Complaint

Mr H complains about advice he says he received from an appointed representative ("AR") of Joseph Oliver - Mediacao de Seguros LDA ("Joseph Oliver") to transfer his pension to a Qualifying Recognised Overseas Pension Scheme ("QROPS") and make an investment in the Trafalgar Multi Asset Fund ("TMAF").

Background

The advice

Mr H says he was advised in 2014 by an individual I'll refer to as Mr B. Mr H says he was referred to Mr B by another business called Pinnacle Brokers. There isn't a lot of available detail about this introduction, but Mr H says that he filled out a questionnaire provided to him by Mr B in September 2014.

Mr B then sent Mr H a detailed "Pension Transfer Report" dated 16 December 2014. The report recorded Mr B as the adviser – but did not record the firm Mr B was representing. The report contained details of Mr H's existing defined benefit Royal Mail pension scheme and a proposed transfer to a QROPS with a firm called STM Fidecs ("STM") based in Gibraltar for an onward investment in TMAF, a fund based in the Cayman Islands.

The report said:

> *"The purpose of this analysis is to provide information, regarding the possible transfer of your benefits provided by the Royal Mail Statutory Pension Scheme to an alternative pension arrangement.*
>
> *This analysis does not, on its own, show whether or not transferring your benefits is advisable, as that also depends on many other factors, such as your "attitude to risk" your personal circumstances and your objectives. It does, however, give an indication of the likelihood of being able to match or exceed the benefits provided by your existing scheme with a transfer to an alternative plan."*

The report said that the QROPS and investment in TMAF would need to achieve a critical yield of 9.87% to match Mr H's existing benefits.

On 17 December 2014, Mr H was sent a suitability letter on "*The Pension Reporter*" letterhead. The footer of the letter said:

> "*The Pension Reporter is a trading name of Nationwide Benefit Consultants Ltd who are appointed representatives of Joseph Oliver Mediacao de Seguros Lda. Authorised and regulated by the Instituto de Seguros de Portugal 410317061 and the Financial Conduct Authority 521370".*

Joseph Oliver is a financial advisory firm based in Portugal. At the relevant time, it held an EEA branch passport to conduct insurance mediation activities in the UK. Nationwide Benefit Consultants Ltd ("NBCL") was its AR between May 2014 and April 2016 (as set out on the FCA Financial Services Register).

The NBCL suitability letter recommended that Mr H transfer his pension to a QROPS. It said:

> *"The Critical Yield Report (attached) states a critical yield of 9.87% is needed to match the benefits of your existing Royal Mail scheme at normal retirement date. Based on your risk profile it was agreed that the critical yield is not achievable but given your desire to pass funds onto your beneficiaries, greater investment choice and the probability of moving abroad, I believe the transfer to a QROPS is right for you."*

The letter wasn't signed with the name of the individual adviser – it was signed generically as from "*The Pension Reporter*".

After receipt of these documents, Mr H decided to transfer his entire Royal Mail pension scheme (worth around £168,800) into the QROPS with STM and invested this in TMAF in March 2015.

TMAF was managed by a firm called Victory Asset Management. According to a shareholders report for TMAF, Mr B was connected to Victory Asset Management. Another individual, I'll refer to him as Mr X in this decision, was a director of both Victory Asset Management and NBCL.

TMAF was mismanaged and is now in the process of liquidation. It appears to form part of an investigation by the Serious Fraud Office ("SFO"). It looks like Mr H has suffered a catastrophic loss from the investment in TMAF.

Mr H's complaint to Joseph Oliver and our investigator's findings

Mr H complained to Joseph Oliver in 2017. He said the advice to make the transfer and invest in TMAF was unsuitable. He said the advice had been given by Mr B of NBCL, an AR of Joseph Oliver. He also said that he had found out that Mr B was connected to Victory Asset Management and that there was therefore a clear conflict of interest. So, he said Joseph Oliver should compensate him for his losses.

Joseph Oliver rejected the complaint and said it wasn't responsible for the advice. It said that Mr B had never worked for NBCL and had fraudulently used NBCL letterhead to give the advice to Mr H.

One of our investigators looked at all the evidence and explained why he felt that Mr H's complaint should be upheld. The investigator said that Mr B was representing NBCL (trading as *The Pension Reporter*) when advising Mr H and that, as NBCL's principal, Joseph Oliver was responsible for the advice. He concluded that the advice to make the QROPS investment was unsuitable and therefore Joseph Oliver should compensate Mr H for his losses.

Joseph Oliver didn't accept the investigator's view and the matter was referred to me for a final decision. Joseph Oliver reiterated that Mr B had fraudulently used NBCL letterhead and this was something that it shouldn't be held responsible for.

My provisional decisions

This case is complex. The arguments have also evolved and further evidence has been submitted and reviewed by me. That is reflected in the fact that I have issued three provisional decisions in this matter and recently sent a further communication to both parties in December 2020. These set out my intended findings but were not final decisions.

In the first two provisional decisions (dated 8 August 2019 and 11 March 2020), I explained why I believed the complaint was one that we could consider against Joseph Oliver. I said that Joseph Oliver was subject to our jurisdiction despite being directly regulated by the Portuguese authorities. I explained why I believed that Mr B had given advice to Mr H for and on behalf of NBCL which was an appointed representative of Joseph Oliver. I also said that Joseph Oliver was responsible for the advice given by NBCL on the basis of the common law principle of *apparent authority* as it had represented that NBCL could give the pensions advice given to Mr H. So, I provisionally concluded we did have jurisdiction to consider the complaint.

I also explained why the complaint was one that should be upheld as the advice given to Mr H was clearly unsuitable advice. I therefore provisionally said that Joseph Oliver should pay Mr H compensation. I explained how I thought Joseph Oliver should calculate the compensation.

I then issued a third provisional decision on 24 August 2020. In this provisional decision, I said that having looked at the evidence, I wasn't convinced that I could safely conclude that Joseph Oliver made representations that NBCL was authorised to give the advice that was given to Mr H. So my provisional decision at that time was that there wasn't *apparent authority* and therefore Joseph Oliver wasn't responsible for the advice given by NBCL.

The latest communication I sent to the parties in December 2020 explained that I had reconsidered matters once again and reviewed further evidence. I said that I intended to issue a final decision that said:

- Joseph Oliver was an authorised business and the complaint was within our territorial jurisdiction.

- The complaint was about advice in relation to a transfer from an occupational pension scheme to a QROPS to make investments. So, the complaint was about a regulated activity which is another requirement under our jurisdiction rules.

- I was satisfied that the advice was given by Mr B for NBCL. I found there to be a clear relationship between Mr B and Mr X, the director of NBCL.

- I considered the appointed representative agreement between Joseph Oliver and NBCL (the AR agreement), section 39 of the Financial Services and Markets Act 2000 ("FSMA") and common law agency principles. Whilst I didn't think section 39 FSMA was applicable, I was satisfied that NBCL had apparent authority to give pensions advice on behalf of Joseph Oliver. That was because I thought that Joseph Oliver had made representations that NBCL could give pensions advice and that Mr H had relied on these representations.

- So, my conclusion was that Joseph Oliver was responsible for the acts and omissions of NBCL and our service had jurisdiction to consider Mr H's complaint against Joseph Oliver.

- And, as the advice given by NBCL to Mr H was unsuitable, Joseph Oliver should pay compensation to Mr H.

Joseph Oliver strongly disagreed with these findings and submitted further arguments for my consideration.

Joseph Oliver's arguments

Over the course of the complaint, Joseph Oliver has made a number of arguments about why it isn't responsible for what has happened. These submissions have been lengthy and many of them overlap or repeat earlier points. They can be summarised as follows:

- Para 4.2.2 Chapter 1 of the regulator's Conduct of Business Sourcebook ("COBS") sets out very clearly that it is the Home State (i.e. the Portuguese authorities) that is responsible for complaints against Joseph Oliver – not the UK authorities. This provision says:

  "In the FCA's view, the responsibility for these minimum requirements rests with the Home State for an EEA firm providing passported activities under the Directive in the United Kingdom, the rules implementing the Directive's minimum requirements do not apply, but the additional rules within the Directive's scope have their unmodified territorial scope unless the Home State imposes measures of like effect."

- It didn't have access to STM's files and so important evidence has been withheld from it and has not been considered by me. This evidence would show that neither Joseph Oliver nor its AR (NBCL/Mr X) was involved in this transaction.

- STM had provided no evidence that commissions were being paid to an NBCL account – so this wasn't business conducted by NBCL.

- STM had also confirmed that it had not carried out any checks on whether Mr B was employed by NBCL when agreeing to accept introductions from him. STM had also entered into an introducer agreement with NBCL. So, in the circumstances, STM should be liable as the principal authorising this business.

- The introducer agreement between NBCL and STM was so that Mr X could continue to service clients he had introduced via a separate company. The agreement was not so that NBCL could submit new business.

- It was likely that Pinnacle Brokers gave the advice to invest in TMAF – not NBCL. The individual associated with that company was implicated in the fraud of TMAF. And it was Mr B (in an unregulated capacity) who gave the advice about the pensions in the Pension Transfer Report. So, the complaint was not about advice given by NBCL at all. It followed that the activity being complained about took place from the address that Pinnacle Brokers operated from, not NBCL's office and the complaint was really about things that Pinnacle Brokers had done.

