complaint

Ms S has complained about advice she received from Mr A, a financial adviser with Dhanda Financial, an appointed representative of TenetConnect Services Limited. Ms S was the victim of a fraud perpetrated by Mr A, and she holds Tenet responsible.

background

Ms S had been a client of Mr A for some time before the events complained of. Early on in the relationship she had begun paying £100 each month for his financial advice.

In June 2010 Mr A started to propose new investments to replace existing ones. She has specifically complained about the following recommendations:

1. June 2010 – a £90,000 investment into an Indian property scheme.
2. September 2010 – a further £8,000 invested into the property scheme.
3. January 2011 – a £40,000 loan to Mr A and £10,000 into the property scheme.
4. October 2011 – a further loan arrangement with Mr A for £26,000.
5. January 2012 – a further payment into the property scheme of £10,500.

It's since become apparent that these arrangements were part of a wider fraud and Ms S's funds were stolen by Mr A. He was prosecuted and imprisoned.

Ms S complained about Mr A's acts to Tenet, the principal of Dhanda Financial. Tenet didn't accept that is should be held responsible. It didn't think the complaint was one we could look at. So Ms S referred the matter to this service.

I issued a provisional decision on this complaint on 14 December 2018. In this I said:

'We can consider a complaint if it relates to an act or omission by a firm in the carrying on of one or more listed activities, (including regulated activities), or any ancillary activities carried on by the firm in connection with those activities.

DISP 2.3.1 says:

'The Ombudsman can consider a complaint under the Compulsory Jurisdiction if it relates to an act or omission by a firm in carrying on one or more of the following activities:

(1) Regulated activities…

Or any ancillary activities, including advice, carried on by the firm in connection with them.'

And the guidance at DISP 2.3.3 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).'

And section 39(3) of the Financial Services Markets Act (FSMA) 2000 says:

> *'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.'*

This means that in this particular case there are two questions to be considered to decide whether this complaint is one we can look at:

1. *Were the acts about which Ms S complains done in the carrying on of a regulated activity?*

2. *Were those acts ones for which Tenet was responsible?*

Were the acts about which Ms S complains done in the carrying on of a regulated activity?

The key question in this respect is whether Ms S was advised by Mr A to sell some of her regulated investments in order to make the investments in the 'India Fund'/make personal loans to Mr A.

Normally regulated financial advice is well documented but it this case, not surprisingly, it isn't. However, the lack of documentary evidence that confirms advice was given doesn't mean that advice wasn't given. Financial advice can be given in an informal non documented way. In deciding whether Ms S was given regulated financial advice I must do so on the balance of probabilities i.e. is it more likely than not that advice was given.

The background to the various investments in the India fund is set out in detail in Ms S's original complaint letter to Tenet of 20 January 2014. In this letter Ms S makes clear that each of the five surrenders to fund the Indian investments were made on the advice of Mr A – the letter does not mention the money that was loaned to Mr A.

For example in respect of the original investment of June 2010 Ms S said:

'In particular Mr A told me the India fund would generate 50% return on investment within 18 months. He said it presented a very rare opportunity, as such funds were typically reserved for preferred investors, however he was aware of someone who had 'dropped out' and having reviewed my portfolio said it offered a great opportunity as a replacement for some of my then under-performing investments. He said he was investing his own money too and that he would be the 'named person' in respect of the India Fund, which he said was necessary because of rules and regulations in India, though I did not know what this meant. I did however take comfort from the fact that Dhanda Financial was so closely associated with the India Fund. Without waiting for my response, Mr A suggested I move £90,000 from my existing portfolio to the India Fund and pointed out exactly which £90,000 could be readily moved. More particularly he suggested I 'cash in' an ISA (valued at £76,267.19) and an investment bond with St. James' Place (valued at £16,995.71). He was really quite pushy and at pains to point out how foolish it would be for me to pass on such a fantastic opportunity.'

Similar comments to the above were made for all the other investments surrendered by Ms S i.e. that they were as a result of advice from Mr A.

In her original letter of complaint Ms S did not mention money she had also lent to Mr A personally. As I will discuss later the money to fund these loans also came from the surrender of regulated investments. My conclusion from this is that Ms S attributed the losses she had suffered to advice to invest in the India fund but didn't think she could complain to Tenet about the personal loans. In terms of jurisdiction the key issue is whether she was advised to surrender the regulated investments. As a layperson Ms S was unaware of this important distinction. I consider that when she made these statements she was unaware of the significance of the surrender advice and was merely providing background information on the transaction. As far as she was concerned the primary focus of her complaint was the advice to invest in the India fund and not the advice to surrender her existing investments.

