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 B's complaint is about advice that he has said he received to switch his personal pension to a Self Invested Personal Pension (SIPP) with another provider. The transfer was recommended in order to allow an investment in a product offered by Sustainable Growth Group (SGG). The complaint is that the advice was unsuitable as the eventual investment represented a greater level of investment risk than Mr B was prepared to accept.

Mr B has said the advice was given by the ER Network an appointed representative (AR) of Intrinsic Financial Planning Ltd.

background

Mr B met with the adviser who was an employee of the ER Network. The adviser also had an unregulated business, Vita Investment Planning (VIP).

Whether advice was provided is in dispute but, after the meeting, a SIPP application was completed and Mr B's personal pension was switched to a SIPP. An investment was made in a SGG product shortly after.

The SGG investment was placed into administration in early 2012, following allegations of fraud. This prompted Mr B to complain about the suitability of the advice he received.

I issued a provisional decision on this complaint on 11 June 2019. In this I said the following:

'I will deal with our jurisdiction in three steps:

- *What is Mr B's complaint*
- *What regulated activities does his complaint involve*
- *Is Intrinsic responsible for the activities of its AR*

Mr B's complaint is that he was advised to switch a personal pension to a SIPP for the express purpose of investing in a SGG product.

Both a personal pension and a SIPP are specified investments as per article 82 of the Regulated Activities Order 2001 (RAO). Advice to switch from a personal pension to a SIPP would be regulated investment advice as per article 53 of the RAO. In addition to the alleged advice the adviser was involved in the pension switch and, based on what Mr B has said, carried out the regulated activity of arranging deals in investments (article 25 of the RAO).

It is in dispute whether Mr B was dealing with the ER Network or the adviser's unregulated business VIP. I will therefore make various findings about what actually happened before going on to consider whether Intrinsic is responsible.

The adviser's version of events

The adviser has provided the following comments. The comments were made in response to a series of questions asked by the adjudicator.

The adjudicator asked the adviser to explain the various references to the ER Network on different forms. The adviser's answer was:

'At the time I was unsure how a non – regulated application should be completed and also I was told that in order for a SIPP provider to speak to me I would have to mention a regulated adviser name. Upon checking with Berkeley Burke they confirmed we had received the incorrect information and new documents were issued.'

'After the confirmation from Berkeley Burke the welcome letter was amended correctly and I attach a copy that was given to me by Mrs B that she received clearly stating that an application "from your non-regulated agent…at Vita".'

(Mrs B made the same investments as Mr B and at the same time)

The adviser has also confirmed that he approached personal pension providers under the guise of the ER Network – because pension providers would not release information to a non regulated firm. Also when the applications were originally submitted to Berkeley Burke they were also submitted with ER Network noted as the adviser – although after the event this was changed.

The adviser also said:

'I did help clients complete their SIPP application forms and we were at the time told to put as the designated IFA ER Network as it would mean that Berkeley Burke would speak to us if a client had a question etc. It was administrative only. Clients are also aware that ER Network is not an IFA but an appointed representative of Intrinsic using the restrictive advice route. As stated previously we received incorrect information regarding this from Berkeley Burke.'

As part of the application process for the SGG product on 28 September 2008 Mr B signed terms of business for VIP. These said the following:

'VIP is an independent company dedicated to introducing Individuals and businesses to a range of products and services from different providers. VIP is an agent of TMJG whose role is to act as conduit between the product providers and VIP. TMJG and VIP are not providers of any products or services and can offer no advice, assurance, or recommendation in relation to any product or service.'
(TMJG is The Marcus James Group)

'VIP solely offers a non-advisory service which provides customers with information to assist them in selecting products they feel are most appropriate for their needs. VIP does not attempt to offer you any financial advice either about the product itself or the suitability of the product for your particular financial and other circumstances. All products and services are offered free from financial advice and are not regulated by the Financial Services Authority (FSA), neither are they considered to be unregulated collective investment schemes. Nothing in any of the documentation/information provided to you shall be deemed to constitute advice or a recommendation to purchase a particular product or service. It is important that you seek independent financial advice, especially if you are in any doubt as to

the suitability of the product or service. Investments into products purchased through VIP are not covered by the Financial Services Compensation Scheme.'

