complaint

Mr B complains about advice to switch his existing pension benefits into a self-invested personal pension (SIPP). He thinks the advice was unsuitable because it did not take into account the proposed investment which involved more risk than he was prepared to take.

Mr B says the pension switch advice was given by an appointed representative of Intrinsic Financial Planning Ltd.

background

I issued a provisional decision in this complaint on 2 May 2019. I summarised the factual background including accounts of events given by Mr B in a form he competed for his lawyers and in questionnaire he completed for the ombudsman service.

Mr B had said that he dealt with an adviser called Mr B2 from Gwent and Forest Mortgage Centre which was an appointed representative of Intrinsic. Mr B also said Mr B2 explained the investment using a CD from a firm called Marcus James and that Marcus James had advised him to encash his pension.

Mr B had signed a letter of authority allowing the adviser to get information about his existing pensions which said his adviser was a different firm called Ideal Financial Planning which was also an appointed representative of Intrinsic. The adviser also gave the name of that firm on the SIPP application form.

Mr B had also signed a declaration for the SIPP provider that said he had been offered the opportunity to seek advice and had chosen not to.

And there was a further form Mr B had signed which had mentioned another adviser firm, called 1 Stop, advising on the SIPP.

Intrinsic said there was no evidence that advice was given on its behalf. It did not think it had any liability in this matter.

In my provisional decision I explained why I thought we can consider Mr B's complaint, why it should be upheld and how things should be put right. I attach an anonymised version of the findings section of my provisional decision as an annex.

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

my findings

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

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

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

my final decision

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

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

Philip Roberts
ombudsman

ANNEX

my provisional findings - jurisdiction

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

some preliminary points 1: the basis for deciding jurisdiction:

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

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

some preliminary points 2: authorised and exempt persons:

Section19 FSMA prohibits a person from carrying on a *"regulated activity"* unless he is *"an authorised person"* or *"an exempt person".*

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

> *"(1) If a person (other than an authorised person) –*
> *(a) is a party to a contract with an authorised person ("his principal") which –*
>
> *(i) permits or requires him to carry on business of a prescribed description, and*
> *(ii) complies with such requirements as may be prescribed, and*
>
> *(b) is someone for whose activities in carrying on the whole or part of that business his principal has accepted responsibility in writing,*
>
> *he is exempt from the general prohibition in relation to any regulated activity comprised in the carrying on of that business for which his principal has accepted responsibility…*
>
> *(2) A person who is exempt as a result of subsection (1) is referred to in this Act as an appointed representative.*
>
> *(3) The principal of an appointed representative is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility."*

Intrinsic had such an agreement with both Gwent and Forest Mortgage Centre and Ideal Financial Planning Limited. I understand those agreements were in the same form. I will refer to it as the s.39 Agreement.

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

In 2011 the financial services regulator in the UK was the Financial Services Authority. In 2013 it was replaced by the Financial Conduct Authority. For convenience I will just refer to the FCA, or the regulator, throughout.

Intrinsic's position:

Intrinsic has made a number of points in this complaint and other similar complaints, including the following:

- Its appointed representatives did not give any advice on its behalf.
- Gwent and Forest Mortgage Centre was only authorised to advise on mortgages and related protection insurance. The appointed representative was not authorised by it to give investment advice.
- Under the s.39 agreement:
    - Appointed representatives are not permitted to advise on unregulated collective investment schemes such as the fund Mr B invested in with his SIPP.
    - Appointed representatives could only advise on approved investments and the Berkeley Burke SIPP and Sustain investments were not on its approved list.
    - Advice to switch pensions had to be approved by Intrinsic before the advice was given to the client and it was not approved by Intrinsic in this case.
    - Advice to switch pensions could only be given by an adviser who had passed Intrinsic's internal exam relating to pensions transfers and switches. The adviser in this case had not passed that exam at the time of the advice.

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

what is the complaint?

