DRN-4459949

The complaint

Mr E complains that Clear Capital Markets Ltd ("CCM") gave him unsuitable investment advice. He says, in summary, that:

- He was advised to invest in high-risk stocks which weren't suitable for him as a medium-risk client.
- CCM sold his shares at a loss without his agreement – he didn't know it could do this.
- CCM could've sold his shares at a profit, and he should've been able to choose when to sell because he didn't have a discretionary account.

What happened

Mr E opened an advisory share dealing account with CCM in or around November 2020.

He was assessed as having a medium attitude to risk and his investment objective was capital growth. He held other investments and had experience of dealing in shares, including AIM stocks. In the initial phone calls before and during account opening, Mr E said he was interested in AIM stocks, accelerated book building and placings. And he asked about extended settlement and whether he could invest more than he held in the account.

After opening the account, CCM recommended two placings in AIM stocks. In December 2020, Mr E invested £20,000, plus commission, in a company I will refer to as "V". In March 2021, Mr E invested £20,000 plus commission in a company I will refer to as "M". In both cases Mr E invested more than he held in his account, with a total of £20,000 credit being provided by CCM via its third-party provider. Settlement was for T+10, the intention being to sell quickly at a profit before the shares had to be paid for.

Some V shares were sold at a small profit. Mr E wanted to keep the remainder in the hope that the price would rise. But he says CCM sold the shares at a loss, without telling him.

Mr E says he left the sale of M shares in the advisor's hands, but that a sale didn't take place when the shares were showing a profit. Following a conversation with the advisor, Mr E said he wanted to keep the shares in the hope that the price would rise. But he says CCM sold the shares at a loss without telling him.

CCM said Mr E had experience of trading this way and had been made aware of, and agreed to, the risks. It said it had no choice but to close out Mr E's positions because the account was in "loan balance"; in other words, the trades settled with insufficient funds in the account to cover the balance.

Our investigator didn't recommend that the complaint should be upheld. He said, in summary, that:

- He couldn't conclude that CCM had given Mr E unsuitable advice, based on his circumstances at the time, his capacity for loss, and his previous investment experience.
- CCM was unsuccessful in contacting Mr E beforehand, but it had acted in Mr E's best interests, and in line with the agreed terms and conditions, when it sold the shares. Mr E would be in a worse position now if the shares hadn't been sold.
- Whilst M shares were initially showing a profit, trading was taking place over the counter and volumes for on-market trades were too low for CCM to place a profitable sale order.

Mr E didn't agree so the complaint was passed to me.

My provisional decision

I thought the complaint should be upheld and I explained why. I said:

> CCM gave investment advice to Mr E. In doing so, it had a regulatory obligation to ensure that the advice was suitable for Mr E and, in particular, in line with his risk tolerance and ability to bear losses.
>
> CCM advised Mr E to invest £40,000 in two AIM placings. The recommendations included use of a £20,000 credit facility (£10,000 for each placing) and the trades were for extended settlement, with the intention of selling the shares at a quick profit before the settlement date.
>
> In its risk warnings, CCM considers small cap and AIM shares high risk. It says:
>
> *"There is an extra risk of losing money when shares are bought in unquoted or smaller less liquid quoted companies.*
> *Some Small Cap or AIM listed companies can be highly illiquid and have a large bid/offer spread making them difficult to sell at the quoted price, and in some cases, it may be difficult to sell them at any price.*
> *Companies listed on the AIM market can be highly volatile and are considered high risk speculative investments."*
>
> I agree that investment in AIM shares is usually considered high risk.
>
> Mr M had been assessed as having a medium attitude to risk. It doesn't automatically follow that some trading in high-risk shares would be unsuitable for him as a medium risk investor. It can be appropriate to include some low and high-risk investments in a portfolio to give it an overall medium risk. And some medium risk investors may decide to take a punt with a small percentage of their available capital. But I think CCM advised Mr E to take more risk than was suitable for him. I say this because:
>
> Rather than just buying quoted AIM shares, CCM's recommended strategy added to the risk. The shares were purchased for extended settlement with a view to selling them quickly at a profit before they had to be paid for, and the trades were leveraged – CCM provided Mr E with credit which he would need to repay on demand if the shares weren't successfully sold. And, for M shares, this was an initial placing so there was no track record of the share price.

There was an option to choose “speculation” as an objective, but Mr E chose “capital growth”. This suggests to me that he didn’t want to take big risks with his investment. CCM’s definition of “speculation” is “*seeking a high-risk return on capital*” and I think this accurately describes the nature of the trading it recommended to Mr E.

