DRN-5991608

The complaint

The trustees of the P trust, who I'll refer to as Mr and Mrs F, complain about Rixon Matthews Appleyard (Financial Services) Limited ("Rixons").

Mr and Mrs F say that Mr L of Rixons gave them unsuitable advice to use money in their Small Self-Administered Scheme ("SSAS") to invest in Best Asset Management Limited and Greyfriars Asset Management LLP.

Mr and Mrs F are complaining in their capacities as trustees of the trust.

What happened

Mr and Mrs F say they first came to know Mr L whilst he worked for "Firm T". The Financial Conduct Authority ("FCA") register shows Mr L was authorised with Firm T until February 2015.

Mr F made two investments ("CWM" and "Elysian Fuels") via Firm T that later failed. CWM started to experience difficulties during 2015 and I understand that Elysian Fuels failed a short time later. Mr F later complained to Firm T about these investments and received compensation in 2016/2017. I'll explain more about this later in the decision, but during this complaint Mr F said that Mr L was involved in these two failed investments.

Mr and Mrs F opened a SSAS in around November 2014. It appears Mr L was involved with the setting up of the SSAS and the statements for the SSAS show that Mr and Mrs F paid a sum of £5,000 to a company that Mr L owned - I'll call this company CDL - in November 2014. It appears from another complaint I've seen that CDL was a consultancy type company that was not authorised by the FCA. The precise nature of the consultancy service it provided is unclear.

The FCA's register shows that Mr L joined Rixons in January 2015 and was registered with the regulator as a CF30 approved person for Rixons. Mr F seemingly knew of Rixons before this – he had dealings with individuals there in a personal/social capacity.

In July 2015, Mr and Mrs F's SSAS held around £207,000 as well as property. Mr and Mrs F say they were advised by Mr L to make investments of £54,000 and £30,000 in Best Asset Management and £60,000 in Greyfriars. Best Asset Management appears to be a bond investment based on car park developments and leases in the United Arab Emirates that promised regular payments to investors over a fixed period. My understanding is that Greyfriars was also a corporate bond investment and that it was part of the Best Asset Management group of companies. Some of the correspondence refers to both investments as "Best International". So I'll refer to it in this way in parts of this decision.

Mr L left Rixons in September 2016.

By 2018, Mr and Mrs F had received their money back on the £30,000 investment with a profit. But the other two investments (the £54,000 and £60,000 investments) failed and it looks like Mr and Mrs F have suffered a significant loss in their SSAS.

In 2018, Mr F contacted Rixons about whether he could recover compensation in connection with the Best International investments from Rixons. No compensation was paid by Rixons - however it appears that Rixons accepted instructions from Mr and Mrs F at this point to transfer the SSAS to a different operator.

Mr F says he only discovered he could make a complaint against Rixons to our service about the failed Best International investments in 2022. Mr and Mrs F then lodged a formal complaint in December 2022 alleging that Mr L of Rixons hadn't warned them about the risks of the Best International investments and that Rixons is therefore responsible for their losses.

Rixons says it isn't responsible for the advice of Mr L. It says that Mr L was registered with Rixons at the time but that Mr and Mrs F were not Rixons clients and that it had no record of any advice given by Mr L to Mr and Mrs F.

The complaint about Rixons was referred to our service in February 2023. For the avoidance of doubt, Rixons has consented to us considering the complaint outside of the allowable time limits.

Our investigators have obtained evidence from the parties and the matter was then passed to me to decide. I issued a provisional decision upholding the complaint. My findings were essentially that:

- Mr L gave Mr and Mrs F advice and made arrangements for the Best International investments – so he undertook regulated activities in connection with the matter being complained about.

- Mr L likely held himself out as a Rixons adviser when doing so – he was not undertaking the activities in some other capacity.

- Although Rixons wasn't liable for Mr L's acts by way of agency law, Rixons was *vicariously liable* for Mr L's acts.

- The advice wasn't suitable and therefore Rixons should compensate the SSAS Trust/Mr and Mrs F.

Mr and Mrs F accepted my provisional findings. Rixons didn't accept my findings and made detailed submissions for me to consider. They can be summarised as follows:

- It wasn't clear that Mr and Mrs F as trustees were eligible complainants under our complaint handling rules.

- Rixons hadn't seen evidence that the investments in Best International had been made in the SSAS.

- The provisional decision had referred to Greyfriars Asset Management Limited – but that company doesn't exist. Greyfriars Asset Management LLP does exist and is now dissolved. It was possible that the investment being complained about was actually in a Discretionary Fund Management service operated by Greyfriars. The provisional

decision doesn't address this at all - including the suitability of any such arrangement – which could fall to the Financial Services Compensation Scheme ("FSCS").

- It wasn't clear that Mr and Mrs F had tried to mitigate their losses or what distribution they'd received or were due to receive from the failed Best International investments.

- The previous failed investments made via Firm T were important. Rixons hadn't seen all the evidence about the circumstances surrounding these failed investments. But in Rixons' view, as Mr and Mrs F had previously received regulated advice via Firm T and the fact that Mr F has also previously lost money on investments and sought and received compensation in respect of that advice, it makes it more likely than not that they would be more cautious and diligent. It was implausible that Mr and Mrs F would have proceeded with any such investment (if they were in fact being advised) in the absence of zero documentation from Mr L and/or Rixons.

- Mr and Mrs F weren't clients of Rixons and had never received client agreements or similar documentation. Had they been clients and received such documents, they would have known to have lodged a complaint about the Best International investments far sooner than 2022.

- Mr and Mrs F need to explain who advised them to set up the SSAS. The evidence, which Rixons hadn't seen, indicates that Mr L had undertaken a regulated transaction in the creation of the SSAS but did so whilst acting through an unregulated company called CDL. Rixons' view is that the advice about the Best International investments probably did start in 2014 and continued into 2015, and that at all times that advice was being provided by Mr L in an unauthorised capacity – not in a Rixons capacity. This appeared to be Mr L's way of operating and the activities in relation to the investments in Best International, Mr L was on a frolic of his own – not acting within the of authority of Rixons.

- I had failed to obtain full details from Mr and Mrs F about the circumstances of the alleged advice from Mr L.

- Rixons don't doubt that Mr L was advising Mr and Mrs F, but reject the position that he was doing so as an adviser of Rixons. There is no corroborating evidence that implies Mr and Mrs F believed he was acting as an agent/adviser of Rixons at the time of the Best International investments.

- The provisional decision places incorrect weight on the limited evidence. Mr F hadn't been able to provide all the emails and messages from the time of the investments. Mr F had taken the conscious decision to select emails and text messages to retain for his records and dispose of others. He had also previously lost money on investments and made successful complaints about them and so his attention to detail and caution in respect of future investments is more likely than not to have been heightened. So it didn't make sense that he could not remember key events now.

