DRN-4026588

The complaint

Mr B complains that advice given by an appointed representative of TenetConnect Limited to invest in Elysian Fuels wasn't in his best interests and caused him a financial loss.

Mr B is represented in this complaint by a claims management company (CMC).

What happened

This decision just relates to the advice given to Mr B in February 2014. Mr B's sons were also advised at the same time, which involved separate fact-finding and assessments of their attitude to risk. Their complaints are dealt with separately.

The advice was given by Anand Associates, an appointed representative of TenetConnect Limited ("Tenet"), so Tenet is responsible for answering the complaint, and I will just refer to that business in the decision.

The fact find completed in January 2014 captured the following information about Mr B's circumstances:

- He was a widower aged 71;
- He ran a successful engineering company I'll refer to as "N" with his two sons;
- He took a salary of £18,000 but had net assets of around £2.45m including his home (an unencumbered property valued at £600k);

A risk questionnaire evaluated his attitude to risk as 7/10 categorised by Tenet as *"medium to high risk".*

He had the following pension provision:

- an Executive Pension Plan (EPP) with provider "A" valued at around £800,000,
- another EPP started in 1977 and a Personal Pension (PP) started in 1989 with different providers which he didn't know the values of;
- a 75% share in a Funded Unapproved Retirement Benefit Scheme (FURB), worth around £667,500
- The retirement age for each scheme was noted as 75, although Mr B said he didn't actually intend to stop working.

N was due to make an employer pension contribution of £104,000 for Mr B, split across three tax years, taking the value of the FURB to around £890,000.

Tenet's recommendation letter dated 10 February 2014 stated Mr B and his two sons were "*a close-knit family making joint decisions both at a business and personal level*". It identified they were in a position to invest around £33,000 between them, and Mr B apparently wanted to take a high-risk approach to investing. After considering a number of investment options, Tenet recommended Mr B invest in Elysian Fuels ("EF"), which was structured as a limited liability partnership through Future Capital Partners Limited ("FCP"). The adviser recommended Mr B purchase 100,000 unquoted shares at £1 each in an EF limited company connected to the partnership. The investment would be funded by Mr B paying a cash deposit of £16,600, with the remainder through a limited recourse loan of £87,150 through FCP. The shares would then be sold to a new Self-Invested Personal Pension (SIPP) for £100,000, with the cash released to Mr B. The employer contribution from N would also be paid into the new SIPP rather than to Mr B's existing EPP or FURB. The choice of SIPP provider ("J") was explained in a further letter dated 19 February 2014. Tenet offered to reduce its usual advice fee to £4,000, £2,000 apportioned to Mr B, and the two sons paying £1,000 each.

Mr B signed J's SIPP application on 21 February 2014, and N made a pension contribution of £104,000 to Mr B's SIPP. Subsequently the investment in EF went ahead, and in March 2014 Mr B signed the paperwork to sell the EF shares to his SIPP with J. When the £100,000 was released Mr B says he just added it to his savings rather than invest it for growth.

Not long after this, HMRC started investigating the arrangements around EF investments, questioning the original value of £1 per share and how transactions were treated for tax purposes. The EF project failed, and the company went into compulsory liquidation in 2016. The 2016 statement of Mr B's SIPP showed the EF shares had a nil value.

In September 2018 HMRC wrote to Mr B as it didn't look like the EF LLP was carrying on a business with a view to profit, and therefore the disposal of shares to his SIPP incurred an unauthorised tax charge of 40%. Mr B agreed to repay just under £55,323 to settle the tax charge.

In November 2018 Mr B's CMC told Tenet it had been instructed to "*pursue complaints*" on behalf of Mr B (and his sons), in respect of the advice to invest in EF, suggesting Tenet put its professional indemnity insurers on notice, as their clients' losses were in the region of £200,000 to £300,000. In an appendix the CMC made a subject access request ("SAR") and set out an extensive list of documents and information it would like to see. Tenet acknowledged the complaint but requested further information from Mr B (and his sons) in order to proceed. As this information wasn't received, on 6 December 2018 Tenet said it closed its file.

