DRN-4495226

The complaint

Mr S is unhappy about the role of Inter-UK Financial Services Limited (Inter-UK) in the switch of his personal pensions to a Self-Invested Personal Pension (SIPP) held with Intelligent Money to invest with SVS Securities. He says the switch was unsuitable and Inter-UK should pay him compensation.

What happened

Mr S says he was a client of Mr X. In February 2018, there was a switch of his Standard Life pension together with a Scottish Widows plan into a SIPP with Intelligent Money (IM). The total amount transferred was around £379,000.

Following the switch of his pension funds in 2018, Mr S took tax-free cash of about £95,000 and a further £12,000 from his pot. He then invested the residual funds through an arrangement with SVS.

Mr S says the 2018 transaction was as a result of advice he received from Mr X. However, he's not been able to provide any advice paperwork – such as a fact find or suitability letter. However, the SIPP application with IM shows that it was submitted by a Ms Y of Inter-UK.

Unfortunately, Mr S received a letter in May 2020 which said SVS was in special administration – a formal insolvency procedure. It explained he was eligible to apply to the Financial Services Compensation Scheme (FSCS) for compensation up to the statutory cap of £85,000.

Mr S contacted the FSCS about a claim against an unrelated firm he believed to be associated with Mr X. But it rejected his claim on the basis that there was another party – Inter-UK – involved in the pension switch and the subsequent investment into the SVS portfolio.

Mr S complained to Inter-UK in June 2021. Inter-UK didn't respond to the complaint and so his case was referred to our Service in February 2022.

In its only submission to our service, Inter-UK said it was unable to locate an advice file. Both parties are therefore unable to produce a suitability report, or any other advice documents from the time of advice. But it added that Mr X was never a certified adviser with it. Inter-UK's director said the following:

> *"I have queried the application process with Intelligent Money, the SIPP provider, and it appears that the Terms of Business were set up by [Ms Y] who was the Director of an [appointed representative (AR)] which was briefly under Inter-UK (Terms of Business were set up in Inter-UK's name, not the AR), she was not a principal of Inter-UK and should not have been able to set up TOB without a Principal signing."*

After Inter-UK failed to engage any further with us and our investigator, an ombudsman issued a jurisdiction decision setting out that Inter-UK was responsible for the complaint based on its AR's involvement in the pension switch and investment.

Another investigator then looked at the merits of the complaint. He concluded that Inter-UK had advised Mr S and the advice to transfer to the SIPP and SVS was unsuitable and that it was therefore fair and reasonable for Inter-UK to pay Mr S compensation for his losses.

Once again, Inter-UK failed to respond to the investigator's view. So Mr S's complaint was passed to me to decide. I issued a provisional decision on 13 November 2023. I said I planned to uphold the complaint but given the lack of engagement from Inter-UK, my findings were based on limited evidence. I anticipated that on receipt of my provisional decision, Inter-UK would provide further arguments and evidence. But it did not respond at all – despite us chasing it. As such, my decision remains the same and is repeated below.

My decision on jurisdiction

I've considered all the available evidence and arguments provided in relation to this complaint.

The Financial Ombudsman Service can't look at all complaints. Before we can consider a complaint, we need to check, by reference to the Financial Conduct Authority's (FCA) Dispute Resolution Rules (DISP) and the legislation from which those rules are derived, whether it's one we have the power to look at.

A previous ombudsman issued a decision on jurisdiction. Inter-UK has not disputed the previous ombudsman's findings that it is responsible for the AR's involvement in the pension switch.

Nevertheless, given that jurisdiction is a matter that we must constantly review, I wish to clarify two things.

First, Mr S has always said that he was advised by Mr X. There is no clear evidence that Mr X had anything to do with Inter-UK as an adviser. And I think it's notable that when Mr S submitted a claim to the FSCS, he did so on the basis that he believed Mr X to be connected to a completely different firm when giving him advice. So, I don't think I can conclude that Mr X gave Mr S advice as an Inter-UK adviser and that it is therefore responsible for the advice to Mr S to switch his pensions to the IM SIPP and the subsequent investment.

