complaint

Mr M complains that Andrew Morton & Co Ltd, an appointed representative (AR) of Best Practice IFA Group Limited (Best Practice), acted wrongly and out of line with the instructions provided in investing in a number of high-risk shares. He also believes that Best Practice has failed to exercise due care in monitoring its advisor's activities, as he was not allowed to carry out the activities complained about.

background

In April 2010 Best Practice recommended that Mr M transfer his Individual Savings Account (ISA) to another provider and invest in its cash fund to protect him from the volatility in the stock market, with a view to later reinvestment as and when this became advantageous. At the time of the advice a fact find was completed, Mr M's circumstances were recorded as follows:

- Married
- Self-employed
- Income of £5,000
- Monthly expenditure of £1,100

The only asset listed other than his primary residence was an ISA valued at £4,000

His attitude to risk was recorded as adventurous. It was noted that Mr M had £4,000 to invest and that he needed an emergency fund of £5,000.

The adviser issued a suitability report confirming his thoughts and recommendations in respect of the transfer of Mr M's ISA. Amongst other things the report said:

> *"Your ISA needs attention, in my opinion. As we discussed, I have discounted switching funds within* [name of Mr M's existing ISA provider] *because of the problems associated with the "poverty" of fund management over the past 3 years – in particular. Your investment is underperforming badly in comparison to its "peer" group, especially when compared to the same investment sector held via* [name of new ISA provider]*. In simple terms it has already lost a lot of its former value…"*

And

> *"On this basis you are prepared to accept some volatility in this ISA investment if that will bring with it the potential for above average returns over time, i.e. 5 years or possibly longer – hopefully better returns than the fund currently held with* [name of existing ISA provider]*."*

And

> *"I recommended* [name of new ISA provider] *and their "platform" as my favoured alternative for your ISA investment – after re-registration the investment balance is to be switched into Cash.*
>
> *You agreed with me, that whilst you had a "balanced" attitude towards risk and reward you are now prepared to accept volatility in this part of your investments,* [name of existing ISA provider] *is out with the more acceptable norm (as regards poor performance and volatility, albeit that past performance is not necessarily a guide to the future)."*

And

> *"I recommended re-registering your ISA with* [name of new ISA provider] *and then switching to the Cash Fund. The investment objective of the* [name of new ISA provider] *Cash Fund is to provide a temporary "home" for your ISA investment Fund before investing again – in another collective investment fund. The fund is managed by* [name of new ISA provider] *and represents "cash" held on deposit. It is a "safe haven" from current market volatility – specifically in a downward direction.*
>
> *The choice of this Cash Reserve is a tactical move vindicated by the low value of your investment.*
> *…*
>
> *The principal reason for my recommendation of the "*[name of new ISA provider] *Cash Fund" is centred on the change in the nature of the Global economy over the last twelve months, i.e. the "Credit Crunch", continuing "high" real interest rates, rising inflation – especially gas, oil and other commodity prices – especially food.*
>
> *Given the recent volatility of stock markets around the world, specifically in a downward direction, I believe that the fund choice listed above is a comparatively advantageous strategy – volatility has paid dividends (in comparison to your current investment with* [name of existing ISA provider]*)."*

Mr M accepted the recommendation and in May 2010 just over £4,000 was transferred into his new ISA.

Over the next month the adviser purchased holdings in three investments:

- ETFS Daily Leveraged Gold (LBUL) – 12 May 2010
- Xcite NPV ords (XEL) – 14 May 2010
- Insynergy Absolute India A GBP (Acc) – 4 June 2010

Later the adviser sold the holdings in ETFS Daily Leveraged Gold (LBUL) and Insynergy Absolute India A GBP (Acc) and invested more in Xcite NPV ords (XEL).

In October 2014 Mr M closed the account. The balance was around £700.

After this, Mr M complained to Best Practice. It responded saying that there was no evidence of advice being given in relation to the transactions complained about. Because of this, it appeared that the adviser had in fact been discretionary managing the portfolio, which he was not authorised to do. As a result, it did not think that it could be held responsible for the activities complained about.

Unhappy with this response Mr M referred his complaint to our service. Best Practice said that the adviser was acting outside the scope of his permissions and that it could not be held responsible for his actions.

