DRN-3412826

The complaint

Mr H complains, with the help of a representative, that Mr D of Wealthwise CFM Ltd (WCFM) an appointed representative (AR) of ValidPath Limited (ValidPath) gave him unsuitable advice to invest in Stirling Mortimer 6 (Morocco).

What happened

WCFM advised Mr H to switch existing pension provision to a SIPP. The SIPP application form, signed on 17 July 2007, confirmed that Mr H was:

- Married
- Employed
- Intending to retire at 75
- 56 years old

His funds were to be allocated to a deposit fund. Mr D of WCFM was listed as the financial adviser in respect of the SIPP, the FCA (then FSA) number recorded in this section was ValidPath's. It was also recorded that WCFM was to be paid 5% initial commission and fund-based renewal commission at a rate of 0.4%.

Mr D of WCFM also confirmed Mr H's identity and signed a declaration confirming the sale was advised and non-distance (face-to-face).

On 10 August 2007, Mr H's ceding scheme wrote to the SIPP provider enclosing a cheque for £69,120.08, the transfer value of his existing pension. The plan had a protected tax-free cash payment of £31,927 (in excess of 25%).

A subscription contract for preference shares in Stirling Mortimer was issued in May 2008, the agent copy was sent to Mr D of WCFM.

Background to the complaint

One of our investigators looked into Mr H's complaint, he concluded that this complaint was one we could consider and that it should be upheld. Briefly he found that:

- The complaint had been brought in time.
- Mr H's complaint was about the advice to invest in Stirling Mortimer.
- On balance, WCFM advised Mr H both in relation to the pension transfer and the subsequent investment in Stirling Mortimer, both were regulated activities.
- WCFM was acting as AR of ValidPath when undertaking the activities complained about.
- ValidPath accepted responsibility for the activities that are the subject of this complaint.
- WCFM didn't follow the processes ValidPath had in place but this was a matter of how it conducted business not what business it conducted – and, this didn't stop ValidPath from being responsible in this instance.

- The advice to invest in Stirling Mortimer wasn't suitable.

Mr H accepted the investigator's findings. ValidPath disagreed and made further submissions. I've considered these submissions in their entirety, here I've just included a brief summary of what I consider to be the key points. Broadly speaking, ValidPath has raised two key objections a) the complaint has been brought too late and, b) it's not responsible for the activities that are the subject of this complaint. In relation to each ValidPath's raised a number of points. I've summarised the crux of these, including ValidPath's most recent submissions, in turn below.

The complaint has been brought too late:

- The issues that plagued Stirling Mortimer were well known, documented and publicised more than three years before the complaint was raised.
- Due to WCFM's ongoing relationship with Mr H, it's implausible that he wasn't reasonably made aware of the problems with the Stirling Mortimer investment more than three years before the complaint was raised.
- Based on the annual statements sent to him by the SIPP provider, it was clear that the Stirling Mortimer investment hadn't grown significantly over a number of years and then dropped sharply.
- A benchmark property index had gone up by around 94% between April 2008 and July 2015. So, Mr H ought reasonably to have become aware that he had cause for complaint more than three years before this complaint was raised.
- Two similar complainants, who invested in Stirling Mortimer around the same time, confirmed they became concerned about their investment in 2014 on receiving statements from Sanlam.
- It's clear Mr H ought reasonably to have become aware he had cause for complaint more than three years before he made the complaint in 2018.
- The complaint had therefore been brought too late.

It provided copies of the information sheets completed by the complainants relating to them becoming aware of a problem in 2014. The sheets have been anonymised. These do confirm that they both became aware of problems with the fund in early 2014. I would note that the forms are almost identical not only in circumstances but also in the precise wording used to describe what happened and when.

ValidPath's not responsible for the activities complained about:

- WCFM wasn't acting as its agent in relation to the activities complained about and Mr H wasn't ValidPath's client. The only reference to him on its system is WCFM recording him as a *potential* client. None of the documentation that would've been completed in the course of a regulated advice process was completed.
- WCFM wasn't permitted to undertake this type of business. And ValidPath didn't accept responsibility for this business.
- All product provider agencies were administered at network level, ValidPath didn't have an agency with Stirling Mortimer – WCFM took steps to circumvent this process.
- Schedule 3 of the AR agreement simply lists all of the investments listed in the relevant definition, this doesn't mean that ARs were permitted to advise on any of these investments.
- WCFM were limited to providing services in line with the bespoke terms of business provided to it by ValidPath, this excluded unregulated investments.
- None of the processes put in place were followed and WCFM actively hid these activities from ValidPath.

