DRN-4026667

The complaint

Mr B1 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 B1 is represented in this complaint by a claims management company (CMC).

What happened

In February 2014 Mr B1 was advised by Anand Associates to invest in Elysian Fuels, a green energy company. Mr B1's father (Mr B) and brother were also advised, which involved separate fact-finding and assessment of their attitude to risk. This decision just focusses on the advice given to Mr B1.

Anand Associates is 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.

A fact find completed in January 2014 captured the following information about Mr B1, in summary:

- He was aged 41, married with three dependent children;
- He was the sales director of the successful family engineering business I'll refer to as "N", where he worked with his father and brother;
- His income from employment was recorded as around £51,800 made up of £12,000 salary and £39,800 in dividends, with total monthly net income of £6,900;
- He received rental income of £50,000 from a property jointly owned with his brother;
- He had savings of around £85,000, shares and ISAs totalling £45,000 and was entitled to £37,500 of company cash;
- He owned property valued at around £1.7m of which his main residence was £600,00, with mortgage borrowing of £800,000,
- He'd been contributing to an EPP (executive pension plan) since 1998 valued at the time as £95,000, and was due an employer pension contribution from N of £52,000, plus a 12.5% share of the FURB (funded Unapproved Retirement Benefit Scheme) valued at £111,250

His attitude to risk was recorded as "high" 9 (out of 10).

There's no personal recommendation letter for Mr B1. But Tenet's 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*" and included the adviser's recommendations for all three of them. Followed by a subsequent letter dated 19 February 2014 which focussed on the choice of pension provider.

The adviser identified Mr B and his two sons were in a position to invest around £33,000 between them, and apparently wanted to take a high-risk approach to investing their available cash. After considering a number of investment options, Tenet recommended exposure to Elysian Fuels (EF), a limited liability partnership through Future Capital Partners Limited ("FCP").

The adviser recommended their pooled resources be used to purchase unquoted shares at £1 each in an EF limited company connected to the partnership. Their net investment of £33,200 (to purchase a round number of shares) would result in a gross investment of £207,500 with the balance funded by way of limited recourse loans. Mr B1 was advised to purchase 50,000 unquoted shares at £1 each in an Elysian Fuels ("EF") limited company connected to the partnership. The investment would be funded by Mr B1 making a cash payment of £8,300, with the remainder by way of a limited recourse loan of £43,575 through FCP. Mr B1was advised to open a new self-invested personal pension "(SIPP") into which the employer pension contribution from N was paid, rather than his existing EPP. The shares in EF would be sold to the new SIPP for £50,000 and the cash released to Mr B1, which he added to his savings rather than invested for growth. Tenet offered a reduced advice fee, of which Mr B1's share was £1,000.

Not long after this, HMRC started investigating the arrangements around EF investments, and questioned 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. I've not seen a SIPP statement in Mr B1's name, but I understand the EF shares are effectively worthless so Mr B1 has lost his money. It's not clear if Mr B1 has made any repayments to the loan.

In September 2018 HMRC wrote to Mr B1 as it wasn't satisfied 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%. HMRC initially made a without prejudice settlement offer of £26,166.02, which Mr B1 paid, but when the calculations were updated there was a £1,960.98 shortfall, so Mr B1 paid a total of £28,127 to settle the tax charge.
In November 2018 the CMC wrote to Tenet explaining they had been instructed to "*pursue complaints*" on behalf of Mr B1 (and his father and brother) in respect of the advice given to invest in EF. Amongst other things the letter requested Tenet put its professional indemnity insurers on notice, as their clients' losses were in the region of £200,000 to £300,000. As an appendix to the letter 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 said it needed the CMC to provide further information from Mr B (and his sons) in order to proceed. When it didn't receive this information, on 6 December 2018 Tenet said it closed the 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, as the 30 November 2018 letter had been considered as a SAR not a complaint. Tenet said the 6 March 2020 complaint had been made more than six years after Mr B1 had been advised to invest in EF, and more than three years since he 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 the complaint had been made in time, as the 30 November 2018 letter had been a complaint, even if Tenet had chosen to treat it as a SAR. 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 in relation to Mr B's complaint explaining why the complaint had been made in time, and said the same reasoning would apply to complaints from Mr B's sons.

