DRN-3661849

The complaint

Mr and Mrs C are complaining about Personal Touch Financial Services Ltd (Personal Touch) because they say they received advice from one of its appointed representatives (AR) – Financial Services Scotland (FSS) - to invest in an unregulated investment in StoreFirst. They say the StoreFirst investment is illiquid and not providing any income and should never have been recommended to them.

What happened

Mr and Mrs C are represented by a Claims Management Company (CMC). They say that in 2012, they received advice from Mr L who worked for FSS to invest £120,000 in StoreFirst. They say they were advised to disinvest existing investment bonds with Aviva to make the Store Pod investment.

Mr and Mrs C say the returns the expected from the investment have not materialised and they are worried that they have lost the money they invested in StoreFirst.

The CMC says that the StoreFirst investment should never have been recommended to Mr and Mrs C as they were ordinary retail customers – not sophisticated or high net worth clients. As a result, the CMC says that Personal Touch should pay Mr and Mrs C compensation for the unsuitable advice of Mr L.

In summary, the CMC provided the following evidence and arguments in support of the complaint:

- A fact find, recommendation letter and related documents from Mr L to Mr and Mrs C showing that he had given advice to them about their RBS ISA investment in 2012 and recommended that they invest in an Skandia ISA. This was a separate transaction to the one being complained about, but the CMC said the documents showed that Mr L had given this advice representing FSS. The CMC said this was evidence that Mr L had given regulated advice in an FSS capacity at the same time as the advice about StoreFirst and therefore his advice about the Avia bonds and StoreFirst was also likely to have been given in his FSS capacity.

- An undated hand-written letter to Aviva signed by Mr and Mrs C asking that their bond investments be disinvested. The CMC said that this letter had been written by Mr L and this evidenced that he had advised Mr and Mrs C about the disinvestment.

- A document showing that Mr L had witnessed Mr and Mrs C's signatures on the StoreFirst investment lease agreement dated April 2012.

- As Mr L had given the advice about the regulated Aviva bonds whilst representing FSS, Personal Touch (as the principal of FSS) was responsible for the linked advice about the StoreFirst investment. The CMC said this was consistent with a previous decision of the ombudsman service.

Personal Touch didn't uphold the complaint. In summary, it said:

- Mr L was Mr and Mrs C's son-in-law and that there was no evidence that Mr L gave the advice about the Aviva bonds or StoreFirst in any capacity linked to FSS.

- Mr L would have known that he was not authorised to give advice about StoreFirst and that is why there is no documented audit trail of this advice on their databases.

- Mr L had omitted to include the Aviva bond details in the fact find for the FSS advice relating to the ISA investment. This indicated that he had conducted any work relating to the Aviva bond and StoreFirst investment completely separate to his FSS work.

- If Mr L had given the advice, he would have been in beach of the contract that Personal Touch had with FSS. Therefore, Personal Touch was not responsible for the advice under section 39 of the Financial Services and Markets Act 2000.

- The above points meant that this wasn't a complaint that the ombudsman service could consider against Personal Touch.

- Mr and Mrs C were also not as financially unsophisticated as the CMC had suggested. They were directors of a business consultancy company. And it wasn't clear what loss Mr and Mrs C had suffered from the StoreFirst investment.

One of our investigators looked at the complaint. Having considered all the evidence, his view was that the complaint wasn't one that we had jurisdiction to consider, for essentially the same reasons set out by Personal Touch. He said that it was most likely that Mr L had advised Mr and Mrs C in a personal capacity.

I was then asked to issue a decision on the matter. Personal Touch at this point also said the complaint was time barred under our rules as Mr and Mrs C ought to have known they had complaint when StoreFirst stopped making paking payments to them under the lease.

I issued a provisional decision on 29 July 2022. In summary, my findings were that:

- Mr and Mrs C had complained within time. They received scheduled payments for around four years and I didn't think one deficient payment alone in around May 2016 was enough for them to have realised they had cause for complaint.

- The complaint did involve a regulated activity as it related to the disinvestment of the Aviva bonds for investment into StoreFirst.

- Mr L was likely to have given the advice in his capacity as an FSS adviser – an appointed representative of Personal Touch.

