DRN-2901809

The complaint

Mr N's complaint is about investment advice from Barclays Bank UK PLC ('Barclays' or 'Barclays UK') in late 2015, about that advice leading to an investment portfolio that began around January 2016 and about the management of that portfolio until it was liquidated in 2019.

What happened

Background/the 2018 case

Mr N referred a complaint, about Barclays, to this service in May 2018. In it, he made allegations about fees, including the allegations that additional and third-party management and portfolio related fees were undisclosed to him, and that only the Annual Management Charge ('AMC') of 0.95% was disclosed to him.

We issued a view on the complaint in August 2018, a Provisional Decision ('PD') on the complaint in March 2019 and a Final Decision ('FD') on the complaint in June 2019. The FD addressed the fees and charges related issues in the complaint and Mr N's 13 main comments/submissions on the findings in the PD, which covered events from 2015 up to when the FD was issued.

His comments/submissions addressed, under dedicated sub-headings, Barclays' regulatory Conduct of Business Sourcebook ('COBS') obligations, the third-party fees matter, issues arising from a meeting with Barclays on 13 October 2015, Barclays' alleged exploitation of his vulnerabilities, alleged fact finding mistakes (with regards to the fee schedule and suitability), an issue about whether his adviser was independent or restricted, his request for a fee structure in November 2017, Barclays' compensation of £150 for delays in setting up his bank accounts and its refund of insurance fees associated with his packaged bank account.

Mr N returned to us in 2020. He said he had new material evidence related to his 2018 case, and that the case should be re-opened. The Ombudsman who issued the 2019 FD – the 'Deciding Ombudsman (DO)' – reviewed his submissions. Another Ombudsman – the 'Corresponding Ombudsman (CO)' – sent him the review outcome (including the DO's comments) in September 2020. The outcome was that the DO considered that some of the points Mr N had raised had already been addressed in FD and that the others did not amount to *new material evidence* that would have changed the FD's outcome.

Mr N disagreed with this and he continued, into 2021, to pursue reconsideration of the matter. By 2021 he had also submitted a new complaint about Barclays.

The CO wrote to him in April 2021 acknowledging that he still wanted reopening of the previous case; that he wanted copies of the view, the PD and the FD from previous case; that he disagreed with the view that had been issued in the new case and that he said there is a conflict between the outcomes we have issued in both cases. His submissions were put to the DO and again she concluded that some points were already addressed in the FD and that the others do not amount to new material evidence that would have changed the FD's

outcome. Mr N was informed that there would be no reopening of the previous case and no further engagement by us in that respect. Copies of the view, PD and FD in the previous case were sent to him.

The CO said that the investigator assigned to Mr N's new case is entitled to reach findings on it based on available relevant information; that the investigator can reconsider his view in light of the comments he had made on it; that if at the end of the view stage of our process Mr N remains unhappy, his case can go to an Ombudsman; but, that only the new case will go to an Ombudsman, and no further consideration will be given to the previous case (and the issues related to it).

The 'new' case

The investigator did not uphold Mr N's new complaint. He mainly found as follows:

- The complaint is mainly about alleged unsuitability of his £3 million investment in a Jersey based Discretionary Managed Portfolio ('DMP') service recommended by Barclays in October 2015. Mr N wants a refund of fees he says were unexplained/misrepresented to him, a refund of accountant fees he says he incurred to resolve problems after liquidation of the investment in 2019 and redress for what he considers to have been an unsuitable investment, based on the relevant benchmark performance. The investment was recommended around the time Mr N sold his business and sought to invest from the proceeds of the sale.

- There will be no consideration of the allegation about misinformation on fees/charges because this has already been addressed in the previous complaint (and FD). Furthermore, Mr N's argument that Barclays did not give details of fees/charges until 2018 is met by the effect of the introduction of MiFID II in January 2018, which meant firms that previously did not have to give such details now had to, so it was not unreasonable that Barclays did not give those details earlier than 2018.

- Mr N completed a Financial Personality Questionnaire ('FPQ') in April 2015 with responses that confirmed a moderate/medium risk profile; his private banking application form signed on 28 October 2015 also confirmed his selection of a moderate risk strategy; he had the financial capacity to mitigate potential losses and the suitability letter issued to him for the investment confirms that he sought to benefit from professional and dedicated portfolio management.

- Whilst Mr N was not an experienced investor, it could be seen why Barclays recommended the DMP service to him and why that service may have appealed to him. He liquidated the investment in February 2019 with around £3.65 million in proceeds, so he made a sizeable gain for an investment of just over three years and three months.

- There is some evidence of inconsistent know-your-client ('KYC') information in Barclays' records but that did not affect its advice to Mr N. He says the offshore setting for the investment was unsuitable given the potential tax implications he would have faced if he had to withdraw funds and bring them into the UK. Barclays made it clear to him that it was not a tax adviser and evidence suggests that Mr N had tax advice from his accountant or opportunity to get such advice. Barclays was still obliged to consider possible tax implications as part of the overall suitability of its advice. Evidence suggests Mr N had no withdrawal plans for the investment at the time of advice, that the offshore setting matched his plan (as a Resident Non-Domicile/'RND') to remain in the UK for the mid-term (seven years), after which if he

left the UK the offshore setting could then have had tax advantages for him, so it was not unsuitable.

- Mr N says Barclays did not explain risks associated with the investment, but evidence of the presentation he received for the DMP service shows otherwise. He says Barclays' suitability letter was received after the investment was made, but COBS 9.4.4 says a firm must provide a suitability letter when, or as soon as possible after, the investment happens and Barclays sent him the suitability letter a few days after the investment, so that was not unreasonable. He alleges gross misconduct and falsifications by the relevant Barclays adviser, but regulatory matters are for the Financial Conduct Authority ('FCA') to address, not for us. He is unhappy about performance of the investment, but performance was not guaranteed to him. He says he was rushed into the investment but evidence shows otherwise – after his meeting with Barclays on 13 October there was an email from him to Barclays on 17 October saying he had read the information given to him and that he was interested in the DMP service; he could have sought clarification of anything he did not understand or asked for more information if he needed that; there is no evidence that he did either; his investment application form was signed on 28 October; overall, he had time to consider and to change his mind if he wished to.

