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SCPI real estate investment companies: when a bank fails to send its customer's subscription form

When buying units in a real estate investment company, the investor can subscribe for the units directly from the investment management company, or contact their usual adviser who will send the subscription form to the investment management company. The existence of several players in the subscription chain may prove problematic, as in the case I am presenting to you this month, where the adviser failed to send its customer's subscription form to the investment management company. The question then arises of the harm and the compensation due.

The facts

In November 2020, Mr A, a customer of bank X, subscribed for units in a real estate investment company on the recommendation of his adviser. At the end of the 5-month period for entry into possession (see box below), Mr A noticed that he had not received the dividends that he had been told he would receive. After consulting his adviser, he was told that his subscription form had not been sent to the real estate investment company.

As the funds he thought he had invested had been returned to him, Mr A asked X to compensate him for the income he would have received if the subscription had been taken into account.



X agreed to pay him compensation for the income not received for the period from the date of entry into possession of the units until the date on which the funds were returned to Mr A.

Mr A considered this compensation insufficient however, since, if he wished to reinvest his funds in real estate investment company units, there would be a further 5-month period for entry into possession, during which he would again not receive any dividends. Moreover, he also believed he should be compensated for revenue not received in the period between the date of return of the funds and the new subscription.

It was under these conditions that Mr A asked me to intervene.

It should be noted that real estate investment companies (SCPI) allow investors to become co-owners of real estate by buying units that are affordable on a modest budget. Real estate investment companies are called "residential" if they own real-estate assets for residential use, and "corporate" if they own real-estate assets for commercial use (offices, hotels, warehouses etc.). Unitholders are entitled to dividends representing a fraction of the rent received, generally in the form of interim dividends that may be quarterly, for example.

Real estate investment companies involve a liquidity risk as there is no secondary market for selling the units. Moreover, neither the capital invested nor the return are guaranteed.

As real estate investment companies invest in real estate assets, each new subscription must result in actual ownership of real estate. These new acquisitions, and leasing them, take time, hence the need for a period for entry into possession, which may last several months, during which investors receive no return.

The investigation

While investigating this case, I contacted the bank concerned to ask for its comments.

The bank acknowledged its mistake: the subscription form for the units was not sent to the investment management company.

On the other hand, it was not aware that its customer wanted to subscribe again. It appeared on the contrary, in the light of correspondence between the customer and his



adviser which was transmitted to me, that Mr A wanted to leave the bank in question and close his accounts there.

It was only during the mediation process that Mr A changed his mind and stated that he wished to subscribe for units in the real estate investment company again.

Recommendation

Noting that Mr A had indeed not stated that he wished to subscribe for units in the real estate investment company again, after the funds that were initially intended to be invested were returned to him, I considered that the bank had responded fairly by compensating him for the income he would have received for the period from entry into possession until Mr A's funds were returned.

Nevertheless, in my opinion I insisted on stating that in the event of a further subscription, the harm resulting from the lack of income paid during the period of entry into possession also had to be compensated for.

On the other hand, it did not appear to me that compensation was justified for income not received during the period from the return of Mr A's funds until the new subscription. At that time, Mr A had not in fact informed the bank concerned that he wanted to subscribe again. It was therefore not justified to ask the bank to compensate him on that account. Furthermore, since the funds initially intended for that investment had been returned to Mr A, he had free disposal of them and there was nothing to stop him investing them.

Lessons to be learned

Due to negligence, an institution may fail to send a customer's purchase order to the investment management company. It is then up to the institution at fault to return its customer to the position he would have been in if the subscription form had been correctly transmitted, in particular by compensating him for the harm resulting from loss of the income due to the unitholders.

Indeed, as I have already stressed several times, the distinctive feature of civil liability, as case law regularly states, is that it restores the balance destroyed as precisely as possible.


In this instance, the compensation should amount to the income not received from entry into possession of the units until the time that the investor recovered the sum he was deprived of in order to make the investment.



The solution would have been quite different if, on discovering the problem, the investor had immediately stated that he wished to subscribe for the units again. In that case, the compensation would have been equal to the amount of income not received plus the income that would have been received until the actual date of entry into possession, including any period required for administrative processing of the new application for subscription.

Similarly, the outcome would have been very different if Mr A's adviser had delayed returning the funds initially intended to subscribe for the units, depriving Mr A of disposal of them and the possibility of investing them elsewhere. A loss of profit of that kind constitutes a loss of opportunity which would need to be analysed in the light of elements showing the likelihood that Mr A would have given orders that would have been earned him profits.

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