- There was a fraud on the TMAF conducted by a network of people including Mr B and Pinnacle Brokers. Mr B had likely perpetrated this by "cloning" NBCL letterhead and concealing things from NBCL and Joseph Oliver. So, as per case law on this issue, this could not be the act of Joseph Oliver under agency laws.

- Mr B wasn't listed as an authorised representative of NBCL on the FCA's register – and Joseph Oliver says this was a regulatory requirement. Joseph Oliver says the

absence of any notification of Mr B as a representative of NBCL on the FCA website supported its argument that Mr B had advised Mr H without any authority.

- The suitability letter hadn't been signed by the director of NBCL, Mr X, who was authorised by Joseph Oliver. Instead a generic computer generated signature of "*The Pension Reporter*" was used and this was most likely done by Mr B without the knowledge of NBCL.

- The suitability letter used by Mr B was fake and gave the wrong email address for NBCL and the wrong Portuguese regulator (Instituto de Seguros rather than the correct regulator the ASF).

- Mr B worked for a business called Nationwide Corporate Benefits Limited *not* Nationwide Benefit Consultants Limited. This is evidenced by Mr B's *Linkedin* profile and his email address. Both businesses operated from the same building and so it wouldn't have been difficult for Mr B to carry out the fraud.

- Joseph Oliver believed that Mr B had been trying to redirect commission payments from transactions involving STM to a personal account. He was also accessing funds invested in TMAF via his involvement in the management company Victory Asset Management. This was his motive for carrying out the fraud.

- Joseph Oliver's business development manager provided a statement which said that he had visited NBCL's office and told Mr X of NBCL that he was not able to give investment advice and could not employ any advisers. He also said that his visits to NBCL confirmed that it had not conducted any business during the period of this complaint.

- My earlier provisional findings about the relationship between Mr B and Mr X were pure conjecture. If Mr X was truly aware of what Mr B was doing, he would have allowed Mr B to use proper letterhead and/or signed the documents himself.

- *Only* Mr X was authorised to act as NBCL under the AR agreement – no one else.

  Clause 7.1 of the agreement confirmed this as it said:

  "Tax Liabilities
  7.1 The Appointed Representative warrants and represents to the Company that he is an independent contractor of self-employed status and/or a director of his own company."

  And Clause 12.1 said:

  "Nature of Agreement
  12.1 This agreement is personal to the parties and neither party may assign, mortgage, charge or sub-licence any of its rights hereunder, or sub-contract or otherwise delegate any of its obligations hereunder, except with the written consent of the other party."

  And appointing Mr B would have contravened clause 6.2 of the agreement:

  "6.2 Subject to any express provision to the contrary in this agreement, the

Appointed Representative shall have no right or authority to and shall not do any act, enter into any contract, make any representation, give any warranty, incur any liability, assume any obligation, whether express or implied, of any kind on behalf of the Company or bind the Company in any way."

- Neither NBCL nor indeed Joseph Oliver was authorised to give investment advice in the UK under its passported permissions. The AR agreement between Joseph Oliver and NBCL authorised NBCL to provide advice on life assurance and pension products which are long term insurance contracts – but this didn't include pension transfers and investments.

- Under the AR agreement with Joseph Oliver, NBCL could not make any representation, enter any contract or give any warranty without the prior consent of Joseph Oliver. No consent had been obtained in this case and so Joseph Oliver couldn't be held responsible for anything done here.

- And a term in the AR agreement also said that the AR must perform all obligations in accordance with best industry practice and compliance with applicable laws, including the regulatory rules. This hadn't happened here and so the advice can't be said to have been authorised by Joseph Oliver.

- Joseph Oliver has never had an agreement with STM or with Mr H – that was another requirement of the AR agreement for valid introductions made by NBCL.

- The AR agreement does not mention QROPS. So this means Joseph Oliver doesn't accept responsibility for advice about QROPS.

- (More recently Joseph Oliver has said) NBCL could not provide *any* advice under the AR agreement. But Mr X was also prohibited from giving advice beyond his level of competency. The agreement was that NBCL would introduce clients to Joseph Oliver and Joseph Oliver would advise within the scope of the IMD.

- Put simply, this wasn't business conducted under the terms of business that Joseph Oliver had agreed with NBCL in the AR agreement.

- Mr X had confirmed in an email in 2015 that NBCL had not conducted any SIPP business. So Joseph Oliver was entitled to believe the AR agreement and the restrictions contained therein was working as it should do.

- There is no evidence that Mr B was an employee or adviser for NBCL. He was conducting independent business of his own or otherwise on a frolic of his own. Recent case law showed that a principal can't be held vicariously responsible in these circumstances.

- There was no apparent authority in this case. The circumstances here are similar to the recent court case of *Anderson v Sense Network Ltd* [2018] EWHC 2834 (Comm) where the Court declined to hold that the "status disclosure" wording on a letterhead gave rise to apparent authority. Any finding of apparent authority in these circumstances would "eviscerate the requirement" under section 39 FSMA for the principal to have authorised the business. And the AR agreement in this case clearly prohibited NBCL from giving pension advice.

- I had relied on historic pages from the NBCL website www.pensionreporter.com as evidence that Joseph Oliver has represented that NBCL could give pensions advice. But this website and the relevant pages did not exist at the time of the events being complained of by Mr H. So they were not representations that could give rise to apparent authority.

- In any event, the NBCL website referred to the provision of pension information, not pension advice. So the website did not contain representations that NBCL could give pension advice.

- The statements on Joseph Oliver's website about QROPS that I said gave weight to apparent authority related to partner businesses offered by a different company Joseph Oliver Marketing Limited – not UK business for retail customers by Joseph Oliver

- Joseph Oliver did not allow NBCL to trade as *The Pension Reporter*. NBCL's application to become a AR did not include reference to name The Pension Reporter.

- In any event, if NBCL had been trading as "Pension *Transfer* Reporter" then Joseph Oliver could be said to know that Mr X was arranging pension transfers. However, that was not the case as the word *transfer* is missing from "*The Pension Reporter*" trading name of NBCL.

- "Pension business" is not the same as pension *transfer* business and Joseph Oliver did not represent to the outside world that NBCL was a pension transfer specialist. The FCA register does not show that Joseph Oliver or NBCL had the necessary permission to conduct pension transfers and this information was available to the world. Joseph Oliver is authorised to provide advice on some pensions i.e. personal pensions which are long term insurance contacts. Lots of businesses, including large insurers in the UK had confirmed that this was the case.

- Importantly, Joseph Oliver did not supply or approve the letterhead or website of "*The Pension Reporter*". So unlike in *Martin v Britannia* [1999] 12 WLUK 726, there was no representation from Joseph Oliver – and so no conferral of apparent authority.

- It was absurd to conclude that Joseph Oliver authorised NBCL and Mr X to conduct activities over and above its own FCA authorisation. And Mr X was only qualified to give advice about "protection and savings" and identifying client's needs. Mr X was not authorised to give advice on pension transfers and unregulated investments. NBCL had only joined Joseph Oliver as an AR to develop pension business in Portugal, not the UK.

- The agreement between Joseph Oliver and a SIPP operator that I had highlighted in in an earlier decision wasn't validly signed by two directors. So, it wasn't evidence that Joseph Oliver was making representations to other parties that it could conduct pensions activities of the type conducted here. Joseph Oliver had never recommended a SIPP to anyone.

- Mr H was not being truthful about the checks he made before going ahead with the transaction. Mr H hadn't taken care to meet his adviser and was willing to take a large risk with his entire pension. So it is implausible that he checked the FCA

register at the time of the events in the way he has suggested and he can't have read the NBCL website as it didn't exist at the time in 2015.

- Mr H did not sign the client agreement attached to the suitability letter and so Mr H can't be said to be relying on any representations. Joseph Oliver was convinced that Mr H hadn't even received a suitability letter from NBCL as he had not mentioned receiving one when he first made his complaint.

- The reality was that Mr H had decided to transfer his pension after he had been contacted by Pinnacle Brokers – that was where Mr H had placed reliance.

- If Mr H had really checked the FCA register he would have realised that NBCL and Joseph Oliver did not have authorisation to give pension advice and that Mr B had no connection with these entities. So, overall, it wasn't reasonable for him to conclude that Mr B or NBCL was authorised to give him advice about his pension.

- Mr H waited two years to complain to Joseph Oliver. He would have complained sooner if he really believed Joseph Oliver was responsible.

- I needed to take account of the recent High Court decision in *Adams v Options Sipp UK LLP [2020] EWHC 1229 (Ch)*. This was an important case as it establishes the importance of contractual documents, over and above other factors, such as apparent authority.

On the merits (rather than jurisdiction arguments) of the complaint, Joseph Oliver says

- It is not responsible for the advice given to Mr H for all the reasons above.

- It is not in ombudsman service's remit to decide what business falls within the scope of IMD. Just because one member state requires a different procedure i.e. "top-up permissions" does not mean that the business is outside of the scope of the IMD. It is the responsibility of the Home state to decide the minimum requirements. The Home State is Portugal, and it is their regulator's (A.S.F) responsibility to determine whether pension advice Mr H complained about was business that came within the scope of the IMD.

- The IMD means that it is the home state regulator (Portugal in this case) has responsibility for determining what the minimum requirements are for the advice allegedly given by Joseph Oliver – including whether it was fair and reasonable and in line with good industry practice.