I sent my provisional decision to Mr H and ValidPath explaining that I thought this complaint is one we can consider and that it should be upheld. I invited both parties to make any further submissions they would like me to consider. Mr H accepted my provisional decision. ValidPath confirmed that it didn't have anything further to add, beyond the submissions it had already made.

This case has now been passed back to me for a decision. Neither party had anything to add in response to my provisional decision. I took into account all of the submissions made previously and my findings remain as set out within my provisional decision. I've broadly reiterated these below.

As I've previously noted, there's little in the way of documentary evidence available in this case, based on what we've been told, this appears to be because the file the AR had was destroyed.

What I've decided – and why

I must decide whether we can consider a complaint on the basis of the jurisdiction rules that apply. I've concluded the complaint is one we can consider.

The parties to this complaint have provided detailed submissions to support their position and I'm grateful to them for taking the time to do so. I've considered these submissions in their entirety. However, I trust that they will not take the fact that my decision focuses on what I consider to be the central issues as a discourtesy. The purpose of this decision isn't to address every point raised in detail, but to set out my findings, on what I consider to be the main points, 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 most likely to have happened in the light of the available evidence and the wider circumstances.

When we receive a complaint about the acts or omissions of an appointed representative, the usual jurisdiction tests apply:

- Did the actions being complained about take place when the representative was an appointed representative of the principal?
- Does the complaint relate to an activity we cover?
- Do we have territorial jurisdiction?
- Is the complainant eligible?

In this case, I'm satisfied these tests are met. Mr H is an eligible complainant, we have territorial jurisdiction and WCFM was an appointed representative of ValidPath at the time of the acts complained about. I'll now turn to the issues of jurisdiction that are in dispute, namely whether Mr H complained in time and whether ValidPath can be held responsible for the actions of its appointed representative.

Has the complaint been brought in time?

Our jurisdiction is set out in the Financial Conduct Authority's handbook. These rules are referred to as DISP.

DISP 2.8.2:

"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

…

(2) more than:

(a) six years after the event complained of; or (if later)
(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;

unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;

unless:

(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R or DISP 2.8.7 R was as a result of exceptional circumstances;

…"

In line with the above, we *cannot* consider a complaint where it has been brought:

- More than six years after the event took place; *or, if later,*
- More than three years after the complainant became aware, or *ought reasonably* to have become aware, that they had cause for complaint; unless
- The business consents to us looking into the complaint despite it having been brought out of time; or
- Exceptional circumstances apply, for example, where the complainant has been incapacitated – and, as a result of this, was unable to bring the complaint to this service within the applicable time limits.

It isn't in dispute that the event happened more than six years before the complaint was raised. So, I've focused on whether or not Mr H became – or ought reasonably to have become – aware of his cause for complaint more than three years before he raised the complaint.

ValidPath says that the press coverage, drop in value of the investments and the meetings that Mr H ought to have been having with WCFM ought reasonably to have led to Mr H becoming aware that he had cause for complaint more than three years before he raised the complaint.

The press coverage ValidPath referenced are predominantly articles in the financial press. I wouldn't necessarily expect a retail client to be aware of these. There may have been a few articles in more mainstream press. But, there wasn't a national press campaign or prolific coverage to the point that it would be reasonable to conclude Mr H ought reasonably to have become aware of the problems faced by the investment – or that the investment wasn't suitable for him – via media coverage.

ValidPath's arguments as to why the complaint should be time-barred focus heavily on what WCFM ought to have known and relayed to Mr H and what *should've* been discussed in meetings WCFM *ought* to have had with Mr H. The test is what Mr H knew or ought reasonably to have known – this is based on information available to *him*. I can't decide what

Mr H knew – or ought to have known – based on what WCFM ought to have done, in the absence of evidence that it actually did this. I haven't been provided with any evidence that Mr H had meetings with WCFM within which he was told about any problems with the investment more than three years before the complaint was raised.

In making the above findings, I acknowledge there may have been an ongoing relationship with WCFM. However, I haven't seen any evidence that WCFM actually held regular reviews with Mr H or that it discussed the problems with Stirling Mortimer during any such meetings. To be clear, I don't disagree with ValidPath that under the circumstances WCFM should've held meetings with Mr H and that it should've *at least* informed him about the issues with Stirling Mortimer. But, that's not evidence that this happened – or, in turn, that Mr H knew or ought reasonably to have known that he had cause for complaint.

We have copies of the annual statements Mr H received in respect of his SIPP. Based on these, the SIPP provider didn't drop the value of the investment on the annual statements provided to Mr H until around a year before he complained. In the absence of evidence that Mr H was otherwise made aware of the issues with the Stirling Mortimer investment, I think these would've reassured him that the investment retained significant value. Mr H complained to ValidPath within a reasonable timeframe of the SIPP provider dropping the value of the investment significantly.

