

Since I issued my provisional decision the firm has changed its name to Quilter Financial Services Ltd. As I referred to the firm as Intrinsic in the provisional decision I have continued to do so in this decision.

## **complaint**

Mr D's complaint is about advice that he says he received to switch two personal pension into a self invested personal pension (SIPP) with another provider. The transfer was recommended to enable investments in two unregulated investments offered by SGG group and Global Forestry (Belem Sky). Mr D says this advice was given by the ER Network an appointed representative (AR) of Intrinsic Financial Planning Ltd. Mr D considers the advice was unsuitable.

## **background**

Mr D met with the adviser who was an employee of The ER Network Ltd, an AR of Intrinsic. The adviser also had an unregulated business, Vita Investment Planning.

Whether advice was provided is in dispute but, after meeting the adviser a SIPP application was completed and Mr D's two personal pensions were switched into the SIPP. A short time later the above investments were made.

The SGG investments went into administration in early 2012, following allegations of fraud. This prompted Mr D to complain about the suitability of the advice he has said he received.

Intrinsic said that it was not responsible for the advice as it was not given by its AR but by the unregulated firm – Vita Investment Planning.

I issued a provisional decision on this complaint on 27 June 2019. In this I said the following:

*'I will first consider whether this is a complaint that we can look at. In doing so I have considered all of the available evidence and arguments.'*

*I will consider our jurisdiction in three steps:*

- *What is the complaint?*
- *What if any regulated activities is Mr D complaining about?*
- *Is Intrinsic responsible?*

*In a letter of complaint to this service of 4 October 2013 Mr D's solicitor set out his complaint in the following terms:*

*'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.'*

*'The client was introduced to the firm in full knowledge that the sole purpose of the transfer was to invest into SGG.'*

*'...the advising firm should have dealt with the SGG investment as part of the SIPP transfer.'*

*The response of the firm is to state that the pension transfer advice was undertaken in isolation. It is clear that this cannot be the case.'*

*The complaint that has been made is that Mr D was advised to switch his personal pension to a SIPP. The purpose of the switch was to enable the investment in the SGG product to be made. The solicitors have not explicitly said that the adviser also recommended the SGG investment.*

*At the time the original complaint was made there were no issues with the Global Forestry investment but it has since failed. However, I don't it makes a difference whether the complaint includes this investment or not. I will explain why later.*

*Both the original personal pensions and the SIPP are specified investments as per article 82 of the Regulated Activities Order 2001 (RAO). Having considered the SGG and Global Forestry investments in my view they would be considered to be unregulated collective investment schemes (UCIS). A collective investment scheme is a specified investment as per article 81 of the RAO. So if Mr D had been advised to switch his personal pension to the SIPP this would be regulated investment advice (as per article 53 of the RAO). If Mr D had also been advised to make the SGG and Global Forestry investment this would also be regulated investment advice.*

*However, it has been made clear by the FCA that when recommending a SIPP consideration must be given, if known, to the investments to be held within the SIPP. If the underlying investments are unsuitable then so will be the SIPP. I consider that the purpose of the pension switch advice was to enable the investment in the SGG and Global Forestry products – so the adviser knew what the investments to be held in the SIPP were. Therefore, even if advice had not been given about the SGG/Global Forestry products it is possible to find that the pension switch advice was unsuitable based on the intended investments to be held in the SIPP. This argument also means that whether the SGG and Global Forestry investments were in fact CIS isn't relevant to jurisdiction.*

*It also seems likely that the regulated activity of arranging deals in investments (in respect of the pension switch) took place.*

*Whether advice was given and exactly what happened to bring about the pension switch and the later investments and which parties were involved is disputed. Before establishing what, if any, responsibility Intrinsic has for the actions of its AR I will first make various findings about what actually happened.*

### **was advice given?**

*It is not in dispute that a number of meetings were held between Mr D and the adviser (putting aside the capacity in which he was acting). Mr D was thinking about releasing capital from his pensions to possible fund a business venture. It is therefore clear that Mr D had a meeting with the adviser to discuss pensions – this would have been in my view regulated advice and would have taken place under the auspices of The ER Network. The upshot of these meetings was that Mr D switched two personal pensions to a SIPP with Berkeley Burke. Following the pension switch 25% of the SIPP was withdrawn as tax free cash. At the same time the investments in the SGG products and Global Forestry were made. Whether the SGG/Global Forestry investments were advised by the AR or Vita Investment Planning, it is clear that the adviser knew that these investments were going to be made when the pension switch was completed.*

