DRN-3042870

Complaint

Mr M complains about Swan Securities and Investments Limited ("Swan") which, at the time of the events subject to complaint, was an appointed representative of Kession Capital Limited ("Kession"). Mr M says he was advised by Swan to invest into high-risk unregulated investments and he was mis-led about, and missold, these investments. He says there were no risk warnings and no documentation was sent to him setting out the advice.

Background

Mr M's complaint concerns two investments he made in 2015. An investment of £10,000 in non-voting shares of Sooner Energy and an investment of £25,000 in a bond issued by Clean Energies. Both these investments were made following interaction between Swan and Mr M.

The Financial Conduct Authority (FCA) Register records that Swan was an appointed representative of Kession from 30 March 2015 to 5 September 2016. Kession has provided a copy of an appointed representative between it and Swan, which was signed by Swan and Kession on 3 March 2015.

The Sooner Energy investment

A 13 August 2015 letter from Swan to Mr M says:

"Further to our recent conversation in relation to Sooner Energy. please follow the link below to view the Prospectus. I hope that you find this informative.

Sooner Energy Prospectus

I shall endeavour to reach out in the near future to discuss in more detail and I look forward to your feedback. Please do not hesitate to contact me should you have any questions in the meantime"

A 20 August 2015 letter from Swan to Mr M says:

"Following our conversation and the introduction to Sooner Energy SPV-1 Limited, please find enclosed the subscription agreement. We request that you kindly initial each page (in the bottom right hand corner) and sign on pages 10 and 18."

So the Sooner Energy investment was discussed by Swan with Mr M, then the prospectus for the investment was provided to Mr M, after which there was a further conversation about the investment, and an application to invest was made by Mr M. I have not seen any notes or recordings of the conversations which took place.

The Clean Energies investment

A 3 September 2015 email from Swan to Mr M says:

"Further to our recent conversation in relation to the Clean Energies Investor Bond, please

see attached the Investment Memorandum. I hope that you find this informative. I shall endeavour to reach out in the near future to discuss it in more detail and I look forward to your feedback. Please do not hesitate to contact me should you have any questions in the meantime."

On 8 September a subscription agreement for Clean Energies was sent to Mr M by email, from Swan.

So this seems to follow a similar pattern to the Sooner Energy investment – it was discussed by Swan with Mr M, then the investment memorandum for the investment was provided to Mr M, after which an application to invest was made by Mr M. I have not seen any notes or recordings of the conversations which took place in relation to this investment either.

Kession's response to the complaint

In response to the complaint Kession said, in summary:

- It accepts that Swan was its appointed representative at the time Mr M made the investments. However, Swan was only acting as its appointed representative where it gave Swan authority to do so.

- It did not sign off any financial promotion regarding Sooner Energy or Clean Energies.

- Swan's actions fell outside of its control and oversight. All the information provided to it as part of the complaint demonstrates the investments were marketed and sold by Swan outside of its appointed representative agreement. It is therefore unable to comment on whether the investments were mis-sold or whether advice was given.

Our investigator's view

Our investigator concluded Mr M's complaint was one we could consider against Kession, and that it should be upheld. He said, in summary:

- Although Mr M says he considers that he was given financial advice by Swan, he has not been provided with enough evidence to make this finding.

- But he did think Swan was arranging deals in investments, with regard to the two investments complained about here. Mr M's investments were in equities and bonds. So any arranging done in connection with these investments would constitute a regulated activity.

- A principal's responsibility for its appointed representative is set out in Section 39(3) of the financial Services and Markets Act (FSMA) which says *The principal of an appointed representative is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility*.

- He had been provided with a copy of the agreement Kession had with Swan. This sets out that Swan was not permitted to provide advice to retail consumers, but it was permitted to promote and arrange business for retail consumers.

- Swan was permitted by Kession to carry out "*Relevant business*", which is defined by the AR agreement as being "*regulated activities which the AR is permitted to carry out under this Agreement which are subject to the limitations of the Appointor's part*

IV permission as detailed in Schedule 5." This shows Kession permitted Swan to arrange investments of the type made by Mr M.

- So the arrangement of the investments complained about is something that Kession gave permission for Swan do i.e. business for which Kession accepted responsibility. Mr M's complaint was therefore one he could consider.

- There were restrictions on the promotion of the investments Mr M made.

- He had not seen sufficient evidence to show Swan took the steps set out in the FCA rules, to ensure Mr M could receive a promotion of the investments.

