DRN-4007247

The complaint

Ms I complains about the acts of Mr Y. She says he gave her unsuitable advice to put some money she had into a self-invested personal pension (SIPP) to be able to invest through a discretionary fund manager (DFM) – SVS Securities PLC (SVS). She says Pi Financial Ltd (Pi) is responsible because Mr Y was with a business that was an appointed representative of it at the relevant time.

What happened

I can see from the Financial Conduct Authority (FCA) register that Mr Y worked for a business called Future Wealth Management Ltd (Future) between 13 May 2015 and 11 October 2018. That business was an appointed representative of Pi between 15 January 2015 and 5 March 2019.

Ms I says she'd known Mr G for 15 years after a recommendation from a friend. It seems she met Mr G for investment advice on 1 March 2018. She was then sent a recommendation letter by Mr Y dated 19 March 2018. That recommendation letter was on Future headed paper with Mr Y's name at the bottom and read:

> *It was good to meet with you on 1st March 2018. I am now writing to confirm the content and outcome of our discussions…*
>
> *You will recall you were provided you* [sic] *with a copy of my Client Agreement on the 1st March 2018 in which my terms of business and charging structure has been laid out. You instructed me to specifically limit my advice to Pension Planning, specifically setting up a Self-Invested Personal Pension (SIPP) and I have acted accordingly. I have, therefore, only obtained the necessary information from you to advise on the above area. You should be aware that my recommendations may have differed if I had undertaken a full review of your financial circumstances…*
>
> *At the present time, your prime objective is to find a suitable SIPP and open this to pay in £30,000 before the end of this tax year. This is money you have saved from your business and wish to invest this into a SIPP with the view of adding your paid up personal pensions when it is active. You wish to have an arrangement that gives you flexibility with regards to access and with regards to investment choice. You wish to have access to a wider range of investments and the flexibility to change these to reflect your circumstances and your attitude to risk. You also wish to be able to leave your entire fund to your family in the event of your death and wish your new arrangement to take advantage of new laws that benefit pensions in the future. You have requested that I research the market for a suitable SIPP provider with whom to invest all of your pension monies…*
>
> *You wish to open up a Self Invested Person* [sic] *Pension not only so you can pay in £30,000 from profits from your business but so you can eventually consolidate your existing pensions into this arrangement. You wish to have an arrangement that allows you flexibility in terms of investment and access when you come to retire. You may wish to take lump sums over an income but would like the arrangement to adapt*

to your lifestyle. You also wish your plan to take advantage of any changes to access, death benefits etc which the SIPP will reflect immediately.

Your only objective in retirement is that you wish to have a good standard of living which you have at the moment. You wish to give this sum of money the opportunity to grow so that you can use this to support your leisure pursuits in retirement but again this may change and you may continue to work and only access the money to reduce the amount of hours that you work. You wish to have flexibility with regards to where the monies are invested, how you can access these and how they are managed…

You completed a risk profile questionnaire and you scored 5 out of 10. This puts you as a balanced risk investor. You agreed with this and feel this is a fair reflection of your understanding of financial products and your goals and aspirations…

It was clear, given your requirement to have flexibility in terms of where your pension monies are invested, that a SIPP would be the best vehicle to allow you to do this…

As previously outlined you wish to have your monies managed by an appropriate DFM with whom I will be recommending for you, having researched the market…

As part of my duty of care to you I have considered the proposed portfolio and believe it suitable for you based on your current attitude to risk and capacity for loss…

After due consideration of your attitude to risk, tolerance and capacity we have agreed that the most suitable portfolio for you is within the Mixed Model Portfolio…The potential growth on this plan in comparison with the growth on your existing plans gives your pension monies a real opportunity to grow so that you have enough income in retirement and do not have to work on longer than you would like.

I believe that for you the active portfolio management that SVS Securities charges represent good value…

Our fee structure is detailed in our client agreement which was given to you at your meeting.

