DRN-3304571

The complaint

Mr N took out a self-invested personal pension (SIPP) with SVS which is administered by Gaudi Regulated Services Ltd (Gaudi). Mr N's pension has lost all or most of its value and Mr N says Gaudi did not carry out proper checks on the adviser before accepting his SIPP application.

What happened

In 2011 Mr N had an existing SIPP. He was disappointed with the way his pension was performing and was interested in making changes to it.

Mr N contacted an adviser I will call Mr W. Mr W worked for 5G Wealth Management Ltd (a UK company) which was a representative of FCP Insurance Consultants Limited (which was registered and regulated in Cyprus). I will generally refer to FCP for convenience.

FCP prepared a "Pension Analysis & Transfer Report" for Mr N in October 2011. It recorded that Mr N had an existing SIPP with a fund value of just under £75,000. Around £35,000 was in a share dealing account and the rest on deposit.

Mr N's attitude to investment risk was recorded as "Moderate to High."

FCP recommended that Mr N transfer his SIPP to an SVS SIPP because of the availability of *"a large array of specialist investments"* and unlimited access to self trade and online share trading.

Mr N accepted the recommendation and applied for a SVS SIPP.

The application included a request to transfer Mr N's existing SIPP to the SVS SIPP. The operator and trustee of the scheme was London& Colonial Services Limited. It delegated the administration of the scheme to Gaudi.

Gaudi has explained that in October 2011 it received an application from FCP to be registered with it in relation to the SVS SIPP. It said it subsequently checked the FSA Register and noted that FCP was relying on a passported authority to carry on regulated business in the UK as a result of being regulated by the authorities in Cyprus.

Gaudi has said it was unclear to it what business could be carried out in this way and so it asked Mr W what business he could carry on. He said he was not aware of any top up requirements for authorisation for "pension transfers". He said he already dealt with a number of other companies (which he named). He also explained the history of FCP.

Gaudi decided to accept business from FCP. Later, it says, it was contacted by FCP who said it did not have extended permissions which allowed Mr W to advise on pension business in the UK. This was in the Spring of 2012. Gaudi says it wrote to Mr N in June 2012 and again in May 2014 to bring this matter to his attention and to urge him to seek advice from a suitably authorised individual to ensure the original advice he had received was not flawed.

Gaudi says that it did undertake appropriate investigations but was itself the victim of misleading information provided by Mr W.

Gaudi says given the dates of its letters to Mr N, his complaint has been made out of time and should not be considered.

One of our investigators considered Mr N's complaint. She thought:

- The complaint had not been made late.
- The complaint relates to events in 2011 and was first made in 2018.
- The complaint was made more than six years after the event complained about but there is no evidence to show the complaint was not made within three years of the time when Mr N knew or should reasonably have known he had cause for complaint.
- Gaudi says SVS told Mr N his pension was worthless in March 2014 – but she had not seen evidence to show this. In any event, this would not have caused Mr N to know he had cause for complaint about Gaudi. Nor would the letters from Gaudi saying the adviser had not been properly authorised when he gave the advice.
- Gaudi should have made reasonable checks on FCP before accepting any business from it.
- Enquiries into FCP's authority to offer pension advice were not made until March 2012, five months after Mr N had applied for and opened his SIPP.
- If Gaudi had made reasonable enquiries at the time of Mr N's application it would have known that FCP was not permitted to provide regulated advice on pension or investment business.
- Accepting business where a consumer believes they are receiving regulated advice, when they are not is likely to lead to consumer detriment. Gaudi stopped accepting business from FCP in June 2012 when it discovered FCP was not authorised to provide regulated advice. Had Gaudi carried out sufficient due diligence it would have concluded this before accepting Mr N's business.
- Had Gaudi refused Mr N's business and provided him with their reasoning he would not have gone ahead with the transaction.

The investigator said in the circumstances she had not gone on to also consider any due diligence issues in relation to SVS. The investigator then explained how she thought Gaudi should put things right.

Mr N agrees with the investigator. Gaudi does not. It thinks the complaint was made too late. It made a number of points, including:

- In June 2012 Gaudi wrote to Mr N stating:

  "I am writing to advise you that the financial adviser that submitted your

application to the SVS SIPP, [Mr W] of 5 G Wealth Management, is no longer authorised to submit business to the SVS SIPP."

