DRN-4651620

The complaint

Mr B complains about the actions of Ms X. He says Ms X gave him unsuitable advice to move a pension to his self-invested personal pension (SIPP) to make a high-risk investment. He says True Potential Wealth Management LLP (True Potential) is responsible for his loss because Ms X was a registered individual of it at the time.

What happened

An unregulated introducer – Mr Y – had previously worked with a financial adviser to move two of Mr B's pensions to a SIPP to invest in an overseas property investment. The SIPP application was dated 19 June 2013. SIPP statements show the two pensions being moved on 19 July 2013 and 23 July 2013 respectively and the overseas property investment being made on 19 September 2013. It's agreed that Ms X wasn't involved in the setting up of the SIPP, these pension switches, or the overseas property investment.

I've been provided with an email from Mr Y to the SIPP operator dated 22 January 2014 which read:

> *Just had* [Mr B] *on the phone. He has discovered he has another 9k in an old…pension. He has advised* [the previous pension provider] *that he wants to transfer it into his…SIPP.*

It seems the pension scheme was being wound up and Mr B had options for what to do with the funds he had in it. The default if he didn't do anything was that it would be moved to a Section 32 scheme. It's not clear why the previous financial adviser wasn't used but instead Mr Y referred Mr B to Ms X. Ms X contacted the company that was administering the winding up to gather information. I've been provided with the following evidence of Ms X's involvement:

- An email from the company administering the winding up of Mr B's previous pension to Ms X dated 16 April 2014 which read:

  > *Please find attached* [the previous pension provider's] *response to your queries and the requested transfer papers, I will forward the hard copies to you in the post today.*

- A phone note the SIPP operator made of a conversation between it and Ms X about Mr B dated 2 May 2014 which read:

  > [Ms X] *will be advising on the transfer of benefits from occupational pension scheme…*
  >
  > *She has LOA from* [Mr B] *and will send that to me.*
  >
  > *She will also confirm she is providing advice.*

In generic terms I explained that we will need to provide a period of reflection letter once we are satisfied the member has sought advice on the transfer.

[Ms X] *only advising on transfer. Will not be servicing adviser on SIPP.*

- An email from Ms X to the SIPP operator dated 2 May 2014 which read:

  I can confirm that I am the regulated adviser that has been approached by the client to give advice on the transfer of his ceding scheme into his existing SIPP. I will not be taking over the advising of his existing Sipp ongoing, this is just on the transfer alone.

- An email from Mr B to the SIPP operator dated 2 May 2014 which read:

  [Ms X] *is the IFA giving the advice.*

- A letter from the SIPP operator to Mr B dated 2 May 2014 saying it'd been contacted by Mr Y in connection with organising the switch and "[Mr Y] *has explained that* [Ms X] *is advising on the transfer*".

- A letter from Mr B to the SIPP operator dated 7 May 2014 giving it authority to deal with Mr Y and Ms X which read "*We're pleased to confirm to you that* [Ms X] *is advising us on this matter*".

- A phone note the SIPP operator made of a conversation between it and Ms X about Mr B dated 16 May 2014 which read:

  [Ms X] *wanted update on transfer…*

  She thought [Mr Y] *had sent the discharge forms to me. She asked him to do that weeks ago. She will chase.*

  I asked her if she is advising on the transfer only – Yes. I asked who is advising on the investment. As far as she is aware the transfer will be held as cash in the account.

- An email from Ms X to the company administering the winding up of the previous pension dated 19 May 2014 which read:

  Can you tell me if you have the signed discharge papers by the client. [The SIPP operator] *are wanting sight of these and I think* [Mr Y] *has sent them to you rather than* [the SIPP operator] *forwarding them on due to the urgent nature of the transfer.*

- An email chain between Ms X –and the company administering the winding up of the previous pension dated 20 May 2014. This culminated with Ms X forwarding the chain on the same day to the SIPP operator. That email read:

  As you can see from the email below from the company in charge of the transfer of the scheme on winding up. As it is an occupational money purchase scheme and is winding up, the discharge papers are not signed by the client, they are signed by the trustees.

These had to be sent to [the company dealing with the winding up of the previous pension] *quickly to meet the deadline for anyone not wanting to be bulk transferred to the* [Section 32] *Scheme.*

Therefore the transfer company liaised with [Mr B] *to receive these documents as a matter of urgency which they are now with* [the previous pension provider].

I will get a copy of this form for you if this is needed. However I am sure that this will be sent to yourselves in order that you can complete your registration details as the receiving scheme.

Please let me know what, if anything, you are now awaiting.

- An email from the SIPP operator to Ms X dated 2 June 2014 which read:

  I understand that you are only advising [Mr B] *on the transfer of benefits from* [the previous pension] *to the…SIPP Scheme. You believe that once the funds are transferred it will remain as cash within the SIPP. Please can you confirm this is correct?*

- An email from Ms X to the SIPP operator dated 2 June 2014 which read:

  I can confirm that I am only advising on this transfer into his existing SIPP…and making a recommendation of a cash holding.

  If I can be of any assistance with regards to the [previous pension] *information, as I have various in the file.*

  I needed the additional information for an illustration for the addition of monies to the existing SIPP.

