DRN-4807617

Financial Ombudsman Service

The complaint

Ms R complains, through her solicitors, that she was mis-sold Dolphin loan note investments by an appointed representative (AR) of Equity for Growth (Securities) Limited (EFG).

What happened

It seems that Ms R signed up with Osborne Baldwin Ltd – which was trading as Hunter Jones – in late 2016/early 2017. At that point Hunter Jones wasn't EFG's AR. Ms R signed a self-certified high net worth investor declaration on 14 January 2017 and her investment list shows four investments being made through Hunter Jones in 2017 totalling £50,000. These were across different unregulated property investments and included a £10,000 investment in Dolphin loan notes on 13 March 2017. These investments aren't part of this complaint.

Hunter Jones then became an AR of EFG – on 4 May 2018. Ms R signed a self-certified sophisticated investor declaration on 7 May 2018 and her investment list shows a further four investments being made through Hunter Jones in 2018 – totalling £35,000. Again, these were across different unregulated property investments.

Hunter Jones' records have a call note dated 7 January 2019 which reads:

> *sold her shares has 85k wants to spread about was disappointed in charges etc wants diversified spread…sending proposal*

I can see notes that proposals were then sent by email and post on 7 and 8 January 2019 respectively and "*redrock brochure and terms sent via email*" on 9 January 2019. I understand Red Rock was a Dolphin investment so references to Red Rock should be read as Dolphin in this decision.

I've been provided with the following correspondence:

- A letter from Hunter Jones to Ms R dated 10 January 2019 which read:

  > *Following on from your email correspondence…please find enclosed the below application forms for you to complete and return in the pre-paid envelope provided:*
  >
  > *…Red Rock (Dolphin Trust)*
  >
  > *We will not require any further documentation, as we have everything on file.*
  >
  > *If you have any questions or queries, please do not hesitate to contact us.*

- A letter from Hunter Jones to Ms R dated 14 January 2019 which read:

  > *Please find enclosed the Dolphin Trust Expression of Interest for you to complete and return in the pre-paid envelope provided.*

> *Apologies for sending you the incorrect one.*
>
> *If you have any questions or queries, please do not hesitate to contact us.*

- A Dolphin expression of interest form for a £20,000 investment which was signed by Ms R on 16 January 2019.

- A letter from Ms R to Dolphin dated 16 January 2019 which read:

> *I UNDERSTAND THAT MY NEW APPLICATION + MONEY (£20,000) MUST BE IN BY THE END OF FEBRUARY 2019. MY ABOVE CERIFICATE FOR £10,000 IS DUE TO FINISH 13 DAYS LATER ON THE 13-03-2019.*
>
> *I WOULD BE GRATEFUL IF YOU COULD STRETCH A POINT + RE-INVEST MY £10,000 INTO THE SAME ISSUE AS MY NEW £20,000 BOTH AT 10% INTEREST.*

- A letter from Hunter Jones to Ms R dated 18 January 2019 which read:

> *Please find enclosed the Loan Note Offer for you to check and then it will need to be signed and witnessed. The witness may be any adult who is not a family member.*
>
> *Also attached is a sample of the Loan Note Instrument – this does NOT need to be returned to Dolphin. You only need to send the 2 pages of the Loan Note Offer.*
>
> ***NB: When returning the Loan Note Offer please ensure that nothing else is enclosed in the envelope other than the 2 pages mentioned above. There should be no covering letter and no additional copies of ID etc.***
>
> *The bank details are on the form and you may now make payment, please ensure you use the Payment Reference on the form & your surname.*
>
> *I would be grateful if you can let me know by email once you have sent the forms so that I can keep my records up to date.*
>
> *Should you be paying in separate tranches, I would be very grateful if you could let me know.*
>
> *If you, however, have any queries please do get in touch!*

A £20,000 investment was made into Dolphin loan notes on 22 January 2019.

Hunter Jones' records have a note dated 25 January 2019 which reads "*Redrock app form sent via post*".

I've then been provided with a letter from Hunter Jones to Ms R dated 4 February 2019 which read:

> *Please find enclosed the Loan Note Offer for you to check and then it will need to be signed and witnessed and returned in the pre-paid envelope provided. The witness may be any adult who is not a family member.*

Also attached is a sample of the Loan Note Instrument – this does NOT need to be returned.

