DRN-5629276

The complaint

Ms J complains about unsuitable advice she says she received from Mr X to move her pension to a self-invested personal pension (SIPP) and then invest via a platform called Cornhill. Ms J says Mr X was representing Future Wealth Management Ltd (FWM) – an appointed representative of Pi Financial Ltd (Pi) so Pi is responsible for the advice.

What happened

Mr X worked for FWM which was an appointed representative of Pi between 15 January 2015 and 5 March 2019.

Ms J says she was contacted in February 2018 and offered a pension review which she agreed to. It doesn't appear that she ever actually met with Mr X, but she met with someone who I'll call "Mr B". Mr B was an introducer of business to FWM. And following that meeting it appears that several documents were provided to her from FWM.

The following are the key documents:

- A FWM client agreement which Ms J signed on 13 February 2018. This confirmed FWM was an appointed representative of Pi.

- A FWM fact find for Ms J dated 13 February 2018.

- A risk profiler for Ms J dated 13 February 2018 which showed she had no investment experience other than ISAs and pensions and all her investments had been made after advice.

- A letter from Mr X to Ms J on FWM headed paper dated 16 March 2018 which read:

> *It was good to speak with you on 15th February 2018. I am now writing to confirm the content and outcome of our discussions…*
>
> *You instructed me to specifically limit my advice to Pension Planning, specifically setting up a Self-Invested Personal Pension (SIPP) and I have acted accordingly…*
>
> *At the present time, your prime objective is to review your existing pension contract…and set up a SIPP to provide you with greater investment choice and flexibility. You have not been satisfied with the level of service you have received as you can only access your information online and the advisor you had a relationship with has left. You are unhappy with the direction and approach from the new advisor so wish to move your monies away. Your funds have also made a loss…and you would like the option to move them to a provider that will manage your money in line with your risk profile and your objectives. You wish to have the ability of a flexible income when you choose*

to retire as you have money and assets that you can live on, so would like to access your monies for leisure pursuits etc. You have requested that I research the market for a suitable SIPP provider with whom to invest all of your pension monies. You wish to retain flexibility within the SIPP to allow you access investments that suit both your objectives in retirement and level of risk you're comfortable with…

You wish to consolidate your plans within an arrangement that not only will be regularly reviewed but that will have an opportunity to change investment strategy to suit your risk profile and objectives. You wish to have access to your monies and take advantage of the ability to access this flexibly so that you can have the lifestyle you have grown accustomed to when you stop working. You also wish your plan to take advantage of any changes to access, death benefits etc which the SIPP will reflect immediately.

Your only objective in retirement is that you continue to have the lifestyle in retirement as you do now. You have a mortgage free property and a sum of cash you can access should you need to, and sometimes supplement your income with some part time work. You wish to use this pension to supplement your lifestyle and perhaps give you the opportunity for leisure pursuits when you eventually stop working…

With regards to the monies that are going to be actively managed on your behalf by Tam Asset Management you confirmed that you would be comfortable with up to 8-10% loss before you would look at moving any monies or reinvesting in to a different investment plan…

You completed a risk profile questionnaire and this confirmed you would be classed as a Growth investor. You agreed with this and feel this is a fair reflection of your understanding of financial products and your goals and aspirations.

As a Growth investor you have agreed with your advisor that you are willing to accept a certain level of risk in return for the potential for higher returns in the longer term. You recognise that this may result in the value of your portfolio fluctuating, possibly significantly, in the short term.

Linking this to current objectives we noted the following:

Building up an adequate pension in retirement is your main priority. As you have some experience with investments you are looking to take a more hands on approach with your investments and the risk profile is a fair reflection of the level of risk you are willing to accept to achieve your desired goals. You are happy to accept risk to the value of the capital in order to achieve better potential returns and if a loss occurred you would be happy to adjust this objective…

It was clear, given your requirement to have flexibility in terms of where your pension monies are invested, that a SIPP would be the best vehicle to allow you to do this. Having researched the marketplace, I recommend that you use Forthplus as your SIPP provider. Forthplus was chosen over the other providers on the original research due to their low annual management charge, low set-up fee, online access and quality of service…

As previously outlined you wish to have your monies managed by an appropriate DFM with whom I will be recommending for you, having researched the market. I have enclosed a copy of the DEFAQTO report to support the recommendation.

You have chosen to invest 100% of your pension monies from True Potential with TAM Asset Management, and I can confirm that they are on the panel at Forthplus…

The portfolio they are proposing for you will be outlined in the document they supply directly to you. As part of my duty of care to you I have considered the proposed portfolio and believe it suitable for you based on your current attitude to risk and capacity for loss…

I believe that for active portfolio management the TAM Asset Management charges represent good value.

- A risk profile report dated 16 March 2018 which named Mr X as the adviser and was signed on 21 March 2018. This gave Ms J a risk profile of "*8 of 10 – High*".

- A Pi pension replacement contract form signed on 21 March 2018 which named TAM Asset Management (TAM) as the proposed investment.

- "*DOCUMENTATION FOR OPENING A CORNHILL FLEXMAX INVESTMENT ACCOUNT*" which consisted of a risk tolerance questionnaire and an investment allocation document. These were both signed by Ms J on 21 March 2018 and also by by Mr X of FWM as the adviser on 28 March 2018. Ms J's risk questionnaire answers gave the result of a "*Balanced risk profile*" and the investment allocation document listed six funds, including 35% Luxif Amathus Conservative, 35% Luxif Amathus Balanced and 15% International Equity. I'll refer to this as the "the first Cornhill document".

- A SIPP application form dated 21 March 2018 which named Mr X of FWM as the adviser and said he was operating under Pi Financial. This was signed by Mr X on 28 March 2018 in the adviser section.

- Copies of Ms J's passport and council tax bill certified by Mr X on 28 March 2018 on FWM headed paper.

The SIPP statements show:

- The SIPP was opened on 28 March 2018.

- £124,082.20 was transferred in from Ms J's previous pension on 13 July 2018

- Ms J withdrew £10,000 on 27 July 2018. This appears to have been taken as a pension commencement lump sum (PCLS).

Mr X wrote to Pi on 4 May 2018 to say that he'd be closing FWM. But we've recently been provided with a form from the SIPP operator requesting the PCLS taken by Ms J in July 2018 was purportedly signed by Mr X of FWM.

REX Financial Services LLP (REX) took over the servicing of her SIPP on 14 August 2018. There is a letter of authority sent to the SIPP operator effecting this. Her representative says FWM had started passing clients over to REX at this time and Ms J hadn't approached REX or requested further advice from it.

On 6 September 2018 REX sent Ms J a financial planning report which includes:

> *I am recommending that within your Forthplus SIPP you invest via the Cornhill FlexMax Investment Account…*
>
> *We assessed your attitude to risk using the Dynamic Planner risk profiling tool…*
>
> *Your results were as follows:- 6*
>
> *Level 6 can be described as '**HIGH MEDIUM**' risk…*
>
> *You have confirmed to me that your attitude to risk is above average and, as such, I am happy to recommend the Flexmax Platform from Cornhill Management as you have expressed a desire to invest your pension in their range of portfolios.*
>
> *Cornhill Management have created a range of bespoke portfolios specifically for our use, these porfolios are essentially fund of funds and are comprised of different weightings of the 2 following funds.*
>
> *…*
>
> *Part of the Cornhill application form comprises a risk tolerance questionnaire and the result of this questionnaire confirms the best portfolio for you. Based on the risk tolerance questionnaire, you are classed as a balanced investor and will therefore invest in the following portfolio:*
>
> ***Balanced – 50% Luxif Amathus Conservative and 50% Luxif Amathus Balanced***
>
> *You have also advised that you are likely to require some or all of your remaining tax free cash entitlement and, to this end, we are also recommending a partial investment into the WIOF International Equity fund which has no penalties for early encashment.*

The SIPP statements show £110,000 being transferred to Cornhill on 14 September 2018. I can see that this was then invested into the three funds recommended in REX's financial planning report.

