DRN-5287933

The complaint

Mr K complains EGR WEALTH LIMITED ('EGR') misled him to invest in a bond which failed to mature causing him financial loss.

What happened

In October 2019, Mr K invested £20,000 in the Access Commercial Investors 4 bond ('the bond') arranged by EGR, which he was introduced to by an unregulated third party. Mr K received some income for a time but when the bond failed to mature on 31 December 2022 as expected, he received no further income or the capital investment back due when the bond matured.

As Mr K didn't receive back the money he invested as expected, he thought to complain about what happened. Initially he made his complaint to our service but as EGR hadn't yet received a complaint itself, our service passed on Mr K's concerns to it. Mr K's complaint to EGR then was in summary that he felt EGR misled into investing in the bond, which he later clarified as being due to the level of risk involved and his understanding of the nature of the bond.

EGR considered his complaint but didn't think it should be upheld. In summary it said:

- The bond was sold to him on a non-advised basis.
- It had followed the relevant rules ensuring that Mr K was someone it could promote this type of bond to, and that it was an appropriate investment for him.
- The risks had been clearly disclosed and set out to him.

Mr K didn't agree with EGR's response and so asked our service to consider his complaint now EGR had issued him its final response to his complaint. One of our Investigators considered his complaint and thought it should be upheld. She said this was because:

- The bond, AC4, met the definition of 'non-readily realisable security' ('NRRS') which required EGR to ensure it could first offer the bond to Mr K, and second, ensure it was an appropriate investment for him.
- She agreed that EGR fairly considered that Mr K was someone it could offer the bond to given he declared himself on the application to be a 'restricted investor'. But thought the bond was an inappropriate investment for him as:
    - He was an inexperienced investor.
    - He lacked the knowledge and experience to understand the risks involved.

Mr K agreed with our Investigator's outcome, EGR did not. In response to our Investigator's findings, it said:

- The relevant rules didn't require it to ask more questions than it did or probe the

responses.

- It thought our Investigator wasn't applying the rules in COBS 10 as they were at the time the investment was arranged.

- The Information Memorandum ('IM') for the bond clearly explained the risks and nature of the bond.

- The bond was an appropriate investment for Mr K following what COBS 10 said at the time.

- Even if it gave Mr K a warning that the bond was inappropriate, it wouldn't have made a difference to him asking to invest in it as to the risks had been set out clearly to him he had to have been aware of them.

- In the FCA's principles of good regulation, Principle 4 says consumers should take responsibility for their decisions.

Our Investigator considered EGR's response but didn't think it changed her outcome, she continued to think the complaint should be upheld.

As an agreement wasn't reached the complaint has been passed to me to decide.

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.

EGR's role in the sale of this investment

EGR says it only provided Mr K with an execution-only service when it dealt with him. In the course of that business, it says it didn't provide any advice or give any recommendations to Mr K about investing in the bond, or any other regulated investment.

The evidence provided includes an application which Mr K completed which led to his investment in the bond through EGR. This included his declaration he was a 'restricted investor' and his answers to the questions EGR asked to test the appropriateness of it for him. Also within that is an acknowledgement from Mr K that EGR hadn't given him any investment advice. Given the nature of the application form as I've described, I've not seen that EGR gave regulated advice to Mr K as there is nothing to suggest it made an investment recommendation to him leading to his investment in the bond.

I'm satisfied from reviewing the application documents then that EGR did however play an important role in the sale of the bond to Mr K. In his submissions Mr K has explained he was directed to EGR following advice he received from an unregulated third party. The firm he has named in that isn't regulated and so I don't know if advice was given which led to Mr K engaging with EGR. But I don't think that matters here given EGR had its own distinct role in Mr K investing in the bond. Regardless of the actions of any other party, I'm satisfied EGR would be wholly responsible for Mr K's investment if it were to fall below its regulatory obligations around the sale of this bond. For the avoidance of doubt, I've not in determining this complaint attributed any acts or omissions of that introducing firm to EGR.