*The adviser's version of events is as follows:*

*'[Mr D] enquired about using his pension fund to develop the land and build the unit and possible purchasing other commercial properties. I explained the differences between a personal pension and a Self Invested Personal Pension Plan and that his current pension plans could not be used as a vehicle to do this but a SIPP may be an answer. [Mr D] was very keen to explore this avenue and instructed me to obtain details of his pension plans. We arranged a further meeting to take place on 09/05/2011.*

*'On the 9/5/2011 both [Mr D and his partner Ms W] were present... I explained that an option was to increase contributions and look at other funds available from her current provider....I then explained there were other investment options available outwith a personal pension but these were very high risk and non regulated...[Mr D] indicated that he was also interested in finding out more about this type of investment. As this meeting was regulated I declined to provide any information and stated we would have to have a separate meeting if they wanted to discuss other investment options. This was arranged for....four days later.'*

*'The requested meeting took place on 12/5/2011 at which I presented my business card and terms of business for Vita Investment Planning Ltd. I explained that I was about to discuss a range of products which were very high risk and non regulated which meant that if anything went wrong that both [Mr D and Ms W] would not have any protection from the Financial Services Compensation Scheme. I also explained that I could not provide any advice at all in relation to any of these products and could only provide information. The decision to invest would be theirs and theirs alone.'*

*Ms W also switched personal pensions to a SIPP and made investment in SGG and Global Forestry.*

*Mr D was provided with Vita Investment Planning terms of business and individual letters in respect of each of the SGG and Global Forestry investments. The terms of business make it clear that Vita Investment Planning dealt with a range of what were considered unregulated investments. It was the advisers understanding that as these were not regulated that they could be arranged by a non regulated entity – Vita Investment Planning.*

*There is therefore evidence linking the non regulated firm (Vita Investment Planning) to the SGG/Global Forestry investments. There is nothing to link this firm to any advice in respect of the pension switch.*

*There is evidence of the AR's involvement in the pension switch. The AR dealt with the ceding schemes and is listed on the SIPP application form as the introducer. It seems likely at the least that the AR carried out the regulated activity of arranging deals in investments. I don't think the advisers later attempts to change the arranging entity to Vita Investment Planning to be valid. It is my view that the understanding of the parties at the time of the arrangement of the switches is the key. Both the ceding pension schemes and Berkeley Burke both thought they were dealing with the ER network.*

*However, I also consider it more likely than not that the AR advised Mr D to make the pension switch.*

*Mr D approached the AR who was his long standing adviser for advice about his pension – an in particular how to release capital from his pensions. After meeting the AR Mr D's*

*personal pensions were switched to a SIPP and capital released from the SIPP. It is in my view unlikely that an investor who approached his adviser for advice about a specific transaction would then undertake that transaction without having been given advice. An investor who approaches his regulated financial adviser for advice about a specific issue would reasonably assume in the absence of any evidence to the contrary that this advice had been given his regulated adviser. As there is no evidence of any involvement of Vita Investment Planning in this process my conclusion is that this advice was given by the AR.*

*In terms of our jurisdiction and the outcome of this complaint I don't think it is necessary for me to decide whether any advice was given about the SGG/Global Forestry or which entity may have given any advice.*

***Is Intrinsic responsible for the SIPP advice given by the AR?***

*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.*

*Vita Investment Planning might be a ‘recognisably independent business’ in respect of the SGG/Global Forestry advice. However, there is nothing to connect this business to the pension switch advice. As set out above, my conclusion is that this advice was given by the AR.*

**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.*

*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 mid 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*

*...*

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

*(b) ...*

(c) an activity of the kind specified by article 53 of that Order (advising on investments)  
(d) an activity of the kind specified by article 64 of that Order (agreeing to carry on activities), so far as relevant to an activity falling within subsection...(a) [or] (c)  
...is prescribed for the purposes of subsection (1)(a)(i) of section 39 of the Act (exemption of appointed representatives).”