You only need to send the 2 pages of the Loan Note Offer.

NB: When returning the Loan Note Offer please ensure that nothing else is enclosed in the envelope other than the 2 pages mentioned above. There should be no covering letter and no additional copies of ID etc.

I would be grateful if you can let me know by email once you have sent the forms so that I can keep my records up to date.

If you have any questions or queries, please do not hesitate to contact us.

I can see that a £10,391.78 investment was made into Dolphin on 19 February 2019. Ms R has explained this was a reinvestment of the £10,000 she'd invested on 13 March 2017, together with returns she'd received on that.

It seems Hunter Jones were involved in confirming both investments as its records show:

- "*Posted Dolphin Welcome Pack with tracking*" on 8 February 2019.
- "*Posted Red Rock Certificate with tracking*" on 8 April 2019.

The Dolphin loan notes now have no value. Ms R therefore complained. She said she'd been led to believe the investments were sound and there was no mention of them being high risk. She said they weren't suitable in her circumstances as she was inexperienced in these types of investments and was 90 years old at the time.

EFG said Ms R wasn't a client of its and it hadn't given her any advice. It said Hunter Jones was an introducing agent that introduced investment opportunities to certified exempt investors who were proactively looking for investment opportunities. Hunter Jones had introduced Ms R to Dolphin loan notes, but this was before becoming its AR and it wouldn't have given any advice. And even if Hunter Jones had carried out regulated activities, the requirements of the rules had been met and Ms R had made her own decision to invest with knowledge of the risks involved.

An investigator was satisfied the complaint is one we can consider. But because EFG didn't agree, the issue was passed to an ombudsman for a decision. An ombudsman decided Hunter Jones' actions had amounted to the regulated activity of arranging deals in investments which had been allowed under the AR agreement in place between EFG and Hunter Jones and so this is a complaint we can consider.

The complaint was passed back to the investigator to give her opinion on the merits of the complaint. The investigator confirmed that her opinion on jurisdiction hadn't changed. In relation to the merits of the complaint, she was satisfied the complaint should be upheld. EFG didn't agree so the issue was passed to me for a decision.

I issued a provisional decision agreeing that the complaint is in jurisdiction and should be upheld. In summary, I said:

- Ms R hadn't just complained about advice but about Hunter Jones' overall involvement in her investing.

- Hunter Jones had carried out the regulated activity of arranging deals in investments under Article 25(1) of The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO) and/or Article 25(2) RAO.

- Hunter Jones was acting in the capacity as an AR of EFG at the time.

- Under the AR agreement, EFG accepted responsibility for arranging deals in investments.

- Providing the invitation to Ms R and promoting the investment opportunity to her was ancillary to this.

- COBS 4.7 and 10 apply in the circumstances.

- Hunter Jones breached COBS 4.7.7R by making the direct offer financial promotion to Ms R when she shouldn't have been certified as a sophisticated investor.

- Even if Ms R was correctly certified as a sophisticated investor or met the criteria of a high net worth investor, that would only have satisfied the first condition of COBS 4.7.7R and Hunter Jones would still have needed to satisfy the second condition too – compliance with the rules relating to appropriateness under COBS 10.

- There's no documentation evidencing that appropriateness was assessed – other than a questionnaire being ticked. Had appropriateness been adequately assessed, Hunter Jones would have identified that Ms R had little investment experience and knowledge and the investments in Dolphin loan notes weren't appropriate for her.

- There was nothing to suggest Ms R would have wanted to continue if Hunter Jones had clearly set out the risks involved and told her it had concerns about the appropriateness of the investments for her. And even if she had still wanted to go ahead, it wouldn't have been fair for Hunter Jones to have proceeded given what it knew about Ms R and the risk.

- The Financial Conduct Authority (FCA) principles, COBS 2.1.1R and 4.2.1R mean Hunter Jones should have carried out due diligence on the Dolphin loan notes.

- Had due diligence been carried out, there would have been things that ought to have caused concern.

- Hunter Jones shouldn't have offered the investments to Ms R or arranged them and so it should compensate her.

Ms R agreed with my provisional decision and said:

- She's not a professional woman and she only made three small investments on her own which eventually all collapsed. She trusted Hunter Jones because she thought it must know more about investing than her.

- Her only contact with Dolphin was when she asked it to reinvest the £10,000 she'd previously invested alongside her new investment.