However, I think Mr S's complaint encompasses all acts undertaken in connection with the pension switch even if he's focused on the advice. Inter-UK appears to accept that its AR set up terms of business with IM SIPP. And the application documents suggest the AR then submitted the SIPP application for Mr S. I think this was probably because it was a requirement of the SIPP operator that a regulated firm be involved in the pension switch. So, I think Inter-UK's AR was likely involved in the regulated activity of making arrangements for Mr S's pension and investment.

Secondly, as DISP 2.3.3G explains:

> "*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)*".

Further, under section 39(3) of the Financial Services and Markets Act 2000 (FSMA):

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

The responsibility of a principal was considered in the case of *Anderson v Sense Network* [2018] EWHC 2834 (this case was the subject of an appeal, but the Court of Appeal issued a decision agreeing with the earlier decision). In the High Court, Mr Justice Jacobs said:

> *"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*."

So, a principal isn't automatically responsible for the actions of its ARs and it's necessary to go beyond looking at the activities Inter-UK was authorised to do.

The analysis of DISP and FSMA in these circumstances usually involves reviewing the agreement between Inter-UK and its AR. The problem here is that Inter-UK have failed to engage with us in our assessment of the complaint. Inter-UK hasn't provided any evidence of what its AR was and wasn't authorised to do.

In the absence of such evidence, I think it's reasonable to conclude that the AR was, more likely than not, authorised by Inter-UK to do the things that it itself was authorised to do. Inter-UK's authorisations as set out on the FCA's register include making arrangements for investments.

This doesn't mean that I'm going against the finding in the *Anderson* case. It is a conclusion I've reached based on the limited evidence and arguments presented to me.

So, my conclusion is that Inter-UK is responsible for the investment arrangements undertaken by its AR and we have jurisdiction to consider that issue.

What I've decided – and why

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

The FCA Handbook contains eleven Principles for businesses, which it says are fundamental obligations firms must adhere to (PRIN 1.1.2 G in the FCA Handbook). These include:

- Principle 2, which requires a firm to conduct its business with due skill, care and diligence.

- Principle 3, which requires a firm to take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.

- Principle 6, which requires a firm to pay due regard to the interests of its customers and treat them fairly.

Further, the Conduct of Business Sourcebook (COBS) at COBS 2.1.1 R requires a firm to act honestly, fairly and professionally in accordance with the best interests of its clients, in relation to designated investment business carried on for a retail client. The definition of "designated investment business" includes pension funds.

So, Inter-UK (via its AR) had obligations to treat Mr S fairly and act in his best interests when arranging the pension switch.

The application form submitted by Inter-UK for the IM SIPP appears to show an intended investment for the SIPP funds in a Saxo fund. When IM SIPP queried this with Inter-UK a short time later in March 2018, Mr X replied from an Inter-UK email address to say that this was only done because the application form didn't have any other options for investment choices. We clearly don't have all the information and evidence, but it seems like Mr X instructed IM SIPP to change the investment instruction to the SVS investment.

As I've said above in the section about jurisdiction, I can't currently conclude that Mr X was connected to Inter-UK as an *adviser*. But he appears to have had access to Inter-UK's email address. So I think that he was likely working for or assisting Inter-UK or its AR in helping it complete the investment arrangements. Inter-UK hasn't countered this. And so I think it's fair to conclude that Inter-UK or its AR knew that Mr S would be using the IM SIPP to make an investment in a fund managed by SVS. It is also relevant to point out in this regard that I'm aware from other complaints about Inter-UK that have been referred to our service that Inter-UK has arranged other SVS investments. So arrangement of investments in SVS doesn't appear to be completely anomalous to Inter-UK's business practice.

At the time, Mr S was earning around £70,000, had no other pensions and was looking to take early retirement due to illness. He owned a house that still had a mortgage. He says that Mr X had advised him about another £70,000 direct investment in SVS, but that he had no other investment experience. Mr S says that he had a low appetite for risk and, looking at his circumstances, I have no reason to doubt that.