In my view the application evidence shows EGR's actions in the course of this complaint amount to the regulated activity of arranging deals in investments as set out at Article 25 in

the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("RAO"). With the AC4 bond amounting to an instrument creating or acknowledging indebtedness by means of it being such as asset set out in Article 77(1)(d) where it acknowledges indebtedness by it paying an income in exchange for Mr K's capital sum, which would be due to be repaid to him at the end of the bond's term.

I'm satisfied then the application process involved arranging Mr K to invest in a regulated investment and directly had the effect of bringing about the transaction. EGR then was carrying out a regulated activity involving a specified investment.

Did EGR meets its obligations in the arrangement of this investment?

I understand the complaint Mr K is making to be that EGR mis-sold him the AC4 bond. To fairly determine that complaint I think it would first be helpful to set out what I consider to be the relevant considerations in fairly determining this complaint.

Relevant considerations

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

I'm satisfied the investment Mr K applied for was a NRRS. Given that, this meant there were rules restricting who this type of product could be promoted to, and how to test whether it was an appropriate investment for the potential investor.

The most relevant of these rules are those set out in COBS 4.7 and COBS 10. EGR would also need to have regard to the general principles in the FCA Handbook at PRIN 2.1, in following being of particular relevance here:

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

- Principle 7 – 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.

Overlapping with Principle 7 and so also a relevant consideration here is COBS 4.2.1R(1), that a firm must ensure that a communication or a financial promotion is fair, clear and not misleading.

To be clear, I've considered and applied these rules to the circumstances below using them as they were in force at the time of Mr K's application.

COBS 4.7 – Direct offer financial promotions

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 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 and 10A) 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

COBS 10.1.2R 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, other than in the course of MiFID or equivalent third country business, 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."

On satisfying itself an investment would be appropriate, COBS 10.2.1R said:

> "(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 10.2.2R said the following around the information a firm should consider about the consumer's knowledge and experience:

> "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."

On the reliance of information provided to it, COBS 10.2.4R said:

> "A firm is entitled to rely on the information provided by a client unless it is aware that the information is manifestly out of date, inaccurate or incomplete."

And on the inference of knowledge or experience alone, COBS 10.2.6G said to firms:

> "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."

If a firm determined from those rules that such an investment would be inappropriate then COBS 10.3.1R required firms to do the following:

> "(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.
>
> (2) This warning may be provided in a standardised format."

In the event a warning was given and the consumer wanted in any event to proceed, COBS 10.3.3G provided the following guidance:

> "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."

As Mr K was applying to EGR for it to arrange an investment in a NRRS, as highlighted above, COBS 4.7.7R restricted EGR from promoting it to Mr K, unless two conditions were met. First that he was one of the specified categories of investor, and second, the investment being applied for was appropriate for him.

Categorisation

Turning first to EGR's categorisation of Mr K. In order to promote the bond to him, EGR needed to satisfy itself he was one of the specified types of investor at COBS 4.7.7R (2). That being he was either a high net worth, 'restricted' or sophisticated – whether certified or self-certified – investor. And, that he signed a declaration to a statement set out in the relevant part of COBS 4.7.10R for restricted investors, or COBS 4.12.6R to 4.12.8R for the other categories.

The application EGR asked Mr K to complete contained a section listing each of those categories and directed him to select which type of investor he met the requirements of from those options. The relevant declarations required for each investor type were displayed on the application within the subsection for each category. Although these declarations are flawed in that the rules set out wording within them defining what should be considered as a net asset. EGR omitted the net asset definition within the investor type declarations on the

application form Mr K completed. Instead, it printed the definition accurately from the rules above the tick box options for the investor types.

