DRN-4397376

The complaint

Mr S and Mrs S complain about a charge that has been deducted from their Flexible Investment Bond and paid to Chetwood Wealth Management Ltd (Chetwood) since 2014.

Mr S and Mrs S say they declined any ongoing services from Chetwood when their former adviser merged with that firm. They complain that Chetwood was paid an ongoing adviser charge from their investment from 2014 until 2022, at which point they contacted the provider of the investment and cancelled the deduction of that charge.

What happened

In February 2013 Mr S and Mrs S were provided with a recommendation to take out a Flexible Investment Bond by an adviser, who I will refer to as adviser 1.

In March 2013 Mr S and Mrs S took out that joint Flexible Investment Bond using the services of adviser 1.

In 2014 adviser 1 contacted them to inform them that his business was merging with Chetwood.

At the same time Chetwood bought the business book and its revenue stream from adviser 1.

Chetwood then contacted Mr S and Mrs S to see if they wanted to become clients and receive an ongoing review service. They declined that offer.

In September 2014 adviser 1 wrote to the provider of Mr S and Mrs S's investment bond on behalf of his firm and indicated that he had agreed to the transfer away of business to Chetwood. He said that included the servicing rights and payment of all renewal, trail and fund-based commissions.

At the same time Chetwood also wrote to the provider and confirmed that it agreed to accept the servicing, renewals, and clawback liability from that business. It said that all statements should now be addressed to Chetwood.

Following that correspondence, the agency of the plan was transferred to Chetwood and Chetwood, having bought the business from adviser 1, was paid a regular fee of 0.5 percent of the value of Mr S and Mrs S's investment.

In June 2022 Mr S and Mrs S became aware that Chetwood had been receiving these payments.

In July 2022 Mr S and Mrs S contacted the provider of their investment bond and cancelled the payments.

Mr S and Mrs S then complained to Chetwood about it receiving this charge from their investment. They said they had expressly stated they didn't want any service from Chetwood.

Chetwood didn't uphold their complaint. It said Mr S and Mrs S had received advice from adviser 1 when they took out their investment bond. It said for arranging the initial sale of the bond, that adviser, or any subsequent agent on the plan, would receive 0.5% of the bond value per year, for the life of the policy, as commission. Chetwood said that payment was contractual from the outset.

Chetwood said that adviser 1 had sold the revenue stream for his business in 2014, which included their bond. So, it said the commission payments for the initial advice had been paid to Chetwood as the new agents.

Chetwood said adviser 1 had introduced Mr S and Mrs S to an adviser from Chetwood and there had been a discussion about becoming Chetwood clients and receiving an ongoing service from Chetwood but they had declined.

Chetwood said the income it had received related to the original sale of the policy and was sold to it in good faith by adviser 1's former business. It said it hadn't set up an ongoing service and it hadn't charged Mr S and Mrs S for any ongoing service.

Mr S and Mrs S disagreed and referred their complaint to our service.

Their representative said that Mr S and Mrs S's financial adviser called them in early 2014 to inform them his firm was merging with Chetwood. She said he wanted to know whether they wished to continue with his services managing their investment bonds.

Their representative said Mr S and Mrs S had a discussion regarding this and a few days later they called adviser 1. She said they informed him that they did not want to continue with his services, or with Chetwood when they merged.

Their representative said a few months later an adviser from Chetwood visited Mr S and Mrs S to offer ongoing services from Chetwood, which they declined. She said they told Chetwood's adviser that they were no longer being provided with any services from adviser 1's firm, and they didn't want any from Chetwood.

Their representative said she was helping Mr S with paperwork in June 2022, when she discovered that the charge had been collected by Chetwood.

Our investigator considered Mr S and Mrs S's complaint and concluded it should be upheld and Chetwood should reimburse the fees paid since 2014.

The investigator said that Mr S and Mrs S had made it clear that they didn't want to be clients of Chetwood when it contacted them in 2014 and Chetwood had confirmed that it hadn't provided them with any service. He noted that despite this Chetwood had benefited from the fees.

The investigator said that while the fee was payable for the life of the contract, it was reasonable to conclude that Mr S and Mrs S had cancelled it in 2014, when they informed the original firm and Chetwood that they no longer wanted to be their client.

The investigator also noted that Chetwood wasn't a party to the investment contract. So he said it was reasonable to conclude that the payment should've ended when it took over and the original firm was no longer the beneficiary of the commission payments.

Chetwood disagreed and said that it was entitled to receive the commission as it had bought the revenue stream from the original firm in good faith. It didn't agree that the discussion in 2014 amounted to a cancellation of the fee. It said in order to cancel the commission Mr S and Mrs S would've needed to contact the provider.