- Hunter Jones hadn't carried out sufficient due diligence on Dolphin and didn't act in her best interests.

- The fees she paid Hunter Jones were excessive.

EFG said it didn't agree with my provisional decision but didn't provide any further comments before the extended deadline it'd requested.

I've carefully reconsidered all the evidence and arguments. Having done so, my findings remain the same as in my provisional decision, so I've repeated these below.

What I've decided – jurisdiction

The Financial Ombudsman Service can't look at all complaints. Before we can consider a complaint, we need to check, by reference to the FCA's Dispute Resolution Rules (DISP) and the legislation from which those rules are derived, whether it's one we have the power to look at.

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.*

Guidance for this rule at 2.3.3G says that:

> *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).*

And Section 39(3) Financial Services and Markets Act (FSMA) says:

> *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.*

To decide whether EFG is responsible here, there are three issues I need to consider:

- What are the specific acts Ms R has complained about?
- Are those acts regulated activities or ancillary to regulated activities?
- Did EFG accept responsibility for those acts?

What are the specific acts Ms R has complained about?

The complaint form that was referred to our service said the complaint related to negligent investment advice and the redress Ms R sought was to be put back in the position she'd have been in if she hadn't invested.

The more detailed letter of claim Ms R's solicitors sent to EFG also referred to a claim for professional negligence and focussed on Hunter Jones negligently advising Ms R to invest in Dolphin loan notes.

EFG says we can't amend the complaint beyond its original content. In effect, it's said the complaint is limited to the issue of Hunter Jones advising Ms R. It's suggested that in finding

we have jurisdiction on the basis that Hunter Jones was arranging deals in investments, the investigator and ombudsman went beyond what Ms R had complained about.

I don't agree. A complaint is defined as:

> *Any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a person about the provision of, or failure to provide, a financial service…which alleges that the complainant has suffered or may suffer financial loss, material distress or material inconvenience and relates to an activity of that respondent…which comes under the jurisdiction of the Financial Ombudsman Service.*

We're an informal dispute resolution service, and as such, we consider complaints in broad terms and aren't necessarily bound by the exact words a complainant uses in their complaint.

Given a complaint can be any expression of dissatisfaction, we don't expect that complaints will necessarily set out everything that a complainant takes issue with and it's quite common for complainants to put the complaint in a way that concentrates on what they consider to be the most significant issue.

As the court said in *Full Circle Asset Management Ltd v Financial Ombudsman Service & others* (2017) EWHC 323, it's a necessary part of the ombudsman's function to determine the nature of the complaint.

In this case, the complaint form and letter of claim concentrate on Ms R having been advised to invest in Dolphin loan notes but in broad terms I'm satisfied that what her complaint is about is that through Hunter Jones she's ended up in investments she shouldn't be in – in other words, it's about Hunter Jones' overall involvement in her investing.

Even if Ms R hadn't raised any issue other than advice when complaining I would have likely come to the conclusion that we can consider what Hunter Jones had done overall, given our inquisitorial remit. However, Ms R didn't just complain about the advice she says she was given. The letter of claim says:

> *Our clients' claim pertains to advice provided by Hunter Jones (an appointed representative) of the Company* ***and*** [my emphasis] *our clients' subsequent investment into Dolphin Trust*

I'm satisfied the use of the word "*and*" should have made it apparent that Ms R was complaining about more than just advice. Furthermore, the letter also refers to Hunter Jones failing to comply with the financial promotion rules.

So, I'm satisfied that Ms R isn't just complaining about advice, but about what Hunter Jones did overall. Having determined what the complaint is about, I then need to decide whether what Hunter Jones did was in the course of it carrying out a regulated activity.

Are those acts regulated activities or ancillary to regulated activities?

I accept that Hunter Jones' main aim was to introduce the Dolphin loan notes. But this doesn't mean it didn't carry out regulated activities. It's perfectly possible that it strayed into carrying out regulated activities such as advising on investments or arranging deals in investments, despite this not being its main aim.

Ms R's recollection is that Hunter Jones advised her. And it's possible it did. However, I've focussed on whether what Hunter Jones did amounted to "*arranging deals in investments*" because that was what the AR agreement in place limited it to doing.