- Had these steps been undertaken properly, Kession would – or should – have concluded that Mr M was not eligible to receive such promotions.

- He had also considered whether Mr M could be classified as an elective professional client. He was not persuaded Mr M would have met this classification, and noted Swan did not appear to have made any efforts to check this.

- So he was satisfied that by arranging Mr M's investments in Sooner Energy and Clean Energies, Swan allowed Mr M to invest in products it ought reasonably to have known were not appropriate for him.

Responses to the view

Mr M accepted the investigator's view, and made no further comments.

Kession did not accept the investigator's view. It said, in summary:

- It has never given Swan permission to sign off financial promotions - this is clearly outlined in the appointed representative agreement. This is something Swan was obliged to seek its permission for and it did not seek permission in relation to these investments. As with all appointed representatives Swan was not allowed to just market any product without its express signoff and permission.

- There are a number of sections of the appointed representative it feels are most pertinent (it quoted from sections 1.2, 1.3 and 1.5, 2.2 and 2.3, 3.1, 4, 7.1 and 7.2 and schedules 1 and 6 – I have not included the quotes here as I set out what I consider to be the key terms of the agreement in my findings below).

- Swan provided it with details of Sooner Energy but this was never followed up or signed off.

- It has no record of Clean Energies, and has never received any communication from Swan in relation to that investment.

- Swan wrote to some of its clients, after taking legal advice, to say that some of the products were not covered by its agreement with Kession.

- It cannot accept responsibility for a product it never agreed to Swan promoting.

My Findings

I have first considered all the available evidence, to decide whether this complaint is one we can consider against Kession. I have reached the same conclusion as the investigator on

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

A number of tests have to be met before a complaint can be considered by this service. The ones relevant to this particular complaint are that the activity being complained of must be a regulated activity or an activity ancillary to one and the principal (i.e. Kession) must have accepted responsibility for the activities of its appointed representative (i.e. Swan).

Under DISP 2.3.1R, we can only consider a complaint under our compulsory jurisdiction if it relates to *an act or omission by a firm in carrying on one or more of the listed activities, which includes regulated activities; or any ancillary activities carried on by a firm in connection with those activities*.

And the guidance at DISP 2.3.3 says *Complaints about acts or omissions include those in respect of activities for which the firm… is responsible (including business of any appointed representative or agent for which the firm... has accepted responsibility)*.

As the investigator noted, this stems from Section 39(3) of FSMA which says *The principal of an appointed representative is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility*.

So I essentially need to apply up to three tests here:

- step 1 – to identify the specific acts complained of;
- step 2 – to consider whether those acts are regulated activities or ancillary thereto; and (if so)
- step 3 – to consider whether the principal firm was responsible for those activities by reason of section 39 FSMA.

I'll consider these in turn.

In my view the acts the complaint relates to are the promotion and arrangements of the investments in the Sooner Energy shares and the Clean Energies bond.

I know Mr M says that he was advised to make the two investments. However, like the investigator I don't think there is enough evidence to safely conclude that Mr M was advised.

There can often be a fine line between the providing of information and giving advice. Without further evidence on this point it is difficult to say that Swan gave advice, even if Mr M understood he'd been given advice. But it is clear from the available evidence that Swan promoted the investments.

Mr M's complaint is also not solely about advice – it clearly relates to his interactions with Swan generally. And we have an inquisitorial remit, so it is reasonable for me to look at things in the round. The evidence is clear that both investments were arranged by Swan. Swan discussed both investments with Mr M, and then sent details of them to him by email or post. It then provided the application documents, and assisted Mr M in the completion of these, before sending them off to the provider of the investments. And I think these arrangements were closely linked to the promotion of the investments.

I am satisfied the promoting and arranging of the investments also involved a regulated activity.

The investments were both a of a type specified in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("RAO"). At the time Mr M made his investment, the RAO said regulated activities include arranging deals in investments. This regulated activity was defined in Article 25 as:

25. Arranging deals in investments

"(1) Making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite a particular investment which is—

(a) a security…

is a specified kind of activity.

(2) Making arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting investments falling within paragraph (1)(a) …(whether as principal or agent) is also a specified kind of activity."

Acts such as obtaining and assisting in the completion of an application form and sending it off, with the client's payment, to the investment issuer would come within the scope of Article 25(1), when the arrangements have the direct effect of bringing about the transaction. I am satisfied the arranging Swan carried out here falls within the scope of Article 25(1). Given the close connection, I am also satisfied that the promotions were ancillary to the arranging.

