DRN-4800397

The complaint

Company A, a limited company, complains that Financial Brokers Limited (FB) gave them inappropriate advice to take out a loan and invest the proceeds. In particular, they say they were mis-sold the loan and that the investment advice was too risky.

Company A is represented by its director, Mrs S.

What happened

Mrs S says that in 2018, she was advised by FB to take out a £90,000 loan in the name of Company A. With herself as the personal guarantor. She says FB advised her to then invest this amount in a property investment through a special purpose vehicle (SPV)
.
Mrs S says she then complained to FB in 2021. She says she had only received one dividend and none of the expected pay-out. She says the investment turned out to be fraudulent and that FB had given her inappropriate advice.

FB disputed they had given Company A any advice or introduced them to the SPV investment. They said they only acted as a non-advisory introducer to the business loan. Mrs S maintained she had been recommended the loan and SPV investment by FB, which she said had been arranged by FB's appointed representative (AR). She brought her complaint to our service.

Our investigator looked into it. He felt that the complaint was within our jurisdiction and should be upheld. Within his view, he said:

- Despite no clear objection from FB as to our jurisdiction of the complaint, he clarified that we could look into it.

- He stated that Article 25 (1) of The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("the RAO"), confirmed that "Arranging deals in investments" was a regulated activity. And in his view, as FB arranged the loan, promoted the investment and subsequently the investment was arranged through the AR, the complaint was one we could consider.

- He went on to consider the merits of the complaint. He said that due to the gearing involved with such an investment, it's not usually possible for an average investor to have an appreciation for all the risks involved. He concluded it was a "non-readily realisable security", which shouldn't be promoted to retail clients.

- He hadn't seen sufficient evidence to conclude FB had taken appropriate steps to establish Company A was a sophisticated client. He felt Company A was more likely than not, a retail client. He also felt that as Company A needed a credit facility in order to make the investment, this should have made it even more apparent that the investment wasn't appropriate.

- The Investigator also said that FB hadn't acted in accordance with the requirement to act with due skill, care and diligence. He said this was in the absence of any due diligence that the SPV owned the property it was said to (which in this case offered investors a guaranteed rental yield of 6% per year for 3 years, as well as a guaranteed developer buy back in year 3 for 110%).

Mrs S, on behalf of Company A, accepted the findings of the investigator. However, FB strongly disputed them. Within their response they said:

- Mrs S was a self-certified sophisticated investor, completing an accreditation test and onboarding process prior to investment.

- Mrs S was not in financial distress and made a separate property purchase in the summer of 2018.

- Companies House and Land Registry documents show the SPV did have ownership of the property, and loans secured against it. So, due diligence completed was sufficient.

The investigator did respond to clarify his view. He said he wasn't persuaded Mrs S was a sophisticated or wealthy investor, and so such an investment shouldn't have been arranged for Company A. He acknowledged receipt of the self-certification questionnaire but wasn't persuaded on balance that Mrs S had completed it. She had stated to him that she didn't fill any such questionnaire in. He also didn't feel the mortgage offer meant Company A was a wealthy client. And he still didn't think that sufficient due diligence had been done regarding whether the SPV owned the property.

However, FB maintained that Mrs S agreed she was a sophisticated investor and/or high net worth individual at the time. They also maintained they'd provided enough to show the SPV owning the property through legal title.

As no agreement was reached, the case has been passed to me to decide. I issued my provisional findings on the case on 10 April 2024. An extract of which forms part of my decision below.

> I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I agree with the investigator that this case should be upheld. I'll explain why and I'll address the considerations in turn.
>
> Why the complaint is one we can consider
>
> Like the investigator (and not expressly contested by FB), I am satisfied this is a complaint that FB is responsible for and about an activity within our jurisdiction. So, one we can consider.
>
> *Why FB is responsible for the complaint*
>
> Under s.19 Financial Services and Markets Act (FSMA), only authorised persons can carry out regulated activities. FB falls under this, as they are an authorised person with the FCA.

