DRN-3861909

The complaint

Mr D complains that Punter Southall SIPP Limited, which at the time of his complaint traded as 'PSFM SIPP' (PSFM), failed to carry out due diligence checks when accepting his application for a Self-Invested Personal Pension (SIPP) in 2010. He says it didn't carry out appropriate checks on the adviser who recommended the transaction, or on the investments to be held in the SIPP.

Mr D is being represented. Any references to Mr D will include information provided by his representative.

What happened

The parties

PSFM

PSFM is a regulated SIPP provider and administrator. It is authorised in relation to SIPPs, to arrange (bring about) deals in investments, dealing 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

Mr D says he was originally introduced to the idea of reviewing his pension by a man I will refer to as 'Mr H'. Mr H was registered with the regulator who at the time was the Financial Services Authority (FSA), and is now the Financial Conduct Authority (FCA), as an approved person. I will refer to the 'FSA', the 'FCA' and the 'regulator' interchangeably. An approved person is a person the regulator has approved to do one or more activities, which are 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'.

Openwork says Mr H worked at Henderson Stone and it was an independent contractor pursuant to a franchise contract with Openwork. And that its franchise contract authorises an approved adviser at a franchisee firm such as Mr H, to act as an appointed representative of Openwork. So, it follows that Mr H was authorised by Openwork to carry on the activities it (Openwork) authorised him to carry out.

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 FSA.

Mr D's case involves a fractional investment into property at TRG's Dunas Beach Resort (the 'Dunas Beach investment'). The total agreed price as shown in a letter from a TRG representative dated 22 December 2010 was EUR 72,475. The price was to be paid in two stages – the first was a deposit totalling EUR 47,108.75. And a final balance of EUR 21,742.50 was to be paid on completion.

The purchase date was recorded as 11 November 2010 under 'Client Summary' and the first deposit price was to be paid by 26 November 2010. The amount due on completion was recorded to be paid by way of a 'mortgage'.

On 23 November 2010, a transfer totalling £53,989.76 (sterling) was received into Mr D's PSFM SIPP. And on 26 November 2010 £38,678.93 was paid for the Dunas Beach investment. This meant Mr D's pension funds bought membership of a limited company with the company buying promissory contracts to buy a suite at the Dunas Beach Resort. Mr H's fees of £1,079.80 were paid on 6 December 2010 from the SIPP.

On 3 July 2012, a representative from TRG wrote to Mr D to confirm the funds he (Mr D) had already paid will purchase a lower share in an apartment with all completion fees and taxes paid. The letter noted that after this time the only fees payable from his SIPP would be monthly resort management fees of £25.The letter said by transferring Mr D's deposit to a lower share, it would avoid him having to finance the completion balance for a period of time and also avoid paying higher completion taxes/ fees which were due in October 2012.

Since the purchase, there have been difficulties with the Dunas Beach investment and legal completion has not taken place for some, if not all, of the properties. So, at least some of the investments have turned out to be dormant companies with no assets. I don't know if that is the case with Mr D's investment. However, the Dunas Beach investment is illiquid and no value can be realised for it for Mr D's SIPP.

The relationship between Mr H and PSFM

PSFM has explained things as follows:

- Mr H (the adviser) 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. But said that

although it cannot find the actual agreement completed back in or around 2009, 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 2009/ 2010. So, the version that has been provided cannot be the exact correct version. However, I can say, on balance, 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* [the Financial Services and Markets Act] *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."*

- As noted above, PSFM paid Mr H - rather than Henderson Stone or Openwork - a fee of £1,079.80 on 6 December 2010, which is referred to as "IFA Fees" on Mr D's SIPP Account Statement.

