complaint

Mr R complains about advice he received to switch his existing pension benefits into a self-invested personal pension (SIPP). He thinks the advice was unsuitable because it did not take into account the proposed investment which involved more risk than he was prepared to take. The pension switch advice was given by Chartered Financial Solutions Ltd an appointed representative of Intrinsic Wealth Limited.

background

I issued a provisional decision in this complaint on 21 March 2019. I explained why I thought we can consider Mr R's complaint, why it should be upheld and how things should be put right. I attach an anonymised version of my provisional decision as an annex.

Mr R agrees with my provisional decision. Intrinsic doesn't, but has nothing further to add.

my findings

I've considered all the available evidence and arguments to decide whether we have jurisdiction to consider the complaint. For the reasons set out in my provisional decision it's my finding that we can consider the complaint.

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. For the reasons set out in my provisional decision it's my finding that the complaint should be upheld and that fair compensation should be paid as set out in the provisional decision.

The compensation should be paid by Intrinsic within 28 days of it being informed of Mr R's acceptance of my decision. If it's not paid within 28 days Intrinsic is to pay interest on any part that has not been paid (including the payment for trouble and upset) at the rate of 8% simple interest a year from the date of this decision until the date of payment.

my final decision

It's my decision that we can consider this complaint, the complaint is upheld and Intrinsic Wealth Limited is to pay compensation as set out in my provisional decision and above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 28 July 2019.

Philip Roberts
ombudsman

ANNEX

complaint

Mr R complains about advice he received to switch his existing pension benefits into a self-invested personal pension (SIPP). He thinks the advice was unsuitable because it did not take into account the proposed investment which involved more risk than he was prepared to take. The pension switch advice was given by Chartered Financial Solutions Ltd an appointed representative of Intrinsic Wealth Limited.

The investment made in the SIPP has been referred to as Sustainable Agro-Energy and Carbon Credit Farming and Jatropha Green Oil. I will refer to it as the investment or the scheme.

Later the investment failed and the investment manager went into administration. As I understand it, the investment is now worthless and Mr R has lost nearly all the money transferred into his SIPP.

background

The events in this complaint occurred in 2009-2010. At the time Mr R was earning about £20,000 a year gross. He did not have an occupational pension although he worked for a large employer with a pension scheme. He did have two personal pension plans. Their transfer values were about £40,000 for one policy and around £4,000 for the other. They were invested in the with-profits fund.

Mr R was in his mid-forties. He had some investment experience. He had some money in a cash ISA and he had some shares worth about £2,000. Mr R also owned two buy to let properties as well as his own home. All three were mortgaged.

Mr R also had a recent experience buying shares from what sounds like a boiler room. The shares turned out to be worthless. Mr R said of this experience:

> *"This had been a lesson I learnt the hard way."*

Mr R has described the events leading up to the pension transfer in 2010 as follows:

> *"Mr [A] called me on numerous occasions during the latter part of 2009 and into 2010… It was after that when I made the decision to invest in the Sustainable Growth Fund.*
>
> *Mr [A] recommended the product to me, and explained the following to me. I would own a plot of land together with a number of palm oil bearing Jatropha trees that would yield an increasing return year on year ie as the trees matured they would produce more oil. The Jatropha tree was an extremely hardy tree able to survive harsh conditions including drought, so was ideal for this purpose. Mr [A] explained that it was a safe investment, ideal for pensions, and that each investor could let their fund grow or could withdraw a dividend each year as an income. Returns during years 0-3 would be modest, but after 3 years would be very good.*
>
> *I had no idea that I could even transfer a pension fund until Mr [A] contacted me, and I had no idea how he got my contact details.*
>
> *My … Pension was a steady investment, and thoughts of a greater return on a safe investment seemed a very good idea, that was the motivation for switching pensions. If I had had any inkling that the Sustainable Growth Fund was in the slightest bit risky, I would never have invested and sacrificed my … Pension which I had built up slowly over nearly thirty years.*
>
> *Once I had agreed to go ahead with the investment, Chartered Financial Solutions Ltd wrote to me explaining that I had to complete and return two discharge forms from [my existing*

pension provider], as well as signing and returning other forms that were enclosed. Chartered Financial would then forward all the documents to the Providers."

Intrinsic have provided some documents from that time. They include:

1. An undated file note.
2. A completed attitude to risk questionnaire.
3. A Lifetime SIPP illustration dated 1 February 2010.
4. A Lifetime SIPP application form dated 18 February 2010.
5. A Lifetime SIPP illustration dated 22 February 2010.
6. A recommendation letter dated 22 February 2010.
7. A financial planning report dated 22 February 2010.

The letter dated 22 February 2010 was from [an adviser with] Chartered Financial Solutions Ltd. At that time it was an appointed representative of Intrinsic. Before that it had been an appointed representative of a different network, Mint Financial, that was taken over by Intrinsic 2008.

The recommendation letter includes:

"Thank you for allowing me to review your financial details. The purpose of our meeting was to discuss transferring your existing pension into a SIPP as you want to invest in a specific investment within that SIPP. At this time you only require advice on the SIPP provider and not the investment within the SIPP you intend to make…

Following our discussion I have recommended the solution detailed below, based on affordability and your stated attitude to risk of balanced. This meets your objectives by arranging for the transfer of your pension into a SIPP to enable you to make the investment you wish when the transfer is complete. You have accepted my recommendation in full."

The file note includes the following:

"[Mr R] is interested in certain funds to invest in within his pension. To do this he needs to transfer to a SIPP and he asked me to facilitate this for him. He does not want any advice on the funds.

…He has three properties, one which is the old marital home and is being sold at present and two buy to let properties which he will keep.

… [Mr R] has never joined [his employer's] pension even though he could have gone into the Final Salary scheme up until 2002. The scheme is now a stakeholder which the company will pay 6% and the employee pay 4%, 5% or 6% of salary. I discussed this with him and at the start he said he was just disillusioned with pensions in general and that's why he never joined, but he did say he would look again at joining now.

[Mr R] sees his properties as the main part of his retirement income and these may be added to in the future when the credit situation and house prices see an upturn."

The Financial Planning Report includes the following:

"Your employer offers a Money Purchase scheme but although you have been in their employment for 10 years you have never joined. I would advise you to join this scheme as your employer will also contribute and there is valuable Death in Service benefits as well of four times income.

You currently have two pensions …l, details of which are set out below. You want to take control of your pensions yourself and 'self-invest' your funds. To enable you to do this you want to transfer the funds to a SIPP.

…We believe it is our duty to provide you with advice on every aspect of your financial affairs. However, you have requested that I limit my advice to the area of your pension.

- *Providing or increasing retirement income*

Having discussed these areas you have confirmed that your priorities are the following:

- *Providing or increasing retirement income*

You have stated that your attitude to risk is balanced growth, and therefore your objective is to achieve a return using a portfolio with higher equity content and a wider geographical spread whilst aiming for consistent longer term capital appreciation. Investment will be predominantly in the UK and overseas equities with an element of investment in fixed interest and property in order to provide growth orientated diversification confined with a moderate/higher level of volatility. A level of predominantly dividend income is achievable.

To fulfil your requirements to be able to self-invest your pension funds into 'Green Oil' funds I am recommending you transfer your Personal Pension policies over to The Lifetime SIPP in order for you to make the investment of your choice.

