

The complaint

Mr and Mrs L complain that Abbey Financial Services (N.I) Ltd (“AFS”) wrongly advised them to invest in an unregulated investment.

What happened

In 2016 Mr and Mrs L cashed in their ISAs and came into some further money from the sale of Mrs L’s mother’s house following her death. They arranged to meet with Mr M to discuss investing some of their money. He was at that time a director and CEO of AFS and had originally advised them about the ISAs.

Following the meeting Mr and Mrs L completed an application to invest in an unregulated investment - the Munio bond – promoted to them by Mr M. They invested £80,000 into six investment bonds with five-year terms issued by Munio Capital Limited. The Munio bonds offered fixed interest of 9.85% payable quarterly but they only received the first few payments.

Mr and Mrs L wrote to Mr M at AFS on 16 November 2018 querying what was happening, stating they were deeply dissatisfied with the update they had received from the provider. They asked for a detailed explanation as to what had happened to their money.

Mr M wrote to Mr and Mrs L on 22 November 2018 referring to a meeting with them the previous day. He set out an explanation of the investment and what had happened with it. He said that Munio Capital made investments by way of loan notes to Privilege Wealth, a payday loan company in the USA.

He said the loan notes paid interest/coupons and were secured for 95% of the capital invested but that Privilege Wealth stopped paying the coupon in 2017 because of difficulties through bad management or fraud. He said Privilege Wealth had then gone into administration and that Munio was now working with the administrators to recover assets and the insurance.

Mr and Mrs L referred a complaint to our service and we contacted AFS who said it had never received a complaint from Mr and Mrs L. However, it did then provide its detailed comments on the complaint they had made.

It said that as a firm offering an independent financial advice service it could not have had any part in the introduction of unregulated investments such as the Munio bonds. It said it had never advised any clients on these types of investments or taken payment in respect of them.

AFS also said that any introduction to the Munio bonds was not carried out by its qualified advisers who were the only ones that could offer investment advice. It said Mr M could only advise on mortgages and protection products and was not offering advice on the Munio Bonds.

AFS pointed to the application completed by Mr and Mrs L which it said showed advice had

not been received – in that no adviser details were provided in the application. It said Mr M was acting in a capacity independent from his involvement with AFS and at no time did he indicate he was giving advice.

In light of the arguments put forward by AFS I considered our jurisdiction to consider the complaint. I issued a decision in which I found that Mr and Mrs L were customers of AFS so far as their investment in the Munio bonds was concerned and that the complaint was about the regulated activities of advising on investments and arranging deals in investments.

One of our investigators then considered the merits of the complaint and gave his opinion upholding the complaint. He found that AFS had breached the relevant rules in relation to making a direct offer promotion of the Munio bonds to them. He also found that they weren't an appropriate investment for Mr and Mrs L and if it had carried out the checks it should've done it would have identified this.

AFS didn't agree with the investigator and the matter was referred to me for review. I issued a provisional decision the findings from which are set out below.

"I note that AFS has referred to inaccuracies set out in the investigator's opinion which it has previously raised in relation to jurisdiction and which I considered and made findings on when deciding we had jurisdiction to consider this complaint.

I appreciate that it may be frustrating that the investigator has referred to matters which I have already made findings on. I explained why AFS was wrong about certain of the issues it raised and that I didn't think those issues Mr and Mrs L got wrong were significant. In my view AFS continues to place undue weight on these issues and I would refer it back to the findings in my jurisdiction decision in relation to these.

I also note the concern that AFS has that Mr M's recollections have been ignored. So it is clear, I have considered his recollections but it is for me to decide how much weight to give his evidence. In this regard neither Mr M nor AFS has provided very much in the way of evidence relevant to the merits of this complaint.

Instead AFS appears to be still arguing that the investment in the Munio bonds is nothing to do with it. However, I have already found in my jurisdiction decision that Mr and Mrs L were its customers in relation to their investment in the Munio bonds. In other words, and in effect, I have rejected its argument that Mr M wasn't acting for AFS when he discussed the bonds with Mr and Mrs L and arranged the investment.

The regulatory provisions I will be referring to

I set out below the key regulatory provisions I will be referring to, although I will also refer to other regulations that I haven't set out in full.