REX hasn't been authorised by the Financial Conduct Authority (FCA) since 19 May 2020. Shortly after, funds Ms J was invested in through Cornhill were suspended. And the company behind those funds was voluntarily liquidated on 11 June 2021.

Ms J tried to make a claim to the Financial Services Compensation Scheme (FSCS) against REX. However, the FSCS responded to the claim by saying:

> *"Pi...are still trading and are still authorised by the FCA and therefore you should contact them about your claim in the first instance. The FSCS are a fund of last resort*

and therefore all other possible avenues for compensation must have been exhausted before we can consider any claim."

It should be noted that the FSCS has not in fact rejected the claim and it may be possible for Ms J to still pursue a claim with the FSCS following the resolution of this complaint by our service.

Following receipt of the FSCS correspondence, Ms J complained to Pi saying the advice she'd received from Mr X was unsuitable. I'll set out further details of Ms J's complaint below.

Pi didn't agree. It said the advice Mr X had given was in line with Ms J's attitude to risk and capacity for loss and met her objectives. And it said it couldn't be held responsible for the performance of Cornhill as that'd been the recommendation of REX and Mr X had recommended TAM. However, it offered Ms J £4,737 with no admission of liability – these were the losses it said would have been incurred between the date of the pension switch and the Cornhill investment.

The complaint was then referred to our service. During the course of the complaint, Pi has also said that it prohibited its advisers from recommending Cornhill by way of a "Rejection Notice" dated 5 October 2017.

After one of our investigators said the complaint should be upheld, an ombudsman (the first ombudsman) was asked to review the complaint. The first ombudsman issued a provisional decision saying:

- She was satisfied that Mr X had advised Ms J to switch her pension to the SIPP and invest through a Discretionary Fund Manager ("DFM"). So, he carried out regulated activities or acts ancillary to regulated activities.

- It was most likely that Mr X had recommended Cornhill and had started making arrangements for Ms J to invest through it. So, he also carried out regulated activities or acts ancillary to regulated activities in relation to this element of the complaint.

- Mr X was holding himself out as Pi's appointed representative at the time.

- Mr X seems to have been allowed to carry out regulated activities in relation to the SIPP and Ms J's previous pension. So, the activities he carried out in relation to those products fell within the actual authority of FWM. Even if one component activity in the advice (the Cornhill investment) was unauthorised – as Pi says it was – this was done in the course of business for which Pi accepted responsibility and Pi is therefore responsible for the whole single stream of advice.

- The advice to switch Ms J's personal pension to the SIPP and invest via Cornhill wasn't suitable.

- REX's involvement didn't break the causal link and it's fair to ask Pi to compensate Ms J for the full loss she suffered.

Ms J agreed with the provisional decision, but Pi did not. In summary, it said:

- The evidence hasn't been assessed impartially on the balance of probabilities. The ombudsman seemed to be requiring Pi to disprove its culpability beyond reasonable doubt and that isn't the standard that should be applied.

- It had been made very clear to Mr X that pension transfers to a SIPP couldn't include non-mainstream pooled investments (NMPIs) and specifically Cornhill in subsequent SIPP portfolios. He took compliance tests that confirmed this and engaged with Pi's extranet which clearly set this out.

- Ms J's complaint wasn't that Mr X had given her unsuitable advice to move her pension to a SIPP and invest through Cornhill. Her representative confirmed that the recommendation had been to invest through TAM. The allegation that advice had been given to invest through Cornhill seemed to be solely based on the first Cornhill document from March 2018.

- Pi had no knowledge of the first Cornhill document and saw it for the first time when we forwarded a copy. If it had been completed by Mr X as FWM, it surely would have been in the file Pi had from FWM.

- FWM's advice letter recommended TAM and this isn't changed by the fact there's no evidence of TAM documentation.

- The absence of an explanation for the first Cornhill document from March 2018 doesn't mean that advice must have been given. Pi can't explain the existence of a document it didn't know existed. But it can dispute that Mr X had any involvement with it.

- Pi shouldn't have to disprove that its responsible for the Cornhill advice when there's no evidence that FWM gave any Cornhill advice and if it did, what that advice was. This effectively reverses the burden of proof.

- The only incontrovertible evidence of Cornhill advice is REX recommending it with no mention of FWM and its previous involvement. And REX's recommendation stated that Cornhill had created a range of "*bespoke portfolios*" specifically for REX's use. It's wrong to ignore this evidence.

- Because REX was an authorised and regulated financial adviser in its own right, its involvement broke the chain of causation.

- The notice of rejection of Cornhill was validly issued and it's clear Mr X knew that Cornhill had been banned.

- The Court of Appeal in *Anderson v Sense Network* [2019] EWCA Civ 1395 confirmed that both *TenetConnect Services Ltd v FOS* [2018] EWHC 459 (Admin) and *Martin & Anor v Britannia Life Ltd* [1999] EWHC 852 (Ch) establish no more than that if an adviser gives advice on a transaction with regulated and unregulated elements, the principal is liable for the unregulated business if it's inherently bound up with the regulated element. Neither case has any relevance as to whether a principal can restrict the business that an appointed representative can undertake because that

issue didn't feature in either case. The *Anderson* case in the Court of Appeal is the lead case in the application of Section 39 of the Financial Services and Markets Act 2000 (FSMA) but it hadn't been considered by the first ombudsman.

- Even if there was advice to invest in Cornhill, this wasn't "*inextricably linked*" to the advice to move the pension. In *TenetConnect* Mr Justice Ouseley said:

> *It is not simply that the advice was given at the same time, or that the trades took place so closely in time. That helps to evidence that the advice to buy was what led to the advice to sell. The advice to sell was given so that the alternative unregulated investments could be made; they were compared, and their advantages persuaded Mr and Mrs Thorpe to accept the advice to sell. The advice, put simply was that, because they could do better in unregulated investments, they should sell the specified investments. The advice on unregulated investment justified the advice on the specified investments, and in that way, became part of the regulated advice.*

  So being "*intrinsically linked*" is evidenced by two factors – that the advice to transfer the pension and the advice to investment were contemporaneous and that the actual transfer and investment occurred closely together. Neither of these factors exist here. FWM couldn't have predicted that six months after its advice another business would advise an entirely different investment.

- Here there were two different advisers; the two pieces of advice were six months apart; the advice that triggered the investment was given by REX and Pi had specifically forbidden NMPIs and Cornhill.

- The Court of Appeal's decision in *Anderson* – 18 months after *TenetConnect* was that a principal is entitled to issue a specific restriction on an appointed representative's activities. And that's what Pi had done here.

After our service obtained an unredacted copy of the first Cornhill document from March 2018, Pi made further submissions. In summary, Pi said:

- It was at a disadvantage by not having all the information earlier.

- Our service hadn't made all relevant requests for information from the SIPP operator to establish the facts surrounding the investment advice regarding Cornhill and why the investment hadn't gone ahead in March 2018.

- The SIPP operator had confirmed to Pi that only one person – who was not Ms J – had been documented as having been advised to invest in Cornhill.

- Both the SIPP application and the first Cornhill document from 2018 appeared to have forged signatures for Mr X. Pi said that Mr X was likely abroad at the time and that the signatures on these forms looked very different to other documents genuinely signed by Mr X.