I have researched the market using Synaptics and O&M Pension Profiler looking for a suitable SIPP provider who will accept these particular investments you want to make within your SIPP. The Lifetime SIPP are at present, the only SIPP provider that will accept this investment, therefore for you to invest in your chosen funds. The Lifetime SIPP can be the only route we can take to facilitate this.

As you are picking the funds yourself you do not want any advice as to the suitability, or otherwise of the investment and I am not offering any advice as regards these funds.

… Although the … With Profit fund has performed reasonably well over recent years, the asset allocation with the fund does not match your attitude to risk as the equity content is lower than it should be for someone with your risk profile. You also should be aware that if you invest in a single asset class you will probably [be] adding extra risk to your funds that [sic] your risk profile says you should have.

…As a result of my recommendation you are transferring your existing pension to enable you to invest in the funds of your choice.

- *The advantages of this are you will be able to invest in the fund of your choice for the potential of greater growth. By transferring you are also crystallising the terminal bonus payable on your two pension plans at present.*
- *The disadvantages are, the Lifetime SIPP is more expensive than your current pension plans and if you do invest in the fund of your choice, a single asset class investment carries a much higher degree of risk than a portfolio of investments because there is no spread of risk you are reliant on one asset to perform well…"*

The SIPP was opened in February 2010 and the switch from [the existing pensions] was completed in March 2010. The transfer value received … was about £46,000, and about £43,000 of Mr R's pension fund was invested in an unregulated non-mainstream investment - the scheme - shortly afterwards in April 2010.

A statement of account provided by the SIPP administrator shows fees of £920.85 were paid to Chartered Financial on 16 April 2010.

The SIPP provider has since provided evidence … to show that the payment was made to Mint Financial (which at the time of the payment had been taken over by Intrinsic) rather than direct to

Chartered Financial. Intrinsic says it is not able to trace the payment because of *"changes in IT infrastructure and procedure".*

Intrinsic says Chartered Financial was its appointed representative but it was not permitted to advise on unregulated investments such as the fund in which Mr R invested and lost money. If the appointed representative was involved it would have been as agent or introducer of the fund and not as its appointed representative. It says no advice was given on its behalf and Intrinsic has no liability in this matter.

Mr R's complaint was investigated by one of our adjudicators. He didn't think the Financial Ombudsman Service could consider the merits of the complaint. He said:

- For a complaint to fall under the compulsory jurisdiction of the Financial Ombudsman Service, which is set out in the Regulator's Dispute Resolution (DISP) handbook, two conditions must be satisfied:

  1) the act or omission complained about must have occurred in the carrying on of an activity covered by the compulsory jurisdiction (DISP 2.3.1R) and
  2) the act or omission must be that of the firm complained about (DISP 2.3.3G)

- Advising on switching out of, and transferring into, personal pension schemes (including SIPPs) is a regulated activity. In this case there is no question that advice *was* provided – a suitability letter was sent by Chartered Financial to Mr R and this clearly shows that a personal recommendation was made.

- But the advice wasn't an activity for which Intrinsic accepted responsibility. The scope of activities for which Intrinsic accepts responsibility is set out in the Appointed Representative Agreement and Intrinsic's Compliance Manual referred to in that agreement.

- Section 9 of the Compliance Manual explains that in order to be permitted to provide pension transfer or switch advice the member must have passed Intrinsic's internal knowledge test.

- The new SIPP was set up in February 2010 therefore the advice must have been provided before this. However Intrinsic has provided evidence that the adviser didn't pass its internal knowledge test until May 2010.

- Because the adviser didn't hold the required internal knowledge qualification at the time the advice was given, he was acting outside of the terms of the Appointed Representative Agreement. As a result the advice did not fall within the scope of permissions for which Intrinsic accepted responsibility, therefore DISP 2.3.3G cannot be satisfied.

- The new SIPP provider has provided evidence that Intrinsic received commission for the advice. Intrinsic failed to identify that this related to advice which had not been approved by its internal Compliance Department. Accordingly it agreed to refund the £920.85 commission.

Mr R's representatives didn't agree. In response, they said:

- By interpreting the rules in the way he has, the adjudicator has put Mr R in the position where he has no regulated protection.

- Mr R wouldn't know what permissions the adviser had. As far as he was aware, the adviser was authorised to and permitted to give advice. It's not something he would have checked.

- Principals are liable for the activities of appointed representatives. If there's been activity by an appointed representative that is outside the scope of their agreement, the principal is still liable for any loss caused to a consumer. In turn, the principal can then recover these monies from the appointed representative as a breach of contract. This is well-established law.

- A principal's core responsibility is derived from section 39 (3) of The Financial Markets and Services Act 2000 (FSMA). This states:

  "The principal of an appointed representative is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility."

- The findings in the legal case of *Martin* & *Another v Britannia Life Ltd [1991] All ER (D) 149* support its view that Intrinsic is liable.

- It's wrong to suggest that a failure by an appointed representative to use approved methods, and/or use methods expressly prohibited, will mean that the principal is not liable. This is an artificial distinction as it has no bearing on causation.

- This service has acknowledged in previous cases that a principal was still liable even if it expressly prohibited business being placed with institutions with which it doesn't hold an agency. There's no reason to depart from this position.

- It's well established that a principal will always be liable for the acts of its appointed representative, despite the acts being expressly prohibited. If there's an issue with the appointed representative acting outside the scope of its authority, this is a private dispute between the principal and the appointed representative. It wouldn't be fair or reasonable to deny Mr R his right of action because of this.

- Intrinsic received commission for the transfer, which means a contract exists between Mr R, Intrinsic and its appointed representative.

my provisional findings - jurisdiction

I have considered all the evidence and arguments, in order to decide whether this service can consider Mr R's complaint.

some preliminary points 1: the basis for deciding jurisdiction:

I must decide whether we have jurisdiction to consider this complaint on the basis of our jurisdiction rules, including the relevant law they are based on or incorporate, based on the relevant facts of the complaint which I must decide on the balance of probability when in dispute.

I cannot decide the issue on the basis of what I consider to be fair and reasonable in all the circumstances. That is the basis on which the merits of complaint will be determined if we have jurisdiction to consider it.

some preliminary points 2: authorised and exempt persons:

S.19 FSMA prohibits a person from carrying on a *"regulated activity"* unless he is *"an authorised person"* or *"an exempt person".*

Intrinsic was an authorised person. Chartered Financial was not. At the time of the event in this complaint s.39(1) and (3) created an exemption from s.19 for *"appointed representatives"* in these terms:

> *"(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…

(2) A person who is exempt as a result of subsection (1) is referred to in this Act as an appointed representative.

(3) 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."

Intrinsic had such an agreement with Chartered Financial. I will refer it as the s.39 Agreement.

The Financial Ombudsman Service can deal with certain complaints against Intrinsic as a regulated firm/authorised person. That may include complaints about the acts or omissions of its appointed representatives. That is why this complaint is against Intrinsic rather than Chartered Financial.

In 2010 the financial services regulator in the UK was the Financial Services Authority. In 2013 it was replaced by the Financial Conduct Authority. For convenience I will just refer to the FCA, or the regulator, throughout.

Intrinsic's position:

Intrinsic has made a number of points in response to the complaint and in relation to jurisdiction, including the following:

- Chartered Financial did not give any advice in relation to the investment fund which is the primary subject of the complaint.

