DRN-4838876

The complaint

Mrs S complains that she was mis-sold two investments by Equity for Growth (Securities) Limited (EforG). She says she has suffered a financial loss and wants her money returned.

What happened

In August 2018, Mrs S invested £10,000 into MIX Ltd loan notes. The loan notes were issued by an investment company incorporated within the Magna Group as a special purpose vehicle (SPV) that was to invest funds into various property projects. Accrued interest and capital was due to be repaid at the end of the term. Mrs S first heard about the investment opportunity through a company called Hunter Jones (HJ), who were an appointed representative (AR) of EforG. Mrs S made a second investment of £30,000 in June 2019 into MIXG Ltd loan notes, again issued by the Magna Group. On both occasions she dealt with HJ when arranging the investments.

In January 2021, Mrs S and the other loan note holders were informed that the Magna Group had run into problems. In its role as security trustee for the loan notes, EforG sent correspondence to investors telling them Magna had no apparent assets that could be acquired in order to repay investors.

In January 2023, through the help of a representative Mrs S raised a complaint with EforG. She said she was advised to invest into the Magna Group by HJ, and this firm also facilitated and arranged the investments by providing her with information and supporting her application.

EforG acknowledge the complaint but didn't provide a full response. So, Mrs S asked this service to investigate and complete an independent review of her complaint.

I issued a Provisional Decision in May 2024.

Regarding our jurisdiction, I said that I found the complaint to be one we could consider. In summary I found:

- There was evidence that HJ was carrying out a regulated activity – that being arranging deals in investments.
- I didn't accept EforG's view that HJ merely acted as an introducer, but rather it made a direct offer financial promotion, and this was ancillary to the arranging of Mrs S's investments.
- I was satisfied that the activities carried on by HJ were ones for which EforG accepted responsibility as part of the AR agreement in place.

I went on to consider the merits of the complaint. In summary I found that EforG failed to meet its regulatory obligations and this led to Mrs S taking out investments she wouldn't have otherwise, so I thought it should pay her compensation.

EforG didn't provide any further submissions for me to consider by the deadline set for responses.

Mrs S also didn't respond to provide further comments or evidence.

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.

But I've first reconsidered all the available evidence and arguments to decide whether this complaint is one I can look at. And I have not found reason to depart from my provisional findings on this.

Is the complaint one I can look at?

We can't consider all complaints brought to this service. Before we can consider something, we need to check, by reference to the Financial Conduct Authority's DISP Rules and the legislation from which those rules are derived, whether the complaint is one we have the power to look at. This should be based on the relevant facts of the complaint. And if those facts are in dispute, I must decide on the balance of probability what happened.

There are a number of jurisdiction tests that must be met in relation to all complaints referred to us. In respect of this complaint where EforG says it is not subject to our jurisdiction, the following are relevant considerations.

We can consider a complaint under our compulsory jurisdiction if it relates to an act or omission by a firm in the carrying on of one or more listed activities.

Rule DISP 2.3.1R says we can:

"*consider a complaint under the Compulsory Jurisdiction if it relates to an act or omission by a firm in carrying on…regulated activities…or any ancillary activities, including advice, carried on by the firm in connection with them*".

And the guidance at DISP 2.3.3G 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)*".

To carry out regulated activities a business needs to be an authorised person (s.19 FSMA). We can deal with certain complaints against EforG, as it is an authorised person. That may include complaints about the acts or omissions of its appointed representatives, such as HJ. That is why this complaint is against EforG, rather than HJ.

s.39 FSMA says:
"(3) 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've had to consider:

- What are the acts about which Mrs S has complained?
- Were these acts done in the carrying on of a regulated activity or an ancillary activity carried on in connection with a regulated activity (DISP 2.3.1)?
- Were those acts ones for which EforG accepted responsibility?

What are the acts about which Mrs S has complained?

Mrs S has said HJ advised her to invest in the Magna loan notes and that this firm arranged the investments for her, which she now says wasn't right for her. In her complaint she has confirmed she was introduced to the investment opportunity by HJ. She says she was given promotional materials relating to the Magna investment by HJ, and application forms. She said there was no mention of the fact that the scheme was a high risk unregulated product.

I find it reasonable in determining the scope of Mrs S's complaint and our interpretation of what should be considered as part of it, to not be restricted to the precise words used by Mrs S. We have an inquisitorial remit and can look at wider issues. In this case I think Mrs S's complaint encompasses all of HJ's acts in connection with the Magna investments and includes any arrangements it made.

Were the acts about which Mrs S complained done in the carrying on of a regulated activity or an ancillary activity carried on in connection with a regulated activity?