- Overall and based on all findings, Barclays' recommendation of the DMP to Mr N was not unsuitable.

Mr N disagreed with this outcome and made a number of submissions in this respect. He initially said, in the main, that the investigator had misguided himself on the issues that he addressed and had not addressed some key issues in the complaint, these being – the DMP service's pre-requirement for his certification as a High Net Worth ('HNW') client, which was not done until three months *after* the investment; Barclays' breach of pre-2018 COBS and MiFID I rules (COBS 6.1.9R and COBS 16 Annex 2R) on the provision of periodic investment reports with full information on fees (including information on the potential for third-party fees); COBS and MiFID I rules at the time which said Barclays could not suitably recommend a service that he had no knowledge and experience of (which is what it did); evidence that the accountant Barclays says he received tax advice from was actually his business accountant (not his personal tax adviser) and evidence that he did not receive personal tax advice from the accountant; evidence that the adviser should have obtained, agreed to obtain, but did not obtain guidance from his accountant on how to structure the portfolio (for tax efficiency); the adviser's failure to assess whether (or not) he had access to sufficient alternative 'clean' and segregated capital in order to avoid withdrawal from the offshore portfolio; evidence from a previous decision from this service in which a claim (about the unsuitability of an offshore investment) with circumstances comparable to his was upheld; the adviser's failure to recommend usage of his Individual Savings Account ('ISA') and Capital Gains Tax ('CGT') allowances at the time; inaccurate information that Barclays had on his investor profile which, importantly, must have been relevant to its poor assessment of suitability at the time (how could it have properly assessed suitability on the basis of inaccurate information?).

Mr N then said his solicitor advised him that he has a case against Barclays for financial negligence and he confirmed he wished to pursue that. He made a succession of submissions setting out his financial negligence/financial loss/damages/but-for-negligence claims, references to the negligence related legal/caselaw authorities he considered relevant to his claims, and submissions on his allegations about misconduct and breach of regulations/compliance by Barclays. His concluding arguments were that the investigator had missed the crux of his case; that crux being Barclays' negligence, malpractice and gross misconduct in relation to –

- onboarding/KYC (including suitability of advice) related to its advice to him – including the adviser allegedly falsifying the investor profile he created for Mr N and misrepresenting whether he provided a restricted or independent service; including the adviser onboarding him without him (Mr N) having first met his accountant, without the adviser having first assessed his investor profile and before the adviser had made a recommendation (hence why he considers he was rushed into the investment); including the adviser's breach of COBS 4.12.3R by recommending the DMP service/offshore portfolio that was meant only for HNW clients without first confirming his certification as an HNW client (a certification that COBS does not allow to be assumed); and including the adviser's/Barclays' breach (especially in the assessment of his investment knowledge and experience, and of his understanding of risks) of the requirements of a proper suitability assessment as set out in the rules and guidance from the European Securities and Markets Authority ('ESMA'),

- non-disclosure of fees/charges at the outset,

- unclear and misleading periodic reports (with regards to fees/charges);

that but for Barclays' negligence in these respects he would have behaved differently; that he would have done so by taking his business to another firm; that he has therefore suffered financial loss as a result of Barclays' negligence (for which he provided a detailed schedule of loss); and that 'suitability', which is what the investigator restricted himself to addressing, is "… *only a small part* …" of the main complaint about negligence and malpractice. Nevertheless, he maintained that the portfolio recommended to him was unsuitable because it was based on a falsified investor profile, because he had no prior investment knowledge and experience to match what he was recommended, because it lacked proper consideration of his tax position and appetite for risk, because it caused too much exposure to the stock market, because he made clear at the time that he did not "*trust discretionary portfolio management*" and because he raised his concerns with the adviser after the investment (especially around November 2016) but they were not addressed and instead he was falsely assured not to worry and was told that the long term strategy for his portfolio remained on course.

In subsequent correspondence Mr N then said the crux of his case is "… *based on the process prior to the investment*" and that this relates to a core argument that he would never have been a client of Barclays if all information about its service that it was required by law and regulations to disclose at the outset had been disclosed to him; that the same applies in terms of the HNW certification assessment that should have been conducted at the outset, but was not; and that the same applies in terms of "… *the confirmation of an accountant*". In this context, he said the matter of whether (or not) Barclays' advice was suitable for him is irrelevant because, but for being misled at the outset, he would never have been Barclays' client in the first instance – and because, had the HNW certification been addressed at the outset (as it should have been), he would never have signed the HNW declaration, as it is likely that he would have been deterred by the risk warning within it.

Mr N then made submissions which referred to what he considered to be new evidence and, it appears, a new complaint issue about Barclays not providing him with Generic Disclosure on its service(s) (including 'Key Facts' disclosure, disclosure about fees/charges and disclosure on whether its service was restricted or independent) and not providing him with a client agreement for its advisory service.

The Investigator was not persuaded to change his view(s) or to go beyond the remit of the new complaint about alleged unsuitability. Amongst his responses to Mr N he acknowledged

the HNW point but said it is not disputed that he was an HNW client, so it is more likely (than not) that he would have been certified as such if that was done before the investment; he referred to evidence in the FPQ in which Mr N agreed to a statement that said he had 'more experience with investing than the average person' and to notes for the meeting of 13 October which said he had a good understanding of equities, bonds and other instruments; and he considered that this showed Barclays assessed Mr N's investment knowledge and experience at the time.

