DRN-3423743

The complaint

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

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 H's application. I will call him Mr A. He was registered with the Financial Services Authority (FSA), now the Financial Conduct Authority (FCA), 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 A 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 A 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 A was employed by a business called Henderson Stone & Co Ltd between 2006 and 22 July 2010. That business was registered with the FSA, now 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 FSA, so it did not have any authority from the FSA/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 A 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 A to act as an appointed representative of Openwork.

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

Openwork has told Mr H that Mr A 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 (TRG) was founded in 2007. TRG owns a series of resorts in Cape Verde. TRG sold hotel rooms to UK consumers, either as whole entities or as fractional shares 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 for a 25% share of a property. The price was to be paid by stages. Mr H 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 property 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 H's investment, but I understand it is illiquid and no value can be realised for it for Mr H's pension scheme.

The relationship between Mr A and PSFM

PSFM has explained things as follows:

Mr A 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 A, 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.”*

The setting up of the SIPP etc

Mr H says he was contacted by Mr A about some existing life and pension plans.

Mr H says he had recently been made redundant and was recovering from important surgery. Mr A seemed to have the answer to his problems: pulling pensions together and releasing money he could spend on a car (Mr H had lost his car on being made redundant) with money left over to invest in a good investment Mr A said he was investing in himself – the Dunas Beah resort investment.

Mr H signed an application form for a SIPP with PSFM. This was dated 14 June 2010.

At around this time Mr H 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 A has provided no Financial Advice in relation to this investment into the Punter Southall SIPP.*
>
> *No time has Mr A given Financial Advice on this investment or instructed Mr H to take out a SIPP*.
>
> *Mr H wishes to consider alternative option for his current plan and instructed Mr A to assist in the introduction to Punter Southall.*

Mr H was offered the opportunity to consider other SIPP Providers but declined.

Mr H is a client of Mr A 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 H was not interested in this facility as he didn't want advice.

Mr A confirmed this was not related to Openwork products or services. Mr H understood this to be the case.

Mr A has assisted Mr H in the intrioduction to Punter Southall and has charged a fee of 2.5% [this figure is handwritten and initialled presumably by Mr A and Mr H] which is to be deducted by Punter Southall for the time Mr A has spent on the administration, travel and meetings with the client, Punter Southall to assist Mr H.

Mr H confirmed he is 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. The fee is based on an introduction only basis.

[signed]

Mr H

14/6/10"

Mr H does not recall signing the above and says it was a difficult time for him with his recent redundancy and recovering from surgery.

The SIPP was opened on 14 June 2010 and on 30 June 2010 it received a transfer in of nearly £67,000 from Mr H's existing pension provider. On 1 July 2010 tax free cash of about £17,000 was paid out to Mr H, "IFA Fees" of £1,717.75 were paid to Mr A, and nearly £39,000 was paid out of the SIPP in respect of the property investment.

Income referred to as property income or dividends in the SIPP account statement was paid into the account from 2015. Mr H says the income received has not been enough to cover the fees on the SIPP.

Complaint against Openwork

In 2018 Mr H complained to Openwork. It did not uphold his complaint. Mr H referred the complaint to the Financial Ombudsman Service and in 2020 an Ombudsman issued a decision that agreed Openwork was not responsible for the advice Mr A had given as it had not authorised him to advise on PSFM SIPPs or the Dunas Beach investment.

Complaint against PSFM

Mr H also complained to PSFM in 2018. It did not uphold Mr H's complaint. PSFM said:

- Mr A introduced Mr H as a potential client on 8 June 2010. Mr A was an appointed representative of Openwork at that time. If Openwork had suspended him at that time this was not shown on the FSA register.
- It is aware of the regulator's expectations on it as a SIPP provider.
- It carried out appropriate checks on Mr A and on the investment.

