DRN-4143136

The complaint

Mr C complains that Mr Y, working at Future Wealth Management (FWM) - which was an appointed representative (AR) of Pi Financial Ltd (Pi) – gave him unsuitable advice to move his pensions to a self-invested personal pension (SIPP) and invest in funds that were too risky for him.

What happened

Mr C says that in 2015, he was contacted by a firm called Kingsgate Law about his existing pensions with Legal & General (L&G). The letter referred Mr C to an individual called Mr G. Mr G was an introducer who had entered into an introducer's agreement with FWM and Pi in January 2015.

Mr C didn't meet with Mr G until late 2017. After the meeting, a Mr Y at FWM sent Mr C a letter confirming what had been discussed. The letter recommended that Mr C move his L&G pensions to a SIPP provided by London & Colonial (L&C). Mr C's funds were then invested through a discretionary fund manager (DFM) recommended by FWM. The DFM that FWM recommended - SVS Securities (SVS) - has since been placed in special administration and the value of Mr C's pension fund has declined dramatically.

Mr C complained to Pi and it initially acknowledged FWM's involvement in the transaction but said that it was limited to arranging the switch of the pensions. Pi said that Mr G, not Mr Y gave Mr C the advice to switch his pensions.

Pi said that Mr G completed all the paperwork that Mr C received, without FWM or Pi's authority. Pi said that Mr G misrepresented that he was a financial adviser with FWM when in fact he was just an introducer.

Pi told Mr C that although primary liability for any unsuitable advice lay with L&G, it couldn't ignore the role of FWM so it offered to help with Mr C's claim against L&G on a no fee basis.

Two investigators from this service have been involved in this complaint. The first investigator concluded that FWM gave Mr C unsuitable advice about a regulated investment. The investigator held Pi responsible for FWM's unsuitable advice to invest in a SIPP and recommended that Pi compensate Mr C.

After considering the first investigator's recommendation, Pi disagreed with the proposed outcome. In summary Pi said that FWM wasn't involved in the recommendation to switch Mr C's pensions to the SIPP.

Pi said that this service didn't have jurisdiction to consider Mr C's complaint because it hadn't accepted responsibility for the business carried out by Mr G. Pi said that even if it was wrong about its liability for the activities complained about, the first investigator had ignored the role played by SVS in causation. Pi said that the loss to Mr C was caused not by the advice to invest in a SIPP but because SVS had mismanaged his funds.

As Pi didn't think this service had jurisdiction to consider Mr C's complaint, a second

investigator became involved. After reviewing the complaint, the second investigator was satisfied that the Financial Ombudsman Service had jurisdiction to consider the complaint.

In summary he thought that even if Mr C had only ever met with Mr G, the evidence showed FWM was directly involved in the switch and that fees were paid from Mr C's SIPP to FWM. The second investigator thought that FWM gave the advice with Mr G acting as a go-between.

The second investigator thought Pi appointed FWM as its AR and authorised it to carry out the regulated activities of investment advice and arranging deals in investments. And that pursuant to section 39 (3) Financial Services and Markets Act 2000 (FSMA) Pi was responsible for anything done by FWM when carrying out this business.

The second investigator thought Pi recommended taking a specific product and that this recommendation was unsuitable given the fact that Mr C's L&G pension represented most of his pension provisions and the SIPP was high risk compared to Mr C's existing pensions.

The second investigator recommended that Pi put Mr C back in the position he would've been, had it had not given him the unsuitable advice.

Pi disagrees with the investigator's recommendation. In summary it says Mr G acted fraudulently when advising Mr C and in breach of sections 19 and 21 of FSMA. As such, Pi says Mr G's unlawful action falls outside its responsibility.

Pi says that it's not responsible for the complaint as Mr C never met or spoke to Mr Y. Pi says Mr Y didn't sign any of the documents and that Mr C never asked about FWM, instead accepting Mr G's advice without question.

Pi says Mr Y didn't write to Mr C and was not involved in the advice process. Pi says Mr Y didn't know that Mr G had prepared the suitability report using FWM stationery.

Pi says again that we've ignored the mismanagement by SVS and have decided to make Pi pay compensation irrespective of the circumstances.

As Pi disagrees with the proposed outcome, the complaint has come to me.

What I've decided – jurisdiction

I'm satisfied this complaint is one that the Financial Ombudsman Service can consider as it concerns acts or omissions of Pi's AR for which it accepted responsibility.

The rules that we are governed by – known as the DISP rules – set out which complaints we can and can't consider. The rules are set by the regulator, the Financial Conduct Authority (FCA), and can be found in its handbook.

