DRN-3837357

The complaint

Mrs H complains about advice she says she was given by Portland Financial Services Limited, an appointed representative (AR) of Sesame Limited, to withdraw funds from a Scottish Widows Investment Bond and invest the money in a Stirling Mortimer No. 7 Cape Verde (SM7) investment. This was a high-risk, unregulated investment and it now appears that Mrs H has lost a significant amount of money. Mrs H thinks that Sesame is responsible for her loss.

Mrs H's representative made this complaint on her behalf, but for ease of reading, I'll simply refer to Mrs H.

What happened

Mrs H says that in 2008, Mr S, of Portland, advised her to withdraw £20,000 from a Scottish Widows Investment Bond and invest in SM7, an unregulated investment. In October 2008, €25,816 was invested in SM7. Unfortunately, this investment appears to have performed badly and Mrs H is worried that she's lost a significant amount of money.

Mrs H considers that Portland gave her unsuitable advice to encash funds from the Scottish Widows Bond and invest in SM7. In brief, Mrs H felt the SM7 investment had been unsuitable for her, given the high-risk nature of it. She said she didn't want to take risks with her funds, which she intended to use during her retirement. As Portland's principal, Mrs H believes that Sesame should be held responsible for her losses and should put her in the financial position she'd have been in had her funds remained invested in the Scottish Widows bond. And so she complained to Sesame about the investment advice she'd been given by Portland.

Sesame didn't think it was responsible for Mrs H's losses. Briefly, it said that given SM7 had been an unregulated, high-risk investment, it wouldn't have given Portland permission to sell it because it didn't allow the sales of these types of contract. It said the advice had been given outside of Portland's permissions and Sesame's knowledge. And it said it had no record of any documentation for the advice Mrs H had been given.

Moreover, Sesame considered that Mrs H had made her complaint out of time. It said that following the global crash of 2008, the Spanish property market had fallen into recession. And in 2010, fraud had been discovered in the SM7 fund. It also said that investors in the fund had been issued with newsletters and in 2017, a newsletter was issued which stated that legal action had been taken to recover the funds. So it considered that by 2017 at the latest, Mrs H ought to have been aware of a cause for complaint. Therefore, it said she ought to have complained by 2020. But she hadn't complained until January 2021.

Mrs H was unhappy with Sesame's position, and she asked us to look into her complaint. Sesame maintained that the complaint had been made out of time and didn't consent to us looking into it.

Our investigator concluded that the complaint had been made in time. She acknowledged that the newsletters Sesame had referred to stated that the Serious Fraud Office had been looking into the misappropriation of funds in SM7. But Mrs H said she'd never received these letters and there was no evidence to show that they'd been sent. Mrs H did have copies of her investment portfolio valuations from 2017 and 2020. In 2017, the SM7 investment had been valued at £33,224 – which appeared to show growth. The 2020 valuation showed a value of 'TBC' – and it was at this point that the investigator thought Mrs H ought to have been reasonably aware of a cause for complaint. As Mrs H had complained in 2021, the investigator felt Mrs H had complained within three years of becoming aware of a potential issue with the advice she'd been given.

Next, the investigator considered whether Sesame was responsible for the acts Mrs H had complained about. She felt that Mrs H had likely been advised to invest in SM7. And she concluded that by giving advice to buy or sell investments, Mr S of Portland had been carrying out a regulated activity. She accepted that Sesame hadn't authorised Portland to advise on unregulated investments. But she noted that Sesame had authorised Portland to give advice on investment bonds. And in this case, Mr S had advised Mrs H to disinvest funds from the Scottish Windows bond to invest in SM7. So she concluded that these two transactions were intrinsically linked. The investigator found no evidence that Mr S had been working for any other firm at the time of the advice and so she concluded it was most likely that Mr S had been representing Portland at this time. Overall, she felt Sesame was responsible for the acts Mrs H had complained about. This meant she considered that the complaint was within our jurisdiction.