- *An initial fee of **3.25%** will be charged to meet the cost of our recommendation…*
- *There is an ongoing **1.00%** charge of funds under management for ongoing service and advice, payable monthly.*

A SIPP was set up for Ms I shortly after – on 28 March 2018 – and I can see from the SIPP statements that £30,000 was paid in on 4 April 2018 and £28,510.20 paid out to SVS on 18 April 2018.

Ms I says she received a letter saying SVS had gone into administration on 9 August 2019, and so she tried to make a claim with the Financial Services Compensation Scheme (FSCS) and then complained to Pi. I understand the claim with the FSCS was later turned down.

Pi didn't uphold the complaint because it said the advice had been given by Mr G, not Mr Y. Although it also had an agreement with Mr G, this was an introducer agreement and it said he wasn't allowed to provide any advice. It also said the loss incurred was because of the mismanagement of the funds by SVS.

An investigator was satisfied we could consider Ms I's complaint against Pi. In summary, he said there was no dispute that Mr G had been involved but he said the evidence suggested Mr Y of Future had carried out regulated activities that had been allowed under the appointed representative agreement. He was also satisfied the complaint should be upheld.

Ms I agreed but raised some points about where the compensation should be paid. Pi didn't agree with the investigator. I've read and considered its response in full. In summary, it said:

- None of the documentation was signed by Mr Y which is unusual.
- It would have been easy for Mr G to issue a letter to look as though it was issued by Future.
- The recommendation letter says the author met Ms I on 1 March 2018. Ms I only met with Mr G so the letter must have been a fabrication drafted by Mr G. And it's reasonable to assume it was drafted by Mr G without the knowledge or approval of Mr Y.
- The loss was caused by Mr G fraudulently giving advice.
- Ms I is not and has never been a client of Pi – there's no past, present or future provision of services to Ms I by Future. And as she's not a customer, she's not an eligible complainant.
- It's clear from Ms I's evidence that Mr G held himself out to be an adviser. There's no evidence that Ms I had any contact with Mr Y, let alone that she received advice from him. Mr Y was also abroad at the time. Mr G never intended Ms I would get advice from anyone else, and he was always intending to carry out business with her under the guise of Future.
- It never received any fees.
- The investigator ignored the underlying principles that whatever an appointed representative does must be lawful otherwise it's automatically excluded from the principal's responsibility. It can't be held liable for fraudulent acts of its appointed representative where they're deliberately concealed from it.
- COBS 10 which the investigator had referred to doesn't apply – it only applies where there's been a direct offer financial promotion which wasn't the case here.
- The investigator assessed the risk profile of SVS with the benefit of hindsight rather than with reference to any material available at the time. Just because it failed not long after the investment was made, doesn't mean it must always have been a greater risk.
- It's Mr G that should be held accountable.

The issue has therefore been passed to me for a decision.

What I've decided – jurisdiction

I've considered all the evidence that's been provided. Having done so, I'm satisfied this complaint is one that the Financial Ombudsman Service has jurisdiction to consider.

To carry out regulated activities a business needs to be authorised (Section 19 of the Financial Services and Markets Act 2000 (FSMA)). Future (and therefore Mr Y) wasn't directly authorised. Instead, it was an appointed representative of Pi. Pi is an authorised firm. It's authorised by the FCA to carry out a range of regulated activities including advising on investments and arranging deals in investments. We can therefore consider complaints about Pi. And this includes some complaints about its appointed representatives.

But this service can't look at all complaints. Before we can consider a complaint, we need to check, by reference to the DISP rules and the legislation from which those rules are derived, whether it's one we have the power to look at.

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 DISP 2.3.3G says that:

> *complaints about acts or omissions include those in respect of activities for which the firm…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*.

And Section 39(3) 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*.

The responsibility of a principal was considered by the judge in the case of *Anderson v Sense Network* [2018] EWHC 2834 (this case was the subject of an appeal, but the Court of Appeal issued a decision agreeing with the earlier decision). In the High Court, Mr Justice Jacobs said, at paragraph 33:

> *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*.

So, a principal isn't automatically responsible for the actions of its appointed representatives and it's necessary to go beyond looking at the activities Pi was authorised to do.