The periodic reports issue was debated further between the investigator and Mr N. The investigator concluded his part in the debate by repeating that fees related issues in the case have already been addressed in the previous FD, so they will not be revisited. He also noted that Barclays in Jersey (not Barclays in the UK) was responsible for the periodic reports, so he said the issue is outside the remit of the complaint about Barclays (UK) and outside this service's jurisdiction (as the Channel Islands Financial Ombudsman probably had the relevant jurisdiction). Mr N continued his part of the debate and disputed the investigator's comments by presenting extensive submissions (and supporting evidence) about Barclays (UK) having ultimate responsibility for the periodic reports, about the Jersey office being no more than a branch for Barclays (UK) at the time (because Barclays Jersey did not exist until 2018), about the UK and EU regulations and laws that meant Barclays (UK) should have provided information about third-party fees in the periodic reports (but did not) and about why he considers that this service has the jurisdiction and obligation to address the matter. Seemingly without prejudice to this position, Mr N also thereafter sought information from the investigator (and Barclays) about pursuing a complaint against Barclays Jersey with regards to the periodic reports matter.

Overall, the investigator retained the conclusion that the complaint should not be upheld and the matter moved into our process for referral to an ombudsman.

Mr N's Submissions to the Ombudsman

Following notice about referral of the complaint to an ombudsman, Mr N submitted statements (and compilations of documents as supporting evidence) that he wished to be passed to and considered by the ombudsman who received the case. One statement presented a detailed critique of the investigator's overall work and findings in the case; and another focused on asserting that the investigator was misguided in his approach to the case.

Another statement presented the case Mr N says he wants the Ombudsman to address. The 'essence' of that case was summarised as the allegations that the Barclays adviser "… *breached the regulations and requirements under the RDR*", that the adviser and Barclays "… *misled* [him] *concerning the services which were* sold" and that "*most importantly,* [he] *did not receive the service, and investment management, he understood he would receive and desired*".

Mr N summarised the background to Barclays recommending the Discretionary Portfolio Management ('DPM') service to him and the main events in the matter. He then made the following main claim – that he was not given the *unique*, *bespoke* and *holistic* DPM service that he should have been given, instead he received a DPM service based on Barclays' application of its in-house models and benchmarks. He set out the evidence and arguments that he says supports the claim. He also set out wrongdoings that he says were committed during the DPM service and during management of his portfolio.

Barclays' Position

Barclays disputes Mr N's complaint and has set out, and repeated, its grounds for doing so in relevant correspondence. It has engaged with this service – and directly with Mr N – throughout the events summarised above. In its last key response to queries from Mr N it addressed the queries and concluded with the following –

"*To remind you, the basics of your situation are:*

- *You invested £3,000,000 with Barclays Jersey in a discretionary portfolio with a Moderate risk rating. We have found this to be suitable.*
- *This portfolio was split between capital and income so the clean capital would not be tainted by any income generated offshore. This is a suitable arrangement for clients who are resident in the UK but not domiciled here for tax purposes.*
- *On 27 February 2019, this investment was surrendered for £3,654,100.21. This represents a return of 21.8% in a little over 3 years and 3 months, which roughly equates to a compound return of 6.17% per annum.*
- *Both Barclays and the Ombudsman have found that the fees were appropriately and compliantly disclosed to you.*
- *We will not reopen or reinvestigate any matters where the Ombudsman has made a final decision, we will abide by their decisions*."

Barclays says all fees and charges related issues were addressed and concluded in the previous case and FD, so it will not revisit them and it will not open a new complaint(s) in response to what it considers to be Mr N's attempts to relaunch the same issues; and that this extends to the allegations he has made under the 'disclosures' related claim, with the matter of disclosures having already been addressed in the FD.

What I've decided – and why

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

Introduction

It is evident, and fair to say, from the background summarised above that Mr N's overall pursuit against Barclays has undertaken a number of different forms over time – from his 2018 complaint that was concluded in 2019; to his request, in 2020, to re-open the 2018 case; to his submission of the new case; to his attempts to have issues from the 2018 case addressed within the new case; to his pursuit of the issue about suitability of advice; then to his claims for negligence, malpractice and gross misconduct by Barclays/the adviser (as summarised above); then to his claim that his case is "… *based on the process prior to the investment*" (including the HNW certification issue) and is about being misled into engaging with Barclays at the outset (so, in this context, he said the question of suitability of advice is irrelevant); then to his references to *disclosure* related issues (which appear to be partly related to the process-prior-to-investment claim and to be partly an extension beyond that claim but related to the 2018 case); then, most recently, to the claim Mr N says he wants the Ombudsman to address (that he was deprived of the unique, bespoke and holistic DPM service he ought to have received and that his portfolio was mismanaged).

Mr N has displayed considerable effort and capabilities in terms of the detailed submissions (and evidence) he has provided to us, and I appreciate that he has done this in order to clarify the different aspects of what he seeks from the complaint. It is impractical for this decision to reflect all of what he has provided to us, but, on balance, I consider that what I have summarised thus far in this decision – and what I continue to address below – has captured/will capture his key submissions. The above summary of his changing claims does

not necessarily suggest criticism of the manner in which Mr N has presented his complaint issues. I have seen enough from his representations in the case to acknowledge that there is a significant strength of feeling on his part that Barclays committed wrongdoings against him, and I consider that the changing and developing nature of his claims has perhaps been an illustration of him trying, over time, to exhaust all elements of this feeling.

Having said the above, it is equally fair to say that complaint issues which appear to have been in flux need to be brought into a focused state, in order for them to be properly approached by this service. I should also note that Barclays – that is, Barclays Bank UK PLC, the respondent to the present complaint – has displayed its own strength of feeling about its dispute of Mr N's suitability related complaint, about its view that the previous/2018 complaint has been concluded and should not be revisited and about its position that it is not the respondent for matters related to Barclays Jersey.

For all the above reasons, and because this service functions within rules about our jurisdiction and about how we determine complaints (including rules about what within a complainant's submissions we can and cannot, or should not, address), I consider it important to set out the scope of this decision. This should allow both parties to be clear on what this decision will and will not address, and why.