- An email from the SIPP operator to Ms X's True Potential email address dated 2 June 2014 which read:

  I understand [Mr B] *has been looking to transfer benefits in from an occupational pension scheme. I understand you have been liaising with* [Mr B's] *dedicated SIPP administrator…and that you have indicated you have been asked only to advise on the transfer and not on the SIPP or the investment. You have noted you believe the benefits transferred will remain as cash in the SIPP.*

  Our Compliance Team have confirmed that you cannot solely advise on the transfer, without also being aware of the client's intended investments and ensuring your client is mindful of any potential risks and losses. We insist on this even if the full investment advice is being undertaken by another adviser. This expectation is set by the Financial Conduct Authority and we are therefore only able to accept the additional transfer, providing you have signed the attached letter.

However, it seems Ms X had some concerns about signing the letter the SIPP operator had asked her to sign. On 5 June 2014 she emailed the SIPP operator saying:

I still have a problem in signing this as it clearly states Advising on Pension Transfers with a view to unregulated investments through a SIPP. I am definitely not doing this

as I am advising on the pension transfer, the suitability of a SIPP and also advising to transfer to cash and the risk situation of cash. In no way am I advising on unregulated products.

Unfortunately, I haven't been provided with the SIPP operator's reply to that email or what was eventually agreed. But I have been given:

- An email from Ms X to the company administering the winding up of Mr B's previous pension dated 17 June 2014. In this email she asked for an update and when she could expect the completed form for the SIPP operator.

- An email from Ms X to True Potential dated 18 June 2014 which read:

  I have another client that I am transferring an occupational pension scheme which is winding up and being dealt with by the trustees and he wishes to add this to his current SIPP…Will you look at this one when I am ready. I have not applied for preapproval as I don't think I need to with this one as the scheme is winding up and will be a bulk transfer to another scheme if not intercepted by the trustees dealing with the winding up of the scheme.

- An illustration request form dated 20 June 2014 which named Ms X of True Potential as Mr B's financial adviser.

- An email from Ms X to the SIPP operator dated 8 July 2014 saying she'd chased the previous pension provider up on the switch.

Mr B's SIPP statements show two payments being received from the pension on 23 July 2014 – of £8,231.40 and £4,822.03.

At some point Mr B decided to invest in Dolphin loan notes. It's not clear when this happened. Mr B's representative says this had been the intention all along, but Ms X says she'd believed the money was going to sit in cash in the SIPP. It's also not clear whether Mr B received any advice in relation to the Dolphin loan notes. I've been provided with the following:

- A client authorisation dated 9 December 2014 which named Mr Y as the introducing agent.

- A copy of the application for the Dolphin loan notes. This was signed by Mr B on 10 December 2014 and witnessed by Mr Y with no mention of Ms X.

- A phone note the SIPP operator made of a conversation between it and Mr Y about Mr B dated 6 January 2015 which read:

  Confirmed loan note has been received…

  I asked if [Mr Y] *has provided regulated advice on this – no. He doesn't have the permissions to do so but he does know the member wants to proceed with this. He has received all the information on the investment and he wishes to proceed without advice.*

  I said I will have to discuss with manager and see how we can move forward with this but reiterated that as Dolphin is deemed to be a complex non

standard investment, we expect clients to receive regulated advice on these investments.

- An email from the SIPP operator to Mr Y dated 7 January 2015 which read:

  Further to our telephone conversation yesterday I can confirm that I have today sent another letter to [Mr B] *recommending that he takes financial advice before undertaking any investments, however if he still wishes to proceed with the proposed investment without taking financial advice then he needs to confirm that in writing.*

- An email from Mr B to the SIPP operator dated 8 January 2015 which read:

  Thank you for your letter concerning taking advice on Dolphin Capital investment.

  I am not looking to seek any advice and I wish to proceed with this investment so please take this letter as my confirmation for you to continue with this investment with Dolphin Capital thank you.

- An email from Mr Y to the SIPP operator dated 13 January 2015 which read:

  [Mr B] *has just advised me that he emailed and posted original letter last week advising he wishes to proceed without regulated advice.*

  Could you please confirm you have received it and that you can know [sic] *make the Dolphin investment.*

- An email from the SIPP operator to Mr B on 20 January 2015 saying it had everything it needed to proceed with the Dolphin investment so the paperwork and funds would be sent to Dolphin.

- The SIPP statements which show a £15,000 investment into Dolphin loan notes on 20 January 2015.

The Dolphin loan notes later defaulted and now have no value. Mr B complained to True Potential. True Potential replied to say it isn't responsible because it has no record of any advice so Ms X must have been acting as a separate firm she had at the relevant time if she was involved. And if she was involved and acting as True Potential, she'd exceeded the authority it'd given her.

An investigator was satisfied the complaint was one we could consider, and that it should be upheld. True Potential didn't agree. The issue was therefore passed to me for a decision. I issued two provisional decisions reaching the same outcome as the investigator but for different reasons.

In my most recent provisional decision I said that even if Ms X hadn't advised Mr B to move his pension to his SIPP, she was involved in making the arrangements for this. And although True Potential hadn't given its actual authority for this because various terms of the agreement hadn't been complied with, it'd given its apparent authority and was vicariously liable. I was also satisfied it was most likely Ms X was aware Mr B would make a high-risk investment with the funds. And in the circumstances, I was satisfied the complaint should be upheld.