- The provisional decision placed reliance on an email where Mr L had affixed a Rixons logo. It is not within the control of Rixons or any other person as to whether

someone affixes a picture or a logo, and to suggest this impliedly places some form of liability onto Rixons is wrong and irrational.

- The provisional decision wrongly interpreted a text message that had been provided as evidence by Mr F. The message in fact showed that Mr F was aware that Mr L wasn't authorised by Rixons to recommend the Best International investments.

- The provisional decision relied on a complaint involving another client where Mr L had recommended Best International investments. Rixons hadn't been provided with details of this other complaint and this was not relevant.

- If Mr and Mrs F are unable to answer questions as to their investment experience, and why they did not question why no documentation had been produced on such a large investment, the complaint should be rejected.

- On the issue of agency, Rixons contract with Mr L didn't authorise him to undertake investment business with unregulated collective investment schemes ("UCIS").

- This complaint involves agency and the established principle is that there is no vicarious liability for the wrongdoing of an independent contractor as set out in *Various Claimants v Institute of the Brothers of the Christian Schools [2010] EWCA Civ 1106*.

- Mr L was not in a relationship akin to employment with Rixons in connection with the advice allegedly given to Mr and Mrs F as per the tests set out in *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB [2023] UKSC 15.*

- The provisional decision misapplied the law by concluding that if Mr L was in a relationship akin to employment with Rixons, that anything done by Mr L was part and parcel of the business of Rixons. The Supreme Court however concluded in *Trustees of the Barry Congregation* that the creation of the risk of the tort occurring should not be considered as part of the criteria for determining whether the *"akin to employment"* test is satisfied i.e. the fact that Mr L could possibly have given advice via Rixons is not a factor to be considered as appears to have been done in the provisional decision. The Supreme Court identified that to do so would confuse the criteria for satisfying the stage one test with the underlying policy justification for vicarious liability.

- Rixons has taken no benefit from the alleged advice, and where any such alleged advice is not integral to the organisation, there is no basis for Rixons to bear the risk of that advice.

- Mr L was only able to give advice about authorised regulated products and was required to get Mr and Mrs F to enter an agreement with Rixons. So Mr L had clearly not undertaken business that he was permitted to do by Rixons.

- If the complaint remains upheld, then Rixons require full disclosure from the Mr and Mrs F and the SSAS in respect of the investments, the current valuations, and recoveries received, any claims or causes of action that the SSAS may have against

third parties that are capable of being assigned to Rixons – including possible recovery via the FSCS.

What I've decided – and why

Jurisdiction

Before I make a decision on the merits of any complaint, I must first be satisfied that the complaint falls within our jurisdiction. I need to check, by reference to the rules set out in the DISP section of the regulator's Handbook and the legislation from which those rules are derived, whether it's one we have the power to look at.

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. I want to make clear that I've taken account of all of Rixons' detailed submissions. But the purpose of my decision isn't to address every point raised and if I don't refer to something it isn't because I've ignored it but because I'm satisfied that I don't need to do so to reach what I think is the right outcome. This simply reflects the informal nature of this service as a free alternative to the courts.

Has the complaint been made by eligible complainants?

We can only look into complaints that are brought to us by or on behalf of eligible complainants (DISP 2.7.1R).

Rixons has queried whether Mr and Mrs F as trustees should be considered as eligible complainants.

Mr and Mrs F were both the only trustees and members of the SSAS in 2015. Therefore, Mr and Mrs F suffered the investment loss in both of those capacities. As investment decisions in the SSAS could only have been made by the trustees (not members), the trustees would have been the recipients of any advice from Mr L and so that is why we've set the complaint as having been made by Mr and Mrs F as trustees.

The trust still exists even though the SSAS operator was changed in 2018. A third administrator trustee was added to the trust at this point. Mr and Mrs F have provided evidence that the third trustee consents to them bringing this complaint.

We can look at complaints brought by trustees if the complaint has been brought by a trustee, if the net asset value of the trust (at the time the trustee refers the complaint to the respondent) is

- less than £1 million, for complaints about acts or omissions *prior* to 1 April 2019;
- less than £5 million, for complaints about acts or omissions on or *after* 1 April 2019.

The event being complained about here took place in 2015. Mr and Mrs F complained to Rixons in 2022. So the value of the trust needs to have been less than £1 million in December 2022 in order for them to be eligible complainants.

The new SSAS operator has provided evidence that indicates that the value of the SSAS trust in April 2022 was around £415,000. Nothing I've seen in subsequent statements suggests the SSAS trust value increased significantly. So I'm satisfied that trust had a net

asset value of less than £1 million in December 2022 when the complaint was referred to Rixons.

So, Mr and Mrs F (as trustees) are eligible complainants as trustees.

Is Rixons responsible for the complaint

I've taken into account the Financial Services and Markets Act 2000 ("FSMA"), the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("RAO") and the DISP rules. I'll set out some relevant detail relating to these below.

Regulated activities

An activity is a regulated activity if it is an activity of a specified kind that is carried on by way of business and relates to an investment of a specified kind (section 22 FSMA).

Regulated activities are specified in Part II of the RAO and include:

- advising on the merits of buying or selling a particular investment which is a security or a relevant investment (article 53 RAO),

- making arrangements for another person to buy or sell or subscribe for a security or relevant investment (article 25 RAO).

The general prohibition

Section 19 FSMA says that a person may not carry on a regulated activity in the UK, or purport to do so, unless they are either an authorised person or an exempt person. This is known as the "general prohibition".

At the time of the events complained about, Rixons was an "authorised person" (also referred to as a "firm" in the regulator's rules). This means it could carry out regulated activities without being in breach of the general prohibition.

Mr L was neither an authorised person nor exempt from authorisation. This means if Mr L had carried out a regulated activity on his own behalf by way of business, he would have been in breach of the general prohibition.

The approved persons regime

The "approved persons" regime is set out in Part V of FSMA. Its aim is to protect consumers by ensuring that only "fit and proper" individuals may lawfully carry out certain functions within the financial services industry.

At the relevant time, section 59(1) of FSMA said:

> *"(1) An authorised person ("A") must take reasonable care to ensure that no person performs a controlled function under an arrangement entered into by A in relation to the carrying on by A of a regulated activity, unless the Authority approves the performance by that person of the controlled function to which the arrangement relates."*

As mentioned, Rixons was an authorised person. The act of advising on investments was a controlled function. Rixons arranged for Mr L to be approved by the FCA to perform the controlled function "CF30 Customer" from January 2015 to September 2016. CF30 was

defined in terms that included "*advising on investments … and performing other functions related to this such as dealing and arranging".*

The approved persons regime does not depend on an individual's employment status. Employees can be approved persons, as can non-employees like Mr L.