- Mr A was an authorised adviser when he introduced Mr H's business to it.
- Mr A was responsible for any advice he gave.
- The investment was of a type that is permitted in a SIPP.
- Mr H 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 H (again quoted in anonymised form):

> *"With the benefit of your information that Openwork have informed you that [Mr A]'s Openwork licences had been suspended by Openwork, this may explain why he got you to sign the enclosed disclaimer… 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 A and given to you to sign. If that was the case then Mr A 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."*

The provisional decision

I issued a provision decision in Mr H's complaint in March 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 A***
>
> 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 A was an approved person and the firm for which Mr A acted, 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 with adequate risk management and effectively, and pay due regard to its customers interests and treat them fairly.
>
> As mentioned above, PSFM entered into an introducer agreement with Mr A

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 A would be giving regulated investment advice to clients he introduced to it. While Mr H's [introduction] seems to have purported to be on a non-advised basis, it was PSFM's general understanding that Mr A would give regulated advice to the clients he introduced to it.

PSFM was content about this because it understood Mr A 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 A personally and accepted the business he referred to it including Mr H'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 H's SIPP account.

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

As an appointed representative Mr A was not an authorised person in his own right. He was only approved by the FSA to give advice on behalf of

Openwork. Mr A'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 A 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 A 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 A 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 A 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 A's character and/or competence and whether Mr A 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 A that was authorised by Openwork – or in other words it should have entered into the introducer agreement with Openwork not Mr A, 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 A could introduce the business he wanted to do.

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

If PSFM had checked with Openwork, it would have discovered that Mr A was not authorised to do business with it. And in turn it would have refused to accept any business from Mr A. PSFM could and should have refused Mr H'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 H's application in 2010. It did pay a fee of £1,717.75 to him. PSFM 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. In another complaint where one of Mr A's other clients signed a very similar agreement PSFM referred to the document as concerning, but there is no evidence PSFM had any concerns about the agreement in 2010 in Mr H's case. If it did see the document the points PSFM makes about it are further reason why it should not have accepted Mr H's application. The document does indeed seem to have been an attempt by Mr A to circumvent his responsibilities and casts serious doubts on the issue of whether Mr A was an appropriate person to do business with. So if PSFM did see the document at the time of the application it is further reason why PSFM should have refused Mr H's application.

PSFM should not have accepted Mr H'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 H because he would have had no SIPP to make the investment from.

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

I cannot see that there is any evidence that Mr H 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. It is the case that he was in a difficult financial position having lost his job and needing a car. But it was not essential for Mr A to transfer his pension to a SIPP and invest in the Dunas Beach resort to release the tax free cash given Mr H's age at the time. And in particular there is nothing to indicate that Mr H would have invested in the Dunas Beach Resort investment if he had not been encouraged to do so by Mr A. And Mr A only acted in that way because PSFM agreed to accept the business he referred to it.

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 investment by Mr A 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 H 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 H 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 A and his principal Openwork before it received Mr H'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 H 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 H. I accept that PSFM had no obligation to give advice to Mr H, 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 H. Rather it is that PSFM did not meet its regulatory obligations, or treat Mr H fairly, by accepting his application for a SIPP introduced by Mr A."

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

Responses to the provisional decision

Mr H agrees with the provisional decision. He says that he has no recollection of signing the non-financial advice agreement and does not have a copy of it in his records. He also provided a copy of an email in June 2010 from PSFM relating to his application sent to an email address relating to another business Mr A ran rather than the financial advice business. Mr H says this shows PSFM had a relatively familiar and informal relationship with Mr A.

PSFM does not agree with the Provisional Decision. Its lawyers made a number of points including:

- There are no grounds for holding PSFM liable for Mr H's losses.
- PSFM fully understands the nature of the principal agent relationship.
- There was nothing irregular about the status of Mr A.
- Mr A appeared to be an employee of Henderson Stone & Co Ltd in the Financial Services Register until July 2010. Mr H's SIPP application was in June 2010.
- At the time of the advice, unbeknown to PSFM, Mr A was suspended from conducting regulated business by Openwork.
- Openwork ought to have notified the FCA and removed Mr A's name from the register when it first had concerns.
- Even if PSFM had searched the register at the time of Mr H's application it would have found Mr A's name as being a person authorised with CF30 Customer function and to the outside world as being a person authorised to undertake regulated activities.
- PSFM was acting upon publicly available information and should not be penalised for doing so. Henderson Stone continued to be an appointed representative of Openwork until 16 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 A satisfy the second FCA point 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 A 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 A operated.