Regulated activities are specified in Part II of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO) and include:

- Advising on the merits of buying or selling a particular investment which is a security or a relevant investment (article 53 RAO) and
- Making arrangements for another person to buy or sell or subscribe for a security or relevant investment (article 25 RAO).

There's insufficient evidence that HJ gave Mrs S advice. So, the crucial issue for me to determine is whether HJ conducted any other regulated activities, such as making arrangements, and if so, whether it carried out activities ancillary to them.

Simply introducing someone to an investment may not involve making arrangements or any other regulated activities under the RAO.

But, what does the evidence show that HJ did?

I'm satisfied from the evidence available:

- HJ made a direct offer financial promotion to Mrs S.
- The Magna loan notes were an investment under the relevant rules.
- HJ's activities amounted to carrying out the regulated activity of arranging deals in investments under Article 25 of the RAO.
- The direct offer promotion was ancillary to the arranging of the investment.

In Mrs S's complaint she has referred to receiving misleading information within the Information Memorandum (IM) for the investments she took out, which were approved by EforG.

The MIX Ltd IM is undoubtedly a financial promotion. This isn't in dispute. Indeed, EforG approved it as such as evidenced by a section in the IM which says: "Equity for Growth (Securities) Limited ("EFORGS") which is Authorised and Regulated by the Financial Conduct Authority, with registration number 475953 has approved the issue of this Document as a financial promotion in accordance with the provisions of section 21 of FSMA."

I also find the MIXG Ltd IM is a financial promotion. There is a dispute about whether EforG approved the IM. I've seen a copy of the MIXG IM (dated March 2019). This document has a

section in the IM which says: “Equity for Growth (Securities) Limited (“EFORGS”) which is Authorised and Regulated by the Financial Conduct Authority, with registration number 475953 has approved the issue of this Document as a financial promotion in accordance with the provisions of section 21 of FSMA." EforG disagrees that it provided approval and has referred to another version of IM which doesn’t state it provided approval. This version is dated September 2019, which was after Mrs S invested, so can’t be the IM Mrs S relied on to invest. Based on the evidence I’ve seen; I think most likely IM that Mrs S received was the March 2019 IM and this was what she relied on to invest. Whether this document was approved by EforG or not is unclear to me. If HJ was acting incorrectly by providing misleading information about the approval, this is not something that Mrs S could have understood. I find that EforG are responsible for the actions of HJ under the AR agreement, so it follows if HJ misled Mrs S about the approval ,EforG is responsible for this.

The FCA Handbook defines a direct offer financial promotion as a financial promotion that contains:

(a) an offer by the firm or another person to enter into a controlled agreement with any person who responds to the communication; or
(b) an invitation to any person who responds to the communication to make an offer to the firm or another person to enter into a controlled agreement;
and which specifies the manner of response or includes a form by which any response may be made.

A controlled agreement is defined as "an agreement the making or performance of which by either party constitutes a controlled activity" - which includes investment activity with securities such as Magna loan notes.

Mrs S has given her recollections of how she came to take out these investments. She has explained she was already a client of HJ’s having made an investment through it previously. She has provided a letter from July 2018 that she received from HJ introducing the Magna investment – and including an application form and pre-paid envelope to return it.
I’ve also seen the Acceptance Form Mrs S signed (on 15 August 2018) to invest in the MIX loan notes. This has a declaration to confirm the IM has been read and understood and in particular the risk warnings. I’ve also seen a copy of a letter from May 2019, again sent to Mrs S by HJ. This included a further application form for Magna loan notes and asked for anti-money laundering documentation as well as a self-certification form.

Mrs S has confirmed she signed a self-certified sophisticated investor statement. But I’ve not been provided with a copy of this, so it’s unclear exactly what she signed to declare. She says HJ advised her to say she was a sophisticated investor, despite her knowing absolutely nothing about this level of investment. She says when she questioned this with HJ, she was told not to worry and it was nothing more than part and parcel of the process of taking out an investment. She was unaware of the impact of declaring to be a sophisticated investor and placed trust in HJ.

There is limited other evidence available. What is available aligns with Mrs S’s recollections of how she came to take out the investments. EforG haven’t provided any evidence from the time to dispute HJs involvement in arranging the investments.

While promoting investments in this way isn’t specifically listed in the RAO as a regulated activity, I’m satisfied it was ancillary to the activities of arrangements that HJ was also involved in for Mrs S’s Magna investments.

Article 25 (Arranging deals in investments) of the RAO says:

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

The Magna loan notes are ‘a security’. HJ’s involvement with Mrs S’s investment was significant and in my view more than acting as an unregulated introducer as EforG has suggested.