- Mr H signed a letter of waiver stating he knew the investment was high risk. So, as per *Adams v Options*, Mr H should take responsibility for his decision and its consequences.

My findings

As set out above, Joseph Oliver has made lengthy submissions in response to my provisional decisions and my recent email to both parties.

My remit is also inquisitorial rather adversarial. I'm required to set out my view on jurisdiction and what I consider to be fair and reasonable and give reasons for this, not to answer every

point or question raised by either party to a complaint. So, in this decision I concentrate on the key arguments and evidence that are material to my determination of the complaint.

I've considered all the available evidence and arguments to decide whether we have jurisdiction to consider the complaint.

What is the complaint about?

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

My view is that Mr H's complaint is about both the suitability of the transfer of his existing pension to the QROPS and the high risk nature of the TMAF investment. He says he was advised by NBCL.

When we recently asked Mr H for his recollection of events again, he told us that:

> *"I was looking to access my pension at 55 as the government had changed the rules, not all of it just the lump sum. I went on the internet and found Pinnacle brokers and spoke to a chap called [an individual at Pinnacle Brokers]. He was very helpful and said he had dealt with a number of postman previously.*
>
> *He said a Financial advisor would be in touch with me soon to ask some more questions and advise a way forward. Soon after I received a form from* [Mr B] *of the pension reporter to fill in regarding my financial situation etc. I do not have a copy of this letter but you already know this.*
>
> *A few weeks later a suitability report arrived from the same person of which you have a copy, followed by an investment report recommending transfer to the TMAF, also of which you have a copy.*
>
> *I cannot emphasize this enough, I checked the FCS* [sic] *register on line and found the pension reporter a member as well as researching stm fidecs and the fact the scheme was registered with HMRC before I went ahead, thinking my pension was safe.*
>
> *To the best of my knowledge this is what happened. I trusted the fact the pension reporter was on FCS* [sic] *register otherwise I would not have gone through with the transfer. I can't add anymore facts/proof other than what I've said and sent already."*

I accept that Mr H has said that Pinnacle Brokers played a role in the transaction. They may even have provided some advice to Mr H. But I'm not looking at a complaint about Pinnacle Brokers.

I'm looking at a complaint about Joseph Oliver – who are regulated in the UK. Mr H received the Pension Transfer Report from Mr B and then a suitability letter from Mr B on NBCL/*The Pension Reporter* headed paper. The suitability letter undoubtedly constituted advice and Mr H said he relied on this. The complaint is therefore about the advice he allegedly received from NBCL, Joseph Oliver's AR.

I'm aware that neither the Pension Transfer Report nor the suitability letter make specific recommendations about TMAF, only the transfer to the QROPS. But, the transfer and investment in the fund were closely related. In effect, this was all part of one transaction and

I think it's clear that Mr B knew this when giving the pension advice as the STM application includes details of the proposed investment in TMAF.

So, although Joseph Oliver had no connection to Pinnacle Brokers, the is complaint about Mr B and whether Joseph Oliver is responsible for the advice he gave to Mr H to transfer his pension to a QROPS for the investment in TMAF.

Can we consider this complaint?

Section 226 of FSMA sets out which complaints we can look at. It says

- 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 (i.e. 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.

Mr H clearly wants our service to consider his complaint. And Joseph Oliver, the respondent, was an authorised person at the relevant time (it was an incoming EEA firm).

But I also need to satisfy myself that the complaint is covered by the compulsory jurisdiction rules. These are set out in the DISP section of the FCA rule book.

What do the DISP rules cover?

The DISP rules set out several jurisdiction tests all of which must be satisfied for our service to be able to consider a complaint. For the purposes of this decision, the relevant tests at issue are:

- Is the complaint about the activities of a firm carried out from an establishment in the United Kingdom?
- Does the complaint relate to an activity we cover?
- Is the business responsible for the acts and omissions the complaint is about?

I will deal with each of them.

Is the complaint about the activities of a firm carried out from an establishment in the United Kingdom?

DISP 2.6.1R says

(1) The Compulsory Jurisdiction covers complaints about the activities of a firm (including its appointed representatives), of a payment service provider (including agents of a payment institution) or of an electronic money issuer (including agents of an electronic money institution) carried on from an establishment in the United Kingdom…

And DISP 2.6.2G says

This

(1) includes incoming EEA firms, incoming EEA authorised payment institutions, incoming EEA authorised electronic money institutions and incoming Treaty firms; but

(2) excludes complaints about business conducted in the United Kingdom on a services basis from an establishment outside the United Kingdom

(other than complaints about collective portfolio management services provided by an EEA UCITS management company in managing a UCITS scheme, and complaints about AIFM management functions provided by an incoming EEA AIFM managing an authorised AIF).

I appreciate that Joseph Oliver is directly authorised by the regulator in Portugal. But, as is clear from the DISP rules above, our jurisdiction applies to incoming EEA firms. So, even though Joseph Oliver was based in Portugal and its home state regulator was the ASF and not the FCA, the firm is still within the compulsory jurisdiction of the Ombudsman Service in relation to the activities of the firm, including its ARs, carried on from an establishment in the UK. Indeed, Joseph Oliver's website states:

Joseph Oliver Mediacao de Seguros Lda. Registered in Portugal with offices in the U.K. Authorised and regulated by the Autoridade de Supervisao de Seguros e Fundos de Pensoes, Financial Conduct Authority (members of the UK Financial Ombudsman Service Scheme) and the CMVM (emphasis added).

I think this complaint does relate to an activity carried on by Joseph Oliver from an establishment in the UK. In this respect, I note that Joseph Oliver's EEA passport was on a branch basis – not a services basis. In other words, it had notified the FCA of its intention to establish a branch in the UK. The test for whether the Ombudsman Service has territorial jurisdiction is whether the act or omission was carried on from a UK establishment – not whether a particular type of passport was held. But the branch passport clearly envisages Joseph Oliver's activities being carried on from a UK establishment.

"Establishment" isn't defined by the rules, but I think it's reasonable to say in this context it means a building or physical office. The suitability letter given to Mr H has the address of NBCL at an address in Telford. This appears to be a physical office and is the same address in the AR agreement between Joseph Oliver and NBCL. I note too that in his statement during the course of this complaint, Joseph Oliver's business development manager says he visited NBCL's office – which I assume to be the Telford office. I think it's likely that this is the address (the establishment) from which the advice was prepared for Mr H.

So, I'm satisfied that this is a complaint about the activities of a firm carried out from an establishment in the United Kingdom.

I've noted Joseph Oliver's observations about Para 4.2.2 of Chapter 1 of COBS. But I'm still satisfied that Joseph Oliver is a business that is subject to our jurisdiction. The reference in this part of COBS is to Insurance Mediation activities and minimum standards that apply to certain types of insurance mediation activities. But I've seen nothing to suggest that we do not have jurisdiction to consider a complaint against an EEA firm with passported permissions to carry on regulated activities from an establishment in the UK. For these reasons, I'm also satisfied that when dealing with the merits of this complaint below, it is the ombudsman services rules that apply in determining whether I should uphold the complaint – not the rules of the Portuguese authorities.

Does the complaint relate to an activity we cover (does it relate to a regulated activity)?

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)"*.

Section 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)."*

Mr H transferred from an occupational pension scheme to a QROPS. It doesn't appear to be in dispute that Mr H received advice about this and he clearly received a suitability letter recommending the QROPS (the dispute is about who gave the advice). Chapter 12 of the FCA's Perimeter Guidance Manual (PERG) offers guidance on personal pensions. The

guidance in place at the time (PERG 12.2) confirms that a personal pension scheme, for the purpose of the RAO:

> *"…is defined in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the Regulated Activities Order) as any scheme other than an occupational pension scheme (OPS) or a stakeholder pension scheme that is to provide benefits for people:*
>
> - *on retirement; or*
> - *on reaching a particular age; or*
> - *on termination of service in an employment.*
>
> *Although the definition does not expressly say so, it is, in the FCA's view, clear from the context in which the term is applied, that such a scheme will be one the sole or principal purpose of which is to provide benefits to members of the scheme upon their reaching a pensionable age. This will typically include pension schemes that are intended to be registered with The Pensions Regulator and to be eligible for tax relief relating to pension schemes. It will also include other types of pension schemes such as qualifying recognised overseas pension schemes (QROPSs) that are not occupational pension schemes."* (my emphasis)

And so a QROPS is clearly a personal pension scheme. Article 82 of the RAO provides that rights under a personal pension scheme are a specified investment. So, giving advice about a QROPS is a regulated activity.

In addition, the pension transfer was part of the overall transaction for investment in TMAF. TMAF appears to be a collective investment scheme – which is a specified investment under RAO (Article 81) or an investment in shares in a body corporate which is also a specified investment (Article 76) as investors became Class C shareholders in TMAF.

Advising and making arrangements on these investments are specified activities under the RAO. I'm satisfied that these acts were carried out in the course of the matters Mr H has complained about.

So, Mr H's complaint about the advice to transfer his pension to a QROPS for an investment in TMAF is a complaint that relates to an act or omission in the carrying on of a regulated activity.

Did Joseph Oliver accept responsibility 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 AR in relation to the business for which it has accepted responsibility. So, did Joseph Oliver accept responsibility for the advice given here to Mr H?