In April 2019 Tenet provided some of the information requested in the SAR, and the CMC complained to Tenet in March 2020. Tenet responded in September 2020, saying the complaint had been made too late, being more than six years after the advice in 2014, and more than three years since Mr B ought reasonably to have known he had cause to complain (either when the statement showed the shares were worthless, or when HMRC pursued him for tax). The CMC said it had complained in November 2018, which was within six years, but Tenet said the 30 November 2018 letter had been dealt with as a SAR not a complaint.

So in February 2021 the complaint was referred to this service. Tenet didn't consent to us looking at it.

I issued a jurisdiction decision in July 2022 explaining why the complaint had been made in time, in accordance with DISP rule 2.8.2. I was satisfied the 30 November 2018 letter met the criteria of a complaint, and Tenet had a record of it being received.

Tenet continued to object, but on different grounds, saying if the 30 November 2018 letter was a complaint, then the six-month time limit should apply, once eight weeks had passed.

I issued a provisional decision in January 2023 in which I reiterated why I thought the complaint was within the jurisdiction of this service. And I went on to say why I was upholding the complaint and what Tenet should do to put things right.

Provisional decision

I made the following provisional findings (in summary):

Jurisdiction

The six-month time limit is not triggered by the expiry of the eight-week period from a complaint being received by a business.

DISP 2.8.1(2) says *The Ombudsman can only consider a complaint if […….] eight weeks have elapsed since the respondent received the complaint.*

Which means unless the business consents, we have no power to consider a complaint prior to the eight weeks having elapsed, as the respondent business (in this case Tenet) must be given adequate opportunity to respond and resolve the complaint first.

But a consumer is only bound by the six-month referral period if a final response has been issued by the business which includes this information. The requirements of a valid final response are set out in DISP 1.6.2. At the relevant time it had to be in writing, should either accept or reject the complaint giving reasons for doing so, provide referral rights to this service and enclose a copy of our leaflet (later versions also required other inclusions such as our website link).

Although Tenet responded to the complaint brought by Mr B's representatives in 2018, its reply did not meet the requirements of a valid final response to his complaint. It didn't include referral rights to this service or explain the six-month time limit, so it follows Mr B isn't bound by it. As there is a record of the complaint being received by Tenet in 2018, and no final response was issued to trigger the six-months period, I was satisfied the complaint is one we have the legal power to consider.

So I went on to consider the merits.

Was the advice to invest in Elysian Fuels suitable?

EF bears many of the hallmarks of an unregulated collective investment scheme (UCIS). On 1 January 2014 the FCA further clamped down on the promotion of such investments at COBS 4.12 so that they were not promoted to ordinary retail clients. But they can be promoted to high-net-worth individuals or experienced, sophisticated investors. The investment in EF was promoted to Mr B by Tenet because of his status as a high net worth individual ("HNWI"). This was defined as Mr B having in the previous year income in excess of £100,000 and net assets valued at in excess of £250,000 excluding his main residence or pension benefits. Mr B signed a statement to confirm to Tenet that he could be treated as such on 21 January 2014. And based on the evidence I've seen I'm satisfied Mr B was a HNWI. The fact-find also suggested Mr B had previously invested in unregulated investments, so had some experience of these. So I didn't think it was specifically a breach of any legislation or regulation for the investment to be promoted to him. That is however a different matter to whether it was suitable for him.

The failure of the EF investment, meaning the shares are effectively worthless doesn't necessarily mean it was unsuitable. That depends on a number of factors, including Mr B's capacity for loss, attitude to risk and understanding and acceptance of the risks involved. Mr B and his sons had intended to invest £33,000 (actually £33,200 for the share purchase to be a round number) between them, in a relatively risky investment, and Tenet's report said they had the capacity to do so. It said Mr B was in a position to take risks with this investment as his income and pension from the family business "N" would be sufficient for the foreseeable future, he already had significant assets, and he had no firm plans to retire. It went on "*[Mr B and his sons] can therefore afford to lose all of this investment as it wouldn't affect their standard of living".*

Tenet's 10 February 2014 "*Wealth Creation*" letter focussed on describing the EF project which related to two renewable transport fuel refineries in the UK and USA. A good case was made for the future market for green energy, and its potential for investment returns. I acknowledged the report stated in bold that investment into bio-refining is considered to be high risk, and investors should read the risk factors in the appendix. This repeated that investment in this sector is highly risky, and in bold capitals "*YOU COULD LOSE ALL YOUR CAPITAL*", and later on in bold, that "*as a speculative high-risk unregulated investment you could lose your entire capital*". So while it didn't appear Mr B had been required to sign to acknowledge he'd read and understood the risk warnings, I couldn't fairly say he wasn't made aware of the risks inherent in this type of investment.

