DRN-3749996

The complaint

Mrs E complains that PSFM SIPP Limited (PSFM) failed to carry out due diligence checks when accepting her application for a Self-Invested Personal Pension (SIPP) in 2011. She says it didn't carry out appropriate checks on the advisor who recommended the transaction, or on the investments to be held in the SIPP. Mrs E says the adviser was no longer authorised when he advised her to transfer her pension to a SIPP with PSFM.

Mrs E is represented by her (new) financial adviser 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 investmentadvice.

The adviser

Mrs E says she was advised by a man I will call Mr H. 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 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.

Henderson Stone & Co Ltd was therefore authorised by its principal, Openwork, to carry on the activities Openwork authorised it to carry out. And in turn Mr H was approved to carry on the controlled function CF30 – which here means investment adviser – for Henderson Stone's (then) principal, Openwork.

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.

Mrs E's SIPP application was in Febraury 2011.

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 via the 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 about EUR 60,000. The price was to be paid by stages. Mrs E paid around £30,000 as a down payment from her 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 Mrs E's investment, but I understand it is illiquid and no value can be realised for it for Mrs E's pension scheme.

The relationship between Mr H and PSFM

PSFM has explained things as follows:

- It does not have a record of the date of Mrs E's application to it other than the date on the application form. 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.”*

What happened – the events complained about

Mr H gave advice to Mrs E’s husband. Mrs E met Mr H at her home in 2010 when he advised her husband to transfer his pension to PSFM and invest in the Dunas Beach Resort. Mr E’s SIPP application was signed in July 2010. Mrs E says a few months later Mr H approached her direct to discuss her pensions. Mrs E says the first time they met to discuss her pension was in January 2011. Mr H gathered information about Mrs E’s existing pensions and in early 2011 he recommended that she also transfer her pensions to PSFM to invest in the Dunas Beach Resort investment. Mrs E’s application was signed in February 2011.

Mrs E says Mr H was very enthusiastic about the investment and was emphasizing his qualifications and expertise as a financial adviser and that he said he had invested all his pension in this way as it was such a great deal.

Mrs E says Mr H told her this was the last unit left and that if she didn’t give him a decision right away he would have another investor. She says she questioned him about what would happen if the resort was to suffer a natural disaster? What would happen to her investment? He replied that all necessary checks and due diligence had been done and it had been approved by the UK Government and therefore in the event of a disaster she would be fully compensated.

Mrs E says Mr H supplied all the forms and other documents to be signed by her with regard

to the SIPP application some of which Mr H also signed as a witness. He then took all the paperwork away and dealt with its implementation. Mrs E says she did not sign any execution only forms.

Mrs E signed an application form for a SIPP with PSFM and a SIPP bank account on 7 February 2011. The account application was witnessed by Mr H.

On 8 February 2011 Mrs E signed a supplemental deed relating to the SIPP. Her signature was witnessed by Mr H. He gave his occupation as "Sales Adviser".

Neither Henderson Stone nor Openwork is referred to on any of the signed documents I have seen.

The SIPP was opened on 8 February 2011 and later that month it received transfers in of nearly £20,000 and around £11,000 from Mrs E's existing pensions and paid out around £29,000 in respect of the property investment.

Unlike in her husband's case, no "IFA Fees" were paid to Mr H from the SIPP account.

Income referred to as property income in the statement was paid into the account in 2015 and 2016. I understand further income was paid until 2019.

In 2016 Mr and Mrs E were concerned about their pensions – it was costing them money each year and didn't seem to be making anything for them. They contacted a different financial adviser. He tried to find out what their pensions were worth and how he could transfer Mrs E's pension to a different investment. He discovered the investment was illiquid and could not be sold.

Mrs E complained to Openwork about the advice she had received saying the advice was unsuitable because the investment was high risk.

The complaint against Openwork

Mrs E complained to Openwork about the advice Mr H had given. Openwork did not uphold Mrs E's complaint. It said:

- Openwork has no record of Mrs E as a client in relation to Mrs E's SIPP nor the investment in Dunas Beach. Neither of those arrangements were available through Openwork.