The first issue I need to address in considering this limb of our jurisdiction rules is whether Joseph Oliver's AR or agent - NBCL - gave the advice in question.

Who gave the advice?

I accept that there's little evidence that Mr X, the only director of NBCL, was directly involved in giving advice to Mr H. The Pension Transfer Report was prepared by Mr B and the suitability letter doesn't have Mr X's details. Furthermore, Mr H has said very clearly that his dealings were with Mr B.

Looking at all the evidence, I think it was Mr B who gave the advice to Mr H – not Mr X.

Mr B wasn't a direct AR of Joseph Oliver. Joseph Oliver's only AR at the time was NBCL. So, I need to be satisfied that Mr B was acting for and on behalf of NBCL – the AR of Joseph Oliver - when advising Mr H. Joseph Oliver strongly argues that this wasn't the case.

Was Mr B acting on behalf of NBCL?

Joseph Oliver says Mr B wasn't a director or employee of NBCL and prepared the advice for Mr H on NBCL's letterhead without the knowledge or permission of NBCL or otherwise forged (and/or cloned) the letterhead as part of a fraud.

I have carefully considered Joseph Oliver's submissions - including the submissions it has sent recently following my email to both parties. I accept that the position isn't clear cut. The evidence I have to draw on is also, at best, piecemeal. But, on balance, I'm satisfied that Mr B *was* an employee, or otherwise acting for and behalf of NBCL. That's because:

- Joseph Oliver's arguments must follow the premise that Mr X, as NBCL's director, had no knowledge that Mr B:

    - was passing himself off as an NBCL adviser;
    - was writing suitability letters to customers using NBCL's letterhead; and
    - was holding himself out to STM as someone authorised to introduce business to STM on behalf of NBCL for investments in TMAF.

    Whilst I accept the above is possible, I don't think it's likely to have been the case on the facts I've seen.

    Mr B was facilitating an investment in TMAF. According to a shareholder's report for TMAF from 2016, Mr X was a director of the investment manager for TMAF, Victory Asset Management. Mr B is also described as a principal of that firm. So, there is a clear connection between Mr B and Mr X and the investment in TMAF. And, I think it's unlikely that Mr B was cloning one of Mr X's companies without his knowledge to direct investments into a fund they both appear to have managed together. I don't think that is typical of a cloning fraud.

- I accept that Mr B may well have been involved in the misuse of funds invested in TMAF. That fund is the subject of an ongoing SFO investigation. But as I've said above, Mr X was also a principal of Investment Manager for TMAF. The shareholders report from TMAF in 2016 appears to indicate that Mr X was not forthcoming with information and evasive about the use of funds. More recently, I have seen a press report that Court action was taken by liquidators for TMAF in London to seize property allegedly purchased using funds misappropriated from TMAF by both Mr X

and Mr B. This does not give me confidence that I can safely conclude that Mr X and his company NBCL have been the victim of a cloning fraud.

- Similarly, Joseph Oliver hasn't provided any evidence from Mr X that substantiates its claim that Mr X was unaware of what Mr B was doing. I understand that Joseph Oliver has not been able to contact Mr X. But I think this indicates an evasiveness on the part of Mr X and an unwillingness to be open and helpful to Joseph Oliver. Again, this gives me no confidence that Mr X had no part in what has happened in respect of generating funds for TMAF through applications submitted by NBCL.

- Even on Joseph Oliver's own evidence, Mr X had recommended the STM QROPS and investment in TMAF to clients via a previous business. So, this arrangement for Mr H was entirely in keeping with recommendations Mr X had made to others.

  I note that Joseph Oliver says that I should take account of the fact that, in its view, this is different as Mr X was authorised to advise on investments such as TMAF via his previous business and that wasn't the case with Joseph Oliver. Even if that is right, I don't think it detracts from a conclusion that Mr X clearly had a history of advising people to take out a QROPS for investment in TMAF. I think that is significant.

- The STM application noted Mr X of NBCL as Mr H's adviser and STM says that its understanding was that Mr B was submitting this and other applications on behalf of NBCL.

  I accept that STM did not carry out checks to confirm this. Furthermore, the communications from STM on this and similar cases I've seen all appear with Mr B and not Mr X.

  However, STM has provided us with the introducer agreement it had with NBCL. That agreement appears to be signed by Mr X and sets out the terms upon which NBCL would introduce new QROPS applications to STM.

  Joseph Oliver says the agreement was probably entered into so that STM could service introductions that Mr X had previously made via his former business – not for new business submitted by NBCL. But I've seen no basis to draw that conclusion – the agreement clearly refers to the introduction of new business by NBCL.

  My view is that the agreement is evidence that Mr X planned that NBCL would make introductions to STM of the type made here.

- I don't agree with Joseph Oliver that the introducer agreement with STM shows that NBCL became an AR of STM from the date of the agreement rather than Joseph Oliver. In fact, the agreement specifically says:

  > *"This Agreement **does not constitute the appointment of the Introducer as an official advisor, agent, representative**, employee, officer or principle of STM and the Introducer may make no such claim whether orally, on any document or any form of communication or do any act which might reasonably create the impression that they are so authorised or permit any person to hold themselves out as such except as specifically stated in this Agreement or otherwise agreed in writing by STM"* (my emphasis)

Furthermore, the activities in this case were conducted by NBCL using the details of Joseph Oliver – not STM - on the suitability letter.

- I accept that Mr B appears to have been involved in a separate company called Nationwide Corporate Benefits Limited – which clearly has a similar name to NBCL. That is peculiar and I can understand the argument that he may have been trying to pass himself off as working for NBCL as part of a fraud conducted against NBCL and Mr X. But Companies House records show that Mr X was a director of Nationwide Corporate Benefits Limited. So, I think it's likely that anything Mr B was doing with that company was done with the knowledge of Mr X.

  In any event, the advice given in this case didn't refer to Nationwide Corporate Benefits Limited – the advice and application refers to NBCL.

- Joseph Oliver says that Mr B tried to re-direct commission payments to himself, but ultimately, commission appears to have still been paid by STM to the existing bank account it had for introductions from NBCL.

- Joseph Oliver's business development manager says he didn't uncover any evidence that business was being conducted by NBCL. But I don't find his evidence persuasive. It does not reconcile with the other evidence I've seen in this and other complaints in the form of suitability letters and application documents. His evidence is also not contemporaneous and I think it's fair to say that he would not have been in a position to determine definitively who NBCL's employees or associates were from his visits.

  Moreover, if NBCL truly didn't conduct any business in respect of Mr H or indeed anyone else using its authorisation with Joseph Oliver, it would call into question why Mr X, on behalf of NBCL, would go to the trouble of entering into an AR agreement with Joseph Oliver at all. It would be odd to enter such an agreement and then do nothing with it. Regardless of the terms of the agreement and whether Joseph Oliver did confer authority on NBCL to conduct pensions activities (which I'll discuss later) I think it's likely that (on his part) Mr X entered the agreement with Joseph Oliver in order to conduct the kind of business that was carried on here in respect of Mr H.

- I have no reason to believe that the suitability letter sent to Mr H is fake or forged. It is headed and footed "*The Pension Reporter*", a trading style of NBCL and appointed representative of Joseph Oliver. I don't accept Joseph Oliver's assertion that the letterhead is "fake" simply because it uses an email address that was not listed on the FCA's website.

- Joseph Oliver also says that the suitability report is fake because it provides the details of the wrong Portuguese regulator – the letter says Joseph Oliver is regulated by the "Institute de Seguros" rather than the ASF (the correct Portuguese regulator). However, I note that Joseph Oliver's own website lists the "Institute de Seguros" under the "Regulators" section – even if there are other references to ASF. So the suitability letter isn't different to Joseph Oliver's own website. So, again, I'm not persuaded that the suitability letter sent to Mr H is fake or forged.

- The fact that Mr X didn't sign the suitability letter personally and that it was simply signed generically as "*The Pension Reporter*" doesn't persuade me that Mr X was unaware that Mr B was making recommendations on behalf of NBCL. Lots of business letters are signed in this way with individuals signing on behalf of

> companies using a company name, even smaller businesses that don't transact business in large volumes.

So, my finding is that Mr B was more likely than not acting on behalf of NBCL when giving the advice to Mr H and arranging the transfer to the QROPS. My view is that, more likely than not, Mr B was doing this as part of a joint arrangement with Mr X.

Did Joseph Oliver only authorise Mr X to act on its behalf under its agreement with NBCL?

As an alternative argument, Joseph Oliver has said that it only authorised Mr X of NBCL to act as an agent on its behalf and so it isn't responsible for the acts or omissions of Mr B. Joseph Oliver has sought to rely on clauses 6.2, 7.1 and 12.1 of the AR agreement for its assertion that it only intended for Mr X to be conducting activities on its behalf.

But, looking at the evidence, I don't think Joseph Oliver restricted its authority and relationship to Mr X. AR agreement between Joseph Oliver and NBCL doesn't identify any particular individuals as being authorised to act on Joseph Oliver's behalf. Rather, the agreement was with the company itself. If Joseph Oliver intended only for Mr X to be its AR it could have entered into an AR agreement directly with him – for example as a sole trader. However, Joseph Oliver entered into an agreement with NBCL. And, in the AR agreement between Joseph Oliver and NBCL, there is no clause that explicitly sets out that Joseph Oliver only accepts responsibility for the activities carried out by Mr X as director of NBCL.