The DISP Rules

The Financial Ombudsman Service can't look at all complaints. Before we can consider a complaint, we need to check, by reference to the FCA's 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."*

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****)."* (my emphasis)

So, to decide whether Rixons is responsible for this complaint, there are three issues I need to consider:

- What are the specific acts Mr and Mrs F have complained about?
- Are those acts regulated activities or ancillary to regulated activities?
- Did Rixons accept responsibility for those acts?

What is the complaint made by Mr and Mrs F?

Mr and Mrs F say that they received unsuitable advice from Mr L to make the investments in Best International in the SSAS in around June/July 2015 – totalling £144,000. Although Mr and Mrs F haven't specifically complained about the £30,000 investment, I think this is reasonably part of the same financial service they're unhappy about as, even if they received their money back, it formed part of the same advice from Mr L.

I think the complaint also reasonably encompasses all the arrangements for the investments.

Were the acts Mr and Mrs F complain about done in the carrying on of a regulated activity?

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.

As a starting point, Rixons has asked for confirmation that the Best International investments were made in the SSAS. We don't have, for example, investment certificates for the Best International investments. So I understand why Rixons has concerns. But we've been provided with a SSAS bank transactions statement showing the investments being made in the SSAS in July 2015. Further, the new SSAS operator has provided a document listing the investments prior to the transfer to the new SSAS in 2018. So, I'm satisfied that the investments were made in the SSAS in 2015.

Rixons has also raised queries about the particular nature and structure of the investments. That's difficult to clarify in this case given the limited evidence we have. But we've seen a number of pension complaints involving Best International investments.

As mentioned in the background, Best Asset Management Limited operated bond investments based on car park developments and leases in the United Arab Emirates. It described itself as a corporate finance, asset management and wealth management provider.

Best Asset Management Limited's annual report for the year ended dated 30 August 2015 shows that it purchased Greyfriars Asset Management LLP in June 2012 and that it owned 99% of the shares in that firm.

Rixons is right to point out that Greyfriars Asset Management LLP was a regulated DFM. I'm aware that the Greyfriars DFM service operated a range of investment portfolios. According to a FCA disciplinary notice against an advice firm, *"one of these portfolios was P6, which was made up of minibonds including overseas investments in real estate, car parks, renewable energy and holiday resorts. The mini-bonds were not listed on a regulated market and promised returns of between 6% and 15% per annum. P6 investments were high risk and illiquid and were unlikely to be suitable for retail customers."*

I'm also aware that Greyfriars was the manager of a corporate bond called the ABC Bond. This involved international business centres. The limited documentation provided to me suggests that the payment to Greyfriars was for the ABC bond.

So I think it's unlikely that Greyfriars offered any DFM service to Mr and Mrs F. They've made no reference to such an arrangement. I think it's more likely that Mr and Mrs F invested in one or more of the Best International bonds and that they were each specified investments – either as bonds under Article 77 or a collective investment scheme under Article 81 of the RAO.

So, did Mr L give Mr and Mrs F advice and/or arrange the investments in Best International?

There is, again, very limited documentary evidence of what happened in respect of the Best International investments.

Mr and Mrs F say that the advice was given to them over a number of meetings:

> *"*[Mr L] *joined Rixons on 27 January 2015 and over the next 3-4 months he offered me a return of 10.25% with Best International, far higher return than currently sat in a bank account at the time.*

> *I was told there was no risk as Best International had 1st charge over assets to cover the investment…*
>
> *I'm not exactly sure how the 3 amounts were finally decided but I remember* [Mr L] *telling me it was a safe investment so much so he convinced me that when I get the investments back there would be opportunities to reinvest and it was crazy to have cash in a bank account when the interest rate was only 0.5%"*

Mr F complained to Firm T in 2023 and said the initial advice was given in 2014 and that Firm T may be responsible. That complaint didn't progress beyond the initial correspondence. But, given what Mr F said as part of the complaint to Firm T, it's possible that the meetings did start when Mr L was at Firm T and continued afterwards. And obviously the SSAS itself was set up in 2014 – before Mr L joined Rixons.

I've been provided with text message records that appear to corroborate that a meeting took place between Mr L and Mr F at around the time of the investment in 2015 when Mr L was with Rixons. And later, following the meeting, a further message from Mr L says:

> *"When you get a moment can you please scan and e-mail me a recent utility bill or statement for both yourself and* [Mrs F] *so Best International can prepare the documentation."*

Another message from Mr L sent later says:

> *"I have the mandate forms now from the* [SSAS operator] *and will be emailing those over later for* [Mr and Mr F's]… *signature so that* [the] *pension can invest in Best International Bonds, once signed they just need to be scanned and emailed back to me."*

I've also been provided with an email chain shortly before the investments where Mr F sends Mr L a copy of a certificate of high net worth obtained via an accountancy firm. I think this was likely done to facilitate the Best International investments.

Whilst this evidence doesn't directly demonstrate *advice* by Mr L, I think this corroborates what Mr and Mrs F have told us about Mr L's role in giving them advice about the Best International investments in 2015. Even if Mr F was a high net worth individual, he appears to still have been a retail customer. Such customers don't tend to make large investments unless someone has recommended that course of action for them. I also think Mr L likely arranged the investments. I think these events likely took place in around June/July2015.

I've also noted in their recent submissions that they don't doubt that Mr L was advising Mr and Mrs F.

So, my finding is that this complaint involves regulated activities of advising and arranging investments.

Is Rixons responsible for the acts about which Mr and Mrs F complain?

It's not in dispute that Mr L was a Rixons adviser at the time of the investments in July 2015.

However, Mr L was not employed by Rixons and was instead a self-employed agent of Rixons. As mentioned above, Mr L was also separately involved with CDL – a company that Rixons had no connection with. He could also have been acting for another business or in a personal capacity. So even though Mr L was a Rixons adviser, I still need to be satisfied that

Mr L was giving advice to Mr and Mrs F and making arrangements as a Rixons adviser at the time and not doing so in some other capacity.

There is very limited evidence available to me. Mrs F doesn't appear to have had much direct involvement in matters. Mr F says he no longer has access to emails from the time (he was using his company email) or text messages beyond 2015. He's kept copies of some emails and text messages, but not all. He's explained that he's no longer got access to his email account and phone messages that he used at the time. I know Rixons thinks this means the evidence he's provided isn't credible. But given the passage of time, I don't find it surprising that some evidence has become unavailable.

The SSAS operator appears to have been dissolved in 2021. So we can't now obtain details of any investment instructions and other documents from 2015 that might have shed light on the capacity in which Mr L was acting.