Under s.39 FSMA, we may include complaints against the authorised person, regarding acts or omissions by their AR, for "the whole or part of the business his principal has accepted responsibility in writing". FB haven't provided any agreement document with the AR. I therefore haven't seen any evidence of anything explicitly excluded from their agreements with their AR.

Further, our powers to consider complaints are outlined in the FCA's Dispute Resolution rules ("DISP"). And DISP 2.3.3G states that complaints about acts or omissions by a firm include complaints about acts or omissions in respect of activities for which the firm is responsible (including the business of any appointed representative for which the firm has accepted responsibility).

I am satisfied that this service can consider this complaint against FB, including matters relating to the conduct of their AR.

Why the activity complained about is within our jurisdiction

I have then considered, if the acts carried out by FB and the AR falls under DISP 2.3.1R. Which states that our service 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, (including regulated activities), or any ancillary activities carried on by the firm in connection with those activities.

FB maintain they didn't advise Company A to take out the investment through the AR. The investigator accepted this and I haven't seen sufficient evidence of advice being given. However, Article 25 (1) of The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("the RAO"), details the activity of "arranging deals in investments". It is as, "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". I am satisfied that the SPV investment amounts to a security for the purpose of this article.

On the evidence available, I'm satisfied that by arranging A's investment into the SPV, the AR has carried out the activity described in Article 25 (1) of the RAO. By reason of s.39 FSMA and DISP 2.3.3G, that means I consider FB to be responsible for that act. Additionally, I'm satisfied FB has also directly played a part in the arranging of the investment. Because it arranged the means for A to make its investment in the first place, carrying out a different regulated activity when doing so.

As a result of this, I'm satisfied that as per DISP 2.3.1R, Company A's complaint can be said to relate to a regulated activity, or matters which are ancillary to one.

<u>What was the investment and did FB meet the requirements under COBS when arranging this investment?</u>

From the information provided to me, it appears Company A was given shares in the SPV. The shares represent beneficial interest in the SPV. However, the SPV remained 100% legally owned by the nominee (who is the AR). The SPV offered investors a guaranteed rental yield of 6% per year for three years and a

guaranteed developer buy back in after three years for 110%. I am satisfied that this investment is a non-readily realisable security (NRRS) for the purposes of the Conduct of Business Sourcebook (COBS).

At the time in question, COBS 4.7.7R states that “a firm must not communicate or approve a direct-offer financial promotion relating to a non-readily realisable security” to a retail client, unless they are a “self-certified sophisticated investor” or “certified high net worth investor”.

FB don’t appear to be saying that Mrs S was a HNW investor (although they dispute her assertion that she was financially struggling). They do, however, say that Mrs S self-certified as a sophisticated investor. In response to the investigator’s assessment, they provided a copy of the accreditation process that they say she went through. This isn’t signed or dated and none of the personal information has been completed to show it related to Mrs S. Further, Mrs S has denied ever completing such a document. On balance, the evidence here does not persuade me Mrs S is likely to have self-certified in the way FB have described. I am satisfied she was a retail client, and this was therefore a significant failing under COBS.

Mindful of the above, I’ve proceeded to consider whether, if Mrs S had certified in the manner FB suggests, could its AR have proceeded to complete the sale of the investment, mindful of the rules in COBS 10, I also find that there were other failings by FB. COBS 10.2.1R sets a requirement on firms to assess the appropriateness of an investment. COBS goes on to set out what this would look like in 10.2.2R as, “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: the types of service, transaction and designated investment with which the client is familiar; the nature, volume, frequency of the client's transactions in designated investments and the period over which they have been carried out; the level of education, profession or relevant former profession of the client”.

The evidence doesn’t persuade me an appropriateness test was carried out, despite the six questions FB have provided. I am not persuaded Mrs S completed them or that they were sufficient. Nonetheless, I’ve considered what’s likely to have happened if FB had done one. Her circumstances show that Mrs S has described herself as a novice investor. Further, despite FB having attempted to show Mrs S had funds and a separate property purchase arrangement, she did describe herself in an email to them in April 2018 as “broke”. Crucially, FB knew she couldn’t invest without obtaining a substantial credit facility.