I note that Joseph Oliver says that I should take account of the intention and understanding of the contract between the respective parties – Joseph Oliver and Mr X – which it says was that only Mr X was authorised under the agreement. But that would require me to ignore what I consider to be the clear drafting of the agreement that referred to NBCL not Mr X alone. I don't think that's right. It would also be impossible to do here as do not know what Mr X's understanding of the contract was.

So, again on balance, I think the evidence shows that Joseph Oliver had a relationship with and authorised NBCL to act on its behalf – and this wasn't restricted to Mr X. And I think the pension advice to Mr H was given by Mr B for and on behalf of NBCL which was an AR of Joseph Oliver at the relevant time.

But as a further alternative argument, Joseph Oliver also says that the pension advice given to Mr H in this case wasn't within the scope of what it authorised NBCL to do under the terms of its AR agreement. It says this means it didn't accept responsibility for the acts being complained about by Mr H under FSMA or the common law. I'll explore this next.

Was this business that was authorised under the terms of the AR agreement?

Joseph Oliver has recently said that NBCL could not give any advice at all and therefore what's happened in this case was not authorised under the agreement.

The AR agreement in this case isn't a very clearly drafted document. It is labelled as an "Introducer Agreement" and I accept that it appears to primarily be drafted as a means by which NBCL would introduce clients to Joseph Oliver to establish an "ongoing relationship" with the client.

However, I note that the AR agreement does include provisions about NBCL not giving advice *beyond* his/her level of competency – suggesting that advice could be given by NBCL

in some circumstances. And Joseph Oliver itself has told us previously that that the agreement authorised NBCL to provide "*advice on life assurance and pension products"* (it distinguished this from pension transfers and investments which it says wasn't authorised). So, on balance, I don't think NBCL was intended to simply be an introducer to Joseph Oliver. I'll explain this more below when I look at apparent authority.

Joseph Oliver has of course pointed to a number of other provisions of the AR agreement that it says were breached by NBCL. In earlier provisional decisions, I explored these arguments in the context of section 39 FSMA and common law agency principles of actual authority. As explained to the parties previously, I am of the view that there is no clear evidence that allows me to safely conclude that Joseph Oliver authorised the pension advice given in this case under section 39 FSMA or the common law principle of actual authority under the terms of the AR agreement. But I think that, irrespective of the specific clauses in the agreement, Joseph Oliver represented that NBCL had apparent authority to give pensions advice on behalf of Joseph Oliver. Apparent authority isn't restricted by the terms of the actual agreement made between the parties.

Did Joseph Oliver represent that NBCL had apparent authority to give pensions advice?

The essence of apparent authority (sometimes called ostensible authority) is not concerned with what was actually agreed between the parties (for example by way of the AR agreement), but rather, how the relationship between those parties *appeared* to third parties. In this complaint, I'm concerned with how the relationship appeared to Mr H.

For apparent authority to operate, there must be a representation by the principal that the agent has its authority to act. As Diplock LJ said in in *Freeman & Lockyer v Buckhurst Properties (Mangal) Ltd* (1964) 2 QB 480:

> *"The representation which creates "apparent" authority may take a variety of forms of which the commonest is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal's business with other persons. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of his principal's business has usually "actual" authority to enter into".*

In *Martin v Britannia Life Ltd* [1999] 12 WLUK 726, Parker J quoted the relevant principle as stated in Article 74 in Bowstead and Reynolds on Agency (16th edition):

> *"Where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf he is bound by the acts of that other person with respect to anyone dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no such actual authority."*

In the more recent case of *Anderson v Sense Network Ltd* [2018] EWHC 2834 (Comm), Jacobs J endorsed Parker J's approach*:*

> *"As far as apparent authority is concerned, it is clear from the decision in Martin (in particular paragraph 5.3.3) that, in order to establish apparent authority, it is necessary for the claimants to establish a representation made by Sense [the alleged*

> *principal], which was intended to be acted on and which was in fact acted on by the claimants, that MFSS [the alleged agent] was authorised by Sense to give advice in connection with the scheme…*
>
> *I also agree with Sense that there is nothing in the "status" disclosure – i.e. the compulsory wording relating to the status of MFSS and Sense appearing at the foot of the stationery and elsewhere – which can be read as containing any relevant representation as to MFSS's authority to do what they were doing in this case: i.e. running the scheme and advising in relation to it. The "status" disclosure did no more than identify the regulatory status of MFSS and Sense and the relationship between them. I did not consider that the Claimants had provided any persuasive reason as to how the statements on which they relied relating to "status disclosure" could lead to the conclusion that MFSS was authorised to provide advice on the scheme that was being promoted. In my view, a case of ostensible authority requires much more than an assertion that Sense conferred a "badge of respectability" on MFSS. As Martin shows, it requires a representation that there was authority to give advice of the type that was given…the relevant question is whether the firm has knowingly or even unwittingly led a customer to believe that an appointed representative or other agent is authorised to conduct business on its behalf of a type that he is not in fact authorised to conduct…"*

The *Anderson* case was the subject of an appeal. The Court of Appeal has now issued its decision agreeing with the earlier decision of Jacobs J. I merely wish to acknowledge the fact of the appeal but it should be noted that Jacobs J's conclusion on apparent authority was not appealed by the parties involved in that case.

And, in *Armagas Ltd v Mundogas SA ('The Ocean Frost')* [1985] UKHL 11 it was stated that:

> *"In the commonly encountered case, the ostensible authority is general in character, arising when the principal has placed the agent in a position which in the outside world is generally regarded as carrying authority to enter into transactions of the kind in question. Ostensible general authority may also arise where the agent has had a course of dealing with a particular contractor and the principal has acquiesced in this course of dealing and honoured transactions arising out of it.* (emphasis added)

So, apparent authority may exist even where the relevant activity was outside the scope of an express agreement between the parties, because what is critical is what the relationship appeared to be to the third party, based on a representation made by the principal. In other words, the principal has placed the agent in a position which in the outside world is generally regarded as carrying authority to enter into transactions of the kind in question. This may not involve any direct interaction at all between the alleged principal and the third party and the representations can take a variety of forms.

What representations were made?

I'm persuaded that, on the particular facts of this case, Joseph Oliver did make representations and placed NBCL in a position where it could hold itself out as Joseph Oliver's agent and had authority to provide advice on pensions of the type given here on behalf of Joseph Oliver. I say this because:

- It registered NBCL as its AR on the FCA register – the corporate entity.

- Joseph Oliver authorised NBCL to use the trading as *The Pension Reporter* as its appointed representative. This was NBCL's trading name on the FCA's register from the outset of its relationship with Joseph Oliver.

- The suitability letter carried details of Joseph Oliver as NBCL's principal. It said "*The Pension Reporter is a trading name of Nationwide Benefit Consultants Ltd who are appointed representatives of Joseph Oliver Mediacao de Seguros Lda. Authorised and regulated by the Instituto de Seguros de Portugal 410317061 and the Financial Conduct Authority 521370".* This is sometimes referred to as a status disclosure.

- Both the suitability letter and the FCA register set out NBCL's website as www.pensionreporter.com.

In my email to both parties in December 2020, I highlighted why I thought that the contents of the NBCL website also formed part of the relevant representations about NBCL giving advice. In response, Joseph Oliver vehemently denied that the website was live (or contained the sections about pension advice that I had found) at the time of the events being complained about.

I think it's likely that the website was in operation at the time of the complaint and did refer to NBCL providing advice. But I accept that it is difficult for me to know whether Joseph Oliver authorised (or was aware of) the information contained on the website. However, I don't need to make a finding about whether the content of the website was a representation made by Joseph Oliver. I'm satisfied that the *other representations* I've listed above are sufficient for me to conclude that there is apparent authority in this case.

Joseph Oliver has highlighted findings made by Jacobs J in the High Court in the case of *Anderson & Ors v Sense Network Ltd* where the Court declined to hold that the "status disclosure" wording on a letterhead gave rise to apparent authority. I've quoted the relevant paragraphs of the decision above. In that case, the use of letterhead was held not to be sufficient to represent that the AR could give advice about a deposit scheme it was operating when this wasn't the kind of activity that advisers usually become involved in operating. Joseph Oliver has also said that the High Court decision is also authority that a finding of apparent authority in these circumstances would "*eviscerate the requirement*" under section 39 FSMA for the principal to have authorised the business.

I agree that a status disclosure in isolation is not generally sufficient to make a finding of apparent authority. But, in my view, the representations I've set out above make this complaint more akin to the facts of *Martin v Britannia Life Ltd* (also quoted above). In *Martin,* the representation by the principal that the agent was a financial adviser acting for an insurance company was regarded as a sufficient representation that the adviser could advise on matters (the mortgage in that case) which were ancillary to insurance products.

Similarly, my view is that by allowing NBCL to operate as its appointed representative and trade as *The Pension Reporter,* use letterhead with that name and use a website with the same domain name*,* Joseph Oliver represented to the outside world (including Mr H) that NBCL was authorised to conduct regulated pensions activities.

Joseph Oliver says that the name *The Pension Reporter* denotes that NBCL would be involved in pensions, but not necessarily pension *advice*. Having considered the matter further since my earlier provisional decisions, I don't find that argument persuasive. NBCL was registered as an appointed representative trading with the name *The Pension Reporter* to conduct regulated activities. I think on any reasonable, common sense interpretation of these facts taken together, it is a representation that NBCL was authorised to conduct regulated activities in connection with pensions - such as advice and arrangements. NBCL would not need to be an appointed representative at all if it were doing nothing but providing information. So, in my view, the context and combination of the trading name and registration with the FCA is important.