Tenet has continued to challenge our jurisdiction but on different grounds. Saying if the 30 November 2018 letter was a complaint, which Tenet acknowledged as such in December 2018, then the six-month referral period applies, once eight weeks have 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) on both the jurisdiction and merits of Mr B1's complaint.

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 B1's representatives in 2018, its reply did not meet the requirements of a valid final response to the complaint. It didn't include referral rights to this service or explain the six-month time limit, so it follows Mr B1 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?

I said 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 (HNWI) or experienced, sophisticated investors. EF may have been promoted to Mr B1's father as he met the criteria of a HNWI, based on his income and net personal assets. But this didn't appear to apply to Mr B1 based on the information captured in the fact find completed in January 2014, and there's no HNWI declaration signed by Mr B1. So I couldn't say it was appropriate if such investments had been promoted to Mr B1.

N was due to make an employer contribution of £52,000 into Mr B1's EPP. Tenet's suitability report dated 19 February 2014, (which covered the advice given to Mr B and his sons jointly), recommended the investment in EF, and said it would be more tax efficient if Mr B1's shares in EF were paid for by a cash contribution of £8,300 with the remaining £43.575 by way of a limited recourse loan. The report set out Tenet's rationale for recommending EF, and in particular the benefit of leveraging (borrow to fund) the investment. Tenet said holding

the shares within a SIPP would shelter them from capital gains tax, as well as enabling the release of £50,000, which Mr B1 could then reinvest. Although no recommendation was given about how those funds should be invested, and I understood Mr B1 retained the released funds in cash rather than reinvesting them.

The failure of the EF investment, meaning the shares are effectively worthless wouldn't necessarily mean it was unsuitable. That depends on a number of factors, including Mr B1's capacity for loss, attitude to risk and understanding and acceptance of the risks involved. The recommendation didn't provide a specific rationale for Mr B1, it was based on all of them being in a position to take risks with this investment, as they derived sufficient income from the family business "N" for the foreseeable future. It included the words "*[Mr B and his sons] can therefore afford to lose all of this investment as it wouldn't affect their standard of living".*

The only evidence to show how Mr B1's attitude to risk was assessed, was a table within the fact-find, in which Mr B1 rated his attitude to risk as "9" (high), against all listed financial products (protection, retirement, investment, savings, and mortgage). The adviser had written "*understands the nature of risk, reward & volatility and willing to take calculated risks with investments rated as high risk".* But there's nothing to show how this was explained to Mr B1 or what he understood. Generally people have different risk tolerances for their various financial responsibilities, so I'd expect to see a range of ratings. For example someone may be prepared to take a higher risk with a portion of their cash savings. But as the main earner supporting his family, I thought it would be unusual for Mr B1 to take a high-risk approach with his mortgage. So I wasn't convinced 9 accurately reflected Mr B1's attitude to risk. I thought it more likely he would be 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 didn't think increasing Mr B1's exposure through a leveraged investment in an unregulated scheme such as EF was right for him, given the significant potential for loss.

The 10 February 2014 "*Wealth Creation*" report focussed on the EF scheme and its potential for high returns. The project related to two renewable transport fuel refineries in the UK and USA, and a good case was made for the future market for green energy. The report mentioned 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*". It also stated the SIPP with J wouldn't have FSCS protection.

