DRN-4020174

The complaint

Ms C complains about the acts of Mr Y. She says he gave her unsuitable advice to switch her pensions to 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 C says towards the end of 2017 she was advised by Mr G to move her pensions to a SIPP to be able to invest through a DFM called SVS. She says she never received any documentation from Mr G however and instead the documentation providing the advice was sent by Mr Y, specifically a recommendation letter dated 19 January 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 30th October 2017. 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 30th October 2017 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 review your existing pensions contract…and set up a SIPP to allow you to access your monies flexibly and have greater investment choice. You do not intend to select an annuity at retirement but would rather access your benefits flexibly as you require so these can support your objectives in retirement. 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…*
>
> *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 objectives in retirement and have where it is invested reflect how you feel about risk vs reward. 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 3 out of 10. This puts you as a cautious 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 Income Model Portfolio…

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.*

The SIPP was set up on 1 March 2018 and just under £50,000 was moved into it from Ms C's previous pensions across 8 and 14 March 2018. Most of that money was transferred to SVS on 21 March 2018.

Ms C was sent a letter on 9 August 2019 saying that SVS had gone into administration, and so she complained to Pi.

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.

After an initial view from an investigator that Ms C's complaint should be upheld, Pi provided detailed information from a number of different complaints that it said showed a pattern of behaviour of Mr G holding himself out as an adviser at Future. It said there was a pattern of complainants believing that Mr G was their sole adviser – not Mr Y – and of Mr G now advising people to make complaints about Pi. It said if Mr Y hadn't given any advice or been involved in the switches and investments, as it didn't think he had, we don't have jurisdiction to consider Ms C's complaint against it. It therefore asked that we get Ms C's detailed recollections of what happened.

An investigator was satisfied we could consider Ms C's complaint against Pi and that it should be upheld. In summary, he said there was no dispute that Mr G had been involved but the evidence suggested Mr Y of Future had also given advice and made arrangements

and this was something that had been allowed under the appointed representative agreement.

Pi didn't agree. 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 C on 30 October 2017. The documentation from 30 October 2017 is in Mr G's handwriting and Ms C 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.
- Certification of the client identity check was forged to appear as though it was done by Mr Y.
- Mr Y was copied into emails using an email address at a different business it had no connection to – not his Future email address.
- The loss was caused by Mr G fraudulently giving advice.
- Ms C is not and has never been a client of Pi – there's no past, present or future provision of services to Ms C by Future. And as she's not a customer, she's not an eligible complainant.
- It's clear from Ms C's evidence that Mr G held himself out to be an adviser. There's no evidence that Ms C had any contact with Mr Y, let alone that she received advice from him. Mr G never intended Ms C would get advice from anyone else and he was always intending to carry out business with her under the guise of Future.
- The fact fees were sent to it doesn't show it knew of, and had accepted responsibility for, the acts of its appointed representative – it passively received them. When the first fee was received, it had no prior knowledge of the business, couldn't ask Mr Y as he'd moved abroad and had no knowledge of the involvement of Mr G or what had happened.
- 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 in January 2018. 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 C 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 C has complained about?

Ms C complains Mr Y gave her unsuitable advice to switch her pensions to 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 C's previous pensions and the SIPP she moved to) 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 C 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 C to switch her pensions and invest through SVS.

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

- The recommendation letter dated 19 January 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. But from the emails I've detailed below, it's clear he 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 Mr Y's knowledge.

- The SIPP operator sent Ms C an email on 16 February 2018 which read:

> *Thank you for your application for a Simple Investment SIPP…submitted through your Financial Adviser* [Mr Y] *at Pi Financial Limited.*
>
> *We are processing your application and we will liaise with your financial adviser if we need any additional documentation or information. We will write to you again once your application has been accepted and your pension has been established.*

> *The Simple Investment SIPP is a UK based Self Invested Personal Pension (SIPP) that provides flexible benefits for advisers and their clients. You will have been provided with the pension product literature by your adviser…*
>
> *if you do have any questions, please do contact* [Mr Y] *at Pi Financial Limited.*

- On 14 March 2018, Mr Y was copied into an email from the SIPP provider to Ms C confirming that money from her previous pensions had been received. It went on to confirm that the initial 3.25% fees would be paid to her "*financial adviser*" shortly.