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

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

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 The ER Network 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 The ER Network to carry on was arranging deals, advising on investments (and mortgages but that is not relevant here) and agreeing to arrange deals and advise on investments. Intrinsic accepted responsibility for that business as follows:

**“6. INTRINSIC’S OBLIGATIONS**

*Intrinsic agrees with the Member:*

**6.1 Responsibility**

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

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

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

***what do the courts say about these types of restrictions?***

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

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

*“21 Section 39(3) then says:*

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

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

*Then the judge said:*

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

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

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

*36 The reason for those promises is obvious. D2 will be, as it were, on the hook to the claimants as in respect of the defaults of D1 and if those defaults have arisen because D1 has exceeded what it was entitled to do or has broken the law in any way, then that gives a right of recourse which sounds in damages on the part of D2 against D1. If [Counsel for D2] was correct, it would follow that any time there was any default on the part of an authorised representative, for example, by being in breach of COBS, that very default will automatically take the authorised representative not only outside the scope of the authorised representative agreement but will take D2 outside the scope of section 39(3) , in which case its purpose as a*

*failsafe protection for the client will be rendered nugatory; that is an impossible construction and I reject it."*

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

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

*So it follows 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 only. 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 have referred to above really considered 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. Grieg 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. As the Claimants' expert, Mr. Morrey, said: "operating the scheme, so having the monies under your control, clearly is not the work of a financial adviser". Mr. Ingram's evidence was that he knew that a firm of financial advisers should not be involved with the scheme, including because the firm was not allowed to handle client money and that the scheme was business of a kind that a properly regulated firm should not be involved with. Mr. Ingram was referring to the express prohibitions in clause 5.3.6 and 5.3.7 against MFSS accepting or holding or handling client money."

### **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 connected to the activities for which the actual authority was given.

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

#### **advice restricted to approved products**

The Intrinsic Compliance Manual includes the following:

##### **"2.1 Intrinsic's Scope of Permission**

Intrinsic is authorised by the FSA to carry out certain activities. This is referred to as Part IV permission. All regulated firms have to obtain a permission, but the scope of their particular permission may include one of several regulated activities depending on the business of the firm.

The regulated activities for which Intrinsic has approval is as follows:

- a) Arranging (brining about) deals in;
  - b) Making arrangements with a view to transactions in;
  - c) Advising on; and
  - d) Agreeing to carry on a regulated activity in (a)-(c)
- in relation to designated investments...

*As appointed representatives of Intrinsic, members can therefore carry on those activities detailed above (dependent upon any restrictions inherent in your contract); these are referred to as the 'Scope of Permissions'.*

*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 ..."*

## **2.4 Restricted activities**

*Intrinsic's scope of permission does not allow appointed representatives or advisers to carry out certain areas of business. Below we detail areas where restrictions apply.*

### **2.4.1 Non-Advised Business**

*Intrinsic believes that advice is always necessary, and our sales processes have been developed bearing this in mind. Although there is scope within the FSA rules to operate certain non-advised processes, Intrinsic have chosen not to take advantage of this.*

### **2.4.2 Products requiring additional authorisation.**

*As an appointed representative firm or adviser with Intrinsic there are some restrictions on activities relating to certain products. Details of these can be found in the Licensing section.*

### **2.4.3 Acting as Trustee, Power of attorney, or Executor of a Will**

*You are prohibited from acting for your client as Trustee; Power of Attorney; or Executor of a Will...*

### **2.4.4 Dual Authorisation**

*You are not permitted to have dual authorisation and be directly by the FSA as well as through Intrinsic...*

### **2.4.5 Dealing with Overseas Clients**

*...*

## **8.6 The Sales Process**

*The advice process is substantially the same for all areas of FCA regulation. There are slight differences between business areas. Please refer to guidance in the Designated Investment, Mortgage and Pure Protection and General Insurance Documents for details of the specific process requirement for these business areas:*

- Contacting the client or potential client;*
- Providing specified information at the outset;*
- Undertaking a 'Know your client' exercise, usually involving some form of fact find;*
- Research to recommend a product which is suited to the client's needs at that time;*
- A recommendation (which the client may reject and a subsequent recommendation may be made);*
- Completion of the application form as a sale is made.*

### **8.6.1 Execution only**

*An execution only case is one where the client requires no advice as they have already decided on the exact contract they require....*

*Intrinsic firmly believe that full advice should be given to clients in all circumstances. However, if you do come across a client who matches the above circumstances you should seek approval of Compliance before proceeding with business on that basis."*

*The above helps to explain the context of the s.39 agreement between Intrinsic and The ER Network.*

*Some points to note are that Intrinsic has permission to advise on all investments but has chosen to offer products from a limited range. And the AR is restricted to the product range chosen by Intrinsic.*

*Intrinsic's ARs are however obliged to give advice and may not just sell on an execution only basis. Advice involves a process that includes getting to know the client's financial situation in order to give suitable advice. And in turn this means that sometimes advice involves the recommendation to end one investment in order to start another.*