- Openwork's refusal to accept liability for Mr H's loss is entirely predictable on commercial grounds. And no weight should be attached to this refusal.
- Further as an employee of Henderson Stone it is vicariously liable for Mr A's actions.
- The Provisional Decision says there is no evidence that Openwork authorised Mr A 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 A's operations there is no evidence that openwork didn't authorise Mr A – beyond Openwork's refusal to compensate Mr H 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 A's authority, the advice Mr A gave to Mr H to sell his existing 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 case of *Anderson v Sense Network* also says that a principal is liable for the acts and omissions of the appointed representative that are within the scope of his authority but performed negligently. Although the *Anderson v Sense* case did not consider whether there was a single braided stream of advice as in the *TenetConnect* case and it does not contradict that case.
- 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's assertion that it is not responsible because the advice to buy Dunas Beach investment was outside its authority is wrong.
- 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 H 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 H's relationship.
- It is no part of the Provisional Decision that PSFM should have advised Mr H on the merits of his investment. PSFM provides an execution only service and Mr H 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 H's loss.
- The advice from Mr A to:
    - sell regulated investments
    - open a SIPP with PSFM
    - invest in the Dundas Beach Resort project

  constitutes a single braided stream of advice to use terms from the *TenetConnect* case.
- 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 must be constructed that even treated in isolation, PSFM's decision to allow Mr H to open the SIPP was wrong.

But this does not make sense.

- Mr A appeared to the world as fully entitled to conduct regulated business of his appearance in the Financial Services Register, where he was listed at the date of Mr H's application to PSFM.
- In any event registration was not necessary as it is permitted for unregulated introducers to introduce business to SIPP providers.
- So treating the opening of the SIPP in isolation, 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 that PSFM should have or was entitled to make.
- So PSFM is not responsible for the losses incurred by Mr H.
- 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 that act by itself caused Mr H 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 H 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 H 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 Mr A's advice to Mr H which breaks the chain of causation between PSFM and Mr H's application and the losses suffered on the Dunas Beach Resort project.
- The reasoning in the Provisional Decision seems to deprive Mr A of all responsibility for his actions. The general principle is that the free acts of a person intended to exploit the situation created by a defendant negatives causal connection.
- Mr A's actions are the critical causal factor that caused Mr H'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 H.

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.

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:

> *"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 H'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 H'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 H'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 H), 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 A, 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 A. 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 A was on the basis he was with an introducer who was authorised and regulated by the FSA/FCA - not on the basis Mr A 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 A 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 A, not with Openwork.

Mr A's status as an appointed representative

It is not really in dispute that Mr A was an appointed representative of Openwork at the time of the disputed advice in this complaint. If PSFM had checked the register at that time he would have appeared to be authorised as an appointed representative even though he was apparently suspended at the time. 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 June 2012.

Although Mr A was registered as an appointed representative of Openwork, as I set out in my provisional decision, PSFM should not have treated Mr A as if he were an authorised person as he was not. He was only 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, who had *"the appropriate FSMA Part 4A permissions to provide advice…"*

Mr A 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 A could only do these things if authorised to do so by his principal. Appropriate checks on Mr A 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 A 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 A's operations there is no evidence that Openwork didn't authorise Mr A.

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 A 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 A 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 A. It would have known if it properly understood Mr A'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 A did not have permission from Openwork to carry on those regulated activities.

A single braided stream of advice

PSFM says that even if Mr A 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 A's acts and omissions and there is no issue with his advice not being authorised by Openwork.

In my provisional decision I said:

> *"Mr H complained to Openwork. It did not uphold his complaint. Mr H referred the complaint to the Financial Ombudsman Service and an Ombudsman agreed that Openwork was not responsible for the advice Mr A 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 for any part of the advice Mr H had received from Mr A.

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 A's acts and omissions in relation to the advice to sell Mr H's existing pension or that Openwork authorised the advice Mr A gave to Mr H in this case.

In my provisional decision I said:

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

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 A 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 A 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 A despite what Openwork would have said.

PSFM has not said it made enquiries about which personal pensions Mr A could advise upon. And it made no attempt to limit Mr A's Introducer Agreement only to cases where Mr A 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 A 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 A 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 A.