'VIP will receive commission from TMJG when you use one of their provider's products or services.'

The adviser has also pointed out that all of the complaints brought to this service are being made with the assistance of the same solicitor. He suggested this raised the possibility of responses being coordinated.

Mr B's version of events is as follows:

'We were advised by [the adviser] of ER Networks about moving our pension scheme into a SIPP scheme by investing in the Sustainable Growth Group. [the adviser] also advised us that this was not a high risk investment and it would be far more beneficial to myself and my wife than keeping our existing pension plans.

We were both under the impression we were being advised by [the adviser] of ER Networks.'

'At no time during our pension transfer were we aware that [the adviser] was working on his own behalf for his own unregulated company Vita Investment Planning. We have used ER Network for over 10 years for financial advice and always dealt with [the adviser].

We would like to make the point clear we were coached in completing all documents regarding our investments by [the adviser].

Myself and my wife were at a mortgage consultation with [the adviser] after which he brought the subject of switching our pension plans.

[The adviser] encouraged us to become involved in re-investing our pension schemes into a SIPP fund and we took his advice. Due to our inexperience in investments if [the adviser] had never approached us would never have been involved in this type of pension fund.'

Mr B's recollections are clearly at odds with the VIP terms of business that he signed.

My conclusions from the above

Based on what the adviser has said I am satisfied that his actions in bringing about the switch of the personal pension to the SIPP amounted to the regulated activity of bringing about deals in investments as per article 25(2) of the RAO. He says that he liaised with the ceding schemes, obtained transfer values, arranged the transfer from the ceding scheme, helped fill out the forms and submitted the applications to the SIPP operator.

The two regulated entities involved (the ceding scheme and the SIPP operator) considered – at the time - they were dealing with the ER Network, an AR of Intrinsic. I am therefore satisfied that this regulated activity was carried out by the ER Network.

Whether regulated investment advice was given and if so which entity gave it is less clear cut. The adviser has said that he did not receive any payment either from Berkley Burke or SGG.

The adviser spent considerable time and energy in bringing about the significant number of transfers, that he should do this for no financial benefit is, in my view, implausible. The adviser was also involved with The Marcus James Group. This is made clear in the Vita Investment Planning terms of business which said the following about commission:

'VIP will receive commission from TMJG (The Marcus James Group) when you use one of their providers products or services. '

The VIP terms of business also makes clear the advisers understanding of the SGG products. The terms said:

'All products and services are offered free from financial advice and are not regulated by the Financial Services Authority neither are they considered to be unregulated collective investment schemes.'

It therefore seems more likely than not that the adviser was paid by TMFG for his role in the investment Mr B made.

There is documentary evidence (the VIP terms of business) that no advice was given in respect of the SGG products and that this investment came about as a result of the actions of VIP.

There is no contemporaneous documentary evidence of the involvement of VIP in the pension switch. I don't think the AR's attempt to retrospectively change the firm involved in the switch from the ER Network to VIP is valid. The parties involved in the pension switch, the ceding scheme, the SIPP operator and Mr B, all thought, at the time, they were dealing with the ER Network in respect of the pension switch.

It is clear from the VIP terms of business that it was the understanding of the adviser that the SGG product, not being a CIS, was not an investment. It would have been the advisers understanding that any advice, if given, or arranging of the purchase would not have been a regulated activity and could legitimately have been carried out by VIP.

Mr B had no funds available to invest, other than his SIPP. In addition it was necessary for Mr B to decide to switch to the Berkeley Burke SIPP to enable the SGG investment to go ahead.

The FCA's perimeter guidance manual section 8.28 provides commentary helpful in deciding whether regulated advice has been given - as opposed to just information.

'In the FCA's view, advice requires an element of opinion on the part of the adviser. In effect, it is a recommendation as to a course of action. Information, on the other hand, involves statements of fact or figures.'