I think the starting point is the FCA's Principles (PRIN) , which apply to all firms.

The Principles are set out under PRIN 2.1.1R and I think the following are relevant to this complaint:

Principle 2 - Skill, care, and diligence: A firm must conduct its business with due skill, care, and diligence.

Principle 6 - Customers' interests: A firm must pay due regard to the interests of its customers and treat them fairly.

Principle 7 - communications with clients: A firm must pay due regard to the information needs of its clients and communicate information to them in a way which is clear, fair, and not misleading.

Principle 9 - Customer's relationships of trust: A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment.

In addition to the Principles the following specific rules set out in the Conduct of Business Sourcebook (COBS) are also relevant.

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).

COBS 4.7.7R:

- (1) Unless permitted by COBS 4.7.8R, a firm must not communicate or approve a direct offer financial promotion relating to a non-readily realisable security to or for communication to a retail client without the conditions in (2) and (3) being satisfied.*
- (2) The first condition is that the retail client recipient of the direct offer financial promotion is one of the following:*
 - a. certified as a 'high net worth investor' in accordance with COBS 4.7.9 R;*
 - b. certified as a 'sophisticated investor' in accordance with COBS 4.7.9 R;*
 - c. self-certified as a 'sophisticated investor' in accordance with COBS 4.7.9 R;*
 - d. certified as a 'restricted investor' in accordance with COBS 4.7.10R.*
- (3) The second condition is that the firm itself or the person who will arrange or deal in relation to the non-readily realisable security will comply with the rules on appropriateness (see COBS 10) or equivalent requirements for any application or order that the person is aware, or ought reasonably to be aware, is in response to the direct offer financial promotion.*

COBS 4.7.10R sets out the wording of the certification necessary for someone to be treated as a certified restricted investor which I am not going to set out but comment on further below.

COBS 9.2.1R

(1) A firm must take reasonable steps to ensure that a personal recommendation, or a decision to trade, is suitable for its client.

(2) When making the personal recommendation or managing his investments, the firm must obtain the necessary information regarding the client's:

(a) knowledge and experience in the investment field relevant to the specific type of designated investment or service;

(b) financial situation; and

(c) investment objectives;

so as to enable the firm to make the recommendation, or take the decision, which is suitable for him.

[Note: article 19(4) of MiFID, article 12(2) of the Insurance Mediation Directive]

COBS 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

(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;

(b) may assume that a professional client has the necessary experience and knowledge in order to understand the risks involved in relation to those particular investment services or transactions, or types of transaction or product, for which the client is classified as a professional client.

[Note: article 19(5) of MiFID and article 36 of the MiFID implementing Directive]

I will also be referring to guidance provided by the FCA in its Perimeter Guidance manual (PERG).

The suitability of the Munio bonds

I set out in my jurisdiction decision why I was of the view that Mr M had advised Mr and Mrs L to invest in the Munio bonds. I will comment on this again before discussing AFS's obligations in terms of assessing suitability.

The usual documents available when advice is given, such as a fact find or suitability report, don't exist in this case. However, I think it is more likely than not Mr M did advise Mr and Mrs L to invest in the Munio bonds based on the limited evidence that is available for the reasons I explain below.

PERG 8.28.2(3)G states:

"Regulated advice includes any communication with the customer which, in the particular context in which it is given, goes beyond the mere provision of information and is objectively likely to influence the customer's decision whether or not to buy or sell."

There is not agreement about all aspects of Mr and Mrs L's investment in the Munio bonds – for example Mr and Mrs L say that Mr M initially contacted them following encashment of their ISAs whereas Mr M says they contacted him by telephone.

However, regardless of who made the initial contact I think the following points provide the context to the promotion of the Munio bonds by Mr M.

- The contact only arose because Mr M had previously advised Mr and Mrs L about the ISAs.

- AFS had an ongoing responsibility for advising on the ISAs after Mr and Mrs L invested in them.
- The meeting with Mr M wasn't a random meeting but arose because they wanted to know what to do with the proceeds from their ISAs and an inheritance.
- They were not provided with any document that identified Mr M wasn't acting for AFS and wasn't advising them.

