

The complaint

Ms M complains about Clear Capital Markets Ltd. She thinks she was advised to take too much risk and invest in unsuitable products.

What happened

Ms M became an advisory client of CCM in October 2019. Her investment objective was noted as seeking income and capital growth and she was assessed as having a medium attitude to risk (ATR). She had investment experience in major shares and small cap shares and was interested in FTSE 350 shares and placings.

She was in regular contact with CCM and traded frequently but by 2022 the value of her account had fallen significantly. She complained to CCM about the advice she'd received, and said in summary, that the brokers weren't competent and CCM should have got out of an investment in Mast Energy Developments Ltd earlier than they did.

CCM looked into the concerns that had been raised but didn't uphold the complaint. They thought that the recommendations they'd provided to Ms M were suitable and in line with the information she'd provided when she opened her account. They noted that:

- Her accrued annual losses hadn't breached her annual risk capital figures and the cumulative value of her CCM investments hadn't exceeded 50% of her total investment portfolio which was the threshold she'd said was available for investment in high-risk products.
- Ms M had confirmed that she had an extensive overall understanding of financial markets and previous investment experience in all the products recommended by CCM. She'd also confirmed her understanding that the value of shares and ETF's and the income from them may go down as well as up.
- Ms M had the final decisions on any trades that had been made. She could have said no to any of their recommendations if she was unsure about the advice being provided.
- All the recommendations were in line with her risk profile and if she'd wanted to, she could have implemented risk management on her investments.
- They didn't think the recommendation to invest in Mast was unsuitable. She'd agreed to the investment and hadn't mentioned any desire to put a stop loss in place. In any event, it wasn't possible to put a stop loss in place for the Mast holdings due to the size of her holding and how the shares were traded.

Ms M didn't accept their findings and asked us to look into the matter. Her complaint was considered by one of our investigators who thought it should be upheld. He didn't agree with how Ms M's total net worth had been calculated as it included her main home and investment properties. The impact of this was that it showed that Ms M had c.£115,000 available to invest in high-risk products when in reality she was only investing a total of

c.£37,000 across her CCM portfolio.

He also thought that too much of Ms M's portfolio was invested in Mast. CCM had advised her to invest c.£30,000 into Mast which was the vast majority of her portfolio. This meant most of her portfolio was concentrated in one holding which wasn't suitable for her circumstances. However, he didn't think there were any complaints about the service and recommendations Ms M received until the Mast recommendation – so he only considered she was treated unfairly from the time of the Mast investment and proposed redress from this point.

CCM didn't agree with his findings. They thought that Ms M was fully aware of the risks associated with the ongoing service they'd provided and she'd agreed to her responsibilities, including her responsibility to say no, when she completed each of her three Retail Client Profiles (RCPs). She'd explicitly confirmed that she understood her responsibilities and agreed to them.

They'd ensured Ms M had time to consider their recommendation to invest in Mast and she'd replied via email saying *"Okay go ahead"*. In each of her completed RCPs, Ms M classed herself as having an extensive overall understanding of financial markets CCM operated in. Based on this, it wasn't credible of her to suggest her account was mismanaged.

As a self-classified experienced investor using CCM's advisory service, Ms M took the decision herself to proceed with the Mast investment. By buying Mast on a T-10 extended settlement, she'd embraced the investment risk, given the potential future investment returns on offer. She would have been happy to reap any profits in Mast but as she was fully aware of the inherent risks and lack of guarantees when investing, she should also take responsibility for the loss incurred.

They didn't agree that they'd incorrectly calculated Ms M's total net worth and capacity for loss. The RCP document, which she'd completed and signed, contained the clear statement, *"How much, as a percentage of your Total Net Worth could you afford to lose without it affecting your lifestyle?"*, with her capacity for loss figure calculated as £115,050, based on her answer to the first question.

The words *'Total Net Worth'* were highlighted in bold and underlined. Ms M completed and signed this document, thereby confirming its accuracy, meaning beyond any reasonable doubt that she had considered her answer of £115,050 as suitable.

If the 5% capacity for loss was based only on the c.£37,000 she wished to invest with CCM then this would equate to a figure of c.£1,800. This figure was absurd for an individual investor with a multi-million pound investment portfolio. Such a small risk figure would render any actual investment activity on her CCM account impossible to justify on capacity for loss grounds, even if the advice provided was based on a low-risk shares.

They thought they had a duty to determine a client's capacity for loss across their total net worth and not just what was invested with CCM. This was because the vast majority of their clients had alternative investments outside of their CCM account. Ms M had most of her total holdings (c.£1,800,000), in low-risk property investments, so the c.£37,000 she had in her CCM account only represented a small portion of her wealth and could therefore be exposed to high risk.

They also questioned why the investigator had accepted Ms M's claim that she was suffering from ill health without any evidence to back up this claim and thought this may have influenced his extra compensation payment of £250 and skewed his response to Ms M's complaint.

The investigator wasn't persuaded to change his opinion so the complaint has been passed to me to make a decision.

