DRN-3250016

The complaint

Mr B, through his representative, complains about the advice he received from Aquila Financial Services, a former trading style of True Potential Wealth Management LLP (TPWM) to switch his personal pension plan to a Self-Invested personal pension (SIPP). Following the transfer, some of the funds were used to invest in an unregulated collective investment scheme (UCIS).

All references to 'TPWM' will include all actions of Aquila Financial Services. All references to Mr B will include submissions by his representative.

What happened

The details of the complaint are well known to both parties, and therefore I have only summarised them below.

Mr B was advised to switch his personal pension benefits, valued at £80,105, to a SIPP by an adviser from TPWM in March 2011. At the time of advice Mr B was in his mid-forties, married with two children, and employed earning around £39,000 a year. He had cash savings of about £14,000 and an investment ISA. It was also noted that Mr B had preserved benefits in a defined benefit pension scheme. His expected retirement age was 65. TPWM assessed Mr B's attitude to risk (ATR) as a seven on a scale of one to ten.

The fact-find completed on 10 March 2011 notes that Mr B wanted to self-invest £50,000 of the transferred funds with the remainder to be invested as per his ATR with the underlying investment recommended by TPWM.

A suitability letter was issued on 11 March 2011. It confirmed Mr B's objectives as:

- full flexibility with investment options
- fund choices which now meet his current circumstances in accordance with his ATR
- improved fund management and performance

TPWM's adviser recommended Mr B switch his personal pension to a SIPP. In considering the alternatives, the suitability letter said:

> *You have a keen interest in shares and speculative investments. A SIPP gives you the opportunity to invest in areas of interest as you have accumulated a fund of £80,106 you feel you could benefit from investment such as shares and more speculative investments. You told me you wanted to self-invest £50,000 into funds/shares of your choice and asked me to advise you on the remaining value of the fund into a traditional fund management that matches your attitude to risk. In your opinion you are comfortable financially and feel you could earn substantial growth from high risk exposure to part of your retirement fund, with the understanding that with high risk strategies comes the same level of risk of losses to your money. We agreed that your objectives and priorities in relation to your retirement planning are:*
>
> - *You would also like to take a more active role in managing your pensions and*

investments within.
- *You would like to use some of your accumulated pension funds for more speculative investments with aim to higher potential return.*

Mr B's existing personal pension had an exit penalty of £233.64. Additionally, Mr B would be required to pay an initial charge of 2% of the transfer value and an annual policy fee of £540 plus VAT. There was also a 3% initial charge and 1.475% annual management charge for the funds recommended.

The net investment of £78,504 was to be split with £50,000 self-invested, £3,500 placed into a bank account to cover fees and the remaining £25,004 was to be directly invested into the Margetts Unit Trust funds, in line with his ATR as follows:

- 30% Margetts Select Strategy Fund
- 40% Margetts International Strategy Fund
- 30% Margetts Venture Strategy Fund

The SIPP application was completed on 14 March 2011 and Mr B's funds were transferred to the SIPP. On 8 April 2011 £50,000 was invested into the Seneca Oil and Gas Fund (Seneca). The remainder of Mr B's funds were invested as set out above.

In 2019 Mr B complained to TPWM about the advice to start a SIPP arguing that the SIPP and the Seneca investment were not suitable for him. TPWM initially said the complaint was made too late, so Mr B brought his complaint to this service.

One of our investigators looked into things and concluded that the complaint had been made in time. TPWM accepted this but maintained the advice to switch to the SIPP was suitable and it explained that it did not advise on the Seneca investment.

Our investigator thought that Mr B's complaint should succeed. He didn't think the evidence suggested the SIPP recommendation was suitable. He said the SIPP was more expensive and brought no additional advantages that could justify the extra cost. And the only justification given for the recommendation was to facilitate Mr B's objective to self-invest. The investigator noted that TPWM said it didn't advise on the Seneca investment, but he didn't think TPWM could avoid responsibility of considering the suitability of the proposed investment within the SIPP.

The investigator explained that COBS 9 (the Financial Services Authority's – as it was called at the time – Conduct of Business rules), required a firm making a personal recommendation in relation to a designated investment take reasonable steps to ensure that its recommendation was suitable. He said the rules required a firm to obtain the necessary information to have a reasonable basis for believing its client was able to bear and understood the risk of the transaction. He said the suitability of the SIPP couldn't be separated from the suitability of the investment it was recommended to facilitate.

The investigator also said that even though the Margetts funds recommended did match TPWM's assessment of Mr B's ATR, these investments were significantly more expensive than his previous pension plan. And they were only recommended as a solution to the funds not earmarked for self-investment. He concluded that had Mr B been given suitable advice, he would have remained in his existing personal pension arrangement.

