DRN-3423734

The complaint

Mr F complains that PSFM SIPP Limited (PSFM) failed to carry out sufficient checks when accepting his application for a Self-Invested Personal Pension (SIPP) and allowing his investment in a high-risk illiquid investment. And that he has suffered loss as a result.

Mr F is represented by a claims management company (CMC) in this complaint.

What happened

The parties

PSFM SIPP Limited

PSFM SIPP Limited trades as Punter Southall Financial Management SIPP. It is a regulated SIPP provider and administrator. It is authorised, in relation to SIPPs, to arrange (bring about) deals in investments, deal in investments as principal, establish, operate or wind up a pension scheme and make arrangements with a view to transactions in investments. It is not and was not at the time of events in this complaint authorised to give investment advice.

The adviser

An adviser was involved in Mr F's application. I will call him Mr H. He was registered with the Financial Services Authority, now the Financial Conduct Authority, as an approved person. An approved person is a person the regulator has approved to do one or more activities, called controlled functions, for an authorised firm.

The FCA register shows Mr H was registered to perform the controlled function CF21 Investment Adviser from 2005 to October 2007 and CF30 Customer from November 2007 to 22 July 2010.

The register also shows that Mr H was approved to perform those functions at Openwork Limited which is an authorised firm, authorised amongst other things to advise on pensions and investments.

According to the FCA register Mr H was employed by a business called Henderson Stone & Co Ltd between 2006 and 22 July 2010. That business was registered with the FCA. And the FCA register shows it was recorded as an appointed representative of Openwork from 2005 to 16 August 2010.

Henderson Stone was not itself authorised by the FCA, so it did not have any authority from the FCA as such.

In brief, only persons (which includes companies) authorised by the regulator may give regulated investment advice. This is referred to as the General Prohibition. An exception to this general rule is that an authorised person may appoint representatives to act for it and the authorised person must take responsibility for the activities it authorises the representative to carry out. In this relationship the authorised person is called the principal.

I understand from dealing with a different complaint that Openwork says Mr H worked at Henderson Stone and it was an independent contractor pursuant to a franchise contract with Openwork. And that its franchise contract authorises an approved adviser at a franchisee firm, such as Mr H, to act as an appointed representative of Openwork.

Mr H was therefore authorised by Openwork to carry on the activities it (Openwork) authorised him to carry out.

As I understand it, Mr H was suspended by Openwork, and not permitted by it to give investment advice, from 23 April 2010 until he resigned on 17 July 2010.

The investment

The Resort Group

The Resort Group was founded in 2007. TRG owns a series of luxury resorts in Cape Verde. TRG sold luxury hotel rooms to UK consumers, either as whole entities or as fractional share ownership in a company. TRG was not regulated by the financial services regulator.

This case involves a fractional investment into property at TRG's Dunas Beach Resort.

As I understand it, the total agreed price was around EUR 75,000. The price was to be paid by stages. Mr F paid around £39,000 as a down payment from his SIPP. This means the pension bought membership of a limited company with the company buying promissory contracts to buy a suite at the resort.

As I understand it, there have been difficulties with the Dunas Beach investments and legal completion has not taken place for some if not all properties. So (at least some) of the investments have turned out to be in what are now dormant companies with no assets. I do not know if that is the case with Mr F's investment, but I understand it is illiquid and no value can be realised for it for Mr F's pension scheme.

The relationship between Mr H and PSFM

PSFM has explained things as follows:

- Mr H used to visit the PSFM offices personally and drop off documentation which he had completed with the client.

- It had an Introducer Agreement with Mr H, but it cannot now locate it.

- Although it cannot find the actual agreement completed back in 2010 it had a standard introduction agreement with financial advisers. And it provided a copy. (The copy refers to the regulator as the FCA but it was still the FSA in 2010 so the version that has been provided cannot be the exactly correct version but I assume it is the same in all material respects.)

- The standard form agreement (in which PSFM is referred to as the Company) included the following:

- "*The Introducer is either a Solicitor, Accountant, or is authorised and regulated by the Financial Conduct Authority, with registration number [ ].*"

- "*The Company wishes to appoint the Introducer to introduce Individuals to it who wish to enter into a Self-Invested Personal Pension operated by the Company.*"

- "*The Introducer wishes to accept the appointment and has agreed to introduce individuals to the Company to enable those individuals to enter into a PSFM SIPP.*"

- "*The Introducer accepts responsibility for the suitability of any advice provided to the Individual in respect of any Investments comprised within the PSFM SIPP in accordance with the requirements of the FCA's Handbook of rules and guidance.*"

- "*The Introducer accepts that the Company does not provide any activities that could be construed as either advising on investments … or managing investments…*"

- The Introducer warrants and undertakes to the Company that:

  - "*It is, and for the duration of this Agreement will be, authorised and regulated by the FCA…*"

  - "*In respect of FCA authorised and regulated firms it has the appropriate FSMA Part 4A permissions to provide advice to, or manage a discretionary investment portfolio on behalf of, the Individuals…*"

  - "*It has full capacity and authority to perform its duties under the Introducer Agreement.*"

- PSFM has provided an extract from its records that show, in relation to Mr F, it recorded Mr H as his regulated adviser/introducer in March 2010. That record remained unaltered until 2012 when it reviewed its records upon the introduction of the Retail Distribution Review. At that point (31 December 2012) Mr H was deleted as the introducer.