I sent my provisional decision to Mr M and Best Practice on 20 September 2019 explaining why I thought this complaint was one we could consider and why it should be upheld. I have attached my provisional findings; these form part of this decision. I said that I would consider

anything either party wanted to add. Mr M did not make any further submissions. Best Practice disagreed with the decision, in summary, it said:

- It strongly refutes that it is responsible for any unauthorised activities that the AR undertook.
- The commission statements obtained showed an incorrect address for Best Practice, so these were not received. Even if these had been received these would have been submitted to the remunerations team, who would have logged it – but, the transaction itself would not have been reviewed as this was not within that team's remit.
- In turn, it challenges our argument that it would have known and been able to identify what funds the client was being invested in. In an ideal environment each commission statement would be reviewed to check whether the funds the commission was paid from were agreed by the client – but, to suggest that that is possible is not fair or reasonable.
- It is a significant leap to suggest that the complaint encompasses the advice to transfer the ISA. If the transfer had gone ahead as set out in the suitability letter, it would not have resulted in a loss as it would have been invested in a cash fund as a 'safe haven'.
- The adviser was suspended in 2011 and Mr M changed servicing adviser on the account in July 2012, so the redress calculation should only be worked out up until that point.
- In other cases against it in relation to this AR's advice we have reached different outcomes.

I reviewed the submissions and concluded that it would be fair and reasonable to change the redress methodology. I wrote to Mr M and Best Practice setting out that I thought the redress calculation should be run up to the point when a new adviser was appointed. Interest should be added from that point on any loss established at a rate of 8% simple per year up until the date of settlement.

Neither party made any additional comments in response to this.

Because agreement could not be reached, this case has been passed back to me for review.

the AR agreement

The agreement between Andrew Morton & Co Ltd and Best Practice sets out, in so far as relevant that:

> *"APPOINTMENT*
> *The Principal warrants for the purposes of the Act, it is an Authorised Person and as such appoints the Appointed Representative to be an Appointed Representative of the Principal in accordance with the purposes set out in 6.1 of this Agreement (but for no other purpose)."*

And

> *"6. The appointed representative's obligations*
>
> *6.1 The Appointed Representative shall on behalf of the Principal undertake such of the following activities as the Principal may require and for which the Principal accepts responsibility PROVIDED ALWAYS the Business is notified to the Principal within 30 days of the date of sale and falls within the categories for which the Principal has authorisation under the FSA rules and the act as notified to the Appointed Representative by the Principal from time to time, namely: -*

6.1.1 seek Clients for investment business on behalf of the Principal, advise Clients about entering into investment agreements on behalf of the Principal, sell investments other than real property investments and time shares, exercise rights conferred by an investment (whether issued by the Principal or connected persons or not).

6.1.2 seek Clients and undertake to advise Clients on all such other aspects of non investment business, private health cover and medical benefits, mortgage advice, insurance, pension, trusts, tax advice, financial planning, term assurance, long term care plans or any other business as the Principal may from time to time require or permit, but at all times in accordance with any restrictions or prohibitions as the third party product provider and/or Principal shall impose, and as the Principal shall deem fit (and the Appointed Representative agrees to accept such restrictions and prohibitions);

…"

exemption of ARs

The Financial Services and Markets Act 2000 (FSMA) says under Article 19, '*The general prohibition'*, that:

(1) No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is—

(a) an authorised person; or

(b) an exempt person.

(2) The prohibition is referred to in this Act as the general prohibition.

Article 39 of FSMA sets out the exemption of ARs to the above, in so far as relevant, it 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.

The business for which an AR can be exempt is set out in FSMA 2000 (Appointed Representatives) Regulations 2001 (2001 No. 1217) this includes advising on investments and arranging deals in investments but not managing investments.

managing investments

Regulated Activities Order Article 37:

> *37. Managing assets belonging to another person, in circumstances involving the exercise of discretion, is a specified kind of activity if—*
>
> *(a) the assets consist of or include any investment which is a security or a contractually based investment; or*
>
> *(b) the arrangements for their management are such that the assets may consist of or include such investments, and either the assets have at any time since 29th April 1988 done so, or the arrangements have at any time (whether before or after that date) been held out as arrangements under which the assets would do so.*

PERG 2.7.8G provides guidance on this:

> *The regulated activity of managing investments includes several elements.*
>
> *1. First, a person must exercise discretion. Non-discretionary portfolio management (where the manager buys and sells, as principal or agent, on the instructions of some other person) is not caught by this activity, although it may be caught by a different regulated activity such as the activity of dealing in investments as principal or dealing in investments as agent. The discretion must be exercised in relation to the composition of the portfolio under management and not in relation to some other function (such as proxy voting) carried on by the manager.*
>
> *2. Second, the property that is managed must belong beneficially to another person. This excludes from the regulated activity the management by a person of his own property. But discretionary management of assets by a person acting in his capacity as trustee will be caught even though he is the legal owner of the assets.*
>
> *3. Third, the property that is managed must consist of (or include) securities or contractually based investments. Alternatively, discretionary management will generally be caught if it is possible that the property could consist of or include such securities or investments. This is the case even if there never has been any investment in securities or contractually based investments, as long as there have been representations that there would be.*

my findings

I have looked at all of the information provided by both parties in order to decide whether this complaint is one we can consider. Having done so, I remain of the view that the complaint is one we can and should consider. I have then reconsidered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. I have addressed each point in turn below.