The investigator went on to consider the merits of the complaint. At the time of the advice, Mrs H had already been over state pension age. And there was no evidence to show why disinvestment from a relatively low-risk bond into the high-risk SM7 investment had been recommended. So the investigator concluded that the advice had been unsuitable for Mrs H, and she recommended that Sesame should pay Mrs H fair compensation.

Sesame disagreed – although it maintained that the complaint had been made out of time and so said it wasn't commenting on the merits. It stated that while Mrs H couldn't remember receiving any updates, it didn't mean that none had been sent. It said the scale of the problem with the SM7 investment had been made clear in 2010 and 12 months later a follow-up made it clear that the only prospect of an investment return was through legal action. It argued the annual reports were a statutory document which were sent to all investors and these should've set alarm bells ringing that all might not be well with the investment. It therefore asked for the matter of jurisdiction to be reviewed by an ombudsman.

Our investigator let Sesame know that I intended to decide the issues of jurisdiction and merits together. She asked Sesame to provide any evidence it wanted me to consider regarding the merits of Mrs H's complaint. However, Sesame didn't provide anything more.

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.

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 Mrs H became aware, or ought reasonably to have become aware, that she had cause for complaint.

The act Mrs H has complained about is the encashment of funds from a Scottish Widows investment bond to make the SM7 investment. Mrs H says she didn't know the SM7 investment was unregulated and it wasn't suitable for her.

There is no documentary evidence about the advice or when exactly the advice was given. But it appears that £20,000 was encashed from the Scottish Widows bond in September 2008 and the SM7 investment was made a short time later. So I think it's likely that the advice was given in or around September 2008.

Mrs H referred her complaint to Sesame in January 2021. This is clearly more than six years after the advice was given. So, the crucial issue for me to decide is 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 Mrs H knew, or ought reasonably to have known, she had cause to complain. Because the complaint was made in January 2021, the question becomes whether she knew, or ought reasonably to have known, that she had cause to complain before January 2018.

Sesame considers that Mrs H should have become aware of a cause for complaint about Portland's advice by 2017 at the latest. It's provided copies of newsletters which it says were sent to all SM7 investors in 2016 and 2017. Broadly, these newsletters show that the Serious Fraud Office was investigating the SM7 fund and there was likely to be litigation.

However, Mrs H has consistently told us that she didn't receive copies of these newsletters. While – as I've set out above – Sesame has sent us copies of the 2016 and 2017 letters, these aren't specifically addressed to Mrs H. There's no evidence on file that copies of these newsletters were sent to Mrs H, or if they were, when. And in this case, Mrs H made a direct investment into SM7. She didn't invest her funds into SM7 through a SIPP or other similar wrapper. If she had, it's more likely that she'd have received annual reports from a SIPP provider etc. But in this case, she says she was reliant on the updates she was given by Mr S, who she states didn't tell her that SM7 was in difficulty and I'm satisfied this is most likely in the circumstances here.

And I've seen copies of the November 2017 and 2020 valuations of Mrs H's investment portfolio. In 2017, Mrs H's SM7 investment was valued at £33,224 Whilst this represented only modest growth on her initial investment, there had been some growth, and by Mrs H's account, she was an unsophisticated investor. And I don't think there was anything in this valuation to lead Mrs H to conclude that her investment could be or was at risk. Mrs H hasn't provided us with a copy of the valuation statements for the 2018 and 2019 years, so it isn't clear whether they were sent or not.

The 2020 valuation, however, differs markedly from the 2017 valuation, in that the value of the SM7 investment was given as 'TBC'. In my view, based on the available evidence, it seems it was at this point, in November 2020, that Mrs H ought to have been prompted to realise that there might be an issue with the investment and that the advice to invest in SM7 may not have been suitable for her. I'd add that even if valuations *were* sent in November 2018 and 2019 which showed a TBC value, these would likely have been sent after January 2018. So I think the complaint would still have been brought within three years of any 2018-dated valuation.

Based on the above, I think there's insufficient evidence to show that Mrs H ought to have been aware that she had cause for complaint before January 2018. So, I find that she's made her complaint within our time limits.

Is Sesame responsible for Portland's actions?