The setting up of the SIPP etc

Mr F says he was contacted by Mr H about the Resort Group. Mr H told him it was a great opportunity and that it was the way forward with pensions and that he had invested in it himself. As Mr H had been Mr F's adviser in the past, he trusted him. Mr F says Mr H told him the investment would give him a good return every year and he would have growth of the investment on top of that.

Mr F signed an application form for a SIPP with PSFM. This was dated 18 March 2010. The form asked if Mr F wished to appoint an investment manager. The answer no was given. The words "execution only" were written on the form in this section.

At around this time Mr F also signed a document headed "Non-financial Advice Fee". I will quote it in an anonymised form. The errors are in the original. It said:

> *"Mr H has provided no Financial Advice in relation to this investment into the Punter Southall SIPP.*
>
> *It was Mr F who asked Mr H if he knew of a SIPP Administrator to invest his current…Pension to Look at the purchase of commercial land through execution only*.
>
> *No time has Mr H give Financial Advice on this investment or instructed Mr F to take out a SIPP*.
>
> *Mr F is a client of Mr H through Openwork however he is not interested in any services the company provides in relation to Financial Advice. Openwork do provide access to a SIPP however Mr F was not interested in this facility as he didn't want advice.*
>
> *Mr H confirmed this was not related to Openwork products or services. Mr F understood completely.*
>
> *Mr H has helped Mr F in the paperwork to set up this SIPP and as such has charged a fee of £795.00 which will be deducted by Punter Southall for the time Mr H has spent on administration, travel and meetings with the client, Punter Southall to assist Mr F*.
>
> *Mr F confirmed he was happy for this fee to be deducted from his SIPP fund and accepts this is a reasonable fee for the work to be carried out.*
>
> *It was Mr F who asked Mr H to help him with the paperwork administration after Mr H had introduced Punter Southall to him.*
>
> *Mr H did explain to Mr F he could ask someone else or do it himself but Mr F wanted Mr H to do the work.*
>
> *Mr H did not charge a fee for the introduction.*
>
> [signed Mr F]"

Mr F says that despite the above document he thought Mr H was advising him as his financial adviser.

The SIPP was opened on 26 March 2010 and on 29 April it received a transfer in of nearly £43,000.

"IFA Fees" of £820 (rather than the £795 referred to above) were paid to Mr H from the SIPP account on 4 May 2010.

Nearly £39,000 was paid out of the SIPP in respect of the property investment in June 2010.

Income referred to as property income in the SIPP account statement was paid into the account from 2015.

Complaint against PSFM

Mr F complained to PSFM in 2017. It did not uphold Mr F's complaint.
PSFM said:

- It is aware of the regulator's expectations on it as a SIPP provider.
- It carried out appropriate checks on Mr H and on the investment.
- Mr H was an authorised adviser when he introduced Mr F's business to it.
- Mr H was responsible for any advice he gave.
- The investment was of a type that is permitted in a SIPP.
- Mr F should complain to Openwork.

I note that in relation to the "non-financial advice agreement" document, PSFM said the following in its final response letter to Mr F (again quoted in anonymised form):

> *"This is a concerning document, which as a client of Mr H through Openwork Limited, who is not a sophisticated client as outlined by [the CMC], I am very surprised you signed it. Due to the nature of the financial services terminology used within the letter, this document has the appearance as though it was prepared by Mr H and given to you to sign. If that was the case then Mr H has not acted in accordance with the Statements of Principles and Code of Practice for FSA Approved Persons which applied in 2010.*
>
> *And if this was the case then it could be argued that he has intentionally tried to circumnavigate his responsibilities to you his client. As an adviser he was responsible for determining whether the transfer of your … pension into a SIPP was the most appropriate course of action for you. As your adviser he also had a responsibility to you to ensure that investing in the fractional share in Dunas Beach Resort was aligned to your attitude to risk as well as meeting your needs and objectives.*
>
> *How did you become aware of this opportunity to invest into the fractional share in Dunas Beach Resort? This is not something that PSFM SIPP ever promoted, whereas I am aware that this is something that Mr H actively promoted. If it was Mr H who made you aware of this investment, then this was not an execution only transaction, because he has introduced you to the concept.*
>
> *Alternatively, if it was you who initially became aware of this investment and it was you who approached Mr H as you were already a client of his, then by signing this letter you have weakened your case against Mr H and his employer at the time Openwork, who are ultimately responsible for his actions."*

The provisional decision

I issued a provision decision in Mr H's complaint in February 2022. After first discussing the relevant considerations I am required to take into account when deciding what is fair and reasonable in all the circumstances, I said:

> ***"The role of Mr H***
>
> PSFM had processes in place for checking the investments it was prepared to allow in its SIPP and the introducers it was willing to accept business from. It has explained it had processes in place before the 2009 Thematic Review report was published and it has referred to the points made in that report to explain why it thinks it acted reasonably at the time.
>
> PSFM says part of the report focuses on the relationship with introducers and that it undertook the checks referred to – checking that advisers who introduce clients to it were FSA authorised and had appropriate permissions. Mr H was an

approved person and the firm for which Mr H acted as an approved person, Openwork, had the relevant permissions to provide investment advice. It carried out its checks periodically and on an ongoing basis.