Scope of this decision

- This decision addresses only Mr N's complaint about unsuitable investment advice from Barclays in 2015.

- This decision does not revisit any of the matters from the 2018 complaint that were concluded in the FD of 27 June 2019. Those matters have been reflected in the background above. I am satisfied that they included all issues and arguments relevant to Mr N's dispute about fees and about disclosures. It is also noteworthy that his allegation about the adviser misrepresenting whether he provided a restricted or independent service is expressly featured in the FD – so it too will not be revisited. Mr N has continued to make substantial arguments and submissions about some of these issues, especially the periodic reports matter, but none of his arguments and submissions in this respect will be addressed in this decision because the overall matter has already been treated and concluded in the FD of 27 June 2019. He says the FD addressed only management related fees and not the advice related fees he has now made some of his continuing submissions about (and that, he says, he has 'new evidence' about). Based on my reading of both the PD and FD, I disagree. There is sufficient content in both that shows the DO addressed the matters of fees and disclosure of fees in the context of the DMP service and in general (at the point of Barclays' recommendation in 2015 and thereafter). I accept that there was more focus, in the DO's considerations, on the management and third-party related fees issues, but I am satisfied that the decisions addressed the matter of disclosure of fees to Mr N in its full – not limited – context. That will not be revisited in this decision.

- If Mr N maintains his assertion that new material evidence now exists and now demands a reconsideration of all or any of the matters concluded in the 2019 FD, I consider that his assertion has already been treated and concluded by the DO and CO, as summarised in the background above. If I am wrong in this respect – which I do not believe I am – I also have discretion to dismiss a resubmission of the 2018 complaint and I have done so in the sub-section on 'Dismissal' that follows.

- This decision does not address any issue related to conduct of the DPM service and/or the management of Mr N's portfolio between 2016 and 2019. Mr N initially

maintained that his core arguments about the DPM service and the portfolio were that they were unsuitable, were fundamentally wrong for him and should never have been recommended to him. These points relate to suitability (or otherwise) of Barclays' recommendation (of the service and the associated portfolio) at the outset in 2015. Most recently he presented – as part of his submissions to the ombudsman – what are clearly new claims about alleged misrepresentation of the DPM service (the claim that he did not receive the type of service he ought to have received) and about alleged mismanagement within that service (and in his portfolio). His submissions included the assertion that he ought not be required to raise this as a new complaint with Barclays because these issues had already been mentioned in correspondence with Barclays last year. I disagree.

- There has been debate in this case about the distinction of responsibility between the Barclays entity (in the UK) responsible for the advice given to Mr N and the Barclays entity (in Jersey) that Barclays UK says was responsible for the DPM service and management of his portfolio. Mr N essentially says both firms are parts of the same UK entity that he has complained about, but as far as I have seen, Barclays UK disputes this and maintains that it is responsible only for the advice to Mr N. There also appears to have been no response from Barclays UK treating the new allegations about service misrepresentation and portfolio mismanagement as a complaint it is responsible for. This means that despite Mr N saying the allegations were mentioned in correspondence with Barclays last year, it is not established that he has exhausted the requirement to submit a complaint, about these allegations, to the correct respondent because Barclays UK has not been established as the correct respondent.

- This is important because the case that has been referred to me – and that this service has been addressing thus far – is about Barclays Bank UK PLC, so firstly, I must be satisfied that this is the firm that was responsible for the management service and management of Mr N's portfolio; if so, then secondly, I must be satisfied that the management service and management related complaint has been put to Barclays UK and that it has had requisite time to address it. If Barclays UK is not the responsible firm, the second consideration becomes redundant.

- I have consulted the September 2015 version of the "Wealth and Investment Management" terms of service relevant to the DPM service recommended to Mr N later that year and to the discretionary management of his portfolio that followed. The document states that –

  "*Barclays offers wealth and investment management products and services to its clients through different Barclays Group companies.*

  Wealth Management business is carried on by the following legal entities: Barclays Bank PLC, Barclays Private Clients International Limited and Barclays Bank Ireland PLC."

  In a section dedicated to "Investment service specific terms" it is confirmed that the investment management service (including the discretionary and non-discretionary versions) was provided by "Barclays Private Clients International Limited" ('BPCIL') which the document describes as a distinct and separate Barclays Group company registered in the Isle of Man (with a base in Jersey) and as regulated/authorised, at the time, by "… *the Financial Conduct Authority in the UK in relation to UK regulated mortgage activities*".

- The above appears to match the setting for the *offshore* DPM service recommended to Mr N. That service was provided by BPCIL from, it appears, its base in Jersey – periodic portfolio reports that have been submitted as evidence support this, as they were from Jersey; and the presentation document (for the product presentation given to Mr N in October 2015) confirmed the service was based in Jersey and that the document was "issued and approved" by BPCIL. The complaint that has been referred to me is not about BPCIL, it is about Barclays UK. The FCA's register for firms confirms separate entries for Barclays UK and for BPCIL – with the register showing that the former currently continues to have regulated authority and that the latter's regulated authority ceased on 23 December 2016. They are also different corporate entities, albeit parts of the same Barclays Group of Companies. A complaint about the DPM service and/or about mismanagement of Mr N's portfolio under that service – both of which relate to the activities of BPCIL – is therefore not one for Barclays UK to respond to and is therefore beyond the remit of this decision.

- This service conducts Alternative Dispute Resolution ('ADR'). We are an alternative to the courts and to litigation in the courts. Mr N has clearly received legal advice in this case, from the solicitor he has referred to and seemingly from other sources who have referred to themselves as his "helpers". The somewhat substantial claim he has made under the law/tort of negligence is one better suited for the courts, instead of this service, and perhaps he might have already been told this by his solicitor and/or helpers. I have discretion to dismiss his claim in this respect and I have done so in the sub-section on 'Dismissal' that follows.

