

The complaint

Mrs C complains about advice she says she received from an authorised individual at True Potential Wealth Management LLP ("TPWM"). She says she received unsuitable advice to switch her pension and has suffered a loss as a result.

What happened

Mrs C brought her complaint to us jointly with her husband - Mr C - about advice they say they received from Mr H to switch their pensions from Prudential to a fund managed by another TPWM entity ("the True Potential fund"). This decision relates only to Mrs C and her pension. Most of the events took place between Mr H and Mr C so Mr C is mentioned in places in this decision.

Mrs C says that Mr H had been her adviser for some time with another regulated firm. But at the end of June 2021, Mr H contacted her to say that he was moving to TPWM. Mrs C says that Mr H advised her to move her pension to the True Potential fund because he said it had a better performance than her existing Prudential fund and would allow Mr H to continue to service it and benefit from access to an online portal.

Mrs C says that, based on Mr H's advice, she agreed to make the transfer. Mrs C says that Mr H carried out all the arrangements for the transfer without her further involvement.

Mrs C complained to TPWM a short time later when she says she realised the True Potential fund was riskier and had performed much worse than the Prudential fund.

TPWM says that Mr H had only provided information – not advice – about the True Potential fund. It says Mrs C had submitted the application to transfer the fund after receiving a direct marketing offer sent to her by TPWM. TPWM said that in making the application, Mrs C clearly acknowledged that it was a non-advised sale as this was clear from the paperwork. So it said that it wasn't responsible for Mrs C's unhappiness with the fund performance.

The broad agreed timeline is as follows:

2 July 2021 – Mrs C received a direct marketing offer email from TPWM relating to the True Potential fund.

14 July 2021 – Mrs C's client portal with TPWM was activated. Mrs C says this was done during the second of two meetings with Mr H (the other taking place a week earlier with Mr C). TPWM doesn't dispute that this meeting took place on 14 July 2021.

20 July 2021 – Mr C emailed Mr H to say:

"We have discussed the transfer scenario to True Potential following last week's meeting and I would like you to proceed with the transfers of both mine and [Mrs C's] prudential pensions. Let me know if you require any other specific instruction."

22 July 2021 – The application to switch Mrs C's pension was submitted online. IT records show that this was submitted via Mr H's computer at his office.

TPWM says the fact that the application was submitted using Mr H's computer doesn't indicate that this was an advised sale or that Mr H arranged it. TPWM says it asked Mr H about the circumstances of the application and he confirmed that he allowed Mrs C to submit the application via his work computer because of issues that Mr and Mrs C were having with their mobile phone making the application. TPWM also says that Mr H wouldn't have been able to submit the application without Mrs C's password details.

Mrs C doesn't agree. She insists that Mr H advised her to switch funds and that she had no involvement in the application after the 20 July 2021 email sent by Mr C which she says evidences the agreement to Mr H's recommendation. She says she never used Mr H's computer to submit the application and her husband Mr C was working at his own business premises on 22 July 2021 when this is alleged to have happened. Mrs C says that Mr H created and had access to their client log in details from the previous meeting on 14 July 2021 and so used these to submit the application. Mrs C also says that Mr H was motivated to enact the transfers in order to earn a significant commission from TPWM.

When the matter was referred to our service, one of our investigators felt it should be upheld. But, after TPWM raised jurisdiction objections, it was looked at by another investigator. That investigator decided that we did have jurisdiction to consider the complaint because, in his view, TPWM was responsible for arranging the pension switch. But, looking at the merits of the complaint, he did not think it should be upheld because the True Potential fund was broadly similar to the previous Prudential fund in risk profile and therefore wasn't unsuitable for Mrs C.

Mrs C didn't agree and I then reviewed matters. I issued a provisional decision on 29 September 2023. My provisional decision was that Mr H had likely given Mrs C advice and made arrangements for the pension switch. I also said that, although Mr H had failed to follow certain procedures, TPWM was still responsible for his acts by way of apparent authority. And I didn't think the advice to switch pensions was suitable and so TPWM should pay Mrs C compensation for her losses.

