DRN-3422633

The complaint

Mr C says he has lost all his pension fund as a result investing in what turned out to be a scam. He says Gaudi Regulated Services Limited failed to carry out appropriate checks on his application to open a self-invested person pension (SIPP) and make that investment in the SIPP.

What happened

The parties

Gaudi Regulated Services

Gaudi is a SIPP provider and administrator, regulated by the Financial Conduct Authority ("FCA"). Gaudi is authorised, in relation to SIPPs, to arrange (bring about) deals in investments, deal in investments as principal, establish, operate and wind up a pension scheme and make arrangements with a view to transactions in investments.

Affinity Global Developments plc

Affinity Global Investments was incorporated in 2014 in the UK. In 2014 it issued bonds to be listed on the GXG Main Quote Market in Denmark. The bonds had a five-year term paying a return of 8%-12% over the term of the bond.

Mr C invested in the bonds in his SIPP.

In May 2020, Affinity Global Developments (now called 'Anilana International Developments') entered liquidation.

Dante Partners LLP

Dante Partners was a Financial Conduct Authority (FCA) regulated introducer who, at the relevant time, had been specifically restricted by the FCA from carrying on *"any investment services and activities (to which MiFID applies) on a regular basis except reception and transmission of orders in relation to one or more financial instruments or investment advice".*

Gaudi says that Mr C's application for a SIPP was introduced to it by Dante Partners. Mr C says he is not aware of this firm's involvement in this matter.

Gaudi also says Dante Partners was engaged by Affinity Global Developments to promote its bonds.

I have seen a document summarising the Affinity Global Developments plc Offer Document which says *"This document has been approved by Dante Partners LLP on behalf of its Appointed Representative, IPO Capital Partners Limited who act for Affinity Global*

Developments plc only in this Offer and issue of securities."

Beaufort Securities

Beaufort Securities, was a wealth management and stockbroking firm that offered a range of services to its clients, including advisory stockbroking, online share dealing, foreign exchange trading and discretionary fund management services.

As part of the application process for the SIPP with Gaudi Mr C agreed to open a share dealing account with Beaufort "through whom all investment activity will be transacted."

Beaufort Securities has been fined twice by the FCA, in 2003 and 2006, for various breaches of the FCA's Principles.

Gaudi points out that in this case Beaufort was not acting as a discretionary investment manager. It says Beaufort only executed Mr C's investment instructions.

Mr H

On the Beaufort Stockbroking Account application Mr C agreed to authorise an agent to give instructions in respect of the account. The agent was a man I will refer to as Mr H. Mr H was at the time a director of Affinity Global Developments plc and he gave as his address the registered address of that company.

Gaudi says Mr H instructed Beaufort to make the investment into the Affinity Global Developments bonds.

Mr L

Mr L had previously been an FCA regulated financial adviser between 2001 and 2009. He was not authorised to give regulated investment advice in 2015.

There is no recorded connection between Mr L and Dante Partners or its appointed representative IPO Capital Partners on the FCA register. I am not aware if there was any unregistered relationship between Mr L and either of those firms.

Mr C says he was advised by Mr L. Gaudi says it was not aware of his involvement.

What happened

Mr C is represented by a claims management company (CMC). The CMC says in 2015 Mr C was advised to transfer his existing pensions by Mr L.

It says Mr L advised Mr C to transfer existing personal pensions to a SIPP with Gaudi in order to invest in Affinity Global Developments.

Mr C signed documents to apply for a Gaudi SIPP in January 2015, and the SIPP was opened in February 2015.

On 23 February 2015, Mr C's SIPP transferred almost £700,000 to Beaufort Securities. Almost all of the money in the SIPP was invested in Affinity Global Developments debt instruments.

In May 2020, Affinity Global Developments (now called 'Anilana International

Developments') entered liquidation. It is likely Mr C has lost all his pension.

