complaint

Mr J complains about the misappropriation of his money by Well Read Financial Solutions ("Well Read"). At the time, this business was an appointed representative of The Whitechurch Network Limited ("TWN"). Mr J is seeking compensation for his loss.

background

I set out the background to this case, and my provisional findings, in the provisional decision I issued in March 2016. A copy is attached and forms part of this final decision). In summary, I found that TWN was responsible for answering the complaint and should compensate Mr J for his loss.

TWN responded confirming it didn't agree with the provisional decision. In summary, it said:

- It wished to draw attention to one particular, point. It appears my decision is based on reasoning that's directly contrary to the judgment in *Emmanuel v DBS Management.*
- It thinks the reasoning in *Emmanuel* is not only correct, but binding on this service.
- It is common ground that there are two material issues in relation to the question of jurisdiction. Using the terminology of the provisional decision these relate to (1) *"the activity"*; and (2) *"the act of TWN".*
- It's also common ground that if TWN succeed on either issue, this service will not have jurisdiction to determine Mr J's complaint.
- It wishes to draw my attention to the second issue, and whether the acts of Well Read which form the basis of Mr J's complaint fall within section 39(3) of FSMA.
- The only activities of Well Read which fall within section 39(3) are those carried out pursuant to Article 2.1 of the membership agreement. This provided that Well Read was appointed *"for the purpose of advising Clients when entering into General Insurance Arrangements, Investment Agreements and Mortgage Agreements."*
- I've accepted that Well Read carried out none of these activities in relation to Mr J. Rather, Well Read were liaising with Mr J for the purpose of stealing his money.
- For the purpose on my provisional decision, I seem to have relied on Article 2.4.2.3 of the membership agreement. This permitted Well Read to *"[advise] Clients about…exercising rights conferred by previous Investments, Mortgage and Insurance Contracts".*
- TWN says I appear to have inferred that Well Read must have provided some advice to Mr J in relation to redeeming his previous investments, and this falls within Article 2.4.2.3 of the membership agreement even though it wasn't carried out for the purposes prescribed by Article 2.1.
- This argument was expressly rejected by one of the judges in *Emmanuel.* Such a ruling in the English High Court is binding on this service in relation to a question of jurisdiction.

Mr J's representative confirmed he had nothing to add in response to my provisional decision.

my findings

I've reconsidered all the available evidence and arguments to decide if this is a complaint that this service can decide. I have then gone on to decide the complaint based on what's fair and reasonable in the circumstances of this complaint.

TWN has agreed previously that the question of jurisdiction and the merits of the complaint should be considered at the same time, as these issues materially overlap. I also think these matters are so inextricably bound together it is appropriate to consider them within this decision.

jurisdiction

In reaching my conclusion that this is a complaint this service has the jurisdiction to decide I have considered the following issues:

- Are the activities complained about regulated activities?
- Do those activities come within the scope of the investment business for which TWN has accepted responsibility?

TWN says that under section 39(3) of the FSMA 2000, the only activities it is responsible for are those that come within Article 2.1 of the appointed representative agreement (the agreement). Because the purpose behind the advice of its appointed representative was fraud it was advice that was outside the scope of Article 2.1 and therefore outside the scope of the business TWN has accepted responsibility for.

Article 2.1 states:

"With effect from the Commencement Date The Whitechurch Network hereby appoints the Member and the Member hereby agrees to act as an Appointed Representative of The Whitechurch Network subject to the terms of this Agreement for the purposes of advising Clients when entering into General Insurance Agreements, Investment Agreements and Mortgage Agreements."

In considering the terms of the appointed representative agreement I have considered the agreement as a whole. I have not ignored what Article 2.1 of the agreement says. Nor do I agree with TWN that I have focussed solely on Article 2.4.2. It would not be appropriate to read either article in a vacuum. Instead, I have considered the agreement as a whole.

As I understand Article 2.1 of the agreement, it sets out that the purpose of the appointment of the representative was to advise clients when entering into Investment Agreements. Investment Agreement is defined as '*the making or fulfilment of which is an investment as defined in this agreement*'.

