Losses following investment advice given by the Bank

Topic: **Investment advice**   Case number: **2022/17**

> The clients were a retired couple. After the sale of a property, they each had around CHF 300 000 at the bank under two different relationships. Based on investment advice from their client advisor, they invested CHF 150 000 each in securities and held the rest as liquidity in accounts and in the form of a fiduciary investment. After the outbreak of the Corona crisis, they suffered considerable book losses and sold their investments against the advice of the bank in May and August 2020. They held the bank responsible for the losses realised with the sale. The bank did not see any legal basis for assuming the entire investment losses. In the ombudsman proceedings, the bank maintained its position.

When the clients contacted the Ombudsman, they had had several discussions with the bank, which had already compensated them in one aspect. They asked the Ombudsman to investigate the entire investment process and expressed the impression that the bank had advised them to make investments that were too risky for their needs. They had only hoped to make a small profit with these investments and had only wanted to take small risks.

It is not part of the Ombudsman's duties to conduct such investigations, as actively looking for errors in a submitted dossier is not compatible with his role as a neutral mediator. The ombudsman procedure is basically conducted on the basis of the parties' arguments. The Ombudsman therefore asked the clients to specify their allegations and, as a first step, to submit them in writing to the bank's management together with their claims. At the same time, he gave them the following information on a bank's possible liability in the context of an investment advisory relationship.

In principle, the provisions of the law of mandates are applicable to investment advisory relationships. A bank may be liable if it fails to fulfil or insufficiently fulfils the duties associated with investment advice. In essence, these duties consist of recommending investments to the client that are compatible with his profile and informing him about the risks and the products in accordance with his knowledge. If it fulfils these duties, it is generally not liable for any losses. The risks associated with an investment, in particular the market risk, must in principle be borne by the client. For this reason, banks do not usually offer any guarantee of investment success. Investment decisions are based on estimates of future market developments. These cannot be reliably predicted even by the bank. Unless otherwise agreed, the agent in such a relationship therefore owes careful action, but not a certain success. If certain investment proposals or a proposed investment strategy do not appear to be obviously unreasonable, the conditions for liability are normally not met. The mere fact that the value of an investment suffers a loss is therefore not sufficient to prove a lack of diligence. In the case of portfolio advice, it must also be taken into account that individual securities in an overall proposal may well be riskier than corresponds to the client's risk profile, provided that this is compensated for by other investments in the same proposal.

However, a breach of due diligence may exist if the bank made a recommendation that was obviously unreasonable and inappropriate for the client concerned at the time of the recommendation. According to the case law of the Federal Supreme Court, the appropriateness of a recommended investment is assessed in relation to the client's personal financial situation and his risk profile, i.e. his willingness and ability to take risks. According to the Federal Supreme Court, the scope of the duty to

inform is then determined by the experience and knowledge of the client. A breach of due diligence can also occur if a bank provides objectively false information about a product it is proposing, for example about the risk. Decisive for the assessment is always the situation as it was at the time of the investment recommendation. Liability can also be based on the fact that certain investment products or the entire allocation are unsuitable with regard to the selected investment objective or if the principles of reasonable diversification have not been taken into account or have been insufficiently taken into account. Overall, the prerequisites for a bank's liability are to be classified as high.

In their complaint to the bank's management, the clients finally claimed inadequacies in the investment advisory process. They complained about errors in the creation of the client profile and stated that the investment objective determined in it had been implemented with investments that were too risky. As they did not receive a substantive statement from the bank in a first step, the Ombudsman intervened and asked the bank to comment in detail on the allegations.

The bank stated that the client profile had been carefully established and signed by the clients. Due to the clients' low risk tolerance, the investment objective "income" was chosen, which was correctly implemented according to the bank's general guidelines. This was the second lowest risk category. The opportunities and risks of all products had been explained to the clients. The bank was able to document the individual meetings on the basis of entries in the client history and to prove which information documents had been handed out in each case. The bank pointed out that the clients had hoped for a small profit and that absolutely risk-free investment was not possible.

The bank further stated that after the client had expressed fears about the market situation following the outbreak of the Corona crisis, they had been advised to acquire derivatives on stock market indices to hedge against falling prices. After these had expired worthless due to rising prices, the clients had been compensated in a partial amount, as some of the hedged positions had already been sold at the time of the acquisition of the derivatives. The total losses suffered with the investments made on the basis of the investment advice were much smaller than calculated by the clients. In the bank's view, they were not caused by the choice of products, but by the clients' decision not to keep the investment period of more than 5 years and to sell the positions. This had been done against the bank's explicit advice. The bank was not prepared to pay any further compensation. After the Ombudsman had made further inquiries, the bank reiterated its position.

Against this background and the bank's consistently negative position, further mediation efforts had to be considered as futile. The Ombudsman therefore closed the proceedings with an explanatory notice to the clients.

The main problem in this case was that the parties gave completely different information about the investment process. The clients also disputed the content of various documents bearing their signatures, stating that they had signed them unread trusting the adviser. The Ombudsman cannot question the credibility of the parties and cannot clarify disputed statements of fact by means of an evidentiary procedure, e.g. by means of hearings. However, he drew the clients' attention to the fact that, according to the general rules of evidence, they would have to prove the allegations from which they derive rights. Based on the documents, such evidence would probably be difficult to produce. Provided this was the case, he was unable to identify any misconduct on the part of the bank on the basis of the information available to him which would lead to liability in the sense of the above explanations.

It was apparent to the Ombusman that the parties had different perspectives on the assessment of the risks taken. The bank took into account both the total portfolio, i.e. including the fiduciary investments and the liquidity, while the clients focused solely on the investments in the portfolio,

which were subject to greater price fluctuations. The bank’s view could not be contested. Moreover, the Ombudsman shared the Bank’s view that any investment activity involves risk. It was hardly possible to generate returns with very low-risk investments during the period in question. The fact that the clients had taken certain risks had to be known to them because of the investor profiles.

Finally, it was noticeable that the equity portion of the portfolio was primarily represented by complex structured products. Although the bank was able to prove that it had explained these products to the clients and provided them with the relevant product information in writing, it remained questionable for the Ombudsman whether they had actually understood it. Two of these products related to the same share. The clients were exposed to the risk of having to take over a relatively large number of such shares in the worst case, which the Ombudsman considered to be a mistake. However, this particular risk did not materialise, so that no damage resulted from the error.

The Ombudsman understood that the clients were concerned about the book losses they had suffered after the outbreak of the Corona crisis and wanted to avoid further risk of loss by selling. Overall, however, he lacked convincing arguments in this case to persuade the bank to make further concessions.