Since my provisional decision was issued the firm has changed its name to Quilter Financial Services Ltd. In this decision I referred to the firm as Intrinsic. For the sake of clarity I will continue to do so.

complaint

Ms W's complaint is about advice she said she received from an appointed representative (AR) of Intrinsic Financial Planning Ltd. She says the advice was to switch a personal pension to a self invested personal pension (SIPP) with another provider. The switch was recommended in order to allow investments in unregulated non-mainstream investments.

Ms W invested £30,000 investment in Sustainable Agro Energy and the £7,500 investment in Sustainable Agro Energy Lease programme (Green Oil).

Ms W considers the advice she received was unsuitable.

background

Ms W 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 (Vita).

Whether advice was provided is in dispute but, after meeting the adviser a SIPP application was completed and Ms W's pension was switched from her then current provider into the SIPP. A short time later the above investments were made.

The investments went into administration in early 2012, following allegations of fraud. This prompted Ms W to complain about the suitability of the advice she has said she 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.

I issued a provisional decision on this case on 14 May 2019. In this I said the following:

'I will consider our jurisdiction in three steps:

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

Ms W's solicitor has set out her complaint in the following terms:

In a letter of complaint to this service of 4 October 2013 it wrote:

'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 Ms W was advised to switch her 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 adviser also recommended the SGG investment.

Both the original personal pension and the SIPP are specified investments as per article 82 of the Regulated Activities order 2001 (RAO). Having considered the SGG investments in my view they would be considered to be an unregulated collective investment scheme. A collective investment scheme is a specified investment as per article 81 of the RAO. So if Ms W had been advised to switch her personal pension to the SIPP this would be regulated investment advice (as per article 53 of the RAO). If Ms W had also been advised to make the SGG investment this would also be regulated investment advice.

It also seems likely that the regulated activity of arranging deals in investments took place.

Whether advice was given and exactly what happened to bring about the pension switch and the SGG investment 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 Ms W and the adviser (putting aside the capacity in which he was acting). The upshot of these meetings was that Ms W switched a personal pension to a SIPP with Berkeley Burke. The purpose of the pension switch was to enable investment in a series of unregulated investments offered by SGG group.

These were not mainstream investments and I consider it unlikely that Ms W would have come across these investments herself. I am aware of a number of essentially identical complaints about the adviser and switches to a SIPP to make investments in SGG group products. In my view this is persuasive evidence that the adviser introduced both the idea of the pension switch and the investments in SGG products.

The adviser's version of events is as follows:

'On the 9/5/2011 both [Ms W and her partner] were present. [Ms W] had her existing personal pension statement as she wished to discuss her own retirement plan. We discussed the level of projection that [Ms W's] plan would provide and she felt that the returns were poor and she was looking to take a bit more risk to hopefully improve her retirement fund. 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. As a solicitor she fully understood the significance but asked for further information. [Ms W's partner] 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 [Ms W and her partner] 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.'

Whilst he doesn't explicitly say so I consider it reasonable to assume that the purpose of the second meeting was to discuss the SGG products. According to the adviser, at this meeting he was representing Vita Investment Planning rather than the ER Network. The Vita Investment Planning terms of business and letters for the two investments signed by Ms W adds weight to the adviser's version of events. It is clear from what the adviser says that he separated what he was doing into 'regulated' and 'unregulated' business.

The switch from the personal pension to the SIPP would in my view have been discussed at the first meeting. From the above statement it is clear that the SGG investments couldn't be held within the existing personal pensions – so it is more likely than not that the pension that could hold them (the SIPP) would have been discussed. The SIPP, whilst operated by Berkely Burke, was branded as the 'Sustain Investments SIPP' and would appear to be promoted in conjunction with SGG. It seems more likely than not that the adviser would have discussed the specific merits of the Sustain SIPP and in particular its ability to hold SGG investments. I also consider it more likely than not that the relative merits of the SIPP compared to the original personal pension would have been discussed. Such a discussion would, in my view, constitute regulated investment advice.

My conclusion is that Ms W was advised to switch her personal pension to the SIPP for the express purpose of investing in SGG products. This advise was given by the adviser acting for the ER Network.

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 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 February 2010.

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 Ms W 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 Charter Financial 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. Whilst the Berkley Burke SIPP was not an Intrinsic product I consider it likely that the ceding scheme was. Ms W had originally been advised to switch from a personal pension to a new Clerical Medical personal pension (the ceding pension scheme) in 2007. This advice had been given by the ER Network (acting as an AR of Intrinsic).