Mrs C agreed with my provisional decision but TPWM didn't. In summary, it said:

- Mr H can't be said to have advised Mrs C as no suitability report was prepared. This was a requirement for suitable advice under the regulatory rules as well as Mr H's contract with TPWM.
- If Mr H provided the advice without a suitability report, then he was in breach of his contract with TPWM. And just as would be the case with appointed representatives, TPWM is not responsible for acts of Mr H where he has acted outside of the authority conferred on him.
- Mr C – Mrs C's husband - would have known that advice was only authorised by TPWM if it was accompanied by a suitability report. This was made clear in TPWM's Terms of Business which stated "All charges will be agreed with you in advance and set out in your Personal Illustration, Suitability Report and Application Form."
- Mr C was not a layman – he was involved in financial services and would have known that advice – if it was authorised by TPWM - needed to be documented.

Mrs C also didn't follow data protection procedures if she shared log in details with Mr H. So this all made the accuracy of her version of events doubtful.

- Mrs C received text messages and emails that referred to the opportunity as a "direct offer" -and would have known it was non-advised when she created the portal log in details.

Why I can look into this complaint

I've looked at all the evidence and arguments. Having done so my view is that we do have jurisdiction to consider this complaint. My findings regarding jurisdiction remain as in my provisional decision, but I have supplemented them (where necessary) to deal with the additional points made by TPWM.

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's) Dispute Resolution Rules (DISP) and the legislation from which those rules are derived, whether it's one we have the power to look at.

DISP 2.3.1R says we can:

'consider a complaint under the Compulsory Jurisdiction if it relates to an act or omission by a firm in carrying on...regulated activities...or any ancillary activities, including advice, carried on by the firm in connection with them.'

Guidance for this rule at 2.3.3G says that:

'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).'

At the time of the events complained about, TPWM was an 'authorised person' (also referred to as a 'firm' in regulator's rules). That means it could carry out regulated activities without being in breach of the general prohibition.

TPWM had a number of advisers, one of which was Mr H who joined TPWM in March 2021 and was registered with the regulator as a person dealing with customers for TPWM.

Mr H was a self-employed agent of TPWM. This means Mr H worked under the terms of an agency agreement with TPWM rather than as its employee. It isn't in dispute that Mr H was authorised by TPWM to advise on investments on its behalf.

So, taking into account the above, to decide whether TPWM is responsible for this complaint, there are three issues I need to consider:

- What are the specific acts Mrs C has complained about?
- Are those acts regulated activities or ancillary to regulated activities?
- Did TPWM accept responsibility for those acts?

What is the complaint?

Mrs C's complaint is about the advice she says she was given by Mr H to switch her pension from Prudential to the True Potential fund. I think it's reasonable to say that Mrs C is unhappy with all acts undertaken by Mr H in this regard, including the arrangements she says Mr H made to complete the investment.

I know that Mrs C has also said she's unhappy about the True Potential fund performance. But fund performance isn't something I can look at. But, clearly, if TPWM is responsible for the complaint and the advice was unsuitable, the fund performance will impact compensation.

Were the acts Mrs C complains about done in the carrying on of a regulated activity?

This is the crux of the current dispute.

Regulated activities are specified in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("RAO") and include:

- Advising on the merits of buying or selling a particular investment which is a security or a relevant investment (Article 53 RAO).
- Making arrangements for another person to buy or sell or subscribe for a security or relevant investment (Article 25 RAO).

At the time, the regulated activity of advising on investments was defined in Article 53 RAO as follows:

"Advising a person is a specified kind of activity if the advice is—
(a) given to the person in his capacity as an investor or potential investor, ... and
(b) advice on the merits of his doing any of the following (whether as principal or agent)—
(i) buying, selling, subscribing for or underwriting a particular investment which is a security..., or
(ii) exercising any right conferred by such an investment to buy, sell, subscribe for or underwrite such an investment."

The PERG section of the regulator's handbook sets out guidance from the FCA on the difference between advice and information. At the time, PERG 8.28.1G said:

"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 facts or figures".

TPWM says this was a non-advised sale and that Mrs C submitted the application herself after receiving information from Mr H and the direct marketing offer. TPWM largely relies on Mr H's testimony and the fact that the application was made in a secure portal in its rejection of the complaint.

However, having looked at all the evidence, I think Mrs C's assertion that she was advised to switch her funds is more compelling – and that Mr H did more than just provide information.

