted in a high risk investment notice being issued to me, but I unfortunately do not recall receiving this and the defendant has not disclosed it*".

44. Mr Day was referred to an email sent on 23 June 2005 at 6.27am. Although the email was not addressed to him and he did not see it at the time, it records information submitted by him in support of his application. Under the heading "passwords and agreements" Mr Day has confirmed receipt of a number of documents. Included in the list is "High Risk Investment Notice". It seems to me that this represents confirmation from Mr Day that he had seen the HRIN. That is important because, Mr Day elected to carry on and to trade. He lost around £6,000.

45. In December 2010 he applied to FXCM to trade for a third party, Karen Martino Figueroa, using her account through a power of attorney. The circumstances in which this arrangement began are wholly unclear. Mr Day told me he heard of the opportunity in an online forum and was subsequently interviewed via skype but not he thought, by Karen Figueroa. He told me he was not paid for the trades he conducted but that he considered himself at the time to be an "*up and coming trader*". He traded rolling spot FX for 9 days in January 2011 and lost £1,371.46. During that time he applied stop and close orders to the account and was clearly well-versed in how they worked. He told me in evidence that he stopped trading because he was "*scared to lose money that wasn't [his] own*".

46. From 2016 to 2019 he opened 9 demo accounts and used them to carry out dummy trades. At least some of those accounts (and possibly all of them) allowed Mr Day to carry out dummy CFD trades.

F. Account opening in 2020

47. The relevant COBS obligation is summarised at paragraph 24 of ESMA 2019 as follows: "*firms shall determine whether a client has the necessary experience and knowledge to understand the risks in relation to the investment product or service offered or demanded when assessing whether an investment service (other than investment advice or portfolio management) is appropriate for a client.*" It is common ground that the obligation arises when an account is opened. Mr Levy suggests it continues thereafter.

48. On 31 January 2020 Mr Day applied to FXCM to open a trading account. He provided information, designed to allow FXCM to assess his "knowledge and experience" by selecting answers from drop down menus on an online portal. In responding to questions under the heading "*employment information*" Mr Day told FXCM that he was a company director and that the sector he worked in was "*other service activities*" (so that it was clear that he was not an investment professional). The following warning is recorded twice. Once before the applicant enters personal information and once before employment status is requested:

"*CFDs are complex instruments and come with a high risk of losing money rapidly due to leverage. 69.66% of retail investor accounts lose money when trading CFDs with this provider. You should consider whether you understand how CFDs work and whether you can afford to take a high risk of losing your money*."

49. For ease of reference I have numbered the questions that followed. Questions 1 to 8 sit under the heading "trading experience information (as pertaining to the last 3 years)". The experience questions (1, 4 and 7) had a range of answers with "5 years +" as the available maximum. It was suggested that the reference to "the last 3 years" and the possible response of "5+ years" was confusing. I do not agree. The 3-year reference simply means an applicant is not required to count back from the date of the application. The 3-year reference means that an applicant who had not traded for 2 years and 10 months but had traded for 6 continuous years before that, would be able to report that they had "5+ years" experience.

50. The frequency questions (2 and 5) had a range of answers, the highest frequency was "daily" and the number of trades in the frequency period selected ranged from 1 to 10 or more.

	Question	Response
1	What is your experience trading currencies, CFDs, and/or spread bets through interbank or OTC foreign exchange?	5+ years
2	Frequency of Trades	Daily
3	Number of Trades	5
4	What is your experience trading leveraged products?	5+ years
5	Frequency of Trades	Daily
6	Number of Trades	5
7	What is your experience trading futures and/or options?	None
8	Do you have knowledge relevant to the transactions or services related to FXCM offered product(s)?	No

51. Looked at objectively, questions 1 and 4 are questions about experience. Question 4 is clearly concerned with high risk products. Questions 2 and 3 relate back to question 1 and questions 5 and 6 relate back to question 4. Mr Day's responses to questions 2, 3, 4 and 5 reveal a great deal of experience of thousands of trades. The process did not allow for the inputting of any greater level of experience.

52. Question 7 is a further experience question but is (as I read it) not directed to CFD trading. Question 8 is the only "knowledge" question. On its face it requires the applicant to understand what "transactions or services" are related to FXCM's products and then to

identify if he knows anything about those transactions or services. One interpretation of this question is that it is looking for knowledge about underlying financial markets (eg the oil market). This interpretation is supported by the appropriateness policy (see below) that was available to Mr Day during the registration process.

53. He provided the following information about his assets:

Question	Response
Total Annual Income	£100,000 - £249,999
Net Worth	£1,000,000 - £4,999,999
Savings & Investments	£250,000 - £1,000,000
How much money do you intend to fund your account with?	£50,000

54. In applying for the account, Mr Day (by "clicking the "yes" button") amongst other things:

    a. confirmed that the information he had provided was true and accurate.
    b. agreed to the defendant's terms of business.
    c. agreed to the defendant's order execution policy and
    d. consented to the defendant providing products and services to him in accordance with its rate card, KID and managing conflicts of interest policy

55. The application noted that it was "*important that you read the documents referred to above before proceeding.*" Mr Day agreed to these terms and each of the documents referred to was hyperlinked. The KID, in particular, is an important document. Its content is regulated by EU Regulation 1286/2014 of 26 November 2014 on key information documents for packaged retail and insurance-based investment products ("PRIIPs"). It directed the reader to the Product Guides published by FXCM.

56. On 3 February 2020, Charmaine Mavhunga from FXCM spoke to Mr Day to verify some details about his application. The queries were dealt with satisfactorily, and the account was opened on 6 February 2020.

G. The Appropriateness Policy

57. FXCM's policy was first introduced on 25 October 2017 in order to comply with the soon to be introduced, MIFID II, and perhaps with at least a nod to the FCA's June 2017 review of appropriateness under COBS 10. At that point it was approved by Michael Grant, the defendant's director of global compliance. It was then revised on 10 August 2018 and again on 4 March 2019. It appears to have been the framework against which the issue of appropriateness was assessed.

58. At section 3 under the heading "assessing appropriateness" the following is set out:

"*In instances where the Firm deems an investment may not be appropriate for a client based on the client's knowledge or experience, the Firm must provide a warning to clients of this fact. The Firm will only make the required appropriateness assessment before the client enters into a transaction with the Firm for the first time*."

59. It provides (after appendix 3) that a HRIN would be issued if the client had "*insufficient trading experience*" or fell into one or more of nine objective criteria to do with: age (the client is aged between 18 and 21 or is at least 65 years old), employment status (the client is retired, unemployed or a student), or financial standing (has an annual income under £25,000;

a net worth under £25,000 or has liquid assets under £25,000). Parameters for trading experience are set by reference to a combination of the periods and frequency specified in the questions numbered as 1, 4 and 7 above (the "experience" questions"). At appendix 2 (and elsewhere in the body of the policy) it adds; "if the applicant has indicated that they have filed for bankruptcy".