So what evidence is there that Mr L was acting in a Rixons capacity?

The emails with Rixons logos

Mr and Mrs F have provided an email from Mr L dated very shortly after the 2015 investments with a Rixons logo wherein Mr L provides some information to Mr F about the earlier CWM investment. The email address used is a personal one, but the signature says that Mr L is a Rixons "Financial Planner". Mr L says in the email: *"I am in London all day with Best International, someone wants to invest £7million!".* I accept that this email was sent after the investments made by Mr and Mrs F. But it was not long after. I also accept that it wasn't in Rixon's control whether Mr L affixed the logo. But it is still significant as I think it suggests Mr L was holding himself out at the time as conducting work in relation to Best International as a Rixons adviser (not in a different capacity). I can't think of any other reason why he'd attach the Rixons logo to the email.

Mr and Mrs F have also provided another email exchange from October 2015. This email is sparse in detail but appears to be in connection with the CWM investment and a complaint made to Firm T about it. Mr L's email has a Rixons logo affixed to it.

I'm aware of another email from July 2015 relating to the certificate of high net worth where Mr L doesn't use a Rixons logo. So I accept that Mr L doesn't consistently use the Rixons logo – but he clearly did so for at least some of his communications with Mr F. I can't ignore that.

The text messages

A record of a text message shows that in June 2015, Mr L recommended a mortgage adviser at Rixons to Mr F. I think this supports the view that Mr F was holding himself out as a Rixons adviser.

Mr and Mrs F have also provided a text message exchange from December 2015 where Mr L says in response to a query from Mr F to Mr L about whether Mr L would review his finances:

Mr F:

> *Putting CWM to one side I would like a review of my financial affairs early in the new year if we could meet up? We never did execute a plan to see my expenditure and income on screen so I can plan accordingly. I'm not sure if it is your intention just to*

work with higher net worth clients now but would appreciate a chat so I can plan accordingly.

Mr L:

"Yes that would be good. I certainly want you as one of my clients and it has certainly been a difficult year with CWM and leaving [Firm T] *plus Rixons getting to grips with the way I work. That said there has also been a lot of positives with Best International, Marc Sharpe Limited and some of the other more bespoke investments I have sourced. I have a meeting with Rixons on the 5th as they need to offer more support and get to grips with my own investment strategy for clients. If they don't then I have already registered the name* [LWM] *and have the right people around me to set up a brand new company that will deliver the service I want. Once CWM is sorted we will be able to"*

We don't have the rest of the text message or any subsequent text messages.

In the above text message, Mr L refers to Mr F as a client and so there appears to have been a professional relationship regarding financial services being provided to Mr F – including investment strategies. So it appears to be a client/financial adviser relationship – something that Mr L could only partake in his capacity as a regulated financial adviser. Mr L specifically highlights his role with Rixons and mentions Best International. Mr L appears to be saying that he might move *away* from Rixons if he doesn't get "support" with his "investment strategy for clients". I think this supports a conclusion that Mr L was more likely than not holding himself out as a Rixons financial adviser when advising and arranging the Best International investments for Mr and Mrs F a few months earlier in July 2015 - rather than simply giving advice in a different unregulated capacity.

I accept that we don't have records of all the messages exchanged or *even* a complete copy of this message. It's possible that messages that are no longer available contradict this message. So I think it's right that I treat it with some caution. But I think it's compelling evidence when viewed alongside the emails I set out above where Mr L uses the Rixons logo.

Rixons says I'm misinterpreting this text message and that it shows that:

- Whether Mr L was holding himself out or not as a Rixons adviser, it does not make Rixons responsible for that.

- The reference to the previous CWM investment with Firm T by Mr F shows that Mr L hadn't advised Mr F about the Best International investments as he'd have also mentioned that investment in this message.

- The comment of Mr L that "…*he might move away from Rixons if he doesn't get "support" with his "investment strategy for clients"* supports the notion that Rixons had not permitted Mr L to give advice on any unregulated business such as Best International, a fact which was communicated to Mr F.

I'm not persuaded that these points change my view about the exchange of messages. The previous CWM investment was mentioned because it had fallen into difficulties by that point and so these messages were part of a chain of messages chasing for updates about that investment. Best International wasn't in any difficulties at the point.

I also think the message seems to indicate Mr L was looking for Rixons to provide him with more support in recommending his investment strategy – not that he had told Mr F that he wasn't authorised to recommend Best International by Rixons.

A similar complaint I've seen

I'm also aware from another complaint that there is evidence that Mr L recommended Best International to another client in 2015 in his capacity as a Rixons adviser. There was a clear email recommending the investment – without an accompanying suitability letter. I think that's relevant to the overall circumstances I'm looking at here with regard to Mr and Mrs F. Put simply, Mr L doesn't seem to have been completely averse to recommending Best International in his role as a Rixons adviser.

What about some of the arguments Rixons makes that Mr L must have been working in a different capacity?

Payment to CDL

I've thought about the payment to Mr L's company – CDL - from the SSAS in December 2014 and whether that means Mr L might have given advice about Best International in a CDL capacity rather in a Rixons capacity. When we asked Mr and Mrs F about the payment to CDL, Mr F replied:

> *"It is a long time ago that invoice […] but recall it was to do with the setting up and administration of the SSAS.*
>
> *He joined Rixons a month or so later and then recommended the investment proposition as a representative of Rixons. As I knew the reputation of Rixons and the fact they were FCA authorised it helped my decision to invest. Before then he wasn't authorised to recommend any investments for the SSAS. It all made sense."*

I don't expect Mr F to clearly remember events from so long ago. But Mr L *was* authorised with Firm T at the time and so the above doesn't really explain why a payment was being made to Mr L's company when the SSAS was set up in 2014 rather than to Firm T.

Nevertheless, the payment to CDL was 6-8 months before the events we are looking at in June/July 2015 and before Mr L joined Rixons. It's likely to have been solely to do with the setting up of the SSAS at that time rather than evidencing the capacity that Mr L was acting in for any investment advice and arrangements that later followed. So, I don't think this is compelling evidence that Mr L's advice to Mr and Mrs F regarding Best International in 2015 must have been in a CDL capacity.

Dealings with Firm T

Rixons says that Mr and Mrs F must have known that Mr L was not acting in a Rixons capacity because of his previous dealings with Firm T. It says:

- In light of the fact that CWM and Elysian Fuels had failed, Mr F would have been cautious about making any further investment without any documentation; and

- Mr F would have known what a regulated advice process looked like e.g. that a suitability report and other documentation ought to have been provided.

I think these points go to whether *Mr and Mrs F* reasonably believed Mr L was acting in a Rixons capacity. But that's not the issue I'm looking at here – which is whether *Mr L* was holding himself out as a Rixons adviser. Nevertheless, I can see how Mr and Mrs F's reasonable belief in 2015 might impact my assessment on the capacity in which Mr L was likely holding himself out.