Tenet's suitability report of 19 February 2014 recommended Mr B made an investment of £100,000 in EF, and that it would be more efficient if he made a cash contribution of £16,600, with the remaining £87,150 by way of a limited recourse loan. Tenet said this made the money work harder, using the example of borrowing money to purchase a buy-to-let property. It said holding the shares within Mr B's SIPP sheltered them from capital gains tax and selling the shares into the SIPP would enable £100,000 to be released from his pension tax-free, which Mr B could then reinvest. Although it made no recommendation about how he should invest those funds, and I understood he hadn't done so.

So a modest investment in EF in itself wasn't necessarily unsuitable, given Mr B's worth and capacity for loss. But Tenet's recommendation increased the risk, because it said he should leverage the investment by taking out a limited recourse loan, grossed up to 84% of the total investment. Doing so appeared to maximise the potential investment returns. But if the investment failed, not only would Mr B lose his investment, he might still be liable to repay the loan. In other words, although Tenet had identified Mr B and his sons could afford to invest (and risk) £33,000, it recommended they invest far more than they had the capacity to lose.

In addition, I referred to the attitude to risk questionnaire Mr B completed on 21 January 2014, which assessed him as 7/10. I said while this may have been the aggregate score, some of Mr B's recorded answers suggested he was more risk averse than that. For example when answering question 1 he agreed with the statement "*People who know me would describe me as a cautious person*". And he disagreed with question 8, *"I am willing to take substantial financial risk to earn substantial returns*", and question 11 "*I'd rather take my chances with high risk/high return investments than have to increase the amount I am saving".* These responses suggest at most, Mr B might have been prepared to take up to a medium risk with those funds, as the amount was relatively modest when compared to his overall worth. But I think those answers should've alerted the adviser that increasing Mr B's exposure through a leveraged investment in an unregulated scheme such as EF wasn't right for him, given the significant potential for loss.

I'd seen that Mr B was warned his SIPP with J wouldn't be protected by the Financial Services Compensation Scheme (FSCS), investment performance may be lower than predicted or charges may be higher. But from the positive tone of the report, I wasn't persuaded Mr B would've really understood how the investment in EF worked. Or the possibility of the financial and reputational impact of an unauthorised tax charge.

So the greater risk for Mr B was the tax treatment. Tenet recommended Mr B sell his shares in EF to his SIPP, provided the suggested SIPP provider "J" agreed to this. Mr B would subscribe to the shares first, and then sell them to his SIPP, which would enable the cash to be released to him personally. Tenet said there's nothing in HMRC legislation to prevent a SIPP buying shares from Mr B as a member trustee. And that holding the shares within his SIPP protected them from capital gains tax, making it "*tax efficient".* But I thought Tenet should have been aware that this transaction effectively enabled Mr B to release £100,000 from his pension tax-free, when the maximum set out in legislation is 25%. Mr B became liable for (and has paid) an unauthorised tax charge, so the scheme was not tax efficient, and had the added reputational impact of finding himself under HMRC scrutiny.