60. It seems clear that FXCM did not adhere to the policy. For example, it provides that knowledge and education is to be assessed on this question: "*Do you have knowledge relevant to the transactions or services related to FXCM offered product(s) as a result of working directly in the financial services sector for at least 1 year in a professional position or as a result of obtaining a professional qualification, diploma, or academic qualification?*" (underlining added). In fact, the question used contained only the underlined words. Further the policy contains some notable omissions or errors:

    a. It makes no reference at all to COBS 10A, preferring instead to COBS 10. It refers to regulation 2017/565 (referred to in the table above as "org") which updated MIFID II. Despite this, there is no direct reference to MIFID II in the policy. The omission of any reference to MIFID II might not be strictly an error, but it is certainly surprising.

    b. It accepts that FXCM's products and services are not necessarily appropriate for clients who have "*ever declared bankruptcy*". If a new account application indicated that the applicant had "*declared bankruptcy*" the policy provides that the applicant would receive a HRIN. Mr Day was not asked about bankruptcy and (given that he had been made bankrupt) he did not receive a HRIN. The policy is not consistent on the point.

61. Mr Café told me that Mr Day was perceived from the answers he provided, as an "*ideal client… in the sense that he was successful…… he had indicated he had traded previously and he max'd out all of the answers in terms of what he was trading …. I don't like it when clients lose money, but I feel like we do a really good job of highlighting the risks of a product*.". That evidence seems to me to be a fair reflection of the application.

62. Mr Café also told me that FXCM dropped any questions about bankruptcy "*at some point between 2015 and 2018*" because it was determined that the information was required in the US but "*wasn't a required question in the UK and that our competitors weren't asking it*." He candidly accepted that the appropriateness policy ought to have been updated to reflect that change.

63. The policy and the appropriateness assessment centre on experience. COBS 10A.2.8G makes it clear that it may be appropriate to infer knowledge from experience. The absence of any real investigation of knowledge is in my judgment not fatal to the process.

H. Terms of the relationship

64. FXCM's Terms of Business ("ToB") record at clause 1.8 the documents that have contractual force. They include "*any application or form that you submit to open, maintain or close an account*".

65. Clause 24.3(c) provides that upon the occurrence of an exceptional market event (defined to include "excessive movement, volatility, or loss of liquidity in any relevant market or underlying instrument") FXCM may close any or all open positions.

66. By clause 7.3 FXCM reserves the right to cease to offer any services and/or remove products from its offering. There is a general obligation in such a case to give 30 days' notice and where such notice cannot be given to give as much notice as possible.

H.1 The KID

67. The KID hyperlink within the application form gives access to a number of different KIDs. The relevant CFD KID sets out key information about treasury and commodity CFDs. It expressly directs the reader to consult the Product Guide for more detailed information on each commodity CFD product offered by FXCM. In my view the Product Guide (in effect incorporated through the KID) also sets out contractual terms.

68. One of the vital pieces of information a trader needs to know before deciding to place a CFD contract is the "pip" cost of that contract. The KID explains that pip costs are set out in the relevant Product Guide and in the "trading station" platform for each product.

69. The relevant KID contains a further upfront risk warning that CFDs are "*complex instruments and come with a high risk of losing money rapidly due to leverage*." The document explains what a CFD is and provides a link to the expiry PDF.

H.2 The Product Guide

70. The Product Guide contains a succinct summary of each offered CFD product. There are 13 CFD products related to global stock indices, 6 related to commodities (including USOil), 3 related to metals, 1 relating to Treasury products, 5 relating to cryptocurrency and 5 relating to baskets of currencies and crypto assets.

71. Once again, the Product Guide has an upfront risk warning which mirrors the warning set out in the application process and expands upon it. It signposts the expiry PDF as set out above.

H3. Terms dealing with expiry

72. In my view the contract between Mr Day and FXCM makes plain that the only reliable source of information about expiry dates (the only source that has contractual force) is the expiry PDF. An issue was raised that there was no express averment in the Defence that the KID formed part of the contractual documentation. In my view that does not matter. The Defence admits the reference to KIDs in the application form and (at paragraph 11) and makes it plain that FXCM will rely on the ToB at trial "for their full terms and effect".

73. It was suggested that the KIDs, as a document mandated by EU Regulation, could not be part of the contractual terms of the relationship between FXCM and its customer. I do not accept that submission. In my view it is plain that both the relevant KID and the Product Guide to which it makes express reference as the source of more detailed information on particular commodity CFDs form part of the contract between FXCM and Mr Day. Further, because the application form includes Mr Day's consent to FXCM providing its services in accordance with the KID, it is in my judgment plain (and would be even without clause 1.8 of the ToB) that the KID forms part of the contract.

I. Trading in 2020

74. Mr Day began trading in USOil and currencies on 10 February 2020. At the time, the balance on his account was around £25,000. From mid-February his interest was clearly focussed on USOil.

75. Before dealing with the chronology in more detail, one incident in particular must be mentioned. It is important because it illustrates that Mr Day's recollection of contemporaneous events is not invariably reliable and highlights a potential willingness to seek to blame others for his own decisions. On or around 5 March 2020 the price of USOil dropped substantially and Mr Day found himself with an overdrawn balance on his account of £15,000. In fact, the balance should never have been recorded as overdrawn because, in

accordance with FXCM's terms of business, the losses of a retail CFD customer are capped at the extent of the customer's balance. The debit was removed on 12 March 2020 following a telephone conversation with Charmaine Mavhunga. In his witness statement, Mr Day said this:

34…. I remember being contacted by Charmaine who asked why I hadn't used the account for a few days. She offered to remove the negative balance on my account. At the time, I thought this was a very kind offer, but I now know that under the Defendant's terms of business I could not have been called on to pay the negative balance because I was a retail customer. In hindsight I now think she had been tasked to convince me to invest more money with them.

35. As a result, on 12 March 2020, I transferred a further £75,000 to the Defendant and began trading again….

76. When confirming his evidence Mr Day accepted that, in fact, he had actioned the transfer of £75,000 before speaking to Ms Mavhunga. He therefore sought to amend paragraph 35 of his witness statement to make plain that the money was not transferred as a result of FXCM's encouragement. When asked in cross examination about the last sentence of paragraph 34, Mr Day was initially keen to emphasise that the call felt like a sales call designed to encourage him to carry on trading. When pressed it seemed to me that he accepted that Ms Mavhunga had not been tasked to convince him to invest more money at all.