It doesn't look like there were problems with Elysian Fuels in 2015. The evidence suggests that CWM had run into difficulties by 2015 – and Mr F was chasing Mr L about when his funds would be returned to him from CWM. It is surprising and probably unwise that Mr F chose to make another investment (Best International) via Mr L given the backdrop of the issues with CWM. But I don't think I can draw any safe conclusion from these circumstances about whether or not Mr L was holding himself out to Mr and Mrs F as a Rixons adviser.

We've made enquiries of Firm T and it's now become clear that the previous investments in CWM and Elysian Fuels with Firm T didn't involve suitability reports. The emails and messages provided by Mr F show that Mr L was very likely involved with the investments, but the limited evidence we've obtained from Firm T indicates that it paid compensation to Mr F based on the involvement of a separate Firm T adviser – not Mr L. I think it's difficult to read too much into the investments Mr F had made via Firm T (and of course they're not directly relevant to this complaint) – but it seems that Mr F did make investments via a regulated firm that didn't involve all the usual processes. So it wasn't perhaps unusual for Mr F to not receive advice documents for Best International.

As mentioned above, I'm also aware that Mr F complained to Firm T about the Best International investments. When asked about this he told us that he did so because he'd forgotten that Mr L worked for Rixons at the time. This isn't helpful to Mr and Mrs F as it shows a rather confusing picture about which firm they believed Mr L was working for. But as mentioned, it's possible that some discussions took place when Mr L was still at Firm T - especially about setting up of the SSAS. And it's not completely surprising that consumers who have lost a significant amount of money might make complaints to multiple parties with whom the adviser was connected, especially after the passage of time. And Mr F has clearly now taken the view that Rixons is the culpable party in respect of the Best International investments as demonstrated by the fact that he hasn't taken the Firm T complaint forward.

The email to Rixons in 2018

Rixons has highlighted an email Mr F sent to Rixons in 2018. The email said:

> *"Regarding the £54000 and £60,000 invested by* [Mr L] *on the 25 July 2015 from my pension fund which now seems lost can you advise what options I have to try and recover these amounts.*
>
> *Having checked the FCA register* [Mr L] *was authorised with* [Firm T] *15/2/13 to 18/2/15 and Rixons 27/1/15 to 14/9/16 therefore would it be possible to make a claim under your PI insurance?"*

Rixons says this shows that Mr F didn't really believe that Mr L was conducting Rixons business for the SSAS investments in 2015 and discovered this later. And that this also shows that Mr L must have been acting in a personal capacity with regard to the Best International investments, But I don't think I can necessarily draw that conclusion from this email. I don't think it's clear from the email when Mr F checked the FCA register or that he didn't know that Mr L had been linked to Rixons until 2018. And the email from July 2015 (see above) where Mr L used a Rixons logo is contemporaneous evidence that Mr F did know that Mr L was working for Rixons.

Summary on whether Mr L was acting in a Rixons capacity

Overall, my view on the available evidence is that Mr L was more likely than not holding himself out as a Rixons adviser in 2015 when undertaking acts in relation to Best International. The evidence is, I accept, limited and none of the usual advice documentation is present. And in light of what some of what Mr F has said about his knowledge at the time (e.g. when complaining to Firm T), it's quite possible that Mr and Mrs F did not pay too much regard to whether Mr L was wearing his Rixons "hat" when dealing with them. But Mr L was a regulated adviser undertaking regulated activities in relation to Best International. And I find the emails and text messages I've highlighted above to be persuasive. And I can't see that Mr L was *more likely* acting in a different capacity when dealing with Mr and Mrs F for the Best International investments. Put simply, I don't think he was operating a recognisably independent business to that of his role as a Rixons adviser when dealing with Mr and Mrs F.

But there are other factors to still consider. Our rules say, at DISP 2.3.1R, that:

> "*The Ombudsman can consider a complaint under the Compulsory Jurisdiction if it relates to an act or omission by a firm in carrying on one or more of the following activities:*
>
> *(1) regulated activities [including the regulated activity of advising on investments].*"

There is further guidance at DISP 2.3.3G:

> "*Complaints about acts or omissions include those in respect of activities for which the firm … is responsible (including business of any … **agent for which the firm** … **has accepted responsibility**).*"

As Mr L was not an employee of Rixons, I must consider agency law to determine whether Rixons accepted responsibility for Mr L's acts. Agency is a relationship between two parties where they agree that one will act on behalf of the other so as to affect its relations with third parties. The one on whose behalf acts are to be done is called the principal. The one who is to act is called the agent. In other words, the principal authorises the agent to act on its behalf. The creation of that authority can take a number of forms. And it is usual for the authority to be limited in nature. The law recognises different forms of agency.

I'll therefore consider whether Mr L can be said to have acted as Rixon's agent when undertaking the advice and arrangements. If he was, then Rixons is responsible for the advice.

Agency law

Actual authority

An agent may have actual authority, where the principal has expressly or impliedly given its assent to the agent that it may act on its behalf. If Mr L was acting within his actual authority from Rixons when he gave advice and made the arrangements, Rixons would be responsible for that advice.

Rixons has provided us with the agreement between itself and Mr L which I've reviewed. The main provisions can be summarised as follows:

- *[Rixons] hereby appoints [Mr L] as an Adviser of [Rixons] for the conduct of investment business*: Clause 1.

- Mr L is appointed *"in accordance with the rules of the Financial Conduct Authority as an Adviser of [Rixons] to seek clients, advise clients and invite clients to enter into investment agreement with [Rixons] for investment business within [Rixons'] scope of permission*": Clause 2.

- Mr L is limited to undertaking activities for which Rixons itself has permission: Clause 3.

- All such business must be carried on through Rixons: clauses 4 and 14.

- Mr L agrees to comply with the FCA's "*statements of principle for approved persons*": Clause 6.

- Mr L agrees to participate in Rixons' training and competence scheme and be supervised by a Rixons employee: Clause 7.

- Rixons accepts responsibility for any investment business Mr L conducts pursuant to the agreement: Clause 9.

- Mr L agrees not to use any stationery and business cards other than Rixons': Clause 11.

- Mr L is not to appoint any of his own staff without Rixons' permission: Clause 14.

So clearly Mr L did possess Rixons' actual authority to perform certain functions on its behalf, including giving investment advice and arrangements - which Rixons itself had permissions to undertake.

The agency agreement refers to but doesn't actually limit the "scope of permission" beyond the very broad statement of Mr L's appointment in Clause 1 (the "conduct of investment business") and Clause 2 (to seek and advise clients and invite them to enter into agreements with Rixons).