'Regulated advice includes any communication with the customer which, in the particular context in which it is given, goes beyond the mere provision of information and is objectively likely to influence the customer's decision whether or not to buy or sell.'

'An explicit recommendation to buy or sell is likely to be advice. However, something falling short of an explicit recommendation can be advice too. Any significant element of evaluation, value judgment or persuasion is likely to mean that advice is being given.'

'A person can give advice without saying (or implying) categorically that the customer should invest. The adviser does not have to offer a definitive recommendation as to whether the customer should go ahead.

For example, saying the following can still be advice:

'this investment is a very good buy but it is your decision whether or not to buy; or

'this investment is a very good buy but I am going to leave it to you to decide because I don't know your up-to-date financial position.'

'In the FCA's opinion, however, such information may take on the nature of advice if the circumstances in which it is provided give it the force of a recommendation. For example:

a person may provide information on a selected, rather than balanced, basis which would tend to influence the decision of the recipient.'

This service has dealt with a number of complaints which are essentially identical to Mr B's complaint. After meeting the adviser a number of investors carried out a series of transactions – the switch of a personal pension to a Berkeley Burke SIPP and a subsequent investment in a SGG product. All of the investors were inexperienced investors with relatively modest pension pots. All of the consumers were existing clients of the ER Network.

Whilst each case is decided on its own particular facts, I think the fact that a number of investors carried out a series of identical transactions increases the probability that these were advised transactions.

The ceding schemes were all well known and established companies. At that time SIPPs were relatively new and not a product that most investors were aware of. Within this relatively specialised area Berkeley Burke was not a major operator. Similarly the SGG product was a niche, unusual product which would be unknown to typical retail investors. Mr B was not an experienced investor and apart from his personal pension had no other investments. It seems unlikely that such an investor would undertake such a transaction without advice or some form of encouragement from the adviser.

Taking into account all of the above I am satisfied that it is more likely than not that Mr B was advised to switch his personal pension to a SIPP for the purpose of investing in the SGG product. The adviser would only be paid if Mr B made the SGG investment – which clearly incentivised the AR to encourage Mr B to go ahead with the pension switch and the SGG investment. Given the complexity of the transaction and the inexperience of Mr B it seems unlikely that he would have gone ahead with the pension switch without some form of persuasion or encouragement from the adviser. As the above extracts from PERG make clear this would amount to advice. I also consider it unlikely that the mere provision of information would have persuaded Mr B to switch his personal pension to the SIPP so he could invest in SGG products. The pension fund represented the entirety of Mr B's pension provision. It was clearly very important to Mr B and his retirement planning. In my view this further increases the likelihood that Mr B would not have acted without advice.

For the reasons given above my provisional conclusion is that Mr B was advised to switch his personal pension to a SIPP. It is possible that advice was also given on the SGG product. However, I don't think ultimately it makes a difference to the outcome of this

complaint whether the SGG advice was given or not - so I make no finding on this point. I am satisfied that when advising Mr B to make the pension switch the AR knew that the intended investment to be held in the SIPP was the SGG product.

Did the ER Network of VIP give this advice?

There is some evidence that at least for the SGG product no advice was given by the ER Network. Mr B signed the VIP terms of business. These make clear that the investment in the SGG product had been arranged by VIP and advice had not been given

The evidence available in respect of the pension switch clearly indicates the involvement of the ER Network. The contemporaneous documentary evidence shows the ER Network arranged the switch from the personal pension to the SIPP. As explained earlier, I don't think the AR's later attempt to retrospectively change the firm involved from the ER Network to VIP to be valid. At the time the ceding pension scheme and the SIPP considered that the ER Network was arranging the transaction. The AR said that, at the time, he thought he had to arrange the pension switch via The ER Network. Therefore the ceding scheme, the SIPP and the AR himself, at the time, all thought the pension switch was arranged by The ER Network.

I accept that there is no documentary evidence of any advice given by the ER Network. However, Mr B says he was advised to switch his pension by the AR and the AR's statement is silent on this point.