As no agreement could be reached Mr S and Mrs S's complaint was referred to me for review.

I issued a provisional decision where I concluded that Mr S and Mrs S's complaint against Chetwood should be upheld but for different reasons to those set out in the investigator's view. I concluded that the payments received by Chetwood should be refunded to Mr S and Mrs S together with any lost investment growth on those payments. An extract from that decision is reproduced later in this decision.

Both parties were then given an opportunity to respond with any further representations they wished to make. Both parties acknowledged and accepted my provisional 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.

Having done so, I remain of the same view as set out in my provisional decision, an extract of which is reproduced below and forms part of this decision.

"*What I've provisionally 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.

To recap, Mr S and Mrs S complain about a charge of 0.5 percent of the value of their investment being paid to Chetwood by the provider of that investment. They say this charge shouldn't have been deducted as Chetwood didn't provide them with any service. Chetwood says the monies it received were trail commission from the provider, which originated from the sale of the investment product, so it says it had no obligation to provide any service to Mr S and Mrs S.

The way that trail commission works is not entirely straight forward. In summary, in certain circumstances the provider of an investment product would pay commission to the firm that sold that product. It often paid the commission by way of an initial lump sum followed by smaller instalments. The consumer taking out the investment would agree to that commission being paid to the firm, but it would be paid by the product provider.

In addition, the firm who sold the product could receive monies from the investment by way of an ongoing charge which would be connected to an ongoing service being provided by that firm.

I need to consider therefore which of these two types of scenarios I think on balance applies to Mr S and Mrs S's investment.

Ongoing adviser charge

When Mr S and Mrs S applied to take out their flexible investment bond, they signed an application form which expressly asked the provider of the investment to deduct a specified *amount from their investment capital for an initial adviser charge, and in addition, a regular ongoing amount for an ongoing adviser charge.*

The form indicated that the ongoing adviser charge was to start "immediately" and be deducted "until further notice." It was also calculated as a percentage of the fund value – 0.5 percent per year and to be deducted "monthly."

I consider that this section was expressed in clear terms in the application form and I don't think that form was overly long or complicated and it was signed by both Mr S and Mrs S. So, I consider on balance that they were made aware, when they first took out the investment in March 2013, that a regular charge would be paid to their adviser from their investment.

As it was set up "until further notice" rather than for a specified term such as five years, it would carry on being paid until the provider was notified that it shouldn't be paid any longer, which is what happened in 2022 when Mr S and Mrs S contacted their provider.

There is limited documentation available from the point of sale as the original firm is no longer involved, having sold its business book to Chetwood, and Chetwood doesn't have a client file for Mr S and Mrs S because they declined any ongoing review service.

The charge is described on the application form as an "ongoing adviser charge" which I think would tend to suggest that some type of ongoing service was provided. However, Chetwood argues that it had no obligation to provide an ongoing service, as the money it has received was part of the commission paid to the original firm for the sale of the investment bond and it bought the rights to that "commission" from the original firm.

Before the implementation of the Retail Distribution Review (RDR) at the end of 2012, it wasn't uncommon for advisers to be renumerated in this way. So, they would receive an initial commission and then smaller instalments that would be paid on a regular basis. Advisers could therefore receive ongoing or "trail" commission for the sale of an investment product without providing any ongoing service.

However, in order for the monies paid to Chetwood to amount to commission with no obligation to provide an ongoing service, the relevant events would have needed to take place before 31 December 2012. So before the relevant provisions of the RDR came in force, which I will come back to later in this decision.

I am satisfied on balance that Chetwood bought the rights to any revenue stream relating to Mr S and Mrs S's investment from adviser 1. I note that both adviser 1 and Chetwood wrote to the provider at the relevant time indicating that was the case. It is also agreed by the parties that the provider paid the monies to Chetwood.

I can also see that the provider sent Chetwood a copy of the biannual statement for the bond for the years that followed, with the original statement going to Mr S and Mrs S. I think it is more likely than not, that the provider did so because it was informed by adviser 1 that the rights to any payments had been transferred to Chetwood and Chetwood had also confirmed to the provider that was the case.

<u>Was Chetwood entitled to receive payments without providing a service?</u>

Before the implementation of the RDR and the resulting amendment to the Conduct of Business Sourcebook (COB) Rules, I think Chetwood would've been entitled to be paid instalments from the product provider of Mr S and Mrs S's investment on the basis that it was "commission" without providing an ongoing service. That is, until the point it was *cancelled by Mr S and Mrs S and the way to cancel it, would be to notify the provider, as Mr S and Mrs S did in 2022.*

However, Chetwood has indicated, in its correspondence in response to Mr S and Mrs S's complaint, that the advice was provided to Mr S and Mrs S in February 2013. In addition I can see the application to take out the investment was made in March 2013.