In the agreement, 'Investments' is defined as *'contracts relating purely to investment business*'. 'Investment Business' is defined as '*any and all such business as regulated by the FSA and within the meaning of the FSMA 2000 and for the sake of clarity includes:*

(i) Investment business
(ii) *Pensions business*'

Article 2.4.1 and Article 2.4.2 set out the types of activities the appointed representative may undertake when acting for the purposes of advising clients when entering into investment agreements. These articles are more detailed than Article 2.1. That is because they break down the activities that come within the overall purpose set out in Article 2.1. All of these articles must be read together and not in isolation.

TWN says that because the intention of its appointed representative was to defraud Mr J, his activities cannot come within the scope of the agreement, and so within the scope of the

business for which TWN accepted responsibility. TWN relies on the purpose set out in Article 2.1 in support of that argument.

I have already explained my conclusion that the AR was engaged in activities listed in Article 2.4.2 and that those activities come within the overall purpose in Article 2.4.1. This overall purpose was to enter into an investment agreement.

The appointed representative may well have been intending to defraud Mr J in undertaking those activities, but that does not mean that they fell outside the scope of the activities for which TWN is responsible. Similarly, the fact that TWN's appointed representative may have been motivated by fraudulent intentions does not mean that the activities fall outside DISP 2.3.1R. The activities that Mr J complains about are activities that come within the scope of our jurisdiction and come within the scope of the business for which TWN accepted responsibility.

The intention or purpose behind the advice was to enter into an investment agreement. The purpose behind the advice of TWN's appointed representative may well have been to commit a fraud but I do not agree with TWN's submission that the scope of their responsibility is limited in the way it suggests as a result of this.

I am satisfied that Mr J sold his investments and exercised rights conferred on him by previous investments on the advice of the TWN appointed representative. I explained in my provisional decision that this conclusion was based on evidence such as Mr J's witness statement (which was made for the purpose of a criminal prosecution) and the letters Mr J received from the adviser at the time of the activities he now complains about. TWN hasn't disputed this aspect of my findings.

In my view the scope of the authority covers acts by the representative for the purpose of advising clients when entering into agreements to sell regulated investments in accordance with the meaning under the FSMA 2000 and previously outlined in my provisional decision. I accept that the fictitious investment put forward by TWN's appointed representative was not a regulated product. However, the facts in this complaint indicate that regulated activities took place on the advice of TWN's appointed representative. Those activities came within the scope of the agreement. Those regulated activities were done so that the proceeds of the surrendered investments could then be invested in the Well Read Property Portfolio which was in fact a fictitious investment which was used by the appointed representative to mis-appropriate Mr J's money.

As I said previously the advice to invest in the Well Read property portfolio was not a regulated activity. However that investment advice was ancillary to regulated activities that on my reading of the agreement between TWN and its appointed representative, came within the scope of the business for which TWN has accepted responsibility.

The fact that the alleged investment was not made (because it was a fictitious investment created to facilitate the theft of Mr J's money by the adviser) does not take all of the activities that led to Mr J's loss outside of the scope of the business TWN has accepted responsibility for. Nor can these activities be looked at in isolation. They must be looked at in the context of the advice Mr J received as a whole, notably, the advice he received to surrender existing investments, the arranging of the surrender of those investments and reinvesting in the fictitious investment. Thus there was a chain of activities which included regulated activities and activities carried out in connection with those regulated activities. All of these activities come within our jurisdiction under DISP R2.3.1R.

In summary, I don't agree with what TWN says. I do not accept that the activities of its appointed representative are outside the scope of Article 2.1 of the agreement. Nor do I accept that the activities are outside of our jurisdiction.

I now turn to the points TWN makes based on the judgment in *Emmanuel v DBS Management.* I have carefully considered the points TWN makes. I still disagree with its interpretation of the judgment in *Emmanuel*.

In *Emmanuel* the principal was not liable for activities which were held to be outside the scope of the business he had accepted responsibility for and activities that had occurred before the individual had become an appointed representative of the principal.

As previously stated, I agree with the judgment in Emmanuel.

As previously stated, this is the approach I have taken in this case when considering section 39(3) of FSMA 2000. If the activities complained about by Mr J fell outside the scope of the business for which TWN has accepted responsibility then they would not be the responsibility of TWN and we would not have jurisdiction to consider this complaint.

Where TWN and I differ is that I have concluded that the activities complained about do come within the scope of the business for which TWN has accepted responsibility. Therefore this matter is distinguished from the facts of Emmanuel and is a complaint which this service can look at.