The complaint against Gaudi

In February 2021, Mr C complained to Gaudi that they had not carried out sufficient due diligence on either his introducer, or on the underlying investment held within the SIPP. The CMC said if Gaudi had conducted appropriate due diligence, it would not have accepted Mr C's business.

The CMC said it was implausible that Mr C would have switched his existing pension to a SIPP without advice and that if Gaudi had checked with Mr C it would have discovered he had been advised by Mr L – who was not authorised to give advice. It said Gaudi should also have had concerns about the involvement of Beaufort and that the size of Mr C's investment and the nature of the investment should have been warning signals to Gaudi.

In short, the CMC said Gaudi ought to have realised the investment was likely to a scam and should not have invested Mr C's money in that fund.

Gaudi's response to the complaint

Gaudi explained why they disagreed with Mr C's complaint. It made a number of points including:

- It is not authorised to give advice.
- Mr C was introduced by Dante Partners who had permission to make promotions to retail clients.
- Mr C signed a declaration to confirm that it had recommended that he seek professional advice from a suitably qualified and authorised adviser but had chosen not to do so.
- The SIPP meant Mr C could choose from a wide variety of investments and Mr C chose to set up a dealing account with Beaufort. The pension funds he switched to his SIPP were transferred to that dealing account.
- Mr C completed an application that named Mr H as his appointed agent.
- Mr H then gave instructions to Beaufort and other than transferring the funds to Beaufort Gaudi had no involvement in the investment process.
- Gaudi did carry out due diligence on Dante Partners.
- Beaufort's role was also limited. It did not provide advice.
- The Affinity investment was assessed as a standard investment and so Gaudi was not obliged to put in in place any special measures for it.
- Gaudi acted in accordance with Mr C's instruction in setting up the SIPP and transferring his pension rights to it – which was an execution only transaction.
- Gaudi cannot assess the suitability of a transaction for a client. To decline Mr C's instructions would have been akin to an assessment of suitability requiring it to investigate all Mr C's circumstances. It was not authorised to do this.
- Accordingly, the assessment of suitability is the responsibility of the client, Mr C, and any advisers he appoints.
- Gaudi did write to Mr C in January 2015 and asked him to sign a declaration that he was aware that the investment was high risk and/or speculative, may be illiquid and/or difficult to sell. This should have made Mr C aware of the risks of investing in Affinity and prompted him to seek independent financial advice.
- Gaudi does not agree that it would have been clear that Mr C had been given advice.
- And the promotion of the investment had been approved by authorised firms.
- There was no reason to question or not follow Mr C's instructions.

The complaint to the Financial Ombudsman Service

Mr C complained to the Financial Ombudsman Service and his complaint was considered by one of our investigators. She thought the complaint should be upheld. She made a number of points including:

- Gaudi was obliged to follow the Principles for Businesses in the FCA's handbook.
- The regulator had issued reports on reviews of, and guidance to, SIPP operators and dear CEO letters between 2009 and 2014. These provide a reminder to SIPP operators that the Principles should be followed and illustrate the kind of things the regulator expects from SIPP operators to produce the outcomes envisaged by the principles.
- Gaudi ought to have had significant concerns about the manner in which Mr C was introduced to it and made his investment.
- It is unlikely that Mr C would have switched his pension and invested more than £600,000 in the Affinity investment without advice.
- While accepting that Gaudi believed he was introduced by Dante Partners, it was not authorised to give advice on pension switches. And in the circumstances it was reasonable to make further checks. If it had, it is likely it would have discovered that Mr C had received advice from someone who was not authorised to give investment advice
- Beaufort had been fined twice for breaches of the Principles. While it was still an authorised firm, Gaudi should have been cautious about any business which involved that firm.
- Mr C invested nearly all his pension into one fund which Gaudi had assessed to be a high-risk fund and Gaudi lacked the systems or controls to respond to and avert the risk of over concentration in such funds.
- There was significant risk of consumer detriment and Gaudi should have recognised this risk and acted on it.
- Unlike in the court case of *Adams v Carey*, there is no evidence in this case that Mr C would have proceeded with the transaction regardless of any action taken by the SIPP operator.
- If Gaudi had carried out sufficient due diligence Mr C would not have switched his pension and he would not have invested in Affinity via Beaufort. He would not therefore have suffered the losses he has suffered.