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

Mr B is represented by solicitors. They wrote to Ideal Financial Planning on 29 April 2013. That letter included:

> *"We act for the above person who received advice from your firm to transfer their pension fund into a SIPP and then into investments provided by sustainable Growth Group (SGG).*
> *…*
> *Our client was advised by you to transfer their pension savings into a SIPP. Your adviser was fully aware that out client was considering investing in SGG once the pension transfer to SIPP was complete. Indeed, the whole process was directed to that outcome…"*

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

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

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

was advice given?
if so, who by, and in what capacity?

Mr B is clear that he dealt with Mr B2. Those dealings took place at Mr B's home. Mr B said he contacted him because he had seen something about SIPPs that interested him and because he had had previous dealings with Mr B2. I understand Mr B had arranged a mortgage with Forest and Gwent in 2007. So it seems likely the initial contact from Mr B would have been to Mr B2 at Gwent and Forest.

Mr B has also said that he was not aware of Ideal Financial Planning until [one of his existing pension providers] told him that firm was his new adviser.

To pause there slightly, Ideal Financial Planning was only registered as Mr B's adviser at [that existing pension provider] because he had signed a letter of authority authorising [it and the other existing pension provider] to send information to Ideal Financial Planning. Although this letter was prepared by Mr B2 it was signed by Mr B. Be that as it may, it does seem to be Mr B's position that he was dealing with Mr B2 of Gwent and Forest.

Mr B2 was an appointed representative of Intrinsic trading using his business name Gwent and Forest Mortgage Centre. Mr B2 was not a registered individual at Ideal Financial Planning. It looks like Mr B2 may have been acting for his business (Gwent and Forest) in cooperation with Ideal Financial Planning rather than on behalf of it. But I accept it is not entirely clear.

I note that Intrinsic says Mr B2 made it clear he was only an introducer and that he was not authorised to give pension advice.

As a general point it is normal for relatively inexperienced investors to seek advice about their pensions. Or put another way it is not usual for an inexperienced investor like Mr B to switch existing pensions into a SIPP without advice from a financial adviser. It is also unlikely that an inexperienced investor would decide which SIPP provider to choose without advice or decide on which investments to make in his SIPP without advice. And it is clear that Mr B consulted Mr B2 who he thought to be a financial adviser.

And in this case I note that a SIPP from Berkeley Burke and an investment with Sustain effectively came as a package since the application was badged by both of those groups.

Next there is no evidence that anyone else advised Mr B. There is a reference to 1 Stop Financial Planning on one standard form that Mr B signed but nothing else. While there is evidence that Mr B2 was involved in the obtaining of information about the existing pensions and the application for the jointly badged Sustain/Berkeley Burke SIPP.

Similarly, there is no evidence that advice was given by Marcus James. The use of a promotional video prepared by it by Mr B2 does not amount to advice by Marcus James.

On balance I think it is more likely than not that Mr B2 did advise Mr B to switch his pensions and invest in the schemes as Mr B alleges. I am also satisfied that Mr B2 arranged those deals. For example it is clear he obtained details about Mr B's existing pensions (albeit in Ideal Financial Planning's name) before the application and he completed the application form for the SIPP with Mr B.

I also think that Mr B2 was working for Gwent & Forest in co-operation with Ideal Financial Planning. And I will proceed on that basis but I do not think that my conclusions would be different if Mr B2 was working for Ideal Financial Planning as it was also an appointed representative of Intrinsic.

It is enough to say at this stage that Mr B2 through his business was an appointed representative of Intrinsic and there is at least some evidence he was or may have been acting in that capacity when giving the advice and arranging the deals.

can we consider a complaint about that advice and/or arranging?

the compulsory jurisdiction:

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

Under s.226 FSMA:

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

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

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

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

what do the DISP rules cover in general terms?

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

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

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

what do the DISP rules cover – regulated activities:

DISP 2.3.1R says we can:

> "*consider a complaint under the Compulsory Jurisdiction if it relates to an act or omission by a firm in carrying on…regulated activities…or any ancillary activities, including advice, carried on by the firm in connection with them*".