The FCA’s perimeter guidance at PERG 2.7.7B says of Article 25(1): "The activity of arranging (bringing about) deals in investments is aimed at arrangements that would have the direct effect that a particular transaction is concluded (that is, arrangements that bring it about)."

EforG position is that HJ’s role was passive and very limited in the transactions like this. So it did not arrange deals in investments pursuant to either Article 25(1) or 25(2) of the RAO. EforG has also referred to the case of Watershed Ltd v Dacosta [2009] EWHC 1299. It says this supports that the activity of introducing does not itself constitute a regulated activity for the purposes of Article 25 – and this was all HJ was doing in this transaction. I agree that introducing on its own wouldn’t likely constitute a regulated activity being carried out. But I’ve set out above the evidence of the role HJ carried out, which went beyond a mere introduction and amounted to arranging. Watershed Ltd v Dacosta is also clear that it’s not necessary for the actions taken to “*involve or facilitate the execution of each step necessary for entering into and completing the transaction*”. So, while there isn’t evidence of every step of the transaction, I think the evidence we do have of HJ’s involvement is sufficient to reach a finding that it was carrying out the regulated activity of arranging.

EforG has previously said Article 26 of the RAO exclusion applies to the transactions HJ was involved in. Article 26 has an exclusion from Article 25 if the arrangements ‘do not or would not bring about the transaction to which the arrangements relate’.

EforG has referred to the case of Adams v Options UK Personal Pensions LLP (2021) EWCA Civ 474 and what the court said in that case about Article 26 “Arrangements not causing a deal”, implying ‘causal potency’ in the acts bringing about transactions. Having considered the case, I am not persuaded that it provides any support for EforG’s argument that Article 26 applies in this case. The contacts described above are clear that HJ was responsible for making Mrs S aware of this opportunity and I find it played a critical role in facilitating the transactions, in that it did cause the deals. It follows I’m satisfied that those acts by HJ were carried on by it under Article 25(1) and they are not excluded by virtue of Article 26.

Even if I am wrong, and Article 26 does apply, it only exempts arrangements under Article 25(1) - and I am satisfied that HJ did make arrangements that come within Article 25(2). As the guidance at PERG 8.32.2G states, Article 25(2) is potentially much wider (than Article 25(1)) “as it does not require that the arrangements would bring about particular transactions”.

I’ve considered EforG’s broader position that HJ was only acting as an introducer to Magna loan notes. It says despite the contractual arrangements within the AR agreement the acts

carried out by HJ were acts of an introducing agent only. And it says HJ didn't use the authorisations available, instead it acted as an unauthorised firm, communicating financial promotions without approval by complying with the conditions of an exemption contained in Article 27 of the RAO. This says that:

"A person does not carry on an activity of the kind specified by article 25(2) merely by providing means by which one party to a transaction (or potential transaction) is able to communicate with other such parties."

This of course would only be an exclusion to the activity under Article 25(2) not the Article 25(1) activity that I think was also carried out. But I do not think the exclusion applies here in any event. PERG 8.32.5 says of this exclusion:

"The Regulated Activities Order contains an exclusion (article 27: Enabling parties to communicate) to bring a degree of certainty to this area. This applies to arrangements which might otherwise fall within article 25(2) merely because they provide the means by which one party to a transaction (or potential transaction) is able to communicate with other parties.

In the FCA's view, the crucial element of the exclusion is the inclusion of the word 'merely'. So that, where a publisher, broadcaster or Internet website operator goes beyond what is necessary for him to provide his service of publishing, broadcasting or otherwise facilitating the issue of promotions, he may well bring himself within the scope of article 25(2)."

PERG 8.32.6

"For example, in the FCA's view a publisher or broadcaster would be likely to be making arrangements within the meaning of article 25(2) and be unable to make use of the exclusion in article 27 if:
(1) he enters into an agreement with a provider of investment services such as a broker or product provider for the purpose of carrying their financial promotion; and
(2) as part of the arrangements, the publisher or broadcaster does one or more of the following:
(a)brands the investment service or product in his name or joint name with the broker or product provider;
(b)endorses the service, or otherwise encourages readers or viewers to respond to the promotion;
(c) negotiates special rates for his readers or viewers if they take up the offer;
(d) holds out the service as something he has arranged for the benefit of his readers or viewers."

In the circumstances of how these investments were taken out, I think HJ's letters to Mrs S were intended to and did persuade, and so encouraged her to respond to the promotion. It also indicates HJ was sending and receiving applications. It was not merely to provide the means by which one party to a transaction (or potential transaction) is able to communicate with other parties.