- FSS was authorised to give advice on the Aviva bonds. The advice to disinvest the bonds and invest in StoreFirst was a single stream advice and intrinsically linked. As such, Personal Touch did accept responsibility for the advice being complained about.

- Given all of the above, we had jurisdiction to consider the complaint against Personal Touch.

- The advice was not suitable and therefore Personal Touch should compensate Mr and Mrs C for their losses.

Mr and Mrs C had nothing further to add.

Personal Touch's response focused solely on the time bar issue. It said:

- The burden on proving that the complaint was made in time was on Mr and Mrs C.
- The case law on the Limitation Act 1980 (which was analogous to our DISP rules) warned against being too generous to claimants and unfair to the defendants in interpreting rules.
- It was not appropriate to add "waiting time" to a missed or reduced rent payment.
- Mr and Mrs C were due either monthly payments or quarterly payments due in May 2016 – on a guaranteed basis. This was not paid.
- The payments received until that time were previously made on a reliable basis, were of a large size and presented in the initial advice as guaranteed.
- So, any reasonable person would have been immediately concerned on the non-receipt of the rent payment – it could not be reasonable for Mr and Mrs C to take stock.
- It may well be that Mr and Mrs C's close personal relationship with Mr L may have given them pause about making a complaint. But this is irrelevant to the test that needs to be made in this case.

I recently wrote to the parties explaining why I still felt the complaint had been made in time and shared some further evidence. Personal Touch added to their submissions as follows:

- A manuscript note on the Store First Lease submitted as part of the complaint material set out that the Mr and Mrs C's understanding when making the investment was that the returns would be guaranteed for 5 years.
- The complaint was clearly about the fact that the guaranteed benefits did not arise.
- So Mr and Mrs C's knew or ought to have known they had cause for complaint in in March 2016 when the guaranteed rental period ended after 4 years.
- I had provided undue latitude to the complainants. Even if the non-payment or reduced payment of rent was when Mr and Mrs C's knew or ought to have known they had cause for complaint, I had effectively given them additional time – "3 years plus some thinking time").

My findings on jurisdiction

I have looked at all the evidence and submissions to decide whether this is a complaint we have jurisdiction to consider.

The only further submissions following my provisional decision were about whether the complaint had been brought in time.

Has the complaint been brought in time?

The rules which govern the operation of our service are part of the regulator's handbook. The Dispute Resolution (DISP) section sets out that we can't consider a complaint that has been made to the respondent business (or referred to us) more than:

- Six years after the matter complained about; or (if later)

- Three years after Mr and Mrs C became aware, or ought reasonably to have become aware, that they had cause for complaint.

So what exactly is Mr and Mrs C's complaint? Given the arguments, I've necessarily gone back to look again at what Mr and Mrs C (via the CMC) said in their original complaint letter:

> *"Your appointed representative Financial Services Scotland (FSS) has arranged unregulated investments for our clients. As you will be aware, this type of investment is not deemed suitable for the majority of clients. As our clients are "retail customer" and are neither sophisticated or high net worth clients this type of investment should not have been promoted to our clients.*
>
> *In 2012 following discussions with [Mr L], our clients invested £120,000 in Store Pods with Group' First. The investments came with guaranteed returns. The returns have not materialised and our clients have become increasingly concerned about their investment and the possibility of losing their capital.*
>
> *Our clients financed the investments by surrendering existing investment bonds held with Aviva. This was under the advice of your adviser [Mr L]. We have evidence that [Mr L] wrote the surrender instruction for the clients to sign. In addition we have evidence of his involvement regarding the actual investment:"*

I think the "discussions" referred to above are said to form the advice.

I think it is also worth quoting from Mr and Mrs C's complaint form submitted to our service:

> "*The appointed representative (AR) of the firm has promoted unregulated investments to our client. He has advised the client on the surrendering of regulated investments to finance these unregulated investments. These investments should never have been promoted to our client as they are not Sophisticated Investors and they do not meet the FCA criteria of a Sophisticated Investor*."

Looking at this, my view is that Mr and Mrs C's complaint relates to both advice and arrangements for the investment. The thrust of the complaint is that the investment is unsuitable for retail customers and should never have been promoted to Mr and Mrs C. The investment returns that they had been told would come with the investment have not materialised and this too is a part of Mr and Mrs C's complaint. There is a connection with their unhappiness about returns not materialising and what they were told about guaranteed returns. The connection isn't clear but, having considered Personal Touch's recent submissions carefully, I don't agree that the complaint is about the guaranteed period ending earlier than they were advised. The complaint does not say this. Neither is the complaint about the returns being paid to them late.