In *Emmanuel* the judgment also discussed when, under the Financial Services Act 1986, a principal who appoints an appointed representative may be liable for his wrongs. It states that an authorised person is liable for all the acts of his appointed representative which that representative does in the course of acting as such appointed representative. Section 39 of FSMA 2000 does not differ significantly from the wording adopted in the Financial Services Act 1986. Section 39 states that the principal will be responsible for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility.

Following this, I don't agree that the wrongful acts in this case (defrauding Mr J of his money) stop the activities being regulated activities. Nor that the wrongful intention of the appointed representative stops TWN being responsible for his acts.

Having carefully considered all the available information I conclude that the acts of the adviser that Mr J complains about were done in his capacity as the appointed representative of TWN and come within the scope of the business TWN has accepted responsibility for. It is on that basis that TWN is responsible and that this service can consider the complaint.

As such, I'm satisfied my findings in this case don't conflict with the ruling in *Emmanuel v DBS Management.*

It is also worth reminding TWN that in *Martin v Britannia,* the High Court considered that the concept of investment advice will comprehend all investment advice given to a prospective client with a view to or in connection with the purchase, sale or surrender of an investment. This will include advice as to any associated or ancillary transaction notwithstanding that such transactions may not fall within the definition of investment business for the purpose of the Financial Services Act 1986. In my opinion this must also be the case under the Financial Services and Markets Act 2000.

This approach is also reflected in DISP 2.3.1R which provides that the Ombudsman can consider a complaint under its 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.

For the reasons set out in this my final decision and those set out in my provisional decision this is a complaint which this service can consider.

the merits of the complaint

TWN has made no further comments about the merits of the complaint. And so I have no reason to depart from my findings on this matter in my provisional decision. But to summarise, I'm satisfied Mr J surrendered his existing investments because of the advice he received from TWN's appointed representative. I've not seen evidence to persuade me that he would have done so if it had not been for that advice.

While there's a lack of documentary evidence relating to what happened, that's not necessarily surprising. As it seems the adviser was intent on misappropriating Mr J's money, it's unlikely he would have wanted to leave an audit trail of his actions. But it's not in doubt an act of fraud did take place, which led to the misappropriation of a substantial proportion of Mr J's capital.

my final decision

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £150,000, I may recommend the business to pay the balance.

determination and award: I uphold the complaint. The Whitechurch Network Limited should pay Mr J what would be the current value of the specific investments he was advised to surrender, less any money paid back to him by the Well Read financial adviser. To clarify, the relevant investments are:

- Friends Provident investment bond
- Sterling investment bond
- Abbey National unit trust
- Abbey National PEP

In addition, The Whitechurch Network should pay Mr J £750 in recognition of the trouble and upset this matter is likely to have caused him.

My decision is that The Whitechurch Network should pay Mr J the amount produced by that calculation – up to a maximum of £150,000.

recommendation: As the amount I consider to be fair compensation may exceed £150,000, I recommend that The Whitechurch Network Limited pays Mr J the balance.

This recommendation is not part of my determination or award. It does not bind The Whitechurch Network Limited. Whether Mr J can accept my decision and go to court to

ask for the balance is uncertain. Mr J may want to consider obtaining independent legal advice on this point.

Mr J should also read our factsheet “compensation over £150,000”, which explains our current award limit. It also explains certain implications of accepting our ombudsmen’s decisions. The factsheet can be found in the consumer factsheets section of our online technical resource which can be found by clicking the publications tab.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr J to accept or reject my decision before 12 September 2016.

Doug Mansell
ombudsman

COPY PROVISIONAL DECISION

complaint

Mr J complains about the misappropriation of his money by Well Read Financial Solutions ("Well Read"). At the time, this business was an appointed representative of The Whitechurch Network Limited ("TWN"). Mr J is seeking compensation for his loss.

background

In December 2006, Mr J was advised by an adviser with Well Read to surrender two investment bonds (one with Friends Provident and one with Sterling Bonds) for £95,199.57 and £95,696.10, and reinvest the capital in the Well Read Property Portfolio. In February 2007, Mr J was advised to surrender further investments with Abbey National totalling £70,600.02. The proceeds were again reinvested in the Well Read Property Portfolio. Subsequently Mr J received various communications on Well Read headed paper regarding the investments in the Property Portfolio up to 2013.