There is no formal paperwork evidencing advice. In its response to my provisional decision, TPWM says this is crucial because the regulatory rules in the Conduct of Business Sourcebook ("COBS") set out that advice must be given by way of a suitability report. But COBS sets out what firms should do – not what constitutes "advice" under the RAO. As set out above, no element of the definition of advice in Article 53 requires a suitability letter or for the advice to be set out in writing. And I think the circumstances need to be looked at as a whole in making a decision about what happened and what version of the events is more likely – Mr H's or Mrs C's.

I find TPWM's reliance on Mr H's testimony about matters to be disproportionate in light of the verifiable facts about how the application was processed. TPWM acknowledges that its records show that Mr H's computer was used to submit the pension switch application via the portal. I don't find it credible that this was because Mrs C had no other means to submit the application and so she and Mr C made their way to Mr H's office to use Mr H's computer to do so. This is what Mr H alleges happened. This simply doesn't make sense to me – especially as Mr C has provided copies of emails he was sending at the same time as the application was being processed. As Mr C has said to us:

"Please see the attached e mail that I sent on that same morning at 10.50am to one of the finance companies that we deal with.

This e mail was sent from my work computer in my office at 10.50am. This means that I would have needed to send this e mail and then drive to [Mr H's] office, log in to the client site and then complete a 33 page application form (see attached) all in the duration of four minutes. As you can see from the e mail my colleague (and only full time employee) was on holiday at the time and I would not have scheduled to be out of the office at any point that week."

Mr C's email to Mr H dated 20 July 2021 is also helpful. He refers to discussions taking place about the funds and ends it: *"let me know if you require any other specific instruction."* This indicates that matters were left with Mr H – there is certainly no reply from Mr H to say that Mrs C needed to complete the application herself and that he was not the person to receive any instructions at all as this was a non-advised sale.

TPWM says that Mrs C would have seen some disclaimers about the pension switch being a non-advised sale when signing up to the portal and having received emails. That may or may not be the case – but I ultimately think Mr H submitted the application for the switch (not Mr C) and so Mrs C won't have seen any of the disclaimers on the application at the time of the application or had an opportunity.

Mrs C says that Mr H was motivated to recommend and complete the switch because he stood to earn a significant commission. TPWM has not confirmed how much Mr H stood to earn from the switch. Despite my repeated requests for information about this, TPWM has simply said that *as a result of Mrs C's dissatisfaction* it did not pay Mr H any money for the switch. But that indicates that Mr H *would have* (if Mrs C had not complained) been due some form of payment and one of the metrics for calculating this was the fund provider. So, although I can't draw any firm conclusions about what Mr H's motivations may or may not have been, I think the fact that he would benefit financially from Mr C's switch to the True Potential fund can't be ignored and was likely a factor in his actions.

Mrs C says that she created and shared her portal log in details with Mr H at the meeting on 14 July 2021. Whilst it's not good practice to share log in details in this way, I think it's plausible that this is what happened. And this is what allowed Mr H to complete submit the application on 22 July 2021 for Mrs C.

Overall, taking into account all of the above, I find Mrs C's testimony about what happened at the time and the circumstances surrounding the pension switch more credible than Mr H's. And so I am of the view that Mr H recommended the pension switch. And that he also carried out the arrangements for the switch. Giving advice and making arrangements for the pension switch are both regulated activities. As such, I'm satisfied that this complaint involves a regulated activity.

Did TPWM accept responsibility for those acts?

The first thing to establish when answering this question is what capacity Mr H was acting. At the time in 2021, Mr H still had approved roles with another firm. However, he was authorised by TPWM in March 2021 and I have no reason to doubt that Mr H told Mrw C that he'd moved to TPWM by the time of the meetings in July 2021 especially as TPWM says that bulk letters were sent to Mr H's clients about the move on 30 June 2021. So, I'm satisfied that in relation to the matters that Mrw C has complained about, Mr H was acting in the capacity as an authorised person with TPWM - not any other firm.

But that doesn't mean that TPWM is automatically liable for Mr H's acts. I must still look at whether TPWM *accepted responsibility* for the acts in question. Doing this requires analysis of common law agency principles.

Actual authority

I would usually review TPWM's whole agency contract with Mr H to assess exactly what it authorised Mr H to do. We haven't been provided with a full copy of the contract – but TPWM has provided extracts. And those extracts appear to show that it required its agents to set out any advice by way of a suitability letter. No suitability letter was produced by Mr H for Mrs C and so I think this was a breach of the agency agreement. As such, I can't conclude that there was actual authority in this case. To this extent, I agree with TPWM's submissions following my provisional decision.