So to conclude I said:

- Despite Mr B's substantial assets, I wasn't persuaded it was suitable for him to invest in a complex, leveraged arrangement which resulted in him being invested in unlisted shares in a single unlisted company, and being exposed to significant tax risks.
- I could see the attraction of an investment in green energy, but it was a newly formed company, the plant wasn't yet built, and it had no track record of generating profit, so the venture was highly speculative.
- Although Tenet considers Mr B only invested £16,600 of his own money, he could still have been liable to repay the loan of £87,150 at the end of the term, unless the shares increased significantly in value. So the leveraging didn't decrease Mr B's risk, it actually increased it.
- I said a competent adviser ought to have realised releasing £100,000 meant this was essentially a tax avoidance scheme, which put Mr B at risk of HMRC taking action, as indeed it did.
- It appeared Tenet introduced Mr B to the idea of EF, and I didn't think Mr B would've invested in EF if Tenet hadn't recommended it, or if he'd been given clear advice against doing so.
- While Tenet was advising Mr B in a personal capacity and not strictly the employer (even though Mr B represented both), it's still the case that the employer would have needed to decide where to make its pension contribution in the absence of Tenet's advice to Mr B to invest in EF.
- FURBS no longer have the same advantages as they used to enjoy since the Finance Act 2004 was implemented. A personal pension (or a SIPP) would likely have been viewed as having better tax advantages at the time of these events, and the pension contribution was sufficiently large for there to be nothing particularly unusual about it being paid to a new SIPP.
- So, for the purpose of this complaint I assumed N would always have made its employer pension contribution to Mr B's SIPP - whether it had sought advice on this from Tenet or not.
- Mr B hasn't quantified his loss, but it appeared he lost his initial cash contribution of £16,600 and has paid an unexpected tax bill of £55,323.
- I wasn't sure Mr B had made any repayments towards the loan of £87,150, but I thought HMRC's view of this as a tax avoidance scheme makes it unlikely he'll be required to do so in future. Given the loan was issued by the same company that sold him the shares and based on a questionable value for those shares.
- Mr B received £100,000 cash when the shares were sold to his SIPP, which I understood he retained in cash savings, rather than invest. But that represents money that he would eventually have been able to take from his SIPP anyway, less some tax (which would be at a lower rate than the tax charge he has paid).
- I was satisfied Mr B was a HNWI with the financial capacity and risk appetite to consider a modest investment in a non-mainstream investment product. And it looked like he had some limited previous experience of such investments. But I don't consider the recommendation to invest in EF by way of a leveraged arrangement was suitable. I don't think Mr B fully understood how the scheme worked, and I think

the risks involved were understated. The proposal increased Mr B's risk and exposed him to HMRC scrutiny and an unauthorised tax charge.

So my provisional decision was I upheld the complaint and set out how I thought Tenet should put things right.

Responses to the provisional decision

Both parties responded.

Mr B through his representatives, accepted the provisional decision. And he provided evidence of the amount he had actually paid HMRC in respect of the unauthorised tax charge. Being an initial sum of £52,322.09 in December 2018, and the balance of £2,990.79 which he settled in January 2019 (a total of £55,312.88).

He provided no evidence to show he'd made any repayments to the loan. And he didn't disagree with the assumption that he'd likely be a higher rate taxpayer in retirement.

Tenet responded, making the following points (in summary):

<u>1 - Jurisdiction – six months</u>

It restated its previous argument that if the November 2018 letter was a complaint, then it follows the complaint should now be time-barred due to the time that has now passed. It pointed out DISP rule 2.8.3(G) is guidance, and therefore not binding. If a business hasn't issued a final response letter, the DISP rules allow a complaint to be referred to our service once eight weeks have passed since a complaint to the business.

Tenet did not issue a final response letter, so Mr B was entitled to refer his complaint to this service after eight weeks had elapsed. Tenet thought the six-month referral timescale should apply from the point the eight weeks elapsed, otherwise it "*makes a mockery*" of the time limits in DISP, which would effectively never expire.

<u>2 - Jurisdiction – regulated activity</u>

Tenet wondered why the ombudsman said the investment in EF "*bears many of the hallmarks of an unregulated investment*……" but stopped short of concluding it was UCIS. Tenet believes EF was a UCIS, which are not regulated products, therefore advising on UCIS is not a regulated activity. So the activity in this complaint falls outside of the jurisdiction of this service.

<u>3 - Mr B's previous investment experience</u>

Mr B was a HNWI, and "*no stranger*" to investing in high-risk unregulated investments. He was a sophisticated investor willing to take high risk for high returns, and so is likely to have proceeded with the investment in EF if Tenet had given no advice.