In 2014, Mr J was informed by the police that the adviser was being investigated for alleged fraudulent activities. It was then established that the Property Portfolio investment did not exist. It had been used as a means for the adviser to misappropriate Mr J's money. Mr J has subsequently been told that all his money has gone because it was taken by the adviser.

Mr J then complained to TWN. It responded saying that because the adviser had been acting outside the scope of his appointed representatives' agreement, TWN could not be held responsible for Mr J's loss.

Mr J referred the matter to this service. TWN objected to us considering the complaint. It maintained that it was not liable to answer Mr J's complaint and this was not a complaint we had jurisdiction over.

I issued a decision in June 2015, in which I explained why this service could consider Mr J's complaint. In brief, I considered TWN was liable for the actions of the adviser. As he was an appointed representative of TWN at the relevant time, it was responsible for his actions because his actions amounted to regulated activities which came within the scope of the investment business which TWN had accepted responsibility for.

Our adjudicator then issued his assessment of the merits of the complaint. He upheld the complaint, and also set out how compensation should be calculated. He thought Mr J should also be paid £750 for the trouble and upset the matter had caused.

TWN did not agree with the adjudicator's opinion. It again said it should not be responsible for answering Mr J's complaint. In summary, TWN said:

- It believed I had erred in law in my decision, as I had not seen a full copy of the representative's agreement. It provided a copy of this.
- The business for which the adviser was authorised was set out in article 2.4.1 of the agreement, with relevant definitions provided in article 1. Each activity was defined by reference to business regulated by the Financial Services Authority (now the Financial Conduct Authority).
- A fictional investment plainly falls outside the definitions within the agreement.
- Article 2.4.2.3 provides Well Read with authority to advise clients about *"exercising rights conferred by previous Investments, Mortgage and Insurance contracts".* But this must be read in the context of article 2.4.1 as a whole.
- In the court case of *Emmanuel v DBS Management,* it was ruled that the principal *"is not responsible generally for all the acts which the appointed representative may have done in some capacity other than the carrying on the business of that particular principal".*

- The advice the adviser gave did not relate to a transaction included in article 2.4.1 of the agreement. So the adviser's actions were not the actions of TWN.
- It also believed I had erred in law by concluding that the activities complained about constituted regulated activities for the purposes of DISP 2.3.1R (1).
- A criminal act of theft of a client's money constitutes neither a regulated activity nor an activity ancillary to regulated activities.

Mr J made no further comments about the merits of his complaint. But his representative expressed concern over how long the matter was taking. He felt this was having an adverse effect on Mr J's health and wellbeing.

As the complaint remains unresolved, it has now been referred to me for a decision.

my provisional findings

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

As TWN continues to dispute liability in this case, I've started by again considering whether this complaint falls within the jurisdiction of this service.

jurisdiction

At the outset, I note that TWN says I erred in law by not taking account of its appointed representative's agreement. But it did not elect to provide a full copy of the agreement when asked to send us what evidence it wanted to be considered. Rather, it quoted two specific excerpts from the agreement. Presumably, TWN thought they were the most relevant parts of the agreement, in support of its case.

When considering TWN's responsibility in my first jurisdiction decision, I noted that I had not seen a copy of the agreement. But I also carefully considered the excerpts that TWN had. I explained why I did not agree those meant that TWN was not responsible for the actions of its representative.

However, as TWN has now sent us a full copy of its agreement with Well Read, I have carefully reviewed the entire terms of the agreement and considered the further points that TWN has made to determine if this complaint is one which we can look at. In reaching my decision that we can consider this complaint I have paid particular attention to the sections TWN referred to in its response to my first jurisdiction decision.

As I explained in my previous decision, our service can consider a complaint under its compulsory jurisdiction if it relates to an act or omission by a firm in the carrying on of one or more listed activities, including regulated activities or activities ancillary to those activities, (DISP 2.3.1R). Complaints about a firm include complaints about acts or omissions in respect of activities for which the firm is responsible (including the business of any appointed representative for which the firm has accepted responsibility) (DISP 2.3.3G).

As I have previously indicated, there are therefore two questions to be determined before I am satisfied Mr J's complaint can be considered by this service:

1. Was the loss of money to which the complaint relates done in the carrying on of a regulated activity?
2. Was that act the act of TWN?

the activity

As I say, regulated activities are specified in Part II of the *FSMA 2000 (Regulated Activities) Order 2001* ('the RAO') and include:

- advising on the merits of buying or selling a particular investment which is a security or a contractually based investment (article 53 RAO), and
- making arrangements for another person to buy or sell or subscribe for a security or contractually based investment (article 25 RAO).