Most recently ValidPath submitted that based on the statements provided, the Stirling Mortimer investment didn't increase substantially over the years in value and then dropped significantly. This compares to a benchmark property index which went up by 94% between April 2008 and July 2015. So, it's not feasible that Mr H reasonably didn't become aware that he had cause for complaint.

It also provided copies of the information sheets completed by two complainants in support of their position. The sheets have been anonymised. These do confirm that they both became aware of problems with the fund in early 2014. As noted in the background to this complaint, the forms are almost identical not only in circumstances but also in the precise wording used to describe what happened and when.

I wouldn't expect a retail client, like Mr H, to actively check a benchmark or compare one of his investments to others that may be a reasonable comparison, to assess its performance. It hasn't been suggested that Mr H wasn't willing to accept any risk or that he was led to believe the investment was capital protected, such that any drop in the investment should've led him to become aware that he had cause for complaint on the basis that the investment was unsuitable or mis-sold. I don't think the fact that it may have been clear that the investment wasn't performing as hoped is sufficient.

Whilst it's possible that there were investors who may have become aware earlier that they had cause for complaint, I don't think this means that Mr H should necessarily have become aware at that stage. There are numerous reasons why different individuals may reasonably become aware of a problem/their cause for complaint at different times, such as their:

- experience/knowledge
- expectations of the investment
- reasons for having concerns
- receipt of different information about the investment

I'm not persuaded that Mr H ought reasonably to have become aware that he had cause for complaint more than three years before he complained in this instance.

Taking everything into account, I think the complaint has been brought in time.

Other jurisdiction considerations

The Financial Services and Markets Act 2000 (FSMA) Section 22 (Regulated Activities) provides that:

> *(1) An activity is a regulated activity for the purposes of this Act if it is an activity of a specified kind which is carried on by way of business and –*
>
> *(a) relates to an investment of a specified kind; or*
>
> *(b) in the case of an activity of a kind which is also specified for the purposes of this paragraph, is carried on in relation to property of any kind.*

DISP 2.3.1R says:

> *"The Ombudsman can consider a complaint under the Compulsory Jurisdiction if it relates to an act or omission by a firm in carrying on one or more of the following activities:*
>
> *(1) regulated activities (other than auction regulation bidding); …*
>
> *or any ancillary activities, including advice, carried on by the firm in connection with them."*

And

DISP 2.3.3G, which is guidance for the interpretation of our compulsory jurisdiction, says:

> *"Complaints about acts or omissions include those in respect of activities for which the firm…*
>
> *is responsible (including business of any appointed representative or agent for which the firm… has accepted responsibility)."*

Under section 39(3) of FSMA:

> "*The principal of an appointed representative is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility".*

Exemption of ARs

FSMA says under Article 19, '*The general prohibition'*, that:

> *(1) No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is –*
>
> *(a) an authorised person; or*
>
> *(b) an exempt person.*
>
> *(2) The prohibition is referred to in this Act as the general prohibition.*

Article 39 of FSMA sets out the exemption of ARs to the above, in so far as relevant, it says:

> *(1) If a person (other than an authorised person) –*
>
> *(a) is a party to a contract with an authorised person ("his principal") which –*
>
> *(i) permits or requires him to carry on business of a prescribed description, and*
>
> *(ii) complies with such requirements as may be prescribed, and*
>
> *(b) is someone for whose activities in carrying on the whole or part of that business his principal has accepted responsibility in writing,*
>
> *he is exempt from the general prohibition in relation to any regulated activity comprised in the carrying on of that business for which his principal has accepted responsibility.*

The business for which an AR can be exempt is set out in FSMA 2000 (Appointed Representatives) Regulations 2001 (2001 No. 1217) this includes advising on investments and arranging deals in investments.

So, for me to conclude that this is a complaint that we can consider I need to consider three questions:

1. What are the acts that are the subject of this complaint?
2. Were the acts about which Mr H complains done in the carrying on of a regulated activity, or an ancillary activity carried on in connection with a regulated activity?
3. Were those acts the acts of the principal firm, ValidPath*?*

What are the acts that are the subject of this complaint?

Mr H complains that, given what's happened in respect of Stirling Mortimer, the investment wasn't suitable for him.