- Mr H worked at Henderson Stone and it was an independent contractor pursuant to a franchise contract with Openwork.

- The Franchise contract authorises an adviser such as Mr H to act as an appointed representative of Openwork. He resigned as an appointed representative on 17 July 2010.

- Openwork is not responsible for the acts and omissions of the adviser when acting outside that agreement.

- Openwork authorises advisers to advise on only a restricted range of approved investments and services.

- Mr H was no longer Openwork's appointed representative at the time of the

application.

- Mr H was not authorised by Openwork to give the advice Mrs E was complaining about and it is not responsible for it.

Complaint against PSFM

Mrs E's IFA complained to PSFM at the same time as making a complaint on behalf of Mr E. The IFA initially said (incorrectly) that Mr H had ceased to be authorised in February 2010. He said this was before Mr and Mrs applications were introduced to PSFM.

PSFM issued its final response on 10 August 2016. PSFM said that Mr H ceased to be authorised by Openwork on 22 July 2010 which was after Mr and Mrs E were advised. It went on to say:

> *"[Mr H] was responsible for the advice he gave to you to invest into the Dunas Beach Resort, which he provided whilst he was still an FSA Approved person (CF30). To facilitate this investment, as [your IFA has] stated in your complaint you then subsequently set up a PSFM SIPP. Our records do not have any evidence to show that PSFM SIPP paid [Mr H] an introducer's fee for your introduction, whereas his introducer's fee of £322.65 for your husband's introduction was deducted from your husband's SIPP, or this introduction for which [Mr H] did not claim an introducer's fee, happened at the same time your husband signed his PSFM SIPP application form on 19 July, which was before [Mr H] ceased to be an FSA Approved Person.*
>
> *Therefore this evidences that PSFM SIPP satisfied the regulator's expectation that it should only accept introductions from FSA (in 2010) Approved Persons, which Mr H was on 19 July 2010, and whose firm had the relevant FSMA Part IV permissions (which Openwork Limited had at the time and still does have)."*

Mrs E's IFA pointed out that Mrs E's application was in February 2011 which was after Mr H has ceased to be authorised.

On 11 August 2016 PSFM said

> *"[Mrs E's] application form does not include any reference to [Mr H] as an introducer. Also unlike [Mr E] where there was a deduction from his SIPP to cover [Mr H's] introduction fee, there has been no such deduction from [Mrs E's] SIPPP. Therefore on the balance of probabilities this would infer that either [Mr H] did not directly introduce [Mrs E] to PSFM SIPP, which would be supported by him not claiming an introducers' fee. This is reinforced by the fact that none of Mrs E's SIPP Annual Report packs reflect [Mr H] as being [Mrs E's] adviser (under financial adviser details section it states "No adviser recorded"). Or if [Mr H] did introduce [Mr E's] application his fee was for a joint introduction to [Mr and Mrs E] which happened at the same time [Mr E] signed his PSFM application form on 19 July 2010, which was before [Mr H] ceased to be an FSA Approved Person."*

On 17 August 216 PSFM said:

> *"Please can I reiterate that PSFM SIPP is a SIPP administrator, whose sole function is to administer SIPPs and they have never given any advice to any clients and I have not been able to find any evidence to the contrary that PSFM SIPP provided any advice to [Mr and Mrs E]. At the time of their introduction to PSFM SIPP by [Mr H], any advice was provided by him whilst he was an FSA Approve*

person working for Openwork Limited and this is where the complaint should be focused."

After Mr's E's complaint was referred to The Financial Ombudsman Service, PSFM said:

"We can find no evidence that [Mrs E] was introduced to PSFM SIPP by [Mr H], as inferred in [her IFA's] original letter of complaint dated 13 July 2016. There is nothing in any of the documentation completed in the setting up of [Mrs E's] PSFM SIPP to evidence that [Mr H] was [Mrs E's] adviser or introducer, and there is no evidence that he introduced [Mrs E] to PSFM SIPP Limited. Unlike her husband's PSFM SIPP statement … there has been no introducer fee paid to [Mr H] for [Mrs E's] SIPP.