DISP 2.3.1R says we can:

'consider a complaint under the Compulsory Jurisdiction if it relates to an act or omission by a firm in carrying on…regulated activities…or any ancillary activities, including advice, carried on by the firm in connection with them.'

Guidance for this rule at 2.3.3G says that:

'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).'

And Section 39(3) of the Financial Services and Markets Act (FSMA) says:

'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.'

Recent case law makes it clear a principal firm can limit its responsibility to only part of the 'business' conducted by an appointed representative. It was dealt with in the case of Anderson v Sense Network [2018] EWHC 2834. The court's approach was endorsed by the Court of Appeal. In the Anderson case, the judge, Mr Justice Jacobs, said:

133. …There is no indication in the wording of section 39, or in the case-law, that indicates that the business for which responsibility is accepted is to be determined not by reference to the contract, but by reference to the authorisations granted to the principal which are to be found in the Financial Services register…

To decide whether Sesame is responsible for Portland's actions here, there are three issues I need to consider:

- What are the specific acts Mrs H has complained about?
- Are those acts regulated activities or ancillary to regulated activities?
- Did Sesame accept responsibility for those acts?

What are the specific acts Mrs H has complained about?

Mrs H complains that Sesame gave her unsuitable advice to encash funds from her Scottish Widows investment bond and invest in SM7, an unregulated investment.

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.

As I've explained above, Mrs H's complaint is about the advice she says she was given to encash funds from her Scottish Widows bond to make the investment in SM7. There is no fact-find or reasons why letter which sets out that Mrs H was given this advice or who it was given by.

But I think it's most likely that Mrs H *did* receive such advice and I think it's most likely it was given by Mr S. I don't think she'd have undertaken these actions unless they'd been recommended to her and Mrs H has been consistent and plausible in her recollections. While I've noted that Sesame states there's no evidence that Mr S gave Mrs H such advice, I have seen evidence from Scottish Widows which shows that Mr S submitted the paperwork requesting the encashment of £20,000 from the bond. I find it's most likely too, given his involvement in the encashment transaction, that he advised and arranged the investment into SM7.

The bond is a relevant investment under the RAO and as set out above, giving advice on or making arrangements in relation to relevant investments are regulated activities. And I'm also satisfied that the advice to enter into SM7 was ancillary to the advice Mr S gave to Mrs H about her bond. So, I'm satisfied the acts being complained about were regulated activities or ancillary to regulated activities.

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

The DISP rules allow us to consider complaints against businesses such as Sesame involving their appointed representatives and agents. As I've set out above, DISP 2.3.1R says we can:

'consider a complaint under the Compulsory Jurisdiction if it relates to an act or omission by a firm in carrying on…regulated activities…or any ancillary activities, including advice, carried on by the firm in connection with them.'

Having considered all of the available evidence, I am satisfied that Mr S was acting for Portland when he advised Mrs H to withdraw funds from the bond. I have seen the encashment forms which were sent to Scottish Widows and I can see that these were completed by Mr S acting on behalf of Portland. In my view then, this makes it more likely than not that Mr S was also acting on behalf of Portland when he advised Mrs H to invest her withdrawn funds in SM7.

In relation to whether Sesame is responsible for Mr S' acts on behalf of Portland, I have carefully considered the relevant case law. In my view, the key issue is whether Mr S was acting within the terms of the contract between Portland and Sesame when conducting the acts which are the subject of this complaint.

Sesame has provided us with copies of its contract with Portland, its compliance manual and its 'Scope of Permissions' document. I can see that Sesame did limit the business that Portland was allowed to carry out to a list of specific activities and specific products. And indeed, the Scope of Permissions document expressly excluded unregulated investments from the products Portland could advise on.

However, the list of activities and products that Portland *could* advise on included investment bonds. So, my view is that Portland was authorised to give advice about the merits of selling or encashing funds from Mrs H's Scottish Widows Investment bond. That is what happened here.

It's clear that this complaint involves advice about SM7 too. But, while I accept Sesame didn't give its authority for Portland to give advice about SM7, this was essentially one act – a single stream of advice to sell the Scottish Widows bond to invest in SM7.