- This service is not the industry regulator. Mr N has made serious allegations about regulatory breaches, malpractice and gross misconduct by Barclays and by the relevant adviser. Where these are relevant to the determination of his complaint about suitability of advice they can be considered. However, if he seeks to have us investigate in isolation and, depending on the outcome of such investigation, hold Barclays and/or the relevant adviser accountable for the regulatory breaches, malpractice and gross misconduct that he has alleged that is beyond our remit and would likely be within the remit of the industry regulator (the FCA). This decision does not extend to such a regulatory investigation or finding of accountability.

- We do not conduct criminal law enforcement. Mr N appears to have made serious allegations about fraudulent and/or falsifying and/or illegal/unlawful actions supposedly committed by Barclays and/or the relevant adviser. If and where particular submissions he has made in this respect are undisputed, supported by facts and are relevant to the determination of his complaint about suitability of advice, they can be considered in that overall context. Otherwise, it is distinctly beyond this service's remit to conduct any form of criminal investigation. No such investigation has been conducted to date and none will be done in this decision. If such an investigation is what Mr N seeks, he might wish to consider taking independent and/or legal advice on that separately.

- To conclude and re-affirm, this decision will address only whether (or not) Barclays' investment advice to Mr N in 2015 was suitable. In this respect and context, relevant factors from his process-prior-to-investment claim can also be considered. However, the other aspect of that claim – related to the isolated consideration of regulatory breaches, malpractice and gross misconduct alleged to have been committed by Barclays and by the relevant adviser – will not be addressed for the reason stated two bullet points above.

- Also with regards to the process-prior-to-investment claim, Mr N has presented arguments about why the offshore DPM service and portfolio should never have been 'promoted' to him in the first instance, mainly because he says he had no experience of such an investment product. The facts of his case are such that matters went beyond promotion and into recommendation of and investment in the offshore DPM product. It is not disputed that Mr N sought advice for the investment of proceeds from his business sale. He says Barclays initiated the consideration of such advice (and investment), but even if that was the case he nevertheless engaged with Barclays in order to receive its advice. It therefore follows that he wanted to invest. If the investment proposed to him was unsuitable, the matter of promotion (of that investment) would be relevant. However, if the investment was not unsuitable the question of promotion arguably becomes less, if at all, relevant in the circumstances of his case. The test for suitability is higher than that for promotion, so if Barclays' recommendation was not unsuitable and given that Mr N wanted to invest, it would follow that there was nothing wrong with the investment advice service he received – even if, in isolation, there is a *technical* question about whether (or not) the product should have been promoted to him at the outset.

Scope Continued (Dismissal)

The rules about our jurisdiction are in the Dispute Resolution ('DISP') section of the FCA's *Handbook.* DISP 3.3.4A (R) says as follows:

"*The Ombudsman may dismiss a complaint referred to the Financial Ombudsman Service on or after 9 July 2015 without considering its merits if the Ombudsman considers that: …*

(5) dealing with such a type of complaint would otherwise seriously impair the effective operation of the Financial Ombudsman Service."

The FCA gives the following relevant guidance at DISP 3.3.4B (G):

"*Examples of a type of complaint that would otherwise seriously impair the effective operation of the Financial Ombudsman Service may include: …*

(1) where it would be more suitable for the complaint to be dealt with by a court or a comparable ADR entity; or …

(3) where the subject matter of the complaint has previously been considered or excluded under the Financial Ombudsman Service (unless material new evidence which the Ombudsman considers likely to affect the outcome has subsequently become available to the complainant); …"

As I said above, Mr N presented a substantial claim against Barclays under the law/tort of negligence. The natural forum for such a claim is the civil court(s). Proper determination of such a claim usually includes a hearing(s), the calling (or ordering) of witnesses, examination and cross examination of witnesses during the hearing, the calling (or even ordering) of expert evidence, and the examination and cross examination of such expert evidence. This service neither has the structure to cater for such an extensive formal process, nor are we required to. We are a comparatively informal [ADR] service, with some discretion to call a hearing (where a complaint cannot be determined on documentary submissions and evidence), power to request evidence but not necessarily to 'order' disclosure and we do not have the natural remit for negligence claims that the civil courts have.

Of course, there can be elements of negligent behaviours in the cases we address under different allegations and complaints, but what Mr N has presented is a full scale, pure and dedicated negligence claim – to the extent that he has quoted renowned leading negligence caselaw as part of his submissions for the claim. This amounts to more than a complaint with elements of negligent behaviours alleged within it.

For the above reasons, I consider that the negligence claim Mr N appears to want to pursue is one that would be more suitable to be dealt with by a court. I do not consider that this service should address it and I dismiss it.

I also dismiss any resubmission of the 2018 complaint. I have already addressed this above. I consider that the responses from the DO in 2020 essentially confirmed a similar decision to dismiss for reasons that I share, endorse and incorporate into this decision – those reasons being, in summary, that the points Mr N has re-presented have previously been addressed by this service in the DO's 2019 PD and FD, and that what he has presented as new evidence falls short of establishing *material new evidence likely to affect the outcome* of the PD/FD. Upon reading the correspondence between the DO/CO and Mr N in 2020 and in 2021, I am satisfied that this outcome – and the rationale behind it – is credible and has been clearly explained to him.

Suitability of Barclays' 2015 Recommendation

Based on some of the points Mr N has made, I accept that there were some errors in Barclays' KYC work ahead of its recommendation to him. The investigator identified some of these errors in his views and I echo the same. I consider it important to acknowledge this at the start of this section because it relates to one of Mr N's main arguments about unsuitability, because it prompts me to set out how the matter of suitability in this case will be approached and because, as I develop further below, I wish to give early notice that I have not found it to be the pivotal (or one of the pivotal) arguments about suitability that he believes it to be – so it has not featured in my considerations to the extent that he would probably like.

There are a number of key elements to consider in terms of suitability (or otherwise) of a recommended investment;

- An investor's profile at the time of the recommendation (mainly, his/her objective(s), attitude to risk ('ATR'), investment experience and affordability status (including capacity for loss)). [Which I shall refer to as 'element 1'.]