77. The following points are supported by the documents, not disputed or arise from the evidence. Insofar as contentious matters are set out the following represents my findings of fact:

    a. In late February to early March Mr Day saw USOil prices fall from around $54 per barrel to $30. Expecting the price to recover and increase he opened long positions, buying USOil. In a WhatsApp chat with his brother on 10 March 2020 he said: "[oil is] *a punt with a high reward but still a punt, low was 27, currently 33, 2 weeks ago was 54, so good time to buy*…". In evidence Mr Day accepted that at this time he was "*watching oil prices quite carefully with a view to working out the best time to buy into the market*". By 8 March 2020 (as described above) he had lost his initial £25,000 and so deposited a further £75,000. On 12 March he deposited £75,000 and on 19 March a further £70,000. At that time, the balance on his account was down to around £10,000.

    b. Between 10 February 2020 and 13 April 2020 he placed around 245 separate contracts either in USOil or currency prices. Mr Day accepted in evidence that at this time he was "*depositing large sums of money into [his] account, building up a war chest of more than £500,000, because [he had decided to] open a large position on oil*".

    c. On 18 March, the price was down to $20 and by 22 March the price had risen to around $23. On 22 March he told his brother: "*should have borrowed everything I could and put it in oil when it went to $20*".

    d. A little over a week later on 30 March 2020 the price was at $22. By then, the United Kingdom was in lockdown. On 29 March 2020 he told his brother he had sent to a school parents' WhatsApp group a message saying: "*I can only give one piece of advice in these uncertain times – and that is BUY oil….for the medium to long term it can only go one way*". He deposited a further £80,000 on 30 March and the same amount on 1 April. He then had a balance of £312,074 in his trading account.

    e. At around this time (on 31 March 2020 or 1 April 2020) Mr Day spoke to Graham Smith an experienced investment banking professional. They discussed in broad terms Mr Day's plan to invest in USOil. Mr Day accepted that Mr Smith told him that it was a "bad idea" to invest solely in oil and that he should diversify rather than

putting all of his "eggs in one basket".

f. On 3 April he deposited a further £90,000. On the same day, the Chicago Mercantile Exchange ("CME" which owns the NYME) gave notice that its systems would allow trading of certain energy products including USOil at negative prices. The USOil price sat between $23.490 and $29.110.

g. On 4 April Mr Day discussed Graham Smith's suggestion with his brother. He clearly disagreed with the cautious (and ultimately correct) approach that had been advocated. He said: "*….diversifying is for when there is no sure thing – and I may be wrong, but oil is fairly sure."* On 6 April he deposited £95,000.

h. On each of 8 and 9 April he deposited £95,000. On 8 April CME issued an advisory notice to "*assure CME clearing firms and end clients that if major energy prices continue to fall towards zero in the coming months, CME Clearing has a tested plan to support the possibility of a negative options underlying and enable markets to continue to function normally*". On 9 April USOil at its highest was at $28.315.

i. On 14 April he bought 7000 contracts of USOil at prices between $20 and $22 and closed all of his open currency positions. By then he had made the decision to trade exclusively in USOil. He deposited £95,000. In WhatsApp messages to his brother he said, "*put it this way [the price of USOil] ain't staying here…my money is on up…countries coming out of lockdown shortly*…". Prices on 14 April moved as follows:

Time	Price ($)
00.21	23.025
06.00	22.700
08.04	22.480
19.28	19.915
21.30	20.693

j. Mr Day says he checked the FXCM expirations webpage (not the PDF) because he wanted to keep these positions open for several weeks. His written evidence is that on 14 April he believed, after checking the website, that he was buying into contracts that would expire in May. When the webpage was put to him as it existed on 14 April, he had to accept that the May expiring contract was not at the top of the list. The top contract was the April expiring contract. He told me that his eyes "*were drawn to the May 2020* [closing date]".

k. On 15 April he deposited £95,000. On the same day CME issued a further release assuring firms that it could deal with trades at or below zero. Mr Day bought 1500 contracts. He told his brother "*got to be expecting some heavyweight oil purchasing going on today oil users want to capitalise on this price*…".

l. On 16 and 17 April he continued to buy, opening 2000 contracts. The price fell further, reaching $17.410 on 17 April. On 16 April he noted "*all the oil reports you read are saying oil will drop. No demand…. Nowhere to store it*". The oil reports he refers to were consistent with the messaging from the CME from early April that there was a risk that prices would fall to zero.

m. Between 17 April and 20 April, at a time when he was plainly aware that "the oil reports" were predicting continuing falls in oil, he deposited a further £1,035,000. Of that £690,000 was credited to his account deposited on 20 April., including £500,000 at 4.08pm. His balance at 4.08pm on 20 April 2020 was then £1,796,930.03.

n. On 19 April he opened 1000 contracts at a price ranging from $17.586 to $17.775.

o. On 20 April USOil prices fell as follows:

Time	Price ($)
06.00	15.027
12.36	12.725
13.16	12.189
13.31	11.822
17.49	5.990
17.50	5.500
18.16	4.300
18.17	4.245
18.18	4.430
18.19	3.992
19.08	0.001

p. On 20 April, the expiry date for USOil:

i. Before 11.30am he opened up 501 contracts at $16.930.
ii. At 12.36pm on 20 April he spoke again to Ms Mavhunga. She told him during the call that USOil was expiring at 5pm Eastern Time in the USA, which was 10pm in the UK. It was explained that all open contracts would be closed. The information she was giving was not new. She was simply reflecting exactly the terms of the contract between Mr Day and FXCM recorded in the expiry PDF.
iii. At 12.39pm £95,000 was paid into his trading account. That was the third £95,000 deposit of the day. These and other deposits were required to ensure Mr Day was not falling foul of the margin requirements set out above.
iv. At 1.07pm Mr Day looked at the FXCM expirations webpage (not the expiry PDF) and would have seen that the top date on the page was (in error) 18 May 2020, the date of the May expiring contracts which contracts were not at that point available for purchase.
v. At 1.16pm Mr Day got back in touch with FXCM to check expiry dates. In a virtual chat with Joe Harari he asked if FXCM could confirm "*if the CFD USOil will auto close tonight?*". He responded: "*yes, it is confirmed, 1700 EST*". Again, FXCM was simply reflecting contractual terms. There was discussion about opening new positions after expiry. That could only refer to new positions on the next expiring contracts. Mr Harari pointed out that the price of oil was "*going crazy*" so that FXCM did not know "*what the price difference will be between the contracts*".
vi. At 1.31pm Mr Day went back to the expirations webpage and took a screenshot photograph of it.
vii. In exchanges with his brother Mr Day at 2.09pm, having sent over the screenshot, Mr Day said: "*hoping…. the roll over goes easily*".
viii. At 4.08pm £500,000 was credited to his account
ix. At 16.57 on 20 April he googled "*EST time now*".