- Gaudi agrees that this letter alone is unlikely to have put Mr N on notice that he had cause for complaint. However Gaudi wrote again in May 2014. It says the letter expressly informed Mr N that the person who advised him to transfer his pensions was not regulated to do so.

- Mr N's complaint states that the basis for the complaint was a lack of due diligence by Gaudi which led to Mr N opening an SVS SIPP on the advice of an individual who did not have the necessary permissions. The complaint expressly states:

> "… *FCP Insurance Consultants were not regulated by the FCA at the time of this transaction nor were they regulated to provide pension transfer advice in the UK or anywhere else, what checks did SVS conduct on the introducer? And if any was the client advised?*"

That is the basis of the complaint and so it's the relevant statement to test when Mr N had cause to make that complaint.

- The May 2014 Letter expressly informed Mr N that the person who advised him to transfer his pension funds was not regulated to do so and this links directly to the complaint. Therefore Mr N knew or ought to have known that he had cause for complaint on receipt of the May 2014 letter when he was told his financial adviser did not have the necessary permission to advise on the transfer of his pension to the SVS SIPP and subsequent investment.
- A reasonable prudent retail customer upon receipt of the May 2014 letter would have questioned whether the advice he received was correct (including the service provided by Gaudi) especially in circumstances where he would have had a significant interest in the performance of his SIPP and in turn whether the fact he was informed in May 2014 was something that Gaudi should have identified earlier.
- The May 2014 letter should have prompted Mr N to question whether (a) Gaudi was aware, at the time of the advice, that the adviser was unregulated; and (b) if so why it did not do anything about it and (c) if not why not.
- No further information had been provided by Mr N that was not already available to him at the time of the May 2014 letter. Therefore in May 2014 Mr N would have had all the necessary information. Despite this Mr N did not complain for a further four years.
- Additionally the annual statement for the SIPP would have shown Mr N that his investment was not performing. In May 2014 his investment in SVS Securities had reduced by £5,483. And in February 2015 it had reduced by a further £9,083. In February 2016 the investment value had reduced by a further £18,240 to £32,905. Despite this a complaint was not made until May 2018.
- So Mr N knew he had an investment that had not performed, he knew that the investment adviser did not have permissions to give the advice, and he knew Gaudi had arranged/permitted the investment to be made. The advice received by Mr N, the fall in investment value and the due diligence conducted by Gaudi are "clearly one and the same". The issues were enough for Mr N to have cause for complaint against Gaudi.

My findings on jurisdiction

I've considered all of the evidence and arguments in order to decide whether the complaint is within the jurisdiction of the Financial Ombudsman Service.

In broad terms we may consider the complaint if:

- The complaint is about a firm covered by our jurisdiction.
- The complaint relates to an activity covered by our jurisdiction.
- And that activity occurred within our territorial jurisdiction.
- The complaint is made by an eligible complainant.
- The complaint is made within the applicable time limits.

There are no issues with the first four of those points and I will not refer to them further. The fifth point is in dispute.

The rules setting out the jurisdiction of the Financial Ombudsman Service are set out in the DISP section of the FCA Handbook.

DISP 2.8.2R from the FCA Handbook says:

> "DISP 2.8 Was the complaint referred to the Financial Ombudsman Service in time?
> General time limits
>
> DISP 2.8.1R
> The *Ombudsman* can only consider a *complaint* if:
> (1) the *respondent* has already sent the complainant its *final response* … or
> (2) … eight weeks have elapsed since the *respondent* received the *complaint*; …
> DISP 2.8.2R
> The *Ombudsman* cannot consider a *complaint* if the complainant refers it to the *Financial Ombudsman Service*:
>
> (1) more than six *months* after the date on which the *respondent* sent the complainant its *final response…or*
> (2) more than:
> (a) six years after the event complained of; or (if later)
> (b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;
> unless the complainant referred the *complaint* to the *respondent* … within that period and has a written acknowledgement or some other record of the *complaint* having been received;
> unless:
>
> (3) in the view of the *Ombudsman*, the failure to comply with the time limits … was as a result of exceptional circumstances; or…
> (5) the *respondent* has consented to the *Ombudsman* considering the *complaint* where the time limits …expired …"

In May 2018 a claims management company (CMC) acting for Mr N referred a complaint to SVS Securities in London. It's enough at this stage to say the complaint was about the SVS SIPP. SVS Securities passed that complaint to "The Administration Team" in Salisbury. The Administration Team was Gaudi Regulated Services Limited in Salisbury and its final

response letter in response to the complaint was issued on 4 June 2018. The CMC referred Mr N's complaint to The Financial Ombudsman Service in August 2018.