PSFM is a regulated business. It is an execution only SIPP operator. And it was under a regulatory obligation to conduct its business, in that limited non-advisory capacity, with due skill, care and diligence, manage its affairs responsibly and effectively with adequate risk management and pay due regard to its customers interests and treat them fairly.

As mentioned above, PSFM entered into an Introducer Agreement with Mr H and, though it cannot find the original, PSFM says the agreement included the following:

> *[The Introducer] is, and for the duration of this Agreement will be, authorised and regulated by the FCA…"*
>
> *"In respect of FCA authorised and regulated firms it has the appropriate FSMA Part 4A permissions to provide advice to, or manage a discretionary investment portfolio on behalf of, the Individuals…"*
>
> *"It has full capacity and authority to perform its duties under the Introducer Agreement."*

In 2009 the regulator gave examples of good industry practice, including:

- *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.*

- *Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.*

And PSFM says it has met those standards. I do not however agree.

PSFM should have had a reasonable understanding of the need for those giving regulated advice to be regulated. It should reasonably have understood the appointed representative/principal relationship. It should have understood that the appointed representative's regulated status relies entirely on its principal – it is not free to do whatever it wants to independently.

And PSFM should reasonably have understood the principal's business model when considering doing business with an appointed representative.

It was PSFM's understanding Mr H would be giving regulated investment advice to clients he introduced to it. While Mr F's application purported to be on a non-advised basis, it was PSFM's general understanding that Mr H would give regulated advice to the clients he introduced to it.

PSFM was content about this because it understood Mr H was an approved person and was an appointed representative of Openwork which was authorised to give investment advice. And so PSFM entered into an Introducer Agreement with Mr H personally and accepted the business he referred to it including Mr F's application for a SIPP, request to transfer his existing pension to it and invest in the Dunas Beach resort investment. And it paid a fee to him personally from Mr F's SIPP account.

However PSFM should have been aware of the implications of Mr H being an appointed representative of Openwork.

As an appointed representative Mr H was not an authorised person in his own right. He was only approved by the FSA to give advice on behalf of Openwork. Mr H's authority to give advice came from Openwork. He was only authorised to do the things Openwork authorised him to do.

Openwork is a restricted product range firm, not a whole of market adviser. And PSFM should have known that if it was considering doing business with one of its appointed representatives. It should also have known that it (PSFM) had no arrangement with Openwork – that it was not on Openwork's panel of approved providers it did business with. Put another way, it should have known Openwork, and therefore its advisers, did not do business with it.

So as a general point PSFM should have known an appointed representative is only authorised if it acts within the authority given by its principal. And in relation to a restricted advice firm, such as Openwork, PSFM should have known that the authority given by the principal would be restricted. And it should have understood that advising on its SIPP would not be something an Openwork appointed representative was authorised by Openwork to do.

And PSFM should have understood that if Mr H did not have the authority of his principal
To advise on its SIPPs there was a real risk he would be breaching the General Prohibition if he was introducing SIPP business and taking responsibility for the suitability of the SIPP.

It is permitted for unregulated introducers to introduce business to SIPP providers but that is not what [PSFM] understood its relationship with Mr H to be. It thought he was regulated and would be giving regulated investment advice about the suitability of its SIPPs for its potential customers.

There is also the point that if Mr H was acting beyond his authority with his principal he might not be dealing with it an open and appropriate way. Why, for example, was Mr H trying to do business with a SIPP provider that was not Openwork's approved provider? Was he trying to do business he was deliberately not reporting to his principal? Or did he just not understand the obligations he was under? These points raise questions about Mr H's character and/or competence and whether Mr H was an appropriate person to be doing SIPP business with, whether it was in its customers best interest to do business with him.

These points should have been matters of serious concern for PSFM which should have meant that it ensured it only accepted business from Mr H that was authorised by Openwork – or in other words it should have entered into the Introducer Agreement with Openwork not Mr H, or no agreement at all.

But PSFM was not on Openwork's panel of SIPP providers so it would not have entered into an Introducer Agreement with PSFM so that Mr H could introduce the business he wanted to do.

There is no evidence that Openwork did in fact authorise Mr H to do business with PSFM and it has refused to accept responsibility for the advice Mr H gave to other PSFM SIPP customers with similar complaints.

If PSFM had checked with Openwork, it would have discovered that Mr H was not authorised to do business with it. And in turn it would have refused to accept any business from Mr H. PSFM could and should have refused Mr F's application without going beyond its normal contractual role and regulator's permissions and without giving him advice on the suitability of the investment for him.

I make all the above points regardless of the "non-financial advice agreement". I am not sure if PSFM admits that it received that document at the time of Mr F's application in 2010.

It did pay an £820 fee to him – which is slightly more than the fee referred to in the agreement. But it will have wanted to see some kind of evidence to justify that payment out of the SIPP so it seems likely PSFM did see the document in 2010 or one similar to it referring to the higher fee it paid. But the comments made about the document being "concerning" do not seem to acknowledge that PSFM itself had any reason to be concerned. But if it did see the document the points PSFM makes about it are further reason why it should not have accepted Mr F's application. Mr F says Mr H approached him about the investment, as PSFM seems to suspect would have been the case. This means the document does indeed seem to have been an attempt by Mr H to circumvent his responsibilities and casts serious doubts on the issue of whether Mr H was an appropriate person to do business with. So if it did see the document at the time of the application it is further reason why PSFM should have refused Mr F's application.