The investigator then set out how she thought Gaudi should put this right.

The CMC agreed with the investigator. Gaudi does not agree with the investigator. It has made a number of points in response, including:

- Gaudi did check if Mr C had received financial advice. It is a specific question in the SIPP application form. Mr C signed a declaration to confirm that Gaudi had suggested he take advice. Given that when asked in the application form Mr C did not disclose the involvement of Mr L, there is no guarantee he would have done so if asked again by Gaudi.
- It was always Gaudi's understanding that Dante Partners had introduced Mr C to the SIPP. There was therefore no reason to question how Mr C became aware of Gaudi's services.
- Dante Partners was authorised to introduce business to Gaudi and to promote the Affinity investment.
- Gaudi was not aware of the involvement of Mr L and cannot be held responsible for actions of a person whose existence is not disclosed to it and whose

involvement was actively concealed.

- It now understands Mr L was a family friend of Mr C which explains why Mr C was willing to trust him and rely on his advice.
- Mr L witnessed the signing of the document in which Mr C says he was not given advice, yet it is Mr L that Mr C now says gave the advice. This discrepancy should be explained. Further it seems likely Mr C knew Mr L was no longer authorised to give investment advice given he was a family friend.
- Beaufort provided an execution only service as a conduit for the customers funds to be transferred into the chosen investment and once the investment had taken place Beaufort acted purely as a custodian. It was fully authorised and regulated to provide the services it provided.
- Beaufort did not provide Mr C with a discretionary fund management service. The due diligence carried out by Gaudi was appropriate to the service it provided.
- Mr C only invested in a standard asset and the due diligence obligations relevant for such an investment were carried out.
- The fines issued to Beaufort in the past did not relate to pension investments or to investments in Affinity or its role and as an execution only custodian.
- Gaudi did carry out due diligence on the Affinity investments. It required investments to be fully advised or promoted by a regulated entity as they were here as Dante Partners was noted as the regulated introducer.
- It is Gaudi's view that as the investment was introduced by a friend Mr C would have invested in Affinity in any event.
- Mr C switched one pension reliant on investment returns for another. To have refused to allow it would have been akin to an assessment of suitability which Gaudi is not able to do.
- Gaudi did all that it could which was warn Mr C of the risks of investing in a high risk and/or illiquid investment and suggest independent advice is taken. Mr C signed a declaration to this effect.
- Gaudi is not involved in the investment made in the Beaufort dealing account. The assessment of suitability is down to Mr C and any adviser he appointed.
- Gaudi is aware that Mr C made a claim to the Financial Services Compensation Scheme. It assumes this was in relation to Beaufort. Mr C should provide details and explain whether he has assigned his rights to complaint to the FSCS.

Point made by the Mr C

Mr C's CMC has informed us that Mr C's claim to the FSCS was in respect of Beaufort and was declined by the FSCS. Accordingly, Mr C has not assigned his right to make this complaint to the FSCS and he is free to proceed with this complaint.

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 C'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 C'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 C'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.

The October 2013 finalised SIPP operator guidance set out the following:

> ***"Relationships between firms that advise and introduce prospective members and* SIPP operators**
>
> *Examples of good practice we observed during our work with SIPP operators include the following:*
>
> - *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for un- authorised business warnings.*
> - *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*
> - *Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.*

- *Being able to identify irregular investments, often indicated by unusually small or large transactions; or higher risk investments such as unquoted shares which may be illiquid. This would enable the firm to seek appropriate clarification, for example from the prospective member or their adviser, if it has any concerns.*
- *Identifying instances when prospective members waive their cancellation rights and the reasons for this.*

Although the members' advisers are responsible for the SIPP investment advice given, as a SIPP operator the firm has a responsibility for the quality of the SIPP business it administers.