The guidance at DISP 2.3.3G says

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

As mentioned above, under section 39(3) of FSMA:

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

DISP2 also contains the following guidance:

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

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

2.3.3G interprets "complaints" in this way:

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

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

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)."*

The rights under a personal pension scheme (which includes Mr B's existing personal pensions and the new SIPP are specified as investments by a provision in Part III (Article 82). So are the units in a collective investment scheme (Article 81). (The scheme investments seem to be unregulated collective investment schemes (UCIS)).

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

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

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

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

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

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

But Intrinsic's point is that Mr B2 was acting outside the scope of the s.39 Agreement between him and Intrinsic meaning it had not accepted responsibility for the advice. Put another way Intrinsic is saying Mr B2 was not acting for it when the advice was given. So it says it is not subject to our jurisdiction in relation to this complaint.

This is the point at the heart of this jurisdiction dispute. Was Mr B2 acting in the capacity as Intrinsic's appointed representative when he gave the disputed advice?

The issues are involved. I will set out my view on this issue step by step.

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

As mentioned above, the guidance at DISP 2.3.3G says

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

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

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

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

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

In this case the allegation is that Mr B2 gave advice to transfer personal pensions to a SIPP to invest in a UCIS investment with a third party. I acknowledge that Intrinsic says
Mr B2 was not acting for it and rather he was acting as an introducer to Berkeley Burke and/or Sustain. However the facts of the case mean this is not a case where the act or omission was *clearly* an act by a person who happens to be an appointed representative but who was acting in some other capacity. But that does not mean the appointed representative was definitely carrying on business Intrinsic had accepted responsibility for. I have to look at it more closely.

what does "accepted responsibility" mean here?

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

I note the following comments made by the courts:

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

> *"12…at the hearing before me [counsel] confirmed that he was not seeking to argue that Section 39(3) gives rise to vicarious liability in the strict (legal) sense. This was a sensible concession since it is clear that Section 39(3) does not entail the imposition of vicarious* liability: see, by way of illustration, *Jackson & Powell on Professional Liability* (7th Ed) at paragraph 14-017."

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

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

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

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

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

> *(3) The principal of an appointed representative is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility."* (my emphasis)

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

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

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

what does prescribed mean here?

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

what was prescribed business at the relevant time?

The advice in this case was in …2011.

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

> *2. Descriptions of business for which appointed representatives are exempt*
> *…*
> *(aa) an activity of the kind specified by article 21 [of the RAO] (dealing investments as agent) where the transaction relates to a contract of insurance….*
>
> *(a) an activity of the kind specified by article 25 of the Order (arranging deals in investments) where the arrangements are for or with a view to transactions relating to securities or relevant investment.*
>
> *(ab) an activity of the kind specified by article 25A of the Order (arranging regulated mortgage contracts)*
> *…*
> *(b) an activity of the kind specified by article 53 of that Order (advising on investments)*
>
> *(d) an activity of the kind specified by article 64 of that Order (agreeing to carry on activities), so far as relevant to an activity falling within subsection…(aa), (a)), (ab)…or (c)*
> *…is prescribed for the purposes of subsection (1)(a)(i) of section 39 of the Act (exemption of appointed representatives)."*

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

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

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

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

The s 39 Agreement between Intrinsic and Gwent and Forest expressly incorporated the Compliance Manual. The agreement itself said:

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

Business was defined as:

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

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

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

So the prescribed business Intrinsic permitted it appointed representative Gwent & Forest to carry on was arranging deals, advising on investments and mortgages and certain insurance and agreeing to arrange deals and advise on investments mortgages and insurance. Intrinsic accepted responsibility for that business as follows:

> *"6. INTRINSIC'S OBLIGATIONS*
> *Intrinsic agrees with the Member:*
>
> *6.1 Responsibility*
> *To accept regulatory responsibility for such activities of the Member as may be from time to time expressly authorised under the terms of this Agreement as required by Section 39 of the Act."*

So in this case Intrinsic did in principle authorise Mr B2 / Gwent and Forest Mortgage Centre to advise on investments, arrange deals in investments and agree to do both. (And Intrinsic authorised Ideal Financial Planning to do the same by appointing it on the same standard terms.)