Mr B's representative replied saying he agrees with my provisional decision. True Potential replied saying it doesn't. It provided Ms X's comments on my provisional decision. I've carefully considered these. In summary, she said:

- She didn't give Mr B advice. She'd never spoken to him, met him, or written to him.
- She'd asked for information about Mr B's previous pension so she could assess whether she needed to advise him.
- She later discovered Mr B had already ticked to transfer his pension to his existing SIPP before she'd become involved.
- She would have refused to take up the case if she'd known what Mr B was going to do with the money. Mr Y had never told her, and she can get a statement from him to confirm this. She'd always believed the money would simply be held in the SIPP as cash. She'd told the SIPP provider this was the intention and had declined to sign its form that referred to investments. Mr Y was from a respected company, and she had no reason to suspect anything.
- She'd emailed True Potential for guidance.
- She helped in obtaining updates and getting information for Mr Y but that was it. She wasn't involved in the completion of discharge forms.

I've reconsidered all the evidence that's been provided. I know True Potential will be disappointed, but having done so, I'm still satisfied Mr B's complaint is one we can consider and that it should be upheld. Because my decision is the same as my most recent provisional decision, I've repeated my provisional findings below with my findings on Ms X's additional points added where they're relevant to my decision.

What I've decided – jurisdiction

We can't consider all complaints brought to this service. Before we can consider something, we need to check, by reference to the Financial Conduct Authority's (FCA) DISP Rules and the legislation from which those rules are derived, whether the complaint is one we have the power to look at. So, I need to decide whether the rules and the law they are based on mean this is a complaint we can consider, based on the relevant facts of the complaint. And if those facts are in dispute, I must decide on the balance of probability what happened.

Ms X was clearly an agent of True Potential at the relevant time and her name appeared on the FCA's Register with respect to True Potential. She was approved by the FCA between 20 August 2013 and 8 August 2018 to carry out the controlled function "*Customer*" on behalf of True Potential. The "*Customer*" function included "*advising on investments other than a non-investment insurance contract…and performing other functions related to this such as dealing and arranging*" (SUP 10.10.7A).

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.*

And 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, I'm satisfied that although Ms X was an agent of True Potential, True Potential isn't responsible for everything she did that was within its FCA permissions. To consider Mr B's complaint against True Potential, the complaint must be about an act or omission by Ms X that True Potential accepted responsibility for. If True Potential didn't accept responsibility, this effectively means the acts or omissions aren't True Potential's – and we can't consider the complaint against True Potential.

To decide whether True Potential is responsible here, there are three issues I need to consider:

- What are the specific acts Mr B has complained about?
- Are those acts regulated activities or ancillary to regulated activities?
- Did True Potential accept responsibility for those acts?

What are the specific acts Mr B has complained about?

Mr B complains Ms X gave him unsuitable advice to switch a pension to his SIPP to invest in Dolphin loan notes. In broad terms I'm satisfied that what his complaint is about is that through Ms X he's ended up in an investment he shouldn't be in – in other words, it's about Ms X's overall involvement.

Are those acts regulated activities or ancillary to regulated activities?

Section 22 Financial Services and Markets Act 2000 defines "*regulated activities*" as:

(1) An activity is a regulated activity for the purposes of this Act if it is an activity of a specified kind which is carried on by way of business and –

(a) relates to an investment of a specified kind;…

(4) "Investment" includes any asset, right or interest.

(5) "Specified" means specified in an order made by the Treasury.

The relevant Order is the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO). Advising on investments is a specified activity under Article 53 RAO. And arranging deals in investments is a specified activity under Article 25 RAO.

Ms X says she didn't advise Mr B – she simply started researching his options and then stopped when it became clear the SIPP operator would require her to advise on the intended investments. In my first provisional decision, I was satisfied it was most likely Ms X did give Mr B advice. I've carefully considered Ms X and True Potential's response to that provisional decision, and I accept it's not clear whether Ms X did give advice and it's possible she didn't. But even if she didn't, I think it's clear that she was involved in making the arrangements for Mr B's pension switch – even if her communication was with Mr Y rather than Mr B.

Articles 25-27 of The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("RAO") say:

Arranging deals in investments

25.–*(1) Making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite a particular investment which is–*

(a) a security,

(b) a contractually based investment, or

(c) an investment of the kind specified by article 86, or article 89 so far as relevant to that article,

is a specified kind of activity.

(2) Making arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting investments falling within paragraph (1)(a), (b) or (c) (whether as principal or agent) is also a specified kind of activity.

Arrangements not causing a deal

26. *There are excluded from article 25(1) arrangements which do not or would not bring about the transaction to which the arrangements relate.*

Enabling parties to communicate

27. *A person does not carry on an activity of the kind specified by article 25(2) merely by providing means by which one party to a transaction (or potential transaction) is able to communicate with other such parties.*

The FCA has issued guidance in the PERG part of its handbook. At PERG 2.7.7BG it says the following about Article 25(1) RAO:

The activity of arranging (bringing about) deals in investments is aimed at arrangements that would have the direct effect that a particular transaction is concluded (that is, arrangements that bring it about).

It then says the following about Article 25(2) RAO:

The activity of making arrangements with a view to transactions in investments is concerned with arrangements of an ongoing nature whose purpose is to facilitate the entering into of transactions by other parties. This activity has a potentially broad scope and typically applies in one of two scenarios. These are where a person provides arrangements of some kind:

(1) to enable or assist investors to deal with or through a particular firm (such as the arrangements made by introducers); or

(2) to facilitate the entering into of transactions directly by the parties (such as multilateral trading facilities of any kind other than those excluded under article 25(3) of the Regulated Activities Order, exchanges, clearing houses and service companies (for example, persons who provide communication facilities for the routing of orders or the negotiation of transactions)).