q. He closed his open contracts (bought at around $20 to $22) on 20 April 2020 at 5.50pm making a huge loss. He immediately sent a WhatsApp message to his brother: "*closed. [£1.3m] lost*". After the last of these trades had closed, the balance on his account was £385,605.27. WhatsApp chats with his brother make it clear that Mr Day was thereafter keeping an eye on the price and reflecting on his position. At 5.59pm he said, "*had £1.8m in there but bottled it*". At 6.10pm, referring to the price of USOil he said, "*climbing now*".

r. Between 6.16pm and 6.19pm on the same day he opened 9000 contracts in USOil ("the Further USOil Contracts"). The price was between $4.300 and $3.992. The price of USOil fell to zero at 7.08pm. At 10.49pm these positions were closed (in effect at expiry) at $0.001. The balance on his account after closure was £81,853.28. At 11.14pm an email from Byron Spencer at FXCM confirms that the following notice had been issued to clients (emphasis added):

FXCM Market Alert
USOil has expired as per the normal schedule today (April 20th). However due to the unprecedented market movements, the opening of the new contract month will be delayed. Please note when the new contract is opened, margins may potentially be increased. We recommend trading with caution.

s. FXCM started to trade the next (May expiring) USOil contract on 21 April 2020 at 2.26am at a price of $22.193. The price was much higher because now the underlying WTI futures contract was looking forward to the projected price of WTI at the end of May 2020, a month later.

t. On 22 April 2020 at 4.50pm the defendant emailed Mr Day warning that all further oil CFD contracts may be closed without notice and prior to expiry of the underlying reference price reached or fell below $3.00. The email noted that negative pricing would not be supported.

u. On 28 April FXCM emailed all of its clients with open positions on USOIL (then in the May expiring contract) to inform them that the current contract would be terminated at the close of market on Friday 1 May 2020 and the contracts were set to close only (so that new positions could not be opened). Trading was to resume at 22.00 on Sunday 3 May 2022 with a different futures contract as the underlying reference.

J. An overview of Mr Day's 2020 trading activities and contact with FXCM

78. Mr Day was clearly aware throughout that trading in USOil was risky and accepted as much. As early as March 2020 he refers to the trades as a "*punt*" and in any event accepted the high risk in his oral and written evidence. As long ago as 2005 he had been aware of risks and had lost money. In 2010 he had stopped trading because he was unhappy to put other people's money at risk.

79. As time passed, and as the covid situation worsened, he appears to have formed an increasingly clear view that the price of USOil would rise. Viewed in one way, that was an obvious conclusion to reach. The price would not remain depressed indefinitely. At some point oil use would pick up and prices would rise. The difficulty for Mr Day was that his contracts were not open ended. He was not betting on a price increase at some point in the far future, he was betting on a price increase before expiry.

80. On 14 April he looked at the FXCM expiry webpage. It accurately showed, as the top entry, that USOil contract would expire on 20 April 2020, 6 days later. Although he says his eyes were drawn to the May date, it is clear, and I find, that on 14 April 2020 he was aware that USOil contracts would expire on 20 April at "*approximately 17:00 EST*" as the webpage explained. In my view, this is entirely consistent with his trading after 14 April. In particular he closed a very large number of contracts opened on 14 April at 5.50pm on 20 April 2020. In my view that strongly supports the conclusion that he knew full well that those contracts would not expire in May. He continued to buy USOil in the hope and expectation that the price would rise in the short term and before expiry on 20 April.

81. By 17 April (at the very latest) he was aware that it was being widely reported that oil prices would drop further because, at least at expiry of the April expiring WTI futures contract, there was no demand for oil. That meant that storage facilities were not being emptied (so there was no space to store newly drilled oil) and no one wanted to buy a product they could not sell or

store. Nonetheless, and in the face of this clear message, he appeared then to up his game. He paid more than £1 million into his trading account and on 17 April continued to open new positions. It is clear that Mr Day was prepared to bet on the market rising when every indicator was that it would fall.

82. The day on which USOil expired, 20 April, was a make or break day. Mr Day knew in my judgment the USOil contracts were expiring on that day. That fact was confirmed to him twice on 20 April 2020 and he already knew that position because he had checked on 14 April 2020. I note that he closed his open contracts at 5.50pm on 20 April. He can only have closed those contracts on the basis that he knew (because he had been told twice and because the expiry PDF made it plain) they would be closed later that day if he took no action. He was concerned at that point to limit his already huge losses. Within 20 minutes however Mr Day was once again buying USOil. I do not accept that he made those purchases believing that the contracts would stay open until May. In my view he opened new positions because he felt that the price might rise between 6.19pm and 10pm when the contracts would expire.

83. I formed the view that Mr Day was keen to shift blame for his financially disastrous decision-making onto others. His insistence in evidence that on 14 April he believed he was buying May expiring contracts was plainly wrong. His willingness to say in written evidence that he transferred money into his account as a result of pressure put on him by Miss Mavhunga was demonstrably wrong.

K. As a matter of contract was it possible for Mr Day to open a USOil position expiring in May before the USOil contract expiring in April had expired?

84. I accept that there is no express indication in any of FXCM's documentation that it only offered one USOil future expiring contract at once. In my view it is more important to look for positive indications of what was, in fact, on offer. For the reasons set out below it is clear in my judgment that it was not possible as a matter of contract to open a May expiring contract before the April expiring contract had expired.

85. Schedule B to the ToB deals with CFDs. Paragraph 5 provides that a CFD contract "*will only be formed when you provide an instruction to place an Order on a quote provided by us (either through the [trading platform] or on the telephone)*". Schedule C deals with spread betting. Paragraph 4 of that schedule repeats paragraph 5 of schedule B.

86. A client can therefore only open a USOil position by accepting an offer (or quote) made by FXCM. Quotes provided by FXCM on the trading platform show only one sell price and one buy price for USOil. There is no available option to choose between futures months. Whilst it might be (at least in theory) possible for the price of 2 futures contracts in USOil (one expiring in month 1 the other in month 2) to be exactly the same on a given day, a client would need to be able to choose which futures contract they were buying into if more than one was on offer.

87. In my judgment, the "quote" provided by FXCM on its trading platform, as an offer to a client to buy or sell, can only reasonably be interpreted as a quote to enter into the then open, next expiring USOil contract. To determine what contract that was, the client would need to look at the expiry PDF.