In order to assess Mr E’s attitude to risk, the advisor read out descriptions of a low, medium, and high-risk investor. The advisor suggested, based on the information he’d obtained from Mr E, that he was probably a medium risk investor. Mr E agreed, but said he was interested in ‘accelerated book builds’ and asked what risk they would be classed as. The advisor said they would be “medium to high” and Mr E confirmed that probably reflected his attitude to risk. As that wasn’t an available category, the advisor asked if he was happy for him to tick “high risk”, but Mr E didn’t agree and asked for “medium” risk to be recorded. This again suggests that, whilst Mr E had expressed an interest in high-risk trading, he either didn’t fully understand the risks involved or it wasn’t actually a risk he wanted to take.

CCM defines someone with a “medium” risk profile as:

“Equally concerned about limiting my losses as I am about achieving returns. Up to 50% of Total Investment Portfolio available for investment in high risk products.”

But the advisor didn’t include the second sentence in his description when he read the risk options out to Mr E. I think it’s more likely than not that, had this definition been brought to his attention, he would’ve questioned it and most likely wouldn’t have agreed to half of his assets being invested in high-risk products.

The “total investment portfolio” was formed of all Mr E’s investments, not just those in his CCM advisory account. I don’t think this was appropriate in Mr E’s individual circumstances. I say that because, whilst CCM said that Mr E had a total investment portfolio of £600,000, this included a rental property worth £500,000 which wasn’t readily realisable. I think this should have been excluded for the purposes of deciding whether his assets were suitably invested. In reality, he had £100,000 liquid assets, £15,000 of which was already invested in high-risk shares. Following his investment with CCM, including the use of the credit facility, the total investment in high-risk stocks was more than the 50% referred to in its medium-risk description. That seems to me to be an unsuitably high proportion exposed to a high-risk trading strategy for an individual who was *“equally concerned about limiting my losses as I am about achieving returns*”.

Mr E told CCM he had lost money in the past when he invested in placings. And he was clearly not happy about that. CCM had phoned Mr E on three occasions in 2019 asking him if he was interested in opening an account. Each time Mr E explained he might be interested in the future but that he would want an execution only service because he’d lost money in the past using an advisory broker. In what appears to be a separate incident, he also said he’d “*lost a lot*” after being scammed by a cold caller. This suggests he would want to be more cautious in the future.

I accept it was Mr E who was driving the investment strategy here. He was the one who asked about extended settlement and use of credit, and he had traded in this way in the past. CCM read out the risk warnings for trading in AIM shares and for extended settlement and Mr E agreed that he understood the risks involved. I think he was possibly focussing too much on the profits he could potentially make, without concerning himself with the losses that might also be involved. But CCM was the professional in the relationship. And I think there was some key information which should have reasonably led CCM to clearly explain to Mr E that the type of trading he

> was interested in did not fit the profile he'd chosen and wasn't suitable for Mr E based on his circumstances, risk appetite and capacity for loss. CCM should have made sure Mr E fully understood that, by using credit to purchase the shares, he was potentially going to lose more money than he'd invested. And I think this should have been specifically and clearly explained to him, rather than relying on the standard risk warnings wording.
>
> For these reasons, I think CCM gave Mr E unsuitable investment advice. It should put Mr E back in the position he'd be in now if he hadn't opened the advisory account.

And I set out what CCM needed to do to put things right. I said it should compare the performance of Mr E's investment with that of the FTSE UK Private Investors Income Total Return Index and pay the difference. And that it should pay Mr E £150 compensation for the distress caused because of the unsuitable advice which led to him losing money.

I noted that Mr E's complaint was also about the sale of the AIM shares, and that Mr E had raised concerns about whether CCM had a conflict of interest here which disadvantaged him. But I said I didn't need to consider those aspects of his complaint because I was minded to uphold it, having concluded the advice to buy the shares was unsuitable.

CCM's response to my provisional decision

CCM didn't agree and responded in detail saying, in summary, that:

- Its advice was suitable and in line with Mr E's risk tolerance and ability to bear losses.
- If Mr E's rental property is not included, 42.3% of Mr E's total liquid investment portfolio was invested in high-risk small cap and AIM shares. This is in line with his medium attitude to risk. CCM didn't advise Mr E to take more risk than was suitable for him.
- CCM didn't recommend providing Mr E with credit, he drove this strategy and understood his responsibilities.
- Mr E chose capital growth and not speculation, but this was for his overall investment objective and not his CCM account in isolation.
- Mr E had experience in high-risk trading and confirmed he understood all the risk warnings.
- Mr E confirmed his overall attitude to risk was medium with up to 50% of his total portfolio available for investment in high-risk products. It's common sense that he would be tolerant of risking £10,000 capital in high-risk small cap and AIM shares. And he concerned himself with the potential risk of loss, given he agreed he understood the risks involved.
- Whilst CCM's position is that its advice was suitable in its entirety, if the ombudsman was to uphold the complaint, it must be the position that one of the two investments was suitable, so the ombudsman should only uphold in part, not in full.