It's clear from the above that whether there's been arranging deals in investments depends on the facts. It should also be noted that the examples given above by the FCA were only referred to as typical.

In the case of *Watershed Ltd v Dacosta* [2009] EWHC 1299 the judge (Mr Justice Holroyde) said:

> *Although many of the words and phrases used in the RAO are defined, "making arrangements" is not. The phrase has however been the subject of judicial analysis by Mr Jonathon Crow QC, sitting as a deputy judge of the High Court, in the case of Re Inertia Partnership LLP [2007] 1 BCLC 739. I respectfully agree with what he said at paragraph 39 of his judgment:*
>
> > *"39.1. The word 'arrangements' is, depending on the context, capable of having an extremely wide meaning, embracing matters which do not give rise to legally enforceable rights.*
> >
> > *39.2. In articles 25 and 26, the word 'arrangements' is used in contradistinction to the word 'transaction'.*
> >
> > *39.3. In article 26, the word 'transaction' is plainly a reference to the purchase, sale, etc. of shares contemplated by article 25.*
> >
> > *39.4. As such, a person may make 'arrangements' within article 25 even if his actions do not involve or facilitate the execution of each step necessary for entering into and completing the transaction (i.e. the purchase, sale, etc of the shares.)*
> >
> > *39.5. The availability of the exception in article 26 is essentially a question of fact. As a matter of causation, did the arrangements bring about the transaction (i.e. the purchase, sale, etc of the shares)?"*

PERG 8.32.2G says:

> *Article 25(1) applies only where the arrangements bring about or would bring about the particular transaction in question. This is because of the exclusion in article 26. In the FCA's view, a person brings about or would bring about a transaction only if his involvement in the chain of events leading to the transaction is of enough importance that without that involvement it would not take place. The second limb (article 25(2)) is potentially much wider as it does not require that the arrangements would bring about particular transactions. It is this limb which is of potential relevance within the scope of this guidance.*

I've considered what happened with the above in mind:

- Ms X had asked Mr Y to send the discharge forms to the SIPP operator. She confirmed in a phone conversation with the SIPP operator on 16 May 2014 that she'd chase Mr Y as she'd asked him "*weeks ago*".

- On 19 May 2014, Ms X asked the company administering the winding up of Mr B's previous pension whether it'd received the discharge forms as she thought Mr Y might have sent them to it by mistake.

- Ms X had checked the requirements about signing the discharge papers. She confirmed these requirements to the SIPP operator on 20 May 2014 and asked if it was waiting for any documentation.

- On 17 June 2014, Ms X asked the company administering the winding up of Mr B's previous pension for an update and when she could expect the completed form for the SIPP operator.

- On 18 June 2014, Ms X told True Potential that she was switching Mr B's pension.

- On 8 July 2014, Ms X said she'd chased the previous pension provider up on the switch.

Taking everything into account, I'm satisfied that the acts done by Ms X as set out above were done to bring about the pension switch (whether that was from the original pension or the replacement Section 32 scheme) and as such were done in carrying on the regulated activity of arranging deals in investments under Article 25(1) RAO.

I've thought about whether Article 26 RAO applies in this case, but I'm not persuaded it does.

In *Adams v Options UK Personal Pensions LLP* (2021) EWCA Civ 474, the judge said:

> *I agree it is important to focus on the words "bring about". However, I would add that as used in article 26, those words imply, in Mr Vineall's phrase, "causal potency". For arrangements to "bring about" a transaction for the purposes of article 26, they must play a role of significance. Whether or not arrangements "bring about" a transaction is not to be judged simply on a "but for" basis, but neither is a "direct" connection inevitably required…*
>
> *Contrary to the Judge's understanding, it does not matter that CLP's acts "did not necessarily result in any transaction between (Mr Adams) and (Carey) or "that the process was out of CLP's hands to control in any event". Nor is it determinative whether steps can be termed "administrative".*

In my view, directing Mr Y on where to send the discharge forms, making sure the discharge forms were filled in satisfactorily, chasing the discharge forms and chasing up the switch were significant acts by Ms X which were to bring about the pension switch. I accept that she didn't carry out every step required to arrange the switch and Mr B and Mr Y were doing some of it directly and had already taken steps before she became involved. But *Watershed Ltd v Dacosta* is clear that it's not necessary for the actions taken to "*involve or facilitate the execution of each step necessary for entering into and completing the transaction*". So, I don't think this is determinative to whether a regulated activity occurred.

As such, I'm satisfied that those acts by Ms X were carried on under Article 25(1) RAO and they're not excluded by virtue of Article 26 RAO.

Even if I'm wrong and Article 26 RAO does apply, I'm satisfied that Ms X made arrangements that come within Article 25(2) RAO. As PERG 8.32.2G says, that limb "*is potentially much wider as it does not require that the arrangements would bring about particular transactions*". And the Court of Appeal confirmed this in *The Financial Conduct Authority v Avacade Limited & Others* (2021) EWCA Civ 1206, saying:

> *An intended purpose, an end in view, must be that a relevant transaction take place, but the arrangements do not need to bring it about by way of an actual or notional test of causation.*

I'm satisfied that Ms X had the "*intended purpose*" that Mr B would switch his pension and as such, I'm satisfied that what she did amounted to arrangements under Article 25(2) RAO.