While [Mr H] may have witnessed [Mrs E's] application form and Supplemental Deed; the Bank of Scotland PSFM SIPP application form states N/A against the IFA section, as does the PSFM SIPP application form under the investment adviser section. Therefore we can only assume [Mrs E] decided to come to PSFM SIPP directly based upon the fact that this is what her husband had previously done.

Alternatively if [Mr H] did advise [Mrs E] on this transaction when he was no longer an FSA Approved person without disclosing this to [Mrs E], this is concerning. However, such advice relates solely to [Mr H], previously employed as an FSA Approved Person by Openwork…and has nothing to do with PSFM SIPP. Again I reemphasise there is no evidence to support the[Mr H] introduced [Mrs E] to PSFM SIPP. To the contrary, as stated above, unlike her husband, there was no introducer fee paid out of [Mrs E's] PSFM SIPP.

Our investigation

The complaint about PSFM was referred to the Financial Ombudsman Service and one of our investigators looked into it. He thought the complaint should be upheld. He made several points but in summary he said:

- It was not PSFM's role to determine that the investment was suitable for Mrs E.
- It was PSFM's responsibility to carry out checks on the introducer Mr H and the investment before deciding whether to accept or reject Mrs E's application.
- Mr H was not authorised in his own right. He was an appointed representative of Openwork. As such he was only authorised to do the things Openwork had agreed to accept responsibility for. Openwork is a restricted advice firm meaning that it only authorised Mr H to advice on the limited panel of providers it did business with. PSFM should have known it was not on Openwork's panel of approved providers and that Mr H was not therefore authorised to advise on its SIPPs.
- PSFM should have realised Mr H was acting without authority and this should have been a serious concern to PSFM.
- PSFM should not have accepted Mrs E's SIPP application. And this would have meant Mrs E would not have invested in the Dunas Beach Resort.
- PSFM should therefore compensate Mrs H for the losses she has suffered. And the investigator went on to explain how he thought PSFM should do that.

Although the investigator did not say in express terms that he thought Mr H had introduced Mrs E's application it is clear that was his view and the basis on which he had drawn his

conclusions.

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

- There are no grounds for holding PSFM liable for Mrs E's losses.
- The key piece of legislation governing this matter is the General Prohibition in section 19 Financial Services and Markets Act 2000. It provides that no person may carry on a regulated activity in the UK unless he is an authorised person or an exempt person.
- PSFM fully understands the nature of the principal/agent relationship.
- Mr H was on the Financial Services Register until 22 July 2010 and thereafter could not lawfully give regulated investment advice and Openwork was no longer responsible for his acts or omissions under their previous agreement.
- If Mr H gave regulated advice in breach of the General Prohibition this was not known by PSFM at the time it accepted Mrs E's application.
- The investigator referred to two examples of good industry practice for SIPP operators: confirming that intermediaries have appropriate permissions, and having terms of business with them.
- 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 FCA point quoted in the provisional decision.
- The investigator had not focused sufficiently on the issue of whether in fact Mr H introduced Mrs E to PSFM.
- No introducer fee was paid to Mr H in respect of Mrs E while one was paid in respect of Mr E. It seems unlikely Mr H would make the introduction and then not seek to be remunerated for it. This is a key point which has not been considered – if there was no introduction then Mrs E's complaint must fail.
- Openwork's refusal to accept liability for Mrs E's is entirely predictable on both legal and commercial grounds as a general point and no weight should be attached to this refusal. And specifically in this case because Mr H was no longer an appointed representative of Openwork at the time the SIPP application was made to PSFM and so there is no basis upon which Openwork could be held liable. Mr H breached the General Prohibition and Mrs E should look to Mr H for redress not PSFM.
- The duty to pay due regard to the interests of customers and treat them fairly must be considered in the context of the contractual arrangements that Mrs E has with PSFM.
- PSFM contracted with Mrs E as an execution only SIPP operator.
- The analysis in the High Court decision on this point in *Adams v Options SIPP UK LLP* applies to PSFM and Mrs E's relationship.
- It is no part of the investigator's findings that PSFM should have advised Mrs E on the merits of his investment. PSFM provides an execution only service. This is a point of agreement with the investigator and is relevant to the question of what caused Mrs E's loss.
- The advice from Mr H 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.