*This is in effect what has happened in this complaint – the recommendation to end the existing personal pensions and to replace them with a Berkley Burke SIPP. Mr D switched two personal pensions to the Berkley Burke SIPP. One was an Aegon pension and one was Clerical Medical. I understand that Aegon was an Intrinsic approved pension plan.*

*However, the advice to surrender the existing personal pensions and switch to the SIPP are inextricably linked. Without the surrender advice there could have been no advice to take out the SIPP. Where multiple pieces of advice are inextricably linked then they in effect form a single piece of advice. This was made clear in the case of Tenet Connect v Financial Ombudsman Service [2018] EWHC 459 (Admin). If any part of the advice is the responsibility of the principal then the whole of the advice will also be.*

*So in this case the Intrinsic authorised The ER Network to give advice on the Aegon pension. This advice was inextricably linked to the other elements of the advice (the Clerical Medical advice and the SIPP advice). As one element of the advice (Aegon) is the responsibility of the principal then the whole of the advice is.*

*However, even if the Clerical Medical and Aegon pensions were not Intrinsic authorised products I still think we could look at this complaint.*

### **special process for replacement business**

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

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

*The Compliance Manual goes on to say:*

*“Some customers may have a pre-conceived idea about what they want to do and it is easy for the adviser to allow these cases to become customer driven. However, the Financial Ombudsman Service (FOS) takes a dim view of these cases. Their view is often that unless the customer has been specifically advised not to do something, then the advisers input is viewed as being a recommendation.*

*This means that you need to be clear about what the most suitable course of action is. The reason for recommendation needs to be absolutely clear about what was advised, irrespective of whether the customer intends to follow that advice.”*

*In this case Intrinsic recommended moving Mr D’s existing personal pensions to a SIPP with Berkley Burke. Put another way Intrinsic recommended the replacement of existing policies with another. The replacement business process should therefore have been used and it is not clear that it was. In my view it is arguable that the standard required by the Compliance Manual was not reached because:*

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

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

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

*If the adviser is authorised to give advice about SIPP’s 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 Anderson case a breach of that procedural requirement “does not mean that the transaction in question falls outside the scope of the relevant “business” for which responsibility is taken”.*

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

### **special requirements for “pension transfers”**

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

*In the Compliance Manual the adviser is required to pass Intrinsic’s pensions transfer test before advising on (what Intrinsic calls) pension transfers. I understand that the adviser had the necessary qualifications and had been approved by Intrinsic to give pension transfer advice.*

### **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.*

### **my provisional decision on jurisdiction**

*My provisional decision is that this is a complaint that this service can look at.*

*In the course of my consideration of the jurisdiction aspects of the complaint I have been able to reach a provisional conclusion on the merits of the complaint. I will now therefore go on to explain my provisional conclusion*

### **The merits of the complaint**

*I have considered all of the evidence and arguments in order to decide what is fair and reasonable in all the circumstances of this complaint.*

*As set out above, I am satisfied the AR advised Mr D to switch his two personal pension to a SIPP. The purpose of the advice was to enable the investment in the SGG and Global Forestry products and to release capital in the form of tax free cash.*

*When giving SIPP advice, consideration must be given, if known, to the investments to be held within the SIPP. This has been made clear by a number of statements made by the FCA. For example on January 2013 the FCA said:*

*‘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)...*

*‘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 SIPP's and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes..”*

*‘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.’*

*Whilst this was issued after the advice was given to Mr D, I consider it was not a new requirement of the FCA but rather a reminder of what the rules in force at the time of the advice were.*

*Therefore, when giving the advice to transfer the personal pensions to the SIPP, the adviser should have considered the investments to be held within the SIPP. However, to do so would require the AR to know what the intended investments to be held within the SIPP were. It is clear from the AR's version of events that he was aware that the purpose of the transfer to the SIPP was to enable investment in SGG and Global Forestry products.*

*There are three elements to determining suitability. These are set out in COBS 9.2. A recommended investment:*

- meets the investors investment objectives*
- is such that the investor is able financially to bear any related investment risks consistent with his investment objectives;*
- is such that the investor has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio.*

*Nothing was formally established at the time of the advice about the level of risk that Mr D was prepared to take. However, I consider there is enough background information available to make a reasonable assessment of the level of risk that Mr D had previously taken. I consider that up to the point of the investment Mr D would be broadly categorised as a medium risk investor. Mr D's original personal pensions were invested in a range of mainstream personal pension funds that I consider would generally be considered medium risk.*