<u>4 - Break in causation</u>

The investment in EF was contingent on the SIPP provider "J" permitting the investment to be held within the SIPP. The loss arose because Mr B was able to sell his investment into his SIPP. So regardless of any advice given by Tenet, the SIPP provider failed in its duty of care to Mr B. And while Tenet may be held to have recommended the transaction, it had no control over the release of funds to the SIPP so wasn't responsible for Mr B's loss.

5 - Tax losses

The tax losses arose from the unauthorised release of funds from Mr B's pension without paying the appropriate tax, so should be borne by the SIPP provider not Tenet.

As the tax charge was settled with HMRC on a "without prejudice" basis, Tenet said it needed to know how the figures were calculated, as they don't appear to align to a 55% charge on the amount withdrawn from the SIPP.

So the case has been returned to me to issue the final decision.

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.

Before setting out my final conclusions I'll respond to Tenet's points in turn.

1 - Jurisdiction – six months

I've explained previously firms must be given a fair opportunity to investigate and resolve complaints without our involvement. So we had no power to get involved until eight weeks have elapsed since the complaint was made to Tenet. If no final response was issued, the consumer can refer the complaint to us after eight weeks. This prevents consumers being kept waiting unfairly due to a firm's inefficient complaint handling. There are other time limits relating to how long after an event happening a complaint can be made. The advice was given in 2014, and Mr B brought his complaint to this service in February 2021, more than six years later. But I said that DISP 2.8.2(R) states the "*clock is stopped*" not when Mr B made his complaint, but if there's evidence of a complaint having been *received* by Tenet. I said there was evidence of a complaint having been received by Tenet in November/December 2018, which was within three years from when Mr B ought reasonably to have realised he had cause to complain. So I proceeded on the basis Mr B had complained within the time limits.

Tenet now says that if the 30 November 2018 letter was a complaint, then Mr B is bound by a different time limit, which means he's still complained too late. Tenet claims that Mr B only had six months from the expiry of the eight-week period within which it should have issued its final response (around 25 January 2019) to complain to this service. Otherwise it would be unfair, and the regulator didn't intend complainants to have endless time to complain.

DISP 2.8.2 (R) states:

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

(1) More than six months after the date on which the respondent sent the complainant its final response [……..]

DISP 2.8.3(G) goes on to say:

The response must tell the complainant about the six-month time limit that the complainant has to refer the complaint to the Financial Ombudsman Service.

Tenet's position is that the six-month time period should apply, whether or not the business has provided a response to a complaint. It doesn't suggest its 6 December 2018 response met the definition as set out in DISP 1.6.2 (R) of a final response. But it points out that as 2.8.3(G) is guidance only, (rather than a rule signified by "R") then it is my interpretation that the six-month time period is only triggered if any response to a complaint explains the six-month time limit. But I disagree.

The FCA states that its rules are binding on *firms,* and failure to comply would make a firm liable for enforcement and potential action for damages, which wouldn't apply to guidance. But I think the FCA still expects its guidance to be followed, it just wouldn't take enforcement action against non-compliance with guidance. In any event, the definition of a valid final response letter is set out in 1.6.2(R), which is a rule and therefore is binding. The requirements have changed and strengthened over time but have always required firms to include details of this service, whether by inclusion of a leaflet, a website link or setting out our contact details.

Had Tenet's 6 December 2018 response included our leaflet or website link (from which it would've been possible to discover the six-month time limit), then it may have a point that it wasn't binding on them to mention the six-month timescale in the body of the letter. But Tenet's letter of 6 December 2018 is silent on Mr B's right of referral to this service and included no leaflet or website link. So I see no justification to say that because Tenet issued some kind of response, even though it wasn't a valid final response to the complaint, then the six-month time limit applies from the date of that letter. Tenet believes it wasn't the regulator's intention to give complainants unlimited time to complain. It's not my role to speak for the FCA, but I think the over-riding intention of the DISP rules is ensuring complaints are dealt with effectively, fairly and with a minimum of delay. By failing to provide a meaningful response to Mr B's complaint or referral rights to this service, I don't think Tenet has acted in accordance with the letter or the spirit of these rules. So I'm satisfied the six-month time limit does not apply here.