PSFM should not have accepted Mr F's application for a SIPP and transferred his existing personal pension to it. And this means it would not have made the investment to Dunas Beach for Mr F because he would have had no SIPP to make the investment from.

Did PSFM's failings cause Mr F's loss?

I cannot see that there is any evidence that Mr F was motivated to open his SIPP and invest in PSFM because of, for example, an incentive payment as in the *Adams v Options SIPP* case. There is nothing to indicate that Mr F would have moved his pension if he had not been encouraged to do so by Mr H. And Mr H only acted in that way because PSFM agreed to accept the business he referred to it.

Mr F had a relatively small pension fund and I do not consider it likely that he would have been advised to move his pension by Mr H acting on behalf of his Principal appropriately advising on its approved products. Nor do I consider that any other regulated financial adviser acting reasonably would have advised Mr F that investing his pension in the Dunas Beach investment was suitable for him. It is a higher risk, esoteric investment that is unsuitable for a pension investment for most retail investors.

I therefore consider it unlikely that Mr F would have suffered the same loss if

PSFM had refused to accept his application.

In conclusion

It is my view that in the light of what PSFM knew, or ought to have known, about Mr H and his principal Openwork before it received Mr F's application, it didn't comply with good industry practice, act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr F fairly by accepting his application. And I think that, in not doing so, it allowed him to be put at significant risk of detriment. It did not act in its customers best interest as required in its role as an execution only SIPP provider.

For the avoidance of doubt, I'm not saying that PSFM should have assessed the suitability of the investment or the SIPP for Mr F. I accept that PSFM had no obligation to give advice to Mr F, or otherwise ensure the suitability of a pension product or investment for him. My finding is not that PSFM should have concluded that the investment or SIPP was not suitable for Mr F. Rather it is that PSFM did not meet its regulatory obligations, or treat Mr F fairly, by accepting his application for a SIPP introduced by Mr H."

I then went on to explain how I thought FSFM should put things right.

Responses to the provisional decision

Mr F agrees with my provisional decision. PSFM does not. Its lawyers made a number of points including:

- There are no grounds for holding PSFM liable for Mr F's losses.
- PSFM fully understands the nature of the principal agent relationship.
- There was nothing irregular about the status of Mr H.
- Mr H appeared to be an employee of Henderson Stone & Co Ltd in the Financial Services Register until July 2010. Mr F's SIPP application was in March 2010.
- At the time of the advice Mr H appeared in the Financial Services register and presumably still enjoyed the full confidence of his principal, Openwork.
- Mr H was not suspended by Openwork until April and continued to be an appointed representative of Openwork until August 2010.
- The Financial Services register is a statutory register. PSFM was entitled to rely upon it.
- A fair and reasonable expectation is that PSFM should check the Financial Services Register upon working with a new introducer and thereafter periodically. That is what it did.
- There is nothing in the extract of the FCA publications referred to in the provisional decision that would require investigation of an appointed representative's principal beyond checking the register as PSFM did.
- The terms of business agreed between PSFM and Mr H satisfy the second quoted in the provisional decision.
- It is asserted in the provisional decision that because Openwork had not appointed PSFM to its panel of SIPP providers Openwork must not have permitted its appointed representative such as Mr H to engage with it. This may or may not be true but cannot be known without a close reading of the appointed representative agreement between Openwork and Henderson Stone under which Mr H operated.

- Openwork's refusal to accept liability for Mr F's is entirely predictable on commercial grounds. And no weight should be attached to this refusal.
- Further as an employee Henderson Stone is vicariously liable for Mr H's actions.
- The provisional decision says there is no evidence that Openwork authorised Mr H to perform this line of business. PSFM says it should be the other way around. Without an analysis of the appointed representative agreement that governed Mr H's operations there is no evidence that openwork didn't authorise Mr H – beyond Openwork's refusal to compensate Mr F which is questionable as evidence against PSFM for obvious reasons.
- In the case of *R (on the application of TenetConnect Services Ltd) v Financial Ombudsman Service* [2018] EWHC 459 (Admin) a pension investor was advised to switch certain investments held with reputable insurance companies into a SIPP and purchase among other things a property in Goa. That investment was a scam.
- The ombudsman in that case was clear that the advice to sell regulated investments and switch into the Goan property was one piece of advice and therefore within the scope of the ombudsman's jurisdiction. The court agreed.
- So, whether the advice to invest within Dunas Beach constituted advice within the scope of Mr H's authority, the advice Mr H gave to Mr F to sell his existing Scottish Equitable pension to fund the investment almost certainly was within that scope. The advice to sell and the advice to buy were part of a *"single braided stream of advice"* – the term used in the *TenetConnect* judgment.
- The point of the *TenetConnect* decision is that a single braided stream of advice does constitute regulated advice and is therefore within the scope of the appointed representative's authority if the authority would have captured the selling advice on a standalone basis.
- The Court of Appeal applied this reasoning in the case of *Anderson v Sense Network*.
- So the authorities are clear that in this context Openwork is responsible for the advice of Mr H.
- PSFM did not see the non-financial advice agreement at the time it accepted Mr F's SIPP application and only became aware of it in 2017 when it received Mr F's complaint. Some other document or instruction from Mr F could easily have triggered the payments from
  Mr F's SIPP to Mr H. The lack of evidence around this point should not be construed against PSFM.
- The view that the documents was "concerning" was formed upon reading the document enclosed with the complaint when Mr F's representative had said that Mr F was not a sophisticated investor. PSFM's concerns were with the benefit of hindsight and were not contemporary with Mr F's SIPP application form.
- Determining risk appetite, sophistication and suitability are matters for Mr F's financial adviser and not an execution-only SIPP administrator such as PSFM.
- The non-financial advice agreement adds no additional weight to Mr F's case against PSFM.
- The duty to act honestly, fairly and professionally under COBS 2.1.1R must be considered in the context of the contractual arrangements that Mr F has with PSFM. The analysis in the High Court decision on this point in *Adams v Options SIPP UK LLP* applies equally to PSFM and Mr F's relationship.
- It is no part of the Provisional Decision that PSFM should have advised Mr F on the merits of his investment. PSFM provides an execution only service and Mr F was aware of this when he signed up to PSFM's terms of business. This is a point of agreement with the Provisional Decision and is relevant to the question of what caused Mr F's loss.
- The advice from Mr H to:
  - sell regulated investments