When considering what is fair and reasonable, I have taken into account relevant law and regulations; regulator's rules, guidance and codes of practice; and what I consider to have been good industry practice at the time.

Where the evidence is incomplete, inconclusive, or contradictory (as some of it is here), I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances.

The responses to my provisional decision cover a number of different points and arguments. I have broken these down into the below topics and addressed these in turn. As I have explained above, my provisional findings are attached and form part of this decision – a number of the arguments raised by Best Practice in response to my provisional decision cover issues that I have already considered and addressed within that decision, so I have not repeated my findings in respect of all of these at length again.

Best Practice has suggested that the approach taken in this case is inconsistent with the approach we have taken on other similar cases. I cannot comment on the individual merits of other cases within this decision. I have taken into account Best Practice's comments and I am satisfied that the conclusions I have reached are fair and reasonable in light of the individual circumstances of this complaint.

Complaint

Best Practice disagrees that Mr M's complaint encompasses the advice to transfer. Our remit is inquisitorial and informal. This allows me to look at the complaint in the round and I think the complaint does reasonably encompass the advice to transfer.

The complaint as expressed by Mr M, amongst other things, says:

> *In May 2010 I allowed him to transfer funds held in an ISA of £4,307.27 to an investment platform* with [name of investment platform]*. I am not an experienced investor and entirely trusted* [name of AR] *to act in my best interests as my adviser. However this was not the case.*

Once the ISA was transferred the adviser went about making the investments that are the focus of Mr M's complaint. I think that the transfer was recommended for the purpose of making such investments – and, that *but for* the transfer, these investments would not have gone ahead. So, I do not think that I can reasonably consider the investments made in isolation and I think that the loss does stem from the transfer of the ISA.

The suitability letter suggested that the monies transferred would initially go into a cash fund (although the letter does suggest that this was only intended to be a short-term solution prior to the adviser investing the money at an advantageous time). This is not what happened. Two of the investments were made within a couple of days of the fund that was transferred in being encashed and the third was made a few weeks later.

Responsibility

The advice to transfer the ISA is advice for which Best Practice has accepted responsibility. I remain of the view that in recommending the transfer of Mr M's ISA it is more likely than not that the adviser intended on making such investments as those subsequently made despite what it says in the suitability letter. I find it unlikely that the adviser suddenly changed his mind when the monies became available and decided to take an entirely different route to that which he had previously had in mind.

We can consider Best Practice's AR's advice to Mr M to transfer his ISA – this was a regulated activity and one for which Best Practice had accepted responsibility. That advice was inextricably linked to the subsequent investments made. Even if I were to conclude the AR's actions – after the ISA was transferred and the monies became available – amounted to unauthorised investment management, this would not change the fact that we can consider the advice to transfer the ISA for these investments to be made.

As referenced in my provisional decision, in relation to situations where part of a transaction is regulated and part of it is not the judge in TenetConnect Services Limited v Financial Ombudsman and another [2018] EWHC 459 (admin) said:

> *"The FSMA intended that regulated activity, and the Ombudsman's jurisdiction should be part of a financial service consumer's protection. The legislative provisions should be construed so that, if part of what is done as a single activity is regulated, the whole is regulated rather than the other way round. Otherwise, the regulated part loses the protection which the FSMA requires that it should have. If to accord that protection, aspects which by themselves would not be regulated are brought into the protective scope of regulation and the Ombudsman's jurisdiction, those giving advice will have to make sure that their regulated and unregulated activities are separated, rather than using the unregulated to escape the consequences of intermingling them with the regulated."*

It is possible that the adviser's later actions amounted to the activity of managing investments and that that activity fell outwith the scope of authority given to Best Practice's AR. I have not made a finding in relation to this because, in line with the above, I think we can consider this complaint against Best Practice despite this.