So dealing with preliminary matters:

- Mr N's complaint was referred to Gaudi, it issued a final response, and the complaint was referred to the Ombudsman Service within six months.
- Gaudi does not consent to the Ombudsman Service considering the complaint.
- The complaint relates to events in 2011. The complaint was made to Gaudi in May 2018. So the complaint was made more than six years after the event complained about.

All this means the issue is whether the complaint was made more than three years from the date on which Mr N *"became aware (or ought reasonably to have become aware) that he had cause for complaint"*.

Being aware of "cause for complaint" within the context of the above rule is not necessarily the same as knowing there is a problem. The complainant also needs to be aware, or ought reasonably to have become aware, of the party – the respondent – about whom they are dissatisfied in relation to the provision or failure to provide, a financial service. The complaint has to have (or reasonably ought to have) awareness of who they think has caused them to suffer the problem they are complaining about – who they think is responsible for the problem they are complaining about.

The relationship between Gaudi and Mr N is different to an adviser /client relationship. Gaudi did not give Mr N advice. Mr W of FCP gave Mr N advice. He advised Mr N to take out a SIPP with Gaudi, transfer his existing pension arrangements to it and invest in his new SIPP via SVS. It seems that some of those investments may have been recommended by or promoted by SVS Securities. So if the investments were disappointing Mr N would reasonably have considered FCP and/or SVS Securities to have been responsible.

It is not obvious why Mr N should, initially at least, consider Gaudi to be responsible if the problem was disappointing investments within the SIPP. Mr N knew Gaudi had not recommended the investments to him. And he knew or should have known it was not Gaudi's role to give advice so he could have no complaint about a failure to give advice.

In 2012 Gaudi discovered Mr W was not authorised to give pensions advice and it wrote to Mr N. It said Mr N was no longer authorised to give pensions advice and that it had amended its records to show he had no adviser authorised in relation to the account to request information. It said Mr N could appoint a new adviser if the new adviser would agree to the SVS SIPP Terms of Business.

The letter said nothing about the adviser not being authorised to give advice at the time the advice was given or otherwise indicated any fault on the part of Gaudi. The letter would not therefore have changed the existing position.

Gaudi wrote again in 2014. Gaudi says this letter is material and would have given Mr N awareness of cause for complaint against it when it is kept in mind that by this stage the investments were not doing very well. It says it's implicit, if not explicit, that Gaudi had not identified that the person who advised Mr N to transfer his pension fund was not regulated to do so.

That letter said:

"At the time of your application 5G Wealth Management were acting as an appointed representative of FCP Insurance Consultants (FCP). FCP were at the time regulated in the UK by means of an inward 'passport' from the Cypriot regulator - Cyprus being their place of business. The terms of this "passport", however, only covered insurance mediation and did not cover the giving of pension transfer advice.

The FCA have recently made a statement on the status of FCP which can be read here

https://www.fca.org.uk/news/news-stories/fcp-insurance-consultants-limited

The purpose of this letter is to make you aware that FCP and therefore 5G Wealth Management did not have the appropriate regulatory permissions, and that you may not have recourse to compensation under the Financial Services Compensation Scheme, the Financial Ombudsman Service or the home state equivalents in respect of the initial advice that you received. I would therefore urge you to obtain advice from a suitable authorised individual to ensure that the original advice you received was appropriate.

If you have any questions about the content of this letter then please do not hesitate to contact me on the details below."

As can be seen that letter referred to a notice issued by the FCA. It said:

"FCP Insurance Consultants Limited

UK customers of FCP Insurance Consultants Limited (FCP) should be aware that from November 15 the firm can no longer sell insurance in this country and it is not allowed to provide any other regulated financial services in the UK.

Your insurance policy should still be valid and you can check with the provider of that insurance.

FCP is authorised by the Insurance Companies Control Service, Ministry of Finance in Cyprus and under EU law had permission to sell insurance only in the UK, until the Ministry cancelled its UK permission earlier this month.