Because of this I consider that it is reasonable to attach greater weight to these statements than would normally be the case. Non contemporaneous statements which are unsupported by any additional evidence would normally be treated with caution. Especially in a situation where there is a clear 'right' and 'wrong' answer from the perspective of the person making the statement. However, I don't think Ms S appreciated the significance of the surrender advice and therefore had no incentive to be anything other than truthful when describing the surrender advice.

As part of the prosecution of Mr A, Ms S completed a sworn witness statement. This was completed on 14 March 2014 i.e. a short time after the above letter of complaint sent to Tenet. Ms S signed to acknowledge the following:

'I shall be liable for prosecution if I have willfully stated anything which I know to be false or do not believe to be true.'

Given the nature of the sworn statement made by Ms S I consider that I should attach greater weight to it than I would normally attach to a statement made by a consumer.

The witness statement made by Ms S is consistent with her letter of complaint in terms of the Indian investments. The witness statement also discusses the circumstances of the personal loans not covered in the complaint letter. She wrote:

'In January 2011…he pointed out that my Sterling ISA was not performing very well. He suggested I cash this in and give the funds to him, in return I would receive 5% interest.'

Ms S received around £43,000 from the surrender of the ISA and loaned £30,000 to Mr A and paid a further £10,000 to the India fund.

In October 2011 Ms S made a further personal loan to Mr A. This is described in the witness statement as follows:

'During another meeting with [Mr A] in October 2011 he informed me that one of my investments with St James Place was losing more money. Again he suggested I give him the money and he would give me 5% interest on this over 4 years.'

Based on what Ms S had said in her witness statement and original letter of complaint I am satisfied that it is more likely than not that Mr A advised her to sell regulated investments to fund the Indian investments and the personal loans.

This conclusion is supported by the following:

There is clear evidence that the surrender of the regulated investments and fraudulent Indian investments are connected. Each Indian investment/loan was accompanied by the surrender of a regulated investment. As soon as the money from the sale of the regulated investment arrived in Ms S's bank account it was immediately transferred to an account in the name of Mr A.

Ms S was paying a monthly retainer of £100 to Mr A for the provision of ongoing advice. As such any advice that Mr A gave would not involve any additional cost to Ms S. Ms S had no significant cash sums available and so the funding of the Indian investments needed to be funded by the sale of some of her regulated investments. In deciding which investments to sell to fund the Indian investment/loans, Ms S could make the choice herself or ask her trusted financial adviser for his advice. In my view it is more likely than not that in the circumstances Ms S would have asked Mr A which investment(s) he recommended selling.

The Indian investments never in fact existed and the money was used by Mr A for his own purposes – which appeared to be to fund his extravagant lifestyle and pay gambling debts. It is reasonable to assume that when Mr A approached Ms S his need for further funds was pressing. An important factor in deciding to go ahead with the fraudulent investment/loan would be the prospects of the new investments compared to the existing one. In my view a persuasive fraudster, such as Mr A, would be very likely to use such a key argument when trying to obtain money from Ms S.

For the reasons set out above my provisional conclusion is that each sale of the regulated investments set out above was based on regulated investment advice given by Mr A. Therefore the first jurisdiction test set out above has been met.

The second test is whether Tenet is responsible for the acts of its AR.

Section 39(3) of FSMA says

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

The ombudsman service has already dealt with a number of complaints about advice given by Mr A of which some have been upheld. In the case of Tenetconnect Services Ltd v Financial Ombudsman Service [2018] EWHC 459 (Admin) Tenet attempted to quash an ombudsman's decision upholding a complaint involving Mr A. Many of the arguments put forward by Tenet in the above case are the same as put forward in this case.

In the above case the judge explained that where a consumer has been advised to sell a regulated investment in order to make an unregulated investment or loan this would form a single piece of regulated investment advice. The above case largely mirrors that of Ms S. The consumers were advised by Mr A to sell regulated investments in order to invest in an Indian property and also to make two personal loans to Mr A.

The judge said the following:

I would have concluded, even had the Ombudsman not, that the advice to buy, to put it simply, though taken by itself and in isolation, was unregulated, was here all part and parcel of the advice to sell, and was "regulated". This is not a case where the advice to sell arose

from the need to dispose of an underperforming or risky asset, whereafter the IFA would look for something better. It is not simply that the advice was given at the same time, or that the trades took place so closely in time. That helps to evidence that the advice to buy was what led to the advice to sell. The advice to sell was given so that the alternative unregulated investments could be made; they were compared, and their advantages persuaded Mr and Mrs Thorpe to accept the advice to sell. The advice, put simply was that, because they could do better in unregulated investments, they should sell the specified investments. The advice on unregulated investment justified the advice on the specified investments, and in that way, became part of the regulated advice. The Ombudsman was bound to conclude that they were part and parcel of the same advice. I conclude that the whole advice was regulated activity, and that the Ombudsman had jurisdiction.