But as both the 10 and 19 February 2014 letters were addressed to Mr B, and there appeared to be no personalised advice for Mr B1, I couldn't say what account Tenet took of his individual circumstances. Given he was much younger and less wealthy than his father, with additional financial responsibilities such as dependent children and a mortgage, and he was also below the age at which pension benefits can legally be accessed. I'd seen nothing to show Mr B1 was required to read and understand the risks involved. I thought it likely Mr B1 would've been influenced by his father, rather than independently assessing whether the approach was right for him. And Mr B was in turn being persuaded by Tenet to invest far more money than had originally been anticipated in EF, which was high risk (although with the potential for high returns). Even if Mr B1 had seen the report, it seemed unlikely he'd have understood the EF investment, or the possibility of the financial and reputational impact of an unauthorised tax charge.

The report stated that together Mr B and his two sons had the capacity to invest a total of £33,000, (actually £33,200 for the share purchase to be a round number). But Tenet recommended they leverage their investment by taking out limited recourse loans, grossed up to 84% of the total investment, which appeared to maximise the potential investment returns. But it also significantly increased their risk, as if the investment failed, they'd lose the

investment yet 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.

But the greatest risk to Mr B1 was the tax treatment. Tenet recommended Mr B1 sell his shares in EF to his SIPP, as long as the suggested SIPP provider "J" agreed to this. Mr B1 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 that says it's not possible for a SIPP to buy shares off Mr B1 as a member trustee. And that holding the shares within his SIPP protected them from capital gains tax, making it "*tax efficient".* But I think Tenet should have been aware that this transaction effectively enabled Mr B1 to release £50,000 from his pension tax free, when the maximum set out in legislation is 25%. Mr B1 became liable for (and has paid) an unauthorised tax charge, so the scheme was not tax efficient.

Despite the risks Tenet described the investment in EF as an "*excellent proposition with the prospects of making significant gains"* and represented only a small proportion of Mr B's overall portfolio. But there was no such analysis in relation to Mr B1 overall financial position, and how the investment in EF suited his circumstances.

Even if I accept Mr B1's attitude to risk was on the high side, and I've said I wasn't convinced 9/10 overall was accurate, that doesn't mean this investment was suitable for him. The fact find suggested Mr B1 received rental income from a property owned with his brother and had some savings, it seems at least some of these were jointly held with his wife. And he was responsible for a mortgage and three dependent children. The only reference to his investment experience was the adviser notes in the fact-find he was "*not keen on typical stock market volatility with this particular lump sum.*" So I didn't think Mr B1 was a highly experienced or sophisticated investor with a deep understanding of investments of this nature.

So to conclude I said:

- I wasn't persuaded it was suitable for Mr B1 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 saw 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 consider Mr B1 only invested £8,300 of his own money, he could still have been liable to repay the loan of £43,575 at the end of the term, unless the shares increased significantly in value. So the leveraging increased Mr B1's risk, rather than reducing it.
- A competent adviser ought to have realised releasing £50,000 meant this was essentially a tax avoidance scheme, which put Mr B1 at risk of HMRC taking action, as indeed it did.
- It appeared Tenet introduced Mr B and his sons to the idea of EF, and I didn't think Mr B1 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 B1 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 B1's SIPP - whether it had sought advice on this from Tenet or not.
- Mr B1 hasn't quantified his loss, but it appeared he lost his initial cash contribution of £8,300 and has paid an unexpected tax bill of £28,127.
- Mr B1 hasn't said whether he'd made any repayments towards the loan, 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 £50,000 cash when the shares were sold to his SIPP, which I understand 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).
- In summary I was satisfied Mr B1 had the financial capacity and risk appetite to consider a modest investment in a non-mainstream investment product. But I didn't consider the recommendation to invest in EF by way of a leveraged arrangement was suitable. I didn't think he fully understood how the scheme worked, and the risks involved were understated. The proposal increased Mr B1'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 B1 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. This totalled £28,127, with an initial sum of £26,166.02 in December 2018, and the balance of £1,960.98 settled in January 2019.

He provided no evidence to show he'd made repayments to the loan. Nor did he challenge the assumption that he's likely to be a higher rate taxpayer in retirement.