88. Further, and in support of that conclusion, tools provided by FXCM to look at the movement of oil prices record only 1 set of movements relevant to one expiring contract. The uncontroverted evidence before me is that the price of WTI futures contracts (not the derivative prices determined by FXCM) expiring in future months increases the more in the future it lies. The difference was particularly pronounced on 20 April 2020 when the price was plummeting. For example:

Date and time	April expiring	May expiring	June expiring
1.4.20 3.41pm	20.110	23.810	26.780
3.4.20 1.22am	23.700	26.680	28.620
7.4.20 7.29pm	23.720	28.850	32.040
20.4.20 6.18pm	4.490	22.360	27.700

89. I accept that the expiry webpage showed a misleading expiry date for contracts then on offer on 20 April 2020. But in my judgment the information displayed on the webpage had no contractual force at all. It was not an offer that was capable of acceptance and in any event, I have found that Mr Day was aware that the contracts he was buying would expire later that evening.

L. The Pleadings and the Issues

90. The claim in respect of breach can be conveniently categorised under three heads:

    a. Appropriateness issues
    b. Expiry issues
    c. Issues arising out of negative oil prices

91. The appropriateness issues are:

    a. Did FXCM act in breach of contract or contravene COBS by failing to obtain. adequate information to assess whether Mr Day had the necessary knowledge and experience to make it appropriate for him to engage in CFD trading?

    b. Did FXCM act in breach of contract or contravene COBS by wrongly assessing. that it was appropriate for Mr Day to engage in CFD trading and/or by failing to warn him that it was not appropriate for him to do so?

    c. Did FXCM act in breach of contract or contravene COBS by not reviewing its appropriateness assessment and assessing that it was not appropriate for Mr Day to engage in any further CFD trading by 12 March 2020, 30 March 2020, 2 April 2020 or by 12:36 pm on 20 April 2020?

92. The expiry issues are:

    a. Did FXCM act in breach of contract or contravene COBS by not providing Mr Day with confirmation in a durable medium of the expiry date of the USOIL Contracts and Further USOIL Contracts?

    b. Did FXCM act in breach of contract or contravene COBS by wrongly treating the Further USOIL Contracts as April Expiring Contracts and not May Expiring Contracts?

    c. If the expiry date of the Further USOIL Contracts was 20 April 2020, did FXCM contravene COBS by providing Mr Day with misleading information identifying the expiry date as 18 May 2020?

93. The negative price issues are:

    a. Did FXCM act in breach of contract or contravene COBS by not giving Mr Day prior notice that it operated a system by which trading of contracts in USOIL was suspended and contracts closed out if the underlying reference price fell to zero?

    b. Did FXCM act in breach of contract or contravene COBS by not giving Mr Day as much notice as possible of its decision on 20 April 2020 to close USOIL contracts

if the price fell to zero.

94. If I find breach then issues of causation, contributory negligence, scope of duty and estoppel arise depending on the breaches I find.

M. Law

95. I was referred to a number of authorities. The most relevant is in my view *Quinn v IG Index* [2018] EWHC 2478 (Ch). In that case Mr Quinn (a very successful businessman) argued that IG Index had failed to assess whether spread betting products were appropriate for him and failed to properly apply COBS 2.1.1R the effect of which is that a firm must act in the best interests of its client.

96. In that case, HHJ Pelling KC decided that the obligation to assess appropriateness was a one-off obligation that arose only when an account was opened. It did not arise every time a position was opened or when trading was resumed after a pause. He found that there was nothing in COBS (as they then stood) from which an obligation to assess appropriateness more than once could arise. In reaching this conclusion the learned Judge noted that COBS 10.4.2R provided that a firm was not required to "to make a new assessment on the occasion of each separate transaction". He also decided that there was nothing in Mr Quinn's aggressive but unsuccessful betting that was sufficient to require a new assessment of appropriateness, because that conduct did not mean that the firm "*was aware*" that information he had already provided "*manifestly out of date, inaccurate or incomplete*". Those words appeared in COBS 10.2.4R.

97. I was urged not to follow *Quinn* because it was decided before COBS were changed as a result of MIFID II. In particular the new equivalent of COBS 10.2.4R (COBS 10A.2.6EU) provides that the right to rely on information provided by a client is to be lost when the firm "is aware or ought to be aware that the information is manifestly out of date, inaccurate or incomplete" whereas the old rule provided that the right would be lost if the firm "is aware". It is also pointed out that COBS 10.4.2R has no equivalent in the new rules.

98. In my view the changes to COBS 10.2.4R are immaterial and the removal of COBS 10.4.2R is irrelevant. The new COBS 10.2.4R in my judgment makes expression provision for what would in any event have been implied: that constructive knowledge that information was manifestly out of date, inaccurate or incomplete would suffice and the removal of COBS 10.4.2R cannot be taken to mean that an obligation to re-assess arises on every separate transaction.

N. Appropriateness Issues

N.1 Breach

99. In my view the proper construction of the relevant provisions at the time Mr Day applied for an account is as follows:

    a. FXCM [10A.2.1R] was required to seek information about Mr Day's *knowledge and experience* in the field of investments and then to determine from that information if he understood the risks involved in spread betting [10A.2.3EU].

    b. FXCM was under an obligation in particular to seek information about (a) the types of service and financial instruments Mr Day was familiar with, (b) how often and with what frequency he had previously traded and to the extent appropriate (c) his education and profession [10A.2.4EU].

    c. A firm is not under a strict obligation to ask about an applicant's educational background and profession. I do not find that at all surprising. Educational attainment

might have a positive impact on an assessment in limited circumstances. In my view the absence of formal education would rarely be relevant. Education and appreciation of risk are different things. ESMA 2017 supports this view. There is nothing in ESMA 2019 to contradict it. Very many people who lack a formal education will fully understand the risks inherent in trading CFDs. Equally very many people who have a university education will not.

d. The firm was entitled to rely on the information given by Mr Day [10A.2.6] unless it was aware or ought to have been aware that the information was manifestly out of date, inaccurate or incomplete.

e. It was open to FXCM to place particular weight on a potential client's relevant trading experience [10A.2.8G and also ESMA 2017 dealing with COBS 10.2.6G in similar form].

100. In my view it is not helpful or necessary to undertake a detailed textual analysis of the questions put to Mr Day. The better (and correct) approach in my view is to look at the questions put and ask if, overall, FXCM complied with its obligations.