- In any event, even if Mr X had given advice on Cornhill, because REX was an authorised and regulated financial adviser, its involvement in the actual investment in

September 2018 broke the chain of causation. So Pi wasn't responsible for Ms J's losses.

The first ombudsman has moved departments and so this matter was passed to me to decide. I issued a further provisional decision and reached the same conclusion as the first ombudsman - and for essentially the same reasons.

Pi made further submissions following my provisional decision and in subsequent correspondence. It said (in summary):

- My provisional decision inconsistently weighed the evidence and had reversed the onus proof. Pi was being asked to disprove matters beyond a reasonable doubt test. The provisional decision was so arbitrary, oppressive and unreasonable that no reasonable authority could have arrived at it.

- There is no evidence that Mr X of FWM gave advice to Ms J to invest in Cornhill. The evidence in the form of the advice letter was that he advised her to invest in TAM.

- The first Cornhill document from March 2018 is not evidence of advice and there is no evidence of when or who sent the document to the SIPP operator.

- The six funds in the first Cornhill document was not acted on – no account was opened to invest in these six funds. Any reliance on this as evidence was speculation on my part.

- I hadn't considered the scenario that Ms J might have wanted to proceed with investing in Cornhill as an insistent client - against the advice of Mr X. That was far more likely a scenario than the conclusion I had reached that Mr X had advised her to adopt that course.

- The crux of the provisional decision was that there was a "simultaneous duality of investment advice" from Mr X to invest on the one hand in TAM and on the other in Cornhill. That being the case, how could Mr X have known what would happen several months later?

- I had given very little weight to REX's suitability report and had downgraded it to merely a back-up of earlier advice I had determined had been given by Mr X. The REX report was actually the only documentary evidence of the Cornhill advice and it was clearly advice given by REX. The advice was acted on almost immediately and clearly broke the chain of causation between anything done by Mr X in March 2018 and the Cornhill investment in September 2018.

- Pi reiterated its concerns about the handwriting on the application forms and the authenticity of Mr X's signatures. Pi said these concerns and issues were apparent on a number of cases and that I had ignored the very serious questions that this raised.

- I had misrepresented previous submissions made by Pi when I said that Pi accepted that Mr X had made a Cornhill application via FWM. So far as Pi is concerned, every investment into Cornhill advised on by Mr X was in his separate capacity via a company called Tidal Wealth. So there was no link between Mr X in his FWM capacity and investments in Cornhill.

- I had implied that Pi's inability to explain the first Cornhill documents from March 2018 is incriminatory. But it's not surprising that Pi are unable to provide any an explanation because, having banned its appointed representatives from selling Cornhill, Pi had no knowledge of it. It is very difficult to prove a negative and imposing this burden on Pi is oppressive.

  The document was obtained by Ms J and so it should be for Ms J to prove it's significance as a genuine document.

- Ms J had signed a document for the SIPP in August 2018 appointing REX as her adviser. This was unequivocal evidence that REX and not FWM was responsible for anything that happened thereafter. This broke any chain of causation.

- I had ignored the precedent of a previous decision issued by the ombudsman service where it was said that REX's involvement *did* break the chain of causation from the acts of Mr X. That case wasn't just similar, it was identical to Ms J's.

- An investigator in 2022 had also resolved another similar complaint where he had said that the variation in the investments made by REX compared to those in the first Cornhill document broke the chain of causation.

- In September 2018 REX issued a report to Ms J giving its own specific advice to invest her then existing SIPP into Cornhill and into two funds, without making any reference to advice that FWM may have given. And within days of this, Cornhill funds were purchased in the SIPP.

- If there was "simultaneous duality of investment advice" from Mr X, that advice was neutral up until the point of REX's involvement and Ms J's decision once the pension switch had taken place. REX was directly authorised by the FCA to provide regulated advice and as soon as it was engaged by Ms J it was obligated to provide advice that complied with the regulations – independent of Mr X/FWM and Pi.

- REX's suitability report was limited to "research and recommendation" for the choice of investment as the pension switch had taken place already and there was no need to reassess the pension advice. REX clearly undertook a fresh fact finding exercise to make the recommendation to invest in Cornhill.

- REX had made its own determinations about Ms J's attitude to risk, independent of Mr X and FWM and issued a full suitability report. Ms J had not been treated as an execution-only client by REX – and so clearly Ms J had not made up her mind about Cornhill by the time of her dealings with REX. REX knew that it couldn't rely on any advice that might previously have been given by Mr X.

- My provisional decision accepted that REX gave Ms J advice and was directly and solely responsible under COBS for that advice. But, on the other hand, I said that REX's recommendation didn't break the chain of causation between any previous (unevidenced) advice from Mr X and FWM to the Cornhill losses. Both can't simultaneously be true.

- Where a new adviser (REX) comes onto the scene then the judicial authorities and the FCA's rules are clear that such new adviser is responsible for the advice that it gives.

- Pi reiterated that the cases of *Martin* and *TenetConnect* were not relevant to Ms J's complaint and the issue of what Pi accepted responsibility for under section 39(1) and (2) FSMA. The relevant case to consider in this respect is *Anderson.*

- The notice of rejection issued by Pi relating to Cornhill was clear and engaged the right granted by Pi under section 39(1) and (2) to not allow/permit the sale of Cornhill investments.

- I had summarily dismissed the fact of the notice of rejection for Cornhill issued by Pi and deemed its content to have no effect simply because it was not issued in writing but had been issued electronically via Pi's extranet. I had also incorrectly interpreted the *Rock Advertising* case which was in fact more supportive of Pi's position.

- Mr X was fully aware that he/FWM was not permitted by Pi to sell Cornhill investments.

- I had not taken account of the fact that Pi had restricted Mr X from advising on pension transfers to a SIPP that included NMPIs in 2015. Pi had made it clear that it needed to complete due diligence on the SIPP provider

What I've decided – jurisdiction

I've considered all the evidence that's been provided. Having done so, I'm still satisfied this complaint is one the Financial Ombudsman Service has jurisdiction to consider against Pi.

As a preliminary point, the purpose of this decision is to set out my findings on jurisdiction and merits and explain my reasons for reaching those findings, not to offer a point-by-point response to every submission made by the parties to the complaint. And so, whilst I've carefully considered all the submissions made by both parties – including those made after my provisional decision by Pi - I've focussed here on the points I believe to be key to my determination in the circumstances of this case.

To carry out regulated activities a business needs to be authorised (Section 19 of the FSMA). FWM (and therefore Mr X) wasn't directly authorised. Instead, it was an appointed representative of Pi. Pi is an authorised firm. It's authorised by the FCA to carry out a range of regulated activities including advising on investments and arranging deals in investments. We can therefore consider complaints about Pi. And this includes some complaints about its appointed representatives.

But this service can't look at all complaints. Before we can consider a complaint, we need to check, by reference to the DISP rules and the legislation from which those rules are derived, whether it's one we have the power to look at.

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 DISP 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)*.

And 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*.

The responsibility of a principal was considered in the case of *Anderson* – I'll look into this further below.

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 Pi was authorised to do.

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

- What are the specific acts Ms J 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 Ms J has complained about?

I think it's right to highlight that Ms J's complaint has evolved.