*The SIPP ended up as Mr D's only pension provision and as such I consider that he was not in a position to bear the risks associated with the SIPP. An investor who places the majority of their pension into a SIPP for the express purpose of investing in unregulated, high risk investments is taking a very substantial risk. I don't think it is disputed that the SGG and Global Forestry investments were high risk. I consider that Mr D did not have the capacity to bear this level of risk with his pension. Mr D was reliant on these investments for the majority of his pension income. Any significant loss on these investments would have a serious impact on his retirement income.*

*I am also not persuaded that Mr D had the knowledge and experience to understand the risks involved with the SIPP (by virtue of the investment to be held within it). The SGG and*

*Global Forestry investments were unusual high risk investments and the risks associated with them were well outside what a typical retail investor would encounter.*

*This conclusion is consistent with the comments made by the judge in the case of Burns v FCA (Burns v FCA Upper Tribunal [2018] UKUT 0246 (TCC))*

*'It would be readily apparent to any competent financial adviser that for an unsophisticated retail investor with a relatively small pension pot represented either by interests in a defined benefit scheme or in a personal pension invested in a spread of traditional investments, to switch his benefits into a SIPP which was to be wholly invested in either a single or very small number of inherently risky overseas property investments was a wholly unsuitable course of action for that investor to take.'*

*In my view all three of the factors in deciding suitability were not met. Even if Mr D was prepared to take a high level of risk with his pension, and to be clear I'm not persuaded that he was, to place all his pension into such high risk investments was not consistent with his circumstances. In such a situation the adviser should have advised against doing this. I consider it reasonable to assume that if Mr D had been advised not to go ahead with the SIPP and the SGG investment he would have heeded this advice.*

*Because of this my provisional conclusion is that the advice to switch to the SIPP for the purpose of making the SGG and Global Forestry investments was unsuitable.*

*There is documentary evidence both from around the time of the investment and from some time afterwards that would appear to contradict the above conclusions.*

*This is as follows:*

- *The sophisticated investor certificate signed by Mr D.*
- *The solicitor's questionnaire which records that Mr D understood the investments to be high risk.*

*The sophisticated investor certificate provided by Berkley Burke is a certified sophisticated investor certificate rather than a self certified form. Attached to this form should have been a written statement from an authorised person confirming Mr D had the required knowledge. However, no other paperwork was attached.*

*I am satisfied that Mr D was not a sophisticated investor. It was clearly unwise of Mr D to sign documents confirming things that were untrue –although investors sometimes do. Often this will be to gain access to what they perceive to be attractive investments that are not available to the general public.*

*As described by the Vita Investment Planning letter, the SGG investments appeared, on the face of it, highly attractive. For example the Sustainable Agro Energy investment was described in the following terms. The investment was for a ten year term with a projected annual return of 20% a year by year 10. The product was saleable at any time and had a contractual guarantee to a return of capital between years five and ten.*

*On the face of it this appeared to be an investment that offered extremely attractive returns with very limited risk. However, such high return low risk investments do not in reality exist. An experienced adviser should have realised this. I can understand why an investor would*

*be keen to invest in such an investment – and consequently exaggerate their investment knowledge and experience.*

*Equally the AR, who arranged the pension switch would have known that Mr D was not a sophisticated investor. In my view the AR should not have facilitated the pension switch knowing that Mr D was not the sort of investor the SIPP operator thought should be making these investments. I consider the AR should not arranged the pension switch.*

### ***The solicitor's questionnaire***

*In this Mr D appeared to confirm that no pension advice was given and that he was aware the investments were high risk.*

*The background to the completion of this questionnaire was that it was part of an action contemplated against a trustee associated with the SGG investments. I understand that this action was suggested to investors by the AR and that the AR funded the initial cost of the action. In such circumstances I can understand why the AR might wish to influence the content of the document and in particular not to leave it open to possible complaints or legal action. I therefore do not place any great weight on this document.*

*My provisional conclusions are as follows:*

- *Mr D was advised to switch his existing personal pensions to the SIPP*
- *This advice was given by the adviser acting as an AR of Intrinsic*
- *Intrinsic accepted responsibility for this advice*
- *The advice to switch from the personal pension to the SIPP for the purpose of making the SGG/Global Forestry investments was unsuitable*

*For these reasons my provisional conclusion is that this complaint should be upheld.*

*As a result of the ARs actions Mr D has lost the bulk of his pension savings. I consider this will have been upsetting for Mr D and I propose to award him £500 in recognition of this.*

### ***fair compensation***

*My aim is that Mr D should be put as closely as possible into the position he would probably now be in if he had been given suitable advice.*