- On 21 March 2018, Mr Y was copied into an email from the SIPP provider to SVS referring to him as Ms C's "*financial adviser*".

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

- The SIPP operator's "*key facts*" document named Mr Y of Future as Ms C's adviser.

- Fees were paid to Pi. £1,231.17 was paid on 8 March 2018 as an "*Initial IFA Fee*" and £235.40 and £138.25 were paid on 14 March 2018 – both as "*Initial IFA Fee*".

Pi says it was Mr G who advised Ms C – and Ms C accepts she received advice from Mr G. But just because Ms C 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. On 16 February 2018, the SIPP provider sent Mr Y an email that read:

> *Thank you for the application for the above client. We will write to the client to acknowledge the application and send you a copy.*

So, although I haven't seen a copy of Mr Y submitting the application, I'm satisfied he did. And the email referred to earlier from the SIPP provider to SVS dated 21 March 2018 went on to say Mr Y would:

> *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.*

Ms C's passport and bank statement also seem to have been certified by Mr Y on 1 February 2018 – although I note that Pi disputes that. And I note that a letter from Pi to Ms C dated 3 September 2018 started "*As an existing client of* [Mr Y]*, trading as Future Wealth Management Ltd ('Future Wealth'), you will be aware that they currently operate as an Appointed Representative of pi financial ltd ('pi financial'*)". So, it seems Ms C was on Pi's system as a client of Mr Y.

My conclusion therefore is that Mr Y did give advice to Ms C 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 C and made arrangements. The only mention of any other business is that in the emails Mr Y was copied into and the one he was sent, the email address that was used wasn't his Future one and instead was an email address at a different business. But the fact the recommendation letter was sent in his capacity at Future, the application documentation all referred to Future, the SIPP operator referred to him as representing Pi, and fees were paid to Pi 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 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 C and making arrangements in relation to her specified investments.

So, I'm satisfied that Pi did accept responsibility for Mr Y advising Ms C to switch her pensions and invest through SVS.

My decision – jurisdiction

I don't agree with Pi that Ms C 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 – and why

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 C to move her pensions to 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 the existing arrangements.
- The level of funds involved.
- Ms C's knowledge and experience.

On Ms C's application to SVS on 5 March 2018 she was noted to have income of "*up to £25,000*"; little or no trading experience or knowledge; and the cautious portfolio was selected. The pensions that were switched (just under £50,000) were Ms C's only pensions and she was in her 50s at the time of the events complained about so approaching retirement age with a low capacity for loss. The recommendation letter of 19 January 2018 referred to above also referred to her as a "*cautious risk investor*" according to the risk profile questionnaire she completed.

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

The new arrangement Ms C 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. I can see that a 1.5% initial management charge (£708.89) was charged on 23 March 2018, and it seems there were ongoing transaction charges that were applied. Additionally, there were the adviser fees – an initial fee of 3.25% and an ongoing fee of 1%.

The letter of 19 January 2018 set out the reasons for recommending the SIPP as being that it would:

> *allow you to access your monies flexibly and have greater investment choice. You do not intend to select an annuity at retirement but would rather access your benefits flexibly as you require so these can support your objectives in retirement. 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.*

But whilst the SIPP may have had some advantages, I haven't seen anything that persuades me these benefits were needed by Ms C in her circumstances. There's no evidence that Ms C – with her modest pension funds – needed access to a wider range of investments or that such funds wouldn't have been available with her previous pensions. And if there was a genuine desire by Ms C to consolidate her pensions into one fund, it seems likely there'd have been 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 C to move from her existing schemes and 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 switch Ms C's pensions to a SIPP to invest through SVS should never have been made as a recommendation. I'm satisfied that if Mr Y hadn't given unsuitable advice, Ms C would have left her pensions as they were.