What happened – the events that led to the complaint

In terms of how he came into contact with Mr H, Mr D explained he had previously been advised by Mr H prior to 2010 about another pension with Aegon. This was the pension that was subsequently transferred to the SIPP with PSFM in 2010. Mr D explained his initial introduction to the Dunas Beach investment via Mr H as follows:

> *"*[Mr H] *phoned me on a few occasions telling me about how great this scheme (the SIPP) was and that we should meet up and he would show me. As I wasn't paying into my old pension, I thought I would give him a chance. When he came to my house, he started telling me he was putting all his pension into this (the SIPP) as it was a win-win situation. He was at my house for a few hours. He showed me all these figures and told me that it was easy to get my money out anytime on retirement age."*

Mr D signed an application form for a SIPP with PSFM. This was dated 11 November 2010. The form asked if Mr D wished to appoint an investment manager. The answer 'no' was given. On the same day Mr D signed an application form to open a SIPP bank account. This was witnessed on the application form by Mr H.

On 12 November 2010 Mr D signed a supplemental deed relating to the SIPP. Again his signature was witnessed by Mr H. He (Mr H) gave his occupation as "Sales Advisor". Neither Henderson Stone nor Openwork is referred to on any of the signed documents.

Mr D says Mr H supplied all the forms to be signed and took away all the signed documents to deal with their implementation.

The SIPP was established on 12 November 2010. And as I've said above, on 23 November 2010, the SIPP account received transfers in of £53,989.76. On 26 November 2010 £38,678.93 was paid over from Mr D's SIPP to purchase the Dunas Beach investment. Also, as noted above, Mr H's fees were paid from the SIPP.

Income referred to as 'property income' was referred to in Mr D's SIPP statements. The sums paid ranged from £146 up to £231 and were paid at various times between May 2015 to October 2019. Property expense payments were made on two separate occasions both of £406 on 17 April 2020 and 20 January 2021 respectively.

Complaint against PSFM

Mr D complained to PSFM in 2019 initially through a Claims Management Company. He said PSFM did not display a duty of care or act in his interests as it (PSFM) facilitated, without consideration of suitability, the pension transfer into the Punter Southall (PSFM) SIPP and the investment into the Dunas Beach investment. Mr D also said that PSFM were negligent in its due diligence around Mr H. And that PSFM had not completed the necessary background checks to identify whether Mr H was a regulated adviser at the time of advice. If it had done so, it would have known he (Mr H) was not regulated at the time of the advice and/ or Mr D's application.

PSFM rejected Mr D's complaint and, amongst other things, said:

- It is aware of the regulator's expectations on it as a SIPP provider. The consistent theme from the FSA/ FCA is that firms acting purely as SIPP operators are not responsible for the SIPP advice or the investment advice given. So, PSFM was under no obligation to check the suitability of the investment. But, it recognises, SIPP operators cannot absolve themselves from the responsibility of treating customers fairly, therefore, SIPP operators are responsible for the quality of business it administers.

- The FCA/ FSA expects SIPP operators to take reasonable steps to demonstrate adequate due diligence on the investments held by their members, to ensure that the proposed underlying investments held within the SIPP is appropriate for pension and is a genuine asset that is not part of a fraud or scam. PSFM considers it met the expectations of the FCA/ FSA in terms of due diligence checks to prevent holdings of non-permitted taxable investments and its checks showed the intended investment was genuine and not a scam.

- PSFM records shows that due diligence was completed on the fractional share purchase in Mr D's Dunas Beach investment and these checks confirmed its authenticity as a genuine investment. PSFM pointed to several documents including the Building Licence and plot registration via the Registry and Notary Office. It also

highlighted it checked the Promissory Contract for the purchase and a sale. And it checked Companies House to ensure the existence of the Dunas Beach Apartment.

- PSFM says the Dunas Beach investment was a HMRC permitted investment and therefore, eligible to be held in a SIPP. The Dunas Beach investment is not an Unregulated Collective Investment Scheme – it is a fractional share in physical commercial property which still exists.