I have looked at what happened to satisfy myself that the complaint relates to an act done in the carrying on of regulated investment business. Having done so I am persuaded that Mr J's complaint about the loss of his money as a result of the advice to surrender his investments and reinvest the proceeds was done in carrying on regulated investment business as specified in Part II of the *FSMA 2000 (Regulated Activities) Order 2001 (RAO).*

I acknowledge that there is little information available from the time of the advice. The adviser is dead. The business has explained to us that it can't locate any records relating to Mr J, nor any advice provided to him by the adviser.

I have looked carefully at the available information which includes a witness statement made by Mr J for the Police, letters he received from the adviser on Well Read letter headed paper, and what he has told us about what happened. The witness statement was made for the purpose of a criminal prosecution of the adviser. I have also considered the information that the business has sent us.

I have considered this information and the circumstances surrounding what happened and used it to make reasonable assumptions about what I consider most likely happened.

In his police statement Mr J gives some details of what happened. He says the adviser had been his financial adviser "for a number of years". His police statement goes on to say that during this time, the adviser "was acting on my behalf and looking after the numerous investments that I held".

In 2004 Mr J had invested in two different bonds. One was with Friends Provident and one with Sterling. Mr J says that at some time in 2006, because the market had gone flat, the adviser contacted him and suggested that his "two bonds" may be safer elsewhere and that he could arrange this for Mr J.

In his police witness statement, Mr J says that in December 2006 the adviser began the process to cash in the bonds. Mr J goes on to say that he does not know how this money was transferred but it did not go through his bank account. He assumes it was paid directly to the adviser.

It is not disputed that these two bonds were 'securities' or 'contractually based investments' as defined by the RAO.

Mr J says that in January 2007 he received notification from the adviser that the process was being completed and that the money had been re-invested into the Well Read Financial Property Portfolio. I accept that this was not a security or contractually based investment as defined by the RAO. Indeed, as TWN points out, it is likely this was an entirely fictitious product.

I have seen a letter from the adviser dated 29 December 2006 to Mr J informing him that the proceeds of the two bonds will be reinvested in early January 2007. I have also seen a letter from the adviser dated later in January 2007 informing him that the proceeds of the two bonds had been successfully transferred to the Well Read Financial Property portfolio. Mr J does not know how this money was transferred. He says it did not go through his bank account.

In my view, the available information indicates it was the Well Read adviser rather than Mr J who was arranging the surrender of the two bonds and their re-investment in a different product.

Mr J says in his witness statement that the adviser contacted him again in February 2007. This time he suggested Mr J move investments he held with Abbey National, again into safer environments. I

have seen a letter to Mr J from the adviser in February 2007 saying he'd contacted the provider for information on the particular investments that were to be transferred.

There is a further letter, on Well Read Financial Solutions headed paper, from the adviser towards the end of February 2007. This is headed "Transfer of Abbey National Unit Trusts and PEPs to Property Portfolio". The letter explains that the adviser had begun the process of moving Mr J's remaining high risk investments into a safe environment with steady returns. It stated that the final proceeds would form part of Mr J's Property Bond Portfolio.

Santander has confirmed to us that two unit trusts and two PEPs held by Mr J were surrendered on 23 February 2007 for a total of £68,462.31.

In March 2008 the adviser sent Mr J an annual valuation. This showed a value within the Property Portfolio of £284,462.85. This was an increase from the valuation in January 2007 of £202,455.

I am persuaded by this that Mr J was acting on the advice of the adviser when he decided to surrender some of his existing investments, and reinvest the proceeds. While it appears on balance that the new investment has proved to be bogus, it is my view that the following activities fall within the list of activities which this service can consider in DISP2.3.1:

1. Firstly, the advice to surrender the particular investments in question was a regulated activity.
2. I am also satisfied that the adviser arranged the surrender of those investments which again is a regulated activity and comes within the meaning of the RAO.
3. Although the advice to purchase the property portfolio was not itself 'investment advice' as defined in the RAO, I am nonetheless satisfied that that advice was an activity which was ancillary to the regulated activities of advising on, and arranging, the sale of the investments.