As I've set out above, even if Mr Y didn't advise Ms C, 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 C's best interests to move her pensions to 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 C, 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 C wouldn't have moved her pensions to 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 C for the full measure of the loss she suffered from moving her pensions 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 C advice, but Pi had its own distinct regulatory obligations which, if met, I'm satisfied would have resulted in the pension moves to the SIPP not taking place.

In making these findings, I take account of the potential contribution made by other parties to the losses suffered by Ms C. 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 C for the full measure of her loss. But for Pi's failings, Ms C's pension moves wouldn't have occurred.

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 C's right to compensation from Pi for the full amount of her loss.

Putting things right

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

I take the view that Ms C wouldn't have moved her pensions if everything had happened as it should have. I'm satisfied that what I've set out below is fair and reasonable given Ms C's circumstances and objectives at the time.

In summary, Pi should:

1. Calculate the loss Ms C has suffered as a result of making the switches and investing through SVS.
2. Pay compensation for the loss into Ms C's pension in respect of her pension losses. If that isn't possible, pay compensation for the loss to Ms C direct. In either case, the payment should take into account necessary adjustments set out below.
3. Pay compensation of £400 for the trouble and upset caused to Ms C.
4. Pay interest on the above if fair compensation isn't paid within 28 days of notification of acceptance by Ms C.

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

1. Calculate the loss Ms C has suffered as a result of making the switches and investing through SVS

To do this, Pi should work out the likely value of Ms C's pensions as at the date of my decision, had she left them where they were instead of switching to the SIPP.

Pi should ask Ms C's former pension providers to calculate the current notional transfer values had she not switched her pensions. 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 returns that could have been achieved if the pensions hadn't been switched.

The notional transfer values should be compared to the transfer value of the SIPP at the date of my decision and this will show the loss Ms C has suffered.

Any additional sum that Ms C paid into the SIPP should be added to the notional transfer value calculation proportionately at the point it was actually paid in.

Any withdrawal, income or other distributions paid out of the SIPP should be deducted proportionately from the fair value calculations 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.

2. Pay compensation to Ms C for the loss she's suffered in (1)

I note that Ms C's representative said redress should be paid to its account in line with the client authorisation but that's a matter between Ms C and her representative. Since the loss Ms C has suffered is within her pension, it's right that I try to restore the value of her pension provision if that's possible. So, if possible, the compensation for the loss should be paid into Ms C's pension plan if it still exists. The compensation shouldn't be paid into the pension if it would conflict with any existing protection or allowance. Payment into the pension should allow for the effect of charges and any available tax relief. This may mean the compensation should be increased to cover the charges and reduced to notionally allow for the income tax relief Ms C could claim. The notional allowance should be calculated using Ms C's marginal rate of tax.

If it's not possible to pay the compensation into Ms C's pension, the compensation should be paid to Ms C direct. But had it been possible to pay the compensation into the pension, it would have provided a taxable income. Therefore, the compensation for the loss paid to

Ms C should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Ms C's marginal rate of tax in retirement. For example, if Ms C is likely to be a basic rate taxpayer in retirement, the notional allowance would equate to a reduction in the total amount equivalent to the current basic rate of tax. However, if Ms C would have been able to take a tax-free lump sum, the notional allowance should be applied to 75% of the total amount.

3. Trouble and upset

Pay Ms C £400 for the trouble and upset caused. I'm satisfied Ms C has been caused significant upset by the events this complaint relates to, and the loss of a significant portion of her pension fund. I think that a payment of £400 is fair to compensate for that upset.

4. Pay interest

Pi should pay fair compensation as set out above within 28 days of being notified that Ms C has accepted my decision. If it doesn't, interest on the compensation due is to be paid from the date of the decision to the date of payment at the rate of 8% simple interest per year. Income tax may be payable on any interest paid. If Pi deducts income tax from the interest, it should tell Ms C how much has been taken off. Pi should give Ms C a tax deduction certificate in respect of interest if Ms C asks for one, so she can reclaim the tax on interest from HM Revenue & Customs if appropriate.

My final decision

My decision is that I uphold Ms C's complaint and require Pi Financial Ltd to pay Ms C fair compensation as set out above.

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms C to accept or reject my decision before 13 June 2023.

Laura Parker
Ombudsman