Commission

I have taken into account what Best Practice has said about it not receiving commission notes and that, even if these had been received it would not be practical or reasonable to expect these to be reviewed (in terms of suitability) by the remuneration team. I have not made any finding in respect of this; my findings in relation to Best Practice's responsibility for Mr M's losses are not based on its receipt of commission notes.

The suitability of the advice

Based on what I have seen, Mr M's circumstances and investment experience do not point to him being a high-risk investor. The language used in the suitability report is not clear in describing the approach to be taken or the level of volatility Mr M would need to be willing to accept in taking an adventurous approach. In any case, Mr M did not have the capacity for loss to justify taking an adventurous approach to investing his savings.

I consider that the investments made were unsuitable and, in turn, that the advice to transfer the ISA in order to make such investments was unsuitable. Taking into account Mr M's circumstances a considerably more cautious approach would have been suitable for him. It has not been suggested in response to my provisional decision that Mr M was likely to have become an insistent client or otherwise disregarded suitable advice – but, for the sake of completeness, I have considered this and I think it is more likely than not that Mr M would have followed suitable advice. So I find that, if suitable advice had been given, Mr M would not have ended up invested in the investments which have resulted in Mr M suffering the financial loss about which he complains.

Summary

I have mostly focused on the points raised in response to my provisional decision within this decision. As I have said above, my provisional findings are attached and form part of this decision. For the sake of the completeness, in summary, I have found that:

- The activities that are the subject of this complaint amount to the regulated activities of: advising on investments, arranging deals in investments and possibly managing investments.
- The complaint encompasses the advice to transfer the ISA and that advice fell within the scope of authority given to the adviser – or, in other words, is business for which Best Practice accepted responsibility.
- The subsequent investments made were sufficiently closely linked to the advice to transfer and I can consider the advice to transfer, even if I were to conclude that the adviser went on to act outwith the scope of authority.
- The transfer advice was quite confused in terms of the assessment of Mr M's attitude to risk and the investment strategy to be employed – and, what actually happened is different from what was set out in the suitability letter.
- The investments made were not suitable for Mr M.
- The advice to transfer with the intention of making such investments was unsuitable.
- The investments made and the losses Mr M suffered stem from the unsuitable transfer advice, so it is reasonable for Best Practice to compensate Mr M for his losses in full.

Having reached these findings, I have gone on to set out what I consider to be fair compensation under the circumstances.

fair compensation

In assessing what would be fair compensation, I consider that my aim should be to put Mr M as close as possible to the position he would probably now be in if he had not been given unsuitable advice.

I take the view that Mr M would have invested differently. It is not possible to say *precisely* what he would have done differently. But I am satisfied that what I have set out below is fair and reasonable given Mr M's circumstances and objectives when he invested.

what should Best Practice do?

To compensate Mr M fairly, Best Practice must:

- Compare the performance of Mr M's investment with that of the benchmark shown below and pay the difference between the *fair value* and the *actual value* of the investment. If the *actual value* is greater than the *fair value*, no compensation is payable.

  Best Practice should also pay interest as set out below.

- Pay to Mr M £300 for the distress caused by the loss of a large proportion of his savings.

Income tax may be payable on any interest awarded.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
Monies transferred into the ISA	surrendered	for half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	date of investment	date servicing rights transferred to new IFA (away from Best Practice)	8% simple per year on any loss from the end date to the date of settlement

actual value

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

fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, Best Practice should use the monthly average rate for the fixed rate bonds with 12 to 17 months maturity as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

Any additional sum paid into the investment should be added to the *fair value* calculation from the point in time when it was actually paid in.

Any withdrawal, income or other payment out of the investment should be deducted from the *fair value* at the point it was actually paid so it ceases to accrue any return in the calculation from that point on.

If there are a large number of regular payments, to keep calculations simpler, I will accept if Best Practice totals all those payments and deducts that figure at the end instead of deducting periodically.

why is this remedy suitable?

I have decided on this method of compensation because:

- Suitable advice would have been for Mr M to invest in a way that allowed for capital growth with a small risk to his capital.
- 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 his 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 a mix of diversified indices representing different asset classes, mainly UK equities and government bonds. It would be a fair measure for someone who was prepared to take some risk to get a higher return.

- I consider that a suitable risk profile for Mr M was in between, in the sense that he was prepared to take a small level of risk to attain his investment objectives. So, the 50/50 combination would reasonably put Mr M into that position. It does not mean that Mr M would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker fund. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mr M could have obtained from investments suited to his objective and risk attitude.