Apparent authority

But notwithstanding that Mr H's actions were not authorised in his agreement with TPWM, it could still have given *apparent authority*. This arises when the principal represents to third parties through words or conduct that the agent has authority to act on its behalf and the third party reasonably relies upon that representation. The essence of apparent authority isn't concerned with what was actually agreed between the parties (for example by way of the agency agreement), but rather, how the relationship between those parties appeared to third parties. In this complaint, I'm concerned with how the relationship appeared to Mrs C.

The case law indicates that I must look to see whether:

- TPWM made a representation to Mrs C that Mr H had TPWM's authority to act on its behalf in carrying out the activities she now complains about; and
- Mrs C relied on that representation in entering into the transactions she now complains about.

Did TPWM represent to Mrs C that Mr H had the relevant authority?

I'm satisfied that, in the circumstances of this complaint, TPWM did represent to Mrs C that Mr H had the necessary authority. I say this because:

- TPWM sent or allowed Mr H to send bulk letters on 30 June 2021 setting out that he had moved to TPWM and could provide financial advice in that capacity.
- TPWM authorised Mr H to give investment advice on its behalf. TPWM arranged for Mr H to appear on the FCA register in respect of TPWM.
- TPWM held itself out as an independent financial adviser firm that gave advice and offered products from the whole of the market including the True Potential fund.
- No information was provided to clients that only advice set out in suitability letters was approved. I don't think the fact that TPWM's Terms of Business refer to its charges being set out in suitability reports would reasonably have put Mr C on notice that Mr H needed to provide him with a suitability report in order for TPWM to be responsible for Mr H's acts.
- TPWM used Mr H's relationship with Mrs C to send the direct marketing offer to Mrs C which Mr H then advised Mrs C about.
- It was in TPWM's interest for the general public, including Mrs C to understand that it was taking responsibility for the advice given by its financial advisers. I am satisfied that TPWM intended Mrs C to act on its representation that Mr H was its financial adviser.

Did Mrs C rely on TPWM's representations?

Clearly, Mr H did not provide written advice relating to the fund switch, but that doesn't mean that he didn't recommend it or that Mrs C didn't rely on that recommendation as one being made by Mr H as a TPWM adviser.

I've taken account of the fact that Mrs C's husband - Mr C - is himself FCA authorised. But I understand that this is in relation to motor vehicle finance. And I don't think this means he knew or ought to have known about the documentation required for pension advice under the regulatory rules.

Mr H was Mrs C's trusted adviser and I think that, following being told that Mr H had moved to TPWM, Mrs C proceeded on the basis that Mr H was acting in every respect as the agent of TPWM with authority from TPWM so to act. And I think Mrs C would have trusted Mr H was acting in her best interests when making any recommendation – even one made orally rather than in writing. It is on that basis that Mrs C (via her husband) proceeded to instruct Mr H to complete the fund switch in the email of 20 July 2021.

My decision on jurisdiction

So, for the above reasons, my conclusion there was apparent authority in this case. As such, TPWM is responsible for the advice and arrangements that Mrs C has complained about and our service does have jurisdiction to consider this complaint and I now consider the merits of the complaint below.

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.

Following my provisional decision, TPWM has not provided any comments on the merits of the complaint. So my findings below remain the same.

I'm satisfied that Mr H advised Mrs C switch his pension from Prudential to the True Potential fund. So was this advice suitable?

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, 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 include pension funds.

COBS 9.2.1R sets out the obligations on firms in assessing the suitability of investments. In summary, the business must obtain the necessary information regarding: the consumer's knowledge and experience in the investment field relevant to the advice; their financial situation; and their investment objectives.

As mentioned above, I've taken account of the fact that Mrs C's husband is himself FCA authorised in relation to motor vehicle finance. But he didn't have experience in pension investments and I think he and Mrs C would have relied on advice from Mr H about switching funds.

Mrs C had some other assets, but this was her only pension provision. She was in her late 50s and I don't think it's disputed that she was someone who had a cautious attitude to risk.

Mr H's advice was clearly deficient in the manner in which it was given – there was no fact find or suitability letter - but that doesn't necessarily mean that the recommendation to switch to the True Potential fund was unsuitable.