- Under the s.39 agreement with Chartered Financial:
    - Chartered Financial was not permitted to advise on unregulated collective investment schemes such as the fund Mr R invested in with his SIPP.
    - Chartered Financial could only advise on approved investments and neither the existing pensions nor the Lifetime SIPP were on its approved list.
    - Advice to switch pensions had to be approved by Intrinsic before the advice given to the client and it was not approved by Intrinsic in this case.
    - Advice to switch pensions could only be given by an adviser who had passed Intrinsic's internal exam relating to pensions transfers and switches. The adviser in this case had not passed that exam at the time of the advice.

So in short Intrinsic says it did not, and does not, accept responsibility for the advice about which Mr R complains and the ombudsman service does not have jurisdiction over the complaint.

what is the complaint?

In order to decide whether we can or cannot consider a complaint it is necessary first to decide what the complaint is.

Mr R is represented by solicitors. They wrote to Chartered Financial on 29 April 2013. That letter included:

"We act for the above person who received advice from your firm to transfer their pension fund into a SIPP and then into investments provided by Sustainable Growth Group (SGG).
…

> *Our client was advised by you to transfer their pension savings into a SIPP. Your adviser was fully aware that out client was considering investing in SGG once the pension transfer to SIPP was complete. Indeed, the whole process was directed to that end…"*

On 4 October 2013 the solicitors wrote to the ombudsman service. That letter included:

> *"Our complaint relates to advice provided to our client by the regulated firm. The firm provided regulated advice in relation to the transfer of a pension to a SIPP. The only reason for the creation of the SIPP was to facilitate investment into unregulated products offered by the Sustainable Growth Group ("SGG").*
>
> *The client was introduced to the firm in full knowledge that the sole purpose of the transfer was to invest into SGG.*
>
> *The FSA in their update of the 18th January 2013 (as set out in our complaint letter) made it very clear that they expected firm [sic] to consider the risk of the product they were transferring to a SIPP to invest into…"*

It is therefore clear that the complaint does not relate to the suitability of the investment fund alone. The complaint is about the suitability of the advice to transfer to a SIPP in order to invest in the scheme.

It is also clear from various documents I have quoted above that Chartered Financial did advise Mr R to transfer his existing … pensions to a SIPP. It is also clear that the transfer from the existing pensions to the SIPP and the investment in the fund were closely related – that the first part of that overall arrangement was recommended to allow the second part to take place.

can we consider a complaint about that advice?

the compulsory jurisdiction:

This type of complaint, if we can consider it, comes within our compulsory jurisdiction.

Under s.226 FSMA:

- A complaint which relates to an act or omission of a person (the respondent) in carrying on an activity to which the compulsory jurisdiction applies is to be dealt with under the ombudsman scheme set up under the Act (ie the Financial Ombudsman Service) if the following conditions are satisfied:
    - the complainant is eligible and wishes to have the complaint dealt with under the scheme
    - the respondent was an authorised person at the time of the act or omission to which the complaint relates
    - the act or omission occurred when the compulsory jurisdiction rules were in force in relation to the activity in question.
- "Compulsory jurisdiction rules" means rules made by the FCA specifying the activities to which they apply

Intrinsic (the respondent in this complaint) is an authorised person and was at the time of the events to which this complaint relates.

It is not disputed that Mr R is an eligible complainant and he wishes to have his complaint dealt with by the Financial Ombudsman Service.

The compulsory jurisdiction rules are set out in the DISP section of the FCA rule book. And the compulsory jurisdiction rules/DISP rules applied to the type of activity complained about in this case at the time of those events. I will consider whether they cover the facts of this particular complaint further below.

what do the DISP rules cover in general terms?

In general terms the DISP rules lead to a number of jurisdiction tests all of which must be satisfied. Those tests, in broad terms, are:

- do we have jurisdiction over the respondent firm?
- does the complaint relate to an activity we cover?
- is the complainant eligible?
- do we have territorial jurisdiction?
- are the time limit rules complied with?

The tests are inter-related to a degree. I will deal with each of them. Is convenient to deal with the second point first.

what do the DISP rules cover – regulated activities:

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*".

The guidance at DISP 2.3.3G 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)*".

As mentioned above, 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".*

DISP2 also contains the following guidance:

2.1.4.1G interprets "carrying on an activity" as including:

> *"(1) offering, providing or failing to provide a service in relation to an activity;*
>
> *(2) administering or failing to administer a service in relation to an activity;"*

2.3.3G interprets "complaints" in this way:

> "*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)."

is this a complaint that relates to an act or omission when carrying on a regulated activity?

S.22 FSMA defines "regulated activities" as follows:

> *"(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). Article 4 provides:

> *"4. – Specified activities: general*
>
> *(1) The following provisions of this Part specify kinds of activity for the purposes of section 22(1) of the Act (and accordingly any activity of one of those kinds, which is carried on by way of business and relates to an investment of a kind specified by any provision of Part III and applicable to that activity, is regulated activity for the purposes of the Act)."*

The rights under a personal pension scheme (which includes Mr R's [existing] pensions and his SIPP) are specified as investments by a provision in Part III (Article 82). So are the units in a collective investment scheme (Article 81).

Advising on investments is a specified activity under Part II (Article 53). So is arranging deals in investments (Article 25). And so is agreeing to advise on investments or arrange deals in investments (Article 64).

It is not necessary to deal with the finer detail of any of these investments or activities at this stage. It is enough to say I am satisfied that Mr R's complaint about Chartered Financial's advice to transfer personal pensions … to a SIPP is a complaint that relates to an act or omission in carrying on a regulated activity (that is the regulated activity of advising on investments and/or arranging deals in investments and/or agreeing to carrying on those activities).

is the complaint against a firm that is subject to our jurisdiction?

Intrinsic is subject to our jurisdiction. It is, and was at the time of the events complained about, authorised by the regulator. According to the FCA register Intrinsic currently has permission to:

- advise on investments
- advise on pension transfers and opt outs
- arrange/bringing about deals in investments
- agree to carry on regulated activities.

So far as I am aware Intrinsic had the same permission at the time of the events in this complaint. So the activities the complaints relate to were activities that came within the scope of Intrinsic's authorisation from the regulator.

But Intrinsic's point is that Chartered Financial was acting outside the scope of the s.39 Agreement meaning it had not accepted responsibility for the advice. Put another way Intrinsic is saying Chartered Financial was not acting for it when the advice was given. So it says it is not subject to our jurisdiction in relation to this complaint.

This is the point at the heart of this jurisdiction dispute. Was Chartered Financial acting in its capacity as Intrinsic's appointed representative when it gave the disputed advice? The issues are involved. I

will set out my view on this issue step by step.

is Intrinsic responsible for the acts and omissions the complaint is about?

As mentioned above, the guidance at DISP 2.3.3G 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)"*.

So a principal is answerable for complaints about the acts or omissions of its appointed representative in relation to the business it has accepted responsibility for.

Appointed representatives are not employees of the principal firm. They are independent and might not act only for the principal firm. Sometimes those who operate as appointed representatives operate other businesses also. So sometimes it is clear that a person who happens to be an appointed representative does something on his own account (or in some other capacity) rather than as business for the principal.

So in the case of *Emmanuel v DBS Management Plc* [1999] Lloyd's Re P.N 593 a principal (under [the similar provision in the predecessor Act,] s.44 Financial Services Act 1986) was held not to be liable for activities that were held to be outside the scope of the business the principal had accepted responsibility for. In that case the claimant had been advised to subscribe for shares in and lend money to the appointed representative itself.