If you have any questions or want to make a complaint about FCP, you should contact the firm. You can write to them at … or call on: …

Because the firm was authorised in Cyprus, if you are not happy with how FCP handles a complaint you would have to contact the Insurance Companies Control Service, Ministry of Finance in Cyprus. You can call: …

Or you could get help from a solicitor."

As Gaudi accepts, its letter does not expressly say that it had failed to identify that the adviser was not authorised to give the advice he gave. It does not say Gaudi should have checked and that it had failed to do so, or that it had checked and had been misled by the

adviser for example. The letter does not hint at any breach of duty on the part of Gaudi. Gaudi did not offer to review its conduct or invite complaints. Rather it says - without making it completely clear that it was only referring to complaints about the adviser:

> *you may not have recourse to compensation under the Financial Services Compensation Scheme, the Financial Ombudsman Service or the home state equivalents in response of the initial advice that you received.*

This tends to suggest that there might not be a way to complain about things.

The letter urged Mr N to obtain advice from a suitable authorised individual to ensure that the original advice he received was appropriate. This comment is clearly aimed at the advice received from FCP – Gaudi did not give advice. And if Mr N had instructed an adviser to review that advice it is not at all clear that an independent financial adviser would have gone beyond that brief in 2014 and also reviewed the conduct of Gaudi and advised Mr N that he might have cause to complain about Gaudi.

In my view it is not clear from the above letter in 2014, written to an ordinary retail investor like Mr N, that he would or should have realised that Gaudi failed to act appropriately in some way giving him reason to think he had cause to complain about Gaudi. Even against the background of poor investment performance – which Mr N would or should have been aware of – it is not clear there is reason to complain about Gaudi.

According to Gaudi Mr N's investment had lost around £5,000 by May 2014. This was not so significant as to be alarming. In my view there is not enough to make Mr N aware, or to say he should reasonably have been aware, that he had cause to complain about Gaudi's checks in relation to the adviser.

Mr N complained to Gaudi in May 2018. And so the point is whether he was aware or should reasonably have been aware he had cause to complain about Gaudi more than three years earlier, ie before May 2015. Investment losses did increase in 2015 but it remained the case that Mr N did not have cause to link the problems he was having with his pension with anything done or not done by Gaudi.

Mr N did not realise he had cause to complain about Gaudi until he consulted a CMC in 2018. That's when he found out SIPP operators ought to check that advisers who introduce business to them have appropriate permissions to give advice. I cannot see that Mr N knew or should reasonably have known that point before May 2015. He did know the adviser did not have appropriate permissions but he did not know that Gaudi may have been at fault in accepting his SIPP application. So he was not aware he had cause to complain against Gaudi and I do not find that he ought to have been aware more than three years before his complaint was made in May 2018.

It is therefore my decision that Mr N's complaint is not time barred and can be considered.

What I've decided – and why

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

Relevant considerations

In considering what's fair and reasonable in all the circumstances of this complaint, I've taken into account relevant law and regulations; regulators rules, guidance and standards; codes of practice; and, where appropriate, what I consider to be good industry practice at the relevant time

The Principles

In my view, the FCA's Principles for Businesses are of particular relevance to my decision.

The Principles for Businesses, which are set out in the FCA's handbook "*are a general statement of the fundamental obligations of firms under the regulatory system"* (PRIN 1.1.2G). And, I consider that the Principles relevant to this complaint include Principle 2, 3 and 6 which say:

"Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.

Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems

Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly."

I've carefully considered the relevant law and what this says about the application of the FCA's Principles. In *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin) ("BBA") Ouseley J said at paragraph 162:

> *"The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirement they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules."*

And at paragraph 77 of BBA, Ouseley J said:

> *"Indeed, it is my view that it would be a breach of statutory duty for the Ombudsman to reach a view on a case without taking the Principles into account in deciding what would be fair and reasonable and what redress to afford. Even if no Principles had been produced by the FSA, the FOS would find it hard to fulfil its particular statutory duty without having regard to the sort of high level Principles which find expression in the Principles, whoever formulated them. They are of the essence of what is fair and reasonable, subject to the argument about their relationship to specific rules."*

In *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878) ("BBSAL"), Berkeley Burke brought a judicial review claim challenging the decision of an ombudsman who had upheld a consumer's complaint against it. The ombudsman considered the FCA Principles and good industry practice at the relevant time. He concluded that it was fair and reasonable for Berkeley Burke to have undertaken due diligence in respect of the investment before allowing it into the SIPP wrapper, and that if it

had done so, it would have refused to accept the investment. The ombudsman found Berkeley Burke had therefore not complied with its regulatory obligations and had not treated its client fairly.