However Intrinsic says it only authorised its appointed representative to give investment advice through *advisers* who were registered individuals – meaning advisers it had authorised to give investment advice and who were registered as advisers with the regulator.

The s.39 agreement includes:

> *"5. MEMBERS OBLIGATIONS*
> *The Member shall have the following obligations:*
> *5.1 Conduct of Business*
> *5.1.1 The Member shall comply with the provisions of schedule 2."*

Schedule Two of the s.39 Agreement includes:

"2 Personnel
2.1 The Member may appoint Personnel to carry on the Business, provided that any such Personnel:
2.1.1 are approved by Intrinsic; and
2.1.2 where Intrinsic considers it necessary, become an Appointed Representative of Intrinsic;
2.1.3 where necessary, are approved by the FSA;
2.1.4 have completed successfully, any training course provided by Intrinsic from time to time…"

Intrinsic says it had not authorised Mr B2 to give advice and he was not registered with the FSA to give investment advice.

Intrinsic says that accordingly, Gwent and Forest was not authorised by it to give investment advice. (The same point applies equally if Mr B2 was working for Ideal Financial Planning.)

what do the courts say about these types of restrictions?

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

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

"21 Section 39(3) then says:

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

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

Then the judge said:

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

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

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

36 The reason for those promises is obvious. D2 will be, as it were, on the hook to the claimants as in respect of the defaults of D1 and if those defaults have arisen because D1 has exceeded what it was entitled to do or has broken the law in any way, then that gives a right of recourse which sounds in damages on the part of D2 against D1. If [Counsel for D2]

> *was correct, it would follow that any time there was any default on the part of an authorised representative, for example, by being in breach of COBS, that very default will automatically take the authorised representative not only outside the scope of the authorised representative agreement but will take D2 outside the scope of section 39(3) , in which case its purpose as a failsafe protection for the client will be rendered nugatory; that is an impossible construction and I reject it."*

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

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

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

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

what about the "part of" point?

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

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

the unregulated investments had not been sufficiently closely linked to advice which the AR was authorised to give, then there would have been no liability under section 39.

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

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

what does all this mean?

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

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

exclusion of advice when not given by an approved/registered individual:

Intrinsic has provided a copy of what it says was the form of Initial Disclosure Document used by Gwent and Forest at the time of the events in this complaint. That document is in template form and does not have Gwent and Forest's name on it. Assuming the form is in the format used by Gwent and Forest the form says *"What products do we offer"*. And under that heading it only refers to insurance and mortgages. Investments are not mentioned. Intrinsic says this document would have been given to Mr B2's clients and showed he could not give investment advice.

While I note Intrinsic's point, the document does not clearly say that Gwent and Forest or Mr B2 cannot give investment advice. It does only refer to insurance and mortgages so a reader might perhaps initially think that Forest and Gwent only dealt with those matters. However the same form includes a 'terms of business' section on the fifth and final page and it says:

"Terms of Business

This document sets out the terms of business between Intrinsic Financial Services and its clients.

Investment Advice and Recommendations

Any investment advice your adviser provides will be based on your personal financial objectives. We will confirm these objectives, and the reasons for each recommendation in a "Reason for Recommendation" letter. If you have asked for any restrictions on the types of investment or the markets you wish to invest in, these will be confirmed in the Reason for Recommendation letter."

So the form does not, in my view, make it clear that the adviser cannot give investment advice. Rather it raises the possibility that the adviser might give investment advice on behalf of Intrinsic.

In any event it is the terms of the s.39 agreement that is important. In this case Gwent and Forest – the appointed representative - was given authority for the regulated activity of advising on investments under the s.39 agreement. That is the starting position. So if
Mr B2 gave investment advice he was doing an activity Gwent and Forest had been authorised to do. It was not just sufficiently closely connected to the authorised activity as contemplated in the *Sense Network* case – it was one of the activities for which actual authority had been given.