Another example is in the case of *Frederick v Positive Solutions* [2018] EWCA Civ 431. That case concerns agency rather than s.39 appointed representative issues. Nevertheless the case gives an example of a person having a connection with a regulated business and doing something on their own account. In that case the person who was an agent for Positive Solutions (for some purposes) was held to be engaging in a *"recognisably independent business of his own"* – a property investment scheme.

In this case the allegation is that Chartered Financial gave advice to transfer personal pensions to a SIPP to invest in a UCIS investment with a third party. That advice was clearly documented on Chartered Financial's note paper. There is no suggestion that this was business that was recognisably business of the adviser's own.

The facts of the case mean this is not a case where the act or omission was *clearly* an act by a person who happens to be an appointed representative but who was acting in some other capacity. But that does not mean the appointed representative was definitely carrying on business Intrinsic had accepted responsibility for. I have to look at it more closely.

what does "accepted responsibility" mean here?

It is important to keep in mind here that I am talking about appointed representatives acting in their capacity as appointed representatives. So I am discussing a creation of statute not common law agency.

I note the following comments made by the courts:

Page v Champion Financial Management Limited [2014] EWHC 1778, Mr Simon Picken QC sitting as a Deputy Judge of the High Court said:

> *"12…at the hearing before me [counsel] confirmed that he was not seeking to argue that Section 39(3) gives rise to vicarious liability in the strict (legal) sense. This was a sensible concession since it is clear that Section 39(3) does not entail the imposition of vicarious*

> liability: see, by way of illustration, *Jackson & Powell on Professional Liability* (7th Ed) at paragraph 14-017."

In *Ovcharenko v Investuk* Ltd [2017] EWHC 2114, HHJ Waksman QC said:

> *"49 … Section 39(3) renders an entirely separate statutory liability and has nothing to do, on the face of it, with the law of agency. It does not require an agency to be proved before it can be activated…"*

In that case the judge did also make clear that there might also be an agency relationship between the principal and the appointed representative depending on the facts of the case. However for present purposes it is important to concentrate on the precise terms and scope of the appointed representative status rather than common law agency principles.

As mentioned above, at the relevant time s.39 said:

> *"(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 <u>prescribed</u> description, and*
> *(ii) complies with such requirements as may be <u>prescribed</u>, and*
>
> *(b) is someone for whose activities in carrying on the whole <u>or part of that</u> 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 <u>that business</u> for which his principal has accepted responsibility…*
>
> *(3) 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."* (my emphasis)

So under s.39 the principal (Intrinsic) is required to accept responsibly for "that business" which is a reference back to *"business of a prescribed description"*.

However the case *Anderson v Sense Network* [2018] EWHC 2834 makes it clear that the words *"part of"* in s.39 allow a principal firm to accept responsibility for only part of the generic *"business of a prescribed description".*

I will first deal with the meaning "prescribed business" and before dealing with the *"part of"* point

what does prescribed mean here?

The interpretation section, s. 417 FSMA, says that where not otherwise defined, "prescribed" means prescribed in regulations made by the Treasury. Such regulations have been made – the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001 (as amended from time to time). Regulation 2 covers descriptions of business for which appointed representatives are exempt.

what was prescribed business at the relevant time?

The advice in this case was in February 2010.

At that time the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001 said:

> *"2. Descriptions of business for which appointed representatives are exempt*

…

(a) an activity of the kind specified by article 25 [of the RAO] (arranging deals in investments) where the arrangements are for or with a view to transactions relating to securities or relevant investment.

(b) …

(c) an activity of the kind specified by article 53 of that Order (advising on investments)

(d) an activity of the kind specified by article 64 of that Order (agreeing to carry on activities), so far as relevant to an activity falling within subsection…(a) [or] (c)

…is prescribed for the purposes of subsection (1)(a)(i) of section 39 of the Act (exemption of appointed representatives)."

So *"prescribed business"* is business which is defined at a high level. It means business in the sense of certain regulated activities. It does not mean business in any greater level or particularity. So it does not mean business in the sense of an individual transaction.

So in this case it means, say, advising on investments (under article 53 RAO). It does not mean advising Mr R on his particular investments.

As I have said, Intrinsic was authorised to carry out the above regulated activities in this case.

what was the prescribed business Intrinsic accepted responsibility for in this case?

The s 39 Agreement between Intrinsic and Charter Financial expressly incorporated the Compliance Manual. The agreement itself said

> *"4.1 The member is an Appointed Representative of Intrinsic for the purpose only of carrying on the Business."*

Business was defined as:

> *"the business of acting as an Appointed Representative of Intrinsic on the terms set out in this Agreement."*

The Compliance Manual was more helpful on this point. It included:

> *"the regulated activities for which Intrinsic have approval are as follows:*
>
> *a) arranging (bringing about) deals in;*
> *b) making arrangements with a view to transactions in;*
> *c) advising on; or*
> *d) agreeing to carry on a regulated activity in (a) – (c)*
>
> *in relation to designated investments, mortgages, pure protection and mortgage-related general insurance*
>
> *As appointed representatives of Intrinsic, members can therefore carry out those activities detailed above (dependent on any restrictions inherent in your contract), these are referred to as the 'Scope of Permissions' "*

So the prescribed business Intrinsic permitted Chartered Financial to carry on was arranging deals, advising on investments (and mortgages but that is not relevant here) and agreeing to arrange deals and advise on investments. Intrinsic accepted responsibility for that business as follows:

> *"6. INTRINSIC'S OBLIGATIONS*
> *Intrinsic agrees with the Member:*
>
> *6.1 Responsibility*

To accept regulatory responsibility for such activities of the Member as may be from time to time expressly authorised under the terms of this Agreement as required by Section 39 of the Act."

So in this case Intrinsic did authorise Chartered Financial to advise on investments, arrange deals in investments and agree to do both. This was the (relevant) prescribed business Intrinsic authorised Chartered Financial to carry on and agreed to accept responsibility for.

But as I have said above, Intrinsic says it put limits on the business it accepts responsibly for. In effect it says it authorises investment advice – but only if certain conditions are met, such as the adviser passing a relevant exam, or the investment being on its approved list.

what do the courts say about these types of restrictions?

In *Ovcharenko v Investuk*, HHJ Waksman said the following (where D1 was the appointed representative and D2 was the principal).

First the court set out the purpose of the statutory provision it was interpreting. The judge said:

"21 Section 39(3) then says:

(3) 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.

That, therefore, is a statutory attribution of liability against, here, D2 for the activities of D1 in the way I have described."

Then the judge said:

33 … the whole point of section 39(3) is to ensure a safeguard for clients who deal with authorised representatives but who would not otherwise be permitted to carry out regulated activities, so that they have a long stop liability target which is the party which granted permission to the authorised representative in the first place. In my judgment, section 39(3) is a clear and separate statutory route to liability. It does no more and no less than enable the claimant, without law, to render the second defendant liable where there have been defaults on the part of the authorised representative in the carrying out of the business and which responsibility had been accepted…

34 …[counsel for D2] has relied upon certain other provisions within the authorised representative agreement. … He relies on paragraph 4.3 which is simply a promise by D1 to D2 that it will not do anything outside clause 3….