<u>2 - Jurisdiction – regulated activity</u>

Tenet considers EF to be a UCIS and wonders why I said EF bore many of the hallmarks of UCIS but stopped short of categorising it as such. Whether EF is UCIS or not is only relevant if the complaint turned on whether it was appropriate for those investments to be promoted to Mr B as a retail client. I'm simply considering the suitability of Tenet's recommendation that Mr B (and his sons) invest in EF, which were unlisted shares. Tenet also says that as UCIS are unregulated investments, then the advice to invest in them is not a regulated activity. But that's not correct.

DISP 2.3.1(R) says that we can consider a complaint under the compulsory jurisdiction of this service if it relates to an act or omission of a firm in carrying on "*regulated activities*" or certain other activities (including ancillary activities) set out in the Regulated Activities Order 2001 (RAO). Advising on investments is a regulated activity (Article 53) of the RAO. The EF shares purchased are (unlisted) securities which are specified investments under article 76 of the RAO. So I'm satisfied regardless of whether the investments themselves were a regulated product, the regulated activity being complained about is regulated investment advice as per article 53 of the RAO. Which means we have jurisdiction to consider the activity being complained about.

<u>3 - Mr B's previous investment experience</u>

The recommendation letter explained that despite Mr B's capacity to save, he'd previously invested little in traditional investments such as ISAs and the stock market, instead "*building up Cash and using this to invest in other assets such as property".* It seems Mr B had invested in three Enterprise Property Trusts and had some riskier investments (such as technology and global equities). I'd said I didn't think a modest investment in EF was necessarily unsuitable for Mr B given his overall wealth and capacity for loss. The increased risk came from leveraging the investment by way of a loan, releasing cash there was no evidence he needed, and avoiding tax. Tenet was engaged because Mr B had savings and a pension contribution to invest and was prepared to take considered risks with a sum he could afford to treat less cautiously. But while the risks inherent in the EF investment itself were set out, I don't think Mr B's previous investment experience meant he'd have understood the additional risks arising from the loan, investing in unlisted shares, or the tax implications, unless Tenet had explained these. And I think on balance Mr B is unlikely to have gone ahead, had all the risks been explained as they should have been.

<u>4 - Break in causation</u>

Tenet says there was no legislation or regulation breach which prevented a UCIS investment being recommended to Mr B as a HNWI. And as the investment was conditional on J being prepared to accept the investments in EF into the SIPP, J is responsible for Mr B's loss, not Tenet's advice. But in this decision I'm considering the regulated financial advice provided by Tenet, which introduced Mr B and his sons to the idea of investing in EF. There's nothing to suggest Mr B approached Tenet with that in mind. Tenet made a positive recommendation that Mr B should invest in unlisted shares in EF, which at the time was highly speculative but arguably had growth potential due to the interest in green energy. And in addition Tenet actually recommended Mr B further increase his risk by leveraging the investment, and risked HMRC scrutiny by releasing funds without paying the relevant tax.

An adviser must act in accordance with the regulator's rules, guidance, standards and codes of practice, including the Principles for Business ('PRIN') and the Conduct of Business Sourcebook ('COBS'). Of most relevance in this case are:

- PRIN 6 - A firm must pay due regard to the interests of its customers and treat them fairly;
- PRIN 7 - A firm must pay due regard to the information needs of its client and communicate information to them in a way which is clear, fair and not misleading;
- COBS 2.1.1R - A firm must act honestly, fairly and professionally in accordance with the best interests of its client.

I've already said if Tenet had simply recommended Mr B and his sons invest their available cash (£33,000) in EF that wouldn't necessarily have been unsuitable, despite it being a speculative untested technology. Tenet didn't simply recommend the investment in EF, it recommended the limited recourse loan and an effective tax avoidance scheme. Regardless of the acts or omissions of J, I'm not satisfied Tenet acted in Mr B's best interests, by not making him aware of the additional risks inherent in leveraging the investment and risking HMRC scrutiny. And I'm not satisfied Tenet's advice was suitable for Mr B's objectives and circumstances. Even if Mr B was interested in higher risk investments, and the prospects for green technology, it was for Tenet as the regulated adviser to explain the additional risks of leveraging the investment and the potential for an unauthorised tax charge.