- Whether (or not), on balance, the investor's profile was properly determined between the investor and the adviser. [Which I shall refer to as 'element 2'.]

- Whether (or not), on balance, the adviser's recommendation was suitable for the investor's profile [Which I shall refer to as 'element 3'.]

- Whether (or not), on balance, the investor was informed about the nature of the recommended investment and its risks. [Which I shall refer to as 'element 4'.]

It is important to be mindful that, depending on the relevant circumstances, there could be more than one suitable recommendation for an investor. The regulatory duty upon a firm to assess and give suitable advice does not require that firm to give the *most* suitable advice, or to give advice that is considered, perhaps in hindsight, to be *more* suitable than the advice it gave at the time. If, on balance, Barclays' recommendation to Mr N was *suitable*, the

relevant regulations – which Mr N has cited in his submissions – do not require me to consider whether (or not) it could have been *better* or *more* suitable.

Returning to the KYC issue, Mr N's summary argument is that the adviser's KYC process and findings were flawed, that inaccurate information about him was recorded in the fact finding notes/records and that it therefore follows that the advice to him could not possibly have been suitable if the fact finding was incorrect. I appreciate the approach he has applied in this argument, but in order to achieve a fair and reasonable conclusion in a case it is generally required to follow where the evidence (and relevant laws/regulations) leads to. In other words, if the facts show that fact finding errors committed by Barclays prior to its recommendation misguided the recommendation and made it unsuitable, after consideration of all the elements of suitability mentioned above, then such could be the reasonable conclusion. However, it would be wrong to leap from a finding that KYC errors were committed to the conclusion of unsuitability, without considering the actual recommendation that was made and the elements of suitability mentioned above.

It is enough to say Barclays' KYC related fact finding and record keeping ahead of its recommendation had some errors and could have been better. Mr N has made extensive submissions about this. It is not necessary to set them out in this decision because they persuade me only to the extent of the finding in the previous sentence; because beyond that finding and with regards to his argument that Barclays committed KYC related regulatory wrongdoings the matter becomes one about regulation (which is beyond my remit); and because, as I said in my explanations on *scope*, where particular KYC errors are relevant to my consideration of suitability those errors can (and will) be addressed in the context of suitability.

Another reason for this approach is that whilst many of the pre-recommendation fact finding documents were produced by Barclays, do not appear to have been shared with and agreed by Mr N at the time and are presently disputed by Mr N, in contrast the suitability letter of 22 November 2015 is a document that was shared with him. He does not appear to have objected to it upon its receipt – despite the letter's invitation for him to do so if he had reason to – so it appears to have been agreed by him. It is a document that captures Barclays' summary of his profile and of its recommendation to him – so it seems a good starting point for the consideration of elements 1 to 4. In terms of element 4, there is also evidence of information about the recommended DPM service and portfolio (within and beyond Barclays' October 2015 presentation) given to Mr N. I have not ignored the fact that the suitability letter was issued around four weeks after he had committed to the recommended investment, but the letter (and its appendix) includes invitations to him to contact Barclays if any of the stated information was incorrect or if changes were needed, so this suggests that the letter remained meaningful and that his commitment could have been reviewed at the time if necessary.

The main contents of the suitability letter (and appendix) are as follows:

- A summary of the recommendation to Mr N to invest £3 million in the DPM product, based on a moderate ATR and on a 'total return' pursuit.

- A statement that said he was "… *looking to benefit from the professional management of* [his] *assets and to entrust decision making on an ongoing basis to a dedicated portfolio manager*". I appreciate that Mr N says he neither wanted nor *trusted* discretionary portfolio management, but this statement informed him that such was the nature of Barclays' recommendation and there is no evidence that he objected to it (or that he objected to the notion of discretionary management) in response; so, on balance, I consider that this was indeed what he sought at the time. It is also noteworthy that in his application form for the service/product – dated,

signed and initialled (on every page) by him on 28 October 2015 (prior to the suitability letter) – he expressly selected the DPM service, which had a clear summary explanation of its discretionary based nature set out next to it that he would have seen and read. Perhaps in hindsight, at the time of his complaint(s), he considered this objective differently, but my task is to address the objective presented to Barclays for its 2015 advice.

- Statements about Mr N having "… *sufficient income and cash assets outside of* [his] *assets with Barclays whereby* [he was] *not seeking an income from the investment*"; about him wishing "… *to achieve returns above cash deposits and inflation on a total return basis, being a mixture of income and capital growth over the term of* [his] *investment*"; and about Barclays' recommendation being "… *designed to meet this objective*". A key part of Mr N's argument about KYC flaws relates to the factual details of his wider assets and wealth. However, it is not disputed that he had substantial wider assets and wealth beyond what he sought to invest with Barclays' advice. It also does not appear to be disputed that he did not seek income from the investment, I have not seen evidence that such income was part of his objective and there is no evidence that he corrected the suitability letter in this respect.

- Confirmation of Mr N's moderate ATR and statements that said he was "… *comfortable with the risk* [he] *would be exposed to*" and that he had "… *the capacity to take on this risk as* [his] *invested wealth* [was] *well diversified and* [he held] *sufficient cash and* [had] *no debt*". Again, none of this appears to have been objected to or disputed by Mr N in response to the suitability letter – and his application for the DPM service (prior to the suitability letter) expressly confirmed his selection of the moderate ATR – so, on balance, I consider it reliable. The same applies to statements that followed about his investment experience and knowledge having been considered on the basis that through his experience of running "… *an international business* [he had] *gained an understanding of equity markets and investments*" and that he "… *also had experience more recently dealing with investment management firms which … improved* [his] *understanding of the different types of investment available*"; about him having sufficient access to cash and liquidity elsewhere in his wealth which negated any need to withdraw from the investment; and about him having an investment time horizon of five years and above.

- Notice that the recommendation was for an offshore portfolio, so use of Mr N's ISA allowance had to be considered separately, and that he had indicated he would do so (separately).