- In 2010 Mr H was already known to PSFM and the initial due diligence checks to review his credentials was completed in 2009. In 2009 the initial checks established via the FSA public register showed he (Mr H) was employed by Henderson Stone & Co Limited which was appointed representatives of Openwork Limited. The initial check also showed Mr H was an FSA approved person (CF30) registered with Openwork. And that Openwork were authorised and regulated by the FSA and had appropriate permissions to give advice on investments and pension transfers.

- In its periodic review in 2010, PSFM said it had established no change in Mr H's employment details. But at the time of Mr D's advice PSFM cannot find evidence the due diligence checks were revisited to identify that with effect from 22 July 2010, Mr H's appointed representative status had changed. In any event, PSFM said it could find no prescribed explanation that this due diligence needed to be checked at every introduction. However, it said prior to Mr D's application the initial checks and subsequent periodic checks it made in relation to Mr H in 2010, didn't present any concerns regarding his regulatory status. Further, Mr H was not identified by the FSA warning notices and/ or was not on any FSA warning list.

- Mr H was responsible for Mr D investing in the Dunas Beach investment. PSFM offered no investment advice nor did it sell or promote the investment to Mr D. It was Mr H who influenced Mr D's view on the appropriate investment and pension transfer.

Our investigation

Mr D referred his complaint to our service. Our investigator recommended upholding the complaint. Amongst other things, he said:

- He agreed that PSFM was not responsible for the suitability of the investment itself.

- However, after setting out the facts of this case along with the FCA principles and relevant caselaw, our investigator said PSFM should have known an appointed representative, such as Mr H, was only authorised if they acted within the authority given by their principal. And in relation to a restricted advice firm such as Openwork, PSFM should have known the authority given by the principal would be restricted and it should have understood that advising on its (PSFM's) SIPP would not be something an Openwork appointed representative was authorised by it (Openwork) to do. Given all of this, our investigator concluded that 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 (Mr H) was introducing SIPP business to PSFM and taking responsibility for the suitability of the SIPP.

- Our investigator considered these points should've been matters of serious concern for PSFM. He thought PSFM should've 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 rather than Mr H, or no agreement at all.

- Further, given Mr H was no longer working for Openwork at the time of the advice to Mr D, our investigator considered that if PSFM had checked with Openwork, it would've discovered Mr H was not authorised to do business with it (PSFM).

- In terms of whether PSFM caused the loss Mr D had suffered, in our investigator's view there was nothing to indicate that he (Mr D) would have transferred from his previous pension if he had not been encouraged to do so by Mr H. And Mr H only acted in that way because PSFM agreed to accept the business he referred to it. So, our investigator said PSFM should compensate Mr D for the losses he has suffered. The investigator went on to explain how he thought PSFM should do that which included £300 for the distress and inconvenience it caused.

PSFM disagreed with the investigator's view. In addition to the points it had already made which have been set out above, it said:

- It did not think the investigator's 'criticisms' were well founded and it was not responsible for the loss of Mr D's pension funds.

- In line with good industry practice once the initial checks were conducted in terms of Mr H, PSFM did check the FSA Register 'periodically'. And its initial checks were also in line with good industry practice.

- It fully understood the nature of the principal/ agent relationship. As the investigator correctly identified, Mr H appeared in the FSA Register as an appointed representative of Openwork until 22 July 2010. Thereafter, and on 11 November 2010 (the date of Mr D's SIPP application), Mr H couldn't lawfully provide regulated investment advice and Openwork was no longer responsible for his acts/ omissions in scope of their previous agreement. PSFM said given this, Mr H had breached the General Prohibition. And this wasn't something it was aware of at the time.

- Our investigator attached weight to Openwork's opinion where it states that: *"[t]here is no evidence that Openwork did in fact authorise* [Mr H] *to do business with PSFM and it has refused to accept responsibility for the advice* [Mr H] *gave to* [Mr D]*."* However, PSFM said Openwork refusing to accept liability for Mr D's loss is *"…entirely predictable on both legal and commercial grounds."*

- Openwork couldn't be liable in any event as Mr H was no longer its appointed representative at the time of Mr D's SIPP application. So, PSFM says the person who should be liable is Mr H as he acted in breach of the General Prohibition.