35 All that does is regulate the position inter se *between D1 and D2. It says nothing about the scope of the liability of D2 to the claimants under section 39(3). The same point can be made in respect of clause 4.7 which says, "The representative will not carry out any activity in breach of section 19 of FSMA* [sic – this should be s.39 as per the quote from clause 4.7 in paragraph 9 of the judgment and the following description of the clause] *which limits the activities that can be undertaken or of any other applicable law or regulation". Again, that is a promise made* inter se.

36 The reason for those promises is obvious. D2 will be, as it were, on the hook to the claimants as in respect of the defaults of D1 and if those defaults have arisen because D1 has exceeded what it was entitled to do or has broken the law in any way, then that gives a right of recourse which sounds in damages on the part of D2 against D1. If [Counsel for D2] *was correct, it would follow that any time there was any default on the part of an authorised representative, for example, by being in breach of COBS, that very default will automatically take the authorised representative not only outside the scope of the authorised representative*

> *agreement but will take D2 outside the scope of section 39(3) , in which case its purpose as a failsafe protection for the client will be rendered nugatory; that is an impossible construction and I reject it."*

The judge in *TenetConnect v Financial Ombudsman Service* [2018] EWHC 459 (Admin) agreed with the above. In that case the network principal had argued that it was not responsible for advice to invest in an investment in which it did not authorise the appointed representative to deal. The judge said:

> *"…the decisions in Martin v Britannia and in Ovcharenko are clearly against* [Counsel for TenetConnect]*. The fact that [the appointed representative] had no actual authority, express or implied, to act as he did on Tenet's behalf, nor was he held out by Tenet as having such authority, does not answer the s.39(3) issue."*

So it is clear that the courts think that at least some conditions on the authority given to an appointed representative in a s.39 agreement only apply as between the parties.

Does that mean all terms in the contract apply in that way? The answer to that question is no because of the words part of in s.39.

what about the "part of" point?

None of the cases I referred to above dealt with this point. But it was dealt with in the most recent case on the subject *Anderson v Sense Network* [2018] EWHC 2834. In that case the judge, Mr Justice Jacobs, said:

> *"133. …There is no indication in the wording of section 39, or in the case-law, that indicates that the business for which responsibility is accepted is to be determined not by reference to the contract, but by reference to the authorisations granted to the principal which are to be found in the Financial Services register…*
>
> *136. I agree with the Claimants that liability under section 39 (and its predecessor) cannot simply be answered by asking whether a particular transaction was within the scope of the AR's actual authority…*
>
> *137. In Ovcharenko, HHJ Waksman QC considered the scope of Clause 3.2 of the AR agreement in that case, and went on to hold that the relevant investment advice was "firmly encompassed by the permitted services in the authorised representative agreement": see paragraph [32]. He said that the "business for which responsibility had been accepted encompasses the services set out in Clause 3 of the authorised representative agreement". Thus, section 39 was engaged notwithstanding other provisions of the AR agreement which imposed obligations or restrictions upon the AR; specifically, not to offer inducements, and an obligation not to do anything outside clause 3. The judge considered that these restrictions were matters which applied between the principal and the AR inter se, and did not affect liability under s.39.*
>
> *138. Most recently, in TenetConnect, Ouseley J applied the decisions in both Martin and Ovcharenko, in circumstances where it was common ground that liability under s.39 "was not to be determined as a matter of the contractual law of agency": see paragraph [61]. The basis of the decision in TenetConnect was that the relevant advice on "unregulated" investments was sufficiently closely linked to the advice on regulated investments, which the AR was authorised to give. The case therefore again supports the proposition that in ascertaining the scope of section 39, and the question of the business for which the principal has accepted responsibility, it is relevant to consider the terms of agreement between the principal and the AR. It is implicit in the decision that if the advice on the unregulated investments had not been sufficiently closely linked to advice which the AR was authorised to give, then there would have been no liability under section 39.*

139. I also agree with the Claimants that the authorities indicate that it is appropriate to take a broad approach when seeking to identify the "business for which he has accepted responsibility". The fact that there may not be actual authority for a particular transaction, for example because of breach of an obligation not to offer an inducement (Ovcharenko), or because there was no authority to advise on a related transaction (TenetConnect), or because certain duties needed to be fulfilled before a product was offered, does not mean that the transaction in question falls outside the scope of the relevant "business" for which responsibility is taken. Equally, the approach must not be so broad that it becomes divorced from the terms of the very AR agreement relied upon in support of the case that the principal has accepted responsibility for the business in question.

140. In the present case, I agree with Sense that the scheme, and advice in connection with that scheme, were well beyond the scope of the "business" for which Sense accepted responsibility pursuant to the AR agreement. It is beyond serious argument that the activities of MFSS … in relation to the scheme, both in terms of operating it and advising upon it, were wholly unauthorised. It is no part of the ordinary business of a financial adviser to operate a scheme for taking deposits from clients. …"

what does all this mean?

All this means a principal is responsible for the acts and omissions of an appointed representative acting within their actual authority. It also means that sometimes a principal is responsible when the appointed representative acts beyond their actual authority. And sometimes a principal is not responsible when the appointed representative acts beyond their actual authority. And the test in the *Anderson v Sense Network* judgment is that the principal is responsible when the act or omission is sufficiently closely linked to the activities for which the actual authority was given.

my view about the restrictions in the appointed representative agreement in this case:

exclusion of UCIS advice

The Compliance Manual says advising on UCIS is a specialist activity and outside the appointed representatives' scope of permission.

I do not however need to consider whether or not giving advice on UCIS is sufficiently closely linked to the activities for which authority was given. This is because the complaint is not about UCIS advice. The complaint is about advice to take out a SIPP to replace existing personal pensions in order to make the UCIS investment. This advice is not caught by this exclusion in the s.39 agreement relating to UCIS advice.

exclusion of non-advised business

The Compliance Manual also says that Intrinsic believes advice is always necessary and that its sales process has been developed bearing that in mind. It goes on to say although there is scope within the regulator's rules to operate certain non-advised processes Intrinsic has chosen not to take advantage of this.

Again this restriction is not relevant as the complaint relates to the pension advice rather than to the UCIS which the adviser said he was not advising on.

pre-approval for insistent client transactions:

According to Intrinsic's Compliance Manual insistent client transactions are those where an adviser has presented a particular recommendation to a customer which the customer refuses to accept and requires the adviser to find another alternative course of action. It is where the client is acting against the adviser's advice.

Intrinsic has a process under which the adviser is required to obtain written approval from Intrinsic's Compliance Department before the adviser may proceed with the transaction.

In this case the recommendation letter records a situation where Mr R had plans to invest in the UCIS scheme and only wanted Intrinsic to deal with the pension switch. So in a sense Mr R might be said to be an insistent client since he apparently came to Intrinsic with a plan he wanted to a carry out. But this was not an insistent client transaction in the sense referred to in the Compliance Manual. The adviser did not advise Mr R against the course he wanted to take. Rather the adviser said he would not advise on the investment he wanted to make. Mr R did not therefore insist on acting against the adviser's advice.