In a complaint letter to ValidPath, it was confirmed that:

> *"The complaint is about the suitability of the investment advice received by our client* [Mr H's full name] *when he was advised to invest monies that were invested into the SIPP* with [name of SIPP provider] *into the Stirling Mortimer No 6 Morocco Fund on or around the 15th April 2008."*

And

> "[Mr H's full name] *was not at the time of advice (and never have* [sic] *been in the past) an "Experienced investor" or a "Professional investor" and could not of* [sic] *been classified by your firm as a "High Net Worth Individual" and/or a "Sophisticated Investor". So why was* [Mr H's full name] *advised by a ValidPath Limited CF30 to invest in an Unregulated Collective Investment Scheme (UCIS). The Stirling Mortimer No 6 Morocco Fund was classified as a UCIS."*

Based on his submissions, I think his complaint is focused on the advice to invest in Stirling Mortimer not the wider transaction. In particular, that the fund wasn't suitable for him and shouldn't have been recommended to him.

Were the acts about which Mr H complains done in the carrying on of a regulated activity, or an ancillary activity carried on in connection with a regulated activity?

Regulated activities are set out in Part II of FSMA (Regulated Activities) Order 2001 (RAO). They include:

- Advising on investments where the advice relates to "*buying, selling, subscribing for or underwriting a particular investment which is a security or a contractually based investment*" (article 53 RAO).

- Arranging deals in investments "*for another person…to buy, sell, subscribe for or underwrite a particular investment*" which is a security or relevant investment (article 25 RAO).

There's limited evidence from the point of sale, as I've explained in the background to the complaint. I think it's clear that WCFM was acting as Mr H's adviser in respect of the initial transfer and, on balance, the subsequent investment in Stirling Mortimer.

WCFM and Mr H had an ongoing advisory relationship. The SIPP application listed WCFM as Mr H's adviser in respect of the transaction. WCFM was acting as Mr H's adviser on an ongoing basis. The subscription contract for the purchase of shares in Stirling Mortimer was sent to WCFM as "agent" in respect of the purchase. There's no evidence that Mr H was an experienced investor or that he came across the Stirling Mortimer investments himself or through the involvement of another party. Based on Mr H's circumstances and what he's told us, I think it's more likely than not that Mr H's investment in the Stirling Mortimer fund came about as a result of advice given to him by WCFM to invest in that fund.

Indeed, WCFM doesn't appear to dispute that it recommended this investment to Mr H.

Taking all of this into account, I think that it is more likely than not that WCFM did advise Mr H to invest in Stirling Mortimer.

Further, it's my view that this activity qualifies as the regulated activity of 'advising on investments', as defined in the RAO.

It isn't contested that the Stirling Mortimer investment was a specified investment. There is, unfortunately, very little information available now regarding the details of the fund and how it operated. I'm aware that the fund was part of the Stirling Mortimer Global Property Fund PCC Ltd ("SMGPF"), a protected cell company with limited liability based in Guernsey. My understanding is that the fund had at least some of the features of a collective investment scheme (funds were pooled together and investors didn't have day to day control over their management) but it was neither authorised nor recognised by the FSA or FCA (in other words, if it was a collective investment scheme, it would've been a UCIS). I'm also aware that investors like Mr H were effectively purchasing shares in the fund and I've seen Mr H's subscription contract which showed the subscription on his behalf of preference shares in the Stirling Mortimer fund. I accept that there is, in turn, likely to be more than one possible basis on which the activity was regulated under the RAO.

Overall, I am satisfied that Mr H's complaint relates to activities done in the carrying on of the regulated activity of advising on investments.

The next question is whether that business was business for which ValidPath had accepted responsibility. To the extent that it was merely the purchase of shares, I can see no effective restriction on the carrying on of that activity in the AR Agreement. ValidPath has said that the

Stirling Mortimer investment was business that was expressly restricted by operation of the Terms of Business that would've been applicable between Mr H and WCFM. It maintains that the Terms of Business restricted WCFM from advising on such investments. And, overall, that this wasn't business that WCFM was permitted to undertake or for which it, in turn, had accepted responsibility. I've given careful thought to what ValidPath's said in this regard in the following section of this decision.

Were those acts the acts of the principal firm, ValidPath*?*

As set out above, DISP 2.3.3G says:

> *"Complaints about acts or omissions include those in respect of activities for which the firm…is responsible (including business of any appointed representative or agent for which the firm…has accepted responsibility)."*

It follows that the question then is: was the advising activity conducted by WCFM for Mr H an activity for which ValidPath is responsible?

When I'm considering responsibility by way of s39 FSMA, the test is: was that activity done in the carrying on of business for which ValidPath has accepted responsibility?

ValidPath's adamant that it isn't responsible for the sale of the Stirling Mortimer investment and any advice given in respect of this. Its assertions are based on a number of arguments, in particular:

- WCFM wasn't acting as its agent in relation to the sale of the Stirling Mortimer investment complained about.
- It didn't authorise WCFM to undertake the type of business that's the subject of this complaint.
- The way in which WCFM went about undertaking the business is in breach of the compliance and procedural requirements in place.
- WCFM actively hid its activities.