DISP 2.3.1R says we can:

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

Guidance for this rule at 2.3.3G says that:

> *complaints about acts or omissions include those in respect of activities for which the firm…is responsible (including business of any appointed representative or agent for*

which the firm…has accepted responsibility).

To carry out regulated activities a business needs to be authorised (Section 19 of FSMA). Pi is authorised by the FCA to carry out a range of regulated activities including advising on investments and arranging deals in investments. FWM wasn't directly authorised. Instead, it was an AR of Pi.

Section 39(3) of 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.*

We can therefore consider complaints about Pi including some complaints about its AR.

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

- What are the specific acts Mr 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 Mr C has complained about?

Mr C complains Mr Y gave him unsuitable advice to switch his pensions to a SIPP provided by L&C to then invest the funds through SVS.

Are those acts regulated 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 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO) sets out which activities are regulated under FSMA.

The rights under a personal pension scheme (which includes Mr C's previous pensions and the SIPP he moved to) are specified investments by a provision in Article 82 RAO. Advising on investments is a specified activity under Article 53 RAO. And arranging deals in investments is a specified activity under Article 25 RAO.

I appreciate that it was Mr G who Mr C met with. And Mr C says himself that he didn't have direct contact with Mr Y about the investment. But after considering all the evidence, I'm satisfied that it's likely Mr Y advised Mr C to switch his pensions and invest through SVS based on the following evidence:

- In November 2017 Mr C signed a client agreement with FWM.

- A written recommendation dated 20 December 2017 was sent to Mr C on FWM letterhead bearing Mr Y's name which contained advice. I appreciate Pi doesn't think Mr Y sent the letter, particularly as he didn't sign it. But I consider it reasonable to conclude that Mr Y was likely involved in this process given what I set out further in the bullet points below. I don't think it's reasonable to say that the recommendation letter was produced and sent without Mr Y's involvement or knowledge.

- In December 2017, L&G wrote to Mr Y at FWM to give details of Mr C's existing pension after it received a letter from FWM requesting this information that came from Mr Y on FWM letterhead. The letter from L&G was addressed to Mr Y using FWM's address as recorded on the FCA register. So Mr Y/FWM would have received correspondence from L&G about the transaction.

- In February 2018, FWM forwarded the completed L&G contributions form and discharge paperwork that Mr C had signed. The letter accompanying the paperwork was written on FWM letterheaded paper and was signed by Mr Y's administrator, Ms Y.

- L&C copied Mr Y into an email that it sent to Mr C on 28 March 2018 confirming receipt of money from L&G. The same email also confirmed that an initial fee of £1,840.15 would be paid to Mr C's financial adviser. The email was sent to Mr Y using an alternative email address to his FWM email address. But I don't think this changes the fact that it shows Mr Y was aware of and involved in the investment that Mr C was making.

- The SIPP application form addressed to L&C was completed using Mr Y's name as financial adviser, the email address for FWM and the firm's name as Pi Financial Limited. FWM was to be paid an initial fee of 3.25% with an annual fee of 1%.

- The statements provided by L&C show that the initial adviser fees were paid out in March 2018 with a further adviser fee paid in July 2019, as well as administration fees in 2020 and 2021. Pi confirmed to this service that it received three initial fees in April 2018, followed by a further fee in July 2019.

Pi says it was Mr G who advised Mr C – and Mr C seems to accept that he received advice from Mr G. But just because Mr 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. As I've said above, there's evidence that FWM forwarded completed paperwork. The email referred to above dated 28 March 2018 said that 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*

In its original response to Mr C's complaint, Pi said that Mr Y/FWM's involvement "was limited to arranging the switch of your L&G pensions to L&C". Although Pi later backtracked to say that it was Mr G who arranged the switch of Mr C's pensions, I think FWM knew Mr G was about to invest in the L&C SIPP and helped arrange these investments. So, I think it's likely that Mr G and FWM were working together in arranging investments as well as giving advice. These are regulated activities.

Did Pi accept responsibility for those acts?

As I've set out above, 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.*

In Mr C's complaint, Pi is the principal. So, for me to be able to decide this complaint, I must be satisfied that the activity was carried out by FWM and that Pi accepted responsibility for it.

Pi hasn't said that FWM wasn't authorised to conduct the acts being complained about. Instead, Pi says the activities complained about weren't undertaken by FWM and that Mr G wasn't contractually permitted to transact investment business.

Taking everything into account (including what I've set out above about why a regulated activity took place), I'm satisfied Mr Y was acting as FWM when he advised Mr C and made arrangements. The only mention of any other business is that in some of the emails Mr Y was copied into, the email address that was used wasn't his FWM one and instead was an email address at a different business. But the fact the recommendation letter was sent in his capacity at FWM, the application documentation all referred to FWM, and fees were paid to Pi persuade me that Mr Y was acting as FWM 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 FWM.