To decide whether Pi is responsible here, there are three issues I need to consider:

- What are the specific acts Ms I has complained about?
- Are those acts regulated activities or ancillary to regulated activities?
- Did Pi accept responsibility for those acts?

What are the specific acts Ms I has complained about?

Ms I complains Mr Y gave her unsuitable advice to put some money she had into a SIPP to invest through SVS.

Are those acts regulated activities or ancillary to regulated activities?

Section 22 FSMA defines "*regulated activities*" as follows:

> *(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;…*
>
> *(4) "Investment" includes any asset, right or interest.*
>
> *(5) "Specified" means specified in an order made by the Treasury*.

The relevant Order is the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO). The rights under a personal pension scheme (which includes Ms I's SIPP) are specified as investments by a provision in Article 82 RAO. Advising on investments is a specified activity under Article 53 RAO. And making arrangements in relation to them is a specified activity under Article 25 RAO.

Ms I says although she was initially advised by Mr G, she never received any paperwork from Mr G and the advice letter she received came from Mr Y. Pi says Mr Y didn't give advice and it was only Mr G that did.

I've thought carefully about all of the evidence. Taking everything into account, I'm satisfied it's most likely Mr Y advised Ms I to set up a SIPP and invest through SVS.

In the circumstances here, there are several things that satisfy me it's most likely Mr Y advised Ms I:

- The recommendation letter dated 19 March 2018 clearly gave advice and I'm satisfied it's most likely Mr Y was aware of the content of this letter and allowed it to be sent in his name, even if he didn't draft it himself. I note everything Pi has said about the validity of the letter and the fact it wasn't signed by Mr Y. As well as the fact it seems Mr Y was abroad at the time. And the fact it doesn't seem any adviser fees were paid from the SIPP. But from the email and letter I've detailed below, it's clear Mr Y was involved in what was happening and taking everything into account, I don't think there's enough to reasonably conclude the recommendation letter was created and sent without his knowledge.

- The SIPP operator sent SVS an email copying in Mr Y on 18 April 2018 confirming it'd sent over the funds for investment. The email went on to read:

  > *We have copied this email to the customers' financial adviser who will, where appropriate, either send us appropriate instructions for the investment of these funds to forward to you, or will organise for investment instructions to be submitted online via your website.*

- The SIPP application form named Mr Y as Ms I's adviser – giving a Future email address and Pi as the firm name. It was also selected that advice had been given and SVS was named as the chosen DFM.

Pi says it was Mr G who advised Ms I – and Ms I accepts she received advice from Mr G. But just because Ms I received advice from someone else, that doesn't mean Mr Y didn't also give advice.

I'm also satisfied that Mr Y carried out the regulated activity of making arrangements. I say this because a letter date stamped 26 March 2018 was sent to the SIPP provider by Ms Y on Future headed paper with Mr Y's email address enclosing Ms I's "*paperwork*".

My conclusion therefore is that Mr Y did give advice to Ms I about the SIPP and investments and made arrangements in relation to these so regulated activities took place.

Did Pi accept responsibility for those acts?

Which business was Mr Y acting for?

Taking everything into account, I'm satisfied Mr Y was acting as Future when he advised Ms I and made arrangements. The only mention of any other business is that an email address at a different business was used when Mr Y was copied into the email referred to above from the SIPP operator to SVS on 18 April 2018. But the fact the recommendation letter was sent in his capacity at Future and the SIPP application documentation referred to Future satisfy me that he was acting as Future when he carried out the acts complained about here. I've therefore gone on to consider whether Pi accepted responsibility for those acts under the agreement it had with Future.

The agreement with Future

The appointed representative agreement between Pi and Future says:

> *The Company appoints the Appointed Representative to provide Services for the Company on the terms set out in this Agreement and the Appointed Representative accepts such terms, with effect from 15th January 2015.*

"*Services*" was defined as:

> *any Regulated Activity which the Company is authorised to undertake from time to time notified by it to the Appointed Representative and also giving advice, making arrangements (or offering or agreeing to do either) in relation to term assurance, mortgages, tax planning, long term care products and any other product offered in the giving of financial advice pursuant to this Agreement.*

And "*Regulated Activity*" was defined as:

> *Any activity requiring authorisation under The Act or by the FCA and "Regulated Activities" means more than one of them.*

The agreement therefore is broad and envisages advice being given on, and arrangements made in relation to, investments. And Pi hasn't disputed that.