I've thought about whether Article 27 RAO applies in this case, but I'm not persuaded it does.

PERG 8.32.5G says:

> *In the FCA's view, the crucial element of the exclusion is the inclusion of the word 'merely'. So that, where a publisher, broadcaster or internet website operator goes beyond what is necessary for him to provide his service of publishing, broadcasting or otherwise facilitating the issue of promotions, he may well bring himself within the scope of article 25(2).*

Here, I don't think Ms X's role was a passive one that was only to enable communication between Mr B/Mr Y and the pension providers. Instead, I think Ms X was actively involved in Mr B making the pension switch. I'm satisfied that the arrangements made by Ms X weren't "*merely*" to provide the means by which Mr B/Mr Y and the pension providers could communicate with each other. And as such, they don't come within Article 27 RAO.

I'm therefore satisfied that Ms X carried out the regulated activity of arranging deals in investments under Article 25(1) RAO and/or Article 25(2) RAO. And so, she carried out regulated activities or acts ancillary to regulated activities.

Did True Potential accept responsibility for those acts?

It's clear that when Ms X was carrying out the acts, she was holding herself out as acting as True Potential's agent – she used her True Potential email address and there's no evidence that she held herself out as acting in any other capacity.

However, as I've set out above, principals aren't automatically responsible for every act carried out by their agents. There needs to be a legal basis for establishing True Potential's responsibility. I consider that there are three potential routes by which this might be done:

- Actual authority.
- Apparent authority.
- Vicarious liability.

I've looked at each of those routes in turn.

Actual authority

An agent may have actual authority where the principal has expressly or impliedly given its consent to the agent that it may act on its behalf.

If True Potential had given Ms X permission to carry out the regulated activities complained about on its behalf, then clearly True Potential would be responsible where those services were then performed. But True Potential says it didn't give its permission and it didn't even know Ms X was offering any such services. I'm satisfied the evidence supports that.

True Potential has provided a "*True Potential Wealth Management Partner Contract*" which it says is what would have been in place between it and Ms X, and I have no reason to doubt that.

The agreement said:

> *The Firm hereby appoints the Wealth Management Partner as its Wealth Management Partner for the purpose only of introducing Applications by Clients for new Contracts, for submission to Institutions specified by the Wealth Management Partner and approved by the Firm. All financial services business conducted by the Wealth Management Partner must be transacted via the Firm.*

"*Applications*" was defined as:

> *Application for Contracts or services with the Institutions.*

"*Contracts*" was defined as:

> *The Contracts for the products entered into or to be entered into, by the client, with the Institutions.*

And "*Institution*" was defined as:

> *Any insurance or assurance company, life office, broker, unit trust manager, fund manager, stockbroker, building society, bank, finance house or other financial institution.*

So, pension switch advice and arrangements were allowed under the agreement in theory. However, True Potential has pointed to various requirements of the agreement – some of which it says weren't met and some of which it says may not have been met. I've focussed on those that are relevant to the regulated activity of arranging deals in investments. It says:

- The Dolphin loan note investment wasn't allowed because it was an unregulated investment, and these were prohibited by the agreement.
- There's no evidence that Ms X gave Mr B a business card and terms of business as the agreement required.

It's not clear to me that Dolphin loan notes are an unregulated collective investment scheme and so prohibited under the agreement. But I haven't considered this further because – as set out above – I'm not persuaded Ms X carried out any regulated activities in connection with the Dolphin loan notes. Ms X says she gave a business card and terms of business to Mr Y to pass onto Mr B, but I haven't been provided with any other evidence of this. So, I still accept that it's possible the requirements of the agreement may not have been fully complied with and therefore, Ms X wasn't acting with True Potential's actual authority.

Apparent authority

In an agency relationship like this one, a principal may limit the actual authority of its agent. But case law shows the principal may still be liable to third parties for the agent's acts if those acts were within the agent's "*apparent authority*".

This type of authority was described by Diplock LJ in *Freeman & Lockyer v Buckhurst Properties (Mangal) Ltd* [1964] 2 QB 480:

> *An "apparent" or "ostensible" authority…is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He must not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.*
>
> *In ordinary business dealings the contractor at the time of entering into the contract can in the nature of things hardly ever rely on the "actual" authority of the agent. His information as to the authority must be derived either from the principal or from the agent or from both, for they alone know what the agent's actual authority is. All that the contractor can know is what they tell him, which may or may not be true. In the ultimate analysis he relies either upon the representation of the principal, that is, apparent authority, or upon the representation of the agent, that is, warranty of authority.*

Although Diplock LJ referred to "*contractors*", the law on apparent authority applies to any third party dealing with the agents of a principal – including consumers like Mr B.

The test for apparent authority therefore requires that the principal made a representation, that was intended to be acted upon and was in fact acted upon, that the appointed representative was authorised by it to undertake the act complained of. This means I'd need to be persuaded True Potential itself did something that would have given Mr B reasonable grounds to believe it accepted responsibility for any regulated activities Ms X carried out in relation to his pension and that Ms X therefore had its authority.