In my view, the available evidence supports the testimony of Mrs S in that HJ were actively pushing the investment opportunity. The nature of the contacts doesn't indicate that HJ played a passive role. Bur rather HJ was active in arranging the investments for Mrs S and sought to make it happen by sending information to her to complete the transactions. So, I don't find the exclusion provided by Article 27 can be relied upon in this circumstance.

I've considered the argument whether the carrying out of the activity cannot be properly considered as ancillary to a regulated activity in circumstances where a "bright line" can be drawn between the regulated and unregulated activities based on the facts as set out by Judge Ouseley on the application of Tenetconnect Services Ltd v FOS [2018] EWHC 459 (Admin). It doesn't think the introduction and/or promotion of the investment can be considered as inextricably linked to the alleged arranging of the investment in both substance and timing.

I don't think this point carries relevance, in light of the circumstances of how Mrs S came to take out her investments. I've already acknowledged promoting investments isn't specifically listed in the RAO as a regulated activity, but my finding is that it was ancillary to the activities of arrangements that HJ was also involved in. The facts previously set out, in my view, clearly show that HJ went beyond a mere promotion and this was bound together with the arrangement of the investments. The letters taken with Mrs S's recollections indicates a continuous dialogue following the initial promotion leading to the completion of the transactions. So I don't think the evidence supports that there was clear separation between the activities of HJ. It follows that I don't find there was a bright line between the introduction and arranging of the investments as EforG suggest.

On balance, it seems that HJ's interactions with Mrs S amounted to arrangements under Article 25(1) of the RAO as HJ's involvement had the direct effect of bringing about the investment in the loan notes. Articles 25(1) and (2) are not mutually exclusive. Some activities can fall under both limbs. So even if I'm wrong on this point, I also make a finding that HJ also made arrangements under Article 25(2) as it made arrangements with a view to transactions in investments as the evidence supports that HJ's promotion had the purpose of making Mrs S invest.

Were those acts ones for which EforG accepted responsibility?

For us to be able to look at the merits (the rights and wrongs) of the complaint we have to be satisfied that the activities carried on by HJ were ones for which EforG accepted responsibility. To determine this, I've looked at the appointed representative agreement between EforG and HJ. The agreement says:

"The appointer [EforG] appoints the company [HJ] as its Appointed Representative pursuant to section 39 of the Act to carry out the UK Business under Regulation 2 of the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001, and to that end:

3.1.1 the activity which [HJ] is permitted to carry out pursuant to this Agreement is limited to arranging (bringing about) deals in investments and making arrangements with a view to transactions in investments under article 25 of The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 …"

This indicates EforG did authorise HJ through the AR agreement to arrange deals at the time Mrs S invested.

I understand EforG's position is that HJ was acting in its own right in a capacity of an unregulated introducing agent only, and not using the permissions it gained through the AR agreement. So there has been a misunderstanding with respect to HJ's role and the actions it took, which were fundamentally different to the authorisations it had the ability (but not the requirement or obligation) to use under the AR agreement.

I refer back to the AR agreement again. I note the pre-amble that says HJ was specialising in promoting specific investments in the fixed income and alternative property sector to self-

certified investors and providing suitable information. It confirms HJ does not offer any form of financial advice. This is in line with the section of the agreement that confirms the permissions granted (which didn't include advice). This section is clear that it is limited to arranging (bringing about) deals in investments and making arrangements with a view to transactions in investments under Article 25 of the ROA.

I've seen from the letters referred to earlier between HJ and Mrs S during the period the Magna investments were being promoted, the footer below the signature confirms HJ was an *"Appointed Representative (FRN808287) of Equity for Growth (Securities) Limited (475953) which is Authorised and Regulated by the Financial Conduct Authority".* This further demonstrates at the relevant time HJ was acting in the capacity of an AR of EforG.

I understand EforG doesn't accept HJ used its permissions to carry out the regulated activities gained through the AR agreement in these transactions. In other words, HJ was not acting as its AR. But I've already concluded that the extent of HJ's involvement with the arrangement of Mrs S's investments into Magna meant it was arranging. The more plausible explanation is that it was acting as EforG's AR and therefore arranging an investment using the permissions it was granted through the AR agreement. I'm also conscious, without an AR agreement in place, carrying on a regulated activity would be in breach of the general prohibition and therefore acting unlawfully. So there is good reason why an AR agreement was in place due to the nature of the business HJ was likely to be carrying out.