Joseph Oliver also says it did not authorise the use of the name *The Pension Reporter* or the NBCL letterhead and website. As I understand it, Joseph Oliver's latest submissions are that it didn't know that NBCL was trading as *The Pension Reporter* at all and that the FCA's register has only recently used these details. It says this means this case is distinguishable from the *Martin* case where the principal supplied the agent with the business card that was said to be a representation.

I don't accept this argument. Joseph Oliver has never previously said it was unaware that NBCL was using this trading name. And I don't think it's likely that the trading name *The Pension Reporter* or the website address of the www.pensionreporter.com have only recently been added to the FCA's register. After all, NBCL stopped being a AR of Joseph Oliver (or anyone else) in April 2016. I think it's likely that these details have been on the register from the outset and that Joseph Oliver must have been aware of this and been involved in the registration of these details. So I think this is evidence that Joseph Oliver authorised both the trading name and use of the website address (as I've said above, I make no finding about whether Joseph Oliver authorised the contents of the website). Furthermore, the NBCL letterhead reflected these approved details and so I think was in an approved format.

As explained above, apparent authority can be general in nature and can arise from conduct or by allowing the agent to represent itself as being authorised by the principal to conduct certain acts. I think Joseph Oliver allowed NBCL to represent itself as being authorised to provide pensions advice by registering it as its AR and allowing it to trade as *The Pension Reporter*. That conduct is, in my view, enough to make a finding that there were relevant representations in this case.

I am strengthened in my view by the fact that Joseph Oliver has told us very specifically in response to my earlier provisional decisions that Joseph Oliver itself "*is authorised to provide advice on pensions i.e. personal pensions which are long term insurance contracts*" and "*The AR agreement authorises the AR to provide advice on Life assurance and pension products".* So, Joseph Oliver, by its own admission, did understand that NBCL would give advice about some pension products on its behalf - albeit it's not altogether clear to me what kind of products it understood this to cover.

Joseph Oliver's latest position is that NBCL couldn't give advice at all and that it could only introduce clients to Joseph Oliver. This clearly contradicts what it told us earlier about the AR agreement (see the previous paragraph above). It's also not consistent with other arguments it makes about Mr X not being able to give advice "*beyond his level of competency"*. This contradiction and inconsistency does not make the argument persuasive.

Joseph Oliver has also provided lengthy arguments refuting any finding that it knew NBCL was giving pension advice. In particular Joseph Oliver points to an email sent in June 2015 (some months after the events being complained of here) in which Mr X says to Joseph Oliver:

> *"I'll be in the office soon and will call you then but we have not written any sipp's with JO (or indeed Global) so this is definitely not concerning us."*

In addition, Joseph Oliver says its own authority was limited to pension products that were long term insurance contracts, that it didn't conduct any SIPP pension business in the UK (despite earlier entering into an agreement with a UK SIPP operator) and that the reference on its website to QROPS was for the benefit of partner services offered to European businesses by Joseph Oliver Marketing Limited not advice services by Joseph Oliver Mediacao or its ARs. This, it says, is all evidence that it would not and did not represent that NBCL could give the pension advice given here.

I've considered all these issues very carefully. I think the June 2015 email is of limited evidential value as we have not been provided with any information about the context in which the email was sent or what happened before or after. So I don't think I can give any significant weight to the email in my determination. But, more importantly, in respect of all these arguments, my findings on apparent authority do not hinge on Joseph Oliver knowing that NBCL was giving pensions advice. As set out in the *Anderson* case above:

> *"the relevant question is whether the firm has knowingly or even unwittingly led a customer to believe that an appointed representative or other agent is authorised to conduct business on its behalf of a type that he is not in fact authorised to conduct…"*

So, even if Joseph Oliver did not knowingly lead customers to believe that NBCL was authorised to give pensions advice, I think by allowing NBCL to be registered as its AR and trade as *The Pension Reporter* it unwittingly represented that NBCL could give advice of the type given in this case.

For completeness, I would add that the representations involved in this case make no distinction about the kind of pension products NBCL could advise on. For example, I don't think an ordinary member of the public would be able to draw the technical distinction that Joseph Oliver says should be drawn about long term insurance contracts and pension transfers. I don't think it would be reasonable to expect people to understand NBCL's authority might be limited to a very narrow range of pension products or to personal pension switches but not pension transfers – unless it was made very plain and obvious to them, for example by way of a disclaimer on approved letterhead. Joseph Oliver took no such precautions in what it allowed NBCL to present to the outside world.

So, my conclusion is that Joseph Oliver made representations that NBCL was authorised to conduct the pensions activities that Mr H has complained about.

Did Mr H rely on the representations?

In order to establish whether there was apparent authority, I also need to determine whether Mr H relied on the representations made by Joseph Oliver. In the *Anderson* case, Jacobs J in the High Court summarised the approach to be taken as to whether or not there is sufficient evidence of reliance on the representation as follows:

> "*a relevant ingredient of a case based on apparent authority is reliance on the faith of the representation alleged: see Bowstead and Reynolds on Agency 21st edition, paragraph [8-010] and [8-024];* Martin *paragraph 5.3.3. In* Martin*, Jonathan Parker J. held that the relevant representation in that case (namely that the adviser was authorised to give financial advice concerning a remortgage of the property) was acted on by the plaintiffs 'in that each of them proceeded throughout on the footing that in giving advice [the adviser] was acting in every respect as the agent of [the alleged principal] with authority from [the alleged principal] so to act'.*"

It is of course impossible for me to know with any certainty what Mr H did or didn't rely on at the time. And I accept that the fact that Mr H directed his complaint to Joseph Oliver has limited evidential value about his reliance at the time of the events.

However, as set out above, we asked Mr H again recently for his recollection of events. He told us that:

> *"I cannot emphasize this enough, I checked the FCS [sic] register on line and found the pension reporter a member as well as researching stm fidecs and the fact the scheme was registered with HMRC before I went ahead, thinking my pension was safe."*

I've seen no evidence that Mr H has been untruthful to us at any point. And what he's said is similar to what Mr H said to us before I issued my provisional decisions i.e. before the issue of reliance became a significant consideration in this complaint. At that point Mr H said:

> *"1: A company called Pinnacle Brokers put me in touch with Tom Bigger and he wrote to me. There was never a face to face meeting everything was done by post.*
>
> *2: Correspondence I received from Joseph Bigger was on headed notepaper saying it came from the Pension Reporter which I have already forwarded to you. Also I received a couple of newsletters from the Pension Reporter in the months after the transfer. I have also forwarded an email from fidecs proving commission was paid to NBCL.*
>
> *3: I researched NBCL and the Pension Reporter and they were appointed representatives of Joseph Oliver who I found on the Financial Services Register so I thought my money was safe."*

I find Mr H's account credible and consistent. Mr H placed reliance on the general position with respect to Joseph Oliver's authorisation of NBCL – trading as *The Pension Reporter*. He's told us he took the step of checking the register because he was worried that he might be "scammed". He took comfort from the fact that NBCL and Joseph Oliver were both regulated. So, the fact that NBCL and Joseph Oliver were connected registered was important and they were facts that Joseph Oliver had brought about. It was part of the conduct that makes up the overall representation of authority.

I'm also not persuaded by Joseph Oliver's argument that, having looked at the FCA register, Mr H should reasonably have concluded that NBCL could not give him pensions advice. Joseph Oliver's own argument is that it was allowed to conduct some personal pension activities under its permissions. So I don't see why Mr H should be criticised for not spotting

whether Joseph Oliver and NBCL's permissions did or didn't allow it to give the advice given to him here about a pension.

Joseph Oliver has said that Mr H didn't receive the suitability letter from NBCL. It says the lack of signature on the acknowledgement slip at the end of the letter is evidence of this. I've considered this but I can't see any basis for that assertion. Mr H has told us clearly that he did receive the suitability letter. And other complainants certainly did receive suitability letters from NBCL. I have no reason to think that Mr H wouldn't have received one too.

So, overall, I think it highly unlikely that Mr H would have chosen to follow Mr B's advice if he thought that NBCL was an unregulated entity that could not give pensions advice. Mr H invested a very large sum of money - his entire pension fund - I don't think he would have done this if he believed that NBCL was not an AR of Joseph Oliver and authorised to give him the advice he received which he checked on the FCA's register.

In hindsight, Mr H may have been too trusting in his dealings with Mr B which took place entirely at a distance. That may or may not be because he has certain health conditions (both Joseph Oliver and Mr H have asked me to take this into account). But regardless, I have no reason to doubt what he's otherwise told us.

So, I think Mr H did rely on the representations made by Joseph Oliver that NBCL was authorised to give pensions advice on its behalf and so there was apparent authority in this case.

In the case law relating to apparent authority, the courts have also taken into account whether it is *fair and just* to require a principal to bear a loss caused by the wrongdoing of its agent. I appreciate that TMAF forms part of an investigation by the SFO. But, I still think it's fair and just to hold Joseph Oliver responsible for the detriment Mr H has suffered. That's because I don't think NBCL would have been in a position to persuade Mr H to transfer to the QROPS and make this investment but for the platform given to it by Joseph Oliver.