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. I accept that the *Anderson v Sense Network* case established that a principal can restrict the permission it gives to an appointed representative. But I note that in the case of *TenetConnect v Financial Ombudsman Service* [2018] EWHC 459 (Admin), Mr Justice Ouseley said:

> *'Of course, the FSMA draws a clear distinction between regulated and unregulated activities. But that does not answer the question of what activities amount to regulated activities where a single braided stream of advice is given to a client about regulated and unregulated investments. Paragraph 53 of the 2001 Order deals with advising as a specified kind of activity, it is a regulated activity when "advising" in relation to a specified investment on the merits of an investor or potential investor selling a relevant investment. Rule 2.3.1 of DISP2 provides that a complaint can be considered if it "relates to an act or omission by a firm carrying on one or more of the following activities." "Carrying on an activity" includes offering or providing or failing to provide a service in relation to an activity. That language does not permit a bright line to be drawn between advice on selling the regulated investment and buying the unregulated investment, where the purpose of the sale is to enable a purchase. The advice on such a sale is inextricably linked to the advice on the purchase. A bright line, one side of which is regulated and on the other side of which is unregulated, would only reflect the facts of the situation where the regulated and unregulated activities were themselves brightly divided. But their edges may be blurred; or they may be inextricably linked. The law governing the Ombudsman's jurisdiction could not force facts into unrealistic compartmentalisation without undermining its purpose and effectiveness…*
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> [Counsel for the principal] *was concerned at the description of buying and selling as "intrinsically linked". On these facts, that is a fair characterisation of the relationship, but it cannot be a sound general description of every relationship between selling and buying investments. I do not think that the Ombudsman's description of the advice to buy or the "purchase" transactions themselves as "ancillary" to the advice to sell is accurate. Neither aspect of the advice was in reality ancillary here; both were the significant components of the single stream of advice; the regulated advice was motivated by the proposals for unregulated investment. The FSMA intended that regulated activity, and the Ombudsman's jurisdiction should be part of a financial service consumer's protection. The legislative provisions should be construed so that, if part of what is done as a single activity is regulated, the whole is regulated rather than the other way round. Otherwise, the regulated part loses the protection which the FSMA requires that it should have. If, to accord that protection, aspects which by themselves would not be regulated are brought into the protective scope of regulation and the Ombudsman's jurisdiction, those giving advice will have to make sure that their regulated and unregulated activities are separated, rather than using the unregulated to escape the consequences of intermingling them with the regulated.'*

So, if one component activity of advice is regulated and another is unregulated, the effect of FSMA is that the whole advice is regulated.

Here, arrangements were made for Mrs H to withdraw funds from her Scottish Widows bond to be invested in SM7. I haven't been provided with anything that suggests Mr S wasn't allowed to carry out regulated activities in relation to the bond – indeed, the evidence

explicitly indicates that he was. So, I'm satisfied the activities he carried out in relation to that product fell within the actual authority of Portland. So even if one component activity in the advice (the advice to enter into SM7) was unauthorised – as Sesame says it was and as *Anderson v Sense Network* made clear was allowed – I haven't seen anything that suggests the remainder was. And therefore, the SM7 recommendation was made in the course of business for which Sesame accepted responsibility.

So I think Sesame did, under section 39 FSMA, accept responsibility for the acts conducted by Mr S of Portland in recommending the encashment of the Scottish Widows investment bond for the investment in SM7. So, I find that we do have jurisdiction to consider the merits of Mrs H's complaint against Sesame – which I'll now explore 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.

It's my view that I have jurisdiction and that I have all the information I need to look into Mrs H's complaint. Given the nature of our role to resolve complaints which are within our jurisdiction speedily and with minimal formality, I now set out my conclusions on the merits of Mrs H's complaint also. And I note that the investigator made it clear to Sesame that this might be the next step.

In giving advice to Mrs H, Mr S ought to have made a recommendation that was consistent with her investment objectives and her personal and financial circumstances. He should have given her a written recommendation with reasons. Mrs H says that Mr S didn't provide her with any such documentation before recommending the encashment of the Scottish Widows bond to make the investment in SM7.