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

<u>1 - Jurisdiction – six months</u>

If the ombudsman insists the CMC's letter in November 2018 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 B1 was entitled to refer his complaint to this service after eight weeks had elapsed (so after 25 January 2019). Tenet said that once that eight-week period had passed, then the six-month referral timescale should apply, otherwise it "*makes a mockery*" of the time limits in DISP which would effectively never expire.

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

The ombudsman has 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 UCIS, which are not regulated, therefore advising on UCIS is not a regulated activity. So the activity in this complaint falls outside of the jurisdiction of this service.

3 - Mr B's previous investment experience

Mr B (Mr B1's father) was a HNWI and was *"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 no advice had been given.

4 - Break in causation

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 B1 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 B1. 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 B1's loss.

5 - Tax losses

The tax losses arose from the unauthorised release of funds from Mr B1'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.

6 – Influence of his father

Tenet referred to the adviser's statement that they were a close-knit family. So while the advice was given to all three of them at the same time, the sons were likely to have been influenced by their father and would follow his decision to invest in high risk UCIS. So Tenet said even if no advice had been given, Mr B1 is likely to have invested in any event.

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 B1 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 B1 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 B1 ought reasonably to have realised he had cause to complain. So I proceeded on the basis Mr B1 had complained within the time limits.

Tenet now says that if the 30 November 2018 letter was a complaint, then Mr B1 is bound by another time limit, which means he's still complained too late. Tenet claims Mr B1 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) in which to refer his complaint to us. Otherwise it would be unfair, and the regulator didn't intend complainants to have endless time to complain.

DISP 2.8.2 (R) reads:

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 letter included our leaflet or website link (from which Mr B1 could've discovered the six-month time limit), then they 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 contained no leaflet or website link and is silent on Mr B1's right of referral to this service. 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 B1'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.

2 - Jurisdiction – regulated activity

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 them as such. Whether EF is UCIS or not is only relevant if I was making a finding on whether it was appropriate for those investments to be promoted to Mr B1 as a retail client. But I'm simply considering the suitability of Tenet's recommendation that Mr B1 (and his relatives) 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 are regulated, 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.

3 - Mr B1's previous investment experience

I've not seen a personal recommendation letter for Mr B1, so his previous investment experience isn't commented on. But the fact-find noted Mr B1 "*wasn't interested in typical stock market volatility for this particular investment".* In terms of investment objectives, it noted he wanted to make a "*lump sum investment for growth….. "* and *"tax efficiency should be borne in mind*".

As I said in the provisional decision, I didn't think a modest cash investment in EF was necessarily unsuitable for Mr B1 in proportion to his overall wealth and capacity for loss. The increased risk came from leveraging the investment by way of a loan and releasing cash which there was no evidence he needed. Tenet was engaged because Mr B1 had savings to invest and was prepared to take considered risks with cash he could afford to treat less cautiously. But while the risks inherent in the EF investment itself were set out (in the report to Mr B at least), I've seen nothing to suggest Mr B1 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 B1 is unlikely to have gone ahead, had all the risks been explained as they should have been.

4 - Break in causation

Tenet says there was no reason a UCIS investment shouldn't have been recommended to Mr B as a HNWI. But that argument doesn't apply to Mr B1 who as far as I can see didn't meet the criteria of a HNWI. It also claims that as the investment was conditional on J being prepared to accept the investments in EF into the SIPP, then J not Tenet is responsible for Mr B1's loss. But in this decision I'm considering the regulated financial advice provided by Tenet, which introduced Mr B1 and his relatives to the idea of investing in EF. Tenet made a positive recommendation that Mr B1 should invest in unlisted shares in EF, which at the time was highly speculative although arguably had growth potential due to the interest in green energy. And in addition Tenet actually recommended Mr B1 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 was aware Mr B1 had cash and his employer's pension contribution to invest, but 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's advice was suitable for Mr B1's circumstances and objectives, one of which was tax efficiency. And I'm not satisfied Tenet acted in Mr B1's best interests, by not making him aware of the additional risks inherent in leveraging the investment and risking HMRC scrutiny. Even if Mr B1 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.