So I don't think there's anything in the agreement that specifically prevented Mr L from giving advice or making arrangements in connection with the Best International investments.

However, the agreement requires Mr L to carry on investment business "solely through the Rixons". In this case, I understand that Rixons had no involvement in, and received no remuneration from Mr L's involvement in Best International. And notwithstanding the agreement, an agent acting with actual authority is required to act in the interests of the principal. It's difficult to see that giving advice to invest in Best International, where no commission or fee was passed on to Rixons, was acting in the interests of the principal, Rixons.

It's therefore my view that Mr L wasn't acting within the actual authority of Rixons in relation to the disputed advice and arrangements.

Apparent authority

In an agency relationship, a principal may limit the actual authority of his agent. But if the agent acts outside that actual authority, a principal may still be liable to third parties for the agent's acts if those acts were within the agent's apparent authority

The essence of apparent authority (sometimes called ostensible authority) is not concerned with what was actually agreed between the parties (for example by way of the agency contract), but rather, how the relationship between those parties *appeared* to third parties. In this complaint, I'm concerned with how the relationship appeared to Mr and Mrs F based on representations made by Rixons.

A representation in itself isn't enough to conclude there is liability under the common law by way of apparent authority. The principal's representation that its agent has its authority to act on its behalf will only fix the principal with liability to the third party (here Mr and Mrs F) if the third party relied on that representation.

I'm currently of the view that there isn't sufficient evidence of either representations made by Rixons or reliance by Mr and Mrs F. Unlike in some complaints I've seen involving Mr L, it doesn't look like Rixons sent Mr and Mrs F any documentation regarding Mr L. Nor that Mr L furnished Mr and Mrs F with Rixons documentation. Other than the general registration of Mr L as one of its CF30 advisers on the FCA's register, there is no evidence that Rixons held out to Mr and Mrs F that Mr L had its authority to give them any advice and specifically the advice he gave (and arrangements he made) in June/July 2015. On the facts of this case, I don't think the CF30 registration alone is enough to say that apparent authority applies.

Vicarious liability

However, I've also considered whether Rixons is vicariously liable for the advice and actions of Mr L – taking account of all of Rixons submissions on this point.

What is vicarious liability?

Vicarious liability is a common law principle of strict, no-fault liability for wrongs committed by another person. Not all relationships are capable of giving rise to vicarious liability. The classic example of a relationship which can give rise to vicarious liability is the employment relationship, but Mr L was not an employee of Rixons. However, it's now well established that the employment relationship is not the only relationship capable of giving rise to vicarious liability.

The law on vicarious liability was recently clarified and summarised in *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB [2023] UKSC 15*:

> *58. Having examined the main 21st century decisions on vicarious liability of the highest court, it is now possible to pull together the legal principles applicable to vicarious liability in tort that can be derived from those authorities particularly the most recent cases of Barclays Bank and Morrison.*
>
> *(i) There are two stages to consider in determining vicarious liability. Stage 1 is concerned with the relationship between the defendant and the tortfeasor. Stage 2 is concerned with the link between the commission of the tort and that relationship. Both stages must be addressed and satisfied if vicarious liability is to be established.*
>
> *(ii) The test at stage 1 is whether the relationship between the defendant and the tortfeasor was one of employment or akin to employment. In*

most cases, there will be no difficulty in applying this test because one is dealing with an employer-employee relationship. But in applying the "akin to employment" aspect of this test, a court needs to consider carefully features of the relationship that are similar to, or different from, a contract of employment. Depending on the facts, relevant features to consider may include: whether the work is being paid for in money or in kind, how integral to the organisation is the work carried out by the tortfeasor, the extent of the defendant's control over the tortfeasor in carrying out the work, whether the work is being carried out for the defendant's benefit or in furtherance of the aims of the organisation, what the situation is with regard to appointment and termination, and whether there is a hierarchy of seniority into which the relevant role fits. It is important to recognise, as made clear in Barclays Bank, that the "akin to employment" expansion does not undermine the traditional position that there is no vicarious liability where the tortfeasor is a true independent contractor in relation to the defendant.

(iii) *The test at stage 2 (the "close connection" test) is whether the wrongful conduct was so closely connected with acts that the tortfeasor was authorised to do that it can fairly and properly be regarded as done by the tortfeasor while acting in the course of the tortfeasor's employment or quasiemployment. This is the test, subject to two minor adjustments, set out by Lord Nicholls in Dubai Aluminium, drawing on Lister, and firmly approved in Morrison. The first adjustment is that, to be comprehensive, it is necessary to expand the test to include "quasi-employment" as one may be dealing with a situation where the relationship at stage 1 is "akin to employment" rather than employment. The second adjustment is that it is preferable to delete the word "ordinary" before "course of employment" which is superfluous and potentially misleading (eg none of the sexual abuse cases can easily be said to fall within the "ordinary" course of employment) and was presumably included by Lord Nicholls because "in the ordinary course of business" were the words in section 10 of the Partnership Act 1890. The application of this "close connection" test requires a court to consider carefully on the facts the link between the wrongful conduct and the tortfeasor's authorised activities. That there is a causal connection (ie that the "but for" causation test is satisfied) is not sufficient in itself to satisfy the test. Cases such as Lister and Christian Brothers show that sexual abuse of a child by someone who is employed or authorised to look after the child will, at least generally, satisfy the test. But, as established by Morrison, the carrying out of the wrongful act in pursuance of a personal vendetta against the employer, designed to harm the employer, will mean that this test is not satisfied.*

(iv) *As made particularly clear by Lady Hale in Barclays Bank, drawing on what Lord Hobhouse had said in Lister, the tests invoke legal principles that in the vast majority of cases can be applied without considering the underlying policy justification for vicarious liability. The tests are a product of the policy behind vicarious liability and in applying the tests there is no need to turn back continually to examine the underlying policy. This is not to deny that in difficult cases, and in line with what Lord Reed said in Cox, having applied the tests to reach*

> *a provisional outcome on vicarious liability, it can be a useful final check on the justice of the outcome to stand back and consider whether that outcome is consistent with the underlying policy. What precisely the underlying policy is has been hotly debated over many years by academics and judges alike. See, for example, PS Atiyah, Vicarious Liability in the Law of Torts (1967) chapter 2; Jason Neyers, "A Theory of Vicarious Liability" (2005) 43 Alberta Law Review 287; Anthony Gray, Vicarious Liability: Critique and Reform (2018); Vicarious Liability in the Common Law World (ed Paula Giliker, 2022). As we have seen at para 38 above, Lord Phillips referred to five policies in Christian Brothers but, as Lord Reed recognised in Cox, a couple of those have little, if any, force. At root the core idea (as reflected in the judgments of Lord Reed in Cox and Armes: see paras 42 and 47 above) appears to be that the employer or quasi-employer, who is taking the benefit of the activities carried on by a person integrated into its organisation, should bear the cost (or, one might say, should bear the risk) of the wrong committed by that person in the course of those activities.*

So, broadly, there is a two-stage test to decide whether vicarious liability can apply:

- Stage one is to whether the relationship between the defendant and the tortfeasor was one of employment or akin to employment.