Articles 25-27 RAO say:

> ***Arranging deals in investments***
>
> ***25.***–*(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,*
> >
> > *(b) a contractually based investment, or*
> >
> > *(c) an investment of the kind specified by article 86, or article 89 so far as relevant to that article,*
>
> *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.*
>
> ***Arrangements not causing a deal***
>
> ***26.*** *There are excluded from article 25(1) arrangements which do not or would not bring about the transaction to which the arrangements relate.*
>
> ***Enabling parties to communicate***
>
> ***27.*** *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.*

I'm satisfied the Dolphin loan notes were an investment under the rules. So, the question is whether Hunter Jones' actions amounted to arranging under Article 25 RAO.

The FCA has issued guidance in the PERG part of its handbook. At PERG 2.7.7BG it says the following about Article 25(1) RAO:

> *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).*

It then says the following about Article 25(2) RAO:

> *The activity of making arrangements with a view to transactions in investments is concerned with arrangements of an ongoing nature whose purpose is to facilitate the entering into of transactions by other parties. This activity has a potentially broad scope and typically applies in one of two scenarios. These are where a person provides arrangements of some kind:*

(1) to enable or assist investors to deal with or through a particular firm (such as the arrangements made by introducers); or

(2) to facilitate the entering into of transactions directly by the parties (such as multilateral trading facilities of any kind other than those excluded under article 25(3) of the Regulated Activities Order, exchanges, clearing houses and service companies (for example, persons who provide communication facilities for the routing of orders or the negotiation of transactions)).

It's clear from the above that whether there's been arranging deals in investments depends on the facts. It should also be noted that the examples given above by the FCA were only referred to as typical.

In the case of *Watershed Ltd v Dacosta* [2009] EWHC 1299 the judge (Mr Justice Holroyde) said:

> *Although many of the words and phrases used in the RAO are defined, "making arrangements" is not. The phrase has however been the subject of judicial analysis by Mr Jonathon Crow QC, sitting as a deputy judge of the High Court, in the case of Re Inertia Partnership LLP [2007] 1 BCLC 739. I respectfully agree with what he said at paragraph 39 of his judgment:*
>
> > *"39.1. The word 'arrangements' is, depending on the context, capable of having an extremely wide meaning, embracing matters which do not give rise to legally enforceable rights.*
> >
> > *39.2. In articles 25 and 26, the word 'arrangements' is used in contradistinction to the word 'transaction'.*
> >
> > *39.3. In article 26, the word 'transaction' is plainly a reference to the purchase, sale, etc. of shares contemplated by article 25.*
> >
> > *39.4. As such, a person may make 'arrangements' within article 25 even if his actions do not involve or facilitate the execution of each step necessary for entering into and completing the transaction (i.e. the purchase, sale, etc of the shares.)*
> >
> > *39.5. The availability of the exception in article 26 is essentially a question of fact. As a matter of causation, did the arrangements bring about the transaction (i.e. the purchase, sale, etc of the shares)?"*

EFG says Hunter Jones' role was limited to that of an introducer. But the fact there was an AR agreement in place suggests that at times, in acting as an introducer, Hunter Jones would arrange deals in investments. And in any event, the question is what Hunter Jones did rather than what it was meant to do.

PERG 8.32.2G says:

> *Article 25(1) applies only where the arrangements bring about or would bring about the particular transaction in question. This is because of the exclusion in article 26. In the FCA's view, a person brings about or would bring about a transaction only if his involvement in the chain of events leading to the transaction is of enough importance that without that involvement it would not take place. The second limb (article 25(2)) is potentially much wider as it does not require that the arrangements would bring*

about particular transactions. It is this limb which is of potential relevance within the scope of this guidance.

I've considered what happened that led to Ms R investing when she did in Dolphin loan notes with the above in mind.

Ms R signed a self-certified sophisticated investor form on 7 May 2018 – it seems having been sent this by Hunter Jones. Later – on 14 January 2019 – Ms R was sent an expression of interest form for Dolphin (a form had been sent on 10 January 2019, but it seems this had been an incorrect one). Ms R was told to return this in a pre-paid envelope that'd been provided. And the letter said, "*If you have any questions or queries, please do not hesitate to contact us*". Ms R completed the expression of interest form on 16 January 2019 confirming the amount she wanted to invest, the term she wanted and providing her bank details. And Hunter Jones has confirmed that form was returned to it before being forwarded to Dolphin.

