DRN-5204697

The complaint

Mr A's complaint concerns investments made in a stockbroking account provided by Redmayne-Bentley LLP (Redmayne-Bentley), held in a self-invested personal pension (SIPP), which was provided by another business. A representative has made the complaint on Mr A's behalf. The representative says that, although Redmayne-Bentley did not provide any financial advice, it had a duty of care to ensure that the product met Mr A's needs, and that the underlying asset was a suitable investment for the SIPP. The representative also says Redmayne-Bentley should have raised concerns about the investment and the structure of the SIPP, as well as Mr A's personal unsuitability for a SIPP, and therefore not accepted the investment instructions it was given.

What happened

In March 2011, Mr A transferred his existing personal pension to a SIPP with European Pensions Management Limited (EPML), in order to make investments in shares. This was done on the advice of a Financial Conduct Authority (FCA) authorised Independent Financial Advisor (IFA), WJR Wealth Management (WJR). Both EMPL and WJR are no longer trading.

Once the SIPP with EPML had been established, a stockbroking account with Redmayne Bentley was opened within the SIPP. Mr A subsequently invested in the shares of two companies, using the stockbroking account. He invested around £19,500 into Imperial Music and Media and around £15,000 into Ecovista.

A SIPP statement dated 7 April 2015 shows Imperial Music and Media to be the only investment held by Mr A by this time, and that it had no value.

Curtis Banks took over the SIPP in 2016 from EPML, as EPML went into administration. The Ecovista shares were not transferred to Curtis Banks (I understand these were sold by Mr A before Curtis Banks took over) – only the Imperial Music and Media shares.

Mr A made complaints, via his representative, in letters to Curtis Banks and Redmayne-Bentley dated 2 October 2023. Mr A also made a claim to the Financial Services Compensation Scheme (FSCS) about the advice he received from the WJR. The FSCS accepted Mr A's claim, and calculated his loss to be more than the applicable limit on what it could pay; accordingly, the FSCS paid Mr A an amount equal to that limit (£85,000).

In its response to the complaint, Curtis Banks said it was not responsible for the events subject to complaint, as it had only taken over the administration of Mr A's SIPP; it had not taken responsibility for any actions of EPML before it took over the administration of the SIPP. Mr A's representative referred the complaint against Curtis Banks to us on 31 October 2023. One of our investigators then wrote to the representative to explain he did not think Curtis Banks was responsible for the activities the complaint related to. So, the complaint against Curtis Banks was not we could consider. That complaint is now closed.

The complaint against Redmayne-Bentley was also referred to us by Mr A's representative on 31 October 2023. Redmayne-Bentley responded to that complaint on 14 November 2023. In short, Redmayne-Bentley said it did not have the responsibilities Mr A's representative

contended it did; it acted as an execution only stockbroker. Redmayne-Bentley also said the shares Mr A had purchased were listed on recognised exchanges, and their distribution was not subject to any restrictions. It did not uphold Mr A's complaint.

Redmayne-Bentley subsequently said it believed Mr A's complaint had been made outside of the time limits set out in our rules. It has said that the final trade took place on Mr A's account in March 2015 (the sale of his Ecovista shares). It added that his Imperial Music shares were delisted in 2015 and he was sent 11 statements showing these to be valued at zero, with the final statement being sent on 12 October 2019.

Our investigator considered this and concluded the complaint had been made too late. He said, in summary:

- Mr A's complaint was made more than six years after the events it concerns. So, if the complaint has been made more than three years from the date on which Mr A was, or ought to have been, aware that he had cause for complaint, we will only be able to consider it in exceptional circumstances.

- Consumers don't need to fully understand what has happened or what they can do about it for the time limit to start running. They just need to know enough for it to be reasonable to investigate the matter further. However, it's important to note that consumers need to know both that they've suffered some sort of damage, and that this is or may be attributable to some act or omission by the business in question.

- From the information available, he believed that Mr A would have known that he had an issue with his pension when he was provided with his statement on 7 April 2015 which showed it to be worth nil.

- The court decision in the case of Berkeley Burke SIPP Administration Ltd v Financial Ombudsman Service, which was published on 30 October 2018, made consumers aware that a SIPP operator could be responsible for losses suffered by investments if the SIPP operator had not completed sufficient due diligence on the investment.

- Allowing reasonable time for the court case to be reported on, had Mr A made enquiries from the end of 2018, he would have reasonably been able to find out that SIPP operators had due diligence responsibilities and that Redmayne Bentley could have been responsible for his losses.

- He therefore believed that the three year time period in which to complain started running at the end of 2018, and the complaint had been made too late. He had not seen any evidence to show exceptional circumstances applied.