- 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 Mrs E to open the SIPP was wrong.

  but this does not make sense.
- It is true that Mr H no longer appeared on the Financial Services Register as able to lawfully conduct regulated financial services activities. But treating an introduction for the purposes of operating a SIPP in isolation, registration is not necessary as it is permitted for unregulated introducers to introduce busines to SIPP providers.
- So treating the opening of the SIPP in 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. And this is was not a determination that PSFM should have or was entitled to make.
- So PSFM is not responsible for the losses incurred by Mrs E.
- 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. It is not obvious that if PSFM had refused to open a SIPP for Mrs E that she would not simply have gone somewhere else to get access to this opportunity. This 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 operators would have allowed the investment, the losses were caused by the intervening act of Mr H's advice to Mrs E which breaks the chain of causation between PSFM and Mrs E's application and the losses suffered on the Dunas Beach Resort project.
- Mr H's actions are the critical casual factor that caused Mrs E's loss and he bears full responsibility for those actions. They are nothing to do with PSFM.
- PSFM is not therefore liable for the losses suffered by Mrs E.

The Provisional Decision

I issued a Provisional Decision in this complaint on 9 September in which I explained why I agreed with the investigator's assessment, why I thought PSFM was at fault and what it should do to put things right. I invited Mrs E and PSFM to let me have any comments they wished to make in response to my Provisional Decision. Both Mrs E and PSFM have said they have nothing further to add.

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:

> *"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 Mrs E'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 Mrs E'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 Mrs E'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 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…."*

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 of 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 regard to the interests of its customers (in this case Mrs E), 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.

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 with adequate risk management and effectively, and pay due regard to its customers interests and treat them fairly.

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.

Mr H ceased to be an appointed representative in 2010. The FSA Register was updated to show this from 22 July 2010.

At no point has PSFM said it became aware of Mr H's changed status and terminated its Introducer Agreement with him before Mrs E's application in February 2011.

Did Mr H introduce Mrs E's SIPP application to PSFM?

PSFM says there is no evidence Mr H introduced Mrs E's SIPP application to it. It also says some evidence points to the conclusion that he did not introduce Mrs E's application. It says unlike in Mr E's case, it did not pay an introducer fee to Mr H and it is unlikely he would have made the introduction without being remunerated.

However Mrs E says that Mr H advised her to open a SIPP with PSFM, and to switch her pensions to it in order to invest in the Dunas Beach Resort. And that he gave her the application forms to sign and then took them away in order to deal with the implementation of his advice.

As Mrs E says she did not send the application to PSFM herself it follows that it is her version of events that Mr H submitted her application to PSFM.

It is accepted by PSFM that Mr H introduced Mr E's similar application a few months earlier. But PSFM had little evidence showing that Mr H submitted the application – other than a record of paying a fee to him. And it made a record that Mr H was the introducer. PSFM has said it was Mr H's practice to call into its office and drop off applications rather than, say, send them in by post. So the absence of a copy of any letter from Mr H submitting Mrs E's application in this case is not therefore clear evidence that Mr H did not introduce Mrs E's application as there was no such letter in Mr E's case either.

There is a lack of evidence showing Mr H advised Mrs E to open a SIPP with PSFM, transfer her pension to it and invest in Dunas Beach Resort. But it is more likely than not that this is what happened. It is what Mrs E says happened and it is plausible. It is unlikely she would have opened an SIPP and transferred her pension to it without such advice even if her husband had done the same only a few months earlier.