Instead, Pi said the underlying principles are that whatever an appointed representative does must be lawful otherwise it's automatically excluded from the principal's responsibility. In particular, it said it can't be held liable for fraudulent acts of its appointed representative where they're deliberately concealed from it. But I'm not persuaded Mr Y acted unlawfully or fraudulently in carrying out the regulated activities of advising Ms I and making arrangements in relation to her specified investments.

So, I'm satisfied that Pi did accept responsibility for Mr Y advising Ms I to set up a SIPP and invest through SVS and making arrangements for that.

My decision – jurisdiction

I don't agree with Pi that Ms I was never its client and therefore isn't an eligible customer. For the reasons set out above, I'm satisfied Pi is responsible under Section 39 FSMA for the acts being complained about and this is a complaint that we can look at.

What I've decided – merits

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

I agree with Pi that COBS 10 isn't relevant in the circumstances here and I confirm I haven't taken it into account when considering the merits of the complaint.

As I'm satisfied it's most likely Mr Y advised Ms I to set up a SIPP to invest through SVS, I've considered whether that advice was suitable. The kind of things I would expect Mr Y to consider when assessing suitability are:

- The likely cost of the proposed arrangement compared to other possible arrangements.
- The level of funds involved.
- Ms I's knowledge and experience.

Ms I seems to have had an annual income of between £18,000 and £20,000 at the time. And although the SVS application records her as having liquid assets of "*over £100,000*", it's clear she had limited investment experience. She seems to have had two modest pensions and £20,000 invested elsewhere.

Taking everything into account, I'm satisfied Ms I was a relatively low risk, inexperienced, investor and someone for whom traditional low-cost pension arrangements would have been appropriate.

The new arrangement Ms I entered wasn't a low cost or traditional pension arrangement. The SIPP was stated to have a set-up fee of £100 and an annual fee of £199. And the DFM service would also have had costs – both an initial management charge and ongoing transaction charges. Additionally, there were the adviser fees – an initial fee of 3.25% and an ongoing fee of 1% – that it seems should have been charged and no one has been able to explain why they weren't.

The letter of 19 March 2018 set out the reasons for recommending the SIPP as being that it would give "*flexibility with regards to access and with regards to investment choice*". But whilst the SIPP may have had some advantages, I haven't seen anything that persuades me these benefits were needed by Ms I in her circumstances. There's no evidence that Ms I – with her modest pension funds – needed access to a wider range of investments or that such funds wouldn't have been available with other cheaper options, such as a stakeholder pension, that would have met her needs. Taking everything into account, I'm satisfied it ought to have been clear to Mr Y that there was no obvious justification for Ms I to set up a SIPP to enter the arrangement she did. And this assessment is based on knowledge Mr Y ought to have had at the time – not what we now know about the failure of SVS.

In these circumstances I'm satisfied advice to set up a SIPP to invest through SVS should never have been made as a recommendation to Ms I. I'm satisfied that if Mr Y hadn't given unsuitable advice, Ms I would have set up a cheaper pension and investment arrangement.

As I've set out above, even if Mr Y didn't advise Ms I, he carried out the regulated activity of making arrangements. In conducting this regulated activity, he had to act in line with the FCA's Principles for Businesses. Of particular relevance here is Principle 6 which says:

> *A firm must pay due regard to the interests of its customers and treat them fairly.*

And COBS 2.1.1R says:

> *A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*

So, I'm satisfied Mr Y would still have needed to consider whether it was in Ms I's best interests to set up a SIPP for investment via a DFM. For the same reasons as set out above, I'm not persuaded it was. And if it wasn't Mr Y that advised Ms I, then it seems likely he knew she'd been advised by an unregulated introducer, and he should have taken this into account.

