

Bank's duty to provide information

Topic: **Miscellaneous** Case number: **2017/25**

The clients accused the bank of not having informed them, when collecting coupons, about the fact that the fund unit certificates, kept at their home, should have been converted. The real estate fund units were then redeemed against the clients' will. The resulting loss was over 100,000 CHF which the clients then claimed from the bank. The Ombudsman, unable to find any wrongful conduct by the bank, was unable to act as mediator.

The clients, represented in this case by a lawyer, had held bearer unit certificates for a well-known Swiss real estate fund at their home for several years. Every year they went into the same branch of the bank and presented the coupons for these units for collection and payment into an account opened with the same bank. In early 2017, upon trying to do the same, it emerged that it was no longer possible to collect the coupons. Amendments to the Ordinance on Collective Investment Schemes meant that the units should have been converted to securities registered in the name of a specific person by 31 December 2016 at the latest. As the deadline had passed, the associated securities had then been redeemed by the fund at their intrinsic value, without the client's consent or knowledge. In fact, as this value was significantly lower than the market value, the clients suffered a loss of over 100,000 CHF which they then claimed from the bank. The bank denied any obligation to compensate for the loss however since the unit certificates had been kept at the clients' home and not held with the bank in a custody account. The bank therefore claimed that its role was merely to collect the coupons for the client and that it was not acting as a custodian bank. Moreover, the collection service agreed with the bank was limited to the diligent collection of coupons and did not imply any other duty to provide information regarding the securities to which the coupons related.

The clients' lawyer, who did not share this opinion, then asked the Ombudsman to initiate mediation proceedings. According to him, in this case, the bank had breached its duty to advise and provide information given that the regular collection of coupons had given rise to a specific relationship of trust between the client and the bank. The clients' lawyer based his point of view on case law from the Federal Supreme Court regarding the due diligence obligation and the obligation of loyalty incumbent upon banks under contracts regarding the processing of stock exchange transactions.

The Ombudsman did not share this view. In fact, according to the case law referred to, the bank is in theory not subject to any duty to advise when, in targeted instructions regarding purchases and sales involving the account, a client unconditionally issues the bank with an order and, in so doing, states that he does not require or need advice or information from the bank. In this type of case, such a duty only arises exceptionally: either where the bank, while paying the attention required by the circumstances, is forced to acknowledge that the client has not identified a specific risk associated with an investment, or where, as part of a long-term business relationship, a specific relationship of trust has been developed under which the client may expect, in good faith, to also receive unsolicited advice and warnings.

The Ombudsman also expressed doubts as to whether or not the case law cited by the clients' lawyer applied to the present case. According to him, the collection of the coupons described did not

constitute an investment activity but actually represented a collection order, mainly performed at the bank counter and involving lesser obligations. The bank also quite rightly pointed out that the unit certificates were not kept in a custody account held with it. If this had been the case, in exchange for payment of the usual custody fees, it would have fulfilled its role as custodian bank by ensuring that the clients received all important communications regarding the deposited securities and were able to respond in good time to any changes such as the one disputed here. Although the Ombudsman understood the clients' frustration in light of this incident, he felt that they should bear the risk inherent to the act of keeping their own share certificates at home. In his opinion, the bank had not acted wrongfully and, for all of the reasons stated above, it was not possible for him to initiate mediation proceedings.