However, the advice to surrender the existing personal pension and switch to the SIPP are inextricably linked. Without the surrender advice there could have been advice to take out the SIPP. Where two 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 as the Principal authorised The ER Network to give advice on the ceding pension scheme (Clerical Medical). This advice was inextricably linked to the advice to take out the SIPP with Berkley Burke. Because of this it forms a single piece of advice for which Intrinsic is responsible for in its entirety –because it authorised part of the advice (the Clerical Medical advice).

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 Ms W's existing personal pension 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 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.

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 available evidence and arguments in order to decide what is fair and reasonable in all the circumstances of this case. Having done so, my provisional conclusion is that it should be upheld.

As set out above, I am satisfied the AR advised Ms W to switch her 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 Ms W, 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 SGG 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 Ms W was prepared to take. However, I consider there is enough background information available to make a reasonable assessment of the level of risk that Ms W had previously taken. I consider that up to the point of the investment Ms W would be broadly categorised as a medium risk investor. Ms W original personal pension was invested in a range of equity and property funds that I consider would generally be considered medium risk.

This was Ms W's sole pension provision and as such I consider that she was not in a position to bear the risks associated with the SIPP. An investor who places the entirety of their pension into a SIPP for the express purpose of investing in two unregulated, high risk investments is taking a very substantial risk. I consider that Ms W did not have the capacity to bear this level of risk with her pension. Ms W was reliant on these two investments for the totality of her pension income. Any significant loss on these investments would have a serious impact on her retirement income.

I am also not persuaded that Ms W 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 (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 Ms W was prepared to take a high level of risk with her pension, and to be clear I'm not persuaded that she was, to place all her pension into two such high risk investments was not consistent with her circumstances. In such a situation the adviser should have advised against doing this. I consider it reasonable to assume that if Ms W had been advised not to go ahead with the SIPP and the SGG investment she 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 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 Ms W*
- *The solicitors questionnaire which records that Ms W understood the investments to be high risk*

Ms W also completed a self certified sophisticated investor certificate. This certificate contained the following statement:

I am a self-certified sophisticated investor because at least one of the following applies —

(a) I am a member of a network or syndicate of business angels and have been so for at least the last six months prior to the date below;
(b) I have made more than one investment in an unlisted company in the two years prior to the date below;
(c) I am working or have worked in the two years prior to the date below, in a professional capacity in the private equity sector, or in the provision of finance for small and medium enterprises;
(d) I am currently, or have been in the last two years prior to the date below a director of a company with an annual turnover of at least £1 million.

I am satisfied that, despite what Ms W signed, this is not accurate. I consider the adviser would have known that this was not an accurate description of Ms W.

It was clearly unwise of Ms W 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 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.

The solicitor's questionnaire

In this Ms W appeared to confirm that no pension advice was given and that she 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:

- *Ms W was advised to switch her personal pension 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 investments was unsuitable*

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

fair compensation

The redress calculation should compare the current value of Ms W's SIPP to the total value of her previously held pensions, had they remained with the same providers in the same funds.
Intrinsic should:

1. *Obtain the notional transfer value of Ms W's previous pension plans, if they had not been transferred to the SIPP.*

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

3. *Pay an amount into Mr W'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 Ms W to the SIPP.*
5. *Pay Ms W £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 Ms W's previous pension plans if they 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 W'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.

I note that Ms W in the period June 2011 to June 2012 made monthly contributions into her SIPP. I am unsure whether these contributions continued or whether any investments were made at a later date. Cash contributions after the initial transfer (and any investments made with these contributions) should be excluded from the SIPP transfer value calculation.

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

Intrinsic may ask Ms W 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 Ms W 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 W'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 Ms W. 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 W'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 W to the SIPP.*

Had Intrinsic given suitable advice, I don't think there would be a SIPP. It's not fair that Mr R 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 R 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 R 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 R 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 Ms W £500 for the trouble and upset caused.*

Ms W has been caused some distress by the loss of her pension. I think a payment of £500 is appropriate compensation for that distress.'

Ms W accepted my provisional decision and had nothing further to add. Intrinsic 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 Ms W to accept or reject my decision before 5 September 2019.

Michael Stubbs
ombudsman