

complaint

Mr N, through his representative, complains that Magus Financial Management Limited gave unsuitable advice to invest in a carbon trading partnership.

background

I issued a provisional decision in January 2014, a copy of which is attached and forms part of this decision. In my provisional decision I found that Magus did not advise Mr N to make the investment but did promote it to him. I also found that although the promotion was not made strictly in accordance with the relevant regulations, it was reasonable. I therefore concluded that the complaint should not be upheld.

Neither party has made any further submissions in response to my provisional decision.

my findings

I have reconsidered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

As neither party has made any new submissions in response to my provisional findings, I see no reason to depart from them.

To confirm, for the reasons given in my provisional decision, I consider that Magus did not advise Mr N to make the investment, it only promoted it to him, and that promotion was reasonable in the circumstances.

my final decision

I do not uphold Mr N's complaint about Magus Financial Management Limited.

John Pattinson
ombudsman

COPY PROVISIONAL DECISION

complaint

Mr N, through his representative, complains that Magus Financial Management Limited gave him unsuitable advice to invest in a carbon trading partnership.

background

Mr N was introduced to Magus by his solicitor in 2005. He was provided with information about two schemes in which he could invest in order to offset income tax. He subsequently made an investment into one of these schemes - a carbon trading partnership. He invested a sum of £5m - £1m of his own money and £4m of loans to the partnership.

In 2011 Mr N's representative made a complaint to Magus on his behalf. The complaint was, in essence, that the investment was not suitable for Mr N and that he was not made sufficiently aware of its risk. The complaint was not upheld by Magus.

The complaint was investigated by one of our adjudicators. It was her view it should not be upheld. She said, in summary:

- She was not persuaded that Mr N either sought advice or that he was given advice.
- So she did not consider it appropriate to look at the suitability of the investment.
- She was persuaded that Magus promoted the investment to Mr N, but considered that it was reasonable for it to have done so.

Mr N's representative did not accept this view. It said, in summary:

- Magus promoted an Unregulated Collective Investment Scheme (UCIS) to Mr N without undertaking sufficient due diligence to ensure it was reasonable to make the promotion.
- The sophisticated investor and execution only forms were signed by Mr N after the investment had been made.
- Mr N also signed a Key Facts document which said that Magus would "*advise and make recommendations to you after we have assessed your needs*".
- Mr N's employment history is not relevant. There is nothing about his experience that led to the conclusion he would have understood the self-certification document.
- At the time of investment Mr N's investment experience was very limited; his assets included property and bank deposits.
- The UCIS in this case does not fall within the categories which can be promoted to a self-certified sophisticated investor.
- It is not clear why an execution only transaction was deemed suitable for Mr N, as he was not particularly knowledgeable about investments.

Magus made the following additional comments, in summary:

- Mr N conducted an extensive investigation into the investment. He arranged financing and was happy to sign the self-certificated investor and the execution-only forms.
- Mr N was well placed to understand the importance of the forms given his employment experience.

my provisional findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

I have first considered whether advice was given to Mr N by Magus.

was advice given?

Mr N signed a form entitled “*Execution Only Instruction*”. The form said at the outset:

“I have pleasure in arranging this transaction on your behalf and in response to your specific instructions. You did not seek my advice in relation to this and I have not given any advice. I have not completed a review of your financial affairs and I am therefore unable to confirm that the product is the most appropriate solution for your needs.”

It later said:

“It is a requirement that I notify you that had you sought advice from ourselves any recommendations arising would have featured with a detailed suitability letter and this advice may not necessarily have been in accordance with your present instructions”

I consider this makes it clear that Magus had not given advice and that if it had done so, it may not have recommended the investment Mr N made as being one that was suitable for him.