Jacobs J, having set out some paragraphs of the BBA judgment including paragraph 162 set out above, said (at paragraph 104 of BBSAL):

> *"These passages explain the overarching nature of the Principles. As the FCA correctly submitted in their written argument, the role of the Principles is not merely to cater for new or unforeseen circumstances. The judgment in BBA shows that they are, and indeed were always intended to be, of general application. The aim of the Principles- based regulation described by Ouseley J. was precisely not to attempt to formulate a code covering all possible circumstances, but instead to impose general duties such as those set out in Principles 2 and 6."*

The BBSAL judgment also considers section 228 of Financial Services & Markets Act 2000 ("FSMA") and the approach an ombudsman is to take when deciding a complaint. The judgment of Jacobs J in BBSAL upheld the lawfulness of the approach taken by the ombudsman in that complaint, which I have described above, and included the Principles and good industry practice at the relevant time as relevant considerations that were required to be taken into account.

I've considered the High Court decision in *Adams v Options SIPP*. Since that decision the Court of Appeal has handed down its judgment following its consideration of Mr Adams' appeal. I've taken both judgments into account when making this decision.

I've considered whether the judgments mean that the Principles should not be taken into account in deciding this case and I find that they don't. In the high court judgment, *Adams v Options SIPP*, HHJ Dight did not consider the application of the Principles and they didn't form part of the pleadings submitted by Mr Adams. The Court of Appeal judgment gave no consideration to the application of the Principles either. So, *Adams v Options SIPP* says nothing about the application of the FCA's Principles to the ombudsman's consideration of a complaint.

As outlined above, Ouseley J in the BBA case held that it would be a breach of statutory duty if I were to reach a view on a complaint without taking the Principles into account in deciding what is fair and reasonable in all the circumstances of a case. And, Jacobs J adopted a similar approach to the application of the Principles in BBSAL. I am therefore satisfied that the FCA's Principles are a relevant consideration that I must take into account when deciding this complaint.

COBS 2.1.1R

The rule says:

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

I acknowledge that COBS 2.1.1R overlaps with certain of the Principles, and that this rule was considered by HHJ Dight in the *Adams v Options* SIPP case. Mr Adams pleaded that Options SIPP owed him a duty to comply with COBS 2.1.1R, a breach of which, he argued, was actionable pursuant to section 138(D) of FSMA ("the COBS claim"). HHJ Dight rejected this claim and found that Options SIPP had complied with the best interests rule on the facts of the *Adams* case.

The Court of Appeal rejected Mr Adams' appeal against HHJ Dight's dismissal of the COBS claim on the basis that Mr Adams was seeking to advance a case that was radically different to that found in his initial pleadings. The Court found that this part of Mr Adam's appeal did not so much represent a challenge to the grounds on which HHJ Dight had dismissed the COBS claim, but rather was an attempt to put forward an entirely new case.

Overall, I am satisfied that COBS 2.1.1R remains a relevant consideration – but that it needs to be considered alongside the remainder of the relevant considerations, and within the factual context of Mr N's case.

I note that there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and from the issues in Mr N's complaint. The breaches were summarised in paragraph 120 of the Court of Appeal judgment. In particular, as HHJ Dight noted, he was not asked to consider the question of due diligence before Options SIPP agreed to accept the store pods investment into its SIPP. The facts of the case were also different.

So I have considered COBS 2.1.1R, alongside the remainder of the relevant considerations, and within the factual context of Mr N's case, including Gaudi's role in the transaction. However, I think it is important to emphasise that I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And, in doing that, I am required to take into account relevant considerations which include: law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. This is a clear and relevant point of difference between this complaint and the judgments in *Adams v Options SIPP*. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

The regulatory publications

The FCA (and its predecessor, the FSA) has issued a number of publications which remind SIPP operators of their obligations and set out how they might achieve the outcomes envisaged by the Principles:

- The 2009 and 2012 thematic review reports.
- The October 2013 finalised SIPP operator guidance.
- The July 2014 "Dear CEO" letter.