The additional interest is for being deprived of the use of any compensation money since the end date.

my final decision

I uphold the complaint. My decision is that Best Practice IFA Group Limited should pay the amount calculated as set out above.

Best Practice IFA Group Limited should provide details of its calculation to Mr M in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr M either to accept or reject my decision before 22 December 2019.

Nicola Curnow
ombudsman

COPY OF PROVISIONAL FINDINGS

I have looked at all of the information provided by both parties in order to decide whether this complaint is one we can consider. And, having done so, I have concluded the complaint is one we can consider. I've then considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. I have addressed each point in turn below.

Whilst I have taken everything submitted by both parties into account, my decision focuses on what I consider to be the central issues. The purpose of this decision is not to address every point raised in detail, but to set out my findings and reasons for reaching them.

When considering what is fair and reasonable, I have taken into account relevant law and regulations; regulator's rules, guidance and codes of practice; and what I consider to have been good industry practice at the time.

Where the evidence is incomplete, inconclusive, or contradictory (as some of it is here), I reach my decision on the balance of probabilities - in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances.

jurisdiction

Our jurisdiction is set out in the Financial Conduct Authority's handbook. These rules are referred to as DISP.

DISP 2.3.1R says:

> *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 (other than auction regulation bidding); …*
>
> *or any ancillary activities, including advice, carried on by the firm in connection with them.*

And

DISP 2.3.3G, which is guidance for the interpretation of our compulsory jurisdiction, says:

> *"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)."*

Under section 39(3) of FSMA:

> "*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".*

So, for me to conclude that this is a complaint that we can consider I need to consider three questions:

1. What are the acts that are the subject of this complaint?
2. Were the acts about which Mr M complains done in the carrying on of a regulated activity, or an ancillary activity carried on in connection with a regulated activity?
3. Were those acts the acts of the principal firm, Best Practice*?*

What are the acts that are the subject of this complaint?

In order to decide whether we can or cannot consider a complaint it is necessary first to decide what the subject of this complaint is. Mr M's complaint arises from the investment losses he suffered. Mr M described his complaint as being that the AR acted recklessly and beyond instruction by investing money in risky shares – and, that Best Practice failed to exercise due care and diligence in overseeing the ARs activities.

In Mr M's complaint letter to Best Practice he sets out, amongst other things, that:

> *Between October 2009 and July 2012 I was a client of* [full name of AR] *who worked as part of your company providing Financial Advice.*
>
> *In May 2010 I allowed him to transfer funds held in an ISA of £4,307.27 to an investment platform* with [name of investment platform]*. I am not an experienced investor and entirely trusted* [name of AR] *to act in my best interests as my adviser. However this was not the case.*

The complaint focuses on the high risk investments made but I think it is broader than just the trades the AR made on Mr M's behalf. Mr M was advised to transfer his existing ISA, in line with his complaint, Mr M went ahead with this because he believed that the AR would invest his ISA in a suitable manner – instead, the AR made a number of high risk investments.

It is clear that the transfer from the existing ISA and the investments subsequently made were closely related – in that the first part of that overall arrangement was recommended to allow the second part to take place.

Taking all of this into account, I think that the complaint encompasses the advice to transfer the ISA and the investments subsequently made.

Were the acts about which Mr M complains done in the carrying on of a regulated activity, or an ancillary activity carried on in connection with a regulated activity?

Regulated activities are specified in Part II of the FSMA 2000 (Regulated Activities) Order 2001 ('the RAO') and include arranging deals in investments (article 25 RAO) advising on investments (article 53 RAO) and managing assets belonging to another person, in circumstances involving the exercise of discretion (article 37 RAO).

The AR advised Mr M to transfer the funds from his ISA to another provider and, initially, invest in its cash fund. Once the funds were in place the adviser continued to invest the funds in three different holdings. Later, two of the holdings were sold and the monies were reinvested in the third holding.

Mr M then complained about the losses he suffered as a result of the investments made upon the transfer of his ISA.

It is not in dispute that the adviser carried out these activities. So, I think that the adviser undertook the activity of advising on investments in respect of the transfer of the ISA.

Once the ISA was in place, Mr M has confirmed that the adviser was not discussing the transactions with him prior to making the relevant investments. The adviser was arranging for the buying and selling of investments. In turn, it is possible that the adviser's actions also amounted to the regulated activity of managing investments once the ISA was in place.

Overall, I am satisfied that the adviser undertook a number of regulated activities in connection with the subject of this complaint.