In turn, and in accordance with DISP2.3.1, the question is: Does Mr J's complaint about the loss of his money relate to the carrying on of any or all of those three activities?
TWN says that the Well Read Property Portfolio was a fictional portfolio and the adviser's actions were undertaken in order to appropriate dishonestly Mr J's money. It further says that this means the complaint does not relate to acts done in the carrying on of regulated activities because "*the criminal act of theft of another's money constitutes neither a regulated activity nor an activity ancillary to regulated activities. Where the criminal fraudulently represents that the theft is part of a fictional investment, this does not materially alter the circumstances such that theft becomes an activity regulated by the FCA*."

I agree with TWM that of course it cannot be the case that illegal activities such as fraud could be considered a regulated activity. This is not what I am saying. My view is that the adviser did conduct a regulated activity both when he advised Mr J to sell his bond and trust investments and when he arranged for the surrender of those investments to be effected. The advice to purchase the property fund was in my view ancillary to those regulated activities and is therefore also an activity that falls within my jurisdiction as a result of DISP2.3.1

My further view is that the act about which Mr J complains (the loss of his money) was done in the carrying on of those activities. I am satisfied that the loss Mr J has suffered flows directly from the advice to surrender his existing investments; the arrangement of the sale of those investments and the advice to invest in the property fund. The theft or loss of his money was the final link in a singular chain of events, the inception of which was the regulated advice to sell his existing investments.

the act of TWN?

As I previously indicated, in order for DISP 2.3.1R to be satisfied, I must decide not only that the activity complained of falls within the jurisdiction of this Service, but that the act is the act of the respondent firm. In other words, that TWN is responsible for the activity.

Section 39(3) of the Financial Services and Markets Act 2000 (FSMA) provides:

> *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*.

As I say, I have carefully considered the provisions of the membership agreement which TWN has provided to me. I note that article 2.4.1 of the agreement provided:

"The Member may (subject to the terms, scope and limitations of the Member's authorised permissions) undertake the following types of activity and no others on behalf of The Whitechurch Network:

2.4.1 establishing General Insurance Agreements, Investment Agreements and Mortgages Agreements between clients and The Whitechurch Network
2.4.2 advising Clients about:
2.4.2.1 entering into Investment, Mortgage and Genera/Insurance contracts
2.4.2.2 buying and selling Investments, Mortgages and General Insurance through The Whitechurch Network
2.4.2.3 exercising rights conferred by previous Investments, Mortgage and General Insurance contracts ..".

I note that 'investments' were defined in the agreement as meaning contracts relating purely to Investment Business, which was in turn defined as meaning any and all such business as regulated by the FSA and within the meaning of the FSMA 2000.

I have already decided that when the Well Read adviser recommended to Mr J that he should sell his investments, and when he arranged the surrender of those investments for Mr J, he was carrying out regulated investment business within the meaning of the RAO (i.e. the regulated activities of advising on and arranging investments). I agreed the advice to invest in the Well Read Property Portfolio was not regulated business in accordance with that legislation, but that it was ancillary to those regulated activities.

It follows that in my view, the advice to surrender the investments and the arrangement of that surrender fell squarely within the terms of the agreement between TWN and Well Read and was business for which it accepted responsibility.

As TWN also points out, the authority of *Martin v Britannia Life [2000] Lloyds Rep PN 412 (Ch)* is relevant and provides that the scope of an appointed representative's actual authorised investment business is widened to include any transactions associated with or ancillary to that business.

In that case, the court held:

…the concept of "investment advice" will comprehend all financial advice given to a prospective client with a view to or in connection with the purchase, sale or surrender of an "investment", including advice as to any associated or ancillary transaction notwithstanding that such transaction may not fall within the definition of "investment business" for the purposes of the 1986 Act (Parker J, p426).

In turn, it is my view that TWN has accepted responsibility for the acts of the Well Read adviser when he carried out the regulated activities of investment advice (the advice to surrender the investments); and the arrangement of the surrenders, together with the ancillary activity of advising him to invest in the Well Read property portfolio, notwithstanding that that advice was not regulated investment business.

It follows that in accordance with s39 (3), TWN will be responsible for *anything done* or omitted by its representative in carrying on that business.