As this was not an insistent client transaction the requirement for preapproval was not triggered. And the adviser did not therefore act contrary to his authority from Intrinsic in breach of this requirement.

special process for replacement business

Intrinsic's Compliance Manual includes a special process for replacement business. Intrinsic classifies replacement business as when an adviser recommends that a customer replaces an existing contract with a new one. The Compliance Manual says it is essential that for all replacement business the following principles are followed by the adviser:

- *"Research the exiting policy and fully understand the features and options available.*
- *Carefully compare the features, options and charges of both policies.*
- *Fully explain and record all negative aspects of the replacement to the client.*
- *Ensure all the disadvantages as well as the advantages are fully explained in the reason for recommendation letter and explain what factors made you decide that the replacement was in the client's best interests."*

The Compliance Manual goes on to say:

> *"Some customers may have a pre-conceived idea about what they want to do and it is easy for the adviser to allow these cases to become customer driven. However, the Financial Ombudsman Service (FOS) takes a dim view of these cases. Their view is often that unless the customer has been specifically advised not to do something, then the advisers input is viewed as being a recommendation.*
>
> *This means that you need to be clear about what the most suitable course of action is. The reason for recommendation needs to be absolutely clear about what was advised, irrespective of whether the customer intends to follow that advice."*

In this case Intrinsic recommended moving Mr R's existing pensions … to a SIPP with Lifetime SIPP. Put another way Intrinsic recommended the replacement of two existing policies with another. The replacement business process should therefore have been used. In my view it is arguable that the standard required by the Compliance Manual was not reached because:

- It is not clear the existing policies were researched fully.
- The features of the existing policies were not fully and clearly analysed and recorded in the recommendation report in particular the existing investment options were not fully and clearly considered.
- Nor were the existing charges analysed and compared to the charges of the SIPP.

If the adviser failed to meet the standard required in the Compliance Manual would this mean the adviser acted contrary to his authority and that Intrinsic was not responsible for the advice?

In my view the answer to this question ought to be self-evident. Can a principal really only be responsible for advice if it achieves a certain quality and is presented a certain format? This seems contrary to the purpose of s.39 and wrong.

If the adviser is authorised to give advice about SIPPs it follows that he will need to be able to consider and advise upon the advantages and disadvantages of the client's existing pension provision if he has any. Requiring the adviser to document that advice in a certain way is so closely related to the activities for which permission is given that a breach of such a requirement is only an "*inter se*" matter. It applies only as between the principal and the appointed representative. It does not mean the appointed representative acts outside the scope of his authority.

This type of restriction - as it apples in this case – is either an example of "*certain duties needed to be fulfilled before a product was offered"* as referred to *Anderson v Sense Network*. Or it is closely analogous to such duties. In either event as explained in the *Anderson* case a breach of that procedural requirement "*does not mean that the transaction in question falls outside the scope of the relevant "business" for which responsibility is taken".*

So *if* the adviser breached the requirements in the Compliance Manual relating to the process for replacement business in my view this factor does not mean Intrinsic is not responsible for the advice given.

pre-approval of pension switching advice

Intrinsic has argued that its Compliance Manual includes a requirement for preapproval of pension switching advice. I cannot however find that requirement.

If there is such a requirement and if it was in a similar form to the requirement to get preapproval for insistent client business, my view is that such a restriction is similar in nature and effect to the restriction relating to the procedural requirements for replacement business.

It is therefore my present view that if there is such restriction a breach of it in this case does not mean Intrinsic is not responsible for the advice given.

special requirements for "pension transfers"

The Intrinsic Compliance Manual says that *"pension switching"* should be treated in the same way as *"pension transfers"*. Advice to move from a personal pension to a SIPP is a pension switch according to the regulator's rules. If the advice is to transfer from an occupational pension to a SIPP, that's a *pension transfer* according to regulator's rules. But according to Intrinsic's Compliance Manual both should be treated as pension transfers.

In the Compliance Manual the adviser is required to pass Intrinsic's pensions transfer test before advising on (what Intrinsic calls) pension transfers.

Intrinsic has also provided evidence from its records that appears to show that the adviser was permitted to give pension transfer advice by Mint Financial before it was taken over by Intrinsic. But Intrinsic has also provided evidence to show that the adviser in this case had not passed Intrinsic's exam until May 2010. And the advice to Mr R was in February 2010 ie before he had permission from Intrinsic to give advice on its behalf on what it calls pension transfers.

It is the case that advice to transfer from an occupational pension to a personal pension must be given by or approved by a qualified pensions transfer specialist under the regulator's rules. That

requirement does not however cover pension switching. There is no regulatory requirement for such advice to be given or approved only by a suitably qualified specialist.

In this case the adviser gave what was clearly pension switching advice which he recorded on Chartered Financial note paper. And Intrinsic has said that he uploaded that advice letter/report to Intrinsic's computer system. He did not in any way try to conceal that advice.

It is therefore my view that the giving of the pension switching advice in breach of the requirement to have passed Intrinsic's internal test does not mean Intrinsic is not responsible for the advice given. In my view the requirement – at least as regards pension switching – was like the other procedural restrictions referred to above.

advice restricted to approved products

The Intrinsic Compliance Manual includes the following:

> *"All firms regulated by FSA entered the 'depolarised regime' on 1 June 2005. As an appointed representative of Intrinsic you will be restricted to the distribution channels and product ranges chosen by Intrinsic.*
>
> *Intrinsic has chosen to offer the products from a limited number of companies in respect of Designated Investment business, commonly referred to as Multi-tie…"*

The first three sections of the s.39 agreement deal with:

- the commencement date and the identity of the parties.
- A short section saying the agreement incorporates various other documents including the Compliance Manual.
- an interpretation section.

Section 4 is the appointment section. It says:

> *"4.1 The Member is an Appointed Representative of Intrinsic for the purposes of carrying on the Business.*
>
> *4.2 The Member is not permitted to represent other counterparties or to carry on any other Regulated Activity or to promote, sell or advise on any financial services or plans other that the Plans without the express written consent of Intrinsic, except the Member may make introductions to Independent Financial Advisers as permitted by Intrinsic from time to time."*

Business is defined as:

> *"The business of acting as an Appointed Representative of Intrinsic on the terms set out in this Agreement."*

Plan is defined as:

> *"Any policy, investment agreement, mortgage or other agreement or service specified from time to time in this Agreement."*

Intrinsic has also provided a copy of its *"key facts about our service and costs"* document from January 2010 which was normally handed to clients. It includes the following:

> *"2. Whose products do we offer?*
> *Investment*
> - *We offer products from the whole market*
> - *We can only offer products from a limited number of companies.*

Ask us for a list of the companies whose products we offer.
- *We only offer products from a single group of companies"*

The second option of a limited number of companies with a list available on request was ticked on the form.

Intrinsic says neither [Mr R's existing] personal pensions nor Lifetime SIPPs were specified under the agreement. It says they were not Plans on its approved list. And I accept that is the case.

On the face of it therefore advising on taking out of the Lifetime SIPP was not business of the type Chartered Financial was appointed to carry on. And if that is the case Intrinsic has not accepted responsibility for the advice.

However it is important not to overlook the specific facts of this case. Relevant points are:

- Chartered Financial was an appointed representative of Mint which was taken over by Intrinsic.
- The adviser was classified as a competent adviser for pension transfers by Mint.
- The adviser appears to have processed this transaction in the usual way for a Mint transaction.
- There is no evidence or suggestion that the adviser was somehow trying to bypass normal systems and controls.
- Lifetime SIPP has provided evidence to show it paid £920.85 commission to Intrinsic – or at least to an account in the name of Mint that was controlled by Intrinsic.