So, as neither of these events took place on or before 31 December 2012, I don't think Chetwood can rely on the exception in the COB rules at 6.1A.4A and accept renumeration by way of commission without providing any service.

I'm not satisfied therefore on balance that this charge, or any other payment made to the original advisory firm in relation to these events and then made to Chetwood, amounted to "commission" which would have been allowed to have been collected prior to the implementation of the RDR.

On that basis I'm not persuaded on balance that Chetwood was entitled to collect this as pure commission without providing any service, taking into account COB 6.1A which covers adviser charging and renumeration and which prohibits this unless the relevant events took place on or before 31 December 2012.

I also note in the application form, in a section entitled "Commission" it explained that:
In some instances XXX (redacted) is able to pay commission to your professional adviser. This is where:

- *No financial advice has been provided; or*
- *Where the financial advice is provided before 31 December 2012.*

The amount of commission payable to your professional adviser will be shown in the Personal Example provided.

I consider this again highlighted that if the advice was provided after 31 December 2012, then the provider wouldn't be able to pay commission to the financial adviser.

<u>Contact between the parties in 2014</u>

Mr S and Mrs S say that when they spoke to Chetwood's adviser in 2014, they made it clear that they didn't want Chetwood's services. So, they say that included paying it the ongoing adviser charge.

There is no contemporaneous documentary record of this conversation available. However Chetwood agrees that Mr S and Mrs S didn't want to become clients and receive services from Chetwood, which is why it doesn't hold a full client file for them. Chetwood says that not wanting to receive advice and reviews of their investments from Chetwood, is different from notifying the provider and telling it to stop paying Chetwood the ongoing adviser charge.

It is difficult to say exactly what was discussed in 2014, considering the time that has now passed and given there is no documentary record made at that time available. However, it seems clear that Mr S and Mrs S didn't notify the provider as Chetwood continued to receive the charge. And I think it likely on balance that they were made aware of this charge being paid in paperwork sent about their bond because they were able to find the information in 2022.

I am not persuaded on balance that informing Chetwood it didn't want to receive its service amounted to cancelling the deduction. As I have said, there was a particular way to address this and that was to contact the provider.

However, that is not the end of the matter, because as I have said, I don't think Chetwood was entitled to receive pure commission as a result of the changes brought in by the RDR and implemented in COB 6.1A. And it is clear from the account of both parties that no ongoing service was provided. So, when Mr S and Mrs S made it clear in 2014 that they didn't want any ongoing service, I consider Chetwood should then have ceased to collect the ongoing adviser charge.

Summary

I appreciate that from Chetwood's point of view it bought a revenue stream from another firm, so it considers it was entitled to continue collecting any ongoing payments that would have been paid to that firm. However, because this investment product was recommended and sold after the end of December 2012, I don't think Chetwood could receive that revenue stream without providing a reciprocal service. And it seems clear from both parties that no such service was provided as Mr S and Mrs S declined to receive any service from Chetwood.

Putting things right

Chetwood should refund the payments it received from Mr S and Mrs S's investment bond. It appears that those charges were deducted directly from the investment so Chetwood should also compensate Mr S and Mrs S for any lost investment growth.

I think a fair and reasonable way to calculate the compensation would be for Chetwood to compare the current value of Mr S and Mr S's investment, with the value it would've had if the deductions for the ongoing adviser charge had not been made from 2014, when Chetwood started receiving that charge, to 2022 when it was cancelled by Mr S and Mrs S.

Chetwood will need to liaise with the provider of the investment bond to obtain the relevant information and will need permission from Mr S and Mrs S to do so."

Putting things right

Chetwood should pay compensation to Mr S and Mrs S calculated as set out in my provisional decision above.

For the "current value" Chetwood should use the value of Mr S and Mrs S's investment as at the date of this decision.

However, I understand that Chetwood, in response to my provisional decision, contacted the provider to obtain the relevant information and the current value, for the purposes of calculating the compensation I had outlined, and the provider responded with the information requested.

On that basis, if all parties are agreed and assuming Chetwood has followed the methodology outlined in my provisional decision, I am content for Chetwood to use the "current value" date in that request to the provider, with the aim of ensuring a prompt payment of compensation to Mr S and Mrs S.

Otherwise, Chetwood should use the current value as at the date of this decision for the comparison calculation.

Chetwood should provide details of its calculation to Mr S and Mrs S in a clear, simple format.

My final decision

My final decision is that I uphold Mr S and Mrs S's complaint against Chetwood Wealth Management Ltd and it should pay them compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S and Mrs S to accept or reject my decision before 16 November 2023.

Julia Chittenden
Ombudsman