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 FWM was authorised to do.

Pi has provided an AR agreement between itself and FWM dated 15 January 2015.

Some relevant sections of the agreement include:

2.1 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.

2.2 The Company may at any time prohibit, restrict, add to or otherwise change the Services by notification In Writing to the Appointed Representative, and will use its reasonable endeavours to give at least 14 days' notice of any change.

4.2 The Appointed Representative shall, when performing his obligations under the terms of this Agreement comply with…

4.2.4 the Company's instructions In Writing from time to time, including the provision of any compliance or procedure manual issued by the Company.

4.4 The Appointed Representative shall……

4.4.2 only conduct the Services through such agencies as the Company In Writing directs from time to time.

"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."*

So, the AR agreement allowed FWM (and therefore Mr Y) to carry out the regulated activities of advising on investments and arranging deals in investments.

My decision – jurisdiction

Given what I've said above, I'm satisfied that under section 39 of FSMA, Pi, as principal of FWM is responsible for the activities Mr C complains about. So we have jurisdiction to consider this complaint against Pi.

As I consider this complaint is one that this service can look at, I've gone on to consider the merits.

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.

As I'm satisfied that it's most likely Mr Y advised Mr C to switch his pensions to the SIPP to invest through SVS, I've thought about whether that advice was suitable.

From looking at the answers Mr C gave to Mr G/FWM about his previous investment experience, it looks like he had no other investments and only had cash savings in bank accounts. Mr C's responses indicate that he was a low risk, inexperienced investor, and someone for whom traditional low cost pension arrangements would have been appropriate.

Mr C had an existing pension fund of around £50,000. He was advised to switch his pensions to a SIPP with a DFM arrangement in place. Given the relatively modest funds available to Mr C, it's unlikely that he would've benefited from or needed the services of a DFM.

The new SIPP wasn't a low cost or traditional pension arrangement. FWM outlined the fees in its letter of December 2017. In addition to the initial adviser charge of 3.25%, there was an annual financial adviser charge of 1% which equated to a monthly charge of £44. L&C charged a £100 set up fee and annual fee of £199. Two of the L&G policies also had exit penalties totalling more than £1070.

The letter that FWM sent to Mr C of 20 December 2017 recommended the SIPP because:

> *At the present time, your prime objective is to review your existing pension contracts with L&G and set up a SIPP to provide you with greater investment choice and flexibility. You have been unhappy with the service you have received as you have never had a review and only receive an annual statement. You have not been*

satisfied with the growth in any of your pensions within the with-profits funds and wish to have an arrangement that allows you more flexibility in investment choice.

Although there may have been some advantages to taking out a SIPP in the form of greater flexibility, I'm not persuaded that Mr C, with his modest pension funds, really needed access to a wider range of investments and especially via a DFM. If Mr C was genuinely unhappy with his existing arrangements, it seems likely that there would have been cheaper alternative options, such as a stakeholder pension, that would have met his needs. Taking everything into account, I'm satisfied it ought to have been clear to Mr Y that there was no obvious justification for Mr C to move from his existing schemes and enter the arrangement he 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.

I also note that Pi has previously said that it would help Mr C with a legal claim against L&G for the unsuitable advice that he received. So, I don't think there's much dispute that the investment wasn't appropriate for Mr C. Regardless of the subsequent failure of SVS, I don't think Mr Y/FWM's advice to switch Mr C's pensions to a SIPP was suitable. Without FWM's advice to switch, I think it's likely Mr C would've remained in his L&G pensions.

As I've set out above, even if Mr Y didn't advise Mr C, he still carried out the regulated activity of making arrangements. In conducting this regulated activity, Mr Y had to act in line with the regulator's Principles for Business. I consider that Principle 6 – "A firm must pay due regard to the interests of its customers and treat them fairly" - is particularly relevant.

The Conduct of Business Sourcebook (COBS) is also relevant and at 2.1.1R it 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 Mr C's best interests to move his pensions to a SIPP for investment via a DFM. For the same reasons as set out above, I'm not persuaded it was. If Mr Y/FWM weren't already involved in previous discussions with Mr C, I would have expected them to probe Mr C further on his circumstances, why Mr C wanted to switch his pensions to the SIPP and what the SIPP would be used to invest in and why he wanted to use the services of a DFM.

If they had done so, I don't think it's likely that Mr C would have given them any information which could have reasonably persuaded Mr Y/FWM he had a good understanding of what he was investing in and the benefits of doing so. And Mr Y/FWM would have known that this was being suggested to Mr C by an unregulated third party (assuming FWM wasn't involved in the promotion and advice). So, I think it ought to have been clear to Mr Y/FWM that Mr C was better off staying in his existing schemes.