    - open a SIPP with PSFM
    - invest in the Dunas Beach Resort project

  constitutes a single braided stream of advice to use terms from the *TenetConnect* case.
- In order to find PSFM liable two steps are necessary:
    - first, to unravel the braid and separate out the advice to open the SIPP from the other two streams
    - secondly, an argument has to be constructed that even treated in isolation, PSFM's decision to allow Mr F to open the SIPP was wrong.

  But this does not make sense.
- Mr H was fully entitled to conduct regulated business in virtue of his appearance in the Financial Services Register, where he was listed at the date of Mr F' application to PSFM.
- In any event registration as not necessary as it is permitted for unregulated introducers to introduce busines to SIPP providers.
- So treating the opening of the SIPP insolation, there are no grounds for finding PSFM did anything wrong at all.
- The only plausible grounds for rejecting the SIPP are that the investment that the SIPP proposed was unsuitable – contrary to what was said in the Provisional Decision. And this is not a determination PSFM should have or was entitled to make.
- So PSFM is not responsible for the losses incurred by Mr F.
- Even if it were appropriate to unravel the braided stream of advice (which is not conceded) and treat the opening of the SIPP in isolation it is difficult to show that act by itself caused Mr F any loss.
- A SIPP taken in isolation is just an empty wrapper. It is only when that wrapper is seeded with invested capital that profits or loss become possible.
- The but for test is not satisfied. Mr F was obviously enthused by the possibility of returns offered by the Dunas Beach Resort project and it is not obvious that if PSFM had refused to open a SIPP for Mr F that he would not simply have gone somewhere else to get access to this opportunity. This is especially so as PSFM was neither obligated to pronounce nor capable of pronouncing, on the suitability of the investment.
- In any event the but for test is only a preliminary filter. Even if no other SIPP operator would have allowed the investment, the losses were caused by the intervening act of
  Mr H's advice to Mr F which breaks the chain of causation between PSFM and Mr F's application and the losses suffered on the Dunas Beach Resort project.
- The reasoning in the Provisional Decision seems to deprive Mr H of all responsibility for his actions. The general principle is that the free acts of a person intended to exploit the situation created by defendant negatives causal connection.
- Mr H's actions are the critical casual factor that caused Mr F's loss and Openwork bears full responsibility for those actions. They are nothing to do with PSFM.
- PSFM is not therefore liable for the losses suffered by Mr F.

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.

Your text here 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.

Relevant considerations

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:

> 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 F'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 F'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 F's case, including PSFM'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 those publications but will only refer to the 2009 Thematic Review in detail.

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 customers and treat them fairly') insofar as they are obliged to ensure the fair treatment of their customers. 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.*

- *Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.*

- *Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified.*

- *Being able to identify anomalous investments, e.g. unusually small or large transactions or more 'esoteric' investments such as unquoted shares, together with the intermediary that introduced the business. This would enable the firm to seek appropriate clarification, e.g. from the client or their adviser, if it is concerned about the suitability of what was recommended.*

- *Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely.*

- *Routinely identifying instances of execution-only clients who have signed disclaimers taking responsibility for their investment decisions, and gathering and analysing data regarding the aggregate volume of such business.*

- *Identifying instances of clients waiving their cancellation rights, and the reasons for this.*

- *Ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable).*

- *Ensuring that an investment can be independently valued, both at point of purchase and subsequently.*

- *Ensuring that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc.*

I acknowledge that the 2009 and 2012 reports and the *"Dear CEO"* letter are not formal *"guidance"* (whereas the 2013 finalised guidance is). However, the fact that the reports and *"Dear CEO"* letter didn't constitute formal guidance doesn't mean their importance should be underestimated. They provide a *reminder* that the Principles for Businesses apply and are an indication for the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications which set out the regulator's expectations of what SIPP operators should be doing also go some way to indicate what I consider amounts to good industry practice at the time, and I am therefore satisfied it is appropriate to take them into account.

