

complaint

Mr D invested in Secured Energy Bonds. The bonds were issued by Secured Energy Bonds plc ('SEB') and it has now gone into administration. Mr D says he made the investment on the basis of the Invitation Document approved by Independent Portfolio Managers Ltd ('IPM'). He says the Invitation Document was misleading and unfair.

Mr D claims a refund of the money he invested plus interest from IPM.

background

- An Australian company, CBD Energy Limited, owns and operates solar farms and wind farms. It established a subsidiary in the UK, SEB plc. It was established to finance, manage, and develop solar energy installations in the UK.
- SEB set out to raise money for those activities by issuing mini-bonds to retail investors in the UK.
- The promotion of such investments in the UK must be approved by a Financial Conduct Authority regulated business.
- SEB engaged IPM to approve the promotion. SEB also agreed to take on the roles of Security Trustee and Corporate Director.
- The promotion emphasised the security features of the bond as a selling point. Those features included IPM acting in the two additional roles above and as well as SEB's parent, CBD Energy, guaranteeing the bonds.
- Mr D invested in 2013. So did many other retail investors. Around £7.5 million was raised through the issue of bonds to over 950 investors.
- In November 2014 administrators were appointed for CBD Energy in Australia. The administrators of CBD Energy contacted IPM to discuss SEB which started a process that led to administrators being appointed for SEB in the UK.
- At the point when SEB's administrators were appointed (on 22 January 2015) there was less than £25,000 in SEB's bank account. It is not clear what if any assets it had in the form of solar projects – the purpose for which the money was raised. Rather, a significant portion of the money had been paid to CBD Energy.
- A report by the administrators of CBD Energy dated 10 December 2014 said AUS\$ 8.39 million was owing to SEB. It also said that CBD Energy had used SEB's funds *"in contravention of the purpose for which these funds were raised, to meet [CBD Energy's] cashflow shortfalls in FY14."*
- AUS\$ 8.39 million is around two thirds of the £7.5 million raised from the bond issue.
- Bondholders have not had their money repaid to them after three years as they were originally promised. Nor have they received any interest since 2014.

- The bondholders are secured creditors of SEB but so far have not received any payments in the administration. The prospects of receiving the money they invested, with the contractual interest, seems negligible.
- It looks like investors such as Mr D have lost all the money they invested in Secured Energy Bonds.
- Mr D has complained that he has been misled and treated unfairly by IPM.
- I issued a provisional decision on 26 June 2018. I explained why I thought we could consider Mr D's complaint, why I thought IPM had been at fault and what I thought it should do to put things right.
- Mr D accepted my provisional decision. Mr D pointed out that I had not given details of the precise rate of interest he should be paid.
- IPM has not responded.

my findings

jurisdiction:

- I've considered all the available evidence and arguments to decide whether we can consider this complaint.
- The Financial Ombudsman Service can consider complaints that relate to acts or omissions of a firm in carrying on a regulated activity or any ancillary activity carried on in connection with a regulated activity.
- IPM approved the promotion for the SEB bonds but a number of factors take IPM's acts beyond just approving and amount to the regulated activity of making arrangements under Article 25(2) of the Regulated Activities Order 2000.
- The Invitation Document not only received approval from IPM, it used the expertise of IPM to help sell the investment.
- Part of the reason IPM's expertise is relevant over and above their ability to review the materials is that it had an ongoing role in the investment scheme, approving new documents as they are created.
- The expertise is relevant to IPM's status as Corporate Director which was a non-contingent role that was promoted as part of the security of the bond. And IPM's expertise was relevant to its contingent but nevertheless prominently proclaimed status and role as Security Trustee by which it might have to intervene to manage the investor's asset. IPM was in effect being advertised as a manager of the investor's assets upon a condition being met: this is an active (albeit contingent) managerial role, to which IPM's expertise is relevant.

- The security of the bond was a fundamental part of the overall investment scheme – a central selling point not some mere technicality tucked away in the small print and unnoticed. The security and quality assurance arrangements were a major feature of the investment arrangement or scheme. And the involvement of IPM was central to the security and quality assurance arrangements made for the bond.
- The purpose of IPM's involvement in the arrangements was to bring about the investment.
- Mr D is an eligible complainant because he is a customer of IPM.
- The investment was pursuant to a three party agreement, whereby at the outset Mr D only had privity of contract with SEB plc. However the status of IPM as Corporate Director and Security Trustee was known at the outset. And so was the condition to trigger IPM taking on the Security Trustee role. And when in those roles IPM had to act in the best interest of the bondholder such as Mr D.
- So as well as providing its approval for the promotion, IPM was from the outset the potential party with whom the investor might trade upon SEB's breach. There was therefore the requisite proximity to establish the relationship of customer in the terms agreed by the investor.
- IPM was providing a service to Mr D. He was a user of that service. The service was making arrangements with a view to Mr D subscribing for "a security" ie the Secured Energy Bond. In particular IPM was providing security features as part of the arrangement – acting as Corporate Director and Security Trustee - expressly for the benefit of bondholders.
- IPM was providing a service to investors such as Mr D notwithstanding the fact that Mr D did not pay IPM and SEB (to whom it was also providing a service) did.
- Accordingly there was a customer-firm relationship between Mr D and IPM. And Mr D's complaint relates to matters relevant to that relationship.
- All of that said, I can only consider IPM's conduct as Security Trustee and/or Corporate Director to the extent that such conduct was ancillary to the regulated activity of arranging deals. Accordingly I can look at issues around the setting up of the bond, the buying/selling of the investment but not the later running of the investment by SEB or the later acts of IPM as Security Trustee and/or Corporate Director.

merits:

- I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.
- IPM approved the promotion of the SEB bonds for SEB plc. Without that approval the bonds could not be promoted to investors in the UK.
- IPM approved the promotion as fair, clear and not misleading. It should not have approved the promotion if it was not fair, clear and not misleading.