The key thing is that the representation must come from the principal. That doesn't mean the conduct of the agent is irrelevant to the representation – but the principal's conduct must be the source of the representation.

In relation to the types of representation that are capable of giving rise to apparent authority, Diplock LJ said in *Freeman*:

> *The representation which creates "apparent" authority may take a variety of forms of which the commonest is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal's business with other persons. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of his principal's business has usually "actual" authority to enter into.*

Jacobs J said in *Anderson v Sense Network* [2018] EWHC 2834 Comm (This case was the subject of an appeal but Jacob J's conclusion on apparent authority wasn't appealed):

> *it requires a representation that there was authority to give advice of the type that was given…the relevant question is whether the firm has "knowingly or even unwittingly led a customer to believe that an appointed representative or other agent*

> *is authorised to conduct business on its behalf of a type that he is not in fact authorised to conduct*

And Lord Keith said in *Armagas Ltd v Mundogas SA* [1985] UKHL 11:

> *In the commonly encountered case, the ostensible authority is general in character, arising when the principal has placed the agent in a position which in the outside world is generally regarded as carrying authority to enter into transactions of the kind in question. Ostensible general authority may also arise where the agent has had a course of dealing with a particular contractor and the principal has acquiesced in this course of dealing and honoured transactions arising out of it.*

I'm satisfied that Ms X was acting as an independent financial adviser able to give independent financial advice and make financial arrangements through True Potential. And she was able to do this because at the time of the events in this complaint, True Potential held itself out generally as an authorised independent financial adviser firm that gave advice and made arrangements through its financial advisers, including Ms X.

Ms X was authorised to give pension advice and arrange deals in investments by True Potential. She was held out by True Potential as one of its advisers. She was registered by True Potential as one of its CF30 financial advisers on the FCA Register which is freely available to the general public.

In her role as a financial adviser with True Potential, Ms X was given business cards and stationery and access to a True Potential email address.

True Potential placed Ms X in a position which would, in the outside world, generally be regarded as having authority to carry out the acts Mr B complains about.

It was in True Potential's interest for the general public, including Mr B, to understand that it was taking responsibility for the advice given and arrangements made by its financial advisers. I'm satisfied that True Potential intended Mr B to act on its representation that Ms X was its financial adviser.

I further consider that the provision of financial advice and making of financial arrangements was a key part of True Potential's business. I don't see how True Potential could have carried out its business activities at all if the general public hadn't treated individuals like Ms X as having authority to give advice and make financial arrangements on behalf of True Potential.

So, it's my view that True Potential did represent that Ms X was authorised to give pension switch advice to persons, such as Mr B, who sought True Potential's advice and to help such persons then implement the recommendation by making the necessary arrangements.

As a reminder, Mr B was referred to Ms X because Mr Y couldn't advise him, and he needed a regulated adviser. All the communication with Ms X seems to have been using her True Potential email address and many of the emails had True Potential footers. Even if Mr B didn't then take advice from Ms X and only relied on her to make arrangements, I have no reason to doubt that Mr B believed Ms X was acting at all times as an agent of True Potential and was authorised by True Potential to undertake the acts relating to the switch of his pension.

So, taking this all into account, I don't think it's clear that Ms X or True Potential had informed Mr B that Ms X was only authorised to carry out regulated activities if certain criteria were met. I think it's most likely he was under the impression that Ms X could carry

out regulated activities in relation to his pension. And I'm satisfied he relied on this representation.

It's therefore my conclusion that True Potential is responsible for the acts of Ms X complained about based on apparent authority.

Vicarious liability

I think it's also appropriate for me to consider whether True Potential is vicariously liable for the actions of Ms X – independently of whether apparent authority also operated to fix it with liability for her actions.

The law on vicarious liability was recently clarified in *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB* [2023] UKSC 15:

> *Having examined the main 21st century decisions on vicarious liability of the highest court, it is now possible to pull together the legal principles applicable to vicarious liability in tort that can be derived from those authorities particularly the most recent cases of Barclays Bank and Morrison.*
>
> *(i) There are two stages to consider in determining vicarious liability. Stage 1 is concerned with the relationship between the defendant and the tortfeasor. Stage 2 is concerned with the link between the commission of the tort and that relationship. Both stages must be addressed and satisfied if vicarious liability is to be established.*
>
> *(ii) The test at stage 1 is whether the relationship between the defendant and the tortfeasor was one of employment or akin to employment. In most cases, there will be no difficulty in applying this test because one is dealing with an employer-employee relationship. But in applying the "akin to employment" aspect of this test, a court needs to consider carefully features of the relationship that are similar to, or different from, a contract of employment. Depending on the facts, relevant features to consider may include: whether the work is being paid for in money or in kind, how integral to the organisation is the work carried out by the tortfeasor, the extent of the defendant's control over the tortfeasor in carrying out the work, whether the work is being carried out for the defendant's benefit or in furtherance of the aims of the organisation, what the situation is with regard to appointment and termination, and whether there is a hierarchy of seniority into which the relevant role fits. It is important to recognise, as made clear in Barclays Bank, that the "akin to employment" expansion does not undermine the traditional position that there is no vicarious liability where the tortfeasor is a true independent contractor in relation to the defendant.*
>
> *(iii) The test at stage 2 (the "close connection" test) is whether the wrongful conduct was so closely connected with acts that the tortfeasor was authorised to do that it can fairly and properly be regarded as done by the tortfeasor while acting in the course of the tortfeasor's employment or quasi-employment. This is the test, subject to two minor adjustments, set out by Lord Nicholls in Dubai Aluminium, drawing on Lister, and firmly approved in Morrison. The first adjustment is that, to be comprehensive, it is necessary to expand the test to include "quasi-employment" as one may be dealing with a situation where the relationship at stage 1 is "akin to employment" rather than employment. The second adjustment is that it is preferable to delete the word "ordinary" before "course of employment" which is superfluous and potentially*