*I think Mr D would have invested differently. It's not possible to say precisely what he would have done, but I'm satisfied that what I've set out below is fair and reasonable given Mr D's circumstances and objectives when he invested.*

*I am satisfied that one of the reasons Mr D switched his pensions to the SIPP was to enable the SGG/Global Forestry investments. However, I don't consider this was the only reason. Mr D initially approached the AR to discuss ways of releasing capital from his pensions. I don't think this was possible with his existing personal pensions and so a switch to a SIPP was necessary to achieve this. Advice to switch his personal pensions to a SIPP for the purpose of investing in SGG/Global Forestry and releasing capital was unsuitable. However, I do not consider that a SIPP was an inherently unsuitable product for Mr D. So it would have been suitable advice for Mr D to switch his personal pension to a SIPP in order to release capital. So redress should be based on the investments to be held within the SIPP rather than comparing the value of the SIPP with the original pensions.*



**what should Intrinsic do?**

*To compensate Mr D fairly, Intrinsic must:*

- *Compare the performance of each of Mr D's investments with that of the benchmark shown below.*

*A separate calculation should be carried out for each investment. If the fair value is greater than the actual value, there is a loss. The losses should be combined and the total is the amount of compensation payable.*

*Intrinsic should add interest as set out below.*

*If there is a loss, Intrinsic should pay into Mr D's pension plan to increase its value by the amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.*

*If Intrinsic is unable to pay the compensation into Mr D's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the compensation should be reduced to notionally allow for any income tax that would otherwise have been paid.*

*The notional allowance should be calculated using Mr D's actual or expected marginal rate of tax at his selected retirement age.*

*For example, if Mr D is likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. However, if Mr D would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation.*

- *Pay Mr D £500 for the upset caused by the loss of the bulk of his pension savings.*

*Income tax may be payable on any interest paid. If Intrinsic deducts income tax from the interest, it should tell Mr D how much has been taken off. Intrinsic should give Mr D a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.*

| <i>investment name</i>                          | <i>status</i>       | <i>benchmark</i>                                           | <i>from ("start date")</i> | <i>to ("end date")</i>     | <i>additional interest</i>                                                                                                                                      |
|-------------------------------------------------|---------------------|------------------------------------------------------------|----------------------------|----------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>Sustainable AgroEnergy (lease programme)</i> | <i>still exists</i> | <i>FTSE UK Private Investors Income Total Return Index</i> | <i>date of investment</i>  | <i>date of my decision</i> | <i>8% simple per year from date of decision to date of settlement (if compensation is not paid within 28 days of the business being notified of acceptance)</i> |
| <i>Sustainable AgroEnergy (Capital Builder)</i> | <i>still exists</i> | <i>FTSE UK Private Investors Income Total Return Index</i> | <i>date of investment</i>  | <i>date of my decision</i> | <i>8% simple per year from date of decision to date of settlement (if compensation is not paid within 28 days of the business being notified of acceptance)</i> |
| <i>Global Forestry (Belem Sky)</i>              | <i>still exists</i> | <i>FTSE UK Private Investors Income Total Return Index</i> | <i>date of investment</i>  | <i>date of my decision</i> | <i>8% simple per year from date of decision to date of settlement (if compensation is not paid within 28 days of the business being notified of acceptance)</i> |

**for each investment:**

**actual value**

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

*It may be difficult to find the actual value of the investment. This is complicated where an*

*investment is illiquid (meaning it could not be readily sold on the open market) as in this case. So, the actual value should be assumed to be nil to arrive at fair compensation. Intrinsic should take ownership of the illiquid investment by paying a commercial value acceptable to the pension provider. This amount should be deducted from the compensation and the balance paid as I set out above.*

*If Intrinsic is unable to purchase the investment the actual value should be assumed to be nil for the purpose of calculation. Intrinsic may require that Mr D provides an undertaking to pay Intrinsic any amount he may receive from the investment in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Intrinsic will need to meet any costs in drawing up the undertaking.*

### **fair value**

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

### **why is this remedy suitable?**

*I've chosen this method of compensation because:*

- Mr D wanted capital growth and was willing to accept some investment risk.*
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.*
- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr D's circumstances and risk attitude.'*

Mr D accepted my provisional conclusions and had nothing to add. The firm did not reply.

### **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 my final decision is the same as the above provisional decision.

**my final decision**

My final decision is that I uphold this complaint. I order Quilter Financial Services Ltd to pay the redress set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 5 September 2019.

Michael Stubbs  
**ombudsman**