So is Kession responsible for these acts? Like the investigator, I think it is.

Kession's main point in this complaint is that Swan wasn't allowed to deal with investments unless it had preapproved those investments. And it says it did not approve the investments in this case. Kession also refers to other restrictions in the AR agreement, relating to how communications were to be made and adherence to FCA rules, amongst other things.

I have carefully considered the entirety of the AR agreement and, like the investigator, I am satisfied that the acts Mr M's complaint relates to are ones for which Kession accepted responsibility.

It is not the case that a principal is not responsible for business in *any* instance where *any* term in an appointed representative agreement is not adhered to. The High Court judgement in the case of Anderson v Sense Network (2018) makes it clear section 39 FSMA allows a principal firm to accept responsibility for only part of the generic "business of a prescribed description". In other words, Kession was entitled to appoint Swan as a representative and limit the scope of the regulated activities it could carry out and that it would be responsible for. But the Court of Appeal judgement in the same case set out that only restrictions on "what" generic business could be conducted would limit the principal's responsibility. In contrast, restrictions on "how" that business is to be conducted don't limit a principal's responsibility. In other words, a principal can't avoid responsibility for activities it authorised an AR to carry out just because those activities weren't carried out in the way it wanted them to be.

Turning to the agreement in this case, I think some of the terms of the agreement referred to by Kession relate to *how* Swan was to carry out the business for which Kession accepted responsibility not *what* business Swan could carry out. And I do not agree with Kession's interpretation of some of the other terms, insofar as what they mean for this particular complaint.

At 6.1 the agreement says:

The Appointor hereby accepts responsibility for all the AR's and the Individuals' activities in carrying on the Relevant Business under this Agreement.

Relevant Business is defined in the agreement as:

regulated activities which the AR is permitted to carry out under this Agreement which are subject to the limitations of the Appointor's part IV permission as detailed in Schedule 5. For the avoidance of doubt, the AR is not permitted to carry out any investment management activities. The AR is permitted to market and promote its services, arrange business and give advice. The AR will conduct business with professional clients, elective professional clients and eligible counterparties. In circumstances where clients do not satisfy the criteria to opt-up to elective professional status, the AR may treat them as retail clients and conduct business with them as such insofar as it is restricted to promoting and arranging only. The AR is not permitted to give advice to retail clients. When conducting [sic] *with retail clients the AR will at all times adhere to the strict guidelines outlined in Schedule 6. The Appointor acknowledges that the AR will conduct capital raising and arranging activities via the issuance of corporate bonds for power projects. There is no pooling of capital and no CIS.*

Kession's part IV permission as detailed in Schedule 5 includes arranging investments of the type Mr M made. So the starting point is that Kession accepts responsibility for this, as the agreement notes at 6.1.

At 1.3 the agreement gives Kession the right to impose restrictions as follows:

In accordance with section 39 of FSMA and the FCA Handbook, the Appointor may impose restrictions:

a) on the AR preventing the AR from procuring or attempting to procure persons to enter into investment agreements;

b) as to the types of investment and investment activity in relation to which the AR may act, even if those activities and/or investments form part of the Relevant Business; and

So the agreement did allow Kession to put restrictions in place which may have related to *what* Swan could do (rather than just how it could do it). I have considered what restrictions in the agreement are relevant in this particular complaint. However, I have seen no evidence to show Kession put any restrictions on arranging investments.

2.2 of the agreement says:

The AR shall not make any financial promotion (including but not limited to unsolicited real-time financial promotions) unless such promotion relates to Relevant Business and is either approved in advance by the Appointor or is made only within circumstances where an exemption applies under the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 as amended from time to time.

And 2.3 of the agreement says:

The AR acknowledges that it is not entitled to approve financial promotions for the purposes of section 21 of FSMA and undertakes that it shall not do so, or purport to do so.

But both of these restrictions relate to promotion only – they do not place any restrictions on arrangements. 2.2 is not, in my view, a restriction on the Relevant Business at all as it refers only to financial promotion which is not, in itself, a regulated activity. It does not put any restrictions on arranging or advising. 2.3, although relating to an activity which requires

regulatory authorisation, also does nothing to restrict arranging activities.

The remainder of the terms Kession refers to, in my view, relate only to *how* Swan was to carry out the business for which Kession accepted responsibility. They may give Kession recourse to Swan if it breached those terms, but they do not impact my jurisdiction to consider this complaint.