101. I regard COBS 10A.2.4EU as central. It makes clear (as does ESMA 2019) that a firm has a certain degree of flexibility when assessing appropriateness. When read with ESMA 2019 (and ESMA 2017 to the extent that it is appropriate) I am satisfied that FXCM did not act in breach of contract or contravene COBS by failing to obtain adequate information to assess whether Mr Day had the necessary knowledge and experience to make it appropriate for him to engage in CFD trading. I reach that view for the following reasons:

a. Questions 4, 5 and 6 make it clear that Mr Day had a great deal of practical experience of trades with a high risk profile (leveraged trades).
b. Given the huge amount of experience Mr Day had FXCM was entitled to infer that he possessed relevant knowledge.
c. Practical experience trumps formal knowledge.
d. The absence of any question about bankruptcy is not relevant. Bankruptcy is not always a sign of an inability to understand risk. FXCM was in my view perfectly entitled not raise any question about it. COBS make no mention of bankruptcy.
e. The absence of questions about formal education is also in my view irrelevant. FXCM was not obliged to ask.
f. I accept that FXCM's policy on appropriateness does not match its actual approach. Whilst that is a matter that FXCM should review and put right it does not alter the fact that FXCM's information gathering was perfectly adequate.
g. The absence of a quiz (which is just one method for assessing knowledge) is also irrelevant.
h. FXCM was entitled to rely on Mr Day's answers as truthful. I do not accept that he was in any way confused by the questions or that, if he was, that is relevant.
i. In my judgment the ESMA guidelines were complied with.

N.2 causation if there was breach

102. If I am wrong about those points, then causation issues arise. In my judgment the claim would fall at this hurdle. I reach that conclusion for 2 reasons:

a. If FXCM had concluded that CFDs were not appropriate for Mr Day, he would have been issued with a HRIN. I have no hesitation in finding that had that been the case he would have elected to trade. I have found that is what he did in 2005 and in my view what he would do again. I formed the view that Mr Day is not easily swayed by others. His dealings with Mr Smith are a good example. The service of an HRIN would have made no difference to Mr Day because he was well aware that trading

CFDs was high risk.

b. Further, I find that if FXCM conducted a thorough investigation into appropriateness, that the products would have been assessed as appropriate for Mr Day. Mr Day was a knowledgeable trader. He regarded himself as "up and coming" in 2010 and gathered experience thereafter. It was plain to me that he fully understood all of the risks involved in trading CFDs and in my view FXCM would have reached the same view.

N.3 clients' best interests

103. There is in my judgment no basis for saying that FXCM breached the client's best interests rule. Most importantly, I reach that view because FXCM's assessment of appropriateness was unimpeachable. But if I am wrong about that, and if Mr Day had elected to continue to trade after receiving a HRIN, I can see no basis on which FXCM ought to have prevented him from trading. It is not clear to me why such a refusal would, judged at the time, be in his best interests. The argument cannot be that Mr Day did not understand the risks (he accepts he did, and it is absolutely clear from the evidence that he did). If the argument is that he lost a lot of money and so judged with the benefit of hindsight it would have been in his best interests to stop him trading, the argument is untenable. In my judgment Mr Day's best interests were served by not interfering with his right to elect to trade.

104. ESMA 2019 makes it plain that a firm should look at vulnerability when deciding whether to allow a client to trade if the client elects to do so after receiving a warning notice. There is no suggestion that Mr Day was vulnerable.

N.4 continuing obligation

105. Mr Levy submitted that properly understood, COBS 10A.2.6EU (the successor to COBS 10.2.4R) supports the argument that there is a continuing obligation to assess appropriateness. The rule allows a firm to rely on information provided by a potential client when assessing appropriateness unless it is aware, *or ought to be aware* that that information is manifestly out of date, inaccurate or incomplete.

106. The provision means that a firm does not generally need to take any steps to verify the information provided to it when it assesses appropriateness. It is permitted to trust what a future client says and can safely make an assessment based on that information without fear of any complaint. I accept the right is not absolute. If the firm is aware (or ought to be aware) that that information is manifestly out of date, inaccurate or incomplete it loses the right to rely on it.

107. In my judgment, the words "ought to be aware" make it plain that the firm's consideration of whether information is manifestly out of date, inaccurate or incomplete will be judged objectively.

108. There is nothing in COBS 10A or in COBS 10A.2.6EU which suggests a continuing duty to review appropriateness. Indeed, there is nothing in COBS to suggest that the assessment is anything other than a one-time event. That is also the conclusion reached in *Quinn*. It is important that the assessment of appropriateness concerns products and services, not transactions.

109. COBS 10.4.2R (which has been removed) applied where a client engages in "a course of dealings" and provided that the firm did not need to make a new appropriateness assessment before each transaction but would comply with the rules in COBS 10 if it assesses appropriateness before beginning that service. The absence of a similar rule or provision in COBS 10A does not in my judgment mean that I should conclude that there is a continuing duty to assess for appropriateness. If COBS 10A was intended to introduce an ongoing duty to assess appropriateness with each transaction I would have expected that to be made plain.

There is nothing in COBS 10A to suggest that is the case.

110. Mr Levy refers also refers to ESMA 2019 and its references to "updating client information". In my view that section of the document does not assist. ESMA 2019 simply asks what arrangements there are to keep information updated without providing any positive guidance as to what these arrangements should be. Indeed, it sounds a note of caution about updating without good reason.

111. Even if there was such a duty, I am also satisfied that there is nothing in any of Mr Day's dealings on 12 March, 30 March, 2 April or 20 April to suggest that any of the information on which the appropriateness assessment was based had become manifestly out of date, inaccurate or incomplete or that a completely new assessment at that point would result in a different outcome. Mr Levy put the argument in this way on behalf of Mr Day:

Each major increase in [Mr Day's] deposited funds rendered the financial information given at account opening inaccurate. It was also indicative of gambling-related vulnerability and/or lack of understanding of risk. It should have triggered re-assessment at one or more key points such as 12 March (increase to £100k from £25k and double the £50k intended investment stated in RD's application), 30 March (total £250k), 17 April (at 10:01 RD told CHM "I would like to deposit £500,000" {E/1823} and by the end of the day the total was £1.24m, over 20 times the initial intended investment) and 20 April (total £1.93m by 16:08, over 38 times the initial intended investment)."

112. In my judgment the sums deposited, and whether they were greater than the sums initially anticipated, has nothing to do with appropriateness. They might in some circumstances have been relevant to "gambling related vulnerability" but there is no suggestion that Mr Day had any such vulnerability. It has never been suggested that Mr Day was generally vulnerable or that he could not afford to deposit these sums. I do not accept that depositing funds partly to cover margin requirements could impact on FXCM's view of Mr Day's understanding of risk. Mr Day was and was known to be (or could be taken to be), an extremely experienced trader.