So, EforG authorised HJ to make arrangements for investments. It is my finding that this is what happened in this case. I can consider the direct offer financial promotion as it was ancillary to the arranging and that connection means EforG is responsible for anything done or omitted by HJ in carrying on the business for which it has accepted responsibility. And in any case, my view is that the direct offer financial promotion was intrinsically linked to HJ's authority to make arrangements. So, my conclusion on jurisdiction is that this is a matter that we can look at as it involves a regulated activity and/or an activity that is ancillary to a regulated activity. EforG authorised HJ to carry on these acts. As such, it is responsible for the complaint. It follows that Mrs S is an eligible complainant as she was a consumer and a customer of HJ and is complaining about a regulated activity (arranging an investment).

As I am satisfied Mrs S's complaint is one I can look at I will now consider all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Merits of the complaint

I have carefully taken account of the relevant considerations to decide what is fair and reasonable in the circumstances of this complaint. In doing so, I have taken into account relevant law and regulations; regulators rules, guidance and standards; codes of practice; and where appropriate, what I consider to have been good industry practice at the relevant time.

In my view the key consideration as to what is fair and reasonable in this case is whether EforG met its regulatory obligations when HJ, acting on its behalf, carried out the acts the complaint is about. I consider the following regulatory obligations to be of particular relevance here.

The Principles for Businesses

The Principles for Businesses, which are set out in the FCA's Handbook "are a general statement of the fundamental obligations of firms under the regulatory system" (PRIN 1.1.2G).

I think Principles 6 and 7 are relevant here. They provide:

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"

COBS 4 – Communicating with clients, including financial promotions

Principle 7 overlaps with COBS 4.2 - Fair, clear and not misleading communications, which I also consider to be relevant here:

COBS 4.2.1R:

(1) A firm must ensure that a communication or a financial promotion is fair, clear and not misleading.

There are also rules restricting who "non-readily realisable securities" can be promoted to and how to test whether the investment was appropriate for the potential investor. These rules are set out in COBS 4.7 and COBS 10. These rules are relevant in this case as the Magna loan notes were, in my view, non-readily realisable securities.

The FCA Handbook definition of a 'non-readily realisable security' is:

"a security which is not any of the following:
(a) a readily realisable security;
(b) a packaged product;
(c) a non-mainstream pooled investment;
(d) a mutual society share;
(e) a deferred share issued by a credit union; or
(f) credit union subordinated debt;"

The Magna loan notes are a security that is not readily realisable and none of the other exclusions apply. So Mrs S's investment was a non-readily realisable security (NRRS).

COBS 4.7 - Direct offer financial promotions

At the time COBS 4.7.7R said:

"(1) Unless permitted by COBS 4.7.8 R, 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 4.7.10 R.

(3) The second condition is that 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 10 – Appropriateness (for non-advised services)

At the time COBS 10.1.2 R said:

"This chapter applies to a firm which arranges or deals in relation to a non-readily realisable security, derivative or a warrant with or for a retail client and the firm is aware, or ought reasonably to be aware, that the application or order is in response to a direct offer financial promotion."

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 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."

COBS 10.2.2 R:

"The information regarding a client's knowledge and experience in the investment field includes, to the extent appropriate to the nature of the client, the nature and extent of the service to be provided and the type of product or transaction envisaged, including their complexity and the risks involved, information on:

(1) the types of service, transaction and designated investment with which the client is familiar;

(2) the nature, volume, frequency of the client's transactions in designated investments and the period over which they have been carried out;

(3) the level of education, profession or relevant former profession of the client"

10.2.6G – Knowledge and experience:

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

COBS 10.3 Warning the client

COBS 10.3.1R

"(1) If a firm considers, on the basis of the information received to enable it to assess appropriateness, that the product or service is not appropriate to the client, the firm must warn the client.

COBS 10.3.2R

(1) If the client elects not to provide the information to enable the firm to assess appropriateness, or if he provides insufficient information regarding his knowledge and experience, the firm must warn the client that such a decision will not allow the firm to determine whether the service or product envisaged is appropriate for him."

COBS 10.3.3G

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

EforG has previously argued that the regulatory obligations under COBS 4.7 and COBS10 don't apply in situations like this. Essentially it says HJ didn't communicate a financial promotion – including a direct offer financial promotion - and because of this the regulatory obligations set out above don't apply. Its position is that HJ did not send an invitation or inducement to engage in investment activity. I've considered this point, bearing in mind my finding is that there was a direct offer financial promotion made by HJ to Mrs S.