Mr B approached the AR for advice about his mortgage. It was at a meeting to discuss his mortgage that the idea of the pension switch and the SGG investment was discussed. An investor who in the course of a meeting to discuss a regulated mortgage contract goes on to discuss other regulated investments (a SIPP and a personal pension) would in the absence of any indication to the contrary reasonably consider he was still talking to his regulated financial adviser. There is evidence that the adviser made a distinction between his regulated business and what he considered non regulated business – the VIP terms of business. However, I have seen no evidence that any indication was given to Mr B that in relation to the personal pension and the SIPP he wasn't dealing with his regulated financial adviser (the ER Network).

For the reasons set out above my provisional conclusion is that Mr B was advised to switch his personal pension to the Berkeley Burke SIPP and that this advice was given by the AR. The adviser would have known that the purpose of the switch was to enable an investment in the SGG product.

Is Intrinsic responsible for the advice to switch from the personal pension to a SIPP given by the AR?

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 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 ER Network.

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 prescription". 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 May 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 B 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

Intricnsic'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 pension and to replace it with a Berkley Burke SIPP. Mr B switched a Clerical Medical personal pension to the Berkley Burke SIPP. I understand that Clerical Medical was not an Intrinsic approved pension plan and neither was the Berkeley Burke SIPP.

Where two pieces of advice are so closely connected, in effect they form a single piece of advice. If one element of the advice is the responsibility of the principal then the whole advice is. This has been made clear in the recent court case of Financial Ombudsman Service v TennetConnect referred to earlier. In this case the SIPP advice and the personal pension advice form a single piece of advice. The SIPP advice, as Berkeley Burke is not an Intrinsic approved product, would not be authorised. However, if Intrinsic is responsible for the personal pension advice this would also make it responsible for the SIPP advice. The personal pension advice would be classified by Intrinsic as replacement business.

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

This type of restriction - as it 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.

pre-approval of pension switching advice

Intrinsic has argued in other complaints 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 a restriction, a breach of it in this case does not mean Intrinsic is not responsible for the advice given.

special requirements for "pension transfers"

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

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

I am therefore satisfied at the advice to sell (switch) the personal pension was business for which Intrinsic has accepted responsibility for. The SIPP advice was inextricably linked to the personal pension advice and so in effect forms a single piece of advice. Because of this the whole of the advice is business for which Intrinsic has accepted responsibility for.

my provisional decision on jurisdiction

For the reasons set out above 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 B to switch his personal pension to a SIPP. The purpose of the advice was to enable the investment in the SGG products.

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

SIPPs 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 B, 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 pension 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 the SGG product.

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 B 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 B had previously taken. I consider that up to the point of the investment Mr B would be broadly categorised as a medium risk investor. Mr B's original personal pensions were invested in a range of equity and property funds that I consider would generally be considered medium risk. I don't think it is disputed that the SGG product would be considered to be a high risk investment. On that basis the SGG product exceeded the level of risk that Mr B was prepared to take.

The SIPP ended up as Mr B'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 an unregulated, high risk investments is taking a very substantial risk. I consider that Mr B did not have the capacity to bear this level of risk with his pension. Mr B was reliant on this investment for the entirety of his pension income. Any significant loss on his investments would have a serious impact on his retirement income.

I am also not persuaded that Mr B 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 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 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 B 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 a 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 B had been advised not to go ahead with the SIPP (and without the SIPP there would have been no 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 investment was unsuitable.

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

At the time the investment was made Mr B signed certified sophisticated investor and high net worth investor certificates.

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 B had the required knowledge. However, no other paperwork was attached.

Mr B also signed a form to confirm he was a high net worth investor.

I am satisfied that neither of this forms are accurate descriptions of Mr B. It was clearly unwise of Mr B 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. The SGG investments were described to investors in very positive terms.