As such, I think it is fair and just for Joseph Oliver to be held responsible for any losses caused by NBCL to Mr H whilst carrying on the business it had apparent authority to conduct on Joseph Oliver's behalf.

Other matters

Joseph Oliver says that it took all reasonable precautions regarding NBCL. It says it tried to constrain NBCL through the AR agreement, IT systems and procedure and through supervision. It cites the *Adams v Options* decision to argue that this should mean that it was entitled to rely on the contractual arrangements it had in place with NBCL which took precedence over regulatory obligations.

I've read the *Adams* decision carefully as well as Joseph Oliver's latest submissions. I remain of the view that the decision concerned a very different set of circumstances concerning the obligations of a SIPP operator. It did not deal with apparent authority. So, I don't agree that it is of relevance to my determination about jurisdiction. Furthermore, the contractual arrangements in *Adams* concerned the relationship between the business and the consumer, and the consumer was privy to them. Whereas the contract here concerns the relationship between Joseph Oliver and NBCL, which Mr H was not privy too.

I also acknowledge that Joseph Oliver has highlighted recent case law to argue why it should not be held liable under the common law principle of vicariously liability. But that is a distinct legal concept to apparent authority. I don't need to address the points made about vicarious liability as that is not the basis upon which I've based my findings about jurisdiction.

What does this all mean?

Going back to the starting point for this section of my decision, 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)"*.

My decision is that Joseph Oliver represented that NBCL had authority (apparent authority) to give pensions advice and that Mr H reasonably relied on this representation. As such Joseph Oliver is responsible for the advice given here to Mr H as per the guidance at DISP 2.3.3.

My conclusion on jurisdiction

For the reasons set out above, my conclusion is that we do have jurisdiction to consider this complaint against Joseph Oliver.

My findings – merits

As we have jurisdiction to consider the complaint against Joseph Oliver, I've gone on to consider all the evidence and arguments we have obtained in order to decide what is fair and reasonable in all the circumstances of Mr H's case. When considering what is fair and reasonable in the circumstances of this complaint, I'm required to take into account relevant considerations which include: law and regulations; regulator's rules, guidance and standards; and codes of practice. I'm also required to take into account, where appropriate, what I consider to have been good industry practice at the time.

Again, I have carefully considered all of Joseph Oliver's submissions, but I still think it is fair and reasonable in the circumstances to uphold Mr H's complaint. And this is why.

It isn't in dispute that Joseph Oliver (and consequently NBCL) didn't have the required regulatory "top-up" permissions to give the advice that was given here to Mr H. So, as a starting point, NBCL should not have given the advice it gave to Mr H at all. I also think it's fair to say that Joseph Oliver should have taken steps to ensure it did not make representations that allowed NBCL to appear as if it was authorised to conduct pensions business in the UK.

However, putting aside the issue of top-up permissions and any representations made, I don't think the advice provided by NBCL can be said to have been suitable for Mr H.

In my provisional decisions, I made reference to various COBS provisions dealing with the need for firms to act in their customer's best interests, know its client and give suitable advice (COBS 2 and 9). Joseph Oliver has submitted that COBS doesn't apply to it as an EEA firm. However, I do not consider this submission to have any weight.

Firstly, I note that at the relevant time, COBS 1.1.1 R set out the General Application Rule which provided that:

> *"This sourcebook applies to a firm with respect to the following activities carried on from an establishment maintained by it, or its appointed representative, in the United Kingdom:*
>
> *(2) designated investment business;*
>
> *(3) long-term insurance business in relation to life policies;*
>
> *and activities connected with them".*

COBS 1.1.2 R set out that the General Application Rule is modified in COBS 1 Annex 1 according to the activities of a firm (Part 1) and its location (Part 2). And, COBS 1.1.4 G provided that guidance on the application provisions can be found in COBS 1 Annex 1 (Part 3).

At the relevant time, COBS 1 Annex 1, Part 2 paragraph 1(1) R provided that: "*The territorial scope of this sourcebook is modified to the extent necessary to be compatible with European law* (the "EEA Territorial Scope Rule"). However, at the relevant time, COBS 1 Annex 1, Part 3 paragraph 2.2 G provided the following:

> *"When considering the impact of a directive on the territorial application of a rule, a firm will first need to consider whether the relevant situation involves a non-UK element. The EEA territorial scope rule is unlikely to apply if a UK firm is doing business in a UK establishment for a client located in the United Kingdom in relation to a United Kingdom product. However, if there is a non-UK element, the firm should consider whether:*
>
> *(1) it is subject to the directive (in general, directives only apply to UK firms and EEA firms, but the implementing provisions may not treat non-EEA firms more favourably than EEA firms);*
> *(2) the business it is performing is subject to the directive; and*
> *(3) the particular rule is within the scope of the directive.*
>
> *If the answer to all three questions is 'yes', the EEA territorial scope rule may change the effect of the general application rule".*

As set out above, Joseph Oliver has agreed that it required regulatory "top-up" permissions directly from FCA in order to carry out the business Mr H has complained about. And, it therefore follows that the pensions advice provided to Mr H was not business that came within the scope of the IMD. I am therefore satisfied that the EEA Territorial Scope Rule would not apply in the circumstances and that the relevant COBS rules are applicable.

In its recent submissions, Joseph Oliver refutes that I can make any assessment of what does or doesn't come within the scope of the IMD and therefore whether the specific COBS provisions are relevant considerations. But in any event, I think the COBS are indicative of what constituted good industry practice at the relevant time – which is a relevant consideration I must take account of in reaching my decision. And NBCL, acting fairly and reasonably, should still have given suitable advice to Mr H.

Mr H was 53 years old at the time of the advice, resident in the UK and had no other pension provision other than his final salary scheme. The Pension Transfer Report set out that his

attitude to risk was “medium”. There’s no evidence that he was a sophisticated investor or had any experience of making high risk investments.

So, NBCL should have questioned why Mr H, who lived in the UK, was at all suited to a transfer to a QROPS arrangement in Gibraltar. There’s no evidence that he was seriously considering moving abroad or that he was genuinely interested in having greater investment choice.

Furthermore, NBCL produced a suitability letter recommending the QROPs, but didn’t comment on the underlying investment in TMAF despite knowing that this is what the QROPS would be used for.

I note that in January 2013, (before the investment had been made) the regulator issued an alert that reminded firms of the rules that were in force at the time. The alert stated:

> *“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 investment proposed to be held within the new pension. In particular, we have seen advisers moving customer’s retirement savings to self-invested personal pensions (SIPPs) that invest wholly or primarily in high risk, often illiquid unregulated investments (some which may be in Unregulated Collective Investment Schemes)…*
>
> *The cases we have seen tend to operate under a similar advice model. An introducer will pass customer details to an unregulated firm, which markets an unregulated investment (e.g. an overseas property development). When the customer expresses 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. Sometimes the regulated financial adviser also assists the customer to unlock monies held in other investments… so that the customer is able to invest in the unregulated investment…*
>
> *… 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...”*

Although the alert mentions SIPPs, I think that it equally applied to transfers that were to be invested into a QROPS arrangement and were then to be invested in high risk funds (as happened here). And again, this is indicative of what was good industry practice in giving advice about these matters.

So, my view is that NBCL should have taken into account and advised on the suitability of the TMAF investment as well as the overall QROPS arrangement. It failed to do this.

TMAF was an unregulated speculative investment. It was high risk and investors faced the real possibility of losing all their money. It also appears to lack the protection afforded by the Financial Services Compensation Scheme.

Mr H also had a valuable final salary pension scheme and so the starting point in any consideration of advice to Mr H should have been that a transfer of his pension would not be suitable for him.

To support this point, I refer to COBS 19.1.6G which states:

> *"When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme whether to transfer or opt-out, a firm should start by assuming that a transfer or opt-out will not be suitable. A firm should only then consider a transfer or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer or opt-out is in the client's best interest"*

So, Mr H should have been advised:

- of the risks associated with TMAF and that he could lose his entire pension;
- that TMAF didn't match his "medium" attitude to risk;
- that he would lose significant benefits from his final salary scheme.

As I've quoted above, the suitability letter said:

> *"The Critical Yield Report (attached) states a critical yield of 9.87% is needed to match the benefits of your existing Royal Mail scheme at normal retirement date. Based on your risk profile it was agreed that the critical yield is not achievable but given your desire to pass funds onto your beneficiaries, greater investment choice and the probability of moving abroad, I believe the transfer to a QROPS is right for you."*

This clearly highlighted that NBCL was fully aware that the QROPS could not achieve the critical yield (i.e. would not perform to the level required) to match Mr H's existing benefits. Despite this, it didn't advise against the transfer – but said that the transfer to the QROPS was "*right*" for Mr H. Given what I've said above, I can't see that there was any basis for this conclusion. In short, Mr H should have been advised against the transfer to the QROPS and the investment in TMAF.

Joseph Oliver says that Mr H would have signed a waiver letter acknowledging that he had been told that that the TMAF investment might not be suitable for him and certifying that he was a sophisticated investor. It says I should take this into account.

I accept that he may have signed such documents as I've seen some other consumers that have done so in cases involving NBCL. I also accept that the suitability letter should possibly have raised some questions for Mr H as it mentioned that the critical yield to meet Mr H's existing benefits was unlikely to be met by the transfer to the QROPS and that he would possibly move abroad. Mr H should possibly have queried the latter if that was not his intention at all.