TPWM didn't agree. It said contrary to what was asserted by the investigator, the timeline of events doesn't automatically suggest "*that TPWM could or should have been knowledgeable of the intended investment, or implicit in it*." It said there may have been a third party

involved that recommended the Seneca investment and in that case the responsibility for the investment would be on the third party. TPWM also asserted that Mr B was intent on making the investment and so would have followed this course of action regardless and so it couldn't see how it could be liable for any losses Mr B has suffered as a result. And it thought that if it was found at fault, "*a fair outcome would be for the redress to be the lost fund growth, but not the original capital*" given that the loss of capital was due to Mr B's actions and not those of TPWM. The investigator responded but wasn't persuaded to change his mind.

As no agreement could be reached, the complaint has been passed to me for a final 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 have reached the same conclusions as the investigator and for broadly the same reasons.

Before I explain why, I think it's important for me to recognise the strength of feeling Mr B and TPWM have about this matter. Both parties and their representatives, have provided detailed submissions to support their respective positions. I've read and considered carefully all the information that has been provided to this service in respect of this complaint. However, I hope neither party will take the fact my findings focus on what I consider to be the central issues, and not in as much detail, as a discourtesy. The purpose of this decision is not to address every point raised, but to set out my findings and reasons for reaching them.

Where the evidence is incomplete, inconclusive, or contradictory (as some of it is here), I reach my decision on the balance of probabilities – in other words, what I consider is more likely to have happened in the light of the available evidence and the wider circumstances.

I should also note that it's not my role to punish the business for any regulatory breaches either; that's the role of the industry regulator, the Financial Conduct Authority (FCA). My role is to decide if TPWM has done anything wrong and where appropriate award redress for any financial losses for which it is responsible and/or compensation for any distress and inconvenience caused. In deciding what's fair and reasonable, I must consider the relevant law, regulation and best industry practice, but perhaps unlike a court or tribunal I'm not bound by this. It's for me to decide, based on the information I've been given, a fair and reasonable outcome to the complaint.

It is not in dispute that TPWM provided regulated advice on the switch. In doing so it was required to follow the relevant rules set out by the regulator. All of this needs to be considered in light of the overarching Principles for Businesses – in particular, principles 1 (integrity), 2 (due skill, care and diligence), 6 (customer's interests) and 9 (reasonable care).

The purpose of TPWM's regulatory duties under the Financial Services and Markets Act (FSMA), the Principles and COBS is to provide consumer protection taking into account the differing risks involved in different kinds of investments, the differing degrees of experience and expertise consumers have and the needs consumers may have for the timely provision of information and advice that is accurate and fit for purpose.

So, amongst other things, to fulfil its duties TPWM had to know its client, act in his best interests, and give suitable advice. This included having a reasonable basis for believing that Mr B was able to financially bear any related investment risks consistent with his objectives. I

consider the risks of Mr B transferring his existing pension funds and the risks of his intended investments through the SIPP with these monies were related to the establishment of the SIPP itself.

As the investigator explained, the regulator has made it clear its view is that an adviser needs to consider the underlying investment when advising on a switch. Although the warnings the investigator referred to were issued after the advice was given in this case, they were clarifications of the existing rules, not additions or changes to them.

I think this is consistent with the nature of this type of transaction. The starting position was that Mr B had a personal pension plan. In order to switch to the recommended SIPP Mr B had to sell the rights/investments in his personal pension to fund the switch to the SIPP and buy new rights/investments in it. In doing so, the adviser needed to consider the suitability of the underlying investments to ensure the suitability of the transaction overall. Applying COBS 9.2.2, I'm satisfied TPWM couldn't simply ignore the context of why Mr B wanted a recommendation of a SIPP and what Mr B was intending to do once it was established. The setting up of the SIPP didn't stand alone, it was a single stream of advice and all part and parcel of the same transaction. In order to advise on the merits of setting up a specific SIPP product, TPWM needed to have regard for Mr B's wider circumstances, including how his funds were currently invested and what the intended investment strategy would be.

The fact find that was completed at the time of advice recorded that Mr B felt he could benefit from "*investments such as shares and more speculative investments*." It also said that Mr B had "*extensive experience of financial services, specifically making* [his] *own investment choices over the years*." And that Mr B had "*strong knowledge of investments and take*[s] *an active interest in following investment markets and reviewing* [his] *financial plans*." But the report contains very little information to substantiate these comments.