- Stage two is to ask whether the wrongful conduct was so closely connected with acts that the tortfeasor was authorised to do that it can fairly and properly be regarded as done by the tortfeasor while acting in the course of the tortfeasor's employment or quasi-employment.

As a starting point to my analysis, I reiterate that I'm satisfied that Mr L was purporting to act on behalf of Rixons when undertaking the acts relating to this complaint. I'm not satisfied that he gave investment advice or made the arrangements in a recognisably independent capacity in 2015 when dealing with Mr and Mrs F. I think he was more likely holding himself out as a Rixons adviser.

I also want to make clear that I'm aware that in the case of *James Scott Winter v Hockley Mint Limited* [2018] EWCA Civ 2480 it was said that:

> *"48. Armagas v Mundagas [1986] 1AC 717] is binding authority of the House of Lords that, where a claimant has suffered loss in reliance on the deceit of an agent, the principal is vicariously liable if, but only if, the deceitful conduct of the agent was within his or him actual or ostensible authority."*

Mr L's conduct may have involved some element of deceit that has led to Mr and Mrs F's loss. So there is legal precedent that the usual vicarious liability tests I highlighted above may not apply and that only apparent authority will affix vicarious liability.

However, I think there is significant uncertainty about the correct test in a case such as this one. Mr and Mrs F have the benefit of the client's best interest rule, a regulatory provision which is designed to protect consumers against a spectrum of misconduct, including but not limited to dishonest misconduct, which applies irrespective of whether the conduct also involves the tort of deceit.

Further, the Court of Appeal has applied the general test for vicarious liability to dishonest conduct where the particular legal wrong relied upon is something other than the tort of deceit: see *Group Seven Ltd v Notable Services [2019] EWCA Civ 614*, where the general test was applied in finding a principal vicariously liable for dishonest assistance in a breach of trust and for conspiracy to use unlawful means.

These points suggest to me that it is most likely that the more general test for vicarious liability (not just the apparent authority test applicable to the tort of deceit) also applies in this case in relation to Mr L's advice and arrangements. I am not extending the law, but simply applying it. As such I have also considered the general two stage test.

The stage one test

Rixons' business model was that it gave financial advice and made arrangements for those investments itself, through its agents – people like Mr L. Rixons' status as an authorised firm meant that it was not in breach of the general prohibition when it undertook these acts. So, when its agents undertook these regulated activities, those agents were not in breach of the general prohibition either.

Mr L was a Rixons agent. Rixons had given him permission to carry out the controlled function "CF30". Rixons had therefore engaged Mr L to carry out activities that were an integral part of its business.

I note that the FCA has issued guidance as to when it considers a person to be carrying on a business in their own right, set out in PERG 2.3.5 to 2.3.11. I have considered the guidance in PERG, which says:

> *"In practice, a person is only likely to fall outside the general prohibition on the grounds that he is not carrying on his own business if he is an employee or performing a role very similar to an employee".*

For the avoidance of doubt I do not say I am obliged to follow that guidance. Or that I am obliged to consider that guidance in the same way as I am obliged to consider guidance from the regulator when determining what is fair and reasonable in all the circumstances of a complaint that is within my jurisdiction. Rather I have noted the guidance is consistent with my own conclusions about the nature of Mr L's relationship with Rixons.

Rixons clearly intended Mr L to fall outside the general prohibition when acting on Rixons' behalf in giving investment advice and making arrangements. The only way in which Mr L could have fallen outside the general prohibition at the time was on the basis that he was carrying on Rixons' business rather than his own. In my view, the guidance therefore supports my view that Mr L's relationship with Rixons was similar to employment relationships.

In my view Mr L's activities were part and parcel of Rixons' business. The controlled function of giving regulated investment advice and making arrangements was an activity assigned to Mr L by Rixons as part of Rixons' own business. And by way of the agreement between Mr L and Rixons, Rixons attempted to exert a significant amount of control over what business MrL conducted and how he conducted that business.

So, I'm satisfied that the stage one test is satisfied here and the relationship between Mr L and Rixons was one that was "akin to employment".

The stage two test

I accept that there are factors that point to Mr L's acts as being removed from his role as a Rixons adviser. He did not follow Rixons' processes nor did he account to Rixons for any commission he earned.

However, I think the stage two test is met because the conduct of Mr L was so closely connected to what he was authorised to do by Rixons.

- Mr L appears to have been in a relationship with Mr and Mrs F as a regulated financial adviser. Mr L was only able to portray himself in this way in June/July 2015 because of his role with Rixons.

- In giving investment advice and making arrangements, Mr L carried out business activities of a type that had been specifically assigned to him by Rixons, and of a type that he could only (lawfully) perform on Rixons' behalf.

- In recommending Best International – I think Mr L was carrying out a type of activity that Rixons allowed him to carry out. The agency agreement between Mr L and Rixons doesn't limit the "scope of permission" beyond the very broad statement of Mr L's appointment in Clause 1 (the "conduct of investment business") and Clause 2 (to seek and advise clients and invite them to enter into agreements with Rixons).

- Rixons gave its advisers actual authority to recommend investments if they carried out certain steps. Mr L failed to carry out those steps with respect to Mr and Mrs F's investment. So, although the manner in which Mr L gave the advice was not authorised by Rixons, the activity of giving the advice was something that Rixons authorised Mr L to do.

- Best International was a security under the RAO. Although it was esoteric/non-standard investment, regulated investment advisers can and do give advice about such securities.

- The fact that Mr L may have been acting for his own benefit and not Rixons' does not prevent Rixons from being vicariously liable for Mr L's actions. The courts have found that vicarious liability can apply even where an employee (or a person with a relationship akin to that of an employee) has abused his position in a way that cannot possibly have been of benefit to his principal.

So I think Rixons is vicariously liable for Mr L's actions in respect of the advice to Mr and Mrs F's (as trustees) for the investments in Best International.

Conclusion on jurisdiction

We have jurisdiction to consider this complaint against Rixons as it is vicariously liable for the advice of Mr L.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so, I'm satisfied the complaint should be upheld.

I'm aware that Mr F provided a high net worth certificate as part of the arrangements for the investment. So it's likely that he was the type of trustee/investor to whom Best International could be promoted. But that doesn't mean that Best International was a suitable investment for him and Mrs F.