But the suitability letter was otherwise wholly biased towards persuading Mr H that the transfer to the QROPS was in his best interests. And if he did sign other related documents, I'm not persuaded that he did so with a full understanding of the implications of doing so. So had Mr H been given suitable advice by NBCL or an appropriately authorised adviser, I think he would have listened to that advice and remained invested in his existing pension scheme.

I've taken account of Joseph Oliver's submissions about the *Adams v Options* case. I don't agree that it affects the outcome in this case. There are very big factual and legal differences. That case dealt with a SIPP operator that had not given advice to the complainant. My finding is that NBCL did give advice to Mr H. And unlike in in the *Adams case,* my view is that if Mr H had received suitable advice, he would not have proceeded with the pension transfer to the QROPS and investment in TMAF - even if was looking at his options and how he might access funds earlier than his existing scheme allowed. I don't think he would have wanted to put his whole pension at risk.

I acknowledge that other parties were involved in this transaction – in particular Joseph Oliver says that STM should be held to account. But I'm not considering a complaint against STM and, in any event, STM is not subject to our jurisdiction.

FSMA requires me to award "*fair compensation*" and I'm not therefore limited to the position a court might take. And I think that if Joseph Oliver had treated Mr H fairly, the transfer to the QROPS and the associated investment in TMAF would not have gone ahead. As a result, I'm satisfied that it's fair and reasonable to hold Joseph Oliver responsible for the whole of the loss suffered by Mr H.

If Joseph Oliver believes other parties to be wholly or partly responsible for the loss, it should be free to pursue those other parties. And if Mr H *is compensated in full now*, Joseph Oliver (rather than Mr H) should benefit from any future payments from other parties. So, compensation payable to Mr H should be contingent on the assignment by him to Joseph Oliver of any rights of action he may have against other parties in relation to his transfer to the QROPS and the investment.

I know that Joseph Oliver thinks that the TMAF investment still has value and will provide a return to Mr H. To address this (and provided he is compensated in full), I think compensation should also be contingent on Mr H undertaking to give to Joseph Oliver any future payment he might receive in relation to the investment, if he is to receive any.

I'll set out details of these matters below.

What should Joseph Oliver do?

My aim is to return Mr H to the position he would now be in but for what I consider to be Joseph Oliver's failure to treat him fairly. If Joseph Oliver had done everything it should have, I think he would have left his pension as it was.

So, Joseph Oliver should calculate fair compensation by comparing the position he would be in, if he had not transferred. In summary, Joseph Oliver should:

1. Calculate the loss Mr H has suffered as a result of making the transfer.
2. Pay a commercial value to buy Mr H's share in any investments that cannot currently be redeemed.

3. Pay an amount into Mr H's QROPS so that the transfer value is increased to equal the loss calculated in (1).

4. Pay Mr H the equivalent of five years' worth of QROPS fees.

5. Pay Mr H £500 for trouble and upset.

Lastly, in order to be fair to Joseph Oliver, as mentioned, it should have the option of payment of this redress being contingent upon Mr H assigning any claim he may have against others in respect of this loss to Joseph Oliver – but only in so far as Mr H is fully compensated here. The terms of the assignment should require Joseph Oliver to account to Mr H for any amount it subsequently recovers against the other parties that exceeds the loss paid to Mr H. Joseph Oliver should bear the cost of drafting the assignment.

I have explained how Joseph Oliver should carry out the calculation:

1. *Calculate the loss Mr H has suffered as a result of making the transfer*

Joseph Oliver must undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in October 2017.

For the avoidance of doubt, the calculation should include any free standing additional voluntary contributions that Mr H may have paid into to his occupational pension scheme as I think that Mr H has treated these as part of the same pension pot as the defined benefit element of his fund. In other words, he would have left these invested as they were had Joseph Oliver treated him fairly. If it's not possible to use the regulator's guidance for the free standing voluntary contributions, then the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return Index) should be used to obtain the notional transfer value. I'm satisfied that's a reasonable proxy for the type of return that could've been achieved for the free standing voluntary contributions if Mr H's pension had remained invested as it was.

The calculation should be carried out as at the date of my final decision and using the most recent financial assumptions published at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr H's acceptance of the decision.

Joseph Oliver may wish to contact the Department for Work and Pensions (DWP) to obtain Mr H's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P). These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mr H's SERPS/S2P entitlement.

The calculation should take account of the value of any cash held in the QROPS. Any existing value of the investment should be covered by the next step.

2. *Pay a commercial value to buy any investments which cannot currently be redeemed.*

As I've said above, my aim is to return Mr H to the position he would have been in but for the actions of Joseph Oliver. This is complicated where an investment is illiquid (meaning it cannot be readily sold on the open market), as its value can't be determined. That appears to be the case here.

As I understand it, the QROPS is still open. So, Joseph Oliver should calculate an amount it is willing to pay as a commercial value for the TMAF investment and pay this sum into the QROPS and take ownership of the relevant the investment. Any sum paid by Joseph Oliver can be deducted from the loss calculation set out at step 1 above.

If Joseph Oliver is unwilling or unable to purchase the investment the value of it should be assumed to be nil for the purposes of the loss calculation at 1 above.

I know that Joseph Oliver continues to think that the TMAF investment still has value and will provide a return to Mr H. If Mr H is fully compensated, Joseph Oliver may ask Mr H to provide an undertaking to account to it for the net amount of any payment he may receive from the investment. That undertaking should allow for the effect of any tax and charges on the amount Mr H may receive from the investment and any eventual sums he would be able to access from the QROPS. Joseph Oliver will need to meet any costs in drawing up the undertaking.

In the event that Mr H isn't fully compensated, then the undertaking should provide that any payment from the investment should still be paid Mr H until the amount received (excluding any interest payment) has reached the full compensatable loss due to him. Then any further distributions/value in excess of this sum can be taken by Joseph Oliver.

3. *Pay an amount into Mr H's QROPS so that the transfer value is increased to equal the loss calculated in (1).*

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr H's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr H as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. 25% of the loss would be tax-free and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

4. *QROPS fees*

As I've said above, I understand that the QROPS is still open. If it is, Mr H may wish to close the QROPS and move his funds to a more conventional vehicle such as a SIPP. But, it may not be possible to move the TMAF investment into a UK based SIPP or pension. Some SIPP providers may not accept them. Also, it may not be possible to easily sell or transfer the investment. So there is the possibility Mr H may be 'trapped' in the QROPS. So, if Mr H cannot close the QROPS and he is being charged annual fees, I think it would be fair if Joseph Oliver paid him five years' worth of the QROPS annual charges to reflect these considerations. This should allow sufficient time for Mr H to make changes and stop further fees being incurred.

5. *Trouble and upset*

I also think Mr H has been caused upset as a result of Joseph Oliver's actions. The sudden loss of nearly all his pension fund came as a shock to him and has clearly had a significant

impact. I think it would be fair and reasonable for Joseph Oliver to pay Mr H £500 compensation for this.

Lastly, as set out in my provisional decision, if Joseph Oliver believes other parties to be wholly or partly responsible for the loss, it should be free to pursue those other parties. And if Mr H *is compensated in full now*, Joseph Oliver (rather than Mr H) should benefit from any future payments from other parties. So, compensation payable to Mr H should be contingent on the assignment by him to Joseph Oliver of any rights of action he may have against other parties in relation to his transfer to the QROPS and the investment.

My final decision

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £150,000, I may recommend that the business pays the balance.

Determination and money award: I uphold the complaint. I consider that fair compensation should be calculated as I have set out above. And, I require Joseph Oliver - Mediacao de Seguros LDA to pay Mr H compensation up to a maximum of £150,000.

The compensation resulting from the loss assessment must, where possible, be paid to Mr H within 90 days of the date Joseph Oliver - Mediacao de Seguros LDA receives notification of his acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes Joseph Oliver - Mediacao de Seguros LDA to pay Mr H this compensation.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above – and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I also recommend that Joseph Oliver - Mediacao de Seguros LDA pays Mr H the balance. I further recommend interest to be added to this balance at the rate of 8% per year simple for any time, in excess of 90 days, that it takes Joseph Oliver - Mediacao de Seguros LDA to pay Mr H from the date it receives notification of his acceptance of the decision, as set out above.

If the loss does not exceed £150,000, or if Joseph Oliver - Mediacao de Seguros LDA accepts the recommendation to pay the full loss as calculated above, Joseph Oliver - Mediacao de Seguros LDA should have the option of taking an assignment of Mr H's rights in relation to any claim he may have against other parties.

If the loss exceeds £150,000 and Joseph Oliver - Mediacao de Seguros LDA does not accept the recommendation to pay the full amount, any assignment of Mr H's rights should allow him to retain all rights to the difference between £150,000 and the full loss as calculated above.

If Mr H accepts my determination, the money award is binding on Joseph Oliver - Mediacao de Seguros LDA. My recommendation is not binding on Joseph Oliver - Mediacao de

Seguros LDA. Further, it's unlikely that Mr H can accept my determination and go to court to ask for the balance of the compensation owing to him after the money award has been paid. Mr H may want to consider getting independent legal advice before deciding whether to accept this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 10 March 2021.

Abdul Hafez
ombudsman