From what I've seen, Mr B had about £14,000 in savings and an investment ISA worth about £2,000. No information was provided about the underlying investment strategy within the ISA or his existing pension plan. Nor was there any detail about how involved Mr B had been in managing either of these plans. So I don't agree that the evidence demonstrates that Mr B was an experienced investor willing and able to understand and take the risks associated with the SIPP and subsequent Seneca investments. Mr B also had a deferred final salary pension, but I've not seen sufficient information to persuade me that this would enable him to bear an increased risk to this part of his retirement provision. Especially as the fact find seems to indicate that the personal pension plan made up the majority of his retirement provision.

TPWM have said that a third party may have been involved and it could have introduced Mr B to the Seneca investment. I've not seen sufficient evidence to conclude that this was the case, but even if so, this would not excuse TPWM from its obligation to provide suitable advice, which includes considering the intended investments within the SIPP.

It's also important to note that COBS 2.1.2R sets out clearly that a firm must not seek to exclude or restrict; or rely on any exclusion or restriction of any duty or liability it may have to the client under the regulatory system. So TPWM couldn't limit their obligations in COBS 9 by taking instructions from Mr B to advise only on the SIPP wrapper and just part of his intended investment within the SIPP. And although there is no evidence in this particular case whether TPWM knew Mr B was intending to invest in Seneca specifically, even if they didn't, in order to give suitable advice they needed to ask for this information.

The Seneca fund was unregulated and presented significant risks. Whilst I accept that Mr B did have some other pension provision and modest savings, I don't think this was sufficient to enable him to bear the risks of a complete loss of the £50,000 plus in his pension through

a speculative investment. And even if I accept that TPWM didn't know that Mr B intended to make this investment, it appears the primary reasons for recommending the SIPP was to facilitate Mr B's desire to self-invest. And it appears that TPWM knew that Mr B was interested in speculative investments. So it was required to do more to understand Mr B's circumstances, investment experience and objectives before recommending the switch to a SIPP.

As the regulator said "*if a firm does not fully understand the underlying investment proposition…then it should not offer advice on the pension transfer or switch at all as it will not be able to assess suitability of the transaction as a whole*" and that these "…*failings…are unacceptable and amount to conduct that falls well short of firms' obligations under our Principles for Businesses and Conduct of Business rules*" (FCA alert titled '*Pension transfers or switches with a view to investing pension monies into unregulated products through SIPPs - Further alert*', 28 April 2014).

This alert followed one issued by the regulator in 2013 that specifically referred to cases where advisers were under the false impression that could advise on the suitability of a SIPP in the abstract. Although these alerts were issued after the advice at issue here, TPWM's obligations in this regard stem from COBS 9 and the Principles, all applicable at the time of advice in 2011. These alerts just provide clarification and set out expectations from the regulator and good industry practice.

TPWM and Mr B were in an advisory relationship where TPWM was the expert and they had a duty to meet their regulatory obligations. As explained above, COBS 9 required TPWM to consider the wider suitability of Mr B's intended transactions when recommending a SIPP – whether he requested this or not. TPWM failed to do this and therefore I consider they did not act fairly or reasonably when providing their advice to Mr B.

Without considering the investment Mr B intended to make, I don't consider TPWM was able to give suitable advice on the remaining funds. Further, though the investments recommended do seem to match Mr B's ATR, I agree with the investigator that these investments were only made as a consequence of the transfer and the need to invest the remainder of the funds after the £50,000 earmarked for self-investment.

As such and taking all the circumstances of the sale into account, I'm not persuaded that the advice was suitable. In my view, Mr B's intended investment presented too great a risk given Mr B's financial position. From what I've seen, I don't think he had the necessary experience and knowledge to understand the risks related to the investments which were speculative and exposed him to the risk of complete loss, like the Seneca investment. Given his lack of investment experience, I'm not persuaded he was a credible self-investor. I can't see any persuasive reasons why Mr B needed to change his pension to a SIPP with more investment options.

I don't think TPWM met its obligations under COBS 9 and it shouldn't have recommended that Mr B give up his existing personal pension in order to open a SIPP facilitating the Seneca investment. And I think, on balance, if it had given suitable advice to remain in his existing scheme Mr B would more likely than not have followed that advice. Advice from a professional firm recommending him not to proceed would have carried significant weight. And I've not been presented with evidence that persuades me that Mr B was so strongly motivated to make the transaction that he would have decided to press ahead with it against professional expert advice.

Putting things right

Fair compensation

My aim is that Mr B should be put as closely as possible into the position he would probably now be in if he had been given suitable advice.

I take the view that Mr B would have remained with his previous provider, however I cannot be certain that a value will be obtainable for what the previous policy would have been worth. I am satisfied what I have set out below is fair and reasonable, taking this into account and given Mr B's circumstances and objectives when he invested.