On the basis of what the AR would’ve learnt if it’d done this properly, COBS 10.3.1 R would’ve compelled it to warn Mrs S the investment was not appropriate. I think it’s likely Mrs S would’ve accepted this warning and declined to make the investment had she been warned. Even if I’m wrong, COBS 10.3.3 G guides that a firm would need to consider very carefully whether it would be meeting its broader obligations to that client if it continued to arrange the investment. And in these circumstances, mindful of what it knew about Company A and Mrs S, I’m of the

view that considering their best interests, it ought to have ended the process there.

In summary, I am satisfied that this is a complaint we can consider. FB is ultimately responsible, and the actions amount to a regulated activity. Further, I am satisfied there were several failings by FB. I don't safely conclude Mrs S self-certified as a sophisticated investor. I also don't think a sufficient appropriateness test was carried out and if it had been, FB would've concluded that this was not an appropriate investment for Company A.

Company A responded through Mrs S, to confirm they accepted the findings set out in the provisional decision and had nothing further to add.

FB provided a full and thorough response to the provisional decision. Amongst the points they responded with, they said:

- FB's AR did not hold shares or beneficial interest in the SPV and provided evidence which they said showed this.
- Mrs S had signed and completed a checklist prior to investing which agreed to the terms and conditions and identified herself as a 'sophisticated investor'. They say she acknowledged the risks of the investment here.
- Mrs S signed to agree to FB's role as solely an investment process and not a financial advisor.
- The losses were experienced due to the SPV entering administration, in part due to the pandemic and poor health of the sole director. These factors they say were out of their control and constitute a force majeure situation.

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.

Having done so, my decision remains as I set out previously provisionally. I'll explain why.

I note that FB have provided a CS01 confirmation statement from Companies House, to show that neither them nor the AR do own the SPV in question. I acknowledge this and that it contradicts what was said in my provisional decision. However, I won't comment on it further as it doesn't have a bearing on the outcome I have reached.

I also appreciate FB's point that the losses might not have been foreseeable and may have been due to the pandemic and ill-health of the SPV's sole director. However, I am reviewing the suitability of the advice given. It is not relevant for me to consider why the investment was unsuccessful.

Whilst we don't have a signed or fully completed accreditation process document, FB have provided an electronically signed agreement and investment checklist. FB have pointed to this to show that Mrs S signed to show she accepted the terms and conditions of the investment and was aware of the risks involved.

However, as explained in my provisional decision, regardless of this, COBS 10.2.1R sets out

the requirement for firms to assess the appropriateness of an investment. I don't believe FB did that here, if they had, I am satisfied they would have learnt it was not appropriate for Company A and warned Mrs S. I am satisfied she would therefore have not made the investment.

In summary, I remain of the conclusion that we can consider the complaint and FB is responsible. I don't believe Mrs S self-certified as a sophisticated investor or FB sufficiently assessed the appropriateness of this investment. If they had, I believe they would have known it wasn't appropriate and warned her of this, resulting in her not investing. FB should therefore put things right as if this had happened, as set out below.

Putting things right

- Pay any settlement necessary to the loan provider to immediately end Company A's loan agreement with it.

- Refund 100% of any payments Company A made to the loan, plus 8% simple interest applicable from the date of Company A's payment to the loan provider, to the date of FB's payment to Company A.

- Following receipt of statements from Company A, FB should refund Company A all interest and charges paid in relation to the Bounce Back Loan and Business overdraft agreement Company A took out following the failure of the SPV investment.

  Please note that this is limited to interest and charges incurred on borrowing in the name of Company A. Any interest and charges incurred on borrowing by the director in their personal name is not included.

- Pay Company A £1,000 in compensation for the significant inconvenience caused by the inappropriate loan and investment arranged by FB.

  Please note this is limited to inconvenience caused to Company A. There is no compensation for distress, as Company A is bringing the complaint as a legal entity, and I can't make an award for the distress caused to Mrs S.

My final decision

My final decision is that I uphold the complaint and that Financial Brokers Limited should pay the amount calculated as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Company A to accept or reject my decision before 14 June 2024.

Yoni Smith
Ombudsman