From this list Mr K selected he was a 'restricted investor', and signed a declaration to the following statement:

> "A certified restricted investor is an individual who has signed, within the period of twelve months ending with the day on which the communication is made, a statement in the following terms:
>
> Restricted Investor Statement
>
> I make this statement so that I can receive promotional communications relating to non-readily realisable securities as a restricted investor. I declare that I qualify as a restricted investor because:
>
> (a) in the twelve months preceding the date below, I have not invested more than 10% of my net assets in non-readily realisable securities; and
>
> (b) I undertake that in the twelve months following the date below, I will not invest more than 10% of my net assets in non-readily realisable securities.
>
> I accept that the investments to which the promotions will relate may expose me to a significant risk of losing all of the money or other property invested. I am aware that it is open to me to seek advice from an authorised person who specialises in advising on non-readily realisable securities."

As I mentioned this declaration is flawed where EGR moved the net asset section out of the declaration to the top of this section of the form. But given Mr K selected the first option of 'restricted investor', the net asset definition required to answer that fairly is shown on the same page as the 'restricted investor' declaration. In those circumstances then in my view it would've been sufficiently prominent for Mr K to fairly consider what EGR, and the relevant rules, meant by 'net asset' when considering how to answer this part of the application form.

The information EGR asked Mr K to provide when gathering information from him in its application form didn't include any information about Mr K's assets outside of the £20,000 he was looking to invest, and that he held a directorship in a limited company. EGR couldn't have reasonably known then if Mr K was investing less than 10% of his net assets in NRRS, or that he alternatively may have met the requirements of a high net worth individual due to his income and/or net asset value. EGR invited some further information from him on the form where it asks for further information about the source of the money being invested in the free text box below his selection of 'savings'. As that was left blank, EGR had little else to rely on to potentially question whether Mr K met the requirements of a 'restricted investor'.

I've also considered alternatively whether the self-certified sophisticated investor category could apply given Mr K's directorship. But having reviewed public records about the company he is a director of, I don't think at the time he could fairly be considered as such an investor given its turnover was below those requirements for that categorisation.

While I have my reservations about Mr K satisfying the requirements of either a restricted or high net worth investor given the information available to EGR, he has signed the declaration to say he met the requirements of a 'restricted investor'. EGR arguably ought to have asked for further information given a text box the application form says needed to be completed wasn't. EGR itself also could've asked Mr K for more information to satisfy itself he met the selected requirements of a restricted investor.

But having thought about that on balance EGR had set out what he was signing to declare himself as. And I'm satisfied that on balance EGR would be acting in a reasonable manner by relying on Mr K's declaration here. It's conclusion then that it could reasonably consider Mr K to have passed the first limb of the test in COBS 4.7.7 as it wouldn't be unreasonable in the circumstances to consider him to be a 'restricted' investor.

Appropriateness

The second condition of COBS 4.7.7R is that EGR needed to, having categorised Mr K as an investor within the first limb of the test in COBS 4.7.7R, was to ensure it was an appropriate investment for him, as COBS 10 sets out for such a bond.

In order to fairly determine whether the bond was appropriate for Mr K, EGR needed to ask questions about his knowledge and experience of investing in the NRRS field, or similar. EGR needed to fairly satisfy itself from the information it had about Mr K that he had sufficient knowledge and experience to understand the risks involved with such an investment for it to be appropriate for him.

As set out above, COBS 10.2.2R says such questions should include:

> "(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."

The application form EGR required Mr K to complete aimed to ask questions about these aspects. The key information EGR had to make a fair determination of the appropriateness of the bond for him was that:

- He was investing £20,000 from cash savings.
- He'd ticked a box to indicate he had the necessary experience to invest in NRRS assets.
- The free text box asking for information about his source of wealth and experience was left blank.
- He hadn't worked in a position that would give him the necessary experience, but had through his limited company invested in what Mr K considered to be a similar product.
- He indicated by ticking the relevant boxes that he understood the risks and might get back less than he invested, and that the interest returns weren't guaranteed.