So, I have approached the time bar issue with this in mind.

There is no documentary evidence about the advice or when exactly the advice was given. But it appears that the Aviva bonds were disinvested in February 2012. The StoreFirst investment was made a short time later in April 2012. So I think it's likely that the advice was given in February 2012. And the arrangements would have been made at the same time.

Mr and Mrs C referred their complaint to Personal Touch on 27 June 2019. This is clearly more than six years after the acts being complained of. So, the crucial issue for me to decide is therefore whether the complaint was also made outside the second part of the time limit – i.e. whether it was made more than three years after Mr and Mrs C knew, or ought reasonably to have known, they had cause to complain. Because the complaint was made on 27 June 2019, the question becomes whether they knew, or ought reasonably to have known, they had cause to complain before 27 June 2016.

Mr and Mrs C have provided statements and emails which show that the last scheduled guaranteed full quarterly payment made to them by StoreFirst was in February 2016.

I've made further enquiries about what happened next. It appears that StoreFirst exercised its option to break the lease by which it was the direct tenant of Mr and Mrs C's StoreFirst pods in March 2016. This meant that from this time onwards, Mr and Mrs C would receive rental income not from StoreFirst as guaranteed rent, but directly from people wishing to rent the storage pods with the process managed by StoreFirst.

As part of the evidence in this case, Mr and Mrs C provided a copy of the StoreFirst lease. This lease had a manuscript note at the end of the document – written by Mr C. This said:

"Advised: Guaranteed Income over first 5 years (8-10-12%). Actioned over year 1-4 – not actioned year 5. Broke"

This suggests that Mr and Mrs C were advised by FSS that there would be 5 years of guaranteed payments. Personal Touch says this clearly shows that Mr and Mrs C ought to have known they had cause for complaint as soon as the guaranteed payments stopped after 4 years – some time between March-May 2016.

But, as I've explained above, my view is that the complaint is not that the guaranteed payments stopped earlier than expected. And the CMC has told us Mr C wrote the note on the lease when asking the CMC to review the grounds of his complaint. So it is not contemporaneous evidence of what Mr and Mrs C were advised in 2012 in any event.

The CMC has also said this note was made by Mr C who didn't understand matters as well as Mrs C and he'd got the guaranteed payments mixed up with the fact that they (Mr and Mrs C) could exercise a "buy-back" option in year 5. I think this is credible as I've seen correspondence relating to a buy/sell back option in year 5. Furthermore, the note does not follow the clear terms of the lease in two respects:

- The lease clearly allowed for both parties to break the lease after the end of year 4. So the "guaranteed" payments would end after year 4 of the lease if the break option was exercised (as indeed it ultimately was). The note doesn't reflect this.

- If the break option was not exercised, there would be a guaranteed rent for years 5 **and** 6 – not just year 5 as set out in the manuscript note.

So, overall, I think the manuscript note has limited value is assessing whether Mr and Mrs C have made their complaint in time. Their complaint is not that the guaranteed rents ended earlier than expected. And I don't think it's likely that they were advised that there were 5 years of guaranteed payments - I think they would have known that there was a possibility

that StoreFirst could exercise its break option after 4 years on 20 April 2016. The letter from StoreFirst exercising the break option did not suggest that there would be any problems going forward for Mr and Mrs C and the correspondence between StoreFirst and Mr and Mrs C does not indicate that this came as a surprise to them.

So, I don't think Mr and Mrs C ought reasonably to have known they had cause for complaint in March 2016 when StoreFirst exercised its break option. Put simply, I don't think the exercise of the break option would have put Mr and Mrs C on notice that the advice they'd received in 2012 was unsuitable.