At the time of the advice WCFM was an AR of ValidPath. This is confirmed by the FCA's register and I've not seen any evidence that would lead me to conclude that WCFM was acting in any capacity other than as AR of ValidPath at the time of the activities in question. It's clear from the available paperwork that WCFM was and had been acting as Mr H's investment adviser in respect of his pension.

Mr H did have a client profile on ValidPath's systems albeit it wasn't activated. It recorded Mr D as the adviser and listed various products Mr H held, including the SIPP. ValidPath also told us there was a record of the receipt of commission in respect of the SIPP.

I'm satisfied it's clearly documented that WCFM, as AR of ValidPath, was acting as Mr H's adviser in respect of the switch that made the investment in Stirling Mortimer possible. And, confirmation of the purchase of the shares was sent to WCFM as agent.

It's clear that WCFM as AR of ValidPath was appointed adviser in respect of the SIPP and, on balance, I think it's most likely it was acting in this capacity when it recommended the Stirling Mortimer investment. I'm satisfied that WCFM was acting as AR of ValidPath when undertaking the acts complained about.

So, I've gone on to consider if the acts that are the subject of this complaint comprise business for which ValidPath had accepted responsibility.

To answer this, I've carefully considered the scope of the authority provided by ValidPath to WCFM by means of the appointed representative agreement.

ValidPath says it sent WCFM an agreement for it to execute, but WCFM didn't return this and in turn it doesn't have a copy of a signed agreement.

Instead, ValidPath has provided a copy of an agreement which another of its ARs was subject to and said that the same terms applied to WCFM. I've seen nothing to indicate that might not be the case. I therefore consider it reasonable to accept this standard agreement as indicative of the appointed representative contract agreed between ValidPath and WCFM.

That contract set out the business for which ValidPath accepted responsibility. I've reviewed the agreement carefully. In short, my view is that ValidPath had accepted responsibility for the activities of WCFM that are the subject of Mr H's complaint. I'll explain my view below.

In so far as relevant, the agreement provided that:

2. *The Company accepts responsibility for the activities of the Member carrying on investment business of the kind and for the purposes for which the Member is hereby appointed.*

3. *The Member hereby agrees to act as an agent on behalf of the Company in respect of the – Products (as defined herein) pursuant to the written Terms and Conditions and hereby confirms he/she has read and fully understood to the same Terms and Conditions.*

The functions of the member are defined as:

> *2.1 The member is appointed for the purpose of procuring or endeavouring to procure clients and prospective Clients to enter into Contracts and (for that purpose) giving advice to clients and prospective clients about entering into such Contracts.*

The relevant terms of the clause are defined as:

- ***Contracts*** are defined as *contract(s) for the Products entered into or to be entered into by the client with the Institutions.*

- ***Products*** are defined as *policies of assurance, annuity contracts, pensions plans or policies and such other products and services (including but without limitation critical illness and permanent health insurance policies) and term assurance policies as shall from time to time be dealt in by the Company subject (in the case of investment business) to the provisions of Schedule 3.*

- ***Institutions*** are defined as *any insurance or assurance company, life office, broker, unit trust manager, stockbroker, building society, bank, finance house or other financial institution.*

The member's duties are set out under clause 4:

> *"The Member and the Controller(s) shall have the following obligations to the*

Company and shall abide by and procure that Registered Individuals abide by the following rules and regulations:

- *the Member and the Controller(s) agree and covenant to carry on investment business activities strictly in accordance with paragraph 10, and Schedule 3 (see also FSA Scope of Permission)."*

Clause 10.2 limits the AR's activities:

> *"The Member shall limit its activities in relation to investment business and conduct and transact only those classes of investment in relation to which the Company has authorisation, as detailed in Schedule 3"*

Schedule 3 sets out that:

> *"In accordance with paragraphs 4.1 and 10 above, the Member, its Controller(s), Officers and Registered Individuals agree to partake in the following investment business activity only, for which the Company is authorised to transact by the FSA under its scope of permissions notice…"*

Schedule 3 states that the relevant 'Regulated Activity' is 'Advising on investments' and the 'Investment Types' are as follows:

- Certificates representing certain security
- Debenture
- Government and public security
- Life Policy
- Rights to or interests in investments (Contractually Based Investments)
- Rights to or interests in investments (Security)
- Share
- Stakeholder pension scheme
- Unit
- Warrant

It follows that in order for ValidPath to accept responsibility, the relevant activity by WCFM must be of a 'kind' for which WCFM was appointed and for a 'purpose' for which WCFM was appointed. Clause 2.1 explains the 'purpose' of the appointment, namely procuring clients "*to enter into Contracts and (for that purpose) giving advice to clients and prospective clients about entering into such Contracts"*. It follows that any advice to actual or prospective clients about entering into a Contract that's directed towards procuring the client to enter into a Contract is within the AR agreement's 'purpose'. It's therefore important to establish what are, and aren't, 'Contracts' under the AR agreement and this turns on the definitions of 'contracts', 'institutions' and 'products' (above).