Like the ombudsman in the BBSAL case, I don't think the fact that the publications (other than the 2009 Thematic Review Report) post-date the events that are the subject of this complaint mean that the examples of good industry practice they provide were not good practice at the time of the events. The later publications were published after the events subject to this complaint, but the Principles that underpin them existed throughout, as did the obligation to act in accordance with those Principles.

It is also clear from the text of the 2009 and 2012 reports (and the *"Dear CEO"* letter published in 2014) that the regulator expected SIPP operators to have incorporated the recommended good industry practices into the conduct of their business already. So, whilst the regulator's comments suggest some industry participants' *understanding* of how the standards shaped what was expected of SIPP operators changed over time, it is clear the standards themselves had not changed.

It is important to bear in mind that 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 PSFM 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 F), 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 PSFM could have done to comply with its regulatory obligations and duties.

Due diligence by PSFM and the Introducer Agreement

PSFM is an execution only SIPP operator. It does not dispute that in that role it had some responsibility for the SIPP business it carried on. It says it has always been aware of the obligations it is under especially following the publication of the FSA's report on its Thematic Review in 2009.

As mentioned above, that report included:

> *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.*
> - *Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.*

PSFM says it made the checks and carried out the steps referred to above. So it is not in dispute that some level of checks were appropriate. And I do not think it is in dispute that PSFM was free to decide not to enter a Terms of Business agreement with a potential introducer, and refuse to accept any business from it if it was not happy with the outcome of the checks it made.

PSFM's position is that it made appropriate checks on Mr H, established he was an appointed representative of Openwork which was a regulated firm authorised to advise on pensions and investments. PSFM says it entered into an Introducer Agreement with Mr H. And as set out above in my Provisional Decision, PSFM says, and I accept, the agreement included provisions along the following lines:

> *"The Introducer is either a Solicitor, Accountant, or is authorised and regulated by the Financial Conduct Authority, with registration number [ ]."*
>
> *"The Company wishes to appoint the Introducer to introduce Individuals to it who wish to enter into a Self-Invested Personal Pension operated by the Company."*
>
> *"The Introducer wishes to accept the appointment and has agreed to introduce individuals to the Company to enable those individuals to enter into a PSFM SIPP."*
>
> *"The introducer accepts responsibility for the suitability of any advice provided to the Individual in respect of any Investments comprised within the PSFM SIPP in accordance with the requirements of the FCA's Handbook of rules and guidance."*
>
> *The introducer warrants and undertakes to the Company that:*

> *"It is, and for the duration of this Agreement will be, authorised and regulated by the FCA…"*
>
> *"In respect of FCA authorised and regulated firms it has the appropriate FSMA Part 4A permissions to provide advice to, or manage a discretionary investment portfolio on behalf of, the Individuals…"*
>
> *"It has full capacity and authority to perform its duties under the Introducer Agreement."*

The Agreement with Mr H was on the basis he was with an introducer who was authorised and regulated by the FSA/FCA - not on the basis Mr H was a solicitor or accountant or an unregulated firm that would not be giving regulated advice.

PSFM was content to enter into its Introducer Agreement with Mr H given his status as an approved person who was able to give regulated advice as an appointed representative of Openwork. But to be clear, PSFM entered into an Introducer Agreement with Mr H, not with Openwork.

Mr H's status as an appointed representative

Mr H was shown as an appointed representative on the FCA register until 22 July 2010 and the SIPP application was in March 2010. So if PSFM had checked the register at that time Mr H would have appeared as an appointed representative of Openwork. That was not known to PSFM and so it was not at fault for thinking he was an appointed representative of Openwork at the time of Mr H's application in July 2010.

It is not in dispute that Mr H was an appointed representative of Openwork when PSFM entered into an Introducer Agreement with him in 2010. Although Mr H was registered as an appointed representative, as I set out in my provisional decision, PSFM should not have treated Mr H as if he were an authorised person as he was not. He was an appointed representative of an authorised person, Openwork. His status was that of approved person only. His principal, Openwork, was the authorised person. It was Openwork, not Mr H, who had *"the appropriate FSMA Part 4A permissions to provide advice…"*

Mr H was only authorised to do the regulated business Openwork authorised him to do. Advising on setting up SIPPs and transferring or switching existing pensions to the SIPP and advising on buying investments in a SIPP are ordinarily regulated activities. So as an appointed representative Mr H could only do these things if authorised to do so by his principal. Appropriate checks on Mr H should therefore have included checks on and with his principal.

Openwork

As I said in my Provisional Decision, Openwork is a restricted product range firm. This is a point that should have been known to PSFM if it was considering accepting business introduced from Mr H who it understood to be an appointed representative of Openwork.

Openwork limits the pensions and investments its appointed representative's may advise upon to an approved list or panel of product provider companies. And the PSFM SIPP is not one of the pensions its advisers are authorised to advise upon.

PSFM is sceptical about what Openwork says it is responsible for. PSFM says it's in Openwork's commercial interest to deny any responsibility for the advice to Mr H. And it says without an analysis of the appointed representative agreement that governed Mr H's operations there is no evidence that Openwork didn't authorise Mr H.

The restricted product range business model and the consequences this has on the advice an adviser has permission from Openwork to do is not however a point PSFM should have ignored or made assumptions about. PSFM should have carried out reasonable checks, consistent with its role as an execution only SIPP operator, so that it could make a decision about whether or not to enter into an Introducer Agreement with Mr H in an appropriately informed way.