<u>5 - Tax losses</u>

Tenet says it needs to understand how the tax losses were calculated, as in its opinion the quoted figures don't fit with what they'd expect, namely 55% of the withdrawal from the SIPP (40% income tax plus 15% surcharge).

Tenet has been provided with copies of the letters Mr B received from HMRC, and a redacted copy of a bank statement showing the amount he paid. I'm satisfied Mr B incurred a tax charge which he has paid, and for the purposes of this decision I don't consider it's necessary to check HMRC's calculations.

<u>Conclusion</u>

Having considered everything afresh, I remain of the opinion that Tenet's advice was unsuitable.

At the time of the advice, Mr B had funds available to invest and it seems he was prepared to take a higher risk with those funds. But as I've said, Tenet's advice to increase Mr B's risk beyond the level he was prepared to accept wasn't suitable. And mentioning the advantages of sheltering the shares from capital gains tax while not explaining the tax implications from releasing funds from a pension was misleading, and not in Mr B's best interests. A competent advisor ought to have been alive to the significant risk involved with using a loan in this way to access funds from a pension. Tenet should have recognised this as a tax avoidance scheme and therefore ought to have known of the risk of HMRC taking action. There were several risk factors that ought to have been immediately apparent to the adviser including a potential tax bill, the liability to repay the loan and costs that might have arisen as a consequence, and the reputational impact on Mr B personally and in relation to his business of HMRC scrutiny.

So I see no reason to depart from the conclusions reached in the provisional decision, and I uphold Mr B's complaint.

Putting things right

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

I think if Mr B had been given suitable advice he would have invested the £104,000 employer pension contribution from N into his SIPP differently. I don't know how those funds would've been invested. As it's not possible to say *precisely* what Mr B would have done, I'm satisfied what I've set out below is fair and reasonable given Mr B's circumstances and objectives when he invested.

I consider it fair to calculate and compare the notional position Mr B would have been in had he not been given advice to invest in EF with the actual position he's in now.
The transaction Mr B entered into when the EF shares were sold to his SIPP resulted in the release of a tax-free lump sum of £100,000 from his pension which is being treated by HMRC as an unauthorised payment. Tenet suggested Mr B could reinvest this sum to generate further income, but Mr B has confirmed he retained those funds in cash. In calculating Mr B's actual position now, I propose that the values of the money he released from his pension or paid to HMRC are the amounts to be used, with no adjustment to bring those values up to date. The reason I say this is because rather than investing that money elsewhere, Mr B left it in cash. Therefore, I don't think it is appropriate to add any further investment return.

What should Tenet do?

TenetConnect should calculate the following on the date of my final decision:

Notional position = A+B+C where:

A = Value of Mr B’s SIPP with “J” if it had not purchased shares in Elysian Fuels, no fees had been taken by Tenet and it had instead performed in line with a benchmark of the FTSE UK Private Investors Income Total Return Index at the date of calculation.
I think this is an appropriate benchmark to use given Mr B wanted capital growth and was willing to accept some investment risk. The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It’s a fair measure for someone who was prepared to take some risk to get a higher return. Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr B’s circumstances and risk appetite.

This value should then be reduced to notionally allow for any income tax that would otherwise have been paid in the normal course of drawing benefits. This reduction which I’ll call the ‘notional tax allowance’ should be calculated using Mr B’s expected marginal rate of tax in retirement. As Mr B would be able to take a tax-free cash sum of 25% of the total pension, I’m going to assume he would pay higher rate income tax on the rest, meaning that the notional tax allowance would be 30% overall.

The notional tax allowance is an adjustment to ensure compensation is fair – it is not a payment Tenet will have to make to HMRC.

B = The value of Mr B’s initial contribution of £16,600 to Elysian Fuels which he would have retained if he hadn’t invested in the scheme. To be added to this is the amount of repayments Mr B made on the non-recourse loan (if any), and fees he paid to third parties to administer the LLP associated with Elysian Fuels (if any).