I have considered all of those publications but I will concentrate on the 2009 report which had been published at the time of the events in this complaint

The 2009 Thematic Review Report

The 2009 report included the following statement:

> *"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses ('a firm must pay due regard to the interests of its clients and treat them fairly') insofar as they are obliged to ensure the fair treatment of their clients. COBS 3.2.3(2) states that a member of a pension scheme is a 'client' for COBS purposes, and 'Customer' in terms of Principle 6 includes clients. It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six TCF consumer outcomes.*

We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the member to confirm the position, or by contacting the firm giving advice and asking for clarification. Moreover, while they are not responsible for the advice, there is a reputational risk to SIPP operators that facilitate the SIPPs that are unsuitable or detrimental to clients.

Of particular concern were firms whose systems and controls were weak and inadequate to the extent that they had not identified obvious potential instances of poor advice and/or potential financial crime. Depending on the facts and circumstances of individual cases, we may take enforcement action against SIPP operators who do not safeguard their clients' interests in this respect, with reference to Principle 3 of the Principles for Business ('a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems').

The following are examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms:

- *Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm's clients, and that they do not appear on the FSA website listing warning notices….*

The reports, Dear CEO letter and guidance gave non-exhaustive examples of good industry practice. They did not say the suggestions given were the limit of what a SIPP operator should do. As the annex to the *"Dear CEO"* letter notes, what should be done to meet regulatory obligations will depend on the circumstances.

It's also important to keep in mind the judgments in *Adams v Options* did not consider the regulatory publications in the context of considering what is fair and reasonable in all the circumstances bearing in mind various matters including the Principles (as part of the regulator's rules) or good industry practice.

Overall, in determining this complaint I need to consider whether Gaudi complied with its regulatory obligations as set out by the Principles to act with due skill, care and diligence, to take reasonable care to organise its business affairs responsibly and effectively, to pay due regards to the interests of its customers (in this case Mr N), to treat them fairly, and to act honestly, fairly and professionally. And, in doing that, I'm looking to the Principles and the publications listed above to provide an indication of what Gaudi could have done to comply with its regulatory obligations and duties.

The checks made by Gaudi and the steps it took

I've considered what Gaudi has said about the checks it made and the steps it took keeping in mind its role and contractual obligations as an execution only SIPP provider. I note that

Gaudi was not under an obligation to give Mr N advice on the suitability of the investment he was proposing to make.

Gaudi did carry out some checks on the adviser. It carried out a search of the FSA website to check it was regulated to carry out the transaction, and found FCP was relying upon an inward passport from FCP.

FCP were based in Cyprus and were authorised at the time to carry out insurance mediation in the UK, by way of passporting.

Gaudi was unsure about FCP's permissions, so it asked Mr W. He told Gaudi FCP was appropriately authorised and Gaudi accepted what it was told without further checking that the answer it had been given was correct. And it turned out the answer was not correct. FCP were only authorised to provide advice on general insurance products. Neither it nor its representatives were authorised to provide advice on pensions or investments.

If Gaudi had made reasonable enquiries at the time of Mr N's application, it would have known that FCP was not permitted to provide regulated advice on pension or investment business.

Gaudi stopped accepting business from FCP in June 2012 when it realised FCP was not authorised to provide investment advice in the UK. This is reasonable and appropriate as there is a considerable risk of consumer detriment if consumers are advised by intermediaries who are not authorised to give that advice. And this is strong evidence that Gaudi would not have accepted Mr N's application to transfer his SIPP to an SVS SIPP if it had been aware that the adviser was not authorised to advise Mr N.

It is therefore my view that if SVS had carried out appropriate checks on FCP it would not have accepted Mr N's application and he would not have made the investments he did in his SVS SIPP account. There is no reason to say that Mr N would still have gone on to make the investments in any event. If Gaudi had rejected his application no other SIPP provider should have accepted it either and there is no reason to think that Mr N would have made the same SVS based investments within his existing SIPP. More likely than not he would have walked away from the proposed deal once he had found out that the adviser was not authorised to give investment advice in the UK and Gaudi would not do business with the adviser

Accordingly it is my view that Gaudi's failings did cause Mr N to suffer the losses he has suffered. And in the circumstances it is not necessary for me to go on to consider what checks were made by Gaudi on the investments made in the SIPP.