Her representative initially said to Pi:

> *"The Cornhill investment has now failed and our client has lost her pension funds as a result of this. Although your adviser initially recommended the TAM investment, it is clear that had the pension transfer not gone ahead then the high risk investment could not have taken place.*
>
> *Our client relied on your appointed representative to give her proper advice on the pension transfer. It is clear that had our client's needs and the implications transferring their pension funds, been fully considered by you then the transfer into a SIPP for the purposes of investment in a high risk investment portfolio would not have been recommended. Whilst you may have highlighted certain factors for our client to consider regarding the investment, you at no point stated that the SIPP transfer and/or investment in was against your advice or unsuitable. The investment and the transfer exposed our client's pension funds to significant risk which you did not fully advise them on and/or consider. The investment itself would not have taken place but for the advice given to by you to transfer the pension into the SIPP."*

The complaint did not set out that FWM had given Ms J specific advice about Cornhill. Rather the complaint was that FWM had created the situation in which the loss could occur rather than a complaint about the Cornhill advice as such.

However, after Pi rejected responsibility for the losses stemming from Cornhill, Ms J pointed to the first Cornhill documents as evidence that Pi was involved in giving her advice about the Cornhill investment.

So overall, I think Ms J's complaint is about the pension switching advice as well as the subsequent investment made via Cornhill in the SIPP. I think her complaint is about the advice and arrangements that brought this about.

Are those acts regulated activities or ancillary to regulated activities?

Section 22 FSMA defines "*regulated activities*" as:

> *(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 relevant Order is the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (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.

Pi contacted Ms J after the complaint to talk about the circumstances of the pension switch and investment in Cornhill. Ms J said she met with a Mr B – who appears to be an introducer of business to FWM. It doesn't look like Ms J ever met Mr X, but following the meeting she received documents from Mr X/FWM.

Given the dates of the various documents, it looks likely that Mr B went to see Ms J on 13 February 2018 and obtained a signed client agreement and gathered information about Ms J and reported back to FWM. Those acts don't seem unusual for an introducer of business to an adviser.

Even though he never met her in person, it seems that Mr X/FWM then advised Ms J to switch her pension to a SIPP to invest through a DFM – TAM - by way of the suitability letter dated 16 March 2018. The letter referred to a meeting with Mr X on 15 February 2018. That reference looks like an error as it doesn't appear that any such meeting took place.

Pi has pointed out that the letter is unsigned, but I'm satisfied that advice was given by Mr X/FWM. The letter was sent after Ms J signed the client agreement and fact find with FWM. All the documents appear to be on official FWM paperwork. And I can't see why the fact find and client agreement would be entered into with Pi if there was no intention to follow that up with financial advice from FWM.

Again the dates of the documents suggest a further meeting took place on 21 March 2018 (most likely again with Mr B), with Ms J being asked to sign further documents. The SIPP application was signed by Ms J on 21 March 2018 with Mr X's FWM details added to the form on 28 March 2018. Pi says that Mr X's signature on the SIPP application isn't genuine. But I think it's reasonable to proceed on the basis that if he did not sign it himself, Mr X consented to someone at FWM signing it on his behalf. This seems to be the natural next step to all that had gone on before – the client agreement, fact find, and suitability letter all on FWM paperwork. And the records of the pension advice all appear to be provided by Pi – presumably obtained from FWM's records.

So, I'm satisfied that Mr X/FWM gave the advice in the 16 March 2018 suitability letter and was involved in making the arrangements for the pension switch that followed. Mr X/FWM therefore carried out regulated activities or acts ancillary to regulated activities relating to the pension switch.

I know Pi feels strongly disagrees, but taking everything into account I'm also satisfied in the circumstances here that Mr X/FWM gave Ms J advice about Cornhill and/or took steps to open the SIPP for it to be used to invest in Cornhill at some point between 16 March 2018 (the date of the suitability letter) and 21 March 2018 (the date of the first Cornhill document). I say this because:

- Ms J can't recall when Cornhill was first mentioned to her by anyone at all (Mr B or Mr X). But I can't ignore the first Cornhill document signed by Ms J on 21 March 2018 and signed with Mr X's FWM details on 28 March 2018.

- The first Cornhill document may not have been part of a formal suitability letter. But by presenting it to Ms J on 21 March 2018, I think the funds were being recommended as suitable for Ms J's proposed SIPP at that point even if she hadn't really comprehended that the proposed investment had changed from TAM.

- The SIPP operator has since gone out of business and so we have limited records and information from the business that now operates the SIPP. So we don't know for certain when the first Cornhill document was sent to the SIPP operator. But I think the first Cornhill document was likely sent by FWM with Ms J's SIPP application to the SIPP operator. I say this because the first Cornhill document was obtained from the records held by the current operator of the SIPP and has the same dates as the SIPP application. I can't see why it would have been sent at any other point.

- I accept that the FWM recommendation letter of 16 March 2018 recommended TAM and the pension replacement contract form of 21 March 2018 named TAM. And I also accept the first Cornhill document didn't, it seems, result in the direct arrangement of the investment. Further, I understand and appreciate that Pi wasn't aware of the first Cornhill document before the complaint and so it can't be expected to provide an explanation about why that form was filled out and sent to the SIPP operator.

  But I remain of the view that the first Cornhill document is significant. There doesn't appear to be an equivalent document sent to the SIPP operator for TAM. And I can't see why the Cornhill document was sent to Ms J and the SIPP operator unless it was envisaged that this is what the SIPP would be used to invest in when the SIPP application was submitted and when it received funds. Put another way, I don't think it's merely a coincidence or some mistake that Ms J and the SIPP operator was sent this document. And rather than indicating that there was some form of "simultaneous duality of advice" at this point with Mr X recommending *both* TAM and Cornhill, I think it evidences that Mr X/FWM had changed his advice so that Ms J should invest in Cornhill instead of TAM and was arranging that investment at the point of submitting the SIPP application.

- As I'll mention in the merits section below, there is a pattern of cases where FWM is involved in a TAM recommendation only for a Cornhill investment to be made. I think the reason why the recommendation letter referred to TAM to begin with is likely because Pi had prohibited its advisers from recommending Cornhill. But Mr X/FWM likely wanted to still submit this business to Cornhill and was willing to give instructions to the SIPP operator directly for the investment.

- I note that Pi has questioned the authenticity of the signature on the first Cornhill document. Pi says the signature on the document does not resemble the one it has on record for Mr X.

  But even if he did not sign it personally, I think it's likely that Mr X knew that the document was being sent to the SIPP operator with his FWM details. That may possibly have been done by Mr X's administrator as suggested on other cases. But Mr X has himself been involved in investments in Cornhill. I accept Pi's recent point that it has always said that any recommendations made by Mr X for Cornhill were made via his separate company – Tidal Wealth not FWM. But the point is that Mr X has a connection with Cornhill investments. So, this suggests the submission of the first Cornhill document was more likely than not done by Mr X or with his knowledge and consent.

- I think it's notable that whilst Pi has said that Mr X was abroad in March 2018 and wasn't undertaking FWM business, it has provided evidence that shows that he accessed the firm's "extranet" pages in February and March 2018 – including on 28 March 2018 when the first Cornhill document was signed with FWM's details. That suggests to me that he was undertaking FWM business at this time and things were being done with his consent.

- I'm of course aware that REX later gave advice to Ms J to invest via Cornhill. But even that advice suggests that things had already moved toward an investment in Cornhill. I note that in its financial planning report of 6 September 2018, REX said "*I am happy to recommend the Flexmax Platform from Cornhill Management as you have expressed a desire to invest your pension in their range of portfolios*". This suggests that Cornhill was not something that was initiated by with REX. It's likely that Mr X/FWM had initiated the investment by way of the pension switch and REX was involved in later advising and implementing that strategy as a result of the delay in the ceding scheme sending funds. I'll set out more about this in the merits section of this decision below.

- I think this is more plausible than an alternative scenario – that Mr X/FWM gave advice to Ms J to switch her pension to a SIPP and invest in TAM but then didn't bother to follow that up. And that, instead, without Mr X's knowledge, someone (perhaps Mr B) submitted a SIPP application for Ms J using Mr X's FWM's details and filled out forms for an investment in Cornhill – an investment that Mr X had also happened to be involved in with other clients whilst working for a different firm.