Mrs S says she relied on the IMs approved by EforG before deciding to invest. Her acceptance form for the MIX loan notes contains a section that asks her to confirm she has read and understood the IM. It is also my understanding from other complaints referred to this service that HJ's sales process involved sending IMs to investors. As mentioned above the letters indicate HJ sent Mrs S information in relation to the Magna opportunity before she invested. All of this leads me to the conclusion HJ provided Mrs S with IMs before she invested.

As mentioned, there is a dispute about whether EforG approved the MIXG IM. Based on the evidence I've seen; I think it most likely Mrs S received the March 2019 IM and this was what she relied on to invest. I reiterate my finding that EforG is responsible for the actions of HJ under the AR agreement, so it follows if HJ misled Mrs S about the approval EforG is responsible for this.

The content of the MIX IM and the March 2019 MIXG IM make clear reference to being financial promotions and EforG approving them for that purpose, so this aligns with the definition set out in the FCA handbook about promotions. The FCA Handbook also defines a direct offer financial promotion as a financial promotion that contains: (a) an offer by the firm or another person to enter into a controlled agreement with any person who responds to the communication; or (b) an invitation to any person who responds to the communication to make an offer to the firm or another person to enter into a controlled agreement.

The correspondence and contact between Mrs S and HJ in facilitating the completion of the transactions, is evidence that a direct offer promotion was being made. This evidence supports it's likely HJ directed Mrs S to Magna application material or specified how to respond. Even if I am wrong to say Mrs S was sent IMs by HJ, the letters sent are evidence of an invitation or inducement to make the investments. So I'm satisfied the evidence all points to HJ providing an invitation to Mrs S and promoting the investment opportunity to her whilst it was an AR of EforG.

So, I've considered whether EforG complied with its regulatory requirements.

COBS 4.7 says that a firm must not communicate a direct or approve a direct offer financial promotion relating to a non-readily realisable security unless two conditions are satisfied.

The first condition is the client has been certified or has self-certified as one of the categories listed.

Mrs S accepts that she likely completed a declaration as a self-certified sophisticated investor – although I haven't seen the actual signed version. From what she's told us about her investment experience and knowledge, it isn't clear she did meet the criteria to be classed as a sophisticated investor at the time. As previously mentioned, Mrs S says HJ advised her to say she was a sophisticated investor, despite her knowing absolutely nothing about this level of investment and received reassurances from HJ that it was nothing to worry about and just part of the process of investing.

I've considered this evidence about Mrs S's experience. At time she was investing, she was retired, and using savings to invest so as to provide a pension in retirement. She has explained prior to her Magna investments she'd invested £10,000 in a Dolphin Trust investment over a two-year term (in 2017). While I acknowledge this is evidence that she had some investment experience, I don't consider this to demonstrate detailed knowledge or experience. On balance, I don't think this is sufficient to demonstrate she was a sophisticated investor, and my finding is that she was not.

I'm conscious that just relying on a declaration is also not sufficient to meet regulatory obligations. COBS 4.12.11G says:

(1) A firm which wishes to rely on any of the self-certified sophisticated investor exemptions (see Part II of the Schedule to the Promotion of Collective Investment Schemes Order, Part II of Schedule 5 to the Financial Promotions Order and COBS 4.12.8 R) should have regard to its duties under the Principles and the client's best interests rule. In particular, the firm should consider whether the promotion of the non-mainstream pooled investment is in the interests of the client and whether it is fair to make the promotion to that client on the basis of self-certification.

(2) For example, it is unlikely to be appropriate for a firm to make a promotion under any of the self-certified sophisticated investor exemption without first taking reasonable steps to satisfy itself that the investor does in fact have the requisite experience, knowledge, or expertise to understand the risks of the non-mainstream pooled investment in question. A retail client who meets the criteria for a self-certified sophisticated investor but not for a certified sophisticated investor may be unable to properly understand and evaluate the risks of a non-mainstream pooled investment which invests wholly or predominantly in assets other than shares in or debentures of unlisted companies.

I've seen no evidence that HJ took reasonable steps to ascertain whether Mrs S was a sophisticated investor. I think it's likely that any such reasonable steps would have revealed she did not meet this criterion. The information she has provided about her circumstances indicates she had some investment experience, but not the level of requisite experience, knowledge, or expertise to demonstrate sophistication. I also haven't seen evidence to support she had knowledge or expertise through other means.