The CMC has explained what happened next as follows:

- *We would confirm that no payment was due in April/May. The payment made Feb 2016 for £3080 was the last instalment of guaranteed rent payments as per the contract. This payment was made in advance and covered up to 20 April 2016. For the avoidance of doubt no payments were missed as per the guaranteed rental for years 3 & 4. Bank statements attached will confirm this. As per the contract Store First exercised their right to break the lease on the second termination date which was 20 April 2016. Going forward income would be dependent on the actual pods being rented out. Store First confirmed to the clients that payments would be made in arrears going forward. There was nothing to suggest or support at this point that they would be any worse off.*

- *We would confirm that the next payment made to the clients was for £1197.09 and it was paid 22/07/2016.*

- *The clients realised that the payment was reduced at the point of payment i.e. 22/07/2016. (please note however that this was not a full quarter rental – we understand that this payment covers from 21 April 2016 – 31 May 2016)*

- *They did nothing regarding the reduced payment received 22/07/2016. Mrs C understood it was a pro rata payment as not a full quarter. She also knew that not all their pods had tenants at that time. Mrs C was communicating with Store First.*

I think this is credible and is supported by some of the email communications I've seen between Mrs C and StoreFirst. At the end of April 2016, Mrs C was told that their pods were tenanted, that payments would be made quarterly in arears and that the guaranteed payments had come to an end.

I think Mrs C was expecting the next rental payment at the end of June 2016 - as evidenced by an email dated 7 July 2016 when Mrs C chased StoreFirst for the rent that she was expecting but had not received by that point:

> *"Unfortunately, I find myself yet again having to e-mail. Can someone please advise me why there is still no payment of rental due. Payment should have been made around the 24th June. What is the problem? I am becoming increasingly concerned."*

After further emails, Mr and Mrs C received payment of £1,197 on 22 July 2016.

So, it seems clear that, at least until the end of June 2016, the arrangement with StoreFirst was working as it should have done. Mr and Mrs C had received guaranteed rent for 4 years (quarterly in advance) but StoreFirst had then exercised its break option. Mr and Mrs C expected to receive direct rental returns thereafter (quarterly in arrears). I think they could reasonably have expected this to be either at or even above the level they had received

during the rental period. There was no indication that this would not be the case. They did not know the rent would be significantly reduced when the lease was broken.

I appreciate that the payment was due "around" 24 June 2016 and wasn't in fact made until 22 July 2016. But, in the circumstances of this case, I don't think this means that Mr and Mrs C ought reasonably to have known they had cause for complaint on before 27 June 2016 about the advice they'd received. That is, as I've said above, the key date as it is three years before the complaint was made by Mr and Mrs C. I don't think, non-payment of the rent on 24 June 2016 means that they knew or ought to have known *on that date* that they had cause for complaint about the advice they'd received in 2012. Payments can be delayed for any number of reasons – including simple administrative delays. This was also clearly a time when things were in a state of flux after the lease break option was exercised and the changeover from guaranteed rents from StoreFirst to direct rental payments.

I think the nature of the complaint made by Mr and Mrs C is such that I think they ought reasonably to have been aware they had cause to complaint when payments continued to be either not made or not made as per their expectations. They would have realised then that the investment was riskier than they had been advised, that it was not operating as they expected it to as it was producing significantly less rent than during the guaranteed period. Mrs C also clearly had unresolved concerns about how the investment was being managed by StoreFirst. So I think this should all have called into question the suitability of the advice they'd received from FSS to make the investment. But I don't think Mr and Mrs C ought reasonably to have been aware of this before 27 June 2016.

Mr and Mrs C complained on 27 June 2019. So, my conclusion is that the complaint made by Mr and Mrs C is within our time limits.

Does the complaint involve a regulated activity?

DISP 2.3.1 states that 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 specified activities, including regulated activities and ancillary activities.

Regulated activities are specified in Part II of the Regulated Activities Order 2001 (RAO) and include advising on investments and arranging investments.

Mr and Mrs C's complaint is about the advice they say was given to them to disinvest their Aviva bonds and to make the investment in StoreFirst. There is no letter of recommendation or other document directly evidencing the advice. The evidence, other than Mr and Mrs C's recollections, consists simply of a handwritten letter signed by Mr and Mrs C sent to Aviva asking for the disinvestment of the bonds and a Store Pod lease witnessed by Mr L with his profession as "IFA". But I'm satisified that they did indeed receive such advice. I don't think they undertook these acts without this being recommended to them by Mr L. Personal Touch hasn't disputed this either - it simply says that Mr L gave the advice in a personal capacity.The Court of Appeal in *Adams v Options UK* [2021] EWCA Civ 474 has recently made clear that the StoreFirst investment is not a "relevant investment" or "security" under the RAO. So giving advice about the StoreFirst investment is not itself a regulated activity.