The IM SIPP appears to have been relatively low cost, but it's not clear why Mr S needed to switch his pensions rather than retain or make fund changes to his existing pensions. The SVS fund would also likely have had charges and costs associated with it.

Inter-UK wasn't responsible for providing advice, but it doesn't appear to have done anything to clearly set out its role to Mr S and that it wasn't providing him with advice. It asked no questions about why Mr S was looking to switch his pensions to the IM SIPP and invest in SVS - and the circumstances surrounding the decision to switch. And it appears likely that Inter-UK knew that Mr S was dealing with an unregulated "adviser" in the form of Mr X. So, Inter-UK knew or to have known that Mr S had not received regulated financial advice – despite his circumstances and health meaning that he was at a critical point in his retirement planning.

Had Inter-UK conducted its business with care and sought to act in Mr S's best interests, I think, fairly and reasonably, it should have offered to either provide Mr S regulated advice or encouraged him to seek it elsewhere. It didn't do this and instead simply appears to have arranged the switches and investment.

I have no reason to doubt that Mr S would have sought regulated advice if he'd been encouraged by Inter-UK to do so. And based on what I've seen so far, I think it's unlikely that he would have been advised that switching his pensions to a SIPP and investing funds via SVS was suitable or necessary. I think Mr S would have listened to that advice. So I think it's fair to conclude that Inter-UK's failings have led to Mr S suffering losses.

Mr X gave advice to Mr S when he should not have done so. And I'm aware the FCA has identified issues with SVS and its management of funds and assets. So other parties were involved in the loss. I've taken this into account when assessing whether it's fair to hold Inter-UK responsible for all the losses Mr S suffered.

But this complaint is against Inter-UK – not Mr X or SVS. The DISP rules set out that when an ombudsman's determination includes a money award, then that money award may be such amount as the ombudsman considers to be fair compensation for financial loss.

Inter-UK had its own distinct regulatory obligations to treat Mr S fairly and act in his best interests. So, whilst I take account of the potential contribution made by other parties to the losses suffered by Mr S, I think it's fair and reasonable to make an award against Inter-UK that requires it to compensate Mr S for the full measure of his loss. Inter-UK likely knew or ought to have known that Mr S was receiving advice from an unregulated party – Mr X - and so Mr X was committing a criminal offence. This ought to have been a big warning sign that Mr S was at risk of considerable consumer detriment. But it did nothing about this. This was not a case where there was some minor, unfortunate failing on the part of Inter-UK. But for its actions, Mr S would not be in the position he is now.

I'm not asking Inter-UK to account for loss that goes beyond the consequences of its failings. I'm satisfied those failings have caused the full extent of the loss in question. That another party (or parties) might also be responsible for that same loss is a distinct matter and that fact shouldn't impact on Mr S's right to compensation from Inter-UK for the full amount of his loss.

Putting things right

My aim is that Mr S should be put as closely as possible into the position he would probably now be in if he'd been treated fairly.

I think Mr S would have remained with his previous providers, however I can't be certain that a value will be obtainable for what the previous policies would have been worth. I'm satisfied what I've set out below is fair and reasonable, taking this into account and given Mr S's circumstances and objectives when he invested.

What must Inter-UK do?

To compensate Mr S fairly, Inter-UK must:

- Compare the performance of Mr S's SIPP with the notional value if it had remained with the previous providers. If the actual value is greater than the notional value, no compensation is payable. If the notional value is greater than the actual value, there is a loss and compensation is payable.

- Inter-UK should also add any interest set out below to the compensation payable.

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

- If Inter-UK is unable to pay the compensation into Mr S's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mr S won't be able to reclaim any of the reduction after compensation is paid.

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

- It's reasonable to assume that Mr S is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr S would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

- Inter-UK should also pay Mr S £300 for the undoubted distress caused to him by the unfair arrangements and inconvenience to his retirement planning.