Contracts are defined within the AR agreement, as set out above, as *"contract(s) for the **Products** entered into or to be entered into by the client with the **Institutions"*** [my emphasis].

It's clear from Schedule 3 that permitted investment types included a 'unit'. A 'unit' is defined in the FCA Handbook Glossary as units in a collective investment scheme (article 81 RAO), which, if it met the definition of a UCIS, would cover the Stirling Mortimer investment. However, even if it doesn't meet the definition of a UCIS, permitted investment types also include shares. As I've said above, Mr H purchased preference shares in the Stirling Mortimer fund.

An ‘institution’ is defined as including a ‘financial institution’. This is further defined in the AR agreement, but it’s given a broad definition generally and its meaning will depend on the context in which it is used. In this case, it seems fairly clear that a financial institution was intended to cover the range of institutions that might provide the type of investment contract permitted by Schedule 3. From this, it seems reasonable to say that either Heritage International Fund Managers Limited, as administrators of Stirling Mortimer Global Property Fund PCC Limited, or Stirling Mortimer itself would qualify as an ‘institution’ as required.

In its submissions to this service, ValidPath’s referred to its product provider agencies. It says it didn’t have an agency with Stirling Mortimer and that it was for it as the authorised firm to enter into agency agreements. ValidPath says that because it had no agency agreement with Stirling Mortimer – because WCFM hadn’t followed the established process – this wasn’t business for which it had accepted responsibility. The AR agreement didn’t limit the institutions WCFM could deal with to those with which ValidPath had an agency agreement. I’ve carefully considered what ValidPath’s said but I’m not persuaded that the terms of the AR agreement preclude WCFM from advising Mr H to invest in Stirling Mortimer or that this wasn’t business for which it accepted responsibility.

All in all, in my view, advice to Mr H to invest in Stirling Mortimer is advice on investments in line with ValidPath’s permissions as set out in Schedule 3 and there’s nothing within the definitions of contracts, products or institutions respectively which would preclude this advice from being in line with the purpose and scope of WCFM’s appointment.

Taking all of this into account, I think that by way of the AR agreement, ValidPath permitted WCFM to advise Mr H on its behalf on the merits of utilising a portion of his pension to invest in Stirling Mortimer.

The next question is whether there are any other provisions which may restrict the scope of that permission.

The Terms of Business

I note that the Terms of Business submitted by ValidPath as applicable between WCFM and Mr H provided that:

> *“Wealthwise Corporate Financial Management Ltd is permitted to arrange (bring about) deals in investments and advice on investments. The particular investment types relate to life assurance, pensions, investments in* ***authorised collective investment schemes****, Unit Trust PEPs and ISAs* [my emphasis]*.”*

ValidPath has told us this meant that bringing about deals in ***unauthorised*** collective schemes was prohibited under the relevant terms of business. And, that even if Stirling Mortimer wasn’t a collective investment, it maintains that, unregulated/unauthorised investments – such as Stirling Mortimer – weren’t permitted under its Terms of Business provided to WCFM.

At the outset, I note of course that the Terms of Business were distinct from the appointed representative agreement. When signed they were agreed between WCFM and its client and were designed to set out the services and obligations offered by WCFM to its client. They were directed at the relationship between WCFM and its client. The appointed representative agreement on the other hand, was a contract that spoke to the obligations and duties in the relationship between WCFM and Validpath.

It follows that, because they were distinct agreements, the apparent restriction on the scope of the permissions (outlined above) will only have the effect ValidPath says it has if we can reasonably say that the restriction was *incorporated into* the AR agreement (if it isn't, then the restrictions in the Terms of Business will merely regulate the dealings between WCFM and Mr H and not between ValidPath and WCFM).

With this in mind, I note that the Terms of Business are referenced in the AR agreement, in that it specifies that these needed to be provided to every client in a timely manner, in the format prescribed by ValidPath and in compliance with the FCA's (then FSA) rules. Clause 4.4 reads:

> *"The Member shall conduct business with a client only on the Company's Terms of Business (which shall be supplied timeously to every client) in the format prescribed by the Company and in compliance with the FSA rules as amended from time to time."*

I've therefore considered whether that clause might have effectively incorporated the Terms of Business into the AR agreement.