misleading (eg none of the sexual abuse cases can easily be said to fall within the "ordinary" course of employment) and was presumably included by Lord Nicholls because "in the ordinary course of business" were the words in section 10 of the Partnership Act 1890. The application of this "close connection" test requires a court to consider carefully on the facts the link between the wrongful conduct and the tortfeasor's authorised activities. That there is a causal connection (ie that the "but for" causation test is satisfied) is not sufficient in itself to satisfy the test. Cases such as Lister and Christian Brothers show that sexual abuse of a child by someone who is employed or authorised to look after the child will, at least generally, satisfy the test. But, as established by Morrison, the carrying out of the wrongful act in pursuance of a personal vendetta against the employer, designed to harm the employer, will mean that this test is not satisfied.

(iv) As made particularly clear by Lady Hale in Barclays Bank, drawing on what Lord Hobhouse had said in Lister, the tests invoke legal principles that in the vast majority of cases can be applied without considering the underlying policy justification for vicarious liability. The tests are a product of the policy behind vicarious liability and in applying the tests there is no need to turn back continually to examine the underlying policy. This is not to deny that in difficult cases, and in line with what Lord Reed said in Cox, having applied the tests to reach a provisional outcome on vicarious liability, it can be a useful final check on the justice of the outcome to stand back and consider whether that outcome is consistent with the underlying policy. What precisely the underlying policy is has been hotly debated over many years by academics and judges alike…Lord Phillips referred to five policies in Christian Brothers but, as Lord Reed recognised in Cox, a couple of those have little, if any, force. At root the core idea…appears to be that the employer or quasi-employer, who is taking the benefit of the activities carried on by a person integrated into its organisation, should bear the cost (or, one might say, should bear the risk) of the wrong committed by that person in the course of those activities.

So, broadly, there's a two-stage test to decide whether vicarious liability can apply:

- Stage one is to ask whether the relationship between the wrongdoer and the principal was one of employment or akin to employment.

- Stage two is to ask whether the wrongdoing itself was so closely connected with acts that the wrongdoer was authorised to do that it can fairly and properly be regarded as done by the wrongdoer while acting in the course of their employment or quasi-employment.

These are general principles. They're discussed and applied in a series of recent Supreme Court cases which I've also had regard to.

I think it's likely that stage one is satisfied in the circumstances here. Although Ms X wasn't an employee of True Potential, I believe their relationship was "*akin to employment*". I say this because Ms X's role as an adviser was integral to True Potential's business model. And, by way of the agreement between True Potential and Ms X, True Potential attempted to exert a significant amount of control over what business Ms X conducted and how she conducted that business.

I've therefore gone on to consider the stage two test. I believe this test is also met because:

- Ms X was a financial adviser and authorised under her agreement with True Potential to give pension advice and make arrangements for pension switches.

- The activities complained about were within Ms X's field of activities.

- Ms X may have breached the agreement with True Potential and wrongfully performed her duties. But she wasn't, for example, moonlighting or pursuing a personal vendetta against either Mr B or True Potential. She was just performing her duties as a True Potential adviser in a manner she shouldn't have done.

So, I'm satisfied that the acts complained of were indeed so closely connected with the acts Ms X was authorised to do such that, for the purposes of True Potential's liability to Mr B, those acts may fairly and properly be regarded as having been done by Ms X while acting in the ordinary course of her duties for True Potential.

For the reasons given above, I'm therefore satisfied that True Potential is also vicariously liable for the acts of Ms X complained about.

My decision – jurisdiction

I'm satisfied that that Mr B's complaint about True Potential is one we can consider. So, I've gone on to consider the merits below.

What I've decided – merits

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

As I've set out above, even if Ms X didn't advise Mr B, I'm satisfied she carried out the regulated activity of arranging deals in investments. In conducting this regulated activity, she had to act in line with the FCA's Principles for Businesses. Of particular relevance here is Principle 6 which says:

> *A firm must pay due regard to the interests of its customers and treat them fairly.*

And COBS 2.1.1R says:

> *A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*

It's not clear whether Mr B's pension had already moved to the replacement Section 32 scheme at the time. But whether it had or not, I'm satisfied Ms X would have needed to consider whether it was in Mr B's best interests to move his pension to his SIPP. And I don't believe it was possible to do this without considering the overall transaction.