EforG has argued COBS 4.12 only applies to non-mainstream pooled investments (NMPI), whereas the Magna investments are NRRS. It has referenced that COBS 4.7.9 is specific as to when the term NRRS can be substituted for NMPI in the regulations. And, as COBS 4.7.9 doesn't say the terms can be substituted in respect of COBS 4.12.9, COBS 4.12.9 can only apply to NMPIs. EFG also refers to an FCA Consultation Paper, CP20/8 on the marketing of speculative illiquid securities to retail investors to support its view that the rules that apply for NRRS are in COBS 4.7.7R, and not COBS 4.12.

I don't see the wording of COBS 4.7.9 provides an exhaustive list of where the terms NMPI and NRRS can be substituted. COBS 4.7.9 specifies that NMPI can be substituted for NRRS when discussing certification. In my view, the fact that the certification wordings themselves can equally apply to NRRS and NMPI strongly suggests the rules are intended to apply to

both types of investment. In respect of the FCA consultation paper, I note this uses the words ‘generally’ and ‘in some instances’, and it is a brief comment within the preamble. I don’t think it is giving a clear definitive statement on the application of the rules – or that COBS 4.12 doesn’t apply to NRRS.

I also understand EforG’s position is that it was not required to comply with COBS 4.12.11G, because it is guidance and not a rule or a requirement. It says guidance provisions in the FCA handbook are not binding. While I accept there is a difference between guidance and rules, I don’t think this means COBS 4.12.11G doesn’t have relevance to my considerations. In my view it is a factor that is relevant to my consideration of overall what is fair and reasonable in the circumstances (as set out at the start of my findings on the merits of the complaint).

EforG says even if a financial promotion was communicated, it considers it to be an “Excluded Communication” so COBS 4.7 doesn’t apply. It refers to investors, like Mrs S, being an exempt self-certified sophisticated investor, which meant an unauthorised person was able to communicate a financial promotion. It says HJ’s business model benefits from exemptions when communicating with self-certified investors. It refers to the FPO to support this point. It says s.50A of the Financial Promotions Order (FPO), supports the view HJ was acting as an unauthorised person and was therefore able to communicate a financial promotion to Mrs S under an exemption.

When Mrs S made her investments, HJ was an AR of EforG and as part of this agreement HJ had permission to carry out certain specified regulated activities – crucially including the ability to arrange deals in investments. I’ve already explained why I’m satisfied a regulated activity was being carried out in the circumstances. In this situation, the logical conclusion to reach is HJ was using the permissions it gained through the AR agreement when arranging investments for Mrs S. And I am satisfied HJ was acting as EforG’s AR here, and therefore using its permissions.

By arguing HJ “was not using permissions” EforG is effectively saying HJ was not acting as its AR – this is a point I have already dealt with earlier in my decision. But to reconfirm my earlier conclusion, EforG authorised HJ to make arrangements for investments and it is my finding that this is what happened in this case. This means the regulatory obligations I set out do apply to the sale of Mrs S’s investments in Magna.

EforG has also made further arguments that HJ was not required to comply with COBS 4.7.7 (or COBS 10, which I deal with later in this decision). It maintains the financial promotion of Magna loan notes itself was not a “direct offer” financial promotion and the IM itself was not classed as a direct offer financial promotion because it did not contain the terms and conditions or provide the means to invest. It notes HJ didn’t provide the prospective investors with the ability to invest online or otherwise. I’ve already explained why I’m satisfied that Mrs S was provided with a direct offer financial promotion. For the reasons given previously, I’m satisfied the evidence of the nature of contacts HJ had with Mrs S at the relevant times were an invitation and/or inducement to make the investment into the Magna loan notes. So, it remains that the regulatory obligations are relevant.

EforG’s position is HJ did not have to comply with COBS 4.7.7 or COBS 4.7.9. Instead, it says HJ complied with the FPO where Mrs S has signed a self-certified sophisticated investor statement. Its view is the existence of a declaration means under Article 48 and 50A of the FPO, there is a distinction from this type of investor when comparing to ordinary retail investors. It has also referenced a December 2011 HM Treasury consultation to support its argument there was a responsibility on the investor to correctly certify when categorising themselves and the existence of a signed statement is sufficient to satisfy the FPO requirements.

I'm satisfied the capacity HJ was acting in at the time Mrs S took out her investments was as an authorised firm, therefore it needed to comply with the regulatory requirements relevant to this status. Also, for the reasons already noted above, I don't accept that HJ can blindly rely on the self-certified sophisticated investor statement in the way it suggests, avoiding compliance with FCA rules and guidance. The guidance at COBS 4.12.11G indicates it is unlikely to be appropriate for a firm to make a promotion under the self-certified sophisticated investor exemption without first taking reasonable steps to satisfy itself that the investor does in fact have the requisite experience, knowledge, or expertise to understand the risks - which I haven't seen that HJ did.