If I am wrong about that, my view is that the giving of advice by Mr B2 is sufficiently closely connected to the activity Gwent and Forest was authorised to carry on to mean Intrinsic is responsible notwithstanding that the act is beyond the actual authority granted in the s.39 agreement. Schedule 2 of the s.39 agreement seeks to control *the way* in which the appointed representative conducts the business it conducts not *what* business it conducts. This restriction is, in my view, the same as or closely analogous to *"certain duties need to be fulfilled before a product was offered"* as mentioned in the *Sense Network* case.

Alternatively the clause is similar in effect to the widely drawn clause 4.7 in the Ovcharenko [case] that said the appointed representative:

> *"…will not, for the duration of this agreement, carry out any activity in breach of section 39 or of any other applicable law."*

The court decided (in paragraph 35 of the judgment quoted above) that the restriction regulated the position as between the parties only. Breach of the clause did not mean the appointed representative was acting beyond the scope of the authority given by the s39 agreement. Or at least, following the *Sense Network* case, a breach of such a clause does not mean the appointed representative is acting beyond the scope of his authority if the conduct is sufficiently closely connected to the activity for which actual authority was given. And in my view there is the required degree of connection here given that the appointed representative was authorised to give investment advice in the foundation provisions in the agreement.

While registration with the FSA might seem like a crucial matter in practice it does not seem to have been so. I say this because it has been Intrinsic's consistent position that
Mr B2 was only authorised by it to give mortgage (and protection insurance advice) but he was not registered with the FSA to give mortgage advice either. Whilst Intrinsic has said this is because mortgage advisers do not need to be registered I have seen no evidence that that is the case. And even if it is I do not think the point alters the fundamental or starting position which is that Intrinsic had authorised its appointed representative to give investment advice.

advice restricted to approved products

Intrinsic's Compliance Manual includes the following:

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

As I understand it at the time of the advice, the following were not approved Plan providers:

- [one of Mr B's existing pension providers]
- Berkeley Burke SIPPs
- Sustain Investments.

[The other existing pension provider] was however an approved Plan provider for pensions. This means an Intrinsic appointed representative could (in principle) advise on [that] pension. So in principle we do have jurisdiction to consider a complaint about advice on the merits of selling that pension.

Further the advice to switch out [both pensions] to the Berkeley Burke SIPP to invest in Sustain was one matter. The component parts were all linked to form one overall transaction and so should all be considered together (as I explain below).

Alternatively I am aware of another complaint against Intrinsic dealt with by one of my fellow ombudsmen. In that case Intrinsic was asked if it considered that the restrictions on its appointed representative meant that the investment the client switches away from has to be a listed Plan in order for the appointed representative to be authorised for that transaction. Intrinsic said no, and that the restriction only relates to the products it recommends.

Intrinsic was also asked if there was any restriction on the appointed representative giving advice to encash a non-Plan investment without the funds being invested elsewhere. In that other case Intrinsic said:

> *"There is no restriction to our knowledge, but in practice if the adviser was not subsequently recommending a product on panel then there would be no remuneration so there would be no need for encashment. Of course there are instances where advice to encash an investment can be provided (so clients can pay debts etc.) where a product would not be subsequently recommended. In these cases a fee agreement would be needed for that type of advice. Neither the client or the representative have adduced any evidence that the AR or the adviser entered into any such agreement."*

There is no evidence of a fee agreement in this case but I do not consider that to be crucial. Whether or not a client pays for advice is not the test for whether or not advice was given. What matters is whether or not a personal recommendation is made on the merits of buying or selling a particular investment. And for the reasons I gave above I consider that there was advice from Mr B2 to Mr B to sell his existing pensions in order to transfer to the new SIPP and invest in the schemes.

So whether we can consider the [non-list provider pension switch] in any event (because there is no restriction on the plans the appointed representative may advise to switch out of) or only because it is linked to the Plan … advice, the known motivation for the switch to the SIPP was to invest in the schemes. So these matters are all linked. And following the case of *TenetConnect v Financial Ombudsman Service* it is clear there is no regulatory or jurisdictional divide between those matters. If Intrinsic is responsible for part of the advice, a complaint about it should not be considered in isolation but in its proper context which is in connection with the other parts. This means we also have jurisdiction over the advice to sell the existing pensions and [switch] them to Berkeley Burke and invest in the Sustain schemes even though all but [one of the existing pensions] were non-approved Plans - subject to any other relevant restrictions in the s.39 agreement.