- I also think my conclusion is far more likely than another alternative scenario that Pi has put forward – that Ms J was the instigator of the Cornhill investment and went ahead with it as an insistent or execution only client – against the advice of Mr X. I'm satisfied that Ms J, an ordinary retail consumer, wouldn't have instigated a complex pension switch to a SIPP for investment in an arrangement with Cornhill herself. There's also no evidence that Mr X treated Ms J as an insistent client and, even if he had, that would still have involved Mr X giving advice.

- Pi has pointed to the fact it didn't receive any fees. But everything in the documentation suggests a fee had been due to FWM. And not only do the SIPP statements show no fee being paid to FWM or Pi, but they also show no fee being paid to REX. So, I'm not persuaded the absence of a fee proves that Mr X didn't give advice or arrange what Ms J ultimately invested in. I'm also not persuaded that the

fact the SIPP provider's records didn't show Mr X as having been the adviser for Cornhill is decisive.

- There was a delay between Mr X's advice and acts in March 2018 and the Cornhill investment being made in September. This appears to be because the pension switch took a while to complete – the ceding scheme did not transfer funds until July 2018. And by May 2018, Mr X had decided to stop doing work with FWM. That appears to be why Mr X/FWM arranged for REX to take over servicing of the SIPP and new Cornhill documentation from REX was necessary.

- There's no dispute that REX then gave advice and arranged the Cornhill investment in September 2018. The question is whether Mr X/FWM when advising and arranging the SIPP *also* earlier given advice and/or made arrangements at the time of the pension switch in order to invest Cornhill and effectively put things in motion.

- For the avoidance of doubt, I've noted that we've recently obtained evidence from the SIPP operator that the PCLS was taken by Ms J on the basis of a form that was submitted by FWM. The signature on the form looks like one that may not be Mr X's and it was submitted after May 2018 when Mr X had written to Pi to say he would be closing down FWM. But it should be noted that FWM was still an appointed representative of Pi at this point. And the form could still have been submitted with Mr X's consent. In any event, I don't see the direct relevance of this specific act to the events of this complaint as I think the critical period of FWM's role is March 2018.

Taking everything into account, I'm satisfied that for all the reasons I've set out above, it's most likely that Mr X/FWM advised Ms J to invest through Cornhill and/or made arrangements for this when advising and arranging the pension switch in March 2018. These matters were intrinsically linked. And this all formed part of regulated activities.

Did Pi accept responsibility for those acts?

It's clear that when Mr X was carrying out the acts, he was holding himself out as acting as Pi's appointed representative – he used FWM forms and letterhead and there's no evidence that he held himself out as acting in any other capacity.

Section 39(1) FSMA says

> *(1)If a person (other than an authorised person)—*
>
> *(a)is a party to a contract with an authorised person ("his principal") which—*
> *(i)permits or requires him to carry on business of a prescribed description, and*
> *(ii)complies with such requirements as may be prescribed, and*
>
> *(b)is someone for whose activities in carrying on the whole or part of that business his principal has accepted responsibility in writing, he is exempt from the general prohibition in relation to any regulated activity comprised in the carrying on of that business for which his principal has accepted responsibility.*

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.*

Pi is concerned that I've misunderstood the application of the legislation and have ignored the requirement that Pi must accept responsibility for business and may put limits on the business for which it accepts responsibility. To be clear – I am fully aware that Pi is only responsible for complaints arising from anything done or omitted by FWM in the carrying on of business for which Pi accepted responsibility and that I therefore need to determine what *that business* is and whether there were any limitations to that acceptance.

Pi has provided the appointed representative agreement between itself and FWM. 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.* (my emphasis).

"*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 appointed representative agreement was very wide ranging – *"giving advice, making arrangements in relation to…long term care products **and any other product**"*. So the agreement authorised FWM (and therefore Mr X) to carry out the activities Ms J has complained about – pension and investment advice and arrangements. That is therefore business for which Pi accepted responsibility under FSMA.

I acknowledge that, under the agreement, FWM needed to comply with any "*instructions in Writing*" given by Pi.

Pi has cited two matters that it says limited the business for which it accepted responsibility under section 39 FSMA: a process for pension business it says it agreed with Mr X in 2015 and a Rejection Notice for Cornhill it issued in 2017. I'll deal with each of these in turn below. But before I do so, I want to deal with the issue of whether the appointed representative agreement can be said to have been validly amended to include these limitations at all.

Validly amended? In writing?

In my earlier provisional decision, I said that Mr X/FWM was not issued with a copy of the Rejection Notice validly and therefore it did not limit the business for which Pi accepted responsibility. I noted the Supreme Court's decision *in Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24 where it was held that "no oral modification clauses" are effective to prevent informal modifications because such clauses ensure commercial certainty between the parties.

I've reflected on this aspect of my decision and understand Pi's concerns about whether this can be applied to the facts of this case – where I am dealing with section 39 FSMA rather than property rental payments/no oral modification and where there is little doubt that Mr X/FWM was aware that Pi did not approve of Cornhill.

However, given what I say below, I don't make any findings about this as I'm satisfied it doesn't affect my ultimate conclusion regarding Pi's responsibility as I'll now explain.

The limitations – due diligence/pre-approval/NMPIs

Pi has provided a process "Process [Mr X] of Future Wealth Management Ltd" it emailed to Mr X on 7 August 2015 that it said he needed to follow – and which he accepted by return email on 9 August 2015. This included the following:

> *1. Introduction received (1)*
> *2. Know Your Client relevant information gathered and overall assessment of the client's financial position, needs, attitude to risk, capacity for loss and objectives in relation to the proposed transaction as a whole*
> *3. Written instruction received from the client to carry out limited advice to transfer into a SIPP*
> *4. Client to be put in fully informed position assessing the suitability of proposed transfers*
> *5. [Mr X] to make recommendation NOT constrained by client's objectives*
> *6. If appropriate a conditional recommendation to transfer into a SIPP may be made (2) such a recommendation is conditional on the client selecting an approved DFM from the SIPP provider panel and the DFM constructing a suitable and appropriate portfolio*
> *6. Client will select a DFM from the SIPP providers panel and inform [Mr X]*
> *7. [Mr X] will ensure the DFM is approved by Pi Financial.*
> *8. [Mr X] will ensure the DFM is approved by Pi financial (3)*
> *9. Once the DFM has created the client's portfolio [Mr X] will obtain a copy of the proposed initial portfolio showing asset allocation and stock selected*
> *10. The portfolio is to be analysed using a comparison tool i.e. Analytics, Morning Star, DT, Finemetrica etc to confirm that: (4)*
> *• The overall portfolio matches client's attitude risk, capacity for loss*
> *• No NMPIs are held within the portfolio*
> *• Any investment that involves financial engineering or is vaguely esoteric has been approved by pi financial*

The footnotes said:

> *1. Due diligence must be completed on Introducer and Introducer Agreement signed by pi financial, [Mr X] and Introducer before prospects are accepted.*
> *2. Due diligence must be completed on SIPP provider by pi financial and undertaking received that no NMPIs will be used in the client's portfolio.*
> *3. Due diligence must be completed on the DFM by pi financial and an undertaking received that no NMPIs will be use in the client's portfolio*
> *4. If [Mr X] does not understand the underlying investment proposition and portfolio proposed by the DFM transfer into the SIPP should not take place*

So far as I'm aware, the SIPP operator used in this case was one that was approved by Pi and Pi isn't arguing that it had not carried out due diligence or pre-approved the SIPP operator.