Pi has commented on the fact Mr G gave advice. But this decision is about Pi's responsibility. And because I'm satisfied Ms I wouldn't have set up a SIPP to make the investments she did if Mr Y hadn't given the unsuitable advice or made the arrangements he did, I think it's fair to ask Pi to compensate Ms I for the full measure of the loss she suffered from setting up the SIPP and making the investments she did.

The DISP rules set out that when an ombudsman's determination includes a money award, then that money award may be such amount as the ombudsman considers to be fair compensation for financial loss, whether or not a court would award compensation (DISP 3.7.2R). Someone else may also have given Ms I advice, but Pi had its own distinct regulatory obligations which, if met, I'm satisfied would have resulted in the SIPP not being set up to make the investments that were made.

In making these findings, I take account of the potential contribution made by other parties to the losses suffered by Ms I. This includes Pi's argument that misadministration by SVS caused Ms I's loss. In my view, in considering what fair compensation looks like in this case, it's reasonable to make an award against Pi that requires it to compensate Ms I for the full measure of her loss. I say this because, but for Pi's failings, Ms I wouldn't have set up the pension she did or made the investments she did.

I'm not asking Pi to account for loss that goes beyond the consequences of its failings. I'm satisfied those failings have caused the full extent of the loss in question. That another party might also be responsible for that same loss is a distinct matter and that fact shouldn't impact on Ms I's right to compensation from Pi for the full amount of her loss. If Pi still believes that other parties' actions contributed to the losses, it can take those concerns up directly with them.

Putting things right

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

I take the view that Ms I would have set up a different pension and invested differently. It's not possible to say *precisely* what she would have done differently. But I'm satisfied that what I've set out below is fair and reasonable given Ms I's circumstances and objectives when she invested.

What must Pi do?

To compensate Ms I fairly, Pi must:

- Compare the performance of Ms I's SIPP 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.

- Pi should also add any interest set out below to the compensation payable.

- I understand that Ms I is setting up a new pension plan that she wishes to use moving forward. Pi should pay into a pension plan of Ms I's choosing 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 Pi is unable to pay the total amount into Ms I's pension plan, it should pay that amount direct to her. 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 Ms I won't be able to reclaim any of the reduction after compensation is paid.

- The *notional* allowance should be calculated using Ms I's actual or expected marginal rate of tax at her selected retirement age.

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

- Pay to Ms I £300 for the trouble and upset caused. I'm satisfied Ms I has been caused significant upset by the events this complaint relates to and the loss of what was intended to be part of her pension. Taking everything into account, I think that a payment of £300 is fair to compensate for that upset.

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

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
SIPP	Some liquid/some	For half the investment:	Date of investment	Date of my final	8% simple per year from final

	illiquid	FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds		decision	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 SIPP 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. Pi should take ownership of any illiquid assets by paying a commercial value acceptable to the pension provider. The amount Pi pays should be included in the actual value before compensation is calculated.

If Pi is unable to purchase illiquid assets, their value should be assumed to be nil for the purpose of calculating the *actual value*. Pi may require that Ms I provides an undertaking to pay Pi any amount she 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. Pi 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.

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, Pi 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 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 SIPP 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 Pi totals all those payments and deducts that figure at the end to determine the fair value instead of deducting periodically.

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

Third parties are involved and we don't have the power to tell them what to do. If Pi is unable to purchase the illiquid assets, to provide certainty to all parties I think it's fair that it pays Ms I an upfront lump sum equivalent to five years' worth of wrapper fees (calculated using the fee in the previous year to date). This should provide a reasonable period for the parties to arrange for the SIPP to be closed.

I'm also satisfied it's fair to require Pi to pay Ms I an additional £186 – the amount the SIPP provider charges to switch away from the SIPP – given that Ms I intends to close the SIPP when she's able to.

Why is this remedy suitable?

I've decided on this method of compensation because:

- Ms I wanted Capital growth with a small risk to her 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 her 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 made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.

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

My final decision

I uphold Ms I's complaint. My decision is that Pi Financial Ltd should pay the amount calculated as set out above.

Pi Financial Ltd should provide details of its calculation to Ms I in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms I to accept or reject my decision before 30 August 2023.

Laura Parker
Ombudsman