Our investigator believed the True Potential fund to be of a broadly similar cautious profile to Mrs C's previous Prudential fund. TPWM is also of this view and says that the respective fund performance differs only because no two funds are invested in exactly the same way and the True Potential fund is unitised rather than smoothed.

Mrs C says she wasn't advised that the True Potential fund was a unitised fund and that it is actually higher risk than the Prudential fund. She's provided a letter from her current adviser to support this latter assertion – although I note that the new adviser has based his opinion on a slightly different Prudential fund.

I've looked at these arguments and also taken account of the fact that when Mrs C began to express dissatisfaction with the True Potential fund, TPWM itself says that another of its advisers told Mr C in October 2021 that the True Potential fund was riskier than was suitable for someone in Mr C's position. So my view is that it's reasonable to conclude that the True Potential fund wasn't suitable for both Mr C or Mrs C as they were both in similar positions. And I think it's important to point out that even if I accept that the two funds were broadly similar, there is still the issue of why it would be in Mrs C's best interests to switch from one fund to another *similar* fund? In other words, I can't see any material benefit to the recommendation.

So, I think it is fair and reasonable to conclude that the recommendation to switch funds was unsuitable.

Putting things right

My aim is that Mrs C should be put as closely as possible into the position she would probably now be in if she had been given suitable advice.

Had she not received the unsuitable advice, I think Mrs C would have remained with her previous provider, however I can't be certain that a value will be obtainable for what the previous policy would have been worth. I'm satisfied what I've set out below is fair and reasonable, taking this into account and given Mrs C's circumstances and objectives when she invested.

I'm aware that Mrs C has been unhappy with the True Potential fund for some time and yet only recently switched away from the fund back to the Prudential. So I've considered whether she has failed to mitigate her losses.

Mrs C was invested in a mainstream fund that was intended to be a long term investment. Mrs C (via her husband) has told us that she was waiting to see how the complaint progressed and was also wary of doing things without seeking advice from Mr H's previous firm which she initially found difficult to obtain. Overall, I don't think the delay in switching out of the True Potential fund should impact the compensation calculation.

What must TPWM do?

To compensate Mrs C fairly, TPWM must:

- Compare the performance of Mrs C's investment with the notional value if it had remained with the previous provider. 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.
- TPWM should also add any interest set out below to the compensation payable.
- If there is a loss, TPWM should pay into Mrs C'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 TPWM is unable to pay the compensation into Mrs C's pension plan, it should pay that amount direct to her. 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 Mrs C won't be able to reclaim any of the reduction after compensation is paid.

- The *notional* allowance should be calculated using Mrs C's actual or expected marginal rate of tax at her selected retirement age.
- It's reasonable to assume that Mrs C is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mrs C 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%.
- If either TPWM or Mrs C dispute that this is a reasonable assumption, they must let us know as soon as possible so that the assumption can be clarified and Mrs C receives appropriate compensation. It won't be possible for us to amend this assumption once any final decision has been issued on the complaint.
- TPWM should also pay Mrs C £150 for the undoubted distress and inconvenience caused to her by the unsuitable advice and her retirement planning.

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

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
True Potential fund	No longer in force	Notional value from previous provider	Date of investment	Date ceased to be held	8% simple per year on any loss from the end date to the date of settlement

Actual value

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

Notional Value

This is the value of Mrs C's investment had it remained with the previous provider until the end date. TPWM should request that the previous provider calculate this value.

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

Any withdrawal from the True Potential 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 TPWM totals all those payments and deducts that figure at the end to determine the notional value instead of deducting periodically.

If the previous provider is unable to calculate a notional value, TPWM will need to determine a fair value for Mrs C'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.

Why is this remedy suitable?

I've chosen this method of compensation because:

- Mrs C wanted Capital growth with a small risk to her capital.
- If the previous provider is 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 her 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 Mrs C's risk profile was in between, in the sense that she was prepared to take a small level of risk to attain her investment objectives. So, the 50/50 combination would reasonably put Mrs C into that position. It does not mean that Mrs C would have invested 50% of her 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 Mrs C could have obtained from investments suited to her objective and risk attitude.

My final decision

I uphold the complaint. My final decision is that True Potential Wealth Management LLP should pay the amount calculated as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs C to accept or reject my decision before 14 November 2023.

Abdul Hafez
Ombudsman