Pi's objection relates to the use of Cornhill as the DFM which it says was something that Mr X/FWM had not sought pre-approval for and that the portfolio with Cornhill included NMPI's and was therefore not something that FWM was authorised to recommend or arrange.

I've considered this carefully. Having done so, I'm satisfied that the email exchange and the process in 2015 did not limit the business for which Pi accepted responsibility under section 39 FSMA.

To begin with, it's not clear to me that the Cornhill investment can be properly categorised as a DFM investment at all. There appears to be no discretionary management of funds by Cornhill. It seems to be a platform offering funds.

There is also no dispute that the SIPP operator in this case was one that FWM was permitted to deal with.

In any event, the email exchange and process in 2015 came about because it had emerged that Mr X had been giving clients "restricted advice" – advice that recommended a pension switch to a SIPP but did not involve analysis or recommendations regarding the underlying investments to be held in the SIPP. Such advice does not comply with the regulatory requirements for suitable advice.

The regulator had contacted Pi about this and, after looking into the issue, it appears that Pi agreed the process to satisfy itself and the regulator that Mr X would, going forward give advice in a particular way that was compliant with the regulations.

In my view, the entire aim of the email exchange and process was getting Mr X/FWM to give compliant advice that was suitable for clients. Whilst that aim may have been creditable, I'm not satisfied that the process limited *what* business FWM could undertake as opposed to dictating *how* FWM conducted business that FWM was authorised to undertake under the appointed representative agreement.

As highlighted in the Court of Appeal decision in *Anderson*, a distinction can be drawn between breach of terms of an agreement that go to *what* an appointed representative is authorised to do and *how* an appointed representative carried on an act that is otherwise authorised. The former kind of breach takes the appointed representative's conduct out of the principal's ambit of responsibility, but the latter doesn't, being regarded as a matter between the principal and the appointed representative.

Under the 2015 process, FWM needed to seek pre-approval that a SIPP operator and DFM was approved and check that the recommended portfolio did not contain NMPIs. Mr X/FWM didn't do this in respect of Ms J. But my view is that breach by FWM of the process agreed in 2015 is a matter that goes to *how* it carried on authorised acts – and so does not affect Pi's liability for FWM's acts under section 39 FSMA. Even the term "process" is a clue as to its nature. There was, in my view, no clear statement that the process altered *what* regulated activities FWM was authorised to undertake.

For the avoidance of doubt, I'm aware that in another case Pi has also produced a bulletin from 2017 that it posted on its "extranet" that said that Pi required advisers to ask it to undertake "due diligence" and approve providers before they could be recommended. Again, I consider this to limitation to go to *how* authorised activities are conducted – not *what* FWM was authorised to do.

Cornhill Rejection Notice 2017

I've also looked at the more specific Rejection Notice issued by Pi dated 5 October 2017 for Cornhill. This notice included:

> *With immediate effect, Pi financial ltd ('the Firm') is disallowing the use of Cornhill…*
>
> *The Firm believes the issues above provide too much risk to the client, adviser and Firm to provide PI cover and compliance support on any recommendations.*
>
> *No new business can be introduced to Cornhill*.

My view on this remains as set out in my provisional decision. I accept that, by way of this notice, Pi made clear that its advisers must not introduce new business to Cornhill. I also accept that a principal can restrict the permission it gives to an appointed representative to introduce business to certain providers – as established in *Anderson*.

But this case does not only involve advice and arrangements in relation to Cornhill. There was also advice and arrangements regarding the switch of Ms J's previous pension to the SIPP.

There is case law that says that where activities are inextricably linked they in effect form a single regulated activity and if any one element is the responsibility of the principal then it will be responsible for the whole of the transaction. In the case of *TenetConnect*, Mr Justice Ouseley said:

> *Of course, the FSMA draws a clear distinction between regulated and unregulated activities. But that does not answer the question of what activities amount to regulated activities where a single braided stream of advice is given to a client about regulated and unregulated investments. Paragraph 53 of the 2001 Order deals with advising as a specified kind of activity, it is a regulated activity when "advising" in relation to a specified investment on the merits of an investor or potential investor selling a relevant investment. Rule 2.3.1 of DISP2 provides that a complaint can be considered if it "relates to an act or omission by a firm carrying on one or more of the following activities." "Carrying on an activity" includes offering or providing or failing to provide a service in relation to an activity. That language does not permit a bright line to be drawn between advice on selling the regulated investment and buying the unregulated investment, where the purpose of the sale is to enable a purchase. The advice on such a sale in inextricably linked to the advice on the purchase. A bright line, one side of which is regulated and on the other side of which is unregulated, would only reflect the facts of the situation where the regulated and unregulated activities were themselves brightly divided. But their edges may be blurred; or they may be inextricably linked. The law governing the Ombudsman's jurisdiction could not force facts into unrealistic compartmentalisation without undermining its purpose and effectiveness.*
>
> *…..*
>
> *I turn now to grounds 3 and 4. The issue for the Ombudsman was whether, under s39(3) Tenet, as the principal of Dhanda, was responsible for the advice given by Dhanda, its authorised representative, in relation to the "unregulated" investments. Tenet said that it was not, because what Dhanda did was not done "in carrying on the business for which [Tenet] had accepted responsibility". Although the Agreement between Tenet and Dhanda used widely defined words in "applications", "contracts" and "business", which certainly covered investment advice on buying or selling regulated investments, that was limited to those "dealt in by Tenet", which did not include Goan property or loans to Dhanda. Nor could it cover fraud, or any payments*

made directly by a client to Dhanda. The issue for me, on the Ombudsman's jurisdiction, which again is how the issue arises, is whether the Ombudsman was right to appraise or characterise the advice in relation to those "unregulated" investments as "co-extensive with" or "intrinsically linked to" or "very closely connected to", the advice to sell, such that they were done "in carrying on the business" for which Tenet had accepted responsibility, even though not of itself, advice on the administration of investments dealt in by Tenet. The parties agreed that the question under grounds 3 and 4 was not to be determined as a matter of the contractual law of agency; s39(3) imposed its own basis for holding that an authorised person was responsible for the acts of its appointed representative. I accept that that is the correct analysis. Jonathan Parker J said this about agency in Martin v Britannia, above at [5.2.12]:

> *"In my judgment, just as "investment advice" extends beyond advice as to the merits or otherwise of a particular "investment" as a product (see paragraph 5.2.5 above), Mr Sherman's authorised activities under the 1990 Agreement (which, as I pointed earlier, mirror the provisions of section 44(3) of the 1986 Act) similarly so extended. If anything, the provisions of section 44(3) serve to reinforce my conclusion as to the width of the concept of "investment advice". An activity consisting of "giving advice…about entering into investment agreements" seems to me to involve much more than advising as to the terms of a particular investment agreement, without regard to the question whether it is appropriate for the client to enter into such an agreement, given his particular financial situation."*

…

In my judgment, the same analysis which persuaded the Ombudsman and me that the activities were so closely linked that they amounted to "regulated" activities, impels the conclusion that they come within s39(3).