- Whilst it was true that Mr H no longer appeared in the FSA Register as able to lawfully conduct regulated financial services activities, treating an introduction for the purposes of opening a SIPP, registration is not even necessary. So, PSFM considers treating the opening of the SIPP, in itself, means there are no grounds for finding it did anything wrong.

- PSFM noted that it appears that the opening of the account was treated as part of a *"braided stream of advice."* But as a SIPP operator, as it has said several times, it is not responsible for the suitability of the investment or the advice given. As the investigator concedes the suitability of the investment is not a determination that PSFM should have, or was entitled to, make.

- PSFM provides an execution-only service and the client was aware of these restrictions when signing up to its terms of business. PSFM thinks this issue, in particular, speaks directly to the question of what caused Mr D's loss.

- It becomes very difficult to show the act of allowing the SIPP to be opened, in itself, caused Mr D's loss. After all, a SIPP, taken in isolation, is just an empty wrapper - it is only when that wrapper is seeded with invested capital that profits or losses become possible. PSFM says it would argue it is very clear, having treated the opening of the SIPP as an isolated matter, that this act by itself did not cause the losses suffered by Mr D. Those losses were caused by the intervening act of Mr H's advice to Mr D, which, PSFM says breaks any chain of causation between PSFM accepting Mr D's SIPP application and the losses he suffered in respect of the Dunas Beach investment.

Given no agreement could be reached the matter has been passed to me for a final decision.

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.

I have carefully noted all the representations made by both parties and their respective representatives. But I won't be addressing every single point they've raised. I've instead concentrated on the issues I think are central to the outcome of Mr D's complaint. Further, in considering what's fair and reasonable in all the circumstances of this complaint, I've taken into account relevant laws 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.

I'll also mention at this stage that where there's a dispute about what happened I've based my decision on the balance of probabilities. In other words, on what I consider is most likely to have happened in light of the available evidence.

Relevant considerations

<u>The Principles</u>

I consider 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* [the Financial Ombudsman Service] *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 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 applicable 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 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.

Conduct of Business Sourcebook (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 COBS 2.1.1R overlaps with certain parts 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'm 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 D'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 D'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've considered COBS 2.1.1R, alongside the remainder of the relevant considerations, and within the factual context of Mr D's case, including PSFM's role in the transaction.

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. These include:

- 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* [Treating Customers Fairly] *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.)"*

How this applies in Mr D's case

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'm therefore satisfied it is appropriate to take them into account.

Like the ombudsman in the BBSAL case, I don't think the fact the publications (other than the 2009 Thematic Review report) post-date the events that are the subject of this complaint, mean 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 D), 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's 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."

As set out above, in 2009 the FSA 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.*

PSFM says it has met those standards. But I can see that Mr H ceased to be an appointed representative in 2010. The FSA Register was updated to show this from 22 July 2010. And at no point has PSFM said it became aware of Mr H's changed status and terminated its Introducer Agreement with him before Mr D's application in November 2010. In fact, PSFM accepts it did not know Mr H was no longer authorised by the FSA.

Despite not being authorised at the time of the advice, Mr D says Mr H still advised him to open the SIPP with PSFM. And recommended transferring his existing pension to it. Mr D has suggested that he was prompted to do this to specifically invest in the Dunas Beach investment. In his statement Mr D says when being advised by Mr H, he (Mr H) showed him (Mr D) 'figures' about the investment. Mr H also told Mr D it was a 'win-win situation'. I think it is more likely than not that Mr D was recommended to open the SIPP specifically to invest in the Dunas Beach investment. It is what Mr D says happened and it is plausible. It is unlikely he would have opened a SIPP and transferred his pension to it without such advice.