In summary, my finding is that HJ breached the first condition required under COBS 4.7.7 by making the direct offer promotion to Mrs S when she was not or should not have been certified as a sophisticated investor. I also haven't seen evidence that she met either of the other categories that would mean the promotion could be made to her. Even if I'm wrong on this, I have identified another reason why the complaint should be upheld. That is - I think EforG failed to satisfy the second condition too – compliance with the rules relating to appropriateness under COBS 10.

HJ was obliged, under COBS 10, to "ask the client to provide information regarding his knowledge and experience … to enable the firm to assess whether the service or product envisaged is appropriate for the client" and "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".

I understand EforG's position is that HJ was not obliged to carry out checks, given its limited role as introducer. For all the reasons I set out above – I don't agree that it was just an introducer and must therefore conclude that no checks were carried out. I've already explained that I'm satisfied a direct offer financial promotion was made to Mrs S, so the relevant rules on appropriateness testing were engaged. Had these rules been followed, I think it would have identified that Mrs S had limited investment experience and knowledge for the same reasons as I've already explained.

The loan notes Mrs S invested in are not a straightforward product. There were multiple risk factors associated with them – including the inherent risks of property developments (delays, budget overruns etc), as well as the track record of Magna. There was also a liquidity risk. The loans notes weren't easily tradable on a recognised exchange, and so could not be readily sold. All of these points (and this is not an exhaustive list) would need to be considered in order to understand the investment. It's important to give these specific risks for context, as it demonstrates that the investment was complex, risky and specialist.

All of this indicates that this wasn't a suitable investment for the majority of retail consumers. EforG knew or ought to have known this. So had HJ carried out the checks it should have, it would have identified that the investment in Magna loan notes was not appropriate for Mrs S. She had neither the knowledge nor experience to understand the risks involved in the investment. As I've already explained, I don't find the previous investment Mrs S made demonstrate that she had the requisite knowledge or experience. She says she was looking for a good return to help supplement her retirement income. So, I don't think this is strong evidence that Mrs S had a good understanding of investing in complex high-risk investments.

COBS 10.3 does provide for situations where firms can proceed with arrangements after giving warnings if the client still wants to proceed. But as set out in COBS 10.3.3G "If a client asks a firm to go ahead with a transaction, despite being given a warning by the firm, it is for the firm to consider whether to do so having regard to the

circumstances." I don't think it would have been fair for HJ to proceed here, even if Mrs S did accept a warning, as it ought to have been aware she clearly did not have the capacity to understand all the risks involved with investing in Magna loan notes.

So, my conclusion is HJ was required to follow the relevant rules set out by the regulator. It failed to do this when making the arrangements for the Magna investments. I'm satisfied that, had HJ done everything it should have it would have concluded that it should not make the direct offer promotion to Mrs S and she would not have made the investments that were inappropriate for her. As such, EforG, as principle of HJ, should pay Mrs S compensation.

For the reasons provided, I uphold this complaint.

Putting things right

In assessing what would be fair compensation, I consider that my aim should be to put Mrs S as close to the position she would probably now be in if she had not taken out these investments.

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

What should EforG do?

To compensate Mrs S fairly, EforG must:

- Compare the performance of each of Mrs S's investments with that of the benchmark shown below.
- A separate calculation should be carried out for each investment.
- EforG should also add any interest set out below to the compensation payable.
- Pay Mrs S £300 for the upset caused by losing a significant amount of her savings that were be used to help her financially in retirement.

Income tax may be payable on any interest awarded.

Investment name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
MIX Loan Note – August 2018	Still exists but illiquid	Average rate from fixed rate bonds	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)
MIXG Loan Note –	Still exists but illiquid	Average rate from fixed	Date of investment	Date of my final decision	8% simple per year from final

June 2019		rate bonds			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 Mrs S agrees to EforG taking ownership of the investment, if it wishes to. If it is not possible for EforG to take ownership, then it may request an undertaking from Mrs S that she repays to EforG any amount she 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.

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, EforG 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.

Why is this remedy suitable?

I have chosen this method of compensation because:

- Mrs S wanted to achieve a reasonable return without risking any of her capital.
- The average rate for the fixed rate bonds would be a fair measure given Mrs S's circumstances and objectives. It does not mean that Mrs S would have invested only in a fixed rate bond. It is the sort of investment return a consumer could have obtained with little risk to their capital.

My final decision

I uphold the complaint. My final decision is that Equity for Growth (Securities) Limited should pay the amount calculated as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S to accept or reject my decision before 15 July 2024.

Daniel Little
Ombudsman