Intrinsic has said the following:

> *"I have checked our records and I unable to trace a payment regarding this policy. However, when The Intrinsic Group purchased Mint Financial Services, a number of its back office functions were kept which included commission payments and allocation. Unfortunately, given the different IT systems used by Intrinsic and Mint the commissions unit would not be aware of which cases had been approved by Compliance. Their sole purpose was to process the commissions. I have been informed that this process was changed in the second half of 2010.*
>
> *Regardless of our process at the time, the fact remains that [the adviser] was not authorised to carry out the pension transfer at the time as confirmed in the membership agreement and compliance manual."*

I note that Intrinsic do not deny receiving the payment – only that it can't now trace it. I note that the *"remittance advice"* evidence is the same date as the payment date on the SIPP account. The SIPP account does not show the later re-crediting and re-debiting of the payment as it presumably would if the payment had been rejected and a fresh payment issued to a different payee at a later date.

If Intrinsic cannot now trace the payment that suggests the money has come in and gone out again rather than the payment still being held unaccounted for in a suspense account. This would tend to indicate that the payment was administered by Intrinsic – albeit by a part dealing with affairs relating to former Mint Financial members – and a payment in turn made to Chartered Financial. I say this because Chartered Financial remained an appointed representative of Intrinsic and it seems to have regarded the matter as a legitimate and routine transaction. It did not, for example try to conceal the transaction either by not documenting it or by perhaps using an unregulated sister company.

Indeed Intrinsic has confirmed that the adviser uploaded the recommendation letter to its system (although that is not the same thing as seeking the approval of the Compliance Department). And Intrinsic has suggested that the adviser may have failed to submit his suitability report to the Compliance Department because of a lack of familiarity with Intrinsic's systems. It therefore seems

likely that Chartered Financial would have chased the matter up to ensure it received payment for the work it had done if it had not been passed on promptly.

On balance it seems more likely than not that the payment was made to Intrinsic and that it was therefore aware that it had received a payment from an unlisted plan provider. And that it processed that payment. And so by this conduct it accepted, rather than rejected, the arranging of a deal in a non-listed plan.

I do not accept that Intrinsic's acts are only binding if carried out by the Compliance Department. It is my view that in processing rather than rejecting the transaction and in particular in receiving the commission payment from the non-approved plan provider, Lifetime SIPP, Intrinsic acquiesced in an application for a non-approved plan provided.

For the avoidance of doubt I am not saying that commission was paid to Intrinsic and so advice must have been given on its behalf. That is not so.

I do note the *Frederick v Positive Solutions* case on this point. In that case commission was paid by a mortgage lender to Positive Solutions and the court said this did not in itself make Positive Solutions liable for the advice given by one of its agents. In the Court of Appeal the court said:

> "*9. Commission was paid to the respondent by Abbey National in respect of the transactions but that commission was paid by the respondent into a suspense account because it could not be matched with any transaction on the respondent's systems. Thereafter, Warren is said to have created a false paper trail in order to access his percentage of the commissions. In the meantime, the appellants' properties remain subject to mortgages which they cannot discharge.*

70…I agree with the Judge that the fact that commission was received by the respondent does not assist the appellants. It was clearly generated automatically by the Abbey National systems and when received was held by the respondent in a suspense account, because the transaction to which it related did not appear on the respondent's books. That if anything is support for the Judge's conclusion that this transaction was not carried out as an integral part of the respondent's business or for its benefit, but was moonlighting by Warren."

There are differences between Mr R's complaint and the *Frederick* case. Positive Solutions had arrangements in place to receive commission from the lender. The lender was in effect an approved plan provider. And the adviser was said to have been moonlighting – advising on his own scheme. In the present case there is no suggestion the adviser was advising on his own scheme. The advice was of a type the adviser could give - subject to passing the internal exam and recommending a plan from the approved list.

Intrinsic's prohibition on advising on non-approved plans is not absolute. It does include an exception. The exception is that investments that are not on the approved list may be advised upon with written consent.

The question is therefore whether in the circumstances of this case the advice on a non- approved plan (the Lifetime SIPP) is sufficiently closely linked to the activities for which permission was given ie to promote, sell or advise on listed Plans and non-listed plans with written consent. In my view since Intrinsic acquiesced in that transaction this is sufficiently closely linked to the activities for which authority was given (which includes advice on non-list plans with written consent) to mean that Intrinsic is responsible for the advice.

Further if Intrinsic is responsible for the advice to take out the Lifetime SIPP this cannot be separated from the advice to switch out of [the existing personal pensions]. The two things are inextricably linked. There would not be one without the other. The advice was that it is better to have the Lifetime SIPP than the [existing] pensions. Following the case of *TenetConnect v Financial Ombudsman*

Service I am satisfied that we can consider the advice to dispose of the [existing pension] plans as part of the complaint about the advice to buy the Lifetime SIPP which Intrinsic is responsible for.

my view on whether the complaint is against Intrinsic's appointed representative:

For all the reasons discussed above it is my view that this is a complaint against Intrinsic's appointed representative acting in its capacity as Intrinsic's appointed representative. The complaint relates to business Intrinsic accepted responsibility for and Intrinsic is subject to the jurisdiction of the Financial Ombudsman Service for complaints about that business.

These remaining points can be dealt with quickly as they are not in dispute.

is Mr R an eligible complainant?

Mr R is a natural person who was acting for purposes outside his trade profession or business when he was advised by Chartered Financial. And he was a client or Chartered Financial and therefore a client of Intrinsic. In my view Mr R is therefore a customer of Intrinsic and I am satisfied he is an eligible complainant.

territorial jurisdiction:

The compulsory jurisdiction covers complaints about activities of a firm (including its appointed representative) carried on form an establishment in the UK. There is not dispute that the activities complained about here took place from an establishment in the UK.

was the complaint made in time?

Mr R complains about advice in 2010. He complained to about that advice with six years of the disputed advice. And he referred his complaint to the Financial Ombudsman Service with six months of Intrinsic's final response letter in reply to the complaint. The complaint was therefore made in time.

my provisional decision on jurisdiction

For the reasons discussed above it is my provisional decision that the Financial Ombudsman Service can consider this complaint.

my provisional findings - merits

In looking at the issue of jurisdiction I have also been able to consider all the evidence and arguments we have so far obtained in order to decide what is fair and reasonable in all the circumstances. I have therefore decided to set out my provisional view now…

In considering what is fair and reasonable in all the circumstances of the complaint I am required to take into account:

- relevant law and regulations; regulators rules and guidance and standards; and codes of practice;
- and where relevant what I consider to be good industry practice at the relevant time

In January 2013 the FSA issued an "Alert" on pension transfers with a view to investing into unregulated products through SIPPs.

This complaint involves advice to invest in an unregulated investment scheme through a SIPP. Although the Alert had not been issued at the time of the advice in this case, the Alert comments on how the rules at the time should have been complied with. As such the Alert sets out guidance – albeit informal guidance that had not been published at the time – on how adviser firms should have acted in 2010.