Based on the evidence I do have; Mrs H was aged 69 years at the time the advice was given and was in state-retirement age. She says she was a cautious investor – which appears to be borne out by the valuation statements I've referred to above. These show that Mrs H held other cash and investment bonds with Scottish Widows – and the investment bonds are noted to be 'cautious'.

Looking at the above, I don't think Mrs H was a particularly experienced or sophisticated investor. I think she was likely reliant on the advice she was given by Mr S. And given she told us she depended on her investments to fund her retirement, I don't think she'd have wished to or indeed, had the capacity to take risks with any investment funds at her disposal.

It seems most likely that Mrs H was given advice by Mr S to invest a significant sum into SM7. This was an unregulated investment, which was high risk and speculative. There was a possibility it would fail and Mrs H's entire investment would be lost. So, I think the advice Mr S on behalf of Portland gave to Mrs H to disinvest her Scottish Widows bond and invest in SM7 was clearly unsuitable.

As such, I think Sesame should now compensate Mrs H for her losses

Fair compensation

My aim is that Mrs H should be put as closely as possible into the position she would probably now be in if everything had happened as it should have. I take the view that Mrs H wouldn't have moved her investment and indeed, Mrs H says that she would have left the

funds in the Scottish Widows bond. I'm satisfied that what I've set out below is fair and reasonable.

In summary, Sesame should:

1. Calculate the loss Mrs H has suffered as a result of moving her investment and pay Mrs H compensation for that loss.

2. Take ownership of the SM7 investment if possible.

3. Pay compensation of £300 for the trouble and upset caused to Mrs H.

4. Pay interest on the above if fair compensation isn't paid within 28 days of notification of acceptance by the consumer.

I'll explain how Sesame should carry out the calculation set out above in further detail below:

1. Calculate the loss Mrs H has suffered as a result of moving her investment and pay Mrs H compensation for that loss.

To do this, Sesame should work out the likely value of Mrs H's previous investment as at the date of this decision, had she left it where it was.

Sesame should ask Scottish Widows, Mrs H's previous investment provider, to calculate what the current value of that investment would be had she remained in it. I note from Scottish Widows' documentation that some funds do remain within the bond. But, if there are any difficulties in obtaining a notional valuation, then a benchmark of 50% of the FTSE UK Private Investors Income Total Return Index and 50% of the monthly average rate for one-year fixed-rate bonds as published by the Bank of England should be used to calculate the value. That is likely to be a reasonable proxy for the type of return that could have been achieved.

This value should be compared to the value of the SM7 investment at the date of this decision and this will show the loss Mrs H has suffered. Mrs H should be paid compensation for that loss.

2. Take ownership of the SM7 investment

If Sesame is able to purchase the investment, then the price paid should be allowed for in the current value of the investment.

If Sesame is unable, or if there are any difficulties in buying the investment, it should give it a nil value for the purposes of calculating compensation. Sesame may ask Mrs H to provide an undertaking to account to it for the net amount of any payments she might receive from the investment in future. That undertaking should allow for the effect of any tax and charges on the amount Mrs H may receive from the investment. Sesame will need to meet any costs in drawing up the undertaking.

3. Trouble and upset

Sesame must pay Mrs H £300 for the material distress and inconvenience I think its AR's unsuitable advice caused her. I don't doubt that Mrs H was caused substantial worry and upset when she learned that she'd been given unsuitable advice to encash part of her

Scottish Widows bond and that it appeared she'd lost the entire value of the SM7 investment. So I think it's fair and reasonable that Sesame should compensate Mrs H for the trouble and upset its AR's actions caused her.

4. Pay interest

The compensation amount must, where possible, be paid to Mrs H within 28 days of the date Sesame receives notification of her acceptance of my final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if it takes the business longer than 28 days to pay Mrs H.

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

My final decision

For the reasons I've given above, I have decided that this complaint is within our jurisdiction. And for the reasons I've explained, my final decision is that I uphold Mrs H's complaint.

I direct Sesame Ltd to pay Mrs H the fair compensation I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs H to accept or reject my decision before 12 July 2023.

Lisa Barham
Ombudsman