Ms R was then given a loan note offer by Hunter Jones on 18 January 2019 to check and sign. It seems she sent the relevant pages to Dolphin as instructed. The letter asked her to let Hunter Jones know when the form had been sent. And again, it invited her to "*get in touch*" if she had any questions.

Hunter Jones' notes also confirm it sent her a "*Redrock app form*" on 25 January 2019. I haven't been provided with a copy of this letter or the expression of interest form. But I'm satisfied it's most likely these related to the 19 February 2019 investment and that they would have been similar to those for the 22 January 2019 investment. Again, Hunter Jones has confirmed this form was returned to it and forwarded onto Dolphin.

Ms R was then given a loan note offer for that investment by Hunter Jones to check and sign – on 4 February 2019. Again, it seems she sent the relevant pages to Dolphin as instructed. The letter again asked Ms R to let Hunter Jones know when the form had been sent and said "*please do not hesitate to contact us*" if she had any questions.

Hunter Jones' records show it posted welcome packs to Ms R for the two investments – on 8 February 2019 and 8 April 2019 respectively.

Taking everything into account, I'm satisfied that the acts done by Hunter Jones as set out above were done to bring about investments in Dolphin loan notes and as such were done in carrying on the regulated activity of arranging deals in investments under Article 25(1) RAO. EFG has argued that Article 26 RAO applies in this case, but I don't agree.

In *Adams v Options UK Personal Pensions LLP* (2021) EWCA Civ 474, the judge said:

> *I agree it is important to focus on the words "bring about". However, I would add that as used in article 26, those words imply, in Mr Vineall's phrase, "causal potency". For arrangements to "bring about" a transaction for the purposes of article 26, they must play a role of significance. Whether or not arrangements "bring about" a transaction is not to be judged simply on a "but for" basis, but neither is a "direct" connection inevitably required…*
>
> *Contrary to the Judge's understanding, it does not matter that CLP's acts "did not necessarily result in any transaction between (Mr Adams) and (Carey) or "that the process was out of CLP's hands to control in any event". Nor is it determinative whether steps can be termed "administrative".*

In my view, sending the expression of interest forms to Ms R to sign and return and forwarding these to Dolphin and sending the subsequent loan applications to Ms R were

significant acts by Hunter Jones which were to bring about the investments in Dolphin loan notes. I accept that it didn't carry out every step required to arrange the investments and Dolphin was also in touch with Ms R direct. But *Watershed Ltd v Dacosta* is 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, I don't think this is determinative to whether a regulated activity occurred.

As such, I'm satisfied that those acts by Hunter Jones were carried on by it under Article 25(1) RAO and they're not excluded by virtue of Article 26 RAO.

EFG has said Ms R would have invested in Dolphin loan notes irrespective of Hunter Jones' involvement. This may be relevant to the merits of the complaint, but it isn't relevant to our jurisdiction. I'm concerned with the investments made by Ms R, and I've found that what Hunter Jones did was significant and brought about those investments. The fact it's possible Ms R may have invested in Dolphin loan notes through some other avenue doesn't change my findings.

Even if I'm wrong and Article 26 RAO does apply, I'm satisfied that Hunter Jones made arrangements that come within Article 25(2) RAO. As PERG 8.32.2G says, that limb "*is potentially much wider as it does not require that the arrangements would bring about particular transactions*". And the Court of Appeal confirmed this in *The Financial Conduct Authority v Avacade Limited & Others* (2021) EWCA Civ 1206, saying:

> *An intended purpose, an end in view, must be that a relevant transaction take place, but the arrangements do not need to bring it about by way of an actual or notional test of causation.*

I'm satisfied that Hunter Jones had the "*intended purpose*" that Ms R would invest in Dolphin loan notes and as such, I'm satisfied that what it did amounted to arrangements under Article 25(2) RAO.

EFG has argued that Article 27 RAO applies in this case, but I don't agree. PERG 8.32.5G says:

> *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).*

Here, I don't think Hunter Jones' role was a passive one that was only to enable communication between Ms R and Dolphin. Instead, I think sending Ms R documents that she needed to complete to invest and providing completed documents to Dolphin is evidence of Hunter Jones being actively involved in her making the investments. I'm satisfied that the arrangements made by Hunter Jones weren't "*merely*" to provide the means by which Ms R and Dolphin could communicate with each other. And as such, they don't come within Article 27 RAO.