Were those acts the acts of the principal firm, Best Practice?

For Best Practice to be responsible for the relevant activities undertaken by the adviser, at least part of the transaction has to have fallen within the scope of the authority provided to the adviser by means of the agreement between him and Best Practice.

Best Practice has said that the relevant activities undertaken by the adviser, in respect of the complaint raised, amounted to discretionary management, which it says the adviser was not authorised to do under its agreement with the AR.

Under the agreement the adviser was authorised to undertake a number of activities, listed in detail above, including: advising on and making arrangements in investments. But, it does not include managing investments.

As I have set out above, it is possible that what the adviser did once the ISA was in place amounted to managing investments – but, in this instance, I do not think that this, in and of itself, means that Best Practice is not responsible for the complaint raised. I will explain why.

I think the investments made and the losses suffered as a result of these stem from the advice given to transfer the ISA. I think that it was the adviser's intention from the outset to invest Mr M in the type of investments he subsequently made and that it was with this in mind that he recommended the transfer. That advice fell within the scope of the authority given to the AR by Best Practice by way of the AR agreement referenced above.

In respect of situations where part of the transaction is regulated and part is not the judge in TenetConnect Services Limited v Financial Ombudsman and another [2018] EWHC 459 (admin) said:

> *"The FSMA intended that regulated activity, and the Ombudsman's jurisdiction should be part of a financial service consumer's protection. The legislative provisions should be construed so that, if part of what is done as a single activity is regulated, the whole is regulated rather than the other way round. Otherwise, the regulated part loses the protection which the FSMA requires that it should have. If, to accord that protection, aspects which by themselves would not be regulated are brought into the protective scope of regulation and the Ombudsman's jurisdiction, those giving advice will have to make sure that their regulated and unregulated activities are separated, rather than using the unregulated to escape the consequences of intermingling them with the regulated."*

This means that even if I were to conclude that the AR did undertake the activity of managing investments and that that activity fell outwith the scope of permission granted to it by Best Practice, I still think we could consider the complaint in its entirety. This is because the investments made were sufficiently closely linked to the advice to transfer Mr M's existing ISA, which I believe Best Practice did accept responsibility for.

The suitability report indicates that the plan was for the funds to initially be placed in a cash fund for investments to be made later down the line – but, that is not what happened. As soon as the fund, which was transferred *in specie,* was encashed the adviser made two of the aforementioned investments within two days. In turn, I think there is a direct link between the advice to transfer – for which I believe Best Practice did accept responsibility – to a new ISA, the subsequent investments made and, in turn, the losses suffered.

Taking all of this into account, I think that this is a complaint we can consider because *at least* part of the transaction, which led to losses that are the subject of this complaint fell within the scope of authority Best Practice provided to its AR.

merits of the complaint

suitability of the advice

The way in which Mr M's attitude to risk was described is somewhat confused, as is the description of the investment strategy to be employed in the ISA upon transfer – I have quoted some of the relevant sections above. For example, Mr M is described as being a balanced investor at one point but it is noted that he is willing to accept volatility in respect of this investment. Elsewhere he is described as having an adventurous attitude to risk and then that "on this basis you are prepared to accept *some volatility* [my emphasis] in this ISA investment if that will bring with it the potential for above average returns over time…"

I do not think that the above is consistent or that it is genuinely reflective of an individual who wants to take a high risk or adventurous approach to investments.

In addition to this, the proposed course of action described in the suitability report does not align with the investments actually made. The funds never went into a cash fund and the investments made had the potential to be subject to significant volatility.

As noted in the background to this complaint Mr M's financial circumstances were described as follows:

- Annual income of £5,000
- Monthly expenditure of £1,100
- Only asset listed other than his primary residence was an ISA valued at £4,000

Taking this into account, even if I were to accept that Mr M had a high attitude to risk in respect of this investment, I do not think that Mr M had the capacity for loss to bear the risks of investing his savings in this manner.

I do not think that the course of action which Best Practice's AR undertook in respect of Mr M's ISA was suitable. For the reasons which I set out in detail above, I think that the losses Mr M suffered as a result of these investments stem from the advice given to transfer his ISA – and, based on the available evidence, that advice fell within scope of the business for which Best Practice had accepted responsibility. In turn, I think it is fair and reasonable for Best Practice to compensate Mr M in full for the financial loss he has incurred.

In addition to the financial loss which Mr M has suffered, I think that this situation – the loss of a significant amount of his savings – will have caused Mr M upset and distress. I have taken this into account in my award of compensation set out below.