I have considered if any of the other provisions in the s.39 agreement of the Compliance Manual mean that Intrinsic is not responsible for the advice to [switch away from the existing pensions].

exclusion of UCIS advice

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

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

exclusion of non-advised business

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

Again this restriction is not relevant as it is my finding that advice was given by Mr B2 to Mr B.

special process for replacement business

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

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

The Compliance Manual goes on to say:

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

In this case the adviser recommended moving Mr B's existing pensions …to a SIPP with Berkeley Burke to invest in the Sustain schemes. Put another way Intrinsic recommended the replacement of two existing policies with another. The replacement business process should therefore have been used but it was not.

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

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

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

This type of restriction - as it applies in this case – is either an example of "*certain duties needed to be fulfilled before a product was offered"* as referred to *Anderson v Sense Network*. Or it is closely

analogous to such duties. In either event as explained in the Sense Network case a breach of that procedural requirement "*does not mean that the transaction in question falls outside the scope of the relevant "business" for which responsibility is taken".*

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

pre-approval of pension switching advice

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

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

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

special requirements for "pension transfers"

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

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

Intrinsic says Mr B2 had not passed its pension transfer exam and so was not authorised by it to give the disputed pension advice.

It is the case that advice to transfer from an occupational pension to a personal pension must be given by or approved by a qualified pensions transfer specialist under the regulator's rules. That requirement does not however cover pension switching. There was no regulatory requirement for such advice to be given or approved only by a suitably qualified specialist at the time of this advice.

In this case the adviser gave pension switching not pension transfer advice. In my view the requirement to pass the internal pension transfer exam – at least as regards pension switching – was like the other procedural restrictions referred to above.

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

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

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

is Mr B an eligible complainant?

Mr B is a natural person who was acting for purposes outside his trade, profession or business when he was advised by Intrinsic's appointed representative. And he was a client of the appointed representative and therefore a client of Intrinsic. In my view Mr B is therefore a customer of Intrinsic and I am satisfied he is an eligible complainant.

territorial jurisdiction:

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

was the complaint made in time?

Mr B complains about advice in 2011. He complained to about that advice within six years of the disputed advice. And he referred his complaint to the Financial Ombudsman Service with six months of Intrinsic's final response letter in reply to the complaint. The complaint was therefore made in time.

my provisional decision on jurisdiction

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

my provisional findings - merits

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

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

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

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

This complaint involves advice to invest in an unregulated investment scheme through a SIPP. Although the Alert had not been issued at the time of the advice in this case, the Alert comments on how the rules at the time should have been complied with. As such the Alert sets out guidance – albeit informal guidance that had not been published at the time – on how adviser firms should have acted in 2011.

The Alert included the following:

> *"It has been brought to the FSA's attention that some financial advisers are giving advice to customers on pension transfers or pension switches without assessing the advantages and disadvantages of investments proposed to be held within the new pension. In particular, we have seen financial advisers moving customers' retirement savings to self-invested personal pensions (SIPPs) that invest wholly or primarily in high risk, often highly illiquid unregulated investments (some which may be in Unregulated Collective Investment Schemes). Examples of these unregulated investments are … overseas property developments, store pods, forestry and film schemes, among other non-mainstream propositions.*
>
> *The cases we have seen tend to operate under a similar advice model…The financial adviser does not give advice on the unregulated investment, and says it is only providing advice on a SIPP capable of holding the unregulated investment (e.g an overseas property development). When customers express an interest in the unregulated investment, the customer is introduced to a regulated financial adviser to provide advice on a SIPP*

capable of holding the unregulated investment. The financial adviser does not give advice on the unregulated investment, and says it is only providing advice on a SIPP capable of holding the unregulated investment…

Financial advisers using this advice model are under the mistaken impression that this process means they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect.