I'm therefore satisfied that Hunter Jones carried out the regulated activity of arranging deals in investments under Article 25(1) RAO and/or Article 25(2) RAO.

Did EFG accept responsibility for those acts?

There's nothing that suggests to me Hunter Jones was acting in any capacity other than as an AR of EFG at the time of the acts I'm satisfied amount to the regulated activity of arranging deals in investments.

I've therefore gone on to consider what the AR agreement said. I've set out below the relevant provisions:

> *3.1 The Appointer appoints the Company 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 the Company 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;*
> >
> > *3.1.2 in respect of the Company's specific activities which fall under the requirement and jurisdiction of the Act, the Appointer accepts responsibility for, and any omissions regarding the Company carrying out specific activities within the requirements of the Act.*

So, the business that EFG accepted responsibility for was limited to "*arranging (bringing about) deals in investments*" as specified in Article 25 RAO. I've found that Hunter Jones was "*arranging (bringing about) deals in investments*" and under the AR agreement, EFG accepted responsibility for that business.

As I'll go on to explain in the next section, I also think the evidence points to Hunter Jones providing an invitation to Ms R and promoting the investment opportunity to her. Whilst 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 making arrangements that I've found Hunter Jones was also involved in. I don't agree with EFG that they weren't connected.

I'm therefore satisfied we can consider the merits of Ms R's complaint about her investments in Dolphin loan notes.

What I've decided – merits

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

In my view, the key consideration of what's fair and reasonable in this case is whether EFG met its regulatory obligations when Hunter Jones, acting on its behalf, carried out the acts the complaint is about. I consider the following regulatory obligations to be of particular relevance here (all are quoted as they were at the time of the events complained about):

- The Principles for Businesses, which are set out in the FCA's Handbook. PRIN 1.1.2G says these are "*a general statement of the fundamental obligations of firms under the regulatory system*". Of particular relevance are:
    - 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.*

- COBS 2.1.1R which says:

  A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).

- COBS 4.2.1R which says:

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

- COBS 4.7.7R which says:

  (1) Unless permitted by COBS 4.7.8R, 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 4.7.9R;

  (b) certified as a 'sophisticated investor' in accordance with COBS 4.7.9R;

  (c) self-certified as a 'sophisticated investor' in accordance with COBS 4.7.9R;

  (d) certified as a 'restricted investor' in accordance with COBS 4.7.10R.

  (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 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 10.2.1R which says:

  (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 which says:

  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.

- COBS 10.2.6G which says:

  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 10.3.1R which says:

  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 which says:

  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 which says:

  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.

EFG says COBS 4.7 and 10 don't apply in the circumstances here. I don't agree. Both require there to be a "*non-readily realisable security*" and a "*direct offer financial promotion*".

"*Non-readily realisable security*" is a defined term in the FCA Handbook which says it 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*

I'm satisfied the Dolphin loan notes are a security that isn't readily realisable and none of the other exclusions apply. So, Ms R's investments were both a "*non-readily realisable security*".

I'm also satisfied there was a "*direct offer financial promotion*". "*Direct offer financial promotion*" is also a defined term in the FCA Handbook which says it is:

> *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 "*financial promotion*" is defined as:

> *an invitation or inducement to engage in investment activity that is communicated in the course of business*

And a "*controlled agreement*" is defined as:

> *an agreement the making or performance of which by either party constitutes a controlled activity.*

"*Controlled activity*" includes investment activity with securities such as Dolphin loan notes.

Hunter Jones first promoted Dolphin loan notes to Ms R when it wasn't EFG's AR – when she made her first investment on 13 March 2017. But as I've set out above, it seems "*proposals*" were sent to Ms R by Hunter Jones by email and post on 7 and 8 January 2019 respectively and a "*brochure and terms*" on 9 January 2019. Expression of interest and loan note offer forms then followed later. Unfortunately, I haven't been provided with copies of any of these documents. And although I've been given a copy of an information memorandum, it's not clear that one was provided to Ms R, and if one was, that it was the same as this one. However, Ms R's recollection is that Hunter Jones was integral to her making the Dolphin applications. And my view is that the evidence all points to Hunter Jones providing an invitation to Ms R and promoting the investment opportunity to her whilst it was an AR of EFG.

As I've explained above, I'm satisfied promoting investments in this way was ancillary to the activities of making arrangements. I've therefore considered whether EFG complied with COBS 4.7 and 10.