I am satisfied that the judge's comments set out above are also applicable to this case. Without the surrender of the regulated investments there could have been no unregulated Indian investment or loans. It is therefore correct in my view to consider the sell and the buy advice as being inextricably linked. Because of this linkage the connected pieces of advice form a single piece of regulated advice. The judge went on to say that if one piece of this advice was the responsibility of Tenet then it would be responsible for the whole of the advice.

Tenet accepts that it authorized its appointed representatives to give advice to surrender the regulated investments that Ms S held. In an email to this service of 29 January 2016 Tenet said:

'Subject to representations previously made, Mr A was not restricted in his ability to advise on the surrender of investments insofar as he could advise on the surrender of investments from any provider.'

Tenet therefore accepts that the advice to surrender the regulated investments is advice that it is responsible for. However, for the reasons set out above I am satisfied that Tenet is responsible for all aspects of the advice and not just the regulated elements.

Therefore the second test as to jurisdiction has been met. I consider that a complaint about the advice to sell regulated investments and reinvest/loan the money is one that we can look at.

The suitability of the advice that was given

It has been established by the courts that the Indian property investment was a fraudulent enterprise that never in reality existed. Advice to surrender a suitable investment and reinvest in a fraudulent scheme can only be unsuitable advice.

On the advice of Mr A, Ms S sold regulated investments and loaned the money to him. Whilst some interest payments were made these stopped and the loan hasn't been repaid. It isn't clear what Mr A did with the money loaned to him - whether it was to fund his extravagant lifestyle and gambling debts or to pay interest to other investors who had loaned him money. However, I consider it safe to assume that there was a very real risk that this money would never be repaid. As such advice to Ms S to surrender her existing suitable investments and to loan the proceeds to Mr A for his own fraudulent purposes was unsuitable advice.

My provisional conclusion is that the advice Ms S received from Mr A to surrender regulated investments to invest in the Indian fund or to loan money to him was unsuitable. Because of this the complaint should be upheld.

At the time of her dealings with Mr A Ms S was approaching retirement. The money she lost represented the bulk of her savings. This was deeply upsetting for Mr S - as set out in her victim statement. I therefore propose to award Ms S £500 to compensate her for this.'

I also set out in my provisional decision how I thought Ms S should be compensated. I said that Tenet should calculate what Ms S's investments would be worth if they had not been surrendered and pay this sum to Ms S. The monthly retainer paid to Mr A by Ms S should also be repaid.

Neither Ms S or Tenet had anything further to add

my findings

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

As neither party has anything further to add I confirm that for the reasons set out above this complaint should be upheld.

fair compensation

Had the advice to surrender her regulated investments not been given I consider that Ms S would've remained in her existing investments. But I recognise that Ms S did receive a return from some of the arrangements Mr A put in place – so that will need to be taken account of.

So, to work out what compensation should be paid, Tenet should calculate what the amounts withdrawn would now (i.e. at the date of this final decision) be worth, if they had remained invested as they were. Tenet should then take from that any amount that was paid to Ms S by Mr A. The resulting amount will be the compensation that is payable.

I understand that Mr A has now been declared bankrupt. I therefore think it unlikely Ms S will recover any of their money through other means, and will not make an allowance for that.

I also need to consider whether compensation should be paid in relation to the £100 a month retainer paid to Mr A. Ms S paid this for ongoing advice. As set out above, the advice that Ms S received was unsuitable. I have not seen any evidence that in the period from June 2010 onwards Ms S received any suitable investment advice. These retainers were in effect payment for unsuitable investment advice. Because of this I consider that it is reasonable to refund the monthly retainers paid by Ms S. These should be repaid (from June 2010 onwards) and simple interest at the rate of 8% a year added from the date Ms S paid them to the date of repayment.

I understand Ms S has received a payment as a result of a November 2016 POCA hearing. It seems very likely that Ms S will not be fully compensated by the proposed award as full compensation will exceed the award limit of the ombudsman service. I assume that Tenet will not accept the recommendation to pay the full award. Because of this I consider that the POCA payment should not be taken into account in the calculation set out above.

my final decision

My final decision is that this complaint is one that the Financial Ombudsman Service can look at and that it should be upheld.

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 Tenet Connect pays the balance.

determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My final decision is that Tenet Connect should pay the amount produced by that calculation up to the maximum of £150,000 (including distress and/or inconvenience but excluding costs) plus any interest set out above.

If Tenet Connect does not pay the full fair compensation, then no deduction should be made for the POCA payment received by Ms S.

recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that Tenet Connect pays Ms S the balance plus any interest on the

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms S to accept or reject my decision before 1 March 2019.

Michael Stubbs
ombudsman