From the information EGR had about Mr K, I've not persuaded it could've reasonably satisfied itself the bond was appropriate for him. I say this because EGR had insufficient information about the investment experience he had, the sorts of transactions he'd been involved with, and how often he'd traded those products, to be able to reasonably do so.

The tick boxes on the application form to agree that he has the necessary knowledge and understood the risks don't go far enough to provide EGR the assurance it needed Mr K actually understood the type of bond and the risks involved. If Mr K for example was agreeing to that on mistaken knowledge then he wouldn't have the necessary knowledge.

Importantly EGR had limited information about his investment history to corroborate his agreement on the form to having the experience and knowledge to invest in the bond. It knew he had cash but had no other information about where this had come from or his investment history. EGR's application asked Mr K to provide information about his investment experience, which he left blank, and as I understand wasn't questioned further by EGR.

The extent of what EGR could've known about Mr K's experience then was limited to cash savings and having a company directorship. In my view, the obligations on EGR to gather sufficient information lie with it, not Mr K, and so it was its responsibility to ask further information here before proceeding to determine the bond's appropriateness for Mr K, which I've not seen it did.

I've considered what likely would've happened had EGR carried out even basic queries with Mr K about his knowledge and experience. In response to our service's queries about those factors, he has explained his intentions were to invest in a way which exposed him to only a small amount of risk, aiming to increase his returns above what he was receiving from his cash savings. He was looking, prior to engaging with EGR, in 2019 to invest in both in his personal capacity and on behalf of the company he was a director of. He hadn't invested in the stock market before and so had no real investment experience. His search for lower risk investments led him to the third party who he says introduced him to EGR following advice he gave him, which as I've said above I've not seen any evidence around nor have I attributed any such advice to EGR.

The dates around his experience as provided in Mr K's testimony around this are unclear so it's possible he might have had some previous investment experience immediately prior to engaging with EGR, although it's unclear to the extent this was, in which capacity or when exactly this was. His overall explanations are that he invested through his limited company in a bond with High Street Group, which I understand to be a property related NRRS, or similar. I'm satisfied the High Street Group bond ('HSG bond') was likely in his limited companies name given wrote that on the application. He also mentions a £6,000 investment with an investment platform provider, although it's unclear if those are shares in itself, on its platform or another Cash ISA or if those were owned in Mr K's personal capacity or by the limited company he is a director of.

Regardless of the exact details of this, had EGR had this information it wouldn't be able to reasonably, in my view, conclude that the bond was an appropriate investment for Mr K. I said this because prior to 2019 its unlikely Mr K had anything more than a very basic level of investment knowledge and experience. The HSG bond timing is unclear but given his lack of prior experience and what appears to at most be a short time before his AC4 investment, I don't think EGR could fairly take that investment into account when considering Mr K's knowledge and experience. He wouldn't likely in that time been able to fairly appreciate the nature of such a product or the risks involved where he hadn't yet experienced the higher probability of total loss on those products.

Had EGR made such queries and used that information to fairly determine whether the AC4 bond was appropriate for him, it ought to have considered that it wasn't an appropriate investment for Mr K.

The guidance within COBS 10 at COBS 10.2.6G does allow EGR to infer experience from knowledge, or for it to consider Mr K have sufficient knowledge without needing appropriate experience. Importantly this guidance says it is applicable in circumstances where it would be reasonable to do so. Having considered this guidance, I don't think it could be reasonable for EGR to consider it reasonable to apply this guidance to Mr K's circumstances. I say this because Mr K told EGR that he had no relevant experience from working in financial services, nor could EGR reasonably infer Mr K had sufficient knowledge to invest in the bond with the little to no previous investment experience it ought to have understood Mr K to have – for the same reasons I've set out above.