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, I think this complaint should be upheld and I will now explain why. In considering whether CCM acted appropriately when they gave Ms M advice, I am required to take into account any relevant laws and regulations, guidance and rules provided by the regulator, and any codes of practice. I am also required to take into account, where appropriate, what I consider to have been good industry practice at the time.

An adviser has certain obligations under the regulator's Conduct of Business Rules (COBS) rules and Principles for Businesses (PRIN). Some of the key rules I've considered in determining if the advice was suitable are:

COBS 9.2.1: which says, in summary, that a *firm must ensure that a recommendation, or a decision to trade, is suitable for its client. And when doing so, they must obtain sufficient information about the client's knowledge, experience, financial situation and objectives*

COBS 9.2.2: which broadly says, among other things, that a *firm needs to get enough information from the customer to be able to make sure the recommendation meets their objectives, they're able to bear any related investment risk and they understand the risks involved.*

COBS 2.1.1R: *A firm must act honestly, fairly and professionally in accordance with the best interests of its client.*

PRIN 6: *A firm must pay due regard to the interests of its customers and treat them fairly.*

I've firstly considered the points CCM have made about how they calculated Ms M's total net worth and capacity for loss. Having done so, I disagree with their methodology. I don't think it is appropriate to include the value of Ms M's main property and investment properties. I consider these to be assets which weren't readily realisable and therefore shouldn't have been included in an assessment of whether her assets were suitably invested.

Had the value of the properties been excluded then Ms M's finances would have looked very different. In 2019 she held £151,000 in FTSE 350 shares and £100,000 in cash. I think this asset split is in line with her medium ATR and I think these are the liquid assets from which her capacity for loss should have been calculated. She said she could afford to lose 5% of her investments so this would equate to a capacity for loss figure of £12,550. I think this is a more accurate figure and further proof of this can be seen in an email exchange between Ms M and CCM in February 2021 discussing her capacity for loss:

CCM - 'Hi ****, did you mean to put £500 down as the capacity for loss that would mean I would have to close the positions down if the account falls £500 from here which could just be normal daily fluctuations? Doesn't need to lots but £500 leaves very very little room'

Ms M - 'So what is the minimum I can put down ... it is just that 115,050 is quite risky. Can you indicate what is the reasonable number'

CCM - 'Hi ****, based on our conversation, please can you confirm 10k as the max capacity for loss'

Ms M - 'Okay I agree with 10k.'

Following this exchange and taking into account the RCP which was also completed in February 2021 which again confirmed her capacity for loss as £10,080, I don't think there could have been any doubt that Ms M didn't want to risk loss of £115,050. This means that she wasn't in a position where all the funds she had in her CCM portfolio should have been exposed to a high level of risk.

With this in mind, I think CCM should have been aware that the recommendation they'd made to Ms M a few weeks earlier at the end of January 2021 to subscribe in the Mast IPO wasn't right for her circumstances. Especially as it meant most of her portfolio would be held in one high risk holding where previously it was diversified between a number of holdings in more mainstream shares. Because of this I don't think CCM have treated Ms M fairly and I'm satisfied they need to put things right from the time Ms M made the investment into Mast.

I note the comments CCM have made about the payment for distress the investigator awarded. Ms M has provided testimony detailed the challenges she's faced over the last few years; I thank her for her honesty and I find her testimony plausible. I am therefore satisfied that she has been caused distress and I think an award of £250 is fair and reasonable in the circumstances.

Putting things right

Fair compensation

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

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

What must CCM do?

To compensate Ms M fairly, CCM must:

- Compare the performance of Ms M's investment with that of the benchmark shown below and pay the difference between the *fair value* and the *actual value* of the investments. If the *actual value* is greater than the *fair value*, no compensation is payable.
- CCM should also add any interest set out below to the compensation payable.
- Pay to Ms M £250 for distress caused by seeing her CCM share portfolio value significantly reduce.

Income tax may be payable on any interest awarded.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
CCM Portfolio	Still exists and liquid	FTSE UK Private Investors	Date of investment into Mast	Date of my final decision	8% simple per year from final decision to

		Income Total Return Index	(31/3/21)		settlement (if not settled within 28 days of the business receiving the complainant's acceptance)
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Actual value

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

Fair value

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

Any additional sum paid into the investment should be added to the *fair value* calculation from the point in time when it was actually paid in.

Any withdrawal from the CCM should be deducted from the fair value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if CCM totals all those payments and deducts that figure at the end to determine the fair value instead of deducting periodically.

Why is this remedy suitable?

I have decided on this method of compensation because:

- Ms M wanted Capital growth and was willing to accept some investment risk.
- 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.
- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Ms M's circumstances and risk attitude.

My final decision

I uphold the complaint. My decision is that Clear Capital Markets Ltd should pay the amount calculated as set out above.

Clear Capital Markets Ltd should provide details of its calculation to Ms M in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms M to accept or reject my decision before 8 January 2024.

Marc Purnell
Ombudsman