Mr A's representative did not accept this view. The representative said, in summary:

- It is clear the investigator is classifying Mr A as an individual who has significant pension and investment experience. An individual who doesn't work in the pensions industry would not have any idea about the lack of due diligence of his investment platform provider.

- Redmayne-Bentley is an investment platform and not a SIPP provider like Berkeley Burke so there is absolutely no connection between them, and they have different regulation and responsibilities to each other. How would Mr A have connected the Berkeley Burke case to a Redmayne-Bentley complaint?

- That being said, Mr A would not have heard about the Berkeley Burke case in any event and would not have known that it had any bearing to his own pension. He didn't receive statements over the years that showed any loss and he was not a sophisticated investor.

- Mr A only knew that there was a loss after he contacted a solicitor in Sept 2021. This would bring him within the three year time scale.

My provisional findings

I recently issued a provisional decision. My provisional finding was that Mr A's complaint had been made in time, but it would not be fair and reasonable to uphold it. Redmayne-Bentley did not respond to my provisional findings. The representative said it had no further submissions to make.

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 carefully reconsidered everything, I have not been persuaded to depart from my provisional findings. As neither party made any further submissions following those findings, I have set out my provisional findings again below, as my final findings.

The question of whether the complaint has been made in time remains in dispute, as set out above. So, in the first instance I need to consider whether Mr A's complaint was made in time. I have therefore first considered all the available evidence and arguments to decide whether Mr A's complaint is one we can consider.

We cannot consider all of the complaints we receive. We may only consider the complaints that are within our jurisdiction. And our jurisdiction rules are set out in the DISP section of the Financial Conduct Authority's Handbook.

At the time we received Mr A's complaint the rules provided:

"*DISP 2.8.2R*

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

(1) …

(2) more than:

(a) six years after the event complained of; or (if later)

(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;

unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;

unless:

(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R … was as a result of exceptional circumstances; or

(4) … or

(5) the respondent has consented to the Ombudsman considering the complaint where the time limits in DISP 2.8.2 R … have expired …"

Redmayne-Bentley has not given consent for us to consider the complaint. So, the time bar rules have to be considered.

It is clear from the above that certain factors need to be identified in order to apply the rules to the facts:

- when were the events the complaint is about? And,
- when was the complaint first referred to the Financial Ombudsman Service - or Redmayne-Bentley if earlier - and that complaint was acknowledged or there is some other record of the complaint having been received?

The complaint is about an alleged failure to make adequate checks before allowing investments that were made in 2011. And, as mentioned above, the complaint to Redmayne-Bentley was made by Mr A's representative on 2 October 2023.

It therefore follows that the complaint was referred to Redmayne-Bentley more than six years after the events the complaint is about. And that the question is therefore whether Mr A made his complaint to Redmayne-Bentley within three years of the time when he was aware or should reasonably have been aware he had cause for complaint about Redmayne-Bentley. Or put another way, did Mr A have relevant awareness before 2 October 2020 i.e. more than three years before he made his complaint to Redmayne-Bentley)?

In order for Mr A to have awareness of cause of complaint he needs to be aware, or ought reasonably to be aware:

- of a problem
- that has caused him, or is likely to cause him, some form of loss or harm, and
- that someone else has caused that problem – and who that is.

And in this case, which is a complaint about Redmayne-Bentley, that means awareness that Redmayne-Bentley had, or was likely to have, caused the problem the complaint is about rather than awareness that there was a problem that had been caused by another party, say WJR or EPML.

I think it likely Mr A was aware there was a problem, and it had caused him a loss, before 2 October 2020. The available evidence shows it is likely he would have known of significant losses before that date. But, based on the available evidence, and on balance, I am not persuaded there is sufficient evidence to show Mr A knew, or should reasonably have known, before that date he had cause for complaint against Redmayne-Bentley.

I do not agree with much of what Mr A's representative says about there not being sufficient information available to Mr A to reasonably allow him to conclude the SIPP operator might have some responsibility for his loss. Whilst I agree Mr A, if he had made reasonable enquiries, may not have the read the Berkley Burke judgment itself, or necessarily have

drawn parallels with his own circumstances from that judgment, if he did read it, there was at that time a significant amount of publicity surrounding the responsibilities of SIPP operators for investments they accepted. This publicity went beyond Berkley Burke to the SIPP industry generally. An internet search around this time would have revealed a number of press articles and many adverts for Claims Management Companies, all of which would have made Mr A reasonably aware that the SIPP operator (in this case, EPML) might have some responsibility for his losses.