Mr N’s representative has speculated that the form was presented to Mr N as a “tidying up” exercise and signed in that spirit. But I have seen no evidence of that being the case. As the investment had already been made at the time Mr N signed the form its completion was not contingent on his signing – the investment had been made whether he signed the form or not. So I do not consider that Mr N would have been under any pressure to sign the form. Mr N was also the chief executive of a financial services firm with a turnover of approximately £40m for several years, until shortly before he made the investment. He had held other senior roles prior to that. Whilst the business of the firms for which he worked was not investment, it was a complex risk business and one in which Mr N had enjoyed significant success. So I consider that Mr N would have understood the significance of signing a form which was clearly an agreement that he had not been given any advice.

In these circumstances I consider it unlikely that Mr N would have signed the form if it had it not been truly reflective of the basis on which the investment had been made.

Mr N’s representative has referred to the ‘Key Facts’ document which was given to Mr N by Magus, which said that it would “*advise and give recommendations*”. This document was one that financial advisors must provide as a regulatory requirement, and offered a summary of all the services offered, as it was required to. But its provision did not mean that Magus offered all the services it summarised in each instance. In this case, the document said that if Magus were to offer advice it would do so after it had assessed the needs of its customer. It follows that if no assessment took place it is unlikely that advice was given. And I have not seen any evidence of Magus having assessed the needs of Mr N.

Around six weeks after Mr N signed the “*Execution Only Instruction*” Magus wrote to him to explain an “*offset services agreement*”. Its letter said it had been agreed that the commission being paid on the investment would be split three ways. A third was to go to Mr N’s accountant for the required accountancy work, a third was to go to his solicitor for related legal work, and a third was to go to Magus. The letter explains that Magus had undertaken to carry out some work unrelated to the investment in recognition of the share of commission it would receive. That work was to analyse Mr N’s personal pensions and to arrange transfers to suitable alternative arrangements. I understand this work was subsequently carried out.

This suggests that Magus carried out little or no work in relation to the investment, and that some discussion about what it might alternatively do in return for a share of the commission had taken place. I consider it unlikely that such a discussion would have taken place had Magus had a significant involvement in the process of Mr N’s making the investment – for example, by offering him advice.

Taking into account all the above, I do not consider that advice was given to Mr N by Magus. So Magus did not need to consider the suitability of the investment for him.

I will now consider whether the investment was promoted to Mr N by Magus.

was it promoted?

Mr N was introduced to Magus by his solicitor. The solicitor says that he has little recollection of events at the time of the introduction. But it does not seem to be disputed by any party that the solicitor introduced Mr N to Magus on the basis of Mr N having a generic interest in schemes which may offset income tax liability, rather than his wanting to make a particular investment he had already selected.

Following the introduction, Magus provided details of two investments to Mr N. One of those was the one Mr N subsequently invested into. In these circumstances I think it can be reasonably said that Magus promoted the investment to Mr N – Mr N said that he was looking for a way of offsetting income tax and it provided details of two investments it thought might interest him. This, in my view, amounted to a promotion of those investments.

I must therefore consider whether it was reasonable for Magus to promote the investment to Mr N.

was the promotion reasonable?

Mr N’s representative says that the correct formalities for full compliance with the relevant regulations were not met in this case. Having considered its arguments, I agree that Magus did not fully comply with the relevant regulations. It is relying on Mr N having self-certified himself as a sophisticated investor – he signed a “*statement for self-certified sophisticated investor*” when he completed the execution only form. But the regulation that allowed promotion to those that declare themselves to be sophisticated investors is limited. The regulation (detailed in article 23A of the Promotion of Collective Investment Schemes Order (PCIS)) said that this exemption could only be relied upon, broadly, in relation to schemes that invest wholly in shares or debentures. The investment Mr N made was not such a scheme. So the exemption cannot be relied upon.

The regulations also require that whatever steps are necessary to allow promotion are taken *before* the relevant investment is made, and in this case the statement was signed after the investment had been made.

If the rules have not been complied with the starting position is that something has gone wrong and in turn that suggests the complaint is likely to be upheld. However I am obliged to determine a case

on the basis of what we consider to be fair and reasonable in all of the circumstances of the case. I am required to have regard to relevant law and regulations but am not necessarily bound by them.