The earlier case of *Martin v Britannia* [1999] EWHC 852 (Ch) quoted above also included the following from Mr Justice Parker:

> *In my judgment, advice as to the "merits" of buying or surrendering an "investment" cannot be sensibly be treated as confined to a consideration of the advantages or disadvantages of a particular "investment" as a product, without reference to the wider financial context in which the advice is tendered…In my judgment it is neither appropriate in the context of the 1986 Act, nor for that matter would it be realistic, to seek to limit the concept of "investment advice" by reference to the extent to which the advice relates to the "merits" (i.e. to the advantages or disadvantages) of a particular "investment" as defined; and if that be accepted,* ***it seems to me that it must follow that the concept of "investment advice" will comprehend all financial advice given to a prospective client with a view to or in connection with the purchase, sale or surrender of an "investment", including advice as to any associated or ancillary transaction notwithstanding that such transaction may not fall within the definition of "investment business" for the purposes of the 1986 Act.*** (my emphasis)

I'm satisfied the reasoning of *TenetConnect* doesn't only apply to assessing whether a complaint involves a regulated activity and there's basis for saying it applies to assessing the acceptance of responsibility by a principal of otherwise unauthorised acts under Section 39 FSMA. I'm satisfied that this means a business can be said to be responsible for acts that

are unauthorised if they are linked to acts that are authorised under an appointed representative agreement.

Here, advice was given, and arrangements were made for a SIPP to be set up for Ms J and her pension moved to that SIPP so an investment could be made through Cornhill. I'm satisfied that the appointed representative agreement authorised Mr X/FWM to carry out the regulated activities in relation to the SIPP and Ms J's previous pension. So, I'm satisfied the activities Mr X carried out in relation to the pension products fell within the actual authority of FWM.

Even if one component activity in the advice and arrangements (the ultimate investment in Cornhill) was unauthorised– I'm not satisfied that means that I must interpret the remainder of the advice and arrangements as having also been unauthorised. And as the Cornhill investment was intrinsically linked and connected to the authorised advice, I think Pi is responsible for the whole transaction.

I've considered what Pi has had to say about *Anderson.* My view is that *Anderson* merely distinguished (rather than overruled) the approach taken in *TenetConnect/Martin*. In *Anderson,* the principal's (Sense's) liability was subject to a condition precedent of the appointed representative acting via Sense's agency. That condition was not fulfilled and, unlike in this complaint against Pi, there was *no part* of the advice given by the appointed representative in *Anderson* that could be said to have been authorised by Sense.

My interpretation of the case law and legislation and appointed representative agreement here is, I believe, also consistent with the consumer protection purpose of section 39 FSMA. As has been accepted by the Courts, the whole point of the section is to give the investor a remedy against the principal for misconduct by the appointed representative.

As such, I'm satisfied that the advice and arrangements undertaken by Mr X/FWM to switch Ms J's pension to a SIPP for investment through Cornhill was business for which Pi accepted responsibility under section 39 FSMA.

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 mentioned, I'm satisfied it's more likely than not that Mr X (as FWM) advised Ms J to move her pension to a SIPP to facilitate the Cornhill investment.

Mr X didn't include reference to Cornhill in his suitability letter as he should have done when giving advice or formally outline why he was arranging the investment in Cornhill at all. But for the reasons I've explained above, Pi is still responsible for the acts of Mr X.

That doesn't mean I *must* uphold the complaint. I've considered whether advice to switch Ms J's pension to a SIPP and arrangements to invest in Cornhill could still have been suitable and appropriate.

The kind of things I would expect Mr X to consider are:

- The likely cost of the proposed arrangement compared to the existing arrangement.
- The level of funds involved.

- Ms J's knowledge and experience.

- Ms J's risk appetite and capacity for loss.

This was Ms J's only pension. At the time of the advice, she was in her late 50s and unemployed. Although the risk profiles she completed showed her to have a balanced to high attitude to risk, Ms J has said she had limited investment experience and knowledge, her attitude to risk was low and she had a low capacity for loss. Everything I've seen suggests this was the case and she was a low-risk investor. In particular, she was nearing retirement age and this was her entire pension provision. Taking everything into account, I'm satisfied Ms J was someone for whom traditional low-cost, lower risk pension arrangements would have been appropriate.

The new arrangement Ms J entered wasn't a low-cost or traditional pension arrangement. The SIPP was stated to have a set-up fee of £400 and an annual fee of £400. And Cornhill also had costs including platform, management and transaction charges. Additionally, there were the adviser fees – an initial fee of 3.5% and an ongoing 1% fee.

Whilst the SIPP may have had some advantages, I haven't seen anything that persuades me these advantages were needed by Ms J in her circumstances. There's no evidence that Ms J – with her modest pension fund – needed access to a wider range of investments or that such funds wouldn't have been available with her previous pension. And if there was a genuine desire by Ms J to leave her previous pension provider, it seems likely there'd have been cheaper options, such as a stakeholder pension, that would have met her needs.

There appears to have been no assessment at the time by FWM of the Cornhill funds and what the underlying investments would be. There was no assessment that such funds were safe and would be suitable for Ms J's risk profile. And I note that Pi doesn't say that investing through Cornhill would've have been suitable advice for Ms J.

Taking everything into account, I'm satisfied it ought to have been clear to Mr X that there was no obvious justification for Ms J to move from her existing pension and enter the SIPP arrangement she did to invest in the Cornhill funds. In these circumstances, I'm satisfied advice and arrangements to switch Ms J's pension to a SIPP to invest through Cornhill were not suitable or appropriate. I'm satisfied that if Mr X had treated Ms J fairly, Ms J would have left her pension where it was previously invested.

What about the role of REX?

Pi has commented on REX's responsibility for what happened. It says that REX gave Ms J the advice to invest in Cornhill and is therefore wholly responsible for paying Ms J compensation for losses sustained in Cornhill. Pi says this is consistent with what we've said in other cases and it has highlighted one specific Pi case where an ombudsman decided that there was a break in the chain of causation after Pi had given advice to a customer to invest in TAM and REX had gone on to recommend the customer invest in Cornhill.

I accept that the circumstances here are similar to the previous case cited by Pi. However, I'm persuaded in this case that Mr X/FWM did not just advise Ms J to invest in *TAM only* as seems to be the conclusion in the previous case. As set out above, I think Mr X/FWM advised Ms J to invest through Cornhill or made arrangements for this by the time of the SIPP application. I think the idea of investing via TAM, if it had ever been truly in contemplation, had more likely than not been discarded by the time of the submission of the SIPP application.

My view is supported by other complaints looked at by our service where Mr X/FWM appears to have recommended an investment in TAM in a SIPP (with the same SIPP provider as this case), but where the consumers ultimately ended up investing in Cornhill.

In two of the complaints, it appears that the investment in Cornhill went ahead in March-April 2018 – with FWM making the arrangements for the investment. There was no delay in receiving the ceding scheme funds in those cases.

The third case is one where FWM was involved in setting up the SIPP in February 2018 only for REX to then arrange the investment with Cornhill in July 2018. So, like with Ms J, there appears to have been a delay in the ceding scheme sending funds. In that case REX specifically said in a letter to the complainant in July 2018 that:

> *I have been asked by Future Wealth Management to take over the running of your SIPP…*
>
> *the original advice to invest into [Cornhill] was also given by Future Wealth Management".*

I accept that that an equivalent letter doesn't exist for Ms J. But I don't think the absence of the letter is evidence that REX's advice and role with Ms J was different. In light of the first Cornhill document, I think it's more likely that REX's involvement with Ms J was the same as this other case and that FWM had asked REX to take over the running of Ms J's SIPP and the original advice to invest was given by FWM. And just as with the two complaints above, I think it's reasonable to conclude that Ms J's investment in Cornhill would have gone ahead without REX's involvement at all if there hadn't been a delay in receiving the ceding scheme funds.

A further complaint was resolved by an investigator in 2022. It appears that in that complaint FWM completed a Cornhill application form in May 2018 but REX then completed the investments in the SIPP via Cornhill in September 2018 after issuing its own suitability letter. Again, this suggests a pattern of conduct – REX became involved to complete arrangements already put in place by FWM.