5 - Tax losses

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 B1 received from HMRC, and bank statement evidence 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.

6 – Influence of Mr B1's father

I don't quite understand the point Tenet is making here. I can see an argument that if Mr B had approached Tenet because he wanted to invest in EF, and Tenet had advised against it, then it's possible Mr B may have influenced his sons to join him in that investment despite Tenet's advice. But that's not what happened. Mr B and his sons were introduced to EF by Tenet and Tenet made a positive recommendation for them to invest in EF. So if Mr B1 was influenced by his father, it was because Mr B himself had first been influenced by Tenet to invest in EF, and to increase the risk by leveraging the investment and the potential for an unauthorised tax charge. Tenet cannot absolve itself from its responsibility to make a suitable recommendation for Mr B1, and I've seen no evidence it did that here.

Conclusion

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

I understand Mr B1 had funds available to invest, with which he was a higher risk if there was the potential for higher returns. But as I've said, Tenet's advice to increase Mr B1'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 EF 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 B1 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 B1's complaint.

Putting things right

My aim is that Mr B1 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 B1 had been given suitable advice he would have invested the £52,000 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 B1 would have done, I'm satisfied what I've set out below is fair and reasonable given his circumstances and objectives when he invested.

I consider it fair to calculate and compare the notional position Mr B1 would have been in had he not been given advice to invest in Elysian Fuels with the actual position he's in now. The transaction Mr B1 entered into when the EF shares were sold to his SIPP resulted in the release of a tax-free lump sum of £50,000 from his pension which is being treated by HMRC as an unauthorised payment. Tenet suggested Mr B1 could reinvest this sum to generate further income, but Mr B1 has confirmed he retained those funds in cash.

In calculating Mr B1'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 B1 has confirmed he left it in cash. Therefore I don't think it is appropriate to add any further investment return.

What should Tenet do?

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

Notional position = A+B+C where:

A = Value of Mr B1's SIPP 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 B1 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's called an 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 B1's circumstances and risk appetite.

The value should then be reduced to 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 B1's expected marginal rate of tax in retirement. As Mr B1 would be able to take a tax-free lump 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 B1's initial contribution of £8,300 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 B1 has made to the non-recourse loan (if any), and any fees paid to third parties to administer the LLP associated with Elysian Fuels (if any).

C = The amount of £28,127 Mr B1 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 B1 has already paid HMRC as a result of his interest in the LLP.

Actual position = D+E+F where:

D = Value of Mr B1's SIPP

As the Elysian 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 B1 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 £50,000 released to Mr B from the sale of Elysian Fuels shares to the SIPP. Mr B1 has told us he retained this sum in its entirety in cash savings, and I've noted 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 B1 has suffered a loss (after allowing for future taxation) equal to the difference. Given that Mr B1 is already out of pocket as a result of a tax demand from HMRC, I consider it would put Mr B1 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 B1 £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 B1 owes less tax than he has already paid in respect of the unauthorised payment, or taxation on the LLP. To cover this eventuality, Mr B1 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 B1 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.

My final decision

I uphold the complaint. TenetConnect Limited should pay the amounts calculated as set out above.

Determination and money award

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 B1'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 B1 how much has been taken off. Tenet should give Mr B1 a tax deduction certificate in respect of interest if he 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 B1 by TenetConnet Limited which would take the total compensation payable to Mr B1 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 B1 now already exceeds £160,000 and TenetConnect Limited does not accept the recommendation, in these circumstances it is not required to provide Mr B1 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 B1 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 B1 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 Mr B1 could accept my final decision and go to court to ask for any remaining balance above £160,000.

Mr B1 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 B1 may wish to consider getting independent legal advice before deciding whether to accept the final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B1 to accept or reject my decision before 13 April 2023.

Sarah Milne
Ombudsman