Ms X said at the time – and maintains – that she believed the money would be held in cash in the SIPP initially. I've noted her strength of feeling about this and I've carefully considered everything she's said. However, taking everything into account, I'm still satisfied it's most likely that Ms X knew the intention was that it would be invested into something and that there was a chance that would be something high-risk like Dolphin. She made enquiries with the SIPP operator on 6 June 2014 as to what investments had been made previously in the SIPP and on 16 June 2014 the SIPP operator had replied saying:

> *I can confirm the current investment of the SIPP is an overseas property investment…The cost of the purchase price is £46,752.*

I'm therefore not persuaded that Ms X didn't know what investment had been made previously in the SIPP. And she also knew that was the only investment held in it. This doesn't mean Ms X necessarily knew about Mr Y's previous involvement or that a Dolphin loan note investment would be made in the future. But as I set out in my provisional decisions, Mr B has said the intention all along was that an investment would be made into Dolphin loan notes. And despite what Ms X has said, I don't think it would have made sense for that much money to be held in cash long-term and I think it would have been clear things were being driven by Mr Y.

Taking everything into account, I'm satisfied Ms X either knew, or ought to have known, that the type of investment likely to follow would be too high-risk for Mr B, particularly considering the rest of the SIPP was invested in an unregulated overseas property investment.

Mr B was in his late 40s and self-employed at the time of the advice, earning between £30,000 and £40,000 a year. This pension, together with his SIPP, was his entire pension provision. He's said he had no investment experience and from everything I've seen about his circumstances, he wasn't in a position where he could afford to lose his pension. I haven't been provided with any reason why it was in his best interests to move his pension to his SIPP.

I therefore think Mr B should have been told that switching the pension to his SIPP and investing the funds in a high-risk investment wasn't in his best interests.

I've thought carefully about Mr Y's involvement and what Ms X had said about Mr B having already made up his mind. But Mr B had been referred to Ms X for advice because Mr Y couldn't advise. Ms X was the expert and had the requisite skill and experience and regulatory permissions. I think Mr B would have placed weight on what Ms X said and would have heeded what she said over the advice of Mr Y who wasn't qualified to carry out regulated activities.

I've also thought about the fact the funds were initially held in cash and Ms X's role had ended by the time the Dolphin loan note investment was made. But as I've set out above, I think it's most likely Ms X knew that ultimately the intention was for a high-risk investment to be made. Ms X's role was instrumental, and I'm satisfied she's responsible for the losses Mr B suffered in switching to the SIPP and investing in Dolphin loan notes. That reflects the facts of the case and Ms X's pivotal role in the matter. Ms X could have prevented the investment. Instead, she facilitated it.

Putting things right

A fair and reasonable outcome would be for True Potential to put Mr B, as far as possible, into the position he would now be in if everything had happened as it should have. I consider he would have likely moved to the Section 32 scheme being offered – if he hadn't already done so – or would have stayed in it if that switch had already happened.

Section 32 pension plans generally provided guaranteed minimum payments carried over from the occupational scheme. But Ms X has said there were no safeguarded benefits in the pension that was being wound up and from the information I've now been provided with, I'm satisfied this is the case. Mr B has also not told me any different.

I'm satisfied what I have set out below is fair and reasonable, taking the above into account and given Mr B's circumstances and objectives.

What must True Potential do?

To compensate Mr B fairly, True Potential must:

- Compare the performance of Mr B's pension with the notional value if it had been with the Section 32 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.

- True Potential should also add any interest set out below to the compensation payable.

- If there is a loss, True Potential should pay into Mr B'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 True Potential is unable to pay the compensation into Mr B'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 B won't be able to reclaim any of the reduction after compensation is paid.

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

- It's reasonable to assume that Mr B is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr B 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%. Neither True Potential nor Mr B have disputed that this is a reasonable assumption.

- Pay Mr B £300 for the distress and inconvenience caused. I'm satisfied Mr B has been caused significant upset by the events this complaint relates to, and the loss of a portion of his pension fund. I think that a payment of £300 is fair to compensate for that upset.

Income tax may be payable on any interest paid. If True Potential deducts income tax from the interest, it should tell Mr B how much has been taken off. True Potential should give Mr B a tax deduction certificate in respect of interest if Mr B 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
SIPP	Still exists but illiquid	Notional value from Section 32 scheme provider	Date of pension switch	Date of my final 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 payable from the investment at the end date.

It may be difficult to find the actual value of the Dolphin loan notes. This is complicated where an asset is illiquid (meaning it could not be readily sold on the open market) as in this case.

True Potential should take ownership of the illiquid assets by paying a commercial value acceptable to the pension provider. The amount True Potential pays should be included in the actual value before compensation is calculated.

If True Potential is unable to purchase the investments the actual value should be assumed to be nil for the purpose of calculation. True Potential may require that Mr B provides an undertaking to pay it any amount he may receive from the investment in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan.

True Potential will need to meet any costs in drawing up the undertaking.

Notional Value

This is the value of Mr B's pension had it switched to the Section 32 scheme being offered/remained in the Section 32 scheme until the end date. True Potential should request that the Section 32 scheme provider calculate this value.

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

If the Section 32 scheme provider is unable to calculate a notional value, True Potential will need to determine a fair value for Mr B'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 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 True Potential taking over the investment, or this is something that Mr B 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 True Potential is unable to purchase the investment, to provide certainty to all parties I think it's fair that it pays Mr B 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.

Why is this remedy suitable?

I've chosen this method of compensation because:

- Mr B wanted capital growth with a small risk to his capital.

- If the Section 32 scheme 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 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 B'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 B into that position. It does not mean that Mr B 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 B could have obtained from investments suited to his objective and risk attitude.

My final decision

I uphold Mr B's complaint and require True Potential Wealth Management LLP to pay him fair compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 28 March 2024.

Laura Parker
Ombudsman