Examples of good practice we have identified include:

- *conducting independent verification checks on members to ensure the information they are being supplied with, or that they are providing the firm with, is authentic and meets the firm's procedures and are not being used to launder money*
- *having clear terms of business agreements in place which govern relationships and clarify responsibilities for relationships with other professional bodies such as solicitors and accountants, and*
- *using non-regulated introducer checklists which demonstrate the SIPP operators have considered the additional risks involved in accepting business from non-regulated introducers*

In relation to due diligence the October 2013 finalised SIPP operator guidance said:

"Due diligence

Principle 2 of the FCA's Principles for Businesses requires all firms to conduct their business with due skill, care and diligence. All firms should ensure that they conduct and retain appropriate and sufficient due diligence (for example, checking and monitoring introducers as well as assessing that investments are appropriate for personal pension schemes) to help them justify their business decisions. In doing this SIPP operators should consider:

- *ensuring that all investments permitted by the scheme are permitted by HMRC, or where a tax charge is incurred, that charge is identifiable, HMRC is informed and the tax charge paid*
- *periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme*
- *having checks which may include, but are not limited to:*
    - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*
    - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*
- *ensuring all third-party due diligence that the firm uses or relies on has*

been independently produced and verified

- *good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and*
- *ensuring these benchmarks clearly identify those instances that would lead a firm to decline the proposed business, or to undertake further investigations such as instances of potential pension liberation, investments that may breach HMRC tax-relievable investments and non-standard investments that have not been approved by the firm"*

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 C), 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 have 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 C advice on the suitability of the investment he was proposing to make.

Gaudi says it carried out due diligence on the Affinity investment. It says the investment memorandum was approved by a regulated firm for promotion to retail clients. And Gaudi has said that it required *"any sales to be fully advised or promoted by a regulated entity, as they were in this instance, as Dante was noted … as the regulated introducer with full permissions to promote the investment."*

It should be noted that promoting an investment is not the same as recommending the investment as suitable for an individual client. (And to be clear I am not saying that Gaudi says they are the same.)

Nor does being suitable for promotion to retail clients necessarily mean that an investment should be regarded as one that retail investors may reasonably and safely invest in without taking advice. And again I do not say Gaudi say it is.

As noted above, a document promoting the Affinity investment included:

"This document has been approved by Dante Partners LLP on behalf of its Appointed Representative, IPO Capital Partners Limited who act for Affinity Global Developments plc only in this offer and issue of securities."

So Gaudi was aware that Dante Partners was promoting the investment on behalf of the issuers of the investment and so its role in the introduction was clearly not equivalent to independent financial advice to Mr C on the suitability of the investment for him. (And again, I do not say that Gaudi says it is.)

Gaudi says it wrote to Mr C on 20 January 2015 about his proposed investment. It wrote a declaration for Mr C to sign which included:

"...

Scheme Name: The EasySIPP from [Gaudi]

Investment Name: Affinity Global Developments Plc

I, [Mr C] being a prospective member/member of the above Scheme write to instruct [Gaudi] to purchase Debentures in Affinity Global Developments Plc, as indicated in my separate application, on my behalf for the above Scheme.

…I confirm that I have considered the information prospectus provided by Affinity Global Developments Plc and I am fully aware that the investment is High Risk and/or Speculative, may be illiquid and/or difficult to sell, which may impact on my ability to take my pension benefits and take a pension income and confirm I wish to proceed.

…I acknowledge that I have been recommended to seek professional advice from a suitably qualified and authorised adviser, however, have chosen not to seek advice for this transaction.

I am fully aware that Gaudi…act on an Execution Only Basis as directed by me as scheme member and that Gaudi …has not provided any advice whatsoever in respect of this investment or the SIPP…"

So having reviewed the investment Gaudi thought it was appropriate to warn Mr C that the investment was high risk and /or speculative and that it thought Mr C should get advice about it.

Mr C signed the declaration on 27 January 2015 to say he acknowledged the warning but had decided not to get advice.