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 I set out in my provisional decision, I'm aware that I've summarised this complaint in far less detail than the parties and in my own words. There is a considerable amount of information here but I'm not going to respond to every single point made. No discourtesy is intended by this. Instead, I've focussed on what I think are the key issues here. Our rules allow me to do this. This simply reflects the informal nature of our service as a free alternative to the courts. If there's something I've not mentioned, it isn't because I've ignored it. I haven't. I'm satisfied I don't need to comment on every individual argument to be able to reach what I think is the right outcome.

I accept what CCM says about the percentage of Mr E's total investments invested in high-risk stocks. Following the investment in V and M shares, Mr E held 42.3% of his total investments, excluding property, in high-risk shares. Which I agree is less than the 50% referred to in its description of a medium risk investor.

And CCM says Mr E invested £40,000 in V and M shares, including use of a £30,000 credit facility. I had previously understood the credit extended to him was £20,000.

The rest of the information CCM has provided is largely a repeat of what it had already told us during our investigation.

Having carefully considered everything CCM said in response to my provisional decision, I don't find any reason to change my conclusion, for the reasons I've already explained. In summary:

Whilst the shares themselves may have been high risk, I find the investment strategy was speculative. Whilst the total investment may have represented less than 50% of Mr E's total investment portfolio, taking into account the use of extended settlement, the expectation of a quick sale, and the use of credit, he'd committed 42.3% of his available investment to speculative dealing. I think this exposed Mr E to more risk that he was willing to take.

Mr E had dealt this way in the past, and he may have been the party to first ask about extended settlement and credit. But it was CCM who was responsible for ensuring this was suitable for Mr E. As I set out in my provisional decision, CCM should have taken the time to ensure Mr E did understand the likelihood of him losing money on his investment was quite high. It didn't do this. Rather it relied on a 'tick box exercise' of reading its generic warnings out to Mr E.

I wouldn't expect a medium risk investor to be advised to invest 100% in medium risk investments. It's probably suitable to include a mixture of low, medium and high-risk investments in a portfolio to provide an overall medium risk. And a medium investor may want to use a small proportion of his investment to take a "punt". But, as noted above, the investment with CCM was not an insignificant proportion of his total portfolio.

CCM suggests that, if I uphold the complaint, I should only uphold in part – because one of the two investments would have been suitable for Mr E. It's not my role to try to recreate what a different version of CCM's advice might have looked like, and I can't conclude exactly what Mr E might have done. But if CCM had acted fairly, I find it wouldn't have recommended the investments, and strategy, that it did. And it would have taken the time to explain the risks of those investments and strategy more clearly. If CCM had done that, I'm satisfied Mr E wouldn't have gone ahead as he did. I say this because, once the investments took place, and he came to understand more fully the risks involved, he became quite upset and distressed about the position he'd been put in.

Putting things right

Fair compensation

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

It is not possible to say *precisely* what Mr E would have done. It's possible he may not have invested at all, or he may have decided to go ahead on an execution only basis. But I think it's more likely that, if CCM had taken the time to make sure he understood the risks involved and explained why it wasn't suitable for him, Mr E would have wanted to invest in investments which more suitably reflected his capital appreciation objective and medium attitude to risk. For that reason, I am satisfied that what I have set out below is fair and reasonable given Mr E's circumstances and objectives when he invested.

What must CCM do?

To compensate Mr E fairly, CCM must:

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

2. CCM should also add any interest set out below to the compensation payable.

3. Pay to Mr E £150 for the distress and inconvenience of being advised to take more risk than was suitable for him.

Income tax may be payable on any interest awarded.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Advisory agreement	Still exists and liquid	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) *

Actual value

This means the actual amount payable 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.

When calculating the fair value the starting investment should reflect the actual cash invested by Mr E, not including the credit he was provided with.

Any additional sum paid into the investment should be added to the *fair value* calculation from the point in time when it was actually paid in.

Any withdrawal from the CCM 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 CCM totals all those payments and deducts that figure at the end to determine the fair value instead of deducting periodically.

* HM Revenue & Customs requires CCM to take off tax from this interest. CCM must give Mr E a certificate showing how much tax it's taken off if he asks for one.

Why is this remedy suitable?

I have decided on this method of compensation because:

- Mr E wanted capital growth and was willing to accept some investment risk.
- The FTSE UK Private Investors 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 E's circumstances and risk attitude.

My final decision

I uphold the complaint. My decision is that Clear Capital Markets Ltd should pay the amount calculated as set out above.

Clear Capital Markets Ltd should provide details of its calculation to Mr E in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr E to accept or reject my decision before 27 December 2023.
Elizabeth Dawes
Ombudsman