As PSFM is now aware Mr H promoted the Dunas Beach investment and his use of a "non-advised fee agreement" in other cases shows that he tried to find a way around the normal obligations on regulated advisers.

The main point for PSFM is that it did not pay an introducer fee to Mr H in relation to Mrs E. PSFM says Mr H not claiming a fee indicates he is unlikely to have made the introduction as he is unlikely to have done so without payment.

However PSFM has itself suggested that an alternative explanation might be that Mr H dealt with Mr and Mrs E's business on a joint basis and only charged one fee. That said I do not really think that is the explanation.

Another point made by PSFM is that it is most unlikely he would have introduced the SIPP business without being remunerated for doing so. But this point overlooks two points. First

Mr H will almost certainly have received a payment of some sort for the introduction of the business to Dunas Beach Resort. And so will not have been reliant solely on a fee for the introduction of the SIPP. But that investment had to be made if Mr H was to receive any payment at all. So it was in his interest to try to ensure the application process went smoothly. Mr H introduced Mr E's business to PSFM. It seems likely he will have done the same in relation to Mrs E. It seems unlikely Mr H will have told Mrs E she would have to deal with her application herself.

The second point is that by the time of Mrs E's application Mr H was no longer an appointed representative. He may therefore have thought it best to exercise some caution and not draw more attention to himself by requesting the payment of a fee in case it triggered any checks and his new status was discovered. So a decision by Mr H to forego a fee from PSFM is not implausible.

But on the issue of checks, at no point has PSFM said that by the time of Mrs E's application it knew Mr H was no longer an appointed representative and so was on its guard not to accept further applications from him.

PSFM has also said it only checked the FCA register when Mr H first became and introducer and then only from time to time afterwards. So it cannot be said that the application could not have been submitted by Mr H because that would definitely have triggered a check of the register and rejection of the application.

The lack of an introducer fee does not support Mrs E claim that Mr H introduced her to PSFM. But it does not disprove her claim either and her claim is supported by the other circumstances surrounding her application. When account is taken of all of the circumstances I consider it is more likely than not that Mr H advised Mrs E to invest in the Dunas Beach Resort investment, and that he advised her to set up a SIPP with PSFM and transfer her existing pension to it in order to make that investment. And it is more likely than not that he arranged for all this to happen by helping Mrs E with the application forms etc and submitting them to PSFM. It is my finding that it is more likely than not that Mr H did introduce Mrs E's application to PSFM.

The checks made by PSFM on Mr H

PSFM says it was not obliged to check upon Mr H's regulatory status upon each application it received. I do not need to decide that point. I say that because even if PSFM could reasonably only make checks from time to time by the time of Mrs E's application in February 2011 Mr H had not been an appointed presentative of Openwork for almost six months. Bearing in mind the purpose for which such checks should be made I do not consider it fair and reasonable for things not to be checked for that long. It ought therefore to have rechecked Mr H's regulatory status by the time of Mrs E's application. If it had done so PSFM would have realised Mr H was no longer an appointed representative and would have refused to accept the application, he introduced.

And in any event PSFM should not have entered into an Introducer Agreement with Mr H. And if it had not done so it would not have accepted Mrs E's application introduced by Mr H in 2011.

When it first considered accepting business from Mr H, 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 – the apointed representative 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. It 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 the Introducer Agreement with Mr H personally and accepted the business he referred to it including Mrs E's application for a SIPP, to transfer her existing pension to it and invest in the Dunas Beach Resort investment.

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. It was not one of the limited number of 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, and whether it was in its customers best interests 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.

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 not have entered into Introducer Agreement with Mr H in 2010 and it should have refused to accept any business from Mr H. PSFM could and should have refused Mrs E's application without going beyond its normal contractual role and regulatory permissions and without giving him advice on the suitability of the investment for him.