Clause 4.4 appears to be directed at two matters:

(a) It requires that the client agreements entered into between WCFM and its clients shall be provided in good time on ValidPath's prescribed Terms of Business. It is in turn aimed at the establishment of the contract in the prescribed form – i.e. WCFM is only to use ValidPath's Terms of Business and must provide those to the client at an early stage. It doesn't seem to create a duty owed by WCFM to ValidPath to comply with the provisions contained in that form.

(b) It requires that in conducting business with clients, WCFM must comply with FSA Rules.

Neither of those matters specifically concerns either the kinds of products that can be sold or the purpose for which they can be sold. Given that those matters are both the subject of very specific delimitation in the AR agreement and Schedule 3, it seems doubtful to me that Clause 4.4 is intended to impact them. If that were the case, I would expect to see clear language to that effect. I recognise that ValidPath's interpretation might be implied from the words *"shall conduct business with a client only on the Company's Terms of Business"*, but I consider the plain, sensible interpretation is that the clause is aimed at compliance with the *form* and *timing* of the Terms of Business and not with the scope of responsibility, which is more clearly expressed with some particularity in Schedule 3 of the AR agreement.

In making this point, I also note that in any event, the relevant clause under 'our Services' in the Terms of Business, which tells the client the particular investment types to which WCFM's arranging and advice will relate, appears to me to be informational, rather than prescriptive and binding on WCFM – i.e. it can more readily be interpreted as an informal summary for the client of the 'kinds' of products identified in the AR agreement. It doesn't have the force of an operative contractual condition that prohibits WCFM from giving the customer other kinds of advice.

In any case, I tend to think that if there were any conflict between the AR agreement and Terms of Business as to the scope of the former, I would expect the AR agreement's terms and conditions to be definitive rather than the more informational terms in the Terms of Business, as they are specifically and clearly aimed at establishing the permitted kinds of products.

All in all, it's my view that the scope of the permissions is confined to the relevant provisions in the AR agreement and that the meaning of those provisions isn't affected by the operation of the Terms of Business, which regulates the relationship between WCFM and the client and, in doing so, merely provides information about the type of investments that may be recommended to them.

Compliance breaches

ValidPath's also argued that a number of its internal processes hadn't been followed by WCFM when conducting the activities in question, and that in turn the activities fell outside the scope of its accepted responsibility. However, I should make it clear that a failure to follow a requirement that regulates the manner in which an authorised activity is conducted doesn't necessarily put that activity outside the operation of s39 (as an activity for which the principal firm didn't accept responsibility).

I accept that there are processes that WCFM didn't follow when transacting the relevant business for Mr H. For example, it didn't complete the appropriate paperwork and the business wasn't reported to ValidPath, amongst other things. In my view these requirements are standards to be met in respect of *how* an AR should go about undertaking business on behalf of ValidPath rather than effective restrictions on the type of business they can undertake.

Failure to follow such processes in this instance doesn't mean that ValidPath isn't responsible for the advice complained about. In *Anderson v SenseNetwork* [2018] EWHC 2834, in the High Court decision that was later upheld by the Court of Appeal, the judge said that:

> *"139. I … agree with the Claimants that the authorities indicate that it is appropriate to take a broad approach when seeking to identify the "business for which he has accepted responsibility".* ***The fact that there may not be actual authority for a particular transaction, for example because of breach of an obligation not to offer an inducement (Ovcharenko), or because there was no authority to advise on a related transaction (TenetConnect), or because certain duties needed to be fulfilled before a product was offered, does not mean that the transaction in question falls outside the scope of the relevant "business" for which responsibility is taken*** [my emphasis]. *Equally, the approach must not be so broad that it becomes divorced from the terms of the very AR agreement relied upon in support of the case that the principal has accepted responsibility for the business in question."*

Taking everything into account, I'm of the view that WCFM's failure to follow certain procedures doesn't alter the effect of s39 in this case and I'm satisfied that we can consider Mr H's complaint against ValidPath.

I've taken into account everything ValidPath has submitted about WCFM's behaviour – and it's clear that there have been problems in the relationship – but, I'm satisfied that this doesn't mean that ValidPath isn't responsible for its former AR's activities which are the subject of this complaint.

Merits of the complaint

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

When considering what is fair and reasonable, I've taken into account relevant law and regulations; regulator's rules, guidance and codes of practice; and what I consider to have been good industry practice at the time.

WCFM was required to follow the relevant rules set out by the regulator. These include the overarching Principles for Businesses – principles 1 (*integrity*), 2 (*due skill, care and diligence*), 6 (*customers' interests*) and 9 (*reasonable care)* are of particular relevance here.