However, the adviser was clearly aware that these forms had been signed by Mr B, as he returned them to Berkeley Burke. It would have been apparent to the adviser that these forms were inaccurate (he had provided financial advice to Mr B previously). These forms were a requirement of the SIPP operator and were required to allow the investment in SGG products. The adviser has obligations to his clients including an obligation to act in their best interests. It is hard to see how sending obviously inaccurate forms to the SIPP operator was acting in Mr B's best interests. I consider that at this point the adviser should have declined to act for Mr B in respect of the switch to the SIPP. Given the fact that these were obviously unreliable forms I don't think they change my view on suitability.

As part of potential legal action against a trustee associated with the SGG investment a form was completed by Mr B. Mr B was asked what level of risk he understood the investments had – to which he wrote 'n/a'.

He was also asked 'who advised you to transfer your pension?' – Mr B wrote 'direct.

This would suggest that Mr B was not advised to switch his personal pension to the SIPP.

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 conclusion is that the advice to switch a personal pension to the SIPP for the purpose of investing in the SGG product was unsuitable.

I also consider that losing the entirety of his pension would have been upsetting for Mr B. I propose to award him £500 to compensate him for this.

fair compensation

The redress calculation should compare the current value of Mr B's SIPP to the total value of her previously held pension, had it remained with the same provider in the same funds.

Intrinsic should:

1. *Obtain the notional transfer value of Mr B's previous pension plan, if it had not been transferred to the SIPP.*

2. *Obtain the actual transfer value of Mr B's SIPP, including any outstanding charges.*

3. *Pay an amount into Mr B's SIPP so that the transfer value is increased to equal the value calculated in (1). This payment should take account of any available tax relief and the effect of charges. It should also take account of interest as set out below.*

In addition, Intrinsic should:

4. *Pay five years' worth of future fees owed by Mr B to the SIPP.*

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

I have explained how Intrinsic should carry this out in further detail below.

1. *Obtain the notional transfer value of Mr B's previous pension plan if it had not been transferred to the SIPP.*

This should take account of any guaranteed benefits that may have applied to the previous pension plan.

If there are any difficulties in obtaining a notional valuation, then the FTSE UK Private Investors Income total return index should be used instead. That is a reasonable proxy for the type of return that could have been achieved if suitable funds had been chosen.

2. *Obtain the actual transfer value of Mr B's SIPP, including any outstanding charges.*

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.

The SGG and Global Forestry investments should be assumed to have a nil value.

Intrinsic may ask Mr B to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from these investments. That undertaking should allow for the effect of any tax and charges on the amount Mr B may receive from the investments and any eventual sums he would be able to access from the SIPP. Intrinsic will need to meet any costs in drawing up the undertaking.

3. *Pay an amount into Mr B's SIPP so that the transfer value is increased to equal the value calculated in (1). This payment should take account of any available tax relief and the effect of charges. It should also take account of interest as set out below.*

If it's not possible to pay the compensation into the SIPP, Intrinsic should pay it as a cash sum to Mr B. But had it been possible to pay into the SIPP, it would have provided a taxable income. Therefore 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 in retirement.

Simple interest should be added at the rate of 8% a year from the date of the redress calculation until the date of payment. Income tax may be payable on this interest.

4. *Pay five years' worth of future fees owed by Mr B to the SIPP.*

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

Ideally, Intrinsic should take over the investments 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. But I don't know how long that will take. Third parties are involved and I don't have the power to tell them what to do. To provide certainty to all 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). This should provide a reasonable period for the parties to arrange for the SIPP to be closed. There are a number of ways they may want to seek to achieve that. It will also provide Mr B with some confidence that he will not be subject to further fees.

In my view, awarding a lump sum for an amount equivalent to five years fees strikes a fair balance. It's possible that the SGG and Global Forestry investments could be removed from the SIPP in less than five years. But given the time it has taken to date I think it is possible that it could take a number of years more to resolve all of the issues. So using a figure of five years' worth of fees is an approximate and fair award to resolve the issue now.

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

Mr B has been caused some distress by the loss of his pension. I think a payment of £500 is appropriate compensation for that distress."

Mr B accepted my provisional decision and had nothing further to add. The firm did not agree but had nothing 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 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 B to accept or reject my decision before 6 September 2019.

Michael Stubbs
ombudsman