But for the acts undertaken by Mr X/FWM, I don't think Ms J's investment in Cornhill would have come about. When REX recommended that Ms J invest in Cornhill funds, it didn't fundamentally do anything that was different to what Mr X/FWM had set about arranging. The investment in Cornhill was what Mr X/FWM had set out to do and the switch of the Ms J's previous pension to the SIPP was a critical step in the process. That things took longer than anticipated and REX had to become involved to complete the investment does not change Mr X/FWM's (and therefore Pi's) culpability.

I've taken account of what appears to be the small variation to the investment strategy that took place between the Cornhill documentation from March 2018 to the actual investments made in September 2018. Pi has said that the investigator who resolved the fourth complaint (mentioned above) in 2022 in very similar circumstances decided that this variation meant that there was a break in the chain of causation from Pi to REX. But in my view, I don't think the differences are significant – fundamentally the investment platform was the same and the three main funds were the same. I don't think this similarity was simply a coincidence. I think it was likely the implementation of a pre-agreed strategy.

I accept that REX had its own responsibility to ensure it gave suitable advice to Ms J. But this complaint isn't against REX – it's against Pi. And in the circumstances, I'm not satisfied that REX's involvement is a break in the chain of causation and I don't think it's fair and

reasonable to make any adjustment to the compensation owed by Pi when it too has failed Ms J.

I disagree with Pi that such an approach is illogical. I'm not asking Pi to account for loss that goes beyond the consequences of its failings. I'm satisfied those failings have caused the full extent of the loss in question. That another party, REX, might *also* be responsible for the loss (i.e. because REX had its own regulatory responsibilities that it failed to meet) is a distinct matter and that fact shouldn't impact on Ms J's right to compensation from Pi for the full amount of her loss.

Putting things right

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

I think Ms J would have remained with her previous provider.

I understand from information we have that Ms J still has a SIPP with illiquid assets. I'm satisfied what I have set out below is fair and reasonable, taking this into account and given Ms J's circumstances and objectives when she invested.

What must Pi do?

To compensate Ms J fairly, Pi must:

- Compare the performance of Ms J's pension with the notional value if it had remained with the previous provider. If the actual value is greater than the notional value, no compensation is payable. If the notional value is greater than the actual value, there is a loss and compensation is payable.

- Pi should also add any interest set out below to the compensation payable.

- If there is a loss, Pi should pay into Ms J's pension plan to increase its value by the amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

- If Pi is unable to pay the compensation into Ms J's pension plan, it should pay that amount direct to her. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore, the compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Ms J won't be able to reclaim any of the reduction after compensation is paid.

- The *notional* allowance should be calculated using Ms J's actual or expected marginal rate of tax at her selected retirement age.

- It's reasonable to assume that Ms J is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Ms J would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

- Pay Ms J £500 for the distress and inconvenience caused. I'm satisfied Ms J has been caused significant upset by the events this complaint relates to, and the loss of, in effect, her pension fund. I think that a payment of £500 is fair to compensate for that upset.

Income tax may be payable on any interest paid. If Pi deducts income tax from the interest, it should tell Ms J how much has been taken off. Pi should give Ms J a tax deduction certificate in respect of interest if Ms J asks for one, so she can reclaim the tax on interest from HM Revenue & Customs if appropriate.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
SIPP	Still exists but illiquid	Notional value from previous provider	Date of pension switch	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)

Actual value

This means the actual amount payable from the investment at the end date.

It may be difficult to find the actual value of the SIPP. This is complicated where an asset is illiquid (meaning it could not be readily sold on the open market) as in this case.

Pi should take ownership of the illiquid assets by paying a commercial value acceptable to the pension provider. The amount Pi pays should be included in the actual value before compensation is calculated.

If Pi is unable to purchase the investments the actual value should be assumed to be nil for the purpose of calculation. Pi may (subject to Ms J being compensated in full) require that Ms J provides an undertaking to pay it any amount she may receive from the investment in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan.

Pi will need to meet any costs in drawing up the undertaking.

Notional Value

This is the value of Ms J's pension had it remained with the previous provider until the end date. Pi should request that the previous provider calculate this value.

Any withdrawal from the pension should be deducted from the notional 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 is a large number of regular payments, to keep calculations simpler, I'll accept if Pi totals all those payments and deducts that figure at the end to determine the notional value instead of deducting periodically.

If the previous provider is unable to calculate a notional value, Pi will need to determine a fair value for Ms J's investment instead, using this benchmark: For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds. The adjustments above also apply to the calculation of a fair value using the benchmark, which is then used instead of the notional value in the calculation of compensation.

The pension only exists because of illiquid assets. In order for the pension to be closed and further fees that are charged to be prevented, those investments need to be removed. I've set out above how this might be achieved by Pi taking over the investment, or this is something that Ms J can discuss with the provider directly. But I don't know how long that will take.

Third parties are involved, and we don't have the power to tell them what to do. If Pi is unable to purchase the investment, to provide certainty to all parties I think it's fair that it pays Ms J an upfront lump sum equivalent to five years' worth of wrapper fees (calculated using the fee in the previous year to date). This should provide a reasonable period for the parties to arrange for the SIPP to be closed.

If Pi believes other parties to be wholly or partly responsible for the loss, it is free to pursue those other parties. So, if the loss does not exceed £190,000, or if Pi accepts my recommendation below that it should pay the full loss as calculated above, the compensation payable to Ms J can be contingent on the assignment by Ms J to Pi of any rights of action she may have against other parties in relation to Ms J's pension switch to the SIPP and the investment if Pi is to request this. Pi should cover the reasonable cost of drawing up, and Ms J taking advice on and approving, any assignment required.

If the loss exceeds £190,000 and Pi does not accept my recommendation to pay the full amount, any assignment of Ms J's rights should allow her to retain all rights to the difference between £190,000 and the full loss as calculated above.

Why is this remedy suitable?

I've chosen this method of compensation because:

- Ms J wanted capital growth with a small risk to her capital.

- If the previous provider is unable to calculate a notional value, then I consider the measure below is appropriate.

- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to her capital.

- 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.

- I consider that Ms J's risk profile was in between, in the sense that she was prepared to take a small level of risk to attain her investment objectives. So, the 50/50 combination would reasonably put Ms J into that position. It does not mean that Ms J

would have invested 50% of her money in a fixed rate bond and 50% in some kind of index tracker investment. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Ms J could have obtained from investments suited to her objective and risk attitude.

My final decision

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £190,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £190,000, I may recommend that Pi Financial Ltd pays the balance.

Determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My final decision is that Pi Financial Ltd should pay the amount produced by that calculation up to the maximum of £190,000 (including distress or inconvenience but excluding costs) plus any interest on that amount as set out above.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £190,000, I recommend that Pi Financial Ltd pays Ms J the balance plus any interest on the balance as set out above.

This recommendation is not part of my decision or award. Pi Financial Ltd doesn't have to do what I recommend. It's unlikely that Ms J can accept my decision and go to court to ask for the balance. Ms J may want to get independent legal advice before deciding whether to accept this decision.

If Pi Financial Ltd does not pay the recommended amount, then any investment currently illiquid should be retained by Ms J. This is until any future benefit that she may receive from the portfolio together with the compensation paid by Pi Financial (excluding any interest) equates to the full fair compensation as set out above.

Pi Financial Ltd may request an undertaking from Ms J that either she repays to it any amount she may receive from the investments thereafter, or if possible transfers the investments to it at that point.

Ms J should be aware that any such amount would be paid into her pension plan so she may have to realise other assets in order to meet the undertaking.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms J to accept or reject my decision before 15 July 2025.

Abdul Hafez
Ombudsman