In this case, given the available evidence, I am satisfied that the promotion of the investment to Mr N was reasonable i.e. that Magus could have complied with the relevant regulations.

Mr N's representative says that he could not be considered a sophisticated investor. The point is made that whilst Mr N has experience in the financial services industry he had no experience of investment of this type. But it does not follow that the investment should not have been promoted to him. What needs to be considered is whether Mr N was sufficiently knowledgeable to understand the risks of making the investment. It is my view that Mr N was capable of understanding the risks even if this was his first investment of this type. He had been a senior figure in the City for a number of years and, whilst his core business was not investment, he had worked as the Chief Executive of a financial services business that dealt with complex risk areas for a significant length of time.

Mr N also seems to have made very extensive deliberations over a number of months before making the investment. The extent of these deliberations was such that the provider of the investment required him to sign a confidentiality agreement before disclosing to him all the information he required. And it was more than four months after this agreement was signed before Mr N made his investment. These are not in my view the actions of an investor who lacked sophistication or a capacity to assess risk.

So I think that Mr N could reasonably have been considered a sophisticated investor.

Article 23 of the PCIS Order permitted the promotion – without the restrictions that applied in Article 23A - to a “*Certified sophisticated investor*”. This differs to the self-certified sophisticated investor described in Article 23A as it requires to the certificate to be signed by an authorised person rather than the investor themselves, and for the investor to agree to a specific statement. In my view, given my finding above, this formality could have been complied with. So I consider that it is the case that Magus went about following the regulations in the wrong way, rather than doing something that the regulations did not permit at all.

While there may have been a technical breach of rules this does not in my view mean that the complaint should be upheld if the breach is not material i.e. if it did not cause something to happen that would not have happened had the breach not occurred. So it needs to be considered whether Mr N would still have gone ahead and made the investment had Magus done what the regulations required of it.

The “*statement for self-certified sophisticated investor*” form signed by Mr N includes the following statements:

I declare that I am a self-certified sophisticated investor for the purposes of the Financial Services and Markets Act (Financial Promotion Order) 2001.

- (a) I can receive financial promotions that may not have been approved by a person authorised by the Financial Services Authority*
- (b) The content of such financial promotions may not confirm to rules issued by the Financial Services Authority*
- (c) By signing this statement I may lose significant rights*
- (d) I may have no right to complain to either of the following –
 - i) the Financial Services Authority; or ii)*
 - the Financial Ombudsman Scheme**

(e) I may have no right to seek compensation from the Financial Services Compensation Scheme

I accept that I can lose my property and other assets from making investment decisions based on financial promotions.

I am aware that it is open to me to seek advice from someone who specialises in advising on investments.

This is not significantly different to the statement that Article 23 of the PCIS Order would have required Mr N to agree to had he been a certified (rather than self certified) sophisticated investor. It covers the same core points – an understanding that the investor is being classified as sophisticated, a disclosure that this is being done to in order to allow the promotion of something unregulated, and an awareness that it is open to the investor to seek advice.

So, had Magus followed the regulations correctly, I consider it likely that Mr N would still have gone ahead and made the investment. The requirement would have been to accept a statement which was very similar to the wording contained in the self-certification form Mr N signed, and to do this before the investment was made. In my view the statement Mr N was required to accept is sufficiently close to the wording on the form he signed for it to be reasonably said that he would have accepted it. And, as Mr N did not object to signing the form after the investment was made, I have no reason to believe he would not have accepted something similar before the investment was made.

In these circumstances I do not consider that the complaint should succeed on the basis only that it is arguable that the promotion should not have been made because not all formalities were complied with.

So, to summarise, I do not consider that Magus gave advice to Mr N, and it was in my view reasonable for it to promote the investment to him.

my provisional decision

For the reasons I have given and subject to any further submissions I may receive from the parties, my provisional decision is that I do not uphold Mr N's complaint.

John Pattinson
ombudsman