Putting things right

My aim is to return Mr N to the position he would now be in but for what I consider to be Gaudi's failure to carry out adequate due diligence checks before accepting the SIPP application from FCP.

In light of the above, Gaudi should calculate fair compensation by comparing the current position to the position Mr N would be in if he had not transferred from his existing pension.

In summary, Gaudi should:

1. Calculate the loss Mr N has suffered as a result of making the transfer. Any withdrawals should be taken into account on the date of withdrawal.
2. Pay compensation for the loss into Mr N's pension. If that is not possible pay compensation for the loss to Mr N direct. In either case the payment should take into account necessary adjustments set out below.
3. Pay £500 for the trouble and upset caused.
4. Provide a copy of its calculations.
5. Pay interest if payment is not made promptly.

I'll explain how Gaudi should carry out those steps in further detail below:

1. Calculate the loss Mr N has suffered as a result of making the transfer

To do this, Gaudi should work out the likely value of Mr N's pension had he left it where it was instead of transferring to the SIPP. Gaudi should ask Mr N's former pension provider to calculate the current notional transfer value had he not transferred his pension.

If there are any difficulties in obtaining a notional valuation then the FTSE UK Private Investors Income Total Return index should be used to calculate the value. That is likely to be a reasonable proxy for the type of return that could have been achieved if suitable funds had been chosen.

The notional transfer value should be compared to the transfer value of the SIPP this will show the loss Mr N has suffered. The SVS Securities investments should be assumed to have no value where appropriate.

2. Pay compensation to Mr N for loss he has suffered calculated in (1).

Since the loss Mr N has suffered is within his pension it is right that I try to restore the value of his pension provision if that is possible. So if possible the compensation for the loss should be paid into the pension. The compensation shouldn't be paid into the pension if it would conflict with any existing protection or allowance. Payment into the pension should allow for the effect of charges and any available tax relief. This may mean the compensation should be increased to cover the charges and reduced to notionally allow for the income tax relief Mr N could claim. The notional allowance should be calculated using Mr N's marginal rate of tax.

On the other hand, Mr N may not be able to pay the compensation into a pension. If so compensation for the loss should be paid to Mr N direct. But had it been possible to pay the compensation into the pension, it would have provided a taxable income.

Therefore, the compensation for the loss paid to Mr N should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mr N's marginal rate of tax in retirement. For example, if Mr N is likely to be a basic rate taxpayer in retirement, the notional allowance would equate to a reduction in the total amount equivalent to the current basic rate of tax. However, if Mr N would have been able to take a tax-free lump sum, the notional allowance should be applied to 75% of the total amount.

3. Pay £500 for the trouble and upset caused.

Mr N has been caused some distress and inconvenience by the loss of his pension benefits. This is money Mr N's cannot afford to lose and its loss has caused him a great of stress and worry. I consider that a payment of £500 is appropriate to compensate for that

upset.

4. Provide a copy of its calculations - This should be in a format that should be readily understood by Mr N.

5. Interest - The fair compensation set out above must be paid to Mr N or into his SIPP within 28 days of the date Gaudi receives notification of his acceptance of this final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation is not paid within 28 days.

My final decision

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £150,000, plus any interest and/or costs/ interest on costs that I think are appropriate. If I think that fair compensation is more than £150,000, I may recommend that the business pays the balance.

Decision and award: I uphold the complaint. I think that fair compensation should be calculated as set out above. My decision is that Gaudi Regulated Services Limited should pay Mr N the amount produced by that calculation – up to a maximum of £150,000 plus interest as set out above.

Recommendation: If the amount produced by the calculation of fair compensation is more than £150,000, I recommend that Gaudi Regulated Services Limited pays Mr N the balance and interest on the balance as set out above.

This recommendation is not part of my determination or award. Gaudi Regulated Services Limited doesn't have to do what I recommend. It's unlikely that Mr N can accept my decision and go to court to ask for the balance. Mr N may want to get independent legal advice before deciding whether to accept this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 28 July 2022.

Philip Roberts
Ombudsman