So, in my view if Mr A had been reasonably mindful of his situation and reasonably proactive he would reasonably have become aware of cause for complaint against the SIPP operator who originally accepted his business (EPML). However, I do not think it necessarily follows he would have known, or should reasonably have known, of cause for complaint against Redmayne-Bentley. It is possible that reasonable enquiries would have led to some understanding of Redmayne-Bentley's responsibilities. But, in the circumstances of this particular case, I think it is unlikely; I think it is unlikely the information available would have led Mr A to conclude that the business which provided a stockbroking service to his SIPP (rather than the SIPP operator itself) might be responsible for his loss.

Therefore, in all the circumstances, it is my view that Mr A was not aware or ought not reasonably to have been aware that he had cause for complaint against Redmayne-Bentley more than three years before the representative made his complaint to Redmayne-Bentley. So, the complaint has been made in time.

As I have concluded the complaint is one we can consider, I will go on to consider all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I'm required to determine this complaint by reference to what I consider to be fair and reasonable in all the circumstances of the case. When considering what is fair and reasonable in the circumstances, I need to take account of relevant law and regulations, regulator's rules, guidance and standards, codes of practice and, where appropriate, what I consider to have been good industry practice at the relevant time.

Although Redmayne-Bentley was not operating a SIPP I think the High Court decision in Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 474 has some relevance here. That says the factual context is the starting point for considering the obligations the parties were under.

The relevant obligations in this case were, in my view, set by the FCA's Principles for Businesses and COBS "best interests" rules.

The Principles for Businesses, which are set out in the FCA's Handbook "*are a general statement of the fundamental obligations of firms under the regulatory system"* (see PRIN 1.1.2G). The Principles apply even when the regulated firm provides its services on a non-advisory basis, in a way appropriate to that relationship.

Principles 2, 3 and 6 are, in my view, relevant here. They provide:

"*Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.*

Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.

Principle 6 – Customers' interests – A firm must pay due regard to the interests of its

customers and treat them fairly."

COBS 2.1.1R (A firm must act honestly, fairly and professionally in accordance with the best interests of its client) overlaps with certain of the Principles and is also a relevant consideration here.

As mentioned, the extent of the duties these obligations impose depends on the factual context, including Redmayne-Bentley's role in the transactions. The factual context in this case is the contractual relationship between Redmayne-Bentley and Mr A; this was a non-advisory, or execution only, relationship. And, furthermore, Redmayne-Bentley was simply providing access to trading in the shares of companies listed on recognised exchanges (in this case, the London Stock Exchange). Redmayne-Bentley's obligations need to be considered with that in mind.

The representative acknowledges Redmayne-Bentley was not providing financial advice but then says it nonetheless had essentially the same duties as an advisor – ensuring the SIPP and the investments in the shares were suitable for Mr A and met his needs. I do not think it would be fair and reasonable in the circumstances to make such a finding. Redmayne-Bentley's obligations in the circumstances of this case did not in my view extend to ensuring the suitability of the SIPP or the intended investments. The regulatory obligations Redmayne-Bentley was under do not have the effect in these circumstances of requiring it to take such steps.

I do not say Redmayne-Bentley's obligations would not require it, in any circumstances, to consider whether it should accept an instruction. It might be fair and reasonable to say that Redmayne-Bentley's obligations might require it to make some enquiries in instances where there is an obvious risk of consumer detriment such a potential fraud, for example. But I do not think the circumstances of this case are such circumstances. As I have set out, Mr A had been advised by an authorised IFA and was investing in shares listed on the London Stock Exchange – shares which were widely available for trading through many stockbrokers other than Redmayne-Bentley. I have not seen sufficient evidence to show it would be fair and reasonable to say Redmayne-Bentley's obligations required it to take further steps before accepting Mr A's instructions in the circumstances of this case.

For completeness, I should also mention that I do not think there were any restrictions on investment in the shares which required Redmayne-Bentley to take any additional steps before accepting instructions to trade in them, such as checking whether Mr A was a sophisticated or high net worth investor, for example. So, I do not think it would be fair and reasonable to say Redmayne-Bentley should have taken any additional steps on this basis either.

In short, I have not seen sufficient evidence, in the circumstances of this case, to say Redmayne-Bentley's regulatory obligations – or any standards of good practice – meant it should not have accepted Mr A's trading instructions, or should have taken any additional steps before doing so. It would not therefore, in my view, be fair and reasonable to uphold the complaint.

My final decision

For the reasons given, my decision is that Mr A's complaint has been made in time but it would not be fair and reasonable to uphold it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 8 January 2025.

John Pattinson
Ombudsman