- The invitation document did say there was a risk the security given to the Security Trustee and the guarantee given by CBD Energy might not be sufficient to repay the bondholders.
- But the Invitation Document also gave the clear impression to potential investors that the Secured Energy Bond was a relatively safe investment in which investors had the protection of additional security measures making the investment less risky than other mini-bonds.
- However CBD Energy was not, according to the information in the Invitation Document, in a strong enough financial position to be able to repay bondholders on demand if called to do so under the guarantee it gave.
- And the Security did not have any mechanism to enable the Security Trustee to prevent SEB from disposing of secured property which was a fundamental flaw. It meant the Security Trustee could not prevent SEB from paying most of the money raised for investing in solar projects in the UK to its parent in Australia – who then went bust.
- The security system approved of and participated in by IPM ought reasonably to have safeguarded against that vulnerability. For the system to have provided security that was reasonable in the circumstances it should have allowed IPM to enforce the security if SEB disposed of assets other than in the normal course of the business for which those funds were raised. This would include paying money to the parent company CBD Energy.
- Misuse of SEB's money by the parent company was loss of a foreseeable type. Accordingly IPM did not have to foresee the specific event, as such, to guard against it.
- The Security system was not fit for purpose. The SEB bonds were no more secure, or less risky, than other non-secured mini-bonds.
- The Invitation Document was not therefore fair, clear and not misleading. IPM should not have approved it. And if it had not done so Mr D would not have invested in SEB.
- Mr D's loss is of a type that falls within the scope of IPM's duty and it is fair and reasonable that it should compensate Mr D for the losses he has suffered.

fair redress:

- My finding is that IPM was at fault in approving the promotion which it did in this case as part of arranging the deal in which SEB sold and Mr D bought the investment. That means the investment should not have been promoted to Mr D and he should not have invested. It is not my finding that SEB or IPM as the Security Trustee should have performed the contract and paid Mr D the agreed return.
- Our general approach is described in one of our leaflets as follows: *"If the ombudsman decides a business has acted unfairly – and caused a consumer to lose out in some way – they'll tell the business what it needs to do to put things right. As far as possible, the ombudsman will aim to put the person who's complained in the position they'd be in if the problem had never happened."*

- It is difficult to know what investment Mr D would have chosen if SEB had not been available. But Mr D did choose to invest in a three year fixed rate investment that was marketed as relatively low risk. He chose this rather than invest in, say, an equity based investment or in an unsecured four year mini bond which was also available at the time from a competitor.
- On balance it seems more likely than not that Mr D would have chosen an investment that seemed similarly secure rather than higher risk. And so in the circumstances I think a reasonable return to arrive at a fair value for a reasonable alternative investment is the Bank of England average return for three year fixed rate bonds. That is not to say Mr D would definitely have had such an account – just that it is the sort of return that would be reasonable in the circumstances for the three years he was willing to invest.
- This return should be paid from the time that Mr D paid his investment money to SEB (or its agent) rather than the formal start date of the bond if Mr D paid his money early to SEB to take up what it called its early bird offer. As I understand it Mr D did make such an early payment in October 2013 and that the Bank of England average rate I mention above was 2.21% at the time.
- The return should be compounded annually in accordance with our usual published approach.
- I also consider that IPM has also caused Mr D some trouble and upset. He will have suffered the natural distress, alarm, annoyance and regret any investor feels when the investment they have carefully chosen and trusted fails losing all the money they invested. I think a payment of £250 is appropriate in the circumstances of Mr D's case.
- So in all the circumstances IPM is to pay Mr D the following:
 1. Compensation equal to the sum Mr D invested in SEB.
 2. An investment return on that sum from the time of the investment to the maturity date. That investment return is to be at the Bank of England calculated average rate for three year fixed rate bonds at the time the investment was made.
 3. From the total of 1 and 2 IPM is to deduct the payments made to Mr D by SEB before it ceased making payments and went into administration.
 4. Interest on the figure calculated in 3 at the rate of 8% simple per year from the maturity date to the date of my final decision.
 5. £250 compensation for the trouble and upset caused to Mr D.

IPM is to pay the above within 28 days of being notified of Mr D's acceptance of my final decision. If it does not it is to pay 8% interest per year on all of the compensation due to Mr D (including the compensation for distress and inconvenience) from the date of my final decision to the date of payment of the compensation.

my final decision

I uphold Mr D's complaint against Independent Portfolio Managers Ltd. I direct it to pay fair redress to Mr D as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 1 September 2018.

Philip Roberts
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