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

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

There's evidence that Ms R self-certified – first as a high net worth investor and then as a sophisticated investor – for the purpose of these investments. The available evidence suggests Hunter Jones was proceeding on the basis that Ms R was a sophisticated investor at the time of the Dolphin investments complained about here.

COBS 4.12.11G says:

> (1) *A firm which wishes to rely on any of the self-certified sophisticated investor exemptions…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.*

It therefore would have been good practice to check that Ms R did indeed meet the definition of a sophisticated investor. From what Ms R has told us about her circumstances, I don't think she did, and I've seen no evidence that Hunter Jones took reasonable steps to ascertain whether she did. She had limited investment experience and I haven't seen evidence that suggests she had knowledge or experience through other means. So, my finding is that Hunter Jones breached the first condition required under COBS 4.7.7R by making the direct offer financial promotion to Ms R when she shouldn't have been certified as a sophisticated investor.

It's possible that Ms R did meet the criteria of a high net worth investor. That's what she was certified as at the start of her relationship with Hunter Jones. But even if she did, or if she was correctly certified as a sophisticated investor, that would only satisfy the first condition of COBS 4.7.7. Hunter Jones would still have needed to satisfy the second condition too – compliance with the rules relating to appropriateness under COBS 10. And I'm not persuaded it did.

COBS 10 required Hunter Jones to "*ask the client to provide information regarding her 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".

EFG says that even though Hunter Jones didn't need to comply with COBS 10, an appropriateness test was done. It's provided a copy of an undated "*Appropriateness and Client Categorisation Questionnaire*" which was filled in by Hunter Jones and which selected that Ms R was a "*Certified or Self-Certified Sophisticated Investor*". A note next to this option read:

> *you should supply their Certification with this Questionnaire and the party submitting the Questionnaire should complete the box below and tick where indicated to confirm that he has reviewed the appropriateness of the proposed investment in the Loan Notes and has complied with the rules in COBS 10 of the FCA Handbook.*

And a tick was added next to a section which read:

> *I confirm that…I have assessed the suitability of the Investor named above in respect of their suitability to receive the promotion to invest in the Bonds and that I have satisfied the criteria in COBS 10 of the FCA Handbook*

However, although the questionnaire was ticked to confirm that appropriateness was assessed, I've seen no documentation sitting behind it evidencing that. Had appropriateness been adequately assessed, I think it would have been identified that Ms R had little investment experience and knowledge. Although Ms R had invested in these types of products before, it seems this was predominantly through Hunter Jones. She says she was led by Hunter Jones who she trusted.

The loan notes Ms R invested in aren't a straightforward product. There were multiple risk factors associated with them, including the inherent risk of property developments (delays, budget overruns etc), as well as currency risks and a reliance on incentives provided by the German government. There was also a liquidity risk. The loan notes weren't easily tradeable on a recognised exchange, and so couldn't be readily sold. All these points (and this isn't an exhaustive list) would need to be considered in order to understand the investments. It's important to give these specific risks for context, as it demonstrates that the investment was complex, risky and specialist.

These weren't suitable investments for the majority of retail customers. Hunter Jones knew, or ought to have known, this. Ms R has said she understood the loan notes to be low risk, which suggests she didn't properly understand what she was investing in, and the risks weren't ever explained to her in any detail. I don't think that the fact Ms R had savings or had invested into other similar investments is strong evidence that she had a good understanding of investing in complex high-risk investments. So, had Hunter Jones carried out the checks it should have, it would have identified that the investments in Dolphin loan notes weren't appropriate for Ms R. She had neither the knowledge, nor experience, to understand the risks involved in the investments.

I haven't been provided with anything that suggests Ms R would have wanted to continue with the investments if Hunter Jones had clearly set out the risks involved and told her it had concerns about the appropriateness of the investments for her. It seems that having built up a relationship with Hunter Jones over a period of time, Ms R trusted it to be acting in her best interests.

As set out above, COBS 10.3 does provide for situations where firms can proceed with arrangements after giving warnings if the client still wants to proceed. But COBS 10.3.3G says, "*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". Even if Ms R had still wanted to go ahead with the Dolphin investments, I don't think it would have been fair for Hunter Jones to have proceeded here given what it knew about Ms R and the risk Dolphin loan notes posed to her.