Pi has argued that SVS's misadministration caused Mr C's loss, so I have considered this as part of my decision. But I still think it's fair to make an award for the entire loss against Pi. This is because without FWM's involvement in the switch of the pensions and investment in the SIPP, Mr C would never have lost money in the investment managed by SVS. So, all of Mr C's loss stems from the fact that FWM facilitated the inappropriate switch to the L&C SIPP.

If Pi still believes that the other parties actions contributed to the losses, it can take these concerns up directly with them.

Putting things right

My aim is that Mr C should be put as closely as possible into the position he would probably now be in if he hadn't been given unsuitable advice.

I take the view that Mr C wouldn't have moved his pensions if everything had happened as it should have. I'm satisfied that what I've set out below is fair and reasonable.

In summary, Pi should:

1. Calculate the loss Mr C has suffered because of making the switch and investment.

2. Take ownership of any illiquid investments held in the SIPP if possible.

3. Pay compensation for the loss into Mr C's pensions in respect of his pension loss. If that isn't possible, pay compensation for the loss to Mr C direct. In either case, the payment should take into account necessary adjustments set out below.

4. Pay Mr C's SIPP fees for the next five years, in the event he's not now able to close his SIPP.

5. Pay compensation of £400 for the trouble and upset caused to Mr C.

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

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

1. Calculate the loss Mr C has suffered as a result of making the switch and investment

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

Pi should ask Mr C's former pension provider to calculate the current notional transfer value had he not switched his 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 return that could have been achieved if the pensions hadn't been switched.

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

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

Any withdrawal, income or other distributions paid out of the SIPP should be deducted from the fair value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there are many regular

payments, to keep calculations simpler, I'll accept if Pi totals all those payments and deducts that figure at the end.

2. Take ownership of the investment

Ideally, the asset in the SIPP could be removed from the SIPP. Mr C would then be able to close the SIPP, if he wishes, and avoid paying further fees for the SIPP. For calculating compensation, Pi should agree an amount with the SIPP provider as a commercial value for the investment. It should then pay the sum agreed plus any costs and take ownership of it.

If Pi can purchase the investment, then the price paid should be allowed for in the current transfer value (because it'll have been paid into the SIPP to secure the investment).

If Pi is unable, or if there are any difficulties in buying the investment, it should give it a nil value for the purposes of calculating compensation. Provided Mr C is compensated in full, Pi may ask Mr C to provide an undertaking to account to it for the net amount of any payment the SIPP might receive from the investment. That undertaking should allow for the effect of any tax and charges on the amount Mr C may receive from the investment and any eventual sums he'd be able to access from the SIPP. Pi will need to meet any costs in drawing up the undertaking.

3. Pay compensation to Mr C for the loss he's suffered in (1)

Since the loss Mr C has suffered is within his pensions, it's right that I try to restore the value of his pension provisions if that's possible. So, if possible, the compensation for the loss should be paid into Mr C's pension plans, if they still exist. The compensation shouldn't be paid into the pensions if it would conflict with any existing protection or allowance. Payment into the pensions 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 Mr C could claim. The notional allowance should be calculated using Mr C's marginal rate of tax.

If it's not possible to pay the compensation into Mr C's pensions, the compensation should be paid to Mr C direct. But had it been possible to pay the compensation into the pensions, it would have provided a taxable income. Therefore, the compensation for the loss paid to Mr C should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mr C's marginal rate of tax in retirement. For example, if Mr 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 Mr C would have been able to take a tax-free lump sum, the notional allowance should be applied to 75% of the total amount.

4. SIPP fees

If Mr C is unable to close his SIPP once compensation has been paid, Pi should pay an amount into the SIPP equivalent to five years' worth of the fees (based on the most recent year's fees) that will be payable on the SIPP. I say this because Mr C would not be in the SIPP but for the unsuitable advice. So, it wouldn't be fair for him

to have to pay the fees to keep it open. And I'm satisfied five years will allow sufficient time for things to be sorted out with the SVS investment and the SIPP to be closed.

5. Trouble and upset

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

6. Pay interest

Pi should pay fair compensation as set out above within 28 days of being notified that Mr C has accepted this decision. If it doesn't, interest on the compensation due is to be paid from the date of this 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 Mr C how much has been taken off. Pi should give Mr C a tax deduction certificate in respect of interest if Mr C asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

Pi did ask that if I upheld Mr C's complaint, interest shouldn't be applied until 90 days after my decision. I have considered this point but still think 28 days is a reasonable timeframe within which to deal with my redress directions, particularly as Mr C has suffered this loss for an extended period.

My final decision

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

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

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

Gemma Bowen
Ombudsman