Gaudi in effect argues this is all it could reasonably do given its limited role.

Mr C entered into an arrangement – a term I use in a non-technical sense – in which he transferred his existing personal pension to a SIPP with Gaudi in order to set up a dealing account with Beaufort, which Mr H could operate, so that he (Mr C) could invest in the Affinity investments.

Gaudi says it knew this business by Mr C was introduced to it by Dante and Partners – a promotor of the investment.

And Gaudi says it had checked the investment Mr C was intending to make – the Affinity investment. So it knew Mr H was a director of Affinity and it knew Mr C was opening the Beaufort Dealing account and authorising Mr H to operate it.

So Gaudi knew, before Mr C invested, that it was Mr H, a director of Affinity, who was authorised to make the investment and that no independent advice had been received by Mr C about the wisdom of entering into such an arrangement.

In my view Gaudi should have been concerned about the arrangement Mr C was entering into. Gaudi should have been concerned about the implausibility of someone wanting to transfer an existing personal pension to a SIPP to invest in a high risk, potentially illiquid investment, such as Affinity, without having been persuaded or advised to do so.

In this case it should have been concerned that Mr C had not received any independent advice about the suitability of the investment for him, and the wisdom of the overall arrangement.

Gaudi should have been concerned about the role being played by those who had an interest in the investment. It should also have had some concerns about the poor record of Beaufort and about its involvement in the arrangement.

Gaudi should have been concerned about the size of the investment and the large proportion of the pension being invested in one investment – the high degree of concentration risk.

There were warning signs that there was real risk of detriment here - that Mr C was at risk of suffering real and serious harm through not getting independent advice.

All in all there was enough here to make it reasonable for Gaudi to change its existing policy and decide to accept Mr C's business only if he obtained professional advice from a suitably qualified and authorised adviser. Gaudi should have realised that its alternative requirement of requiring promotion by an authorised firm was not enough to give it reasonable assurance about the quality of the SIPP business it was considering or to reasonably act fairly and professionally in accordance with Mr C's best interests.

Such a decision was not akin to Gaudi giving advice on suitability. It was consistent with its obligations as an execution only SIPP provider – it was just a slight change, appropriate to the circumstances, of its existing policy decision.

So Gaudi should have either appropriately sought clarification from Mr C about whether he had been given any advice. Or alternatively it could have said it was not prepared to accept the business unless Mr C obtained independent advice without first checking whether or not he had been advised.

Bearing in mind the circumstances, a standardised declaration was not enough. If Mr C was being persuaded to invest in the investment – which was a real risk – there was a risk that he would be persuaded not to give the declaration proper attention. Gaudi should have seen this as an unusual transaction in which it should have sought appropriate clarification from Mr C. Or, as mentioned, it could have decided to proceed only if Mr C obtained independent advice.

If Gaudi had appropriately contacted Mr C to find out if he had been advised, Mr C would have revealed that he had been advised by Mr L. If this had happened Gaudi should have made it clear it could not accept such business because Mr L was not authorised to give advice.
Alternatively Mr C might have agreed to get independent advice without mentioning Mr L's involvement.

If Mr C had obtained independent advice it is more likely than not that he would have been advised not to make such an investment. The investment was high risk and not something that most ordinary retail investors should have been advised to invest their pensions in except in only limited amounts. I cannot see that Mr C would have been advised to transfer his existing personal pension to a SIPP to invest his pension in Affinity by any reasonable independent adviser acting reasonably.

Did Gaudi's failings cause Mr C's loss?

It is my view that if Gaudi had considered Mr C's application fairly it should have taken steps which would have meant that it would not have accepted the application. Either Gaudi would have rejected the application or it would, in effect have been withdrawn, if Mr C had obtained suitable independent financial advice.

I do not think it is fair and reasonable in the circumstances of this case to say that Gaudi should not have to pay compensation because of the declaration Mr C signed. I have already said I do not consider that the declaration was an appropriate way to deal with the risks of customer detriment Gaudi ought to have recognised in this case.