However, this complaint also involves advice to disinvest the Aviva bonds. And the disinvestment of the bonds was intrinsically linked to the investment in StoreFirst. These were components of a single stream of advice. The bonds are a relevant investment under the RAO. So, I'm satisfied the case does involve a regulated activity because part of the act being complained about was a regulated activity.

Is Personal Touch responsible (under our rules) for the acts being complained about?

The DISP rules do allow us to consider complaints against businesses such as Personal Touch involving their appointed representatives and agents.

As DISP 2.3.3G explains, "*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)*".

This echoes s.39 (3) of the Financial Services and Markets Act (FSMA), which states:

> *(3)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.*

Therefore, under s.39 of the FSMA, the principal is required to accept responsibility for the business being conducted by the appointed representative. And recent case law makes it clear a principal firm can limit its responsibility for only part of the 'business' conducted by an appointed representative. The recent court cases illustrate some instances of what this means in practice and I've considered this complaint with these developments in mind.

As a starting point, in order for us to hold Personal Touch responsible for the complaint, I need to be satisfied that one of its appointed representatives or agents was involved in the act being complained about in their capacity as appointed representative or agent. In this case, as there is no dispute Mr L gave advice, the question is whether he was acting for Personal Touch when he did so.

FSS was an appointed representative of Personal Touch and Mr L was employed by FSS as one of its registered individuals at the relevant time. However, Personal Touch says that Mr L was Mr and Mrs C's son in law and was acting in a purely personal capacity when giving the advice about StoreFirst. Furthermore, Personal Touch says Mr L knew that he wasn't authorised to give advice about StoreFirst on behalf of FSS and this is why Mr L didn't document the advice or use FSS details at any point. Personal Touch says this is in stark contrast to the fully documented advice about Mr and Mrs C's ISAs which Mr L was authorised to give advice about.

On the other hand, Mr and Mrs C say that Mr L gave them advice about the Aviva bond and StoreFirst in his capacity as a FSS adviser. They say he gave the advice at the same time as the documented FSS advice about their ISAs and believed he was acting for FSS.

We have asked Mr L for his views. He no longer works for FSS and has no links to Personal Touch. He told us that he gave the advice about the bonds and StoreFirst whilst representing FSS, but didn't document this as he was told not to by his colleagues at FSS. He says he didn't know the investment was high risk because it was his first job as an adviser.

I am wary of placing much weight on Mr L's evidence. He is still a close family member of Mr and Mrs C and so he may be trying to help them with their complaint. He must also have known it was more than unusual to be asked by his firm to not document his advice – he likely knew he was advising about something that something that was high risk. So, I've taken account of the evidence only in so far as it is supported by other evidence or the circumstances involved.

Having considered matters carefully, I think Mr L was likely to have been acting in his capacity as an FSS adviser when giving advice about disinvesting the Aviva bonds and investing in StoreFirst. My reasons are as follows:

- The fact find for the ISA advice is dated 14 February 2012 and the recommendation letter is dated 20 February 2012. The handwritten letter to Aviva is undated but Aviva sent the disinvested funds to Mr and Mrs C on 25 February 2012 (the StoreFirst investment wasn't completed until April 2012, but I accept that this was because of the time the investment took to process rather than when the advice was given). So I think the evidence suggests that the meetings (it isn't clear whether there was one or more meetings) between Mr L and Mr and Mrs C relating to their ISAs, Aviva bonds and StoreFirst investment happened at around the same time. I don't think it's likely that Mr L changed roles at some point during the meetings with Mr and Mrs C when advising them about the ISAs, Aviva bonds and StoreFirst investment. I think it's more likely that he gave all the advice in the same capacity – as an FSS adviser.

- Mr L adopted this same approach in another case I've seen that does *not* involve a family member. In that case, just like this one, the consumers say they were given documented FSS advice about their ISAs and undocumented advice about disinvesting their bonds and reinvesting in StoreFirst. The similarities between the cases (including a hand written letter disinvesting the bonds) are striking. The consumers, like Mr and Mrs C believed Mr L to be acting for FSS at all times. This, to me suggests Mr L probably didn't simply make a one off personal recommendation to Mr and Mrs C that was unconnected to his FSS role. In other words, there is more than one complainant who says that Mr L was acting as an FSS adviser at all times. That is significant in my view.