In short, Mr and Mrs L didn't arrange to meet with Mr M because they wanted him to promote an unregulated investment to them and Mr M can't reasonably have thought that was the purpose of the meeting. He must have been aware that they wanted his views, as the person who had advised them previously, on what they should do with their money.

I am satisfied that the context in which Mr M promoted the bonds to Mr and Mrs M as I have set out above went beyond the mere provision of information and was objectively likely to influence Mr and Mrs L's decision to invest in the bonds. In the circumstances I am satisfied that Mr and Mrs L invested in the Munio bonds because they were advised to do so by Mr M.

Given Mr M was advising on investments he was required to assess suitability in accordance with the rules set out under COBS 9.2.

COBS 9.2.1R required that he obtain information regarding Mr and Mrs L's knowledge and experience, financial situation, and investment objectives to make an assessment. He failed to do so and as such, in accordance with COBS 9.2.6R, he shouldn't have advised them to invest in the Munio bonds.

In advising Mr and Mrs L without carrying out an assessment AFS was in breach of both COBS 9.2 and Principle 9. I also think this means AFS failed to conduct its business with due skill, care, and diligence, in breach of Principle 2, and failed to act in Mr and Mrs L's interests and treat them fairly, in breach of both Principle 6 and COBS 2.1.1R.

I have considered whether Mr M could have reasonably concluded that the Munio bonds were a suitable investment for Mr and Mrs L if he had obtained the information that COBS 9.2.1R required and carried out a suitability assessment. Having done so I am not satisfied that he could.

The bonds were a non-readily realisable security and the brochure makes clear it is only suitable for certain categories of retail client. Mr and Mrs L had very limited investment experience and there is no evidence they were one of the categories of client the Munio bonds were suitable for. There is no basis for finding they had had the necessary experience and knowledge to understand the risks involved in the bonds in the circumstances.

Even if I am wrong about AFS having advised Mr and Mrs L, I think there were other failures on the part of AFS to comply with the regulations which mean this complaint should be upheld in any event.

The promotion of the Munio bonds

Promotion isn't a regulated activity but it is an activity we can consider when it is ancillary to a regulated activity, as is the case in this complaint. The provision of the brochure and application for the Munio bonds to Mr and Mrs L by Mr M amounted to a direct offer promotion. COBS 4.7.7R makes clear that such a promotion should only be to certain categories of retail client when it relates to a non-readily realisable security, as I have already referred to.

The brochure for the Munio bond also included a prominent warning on the front page which stated that the offer must only be directed at certified high net worth individuals, sophisticated investors, or self-certified sophisticated investors - in line with the categories of client referred to in the rule.

The application Mr and Mrs L signed for the Munio bonds did include a 'restricted investor' certification for them to sign which bears some resemblance to the certification required under COBS 4.7.10R. However, it is not compliant with the rule for several reasons.

The most obvious is that the rule requires a statement that the investor hasn't invested more than 10% of net assets in a non-readily realisable security in the 12 months preceding the date of signature of the certification, and there isn't such a statement.,

I acknowledge there is a statement in the application which refers to not investing more than 10% of net assets in unlisted shares or unlisted debt securities, but this refers to the period of 12 months preceding 6 October 2014. Given the application was signed on 25 July 2016 this clearly wasn't compliant.

The rule also requires an undertaking from an investor that they won't invest more than 10% of net assets in the 12 months following signing the certification. Again the application contains an undertaking but it refers to 12 months from 6 October 2014, so is meaningless.

Furthermore, it was very unlikely that the £80,000 that was subsequently invested in the Munio bonds was only 10% of Mr and Mrs L's total net assets, given this would have required this amount to £800,000 - not including their home or pension entitlement. From the information available Mr M had no basis for thinking they had net assets to that sort of value so had no reason to think they satisfied the criteria to be considered restricted investors.

I note AFS has argued that Mr M took into account Mr L's status as a property developer but has not explained on what basis Mr M identified him as such or what information he had in relation to this that made Mr M think the Munio bonds were appropriate investments for Mr and Mrs L because of this.

Given my finding that Mr and Mrs L didn't come within one of the categories of client identified in COBS 4.7.7R it follows that Mr M was in breach of the rule when he promoted the Munio bonds to them. Furthermore, I think there was a failure to comply with the second condition set out in COBS 4.7.7(3)R, which requires that the person arranging the investment in the Munio bonds comply with the rules set out in COBS 10.