I am satisfied that the loss Mr J has suffered flows directly from the advice to surrender his existing investments and the actions of the adviser concerning the investments once they were surrendered. Having carefully considered the available information and the wider circumstances it is reasonable to conclude that but for the activities of the adviser Mr J would not have decided to surrender his investments and transfer the proceeds into the Well Read Property portfolio. The advice to Mr J to sell his existing investments and reinvest the proceeds was a chain of events which culminated in the loss of his money. I therefore consider that in accordance with s39 (3), the loss of Mr J's money is an act for which TWN is responsible.

I again acknowledge TWN's point that it did not authorise its advisers to steal their client's money or to act dishonestly. But in my view, "anything done", within the meaning of s39 (3), must include theft, provided it is done in carrying on the business which is authorised. I accept that TWN of course agreed with its appointed representative that it was not authorised to conduct investment business dishonestly. But I do not think any agreement to that effect can alter the clear application of s39.

TWN also says the ruling in the case of *Emmanuel v DBS Management* supports its view that it is not responsible for the adviser's actions. I explained in my previous decision why I did not agree with this position. But for the avoidance of doubt, I have considered the issue again in light of what TWN has said.

In *Emmanuel* it was decided a business was not responsible generally for all the acts which the representative may have done in some other capacity other than the carrying on of business for that particular principal. In that case, the court decided the fraud in question did not take place in the carrying on of a duty for which the principal had accepted authority, and in turn the principal was not imputed with responsibility for that fraud.

In my view, my findings in Mr J's complaint are entirely compatible with that authority. If Mr J's loss did *not* arise in the carrying on of an activity for which TWN had accepted responsibility, there would be no basis on which it would be required to respond to that complaint by this service. However, and for all the reasons outlined above, I am satisfied that Mr J's loss *did* arise in the carrying on of activities that fell within the scope of the authority it had given to Well Read to act on its behalf, and on that basis, the facts in the Emmanuel case are entirely distinguishable from the facts in this complaint.

To conclude, while I have carefully considered the further points TWN has made concerning our jurisdiction to look at this complaint, it remains my view that this service can look at Mr J's complaint and that TWN is responsible for answering Mr J's complaint.

the merits of the complaint

As has been noted already, there's little documentary evidence relating to this complaint. But it is not in dispute that Mr J has been unable to recover any of the money he surrendered on the advice of the Well Read adviser. It is further accepted by TWN that the Well Read adviser recommended the property fund to Mr J in order dishonestly to appropriate Mr J's money.

So although, sadly, the Well Read adviser died before a criminal prosecution against him was finalised, TWN appears to accept that Mr J's money was lost as a result of the dishonest dealings of the Well Read adviser.

As I have outlined above, I am satisfied that those dealings did occur in the carrying on of regulated business, or business that was ancillary to regulated business and further that those dealings were done in carrying on the business for which TWN has accepted responsibility.

So to resolve the complaint, The Whitechurch Network Limited should pay Mr J what would be the current value of the specific investments he was advised to surrender, less any money paid back to him by the Well Read financial adviser. To clarify, the relevant investments are:

- Friends Provident investment bond

- Sterling investment bond
- Abbey National unit trust
- Abbey National PEP

I appreciate Mr J went on to experience further losses through advice from the adviser. But TWN is only responsible for the losses suffered as a result of the activities during the period the adviser was an appointed representative of TWN. I understand this was for the period between 19 April 2005 and 19 December 2008.

I also agree with the adjudicator that this matter will have caused Mr J considerable trouble and upset. So The Whitechurch Network Limited should also pay him £750 in recognition of this.

my provisional decision

For the reasons explained above, I am satisfied The Whitechurch Network Limited is responsible for answering this complaint.

I also uphold the complaint and award compensation as set out above. Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £150,000, I may recommend the business to pay the balance.

recommendation: As the amount I consider to be fair compensation may exceed £150,000, I am minded to recommend that, in this situation, The Whitechurch Network Limited pays Mr J the balance.

This recommendation is not part of my determination or award. It does not bind The Whitechurch Network Limited. Whether Mr J can accept my decision and go to court to ask for the balance is uncertain. Mr J may want to consider obtaining independent legal advice on this point.

Mr J should also read our factsheet “compensation over £150,000”, which explains our current award limit. It also explains certain implications of accepting our ombudsmen’s decisions. The factsheet can be found in the consumer factsheets section of our online technical resource which can be found by clicking the publications tab.

Doug Mansell
ombudsman