113. In any event, even if there was a continuing duty, I can see nothing to demonstrate that FXCM's view of appropriateness on a re-assessment would have changed. Mr Day's knowledge and experience were ample to allow him to trade. He simply made very bad decisions and joined the 69.66% of other clients for whom CFDs were "appropriate" in losing money.

114. Further, I am satisfied that FXCM did not act in breach of contract. Despite the failings of the appropriateness policy I am satisfied that the answers provided by Mr Day were handsomely sufficient to avoid the need for a HRIN.

O. Expiry Issues

O.1 post contract provision of information in a durable medium

115. The relevant parts of COBS are these:

16A.3.1EU *Investment firms having carried out an order on behalf of a client, other than for portfolio management, shall, in respect of that order:*

(a) promptly provide the client, in a durable medium, with the essential information concerning the execution of that order.

(b) send a notice to the client in a durable medium confirming execution of the order as soon as possible and no later than the first business day following execution or, where the confirmation is received by the investment firm from a third party, no later than the first business day following receipt of the confirmation from the third party.

The glossary definition of durable medium is: "*any instrument which enables the recipient to store information addressed personally to the recipient in a way accessible for future reference and for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored*"

16A.3.2G *In determining what is essential information, a firm should consider including:*

(1) for transactions in a derivative:
(a) the maturity, delivery or expiry date of the derivative

116. COBS 16A.3.1EU required FXCM to provide Mr Day with essential information (in a durable medium) concerning the execution of an order after it had been executed. It was agreed that FXCM had sought to discharge this obligation by providing Mr Day with combined account statements. Those statements show a ticket number (identifying the contract), the type of product (for example USOil), the size of the trade, the date and time at which a contract was bought or sold, the gross profit or loss on the trade once closed out, mark-ups, commission, dividends, rollover, adjustments, the net profit or loss (after deductions for commission, dividends, rollover costs and adjustments), an indication of whether the trade was subject to any automatic trading instructions, and the trade account which dealt with the trade. The purpose of providing the information was to ensure that Mr Day knew what he had already done, not to inform him about what he was about to do.

117. COBS does not explain what information is "essential". Guidance (COBS 16A.3.2G) suggests that categories of essential information are not fixed and that the firm has a degree of latitude. The guidance suggests that if a derivative (such as USOil) has an expiry date, the firm should consider including it as part of the essential information. It follows that an expiry date is not intrinsically "essential". When then is an expiry date not essential? In my judgment, if there is no choice of expiry date for a CFD opened at a particular time, it would be acceptable not to treat expiry as "essential" information.

118. In evidence Mr Mischel told me that FXCM did not consider the expiry date of a USOil contract to be essential information. It seemed to me he accepted that it was important information but that it fell short of being essential when there was only one expiry date. He explained that other aspects of a trade (including the hours the underlying product was traded, the pip costs and the initial margin) were very important but were not displayed. Those aspects are fixed so that a customer can always ascertain what the trading hours, margins and pip costs are. He accepted that other CFD platforms did provide expiry dates, but he felt that was the case if they offered the chance to buy into more than one futures contract (in other words a client could choose whether to buy into a number of different futures, each having a different expiry date). I found this evidence convincing. Mr Cox accepted that in considering if information was "essential" it would be legitimate for the firm to consider if the information might change and (as I understood his evidence) he accepted that "as long as it [was] absolutely clear" that there was only one USOil contract open for trading on the platform the fact that there was only one contract could legitimately be taken into account when considering if the expiry date was essential. Mr Bird agreed that having the expiry date in a durable medium "was less likely to be essential as there could not have been more than one expiry open".

119. In my judgment, FXCM did not breach its COBS obligations by failing to provide a durable record of the expiry date of each USOil contract entered into. I am satisfied that FXCM only ever offered one USOil contract at a time. It follows that there was only one possible expiry date, and that expiry date was signposted and available to Mr Day.

O.2 The Further USOil contracts

120. I have come to the clear view that FXCM were clearly and obviously entitled to treat the Further USOil Contracts as April expiring contracts. As a matter of contract there was no alternative.

121. The position becomes even clearer once the context is understood. In my judgment by the end of the phone call with Ms Mavhunga on 20 April 2020, Mr Day knew that all USOil open contracts (whenever acquired) would expire at 5pm Eastern Time in the USA. He knew that after those positions were closed and losses or gains calculated, as long as margin requirements were met, he could buy in to the next open contract (the May expiring contract) and could do so through an automated "roll over" process. The explanation provided by Ms Mavhunga could not have been clearer. Although he looked at the expiry webpage, I am satisfied that the presence of an erroneous May expiry date there did not cause any confusion. When Mr Day contacted Mr Harari, he sought confirmation of what he knew, namely that USOil positions would close later that night. Had he seriously believed that he had bought into May expiring contracts on 14 April I think it more likely than not that he would have sought confirmation from Mr Harari that that was the case. It is plain, even if my conclusion about Mr Day's state of knowledge after he had seen the webpage is wrong, that by the end of the virtual chat with Mr Harari there was no doubt that Mr Day knew that open USOil positions would close late that night.

122. I do not accept that Mr Harari's reference to the "price difference between the contracts" was reasonably capable of causing any confusion at all to Mr Day. In context, it is plain that Mr Harari was talking about the price difference between the April expiring contract and the following May expiring contract. The importance of the price difference (as is clear from the context) is that it could not be guaranteed that the price at which positions closed under the April expiring contract would be anywhere near the price at which the May expiring contract would open. As Mr Harari said, the price of oil was "*going crazy*".

123. When Mr Day opened the Further USOil Contracts between 6.16pm and 6.19pm on 20 April 2020 he was clearly and obviously buying April expiring contracts. It may be that in the fog of a desperate attempt to make up losses he had persuaded himself that he was buying May expiring contracts. Even if that is the case, it is of no relevance at all to the outcome of his claim.

124. For these reasons, I do not accept that Mr Day was misled by the content of the webpage.

P. Zero pricing

125. This part of the claim is based on a supposed breach of clause 7.3 of the ToB. In my judgment there was no such breach. Clause 7.3 applies where FXCM ceases to offer a service or removes a product from its offering. In those circumstances appropriate notice must be given. In my judgment clause 7.3 applies where there is a complete cessation. A temporary suspension of a service or product in unusual circumstances is not in my judgment a cessation in the sense intended by clause 7.3. It follows that the obligation to give notice did not arise under clause 7.3. Mr Levy suggests that FXCM ceased to offer USOil as a product at 7.08pm on 20 April 2020 when the USOil price dropped below zero. His argument is that whether there is a cessation has to be judged at a particular point in time. He submits that when trading was suspended, that looked like a cessation. I do not accept these points. As a matter of linguistics and words it might be possible to argue that there was a cessation (followed by a recommencement). But in deciding what the term means I must look at context, the agreement as a whole and the understanding of an informed bystander.