What does 'arranging,' as referred to in COBS 4.7.7(3)R, refer to?

The reference to 'arranging' in COBS 4.7.7(3)R is to the regulated activity of 'arranging deals in investments' under Article 25 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2000 (the RAO), which I set out below.

"(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,

(b) a contractually based investment, or

(c) an investment of the kind specified by article 86, or article 89 so far as relevant to that article,

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), (b) or (c) (whether as principal or agent) is also a specified kind of activity.”

In its guidance at PERG 8.32.2G the FCA makes clear its view that for arrangements to come within Article 25(1) a person involvement in the chain of events is of enough importance that without their involvement the transaction wouldn't take place.

Mr M's involvement in Mr and Mrs L investing - consisting of his promotion of the bonds, provision of the application, helping them complete the application and sending the application with the cheque for the investment amount to Munio Capital limited - was central to them investing in the Munio bonds. I am satisfied that but for his involvement Mr and Mrs L would never have invested in the bonds. It follows that I am satisfied that AFS was involved in the regulated activity of arranging deals in investments under Article 25(1) of the RAO.

Even if I am wrong about this, the second limb as set out under Article 25(2) doesn't require that the arrangements bring about a transaction, only that the arrangements facilitate the entering into of a transaction. PERG 2.7.7BG indicates one scenario where this would apply is where the arrangements are to assist an investor in dealing with a particular firm, such as arrangements made by introducers. In the circumstances I am satisfied that Mr M was involved in the regulated activity of arranging deals in investments under Article 25(2) in any event.

As AFS were involved in the regulated activity of arranging deals in investments within the meaning of Article 25 of the RAO, it needed to comply with the rules set out in COBS 10.

Did AFS comply with its obligations under COBS 10?

COBS 10.2.1R states as follows:

(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.

(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;

(b) may assume that a professional client has the necessary experience and knowledge in order to understand the risks involved in relation to those particular investment services or transactions, or types of transaction or product, for which the client is classified as a professional client.

[Note: article 19(5) of MiFID and article 36 of the MiFID implementing Directive]

AFS failed to comply with its obligation under COBS 10.2.1R as Mr M didn't determine whether Mr and Mrs L had the necessary experience and knowledge to understand the risks involved in relation to the bonds. He shouldn't have proceeded with arranging the investment without making such a determination.

I think the failure to ask for information about Mr and Mrs L's knowledge and experience and carry out a determination as required by the above rules before arranging the investment in the Munio bonds means AFS also failed to conduct its business with due skill, care, and diligence - in breach of Principle 2 - and failed to act in their interests and treat them fairly, in breach of both Principle 6 and COBS 2.1.1R.

I have considered what might have happened if Mr M had asked Mr and Mrs L to provide information about their knowledge and experience so that he could make a determination as to the appropriateness of the Munio bonds. Having done so I am not satisfied that he could reasonably have concluded that the bonds were appropriate for them, given their only investment experience at the time consisted of the ISAs and a with profits bond.

This wouldn't have precluded AFS arranging the investment in the Munio bonds, but before it did so it would have had to have warned Mr and Mrs L that the investment wasn't appropriate for them in accordance with the requirements of COBS 10.3.1R. Mr and Mrs L could still have decided to go ahead despite such a warning, but I'm not persuaded they would have done so.

In summary I am upholding this complaint because:

- *AFS promoted the Munio bonds to Mr and Mrs L when it shouldn't have done, given they were non-readily realisable securities which should only have been promoted to certain categories of retail client.*
- *AFS failed to carry out a suitability assessment as required under COBS 9.2 and advised Mr and Mrs L to invest in the Munio bonds when it shouldn't have done.*
- *If AFS had carried out a suitability assessment it could not reasonably have concluded the Munio bonds were a suitable investment.*
- *In the alternative, if AFS weren't responsible for carrying out a suitability assessment it was responsible for assessing appropriateness under COBS 10.2 but failed to carry out any such assessment.*
- *If it had carried out an assessment it would have concluded the Munio bonds were not appropriate for Mr and Mrs L and warned them of this as required and Mr and Mrs L are unlikely to have gone ahead in the face of such a warning."*

I awarded redress based on a comparison between the Munio bonds and our benchmark for someone who was willing to take a small risk with their money. I also awarded Mrs L £1,500 for the pain and suffering resulting from her suffering from depression caused by the failed investment and £300 to Mr L for the distress and inconvenience caused.