Nor do I think it more likely than not that Mr C would have invested in the way he did in any event because he was persuaded to do so by Mr L. Mr L was not authorised to give investment advice. If Gaudi had acted appropriately either his involvement would have been discovered and the application rejected on that ground. Or alternatively regulated independent advice would have been obtained which given its regulated and independent status would reasonably have been more influential on Mr C's thinking. Pension investments are important matters and Mr C made a large investment. I cannot see that he would have insisted on such an investment because it had been recommended by a family friend if he was advised against it by an authorised independent adviser.

Accordingly it is my view that Gaudi's failings did cause Mr C to suffer the losses he has suffered.

Putting things right

My aim is to return Mr C to the position he would now be in if Gaudi had acted appropriately.

Gaudi should calculate fair compensation by comparing Mr C's current position to the position Mr C would be in if he had not transferred from his existing pension to Gaudi and invested in the way he did.

Gaudi should calculate fair compensation by comparing the value of Mr C's pension, if he had not switched away from it, with the current value of his SIPP. In summary Gaudi should:

1. Obtain the notional transfer value of Mr C's previous pension plan, if it had not been switched to the SIPP.

2. Obtain the actual transfer value of Mr C's SIPP, including any outstanding charges.

3. Pay a commercial value to buy the Affinity investment (or treat it as having a zero value in the compensation calculations).

4. Pay an amount into Mr C's SIPP so that the transfer value is increased to equal the value calculated in (1). This payment should take account of any available tax relief and the effect of charges. It should also take account of interest as set out below.

5. If the SIPP needs to be kept open only as a result of the Affinity investment and used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.

6. Gaudi should also refund to Mr C any fees or charges he has paid from money other than the money originally transferred in from his personal pension together with 8% simple interest per year from the date the fee or charge was paid until the date of this decision.

7. Pay Mr C £750 for the distress and inconvenience the significant losses in his pension will have caused him. Mr C has been caused significant distress and inconvenience by the loss of his pension benefits. This is money Mr C cannot afford to lose. Mr C suffers from poor health and the loss of his pension has caused considerable distress and worry. And Mr C has not been able to take a pension income following the loss of his job in 2021 because his pension fund is worthless. I consider that a payment of £750 is appropriate to compensate for that upset.

8. Provide Mr C with a calculation in an easy to follow format showing how Gaudi has calculated the compensation payment.

If there are any difficulties in obtaining a notional valuation of the previous pension, then the FTSE WMA Stock Market Income Total Return Index should be used instead. That is a reasonable proxy for the type of return that could have been achieved if suitable funds had been chosen taking account of Mr C's likely attitude to risk.

If Gaudi is unwilling or unable to purchase the investment the *actual value* should be assumed to be nil for the purposes of the above calculation. And Gaudi may ask Mr C to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the investment. That undertaking should allow for the effect of any tax and charges on the amount Mr C may receive from the investments and any eventual sums he would be able to access from the SIPP. Gaudi will need to meet any costs in drawing up the undertaking.

If Gaudi is unable to pay the total amount into Mr C's SIPP it should pay the compensation as a lump sum to Mr C. But had it been possible to pay into the SIPP it would have provided a taxable income. So the total amount should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

The *notional* allowance should be calculated using Mr C's marginal rate of tax at retirement. For example, if Mr C is 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 C would have been able to take a tax-free lump sum, the *notional* allowance should be applied to 75% of the total amount.

The compensation resulting from this loss assessment must be paid to Mr C 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 £160,000, plus any interest and/or costs/ interest on costs that I think are appropriate. If I think that fair compensation is more than £160,000, I may recommend that the business pays the balance.

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

Recommendation: If the amount produced by the calculation of fair compensation is more than £160,000, I recommend that Gaudi Regulated Services Limited pays Mr C 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 C can accept my decision and go to court to ask for the balance. Mr C 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 C to accept or reject my decision before 28 July 2022.

Philip Roberts
Ombudsman