126. In my view clause 24.3 of the ToB applies. It is plain that the drop in price of USOil to below zero was an exceptional market event (at least in the sense that there was excessive movement in the market of USOil). FXCM was therefore entitled to close any open contracts.

In fact (as appeared from the email sent at around 11.14pm on 20 April and as was confirmed by Mr Spencer in evidence) the contracts closed at expiry.

127. In my judgment FXCM came under no obligation to notify Mr Day that it operated a system which would close out positions if USOil prices reached or fell below zero and did not wrongly fail to give notice of its decision to close out contracts if the price fell to zero.

Q. Conclusion

128. For the reasons I have set out the claim must be dismissed in its entirety.

129. I am grateful to all counsel, whose submissions have been helpful and focussed.

Schedule

As of 2017 and 2019	As of 31 January 2020	MIFID II provisions
	2.1.1R (1) A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).	
	4.2.1R(1) A firm must ensure that a communication or a financial promotion is fair, clear and not misleading.	Articles 24(3) and 30(1)
	4.5A.3EU (1) Investment firms shall ensure that all information they address to, or disseminate in such a way that it is likely to be received by, retail or professional clients or potential retail or professional clients, including marketing communications…... (2)… (b) the information is accurate and always gives a fair and prominent indication of any relevant risks when referencing any potential benefits of an investment service or financial instrument….	Article 44(1) of Regulation EU 2017/565 (MIFID Org) supplementing MIFID
10.2.1R *(1) When providing a service to which this chapter applies, a firm must ask the client to provide information regarding his knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded so as to enable the firm to assess whether the service or product envisaged is appropriate for the client.*	10A.2.1R A firm must ask the client to provide information regarding that client's knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded to enable the firm to assess whether the service or product envisaged is appropriate for the client.	Article 25(3)
10.2.1R *(2) When assessing appropriateness, a firm:* *(a) must determine whether the client has the necessary experience and knowledge in order to understand the risks involved in relation to the product or service offered or demanded; …*	10A.2.3EU Investment firms, shall determine whether that client has the necessary experience and knowledge in order to understand the risks involved in relation to the product or investment service offered or demanded when assessing whether an investment service…. is appropriate for a client.	Article 56(1) of MIFID Org

10.2.2R *The information regarding a client's knowledge and experience in the investment field includes, to the extent appropriate to the nature of the client, the nature and extent of the service to be provided and the type of product or transaction envisaged, including their complexity and the risks involved, information on:* *(1) the types of service, transaction and designated investment with which the client is familiar.* *(2) the nature, volume, frequency of the client's transactions in designated investments and the period over which they have been carried out.* *(3) the level of education, profession or relevant former profession of the client.*	10A.2.4EU Investment firms shall ensure that the information regarding a client's or potential client's knowledge and experience in the investment field includes the following, to the extent appropriate to the nature of the client, the nature and extent of the service to be provided and the type of product or transaction envisaged, including their complexity and the risks involved: (a) the types of service, transaction and financial instrument with which the client is familiar. (b) the nature, volume, and frequency of the client's transactions in financial instruments and the period over which they have been carried out. (c) the level of education, and profession or relevant former profession of the client or potential client.	Article 55(1) of MIFID Org
10.2.4R *A firm is entitled to rely on the information provided by a client unless it is aware that the information is manifestly out of date, inaccurate or incomplete.*	10A.2.6EU An investment firm shall be entitled to rely on the information provided by its clients or potential clients unless it is aware or ought to be aware that the information is manifestly out of date, inaccurate or incomplete.	Article 55(3) MIFID Org
10.2.5G: *When assessing appropriateness, a firm may use information it already has in its possession.*	10A.2.7G When assessing appropriateness, a firm may use information it already has in its possession	
10.2.6G: *Depending on the circumstances, a firm may be satisfied that the client's knowledge alone is sufficient for him to understand the risks involved in a product or service. Where reasonable, a firm may infer knowledge from experience.*	10A.2.8G Depending on the circumstances, a firm may be satisfied that the client's knowledge alone is sufficient for him to understand the risks involved in a product or service. Where reasonable, a firm may infer knowledge from experience.	
10.3.1R: *(1) If a firm considers, on the basis of the information received to enable it to assess appropriateness, that the product or service is not appropriate to the client, the firm must warn the client.*	10A.3.1R (1) If a firm considers, on the basis of information received to enable it to assess appropriateness, that the product or service is not appropriate for the client, the firm must warn the client. (2) This warning may be provided in a standardised format.	Article 25(3)

(2) This warning may be provided in a standardised format.		
10.3.2R: *(1) If the client elects not to provide the information to enable the firm to assess appropriateness, or if he provides insufficient information regarding his knowledge and experience, the firm must warn the client that such a decision will not allow the firm to determine whether the service or product envisaged is appropriate for him.* *(2) This warning may be provided in a standardised format.*	10A.3.2R (1) If the client does not provide the information to enable the firm to assess appropriateness, or if the client provides insufficient information regarding their knowledge and experience, the firm must warn the client that the firm is not in a position to determine whether the service or product envisaged is appropriate for the client. (2) This warning may be provided in a standardised format.	Article 25(3)
10.3.3G: *If a client asks a firm to go ahead with a transaction, despite being given a warning by the firm, it is for the firm to consider whether to do so having regard to the circumstances.*	10A.3.3G If a client asks a firm to go ahead with a transaction, despite being given a warning by the firm, it is for the firm to consider whether to do so having regard to the circumstances.	
10.4.2R: *If a client engages in a course of dealings involving a specific type of product or service through the services of a firm, the firm is not required to make a new assessment on the occasion of each separate transaction. A firm complies with the rules in this chapter provided that it makes the necessary appropriateness assessment before beginning that service.*		
	16A.3.1EU Investment firms having carried out an order on behalf of a client, other than for portfolio management, shall, in respect of that order: (a) promptly provide the client, in a durable medium, with the essential information concerning the execution of that order. (b) send a notice to the client in a durable medium confirming execution of the order as soon as possible and no later than the first business day following execution or,	Article 59 of MIFID Org

	where the confirmation is received by the investment firm from a third party, no later than the first business day following receipt of the confirmation from the third party. [the glossary definition of durable medium is: "*any instrument which enables the recipient to store information addressed personally to the recipient in a way accessible for future reference and for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored*"]	
	16A.3.2G In determining what is essential information, a firm should consider including: (1) for transactions in a derivative: (a) the maturity, delivery or expiry date of the derivative	