- In other cases I've seen, Mr L appears to have been involved with a separate company - Lauthan Developments – and introduced consumers to another regulated firm for pension advice and then went on to give advice about StoreFirst representing FSS and signed declarations to this effect. So Mr L has, in other cases, given advice on StoreFirst representing FSS. Although the advice isn't documented here, Mr L clearly was not averse to giving advice on StoreFirst in his FSS professional capacity. I think it's likely that Mr L didn't document the advice as being from FSS in this case because he knew that Personal Touch didn't permit its advisers to give advice about these types of investments – not because he was giving a personal recommendation unconnected to his FSS role. He may have left more of a paper trail in other cases linking the advice to FSS, but that is not fatal to what I think happened here.

Personal Touch points out that Mr and Mrs C may not be completely unsophisticated investors as they later became directors of a company which worked in "business consultancy". That seems to happened much later in 2016 and was a short lived venture as the company was also dissolved in 2016. As such, I don't think it's relevant to my consideration of the issues here. But I accept that Mr and Mrs C should arguably have questioned why the advice about the bonds and StoreFirst was not documented in the same way as the advice for the ISAs. However, I also appreciate that, given the close family relationship with Mr L, they are likely to have trusted that everything was being done appropriately and in their interests and so may have overlooked important details. I give weight to the latter point.

On the balance of probabilities, my view is that Mr L was representing FSS when giving

advice to Mr and Mrs C to disinvest their Aviva bonds and reinvest in StoreFirst and that Mr and Mrs C proceeded on this basis too.

As I've said above, Personal Touch isn't responsible for all acts of its appointed representatives. The crucial issue is whether Mr L was acting within the terms of the contract between FSS and Personal Touch when conducting the acts which are the subject of this complaint.

Personal Touch has said the terms of its contract with FSS limited the business that FSS was allowed to carry out to a list of specific activities and specific products. That list did not include investments such as StoreFirst.

However, the list of activities and products that FSS could advise on included bonds and included Aviva as an authorised product provider. So, my view is that FSS was authorised to give advice about the merits of buying and selling Mr and Mrs C's Aviva bonds. That is what happened here.

Of course, this complaint involves advice about StoreFirst too. But, even if Personal Touch didn't give its authority for FSS to give advice about StoreFirst, this was essentially one act – a single stream of advice to sell the Aviva bonds to buy StoreFirst. In such situations there's well established case law that we can hold the principal responsible for the act even if part of what was done was not authorised. In *Martin v Britannia [1999] EWHC 852 (Ch)* and *Tenetconnect Services Ltd v Financial Ombudsman and another [2018] EWHC 459 (Admin)*, the courts held that advice couldn't be confined to one part of an overall transaction and that acts can be "intrinsically linked". In this case, the advice about selling the bonds and the advice to make the investment in StoreFirst were, in my view, so closely connected that they were intrinsically linked – and part of the same activity.

So, I think Personal Touch did, under section 39 FSMA, accept responsibility for the acts conducted by Mr L in recommending disinvestment of the Aviva bonds for the investment in StoreFirst. So, we have jurisdiction to consider the merits of Mr and Mrs C's complaint against Personal Touch – which I now do below.

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.

In giving advice to Mr and Mrs C, Mr L ought to have made a recommendation that was consistent with their investment objectives and their personal and financial circumstances. He should given a written recommendation with reasons. It doesn't appear he did this before recommending the disinvestment of the Aviva bonds to make the investment in StoreFirst. As I've said above, I think that's because he knew that Personal Touch did not permit such investments. But as I've also explained, that does not mean that Personal Touch isn't responsible for what's happened.

Mr and Mrs C's details (apart from their Aviva bonds) were recorded in the fact find completed by Mr L in respect of their ISAs. In brief:

- Mr C was 64, Mrs C 61.
- Both were retired and their sole source of income was their pensions, which were modest.
- They had approximately £100,000 invested in stocks and shares ISAs.
- They had approximately £10,000 in savings.

- They had assets – mainly consisting of their home – totalling £250,000.
- They had a medium risk profile.