Also doing business with Mr A without first checking with Openwork exposed clients such as Mr H to the risk, which PSFM has referred to as entirely predictable, that Openwork would refuse to accept responsibility for the advice given by Mr A. 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 A 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 A 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 A 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 A was not authorised to do business with it. And in turn it would have refused to accept any business from Mr A.

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

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

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

PSFM says Mr A'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 A sometime before it accepted Mr H's application. PSFM was in error when it accepted Mr H's application as introduced by Mr A – and that error postdates Mr A'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 H's loss for this reason.

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

I cannot look at any complaint against Mr A 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 H would have done if that had not happened.

Mr A 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 A.

If Mr H had become aware that PSFM (or other SIPP operators) would not accept his application from Mr A 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 A's advice in the form it was in.

If Mr A could not introduce SIPP business that involved Dunas Beach Investments in this case, given the timing of events and Mr A's suspension by Openwork, it seems more likely than not that he would have told Mr A 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 Dundas Beach resort investment by Mr A (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 H 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 A and his principal Openwork before it received Mr H'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 H 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 customer's 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 H. I accept that PSFM had no obligation to give advice to Mr H, 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 H. Rather it is that PSFM did not meet its regulatory obligations, or treat Mr H fairly, by accepting his application for a SIPP introduced by Mr A.

In the circumstances, it is my view that Mr H 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 H has suffered

Putting things right

Fair compensation

My aim is that Mr H should be put as closely as possible into the position he would probably now be in if things had not gone wrong and Mr H had not invested in the Dunas Beach investment. However it does seem that Mr H is likely to have transferred his pension because he wanted to consolidate his pensions and take the available tax-free cash from his pension in order to buy a car.

I think Mr H would have invested differently. It's not possible to say *precisely* what he would have done, but I'm satisfied that what I've set out below is fair and reasonable given Mr H's circumstances and objectives when he invested.

What must PSFM do?

To compensate Mr H fairly, PSFM must:

- Compare the performance of Mr H's investment with that of the benchmark shown below. If the *actual value* is greater than the *fair value*, no compensation is payable. If the *fair value* is greater than the *actual value* there is a loss and compensation is payable.

- PSFM should add interest as set out below.

- If there is a loss, PSFM should pay into Mr H's pension plan to increase its value by

the amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

- If PSFM is unable to pay the compensation into Mr H's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mr H won't be able to reclaim any of the reduction after compensation is paid.

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

- It's reasonable to assume that Mr H is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr H would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

- Pay Mr H £500 for distress and inconvenience for the total loss of the investment and the considerable impact this has had on Mr H's pension and financial position. It has caused him considerable worry and stress especially as he might have started to take an income from his pension by now given his difficult financial position.

Income tax may be payable on any interest paid. If PSFM deducts income tax from the interest, it should tell Mr H how much has been taken off. PSFM should give Mr H a tax deduction certificate in respect of interest if Mr H asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

SIPP investment name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
The Resort Group Dunas Beach Resort investment	Still exists but illiquid	For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)

Actual value

This means the actual amount payable from the investment at the end date.

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

PSFM should take ownership of the illiquid assets by paying a commercial value. The

amount PSFM pays should be included in the actual value before compensation is calculated.

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

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

Fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, PSFM should use the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

Any additional sum that Mr H paid into the investment should be added to the *fair value* calculation at the point it was actually paid in.

Any withdrawal made by Mr H from the SIPP, such as the tax free cash payment, should be deducted from the fair value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if PSFM totals all those payments and deducts that figure at the end to determine the fair value instead of deducting periodically.

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.

Why is this remedy suitable?

I've chosen this method of compensation because:

- It is likely Mr H wanted to achieve some income with some growth with a small risk to his capital.

- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to his capital.

- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.

- I consider that Mr H's risk profile was in between, in the sense that he was prepared to take a small level of risk to attain his investment objectives. So, the 50/50 combination would reasonably put Mr H into that position. It does not mean that Mr H

would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker investment. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mr H could have obtained from investments suited to his objective and risk attitude.

My final decision

I uphold Mr H's complaint against PSFM SIPP Limited. My decision is that PSFM SIPP Limited should pay Mr H 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 H to accept or reject my decision before 21 September 2022.

Philip Roberts
Ombudsman