Given EGR ought to have reasonably concluded the bond was inappropriate for him, it should've provided him with a clear warning this investment was inappropriate for him, as COBS 10.3.1R sets out. As EGR didn't think the bond was inappropriate it didn't provide such a warning to Mr K. If I were to consider that a warning in line with those rules was presented to Mr K, I'm satisfied on balance that would've deterred him from progressing his application further. I say this because I'm persuaded, for the same reasons above, Mr K was looking for low risk alternatives to cash products, such as mainstream shares, bonds and/or funds. In my view then clear notice that the AC4 bond would be inappropriate would've stopped Mr K from progressing his application, which would have the effect of him not investing in it.

Even if I were wrong on that point, I can't fairly say EGR could've reasonably satisfied itself when considering the guidance at COBS 10.3.3G that to accept his application if he were to ask it to despite a reasonable warning would've been treating him fairly. Given what EGR knew about his knowledge and experience, I'm not persuaded it could reasonably satisfy itself that arranging investment in the AC4 bond for him would be acting in his best interests and treating him fairly. His application had it got this far, ought to have been stopped at this stage by EGR. Which would have the effect of him not investing in it.

EGR has mentioned it provided Mr K with information about the bond which included several risk warnings and notices he could incur a total loss. It argues from this Mr K ought to have understood the risks involved and was happy to proceed on that basis. I understand the point EGR is making here but I don't agree.

The information memorandum it is relying on to say such notices were provided to Mr K arguably shouldn't have been made available to him. In my view that should only have been provided to Mr K on EGR reasonably satisfying itself Mr K was someone it could promote such assets to, and that it would be appropriate for him to invest in them. In my view then this document should never have been made available to him given I've not seen the bond was an appropriate investment for him. Even if I'm wrong on this point, EGR ought to have known from Mr K's knowledge and experience it was likely he wouldn't have been able to properly and fairly understand the nature and the risks of the bond. I'm not persuaded then EGR could reasonably rely on the reading of this documents to correct the failings towards its obligations around appropriateness above.

I've also not seen that Mr K would've fairly understood the nature and extent of the risks involved from the questions EGR asked him on its application. Many of these questions are fairly general and don't highlight the specific risks involved with NRRS where it covered topics such as eligibility for the Financial Services Compensation Scheme, the possibility of getting less back than invested and returns not being guaranteed.

Summary

Overall, from the evidence provided I'm persuaded Mr K's investment in the AC4 bond shouldn't have gone ahead as it would be an inappropriate for him. Had a reasonable

warning been provided I'm satisfied Mr K would've heeded that and stopped his application, at this point. I say this because EGR ought to have known it couldn't offer the bond to him under COBS 4.7.7 given he couldn't reasonably be considered to have passed the second limb of that test, given the bond was inappropriate for him.

It follows then I uphold this complaint and direct EGR to settle it as follows.

Putting things right

Fair compensation

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

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

What must EGR do?

To compensate Mr K fairly, EGR must:

- Compare the performance of Mr K'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.

- EGR should also add any interest set out below to the compensation payable.

- Pay to Mr K £250 for the impact of worry and upset the loss caused.

Income tax may be payable on any interest awarded.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
AC4 Bond	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)

Actual value

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

If at the end date any asset is illiquid (meaning it could not be readily sold on the open market), it may be difficult to work out what the *actual value* is. In such a case the *actual*

value should be assumed to be zero. This is provided Mr K agrees to EGR taking ownership of the illiquid assets, if it wishes to. If it is not possible for EGR to take ownership, then it may request an undertaking from Mr K that he repays to EGR any amount he may receive from the portfolio 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, EGR 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 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 EGR 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 EGR totals all those payments and deducts that figure at the end to determine the fair value instead of deducting periodically.

Why is this remedy suitable?

I have decided on this method of compensation because:

- Mr K wanted to achieve a reasonable return without risking any of his capital.

- The average rate for the fixed rate bonds would be a fair measure given Mr K's circumstances and objectives. It does not mean that Mr K 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 decision is that EGR WEALTH LIMITED should pay the amount calculated as set out above.

EGR WEALTH LIMITED should provide details of its calculation to Mr K in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 24 April 2025.

Ken Roberts
Ombudsman