Mr L didn't record details of Mr and Mrs C's Aviva bonds. These had a value of approximately £88,000. It also appears that Mr and Mrs C had some other savings through which they ultimately made up the shortfall for the £120,000 investment in StoreFirst once they had disinvested their bonds.

Mr and Mrs C have told us that they were looking to increase their retirement income at the time in 2012, but couldn't afford to take risks.

Looking at the above, I don't think Mr and Mrs C were experienced or sophisticated investors. I think they were reliant on the advice from Mr L. And I don't think they were prepared to, or had the capacity to, take risks with any investment funds at their disposal.

Mr and Mrs C were given advice by Mr L to invest a significant sum into StoreFirst. This was an unregulated investment with a limited track record and no investor protection – so it was high risk and speculative. There was a possibility it would fail and Mr and Mrs C's entire investment would be lost. So, I think the advice Mr L on behalf of FSS gave to Mr and Mrs C to disinvest their Aviva bonds and invest in StoreFirst was clearly unsuitable.

As such, I think Personal Touch should now compensate Mr and Mrs C for their losses.

Putting things right

In assessing what would be fair compensation, I consider that my aim should be to put Mr and Mrs C as close to the position they would probably now be in if they had not been given unsuitable advice.

I think Mr and Mrs C would have invested differently. It is not possible to say *precisely* what they would have done, but I am satisfied that what I have set out below is fair and reasonable given Mr and Mrs C's circumstances and objectives when they invested.

What should Personal Touch do?

To compensate Mr and Mrs C fairly, Personal Touch must:

- Compare the performance of Mr and Mrs C's investment with that of the benchmark shown below and pay the difference between the *fair value* and the *actual value* of the investment. If the *actual value* is greater than the *fair value*, no compensation is payable.
- Personal Touch should also pay interest as set out below.

Income tax may be payable on any interest awarded.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
StoreFirst	Still exists but illiquid	For half the investment: FTSE UK Private	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if

		Investors Income Total Return Index; for the other half: average rate from fixed rate bonds			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.

I understand that the Store First investment has a nil value and is unlikely to provide any returns in the future. So the actual value will be nil. Personal Touch should take ownership of the investment, but if it can't or chooses not to do so, I understand Mr and Mrs C have the option of returning the Store First investment to the freeholder for nil consideration.

In the event that Mr and Mrs C decide not to transfer the investment to the freeholder they should be aware that they will be liable for all future costs associated with the investment such as business rates, ground rent and any other charges. They should also be aware it is unlikely they will be able to make a further complaint about these costs.

Fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, Personal Touch should use the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

Any additional sum that Mr and Mrs C paid into the investment should be added to the *fair value* calculation at the point it was actually paid in.

Any withdrawal (e.g. in this case the rental payments received by Mr and Mrs C from the StoreFirst 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 Personal Touch totals all those payments and deducts that figure at the end to determine the fair value instead of deducting periodically.

Personal Touch should also pay Mr and Mrs C £500 for the considerable distress and inconvenience caused to them by the unsuitable advice.

Why is this remedy suitable?

I have chosen this method of compensation because:

- Mr and Mrs C wanted Income with some growth with a small risk to their capital.
- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to their capital.

- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is a mix of diversified indices representing 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.

- I consider that Mr and Mrs C's risk profile was in between, in the sense that they were prepared to take a small level of risk to attain their investment objectives. So, the 50/50 combination would reasonably put Mr and Mrs C into that position. It does not mean that Mr and Mrs C would have invested 50% of their money in a fixed rate bond and 50% in some kind of index tracker fund. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mr and Mrs C could have obtained from investments suited to their objective and risk attitude.

My final decision

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 that Personal Touch Financial Services Limited pays the balance.

Determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My decision is that Personal Touch Financial Services Limited should pay the amount produced by that calculation up to the maximum of £160,000 plus any interest set out above.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £160,000, I recommend that Personal Touch Financial Services Limited pays Mr and Mrs C the balance plus any interest on that amount as set out above.

This recommendation is not part of my determination or award. Personal Touch Financial Services doesn't have to do what I recommend. It's unlikely that Mr and Mrs C can accept my decision and go to court to ask for the balance. Mr and Mrs C may want to get independent legal advice before deciding whether to accept this decision.

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

Abdul Hafez
Ombudsman