C = The amount of £55,323 Mr B has paid HMRC to settle the tax charge, which he would have retained if he hadn’t invested in the scheme. To this should be added any tax Mr B has already paid HMRC as a result of his interest in the LLP.

Actual position = D+E+F, where:

D = Value of Mr B’s SIPP with “J”.

As the Elysian Fuels shares held in the SIPP are illiquid (so cannot be readily sold on the open market), it may be difficult to find the actual value of the investment. So, I think it is reasonable to assume the investment has no current value and there is no prospect of any future return. On that basis it is fair to make no allowance for a current or future value. For that reason, the actual value of the shares in the SIPP should be assumed to be nil and C will just be the value of other assets (if any) held in the SIPP such as a bank account.

The overall value of the SIPP with “J” should then be reduced by the same notional tax allowance as used for A above.

E = Value of any interest Mr B holds in the LLP. I consider this value to be nil and I do not think there is any reasonable prospect of his interest having any value in the future.

F = Current value of the £100,000 released to Mr B from the sale of Elysian shares to the SIPP. Mr B has told us he retained this sum in its entirety in cash savings, and I’ve noted that Tenet did not provide a firm recommendation on where it should be invested - so no adjustment is to be made to the value.

If the notional value is greater than the actual value, then Mr B has suffered a loss (after allowing for future taxation) equal to the difference. Given that Mr B is already out of pocket as a result of a tax demand from HMRC, I consider it would put Mr B closest to the position he would have been in without Tenet's advice if it pays this sum directly to him.

In addition, Tenet should pay Mr B £250 for the distress, embarrassment and worry of experiencing HMRC scrutiny and an unauthorised tax charge.

Undertakings

It's possible that HMRC reviews its position and decides Mr B owes less tax than he has already paid in respect of the unauthorised payment, or taxation on the LLP. To cover this eventuality, Mr B should provide TenetConnect Limited with an undertaking to pay to it the overall amount of any amount of refund he receives from HMRC.

In addition, it's possible that HMRC asks Mr B to pay further tax in future in settlement of the unauthorised payment, or to discharge the tax liability of the LLP. Tenet should also undertake to pay those sums.

Payment of redress as set out above may be made subject to these undertakings. TenetConnect will need to meet any costs in drawing up the undertakings.

Determination and money award

My decision is that TenetConnect Limited should pay the amounts produced by that calculation up to the maximum of £160,000. Plus interest at 8% per year simple from the date of my final decision to the date of payment, if the award is not settled within 28 days of TenetConnect Limited's receipt of Mr B's acceptance of the final decision.

Income tax may be payable on any interest paid. If Tenet deducts income tax from the interest, it should tell Mr B how much has been taken off. Tenet should give Mr B a tax deduction certificate in respect of interest if Mr B asks for one, so he can reclaim the tax on interest from HMRC if appropriate.

If an undertaking results in a future sum being owed to Mr B by TenetConnet Limited which would take the total compensation payable to Mr B above £160,000 I recommend that TenetConnect Limited should pay the balance of the £160,000 as set out above.

However if the compensation TenetConnect Limited needs to pay Mr B now already exceeds £160,000 and TenetConnect Limited does not accept the recommendation, in these circumstances it is not required to provide Mr B with an undertaking to pay him more as per the schedule outlined above. But in those circumstances, if any repayment of the unauthorised tax charge is made by HMRC, Mr B would also only be expected to return the part of the repayment (if any) to TenetConnect Limited that would reduce the total loss determined by the calculation above to below £160,000.

Mr B should also be aware that if he accepts the final decision the money award is binding on TenetConnect Limited up to £160,000. But any recommendation above £160,000 is not binding on TenetConnect Limited. Further it's unlikely that Mr B could accept my final decision and go to court to ask for any remaining balance above £160,000.

Mr B should be aware that accepting my final decision may affect his legal rights should any liabilities arise in respect of the limited recourse loan he used to purchase the shares or otherwise. So Mr B may wish to consider getting independent legal advice before deciding whether to accept the final decision.

My final decision

I uphold this complaint. TenetConnect Limited should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 13 April 2023.

Sarah Milne
Ombudsman