PSFM has argued that the principal of an appointed representative maybe responsible for advise composed of multiple strands if it is responsible for one of the strands for example the advice to sell an existing pension. But as mentioned, 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.

Also doing business with Mr H without first checking with Openwork has exposed clients such as Mr and Mrs E 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.

PSFM should not have accepted business introduced by Mr H. If PSFM had not entered into an Introducer Agreement with Mr H, Mrs E's husband would not have taken out a PSFM SIPP and invested in the Dunas Beach Resort. If he had not done so Mr H would not have be able to return and persuade Mrs E to do the same thing.

And in any event, regardless of Mr E's application, PSFM should not have accepted Mrs E's application, introduced by Mr H, for a SIPP and transfer her existing personal pension to it because it should not have entered into an Introducer Agreement with Mr H.

And this means PSFM would not have made the investment to Dunas Beach Resort for Mrs E because it would have had no SIPP to make the investment from.

Did PSFM's failings cause Mrs E's loss?

I cannot see that there is any evidence that Mrs E was motivated to open her SIPP and invest in PSFM because of, for example, an incentive payment as in the *Adams v Options SIPP* case. I acknowledge that Mrs E's husband had invested in a similar way in his PSFM SIPP but as mentioned above PSFM should not have accepted his application either. In my view, there is however nothing to indicate that Mrs E would have moved her pension if she 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.

Mrs E had a relatively small pension pot and at the time she was advised Mr H was no longer an appointed representative. I do not consider it likely that she would have been advised to move her pension and invest in Dunas Beach Resort if PSFM had not agreed to

accept business introduced by Mr H. Nor do I consider that any other regulated financial adviser acting reasonably would have advised Mrs E that investing her pension in the Dunas Beach Resort investment was suitable for her. It is a higher risk, esoteric investment that is unsuitable for a pension investment for most retail investors.

I therefore consider it unlikely that Mrs E 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 Mrs E'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 Mrs E fairly by accepting her application. And I think that, in not doing so, it allowed her 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 Mrs E. I accept that PSFM had no obligation to give advice to Mrs E, or otherwise ensure the suitability of a pension product or investment for her. My finding is not that PSFM should have concluded that the investment or SIPP was not suitable for Mrs E. Rather it is that PSFM did not meet its regulatory obligations, or treat Mrs E fairly, by accepting his application for a SIPP introduced by Mr H.

Putting things right

Fair compensation

My aim is that Mrs E 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 Mrs E's present position to the position she would be in if she 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 Mrs E's pension, if he had not transferred, with the current value of his SIPP. In summary:

1. Obtain the notional transfer value of Mrs E's previous pension plan, if it had not been transferred to the SIPP.
2. Obtain the actual transfer value of Mrs E's SIPP, including any outstandingcharges.
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 Mrs E'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 Resort 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 Mrs E any fees or charges she has paid from money other than the money originally transferred in form 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 Mrs E £750 for the distress and inconvenience the avoidable problems with his pension will have caused her. I understand from dealing with Mr E's complaint that as well as the worry and frustration she will have experienced as a result of the losses in her pension, PSFM took legal action to recover fees including taking enforcement action to recover the money fund to be owing. I understand that the same is the case for Mrs E. This will have casued Mrs E further worry and distress that would not have been the case if PSFM had not accpted Mrs E's SIPP application and invested in Dunas Beach Resort on her behalf.

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 Mrs E'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 Mrs E 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 Mrs E may receive from the investments and any eventual sums she 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 Mrs E's SIPP it should pay the compensation as a lump sum to Mrs E. 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 Mrs E's marginal rate of tax at retirement. For example, if Mrs E 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 Mrs E 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 Mrs E or into her SIPP within 28 days of the date PSFM receives notification of her 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

My final decsion decision is that Mrs E's complaint should be upheld for the reasons I have

set out above and that PSFM SIPP Limited should pay fair compensation to Mrs E as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs E to accept or reject my decision before 10 November 2022.

Philip Roberts
Ombudsman