What must TPWM do?

To compensate Mr B fairly, TPWM must:

- Compare the performance of Mr B's investment with the notional value if it had remained with the previous provider. If the actual value is greater than the notional value, no compensation is payable. If the notional value is greater than the actual value, there is a loss and compensation is payable.

- TPWM should add interest as set out below.

- TPWM should pay into Mr B's pension plan to increase its value by the total amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

- If TPWM is unable to pay the total amount into Mr B's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the total amount should be reduced to *notionally* allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mr B won't be able to reclaim any of the reduction after compensation is paid.

- The *notional* allowance should be calculated using Mr B's actual or expected marginal rate of tax at his selected retirement age.

- It's reasonable to assume that Mr B is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr B would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

- Pay to Mr B £250 for the inconvenience caused to his retirement planning.

Income tax may be payable on any interest paid. If TPWM deducts income tax from the interest it should tell Mr B how much has been taken off. TPWM should give Mr B a tax deduction certificate in respect of interest if Mr B asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest

SIPP	Some liquid/some illiquid	Notional value from previous provider	Date of 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 investment at the end date.

It may be difficult to find the *actual value* of the portfolio. This is complicated where an asset is illiquid (meaning it could not be readily sold on the open market) as in this case. TPWM should take ownership of any illiquid assets by paying a commercial value acceptable to the pension provider. The amount TPWM pays should be included in the actual value before compensation is calculated.

If TPWM is unable to purchase illiquid assets, their value should be assumed to be nil for the purpose of calculating the *actual value*. TPWM may require that Mr B provides an undertaking to pay TPWM any amount he may receive from the illiquid assets in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. TPWM will need to meet any costs in drawing up the undertaking.

Notional Value

This is the value of Mr B's investment had it remained with the previous provider until the end date. TPWM should request that the previous provider calculate this value.

Any withdrawal from the SIPP should be deducted from the notional 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 TPWM totals all those payments and deducts that figure at the end to determine the notional value instead of deducting periodically.

If the previous provider is unable to calculate a notional value, TPWM will need to determine a fair value for Mr B's investment instead, using this benchmark: FTSE UK Private Investors Income Total Return Index. The adjustments above also apply to the calculation of a fair value using the benchmark, which is then used instead of the notional value in the calculation of compensation.

The SIPP only exists because of illiquid assets. In order for the SIPP to be closed and further fees that are charged to be prevented, those assets need to be removed. I've set out above how this might be achieved by TPWM taking over the illiquid assets, or this is something that Mr B can discuss with the provider directly. But I don't know how long that will take.

Third parties are involved, and we don't have the power to tell them what to do. If TPWM is unable to purchase the illiquid assets, to provide certainty to all parties I think it's fair

that it pays Mr B an upfront lump sum equivalent to five years' worth of wrapper fees (calculated using the fee in the previous year to date). This should provide a reasonable period for the parties to arrange for the SIPP to be closed.

Why is this remedy suitable?

I've decided on this method of compensation because:

- Mr B wanted Capital growth and was willing to accept some investment risk.
- If the previous provider is unable to calculate a notional value, then I consider the measure below is appropriate.
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with 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 Mr B's circumstances and risk attitude.

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £160,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £160,000, I may recommend the business to pay the balance.

My final decision

Determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My decision is that True Potential Wealth Management LLP should pay Mr B the amount produced by that calculation – up to a maximum of £160,000 (including distress or inconvenience but excluding costs) plus any interest on the amount set out above.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £160,000, I recommend that True Potential Wealth Management LLP pays Mr B the balance plus any interest on the amount as set out above.

This recommendation is not part of my determination or award. It does not bind True Potential Wealth Management LLP. It is unlikely that Mr B can accept my decision and go to court to ask for the balance. Mr B may want to consider getting independent legal advice before deciding whether to accept this decision.

If True Potential Wealth Management LLP does not pay the recommended amount, then any portfolio currently illiquid should be retained by Mr B. This is until any future benefit that he may receive from the portfolio together with the compensation paid by True Potential Wealth Management LLP (excluding any interest) equates to the full fair compensation as set out above.

True Potential Wealth Management LLP may request an undertaking from Mr B that either he repays to True Potential Wealth Management LLP any amount Mr B may receive from the portfolio thereafter or if possible, transfers the portfolio to TPWM at that point.

Mr B should be aware that any such amount would be paid into his pension plan so he may have to realise other assets in order to meet the undertaking.

True Potential Wealth Management LLP should provide details of its calculation to Mr B in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 19 April 2022.

Jennifer Wood
Ombudsman