The SSAS held Mr and Mrs F's entire pension provision of around £207,000. They were also in their 60s. Best International was an unregulated investment. It carried significant risks and a lack of protections. In the circumstances, I don't think the investment of a total of £144,000 in Best International was suitable advice for the trustees' use of pension funds.

I note that Mr F had made some other high-risk investments outside of his pension. So he had some experience of higher risk investments. But those appear to have also involved Mr L/Firm T and it's not clear that Mr F was told of the all the risks. And those investments ought to have further highlighted to Mr L that Mr F was overly exposed to high-risk investments.

I've seen nothing to suggest that if Mr and Mrs F had received suitable advice, they'd have still gone on to make the Best International investments as trustees of the SSAS. So I think it's fair and reasonable for Rixons to pay compensation for the investment.

Putting things right

My aim in awarding fair compensation is to put the trustees back into the position they would most likely have been in, had the SSAS not made the Best International investments totalling £144,000.

I understand that the trustees closed the SSAS and transferred the funds to a different SSAS operator in 2018.

I know that the £30,000 investment was repaid to Mr and Mrs F and performed as expected. The redress formula I set out below will take account of this as the sums received by Mr and Mrs F will be deducted from the compensation payable by Rixons.

I'm satisfied that Mr and Mrs F haven't received compensation via any other source. And even if they have potential recourse to the FSCS against any of the Best International entities (which I doubt), that doesn't mean that it would be unfair for me to make an award against Rixons as my view is that it is responsible for bringing the investment about.

The original SSAS account contained a large cash holding prior to making these investments, which would have needed to be invested elsewhere. And the trustees would then reasonably make some changes to those investments in the intervening years. I'm not in a position to say precisely what they would have done, but what I've set out below is fair and reasonable given their circumstances and objectives when they invested.

To compensate the trustees fairly Rixons should:

- Compare the performance of the Best International investments with that of the benchmark shown below. If the fair value is greater than the actual value, there is a loss and compensation is payable. If the actual value is greater than the fair value, no compensation is payable.

- To assist Rixons in its calculations, Mr and Mrs F should co-operate in providing information Rixons about all income/returns received from the investments (see also the interest section in the table below).

- If there is a loss, it should ideally pay into the new SSAS, to increase its value by the amount of the compensation and any interest. The payment should allow for the effect of charges and any available tax relief. Rixons shouldn't pay the compensation into the pension plan if it would conflict with any existing protection or allowance.

- If Rixons is unable to pay the compensation into the new SSAS – which I expect is likely in this particular case if Mr and Mrs F have retired – it should pay the total amount of compensation directly to them, split in such proportions as they agree as trustees of the SSAS.

- The payments direct to Mr and Mrs F should take into account that had it been possible to pay compensation 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 the trustees won't be able to reclaim any of the reduction after compensation is paid.

- The notional allowance should be calculated using Mr and Mrs F's expected marginal rate of tax throughout retirement. I think it's reasonable to assume that they are likely to be basic rate taxpayers, so the reduction would equal 20%.

- Provide the details of the calculation to the trustees in a clear, simple format.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
3 x investments in Best International	Still exists but illiquid	FTSE UK Private Investors Income Total Return Index	Date of investment	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 complainants' acceptance – subject to the following: If Rixons is unable to calculate and pay redress promptly due to Mr and Mrs F not having yet provided it with the information I've stated above regarding income from the investments,

					then the total number of days it does take to provide this information should be added to the 28-day period before the additional interest becomes payable. By way of example, if and Mr and Mrs F provide the information to Rixons 20 days after Rixons was notified of Mr and Mrs F's acceptance of my final decision, interest would then have to be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation wasn't paid within 48 days.

Income tax may be payable on any interest paid. If Rixons considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell the trustees how much it's taken off. It should also give them a tax deduction certificate in respect of interest if they ask for one, so they can reclaim the tax on interest from HM Revenue & Customs if appropriate.

Actual value

This means the actual amount paid or payable from the investment at the end date. If, at the end date, the investment is illiquid (meaning it cannot be readily sold on the open market), it may be difficult to find the actual value of the investment. So, the actual value should be assumed to be nil to arrive at fair compensation. Rixons should take ownership of the illiquid investment by paying a commercial value acceptable to the SSAS provider. The amount paid should be included in the actual value before compensation is calculated.

If Rixons is unable to purchase the investment the actual value should be assumed to be nil for the purpose of calculation. Provided Rixons pays compensation in full, it may wish to require that the trustees provide an undertaking to pay it any amount they 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. Rixons will need to meet any costs in drawing up the undertaking.

Similarly, provided compensation is paid in full, the payment of redress may be conditional upon Mr and Mrs F giving an assignment of any claim the trustees have against third parties in connection with the investments. The terms of the assignment should require Rixons to account to Mr and Mrs F for any amount it recovers that exceeds the compensation it pays to Mr and Mrs F. Rixons will need to meet any costs in drawing up the assignment.

Fair value

This is what the investments would have been worth at the end date had they grown in line with the benchmark. Any withdrawal, income or other distributions paid out of the investments should be deducted from the fair value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if Rixons totals all those payments and deducts that figure at the end.

Why is this remedy suitable?

I've chosen this method of compensation because:

- I think the trustees would most likely have wanted to obtain capital growth with a moderate amount of investment risk.

- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.

- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given the trustees' circumstances and risk attitude.

Additionally, I've had regard to the likely impact the loss of these investments has had on the trustees and the consequential impact on the retirement plans of Mr and Mrs F. I think this impact would be significant. So I require Rixons to pay the trustees £500 for the distress caused.

My final decision

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £170,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £170,000, I may recommend that Rixon Matthews Appleyard (Financial Services) Limited Appleyard pays the balance.

Determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My decision is that Rixon Matthews Appleyard (Financial Services) Limited should pay the amount produced by that calculation up to the maximum of £170,000 (including distress or inconvenience but excluding costs) plus any interest set out above.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £170,000, I recommend that Rixon Matthews Appleyard (Financial Services) Limited pays the trustees the balance plus any interest on that amount as set out above.

If Rixon Matthews Appleyard (Financial Services) Limited does not pay the full fair compensation, then any portfolio currently illiquid should be retained by the trustees. This is until any future benefit that they may receive from the investments together with the compensation paid by Rixon Matthews Appleyard (Financial Services) Limited (excluding any interest) equates to the full fair compensation as set out above.

Rixons Appleyard may request an undertaking from the trustees that either they repay to Rixons Appleyard any amount they may receive from the portfolio thereafter or if possible, transfer the portfolio at that point.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F and Mrs F as Trustees of the PLF Pension Fund to accept or reject my decision before 30 December 2025.

Abdul Hafez
Ombudsman