Like the investigator, I'm also satisfied that Hunter Jones should have carried out due diligence on the Dolphin loan notes before promoting them and arranging investments in them. I'm satisfied this is a reasonable interpretation of its responsibilities under the FCA principles and COBS 2.1.1R and 4.2.1R.

Like the investigator, I've referred to the report Prof Dr Gerrit Hölzle contributed to the insolvency proceedings against Dolphin. I accept that this didn't exist at the time of the events complained about here and that it's not clear it relates to the same investments Ms R made. I also note EFG's comments about its preliminary nature and provenance. But the report highlighted fundamental issues with Dolphin:

- That it hadn't published any annual financial statements despite having traded for a number of years.

- That a large percentage of its funds were being reserved to make payments to existing investors and weren't being used for the renovation of properties which was the project's purpose.

- That land charges weren't always being arranged on property developments despite this being advertised.

Whilst these issues may not have become apparent until later, I'm satisfied at least some of them would have become apparent earlier – if Hunter Jones had carried out the kind of due diligence I'd expect it to have. I therefore don't agree with Hunter Jones that referring to issues raised in this report is assessing things with the benefit of hindsight.

EFG has said that if Hunter Jones had queried these things, it's likely Dolphin wouldn't have given any responses that would have caused concern. I don't agree. It seems most likely that if Dolphin had provided financial statements, they would have shown issues, otherwise there'd have been no reason to not publish them. And it financial statements still weren't provided, this alone would have been reason not to proceed. It's also difficult to envisage an explanation for the use of new funds and the absence of land charges that wouldn't have caused concerns. And whilst Dolphin may have declined to provide any evidence or explanations, I'm satisfied such a failure ought reasonably to have caused concern.

By failing to carry out adequate due diligence, Hunter Jones missed opportunities to spot issues with Dolphin. If it had been aware of these issues, I don't think it could have fairly or reasonably continued with promoting and arranging Dolphin investments for Ms R.

So, my conclusion is that Hunter Jones was required to follow the relevant rules and principles set out by the FCA. It failed to do this on two different fronts:

- When making the direct offer promotion to Ms R and making the arrangements for the Dolphin loan note investments.

- By not carrying out adequate due diligence on the investments.

I'm satisfied that, had Hunter Jones done everything it should have, it wouldn't have offered the Dolphin loan notes to Ms R or arranged them for her, and she wouldn't have made the investments that were inappropriate for her. As such, EFG should pay Ms R compensation.

Putting things right

In assessing what would be fair compensation, I consider that my aim should be to put Ms R as close to the position she would probably now be in if she hadn't invested in Dolphin loan notes.

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

To compensate Ms R fairly, EFG must:

- Compare the performance of Ms R's investments 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.

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

- Pay Ms R £250 for the distress and upset she was caused as a result of losing a significant amount of money at an age where she'd be unlikely to replace it.

I'm not aware of any wrapper fees being incurred in connection with these investments and Ms R didn't make me aware of any either when I requested this in my provisional decision.

Income tax may be payable on any interest awarded.

Investment name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Dolphin loan notes	Still exist but illiquid	For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	Date of each 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 investments at the end date.

If at the end date the investments are illiquid (meaning they 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 Ms R agrees to EFG taking ownership of the investments, if it wishes to. If it is not possible for EFG to take ownership, then it may request an undertaking from Ms R that she repays to EFG any amount she may

receive from the investments in future. EFG would be responsible for the cost of any undertaking.

Fair value

This is what the investments would have been worth at the end date had they produced a return using the benchmark.

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, EFG 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:

- Ms R wanted Capital growth with a small risk to her capital.

- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to her capital.

- The FTSE UK Private Investors Income ***Total Return*** index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is a mix of diversified indices representing different asset classes, mainly UK equities and government bonds. It would be a fair measure for someone who was prepared to take some risk to get a higher return.

- I consider that Ms R's risk profile was in between, in the sense that she was prepared to take a small level of risk to attain her investment objectives. So, the 50/50 combination would reasonably put Ms R into that position. It does not mean that Ms R would have invested 50% of her money in a fixed rate bond and 50% in some kind of index tracker fund. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Ms R could have obtained from investments suited to her objective and risk attitude.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms R to accept or reject my decision before 18 June 2024.

Laura Parker
Ombudsman