- Confirmation that Mr N had been advised to hold the portfolio in a segregated capital and income structure and that the portfolio was to be set up accordingly.

- Notice that whilst Barclays would take his personal tax position into account in its recommendation, it did not provide tax advice and that it recommended Mr N consult his tax adviser on the tax implications of the recommended portfolio. As I included in the background above, Mr N made submissions about Barclays failing to consult his accountant, about it failing to ensure that he had done so, about it misrepresenting the role of his business accountant and about the recommendation being unsuitable because of the lack of thorough tax related considerations and advice. I address suitability, in terms of tax implications, further below. However, at this point I consider it important to note evidence of an email from Mr N's accountant to him, dated 11 September 2015. The email appears to have been shared, by Mr N, with Barclays in a forwarded email dated 24 September 2015. In it, the accountant (whose email

signature stated his role as a "Private Client" Senior Tax Adviser) refers to Mr N's personal self-assessment tax return, to attaching a completed self-assessment tax return form for the year ending 5 April 2015, to some advice on Mr N's tax position and to a request (to Mr N) to check the form and ensure all his worldwide income, capital gains, outgoings and allowances are correct. On balance, I consider this to be evidence that the accountant serviced Mr N personally and that Barclays could reasonably have relied on this as information/proof that he was in receipt of personal tax advice at the time. Barclays was not responsible to duplicate such advice or for the dedicated tax advice that Mr N says he should have received, and it gave him notice of this within the suitability letter.

I am satisfied that, overall and on balance, Barclays' DPM product presentation to Mr N in October 2015 had sufficiently clear and detailed explanations about the product/service to inform him about the recommendation to invest in it. A copy of the presentation document shows that it was produced specifically for Mr N and that it had a total of 34 pages, divided into sections that included one on the product's/service's overall investment approach, one dedicated to the discretionary management process (inclusive of the mandate derived from Mr N's investor profile – which itself included reference to the income and capital segregation that he required) and one about fees and benchmarks for the service.

As the investigator noted, Mr N had broadly between 13 and 28 October to consider the relevant information. I am mindful that whilst Mr N's first language is not English, he can communicate in English, his communications at the time were in English and he has confirmed assistance from his wife whose first language is English and whose understanding of the language, he says, is at a high level. As such, I am satisfied that he had enough consideration time (inclusive of time he might or might not have needed to be assisted in understanding the contents of the information) during these 15 days, that the absence of further enquiries or objections from him at the time suggests he understood the information and that his commitment to the recommendation on 28 October signifies that he did so in an informed state. This finding also serves to address Mr N's criticism of the sequence of events – that is, the investment happening prior to the suitability letter. Given its contents, the presentation document (which appears to have followed from a presentation meeting with Barclays) was arguably equal to an earlier – and pre-investment – version of a suitability related document.

Returning to the elements I set out above, I do not consider that there are problems with elements 1 and 2. Irrespective of the KYC related errors that Mr N has highlighted and feels strongly about, the balance of evidence shows that by November 2015 when the suitability letter was issued to him, he was in agreement with that letter's summary of his profile and did not object to it; and information in the letter about his profile (in terms of his objective and ATR) is consistent with information he selected and agreed within his DPM application form around four weeks earlier. Overall and on balance, Mr N's investor profile around the time of the recommendation in 2015 was as depicted in the profile/mandate in the presentation document, as depicted in the application form he completed for the DPM service and as depicted in the suitability letter, and I do not find any notable inconsistencies between the profiles in these documents.

The next issue to address – element 3 – is whether the DPM service (and associated portfolio) was suitable for Mr N. In this respect, I should begin by saying I am satisfied that the recommended mandate for the portfolio to "… *hold a mix of equities, government and corporate debt instruments and alternative investments in proportions judged by the Investment Manager to provide returns consistent with a balanced risk investment profile*" matched his moderate ATR (with a reflection of the balanced/moderate ATR within the mandate itself) and was suitable. It broadly matched Barclays' risk profile definition of the moderate ATR and the same goes for what this service would consider to be a

balanced/medium/moderate investor ATR. He also had total personal wealth notably beyond the £3 million he sought to invest, including significant sums in cash and/or liquid assets and no immediate requirement for income from the investment. As such, he had the financial capacity (including capacity for loss – that is, capacity to cope with the risk of potential losses) for the investment.

I understand Mr N's strong feelings about the expectation that his HNW status and certification should have been concluded prior to the recommendation and investment, instead of months thereafter as was the case. Barclays was wrong in this approach but, as I explained above, I am not conducting a regulatory investigation so the main matter to address remains, only, suitability of the recommendation.

In terms of the impact this had on suitability of the recommendation, I agree with the investigator's findings. Mr N has conceded to us that he was an HNW client at the time of the recommendation and that he does not dispute this. The implication is that, had the requisite certification been attended to before the recommendation and the investment he would have been certified as an HNW client anyway. He says the point to note is that the risk warning in the documentation related to the HNW certification process would have discouraged him, so by being deprived of the process he appears to say he was denied a risk warning that would have changed everything. On balance, I disagree. Comparable risk warnings were presented to him as part of his ATR assessment and as part of the product/service presentation given to him, both of which happened before he invested – and warnings were given (for the different risk profiles) in the application form for the DPM service he completed and signed on 28 October 2015.