I gave both parties the opportunity of providing any further information or argument they wanted me to consider before reaching my final decision. Both parties confirmed they had no further comments.

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.

As neither party has provided any additional information or comments in response to my

provisional decision there is no reason for me to change the findings set out within it, which I rely on and repeat in respect of this final decision. In short, I am upholding this complaint because:

- AFS promoted the Munio bonds to Mr and Mrs L when it shouldn't have done.
- AFS failed to carry out a suitability assessment as required under COBS 9.2 and advised Mr and Mrs L to invest in the Munio bonds when it shouldn't have done.
- If AFS had carried out a suitability assessment it could not reasonably have concluded the Munio bonds were a suitable investment.
- In the alternative AFS was responsible for assessing appropriateness under COBS 10.2 but failed to carry out an assessment and if it had done so it would have warned Mr and Mrs L the investment wasn't appropriate and they wouldn't then have invested.

Putting things right

The evidence shows that Mr and Mrs L did want to invest the £80,000 invested in the Munio bonds and as such if they hadn't invested in the bonds they would have invested in another investment. I don't have the benefit of a fact find or other documents that assist me in determining what else they might have invested in or what sort of risk they were willing to take.

The only information that I do have is that they placed significant importance on the bonds supposedly being insured as to 95% of the amount invested. I think in the circumstances our usual benchmark for someone willing to take a small risk with their investment is appropriate.

I note that AFS is unhappy with the award by the investigator for Mrs L's pain and suffering. It has suggested Mr and Mrs L knew what they were investing in and it isn't responsible for anxiety resulting from the investment.

As my findings make clear, AFS is responsible for Mr and Mrs L being invested in the Munio bonds when they shouldn't have been. So, contrary to what it has said, it is responsible for any pain and suffering that resulted from Mrs L investing in the bonds. I can see no reason I should not accept the evidence from Mrs L's doctor that she has become clinically depressed as a result of what has happened and as such an award for this is appropriate.

Fair compensation

In assessing what would be fair compensation, I consider that my aim should be to put Mr and Mrs L as close to the position they would probably now be in if they had not been given unsuitable advice.

I think Mr and Mrs L would have invested differently. It is not possible to say *precisely* what they would have done, but I am satisfied that what I have set out below is fair and reasonable given Mr and Mrs L's circumstances and objectives when they invested.

What should AFS do?

To compensate Mr and Mrs L fairly, AFS must:

- Compare the performance of Mr and Mrs L's investment with that of the benchmark shown below and pay the difference between the *fair value* and the *actual value* of the investment. If the *actual value* is greater than the *fair value*, no compensation is payable.

- AFS should also add any interest set out below to the compensation payable.
- Pay Mr L £300 for the distress and inconvenience caused by the almost total loss of the investment.
- Pay Mrs L £1,500 for the pain and suffering and distress and inconvenience resulting from the almost total loss of the investment.

Income tax may be payable on any interest awarded.

Investment name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
The Munio Bonds	No longer exists	For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	Date of investment	Date ceased to be held	8% simple per year on any loss from the end date to the date of settlement

Actual value

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

Fair value

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

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, AFS should use the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

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 AFS 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 chosen this method of compensation because:

- Mr and Mrs L wanted income with some growth with a small risk to their capital.

- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to their capital.
- 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.
- I consider that Mr and Mrs L's risk profile was in between, in the sense that they were prepared to take a small level of risk to attain their investment objectives. So, the 50/50 combination would reasonably put Mr and Mrs L into that position. It does not mean that Mr and Mrs L would have invested 50% of their money in a fixed rate bond and 50% in some kind of index tracker fund. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mr and Mrs L could have obtained from investments suited to their objective and risk attitude.
- The additional interest is for being deprived of the use of any compensation money since the end date.

My final decision

I uphold this complaint for the reasons explained above. Abbey Financial Services (N.I.) Ltd must calculate and pay redress as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L and Mrs L to accept or reject my decision before 10 July 2023.

Philip Gibbons
Ombudsman