The Alert included the following:

> *"It has been brought to the FSA's attention that some financial advisers are giving advice to customers on pension transfers or pension switches without assessing the advantages and disadvantages of investments proposed to be held within the new pension. In particular, we have seen financial advisers moving customers' retirement savings to self-invested personal pensions (SIPPs) that invest wholly or primarily in high risk, often highly illiquid unregulated investments (some which may be in Unregulated Collective Investment Schemes). Examples of these unregulated investments are … overseas property developments, store pods, forestry and film schemes, among other non-mainstream propositions.*
>
> *The cases we have seen tend to operate under a similar advice model…The financial adviser does not give advice on the unregulated investment, and says it is only providing advice on a SIPP capable of holding the unregulated investment (e.g an overseas property development). When customers express an interest in the unregulated investment, the customer is introduced to a regulated financial adviser to provide advice on a SIPP capable of holding the unregulated investment. The financial adviser does not give advice on the unregulated investment, and says it is only providing advice on a SIPP capable of holding the unregulated investment…*
>
> *Financial advisers using this advice model are under the mistaken impression that this process means they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect.*
>
> *The FSA's view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs…), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes. It should be particularly clear to financial advisers that, where a customer seeks advice on a pension transfer in implementing a wider investment strategy the pension transfer must take account of the overall investment strategy the customer is contemplating.*
>
> *For example, where a financial adviser recommends a SIPP knowing that the customer will transfer out of a current pension arrangement to release funds to invest in an overseas property investment under a SIPP, then the suitability of the overseas property investment must form part of the advice about whether the customer should transfer into the SIPP. If, taking into account the individual circumstances of the customer, the original pension product, including its underlying holdings, is more suitable for the customer, then the SIPP is not suitable.*
>
> *This is because if you give regulated advice and the recommendation will enable investment in unregulated items you cannot separate out the unregulated elements from the regulated elements.*
>
> *There are clear requirements under the FSA Principles and Conduct of Business rules and also in established case law for any adviser, in the giving of advice, to first take time to familiarise themselves with the wider investment and financial circumstances. Unless the adviser has done so, they will not be in a position to make recommendations on new products."*

The above guidance is very clear. So too was Chartered Financial's recommendation letter and report which closely fits the model described and criticised above.

It is my view Chartered Financial should not have recommended and arranged the SIPP transfer without also giving advice on the suitability of the investment Mr R was proposing. This means one of two things. Either Chartered Financial should have advised on the suitability of the Jatropha tree investment scheme for Mr R's pension. Or it should have refused to act if it was not willing or able to advice on the proposed investment in Jatropha trees so that Mr R could get advice from an alternative regulated adviser who would advise on the suitability of the investment.

was the investment suitable for Mr R

Mr R has said he would not have invested in the Sustainable Growth fund if he any inkling that it was the slightest bit risky.

Mr R's attitude to risk was recorded as *"balanced growth"* in the recommendation report with

> *"an objective to achieve a return using a portfolio with higher equity content and a wider geographical spread whilst aiming for consistent longer term capital appreciation. Investment will be predominantly in the UK and overseas equities with an element of investment in fixed interest and property in order to provide growth orientated diversification confined within a moderate /higher level of volatility. A level of predominantly dividend income is achievable."*

This attitude to risk seems broadly consistent with Mr R's other investment experience and financial position – ie the acceptance of some risk rather than the complete avoidance of risk. But his attitude to risk is not so high that high risk speculative investments would be suitable pension investments for him.

The investment Mr R invested in was not consistent with the attitude to risk as described by Chartered Financial. It was not invested predominantly in UK equities and well diversified. It was invested in a single commodity rather than equities and that commodity was based overseas in a developing economy. And the investment was in an unregulated investment structure. The investment was clearly higher risk than the attitude to risk identified and recorded by the adviser. He should therefore have recommended that Mr R did not invest his pension in that fund.

Alternatively if Chartered Financial had refused to act Mr R would have got that advice from some other regulated investment adviser.

Mr R had no particular connection to the fund or the introducer who had recommended it to him in the first place. There is therefore no reason to think that he would not have accepted clear and well-reasoned advice from a regulated independent adviser.

Accordingly it is my view that but for Chartered Financial's error in thinking it could advise on the pension switch without also advising on the proposed investment, Mr R would not have invested in the fund.

Mr R says he would not have transferred away from the [existing pension provider] if he had known the investment was risky. Given that:

- Mr R's pension was worth about £44,000
- SIPPs tend to be higher cost than non SIPP pensions which has a larger impact on smaller pension funds
- Mr R's preferred form of investment of buy to let properties cannot be held in a SIPP

it does seem likely that Mr R would have left his [pensions] unchanged if he had been given suitable advice.

how to put things right

In my view Intrinsic should put things right as follows:

1. Obtain the notional transfer values of Mr R's transferred pensions as at the date of my final decision had they not been transferred to the SIPPs.

Intrinsic should ask the [personal pension provider] to calculate the notional transfer values they would have applied as at the date of this decision had Mr R not transferred his pensions but instead remained invested.

If there are any difficulties in obtaining a notional valuation then the FTSE WMA Stock Market Income Total Return Index should be used. That is a reasonable proxy for the type of return that could have been achieved if suitable funds had been chosen.

2. Obtain the notional transfer value of Mr R's SIPPs at the date of my final decision.

This should be confirmed by the SIPP operator. If the operator has continued to take charges from the SIPP and there wasn't an adequate cash balance to meet them, it might be a negative figure.

3. And then pay an amount into Mr R's SIPP so that the transfer values are increased by the amount calculated in (2). This payment should take account of any available tax relief and the effect of charges.

If it's unable to pay the total amount into Mr R's SIPP, it should pay the compensation as a cash sum to Mr R. But had it been possible to pay into the SIPP, it would've provided a taxable income. So the total amount should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

The *notional* allowance should be calculated using Mr R's marginal rate of tax at retirement. For example, if Mr R is a basic rate taxpayer in retirement, the *notional* allowance would equate to a reduction in the total amount equivalent to the current basic rate of tax. However, if Mr R would have been able to take a tax free lump sum, the *notional* allowance should be applied to 75% of the total amount.

4. Pay any future fees owed by Mr R to the SIPP, for the next five years.

Had Intrinsic given suitable advice I don't think there would be a SIPP. It's not fair that Mr R continue to pay the annual SIPP fees if it can't be closed.

Ideally, Intrinsic should take over the investment to allow the SIPP to be closed. This is the fairest way of putting Mr R back in the position he would have been in.

So, to provide certainty to both parties, I think it's fair that Intrinsic pays Mr R an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees), or undertakes to cover the fees that fall due during the next five years. This should provide a reasonable period for things to be worked out so the SIPP can be closed.

In return for the compensation set out above, Intrinsic may ask Mr R to provide an undertaking to give it the net amount of any payment they may receive from the investment in that five year period, as well as any other payment they may receive from any party as a result of the investment. That undertaking should allow for the effect of any tax and charges on the amount they may receive. Intrinsic will need to meet any costs in drawing up this undertaking. If it asks Mr R to provide an undertaking, payment of the compensation awarded by my decision may be dependent upon provision of that undertaking.

If, after five years, Intrinsic wants to keep the SIPP open, and to maintain an undertaking for any future payments under the investment, it must agree to pay any further future SIPP fees. If Intrinsic fails to pay the SIPP fees, Mr R should then have the option of trying to cancel the investment to allow the SIPP to be closed.

5. Pay Mr R £500 for the trouble and upset caused.

Mr R will have been caused significant upset by the events this complaint relates to, and the loss of, in effect, all of his normal pension fund. I think that a payment of £500 is fair to compensate for that upset.

my provisional decision

I uphold the complaint. My provisional decision is that Intrinsic should pay fair compensation in each of the complaints as set out above.

Philip Roberts
ombudsman