Amongst other things, to fulfil its duties WCFM had to know its client, act in his best interests and give suitable advice.

As I've mentioned on a number of occasions, there isn't a lot of paperwork from the point of sale. Based on this, I've not seen enough to conclude WCFM gathered enough information about Mr H's circumstances and knowledge to satisfy the above requirements. However, I do acknowledge the possibility that there was further paperwork that is now not available.

Mr H says that the Stirling Mortimer investment wasn't suitable for him and shouldn't have been recommended to him because he wasn't an experienced investor or high net worth individual.

The Stirling Mortimer investment was an esoteric, high-risk investment. The fact it was an unregulated investment also meant Mr H wouldn't be covered by the Financial Services Compensation Scheme (FSCS) if it failed. While I think the evidence indicates Mr H was willing to accept some risk with the money in his SIPP, I don't believe he was a particularly knowledgeable or sophisticated investor who should've been advised to put substantial monies from within his pension in an investment of this type.

Mr H's pension provision was intended to provide him with an income in retirement, investing a large proportion of this pension in a high-risk esoteric investment put his pension provision at significant risk.

Taking everything into account, I think the Stirling Mortimer investment was most likely unsuitable for Mr H and that he shouldn't have been advised to make it. It's for this reason that I'm upholding his complaint.

It hasn't been suggested that Mr H was an insistent client or that he was otherwise likely to go against suitable advice from his adviser. But, for the sake of completeness, I've considered this – and, I haven't seen anything that would lead me to conclude that Mr H was likely to disregard suitable advice. I find that Mr H wouldn't have invested in Stirling Mortimer had suitable advice been given by WCFM.

Under the circumstances, I find that it's fair and reasonable for ValidPath to compensate Mr H for the financial losses he's suffered as a result of the unsuitable advice to invest in Stirling Mortimer. In addition to the financial loss established, I think that the loss of a significant amount of his pension provision caused Mr H distress and inconvenience and that ValidPath should compensate him for this.

Putting things right

My aim is that Mr H 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 H would have invested differently. It's not possible to say *precisely* what he would have done differently. But I'm satisfied that what I've set out below is fair and reasonable given Mr H's circumstances and objectives when he invested.

What must ValidPath do?

To compensate Mr H fairly, ValidPath must:

- Compare the performance of Mr H's investment with that of the benchmark shown below. If the actual value is greater than the fair value, no compensation is payable.

  If the fair value is greater than the actual value there is a loss and compensation is payable.

- ValidPath should add interest as set out below:

- ValidPath should pay into Mr H'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 ValidPath is unable to pay the total amount into Mr H'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 H won't be able to reclaim any of the reduction after compensation is paid.

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

- For example, if Mr H is likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. However, if Mr H would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation.

- Pay to Mr H £750 for the distress caused by the loss of a significant portion of his pension.

Income tax may be payable on any interest paid. If ValidPath deducts income tax from the interest it should tell Mr H how much has been taken off. ValidPath should give Mr H a tax deduction certificate in respect of interest if Mr H 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
Stirling Mortimer	Still exists but illiquid	FTSE UK Private Investors Income Total Return Index	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. ValidPath should take ownership of any illiquid assets by paying a commercial value acceptable to the pension provider. The amount ValidPath pays should be included in the actual value before compensation is calculated.

If ValidPath is unable to purchase illiquid assets, their value should be assumed to be nil for the purpose of calculating the *actual value*. ValidPath may require that Mr H provides an undertaking to pay ValidPath 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. ValidPath will need to meet any costs in drawing up the undertaking.

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 Stirling Mortimer investment 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 ValidPath 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've decided on this method of compensation because:

- Mr H wanted Income with some 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 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 H's circumstances and risk attitude.

SIPP fees

Based on Mr H's more recent statements, Mr H holds little in the SIPP other than the illiquid investment. If Mr H wishes to but is unable to close his SIPP, because of the Stirling Mortimer investment once compensation has been paid (which is possible due to the ongoing uncertainty with Stirling Mortimer), ValidPath should pay an amount into the SIPP equivalent to five years' worth of the fees (based on the most recent year's fees) that will be payable on the SIPP. I say this because Mr H wouldn't be stuck with an illiquid investment but for ValidPath's unsuitable advice. So, it wouldn't be fair for him to have to pay fees to keep it open. And I'm satisfied five years will allow sufficient time for things to be sorted out with Stirling Mortimer, and the SIPP to be closed.

My final decision

I've found that this is a complaint we can consider, and I uphold the complaint. My final decision is that ValidPath Limited should pay the amount calculated as set out above.

ValidPath Limited should provide details of its calculation to Mr H in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 10 May 2022.

Nicola Curnow
Ombudsman