So the arranging of the investments is business was for which Kession accepted responsibility. In my view the promotion of the investments (even if carried out here in breach of the AR agreement) was closely associated or intrinsically linked to the arrangements and is therefore also something Kession is responsible for. That is consistent with the approach taken by the courts (Martin & Anor. v Britannia Life Ltd [1999] and Tenetconnect Services Ltd, R (on the application of) v Financial Services Lts & Anor [2018]).

As I am satisfied Mr M's complaint is one we can consider against Kession, I have considered what is fair and reasonable in the circumstances of the complaint.

What is fair and reasonable in the circumstances of the complaint?

Having carefully considered the available evidence, I have reached essentially the same view as the investigator.

The investigator noted the promotion of the investments to retail clients such as Mr M was subject to restrictions and that Swan, acting on behalf of Kession, had to meet regulatory obligations which included treating customers fairly and acting in their best interests.

The regulatory obligations the investigator referred to are set out in the FCA's Principles for Businesses (of which I think Principle 6 "*Customers' interests – A firm must pay due regard to the interest of its customers and treat them fairly*" is the most relevant here) and in COBS 2.1.1R ("*A firm must act honestly, fairly and professionally in accordance with the best interests of its client*.").

The rules on financial promotions at the time (set out in COBS 4) said promotion of investments of the type made by Mr M to retail clients was restricted to investors which fell within certain categories such as "high net worth", "sophisticated" and "restricted". These categories were defined and a process for placing an investor into them set out.

Like the investigator, I have not seen sufficient evidence to show Swan took the necessary steps to check if Mr M fell into one of the categories (and it follows it also did not take the necessary steps for putting him into a category). And I also think it unlikely Mr M could have been put into one of these categories, had the necessary steps been taken. So had Swan acted fairly and reasonably to meet the relevant rules, it would have been aware Mr M was not eligible to receive promotions of the investments.

The alternative basis on which the investments could have been promoted to Mr M was if he were a professional client. However, I have seen no evidence to show any efforts were made by Swan to see if Mr M could be treated as a professional client, or to follow the process set out in the rules for this.

Like the investigator, I think acting fairly and reasonably to meet its regulatory obligations, Swan should not have proceeded to make the promotion and arrange the investments in such circumstances. And so I think it is fair to ask Kession to compensate Mr M for the loss he has suffered.

Putting things right

In assessing what would be fair compensation, I consider that my aim should be to put Mr M as close to the position he would probably now be in if he had not been promoted the investments and had the arrangements not been made.

I take the view that Mr M would have invested differently. It is not possible to say *precisely* what he would have done differently. But I am satisfied that what I have set out below is fair and reasonable given Mr M's circumstances and objectives when he invested.

What must Kession do?

To compensate Mr M fairly, Kession must:

- Compare the performance of each of Mr M's investments with that of the benchmark shown below.
- A separate calculation should be carried out for each investment.
- Kession should also pay interest as set out below.

Income tax may be payable on any interest awarded.

Investment name	Status	Benchmark	From (“start date”)	To (“end date”)	Additional interest
Sooner Energy	Still exists but illiquid	FTSE UK Private Investors Income Total Return Index	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)
Clean Energies	Still exists but illiquid	FTSE UK Private Investors Income Total Return Index	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)

For each investment:

Actual value

This means the actual amount paid or payable from the investment at the end date.

If at the end date the investment is illiquid (meaning it could not be readily sold on the open market), it may be difficult to work out what the *actual value* is. In such a case the *actual value* should be assumed to be zero. This is provided Mr M agrees to Kession taking ownership of the investment, if it wishes to. If it is not possible for Kession to take ownership, then it may request an undertaking from Mr M that he repays to Kession any amount he may receive from the investment in future.

Fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

Any withdrawal, income or other distributions paid out of the investments should be deducted from the fair value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if Kession totals all those payments and deducts that figure at the end to determine the fair value instead of deducting periodically. If any distributions or income were automatically paid out into a portfolio and left uninvested, they must be deducted at the end to determine the fair value, and not periodically.

Why is this remedy suitable?

I have decided on this method of compensation because:

- Mr M wanted Capital growth and was willing to accept some investment risk.
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is a mix of diversified indices representing different asset classes, mainly UK equities and government bonds. It would be a fair measure for someone who was prepared to take some risk to get a higher return.
- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr M's circumstances and risk attitude.

My final decision

I uphold the complaint. My decision is that Kession Capital Limited should pay the amount calculated as set out above.

Kession Capital Limited should provide details of its calculation to Mr M in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 28 April 2022.

John Pattinson
Ombudsman