The FSA's view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs…), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes. It should be particularly clear to financial advisers that, where a customer seeks advice on a pension transfer in implementing a wider investment strategy the pension transfer must take account of the overall investment strategy the customer is contemplating.

For example, where a financial adviser recommends a SIPP knowing that the customer will transfer out of a current pension arrangement to release funds to invest in an overseas property investment under a SIPP, then the suitability of the overseas property investment must form part of the advice about whether the customer should transfer into the SIPP. If, taking into account the individual circumstances of the customer, the original pension product, including its underlying holdings, is more suitable for the customer, then the SIPP is not suitable.

This is because if you give regulated advice and the recommendation will enable investment in unregulated items you cannot separate out the unregulated elements from the regulated elements.

There are clear requirements under the FSA Principles and Conduct of Business rules and also in established case law for any adviser, in the giving of advice, to first take time to familiarise themselves with the wider investment and financial circumstances. Unless the adviser has done so, they will not be in a position to make recommendations on new products."

The above guidance is clear. The advice to switch from personal pensions to a SIPP cannot reasonably be considered by the adviser in isolation. The suitability of the proposed investment should also be considered.

was the investment suitable for Mr B?

Mr B has said he was interested in investing in a SIPP and liked the idea of a green investment.

However it is also the case that at the time Mr B's financial position was not so strong that he could reasonably afford to take large risks with his pension. His income was not very high and nor was his overall pension provision. He transferred his entire pension which had a total transfer value of around £35,000 which is relatively low for a SIPP. Mr B was also a relatively inexperienced investor for a SIPP investor.

Further he invested all that money in two forestry based investments schemes which would be considered relatively high risk. Investing in a single commodity involves a lack of diversity or high specific risk. This is compounded by the additional factors such as of the investments being based overseas in developing economies and being held in an unregulated format meaning it was subject to less supervision and not covered by the Financial Services Compensation Scheme. These factors made the investment high risk for a UK based investor like Mr B.

In all the circumstances it is my view that Mr B was not in a position reasonably to understand or afford the risks involved in the transfer away from [his existing pensions] and invest in the schemes within a SIPP.

Mr B had been working in a self-employed basis for a few years and had been interested in finding out more about SIPPs. He seems to have been attracted to the potential benefits of being in control of his pension, of independence. So I do not think Mr B was risk averse. But suitable advice should have warned him against taking undue risk with his pension funds.

It is therefore my view that suitable advice would have been to either leave the pensions where they were or to perhaps invest in similar low cost traditional personal pension arrangements with access to a wide choice of funds where Mr B could exercise some degree of control if he wanted to. But the additional costs usually involved in starting new plans would probably have favoured leaving things unchanged.

It is accordingly my present view that it was unsuitable advice to recommend to Mr B that he transfer to a SIPP to invest in the Sustain investment schemes. And that with suitable advice Mr B would have left his pensions unchanged.

potential claims against other parties

Intrinsic says it has noted that the Financial Ombudsman Service has made a decision against Berkeley Burke in a different but similar complaint on the basis it was at fault for not adequately checking a Sustain forestry investment before investing in it on behalf of a client. Intrinsic says it wishes to have that point considered as part of its defence to this complaint.

When investment advice is given the adviser ordinarily has responsibility for the suitability of that advice. The client may have other potential claims against others involved but that does not extinguish the potential claim against the adviser or its principal as in Mr B's complaint. So even if the SIPP provider was also at fault (and it should be noted that Berkeley Burke still disputes this service's decision) that does not remove or replace
Mr B's claim against Intrinsic.

In my view it is fair and reasonable in all the circumstances to uphold the complaint against Intrinsic for the fault of its appointed representative and require it to put it things right. The best way to deal with any potential claim against the SIPP provider is to transfer the right to make any such claims to Intrinsic so it can pursue it if it wishes.

how to put things right

In my view Intrinsic should put things right as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr B should also assign to Intrinsic his right to make any claim against the SIPP provider to Intrinsic if it wishes.

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

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

my provisional decision

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

Philip Roberts
ombudsman