Having addressed the HNW related argument I now quote, as follows, from my summary (above) of Mr N's other main arguments for unsuitability –

"… *Barclays' breach of pre-2018 COBS and MiFID I rules (COBS 6.1.9R and COBS 16 Annex 2R) on the provision of periodic investment reports with full information on fees (including information on the potential for third-party fees); COBS and MiFID I rules at the time which said Barclays could not suitably recommend a service that he had no knowledge and experience of (which is what it did); evidence that the accountant Barclays says he received tax advice from was actually his business accountant (not his personal tax adviser) and evidence that he did not receive personal tax advice from the accountant; evidence that the adviser should have obtained, agreed to obtain, but did not obtain guidance from his accountant on how to structure the portfolio (for tax efficiency); the adviser's failure to assess whether (or not) he had access to sufficient alternative 'clean' and segregated capital in order to avoid withdrawal from the offshore portfolio; evidence from a previous decision from this service in which a claim (about the unsuitability of an offshore investment) with circumstances comparable to his was upheld; the adviser's failure to recommend usage of his Individual Savings Account ('ISA') and Capital Gains Tax ('CGT') allowances at the time; inaccurate information that Barclays had on his investor profile which, importantly, must have been relevant to its poor assessment of suitability at the time (how could it have properly assessed suitability on the basis of inaccurate information?).*"

As I have already stated, the periodic reports issue will not be addressed as it relates to the complaint concluded by the 2019 FD. I have also already referred to evidence showing, on balance, that the relevant accountant was Mr N's personal tax adviser and was the source of personal tax advice that he was receiving at least up to a month before his investment.

Barclays was not obliged to give him dedicated tax advice or to liaise with his accountant for that purpose. Its terms of service gave him notice about this and about the recommendation to take independent tax advice. Barclays' investment recommendation reflected Mr N's need

for segregated capital and income. I am not persuaded that it was required to ensure he had access to sufficient alternative *clean* capital in order to avoid withdrawals from the portfolio. There is no evidence that he needed income at the time, or that he anticipated a need for income in the near future or that he gave instructions in either respect. In contrast, the balance of evidence shows that he had a number of alternative and liquid sources of capital to resort to if he needed funds. His distinction of "clean" capital in this respect and his argument about assessing whether (or not) he had access to such capital appears to relate to the hypothetical tax implications of having to withdraw from those alternative sources of capital but, overall, I consider that was also a matter for his accountant to advise him on, not for Barclays.

I have considered Mr N's references to the previous decisions from this service. We address each complaint on its own facts and evidence. A previous decision is not automatically binding on subsequent cases which might share similar facts. The matter of suitability is also inherently subjective, so due regard still applies to individual circumstances and facts, despite any similarities between cases. Overall, on balance and for these reasons I am not persuaded that the previous decisions Mr N has referred to are enough to establish that the offshore DPM portfolio was unsuitable for him.

The offshore context of the portfolio appears to have been the reason why no recommendation was made to Mr N to use his ISA allowance within it – as that could not be done; and the matter of CGT allowance usage is one that he could have and should have discussed with the accountant that was giving him tax advice, as an RND, at the time.

I have already addressed the matter of Barclays' KYC process and Mr N's assertion that some of the information it had on him in that process was inaccurate.

Overall and on balance, I do not consider that the offshore DPM portfolio product/service was unsuitable for Mr N. Besides the offshore setting having potential benefits for him as an RND – benefits that Barclays and the investigator have highlighted – that setting appears to have been a derivative of his objective. He wanted a DPM product/service, which is what Barclays recommended. A part of that recommendation was inevitably the portfolio to be used within that service and that was the offshore portfolio. The suitability letter says he had been advised towards the offshore setting and the implication appears to be that this was tax advice from his accountant because of his RND status.

The offshore setting was not inherently unsuitable. It is not uncommon for offshore investments or portfolios to be recommended to investors – to HNW investors in particular, and to such investors who also hold RND status and who wish to either avoid the implications of an onshore investment or for whom such avoidance is considered suitable.

A November 2015 independent research report, commissioned by HMRC, looked into "… *the operation of the offshore financial advisory market and how and why customers in this market invest in offshore products*". Part of its main findings were that there was a trend of such products being more likely to be used by HNW UK RND investors, for potential tax benefits that were more applicable to them than to UK Resident Domiciled investors; and that investment knowledge and experience held by such investors "*varied considerably*", "*ranging from novice to an expert level understanding*".

Mr N appears to have been part of the trend mentioned in the above report. He disputes meeting notes compiled by the adviser prior to his investment, and I understand some of his reasons why (especially with regards to some of the KYC errors I have already acknowledged). However, in the circumstances of this case, it does not automatically follow that the entirety of those notes can be disregarded. Particular contents should be considered on merit. The notes refer to Mr N seeking to take advantage of his RND status through an

offshore investment and this is consistent with references to the same (or to something broadly similar) in the product presentation document (that he received, considered and agreed with), in the application form he completed and in the suitability letter that was sent to him. On balance, with such an objective, given his HNW and RND status, and in the absence of evidence that he sought or required income from the investment, I am not persuaded that recommendation of an offshore setting for the portfolio was unsuitable. I understand the hypothetical scenarios he has referred to, in which he says the setting could have caused problems, but they appear to be no more than that – hypothetical scenarios – and I have not seen evidence that Barclays was clearly informed, at the outset, of a need (or likely future need) to bring capital or income from the portfolio onshore. It is also noteworthy that Mr N had other assets outside the UK, so the portfolio was not an exception in this regard.

I accept that Mr N had no previous experience of an offshore investment portfolio. This does not automatically mean it was unsuitable for him. It is not uncommon for investors to embark upon a new type of investment for the first time. The points to consider are as I summarised in elements 1 to 4. On balance, I consider that elements 1, 2 and 3 have been established to support the conclusion that Barclays' advice was not unsuitable, and in terms of element 4, I am satisfied with the balance of evidence that shows Mr N was properly informed about the nature and characteristics of the portfolio (and of the discretionary management associated with it, and about risks) prior to his investment. As such, whilst he had no previous experience of the offshore DPM portfolio, it was not unsuitable for him (as I have found) and he committed to it in an informed state.

Conclusion

Overall, on balance and for all the reasons given above, I consider that only Mr N's complaint about suitability is within my remit to address and I conclude that the offshore DPM service and portfolio recommended to him by Barclays was not unsuitable for him.

My final decision

For the reasons given above, I do not uphold Mr N's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 24 February 2022.

Roy Kuku
Ombudsman