PSFM should have known that Openwork operated an approved list of providers for various investment products. And PSFM should have known Openwork had an approved provider of SIPPs and that it was not on its approved list of SIPP operators. So from these points alone PSFM ought to have known that it was more likely than not that Mr H was not authorised by Openwork to advise on its SIPPs just as Openwork says.

As I said in my Provisional Decision PSFM should have known this and would have done if it had carried out appropriate checks on Mr H. It would have known if it properly understood Mr H's regulatory status and checked that he was authorised by his principal to introduce PSFM's SIPPs and carry on the regulated activities he was likely to carry on when acting in that role – ie advising on and arranging deals in pensions and investments. Had it done so it would have realised Mr H did not have permission from Openwork to carry on those regulated activities.

A single braided stream of advice

PSFM says that even if Mr H was not authorised by Openwork to advise on PSFM SIPPs he was authorised to advise on the sale of existing personal pensions and so both parts of that single linked transaction became authorised.

PSFM says the point of the *TenetConnect* decision is that a single braided stream of advice does constitute regulated advice and is therefore within the scope of the appointed representative's authority if the authority would have captured the selling advice on a standalone basis. So Openwork remains responsible for Mr H's acts and omissions and there is no issue with his advice not being authorised by Openwork.

When I issued my provisional decision in this case I also issued a provisional decision in a complaint by another consumer about PSFM relating to the same introducer and investment. In my provisional decision in that cases I said:

> *"[The consumer] complained to Openwork. It did not uphold his complaint. [The consumer] referred the complaint to the Financial Ombudsman Service and an Ombudsman agreed that Openwork was not responsible for the advice [Mr H] had given as it had not authorised him to advise on PSFM SIPPs or the Dunas Beach investment."*

The Ombudsman in that case did not just accept Openwork's assertion. He considered the Openwork appointed representative agreement. He made his decision in 2020 after both the *TenetConect* case and the *Anderson v Sense* case both of which he took into account. The Ombudsman decided Openwork was not responsible for any part of the advice the consumer had received from Mr H.

As no part of what PSFM says was a single braided stream of advice was authorised by Openwork this means Openwork was not responsible for the advice.

I do not accept that I should consider that Openwork is responsible for Mr H's acts and omissions in relation to the advice to sell Mr F's existing pension or that Openwork authorised the advice Mr H gave to Mr F in this case.

In my provisional decision I said:

> *"If PSFM had checked with Openwork, it would have discovered that Mr H was not authorised to do business with it. And in turn it would have refused to accept any business from Mr H."*

PSFM's argument does not answer this point. Openwork had an approved SIPP provider on its list. If PSFM had checked with Openwork it would have found out that Openwork did not authorise Mr H to advise on PSFM's SIPP because it was not its listed SIPP provider. That should have been enough for PSFM to refuse to enter into an Introducer Agreement with Mr H or otherwise accept business form him. I cannot see that PSFM would have carried on in the belief that Openwork was wrong about the authority it gives its appointed representatives and think that in some limited circumstances the appointed representative would be authorised and that it would therefore do business with Mr H despite what Openwork would have said.

PSFM has not said it made enquiries about which personal pensions Mr H could advise upon. And it made no attempt to limit Mr H's Introducer Agreement only to cases where Mr H was advising on switching from pensions on Openwork's approved list of pension providers. Nor has PSFM said that it checked SIPP applications introduced by Mr H to ensure that the applicant was switching away from a pension with a provider on Openwork's approved list.

Accordingly if in a particular case Mr H was advising on switching away from a pension from a provider on Openwork's list of approved providers, this was by chance and not through planning on PSFM's part. This is not a sound basis upon which to have entered into an Introducer Agreement with Mr H.

Also doing business with Mr H without first checking with Openwork exposed clients such as Mr F to the risk, which PSFM has referred to as entirely predictable, that Openwork would refuse to accept responsibility for the advice given by Mr H. This means the client was exposed to the risk of receiving advice in breach of the General Prohibition which was not subject to the usual supervision a regulated adviser is subject to and thus at greater risk of advice that was not in the client's best interest and in relation to which the usual regulatory safeguards of access to the Financial Services Compensation Scheme and the Financial Ombudsman Service would not be available. In short, the risks of consumer detriment from dealing with an adviser who was not authorised to give the advice he was giving were considerable.

So it remains my view that PSFM should not have entered into an Introducer Agreement with Mr H or otherwise accepted business introduced by him.

Reasonable checks in the circumstances

PSFM says there is nothing in the extract of the FCA publications referred to in the provisional decision and above that would require investigation of an appointed representative's principal beyond checking the register as PSFM did. I do not agree with this point. It is important to think about the principles involved rather than get caught up on the precise wording of the examples of best practice the regulator gave. The point is about safeguarding customers interests by checking that those introducers who give advice are authorised. Checks should be appropriate to the circumstances. In the case of an appointed representative of a principal with a restricted product range business model PSFM should have made checks appropriate to those circumstances. Just checking the register was not enough to find out if Mr H was authorised to advise in relation to PSFM's SIPPs. And not making enough checks meant there a was a real risk that the introducer would be giving advice he was not authorised to give.