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

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
IM SIPP	Some liquid, some illiquid	Notional value from previous providers	Date of investment	Date of decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)

Actual value

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

It may be difficult to find the actual value of the portfolio. This is complicated where an asset is illiquid (meaning it could not be readily sold on the open market) as in this case. Inter-UK should take ownership of any illiquid assets by paying a commercial value acceptable to the pension provider. The amount Inter-UK pays should be included in the actual value before compensation is calculated.

If Inter-UK is unable to purchase illiquid assets, their value should be assumed to be nil for the purpose of calculating the actual value. Inter-UK may require that Mr S provides an undertaking to pay Inter-UK any amount he might receive from the investments once he's been compensated in full for his losses if Inter-UK chooses to limit compensation to the award limit. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Inter-UK will need to meet any costs in drawing up the undertaking.

Notional Value

This is the value of Mr S's investment had it remained with the previous providers until the end date. Inter-UK should request that the previous providers calculate this value.

Any additional sum paid into the pension fund should be added to the *notional value* calculation from the point in time when it was actually paid in.

Any withdrawal from the pension fund should be deducted from the notional value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if Inter-UK totals all those payments and deducts that figure at the end to determine the notional value instead of deducting periodically.

If the previous providers are unable to calculate a notional value, Inter-UK will need to determine a fair value for Mr S's investment instead, using this benchmark: For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds. The adjustments above also apply to the calculation of a fair value using the benchmark, which is then used instead of the notional value in the calculation of compensation.

The IM SIPP only exists because of illiquid assets. In order for the SIPP to be closed and further fees that are charged to be prevented, those investments need to be removed. I've set out above how this might be achieved by Inter-UK taking over the portfolio, or this is something that Mr S can discuss with the provider directly. But I don't know how long that will take.

Third parties are involved and we don't have the power to tell them what to do. If Inter-UK is unable to purchase the portfolio and the SIPP can't be closed, to provide certainty to all parties I think it's fair that that Inter-UK pays Mr S an upfront lump sum equivalent to five years' worth of wrapper fees (calculated using the fee in the previous year to date). This should provide a reasonable period for the parties to arrange for the SIPP to be closed.

Lastly, in order to be fair to Inter-UK, it should have the option of payment of the redress being contingent upon Mr S assigning any claim he may have against other parties in respect of this loss but only if Mr S is fully compensated. If Inter-UK chooses to limit the compensation to our award limit, the terms of the assignment should require Inter-UK to account to Mr S for any amount it subsequently recovers from third parties that exceeds the loss paid to Mr S.

If Inter-UK elects to take an assignment of rights before paying compensation, it must first provide a draft of the assignment to Mr S for his consideration and agreement. Any expenses incurred for the drafting of the assignment must be met by Inter-UK.

Why is this remedy suitable?

I've chosen this method of compensation because:

- Mr S likely wanted Capital growth with a small risk to his capital.

- If the previous providers are unable to calculate a notional value, then I consider the measure below is appropriate.

- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to his capital.

- The FTSE UK Private Investors Income ***Total Return*** index (prior to 1 March 2017,

the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.

- I consider that Mr S's risk profile was in between, in the sense that he was prepared to take a small level of risk to attain his investment objectives. So, the 50/50 combination would reasonably put Mr S into that position. It does not mean that Mr S would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker investment. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mr S could have obtained from investments suited to his objective and risk attitude.

My final decision

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £160,000, plus any interest and/or costs that I think are appropriate. If I think that fair compensation is more than £160,000, I may recommend that the business pays the balance.

Decision and award: I uphold the complaint. I think that fair compensation should be calculated as set out above. My decision is that Inter-UK Financial Services Limited should pay Mr S the amount produced by that calculation – up to a maximum of £160,000 plus interest.

Recommendation: If the amount produced by the calculation of fair compensation is more than £160,000, I recommend that Inter-UK Financial Services Limited pays Mr S the balance. This recommendation is not part of my determination or award. Inter-UK Financial Services Limited doesn't have to do what I recommend. It's unlikely that Mr S can accept my decision and go to court to ask for the balance. Mr S may want to get independent legal advice before deciding whether to accept this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 5 January 2024.

Abdul Hafez
Ombudsman