It remains my view that PSFM was mistaken in thinking that Mr H met the criteria it applied when considering potential introducers. It was wrong to treat him as an authorised person who was authorised and regulated by the regulator and had the appropriate permissions to give the advice he gave. His authority to give pensions and investment advice came from Openwork and that authority was limited meaning he did not have authority or permission to give the advice he gave.

It remains my view that If PSFM had checked with Openwork, it would have discovered that Mr H was not authorised to do business with it. And in turn it would have refused to accept any business from Mr H.

It remains my view that PSFM should not have entered into an Introducer Agreement with Mr H or otherwise accepted business introduced from him. This means it should not have accepted
Mr Fs application for a PSFM SIPP, his application to switch his existing pension to it and his application to invest in the Dunas Beach resort investment.

Is it fair and reasonable to hold PSFM responsible for Mr F's losses?

PSFM says Mr H's advice, and therefore Openwork and/or his employer, are responsible for Mr F's loss not PSFM's act of accepting the business he introduced to it.

PSFM says Mr H's acts are an intervening act which breaks any chain of causation linking it to the loss suffered. However, PSFM was not only in error in entering into the Introducer Agreement with Mr H sometime before it accepted Mr F's application. PSFM was in error when it accepted Mr F's application as introduced by Mr H – and that error postdates Mr H's advice. It cannot therefore be an intervening act. I do not accept that it is fair and reasonable to say that PSFM is not responsible for Mr F's loss for this reason.

I have however still considered whether it is fair and reasonable to hold PSFM responsible if Mr H was the initial cause of the problem that led to Mr F's loss.

I cannot look at any complaint against Mr H personally or his employer. And I have explained the Financial Ombudsman Service was also unable to consider a complaint against Openwork either. In this decision I have looked at PSFM's separate role and responsibilities and I have found that it failed to meet those responsibilities. So I need to consider what Mr F would have done if that had not happened.

Mr H might have tried to introduce Mr H's business to another SIPP provider but any other SIPP provider ought reasonably to have refused that business for the same reasons as PSFM. It is not fair and reasonable to say that PSFM should not be found responsible because another SIPP operator might also have failed to make appropriate checks on Mr H.

If Mr F had become aware that PSFM (or other SIPP operators) would not accept his application from Mr H it would have given him cause to question the advice he was given. And I think it is more likely than not that he would not have gone ahead with Mr H's advice in the form it was in.

If Mr H could not introduce SIPP business that involved Dunas Beach it seems more likely than not that he would have told Mr H he could no longer help him and that he should consult an authorised IFA.

I do not consider it likely that Mr H would have been advised to move his pension to Openwork's authorised SIPP to make the same Dunas Beach resort investment by Mr H (or one of his colleagues) acting on behalf of Openwork. It was not an Openwork authorised investment. Nor do I consider that any other regulated financial adviser acting reasonably would have advised Mr F that investing his pension in the Dunas Beach Resort investment was suitable for him. It is a higher risk, esoteric investment that is unsuitable for a pension investment for most retail investors.

It is my view that in the light of what PSFM knew, or ought to have known, about Mr H and his principal Openwork before it received Mr F's application, it didn't comply with good industry practice, act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr F fairly by accepting his application. And I think that, in not doing so, it allowed him to be put at significant risk of detriment. It did not act in its customers best interest as required in its role as an execution only SIPP provider.

I'm not saying that PSFM should have assessed the suitability of the investment or the SIPP for Mr F. I accept that PSFM had no obligation to give advice to Mr F, or otherwise ensure the suitability of a pension product or investment for him. My finding is not that PSFM should have concluded that the investment or SIPP was not suitable for Mr F. Rather it is that PSFM did not meet its regulatory obligations, or treat Mr F fairly, by accepting his application for a SIPP introduced by Mr H.

In the circumstances, it is my view that Mr F would not have suffered the same loss if PSFM had refused to accept his application and that it is fair and reasonable to hold PSFM responsible for the losses Mr F has suffered.

Putting things right

Fair Compensation

My aim is that Mr F should be put as closely as possible into the position he would reasonably be in if things had not gone wrong. In my view that means comparing Mr F's present position to the position he would be in if he had not moved his existing personal pension.

It is therefore my view that PSFM should put things right as follows:

PSFM should calculate fair compensation by comparing the value of Mr F's pension, if he had not transferred, with the current value of his SIPP. In summary:

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

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

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

4. Pay an amount into Mr F'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 Dunas Beach 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. PSFM should also refund to Mr F 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 F £500 for the distress and inconvenience the avoidable problems with his pension will have caused him. Difficulties with a pension are naturally very worrying especially when all or most of the value seems to have been lost. This is even more distressing when the consumer wants to take their pension and are unable to do so.

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 F's likely attitude to risk.

If PSFM 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 PSFM may ask Mr F 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 F may receive from the investments and any eventual sums he would be able to access from the SIPP. PSFM will need to meet any costs in drawing up the undertaking.

If PSFM is unable to pay the total amount into Mr F's SIPP it should pay the compensation as a lump sum to Mr F. 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 F's marginal rate of tax at retirement. For example, if Mr F 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 F 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 F or into his SIPP within 28 days of the date PSFM receives notification of his acceptance of my 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

I uphold Mr F's complaint against PSFM SIPP Limited. My decision is that Mr F's complaint should pay Mr F the compensation calculated as set out above and the additional interest as appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 7 October 2022.

Philip Roberts
Ombudsman