On the issue of checks, PSFM has said it only checked the FCA/ FSA register when Mr H first became and introducer and thereafter from time to time. It says this was in line with best practice at that time and there was certainly no need to check Mr H's status for each application.

Whilst I take on board what PSFM say, that is that it was only required to make checks from time to time, by the time of Mr D's application in November 2010, Mr H had not been an appointed representative of Openwork for almost four months. Whilst there is no specific amount of time for such checks, PSFM has not been able to say when it last checked the register. It says it would check it 'periodically' but hasn't said what that timeframe was at the time of Mr D's application.

Mr H hadn't been registered since the end of July 2010 but in my view, this doesn't mean PSFM had checked it at that time. I think if it had followed Principle 3 it would have taken *"reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems."* Almost four months had passed by and it hadn't thought to check the register. Given the nature of its work, and what these Principles are meant to achieve, I consider this was an unreasonable amount of time not to have checked to see what Mr H's status was at that time.

PSFM say that in any event, even though Mr H was not registered with the FSA at the time, 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 advice about the suitability of its SIPPs for its potential customers.

In any event, as the investigator pointed out, PSFM should not have entered into an Introducer Agreement with Mr H. Instead it should have entered into an agreement with his principal, who at that time, was Openwork. If PSFM had not entered into an agreement with Mr H directly, it would not have accepted Mr D's application introduced by Mr H in 2010.

When PSFM first considered accepting business from Mr H, it 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. Further, PSFM should've understood the appointed representative's regulated status relies entirely on its principal – the appointed representative is not free to do whatever it wants to do 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 Mr D's application for a SIPP to transfer his existing pension to it and invest in the Dunas Beach investment.

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. It should also have known that it (PSFM) had no arrangement with Openwork – that it was not on Openwork's panel of approved providers it did business with. Put another way, it should have known Openwork, and therefore its advisers, did not do business with it.

So, as a general point, PSFM should have known an appointed representative is only authorised if it acts within the authority given by its principal. And in relation to a restricted advice firm, such as Openwork, PSFM should have known that the authority given by the principal would be restricted. And it should have understood that advising on its SIPP would not be something an Openwork appointed representative was authorised by Openwork to do. And PSFM should have understood that if Mr H did not have the authority of his principal to advise on its SIPPs there was a real risk he would be breaching the General Prohibition if he was introducing SIPP business and taking responsibility for the suitability of the SIPP.

This leads to the point, assuming that PSFM were acting under the belief that Mr H was still an appointed representative of Openwork, that if he (Mr H) was acting beyond his authority with his principal he might not be dealing with PSFM in 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 PSFM's 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 an Introducer Agreement with Mr H in 2009 and it should have refused to accept any business from him. It follows that PSFM could, and should have, refused Mr D'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 advice 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 from him.

I can't see 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, despite what PSFM says about the adequacy of its initial checks, doing business with Mr H without first checking with Openwork, exposed clients such as Mr D to the risk. PSFM has, itself, said Openwork's refusal to accept liability for Mr H's advice was entirely predictable.

This also 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/ or 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.

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

For the reasons set out above, I consider PSFM should not have accepted business introduced by Mr H. If PSFM had not entered into an Introducer Agreement with Mr H, I think it's more likely than not that Mr D would not have taken out a PSFM SIPP and invested in the Dunas Beach investment. So, I think PSFM caused loss to Mr D for which he should be compensated.

I can't see that there is any evidence that Mr D 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. I note Mr D had followed advice from Mr H previously about another pension. In my view, there is nothing to indicate that Mr D would have moved his pension for a second time if he had not been encouraged to do so by Mr H. And Mr H only acted in that way because PSFM agreed to accept the business he referred to it.

Mr D had a relatively small pension pot and at the time of the advice Mr H was no longer an appointed representative. I do not consider it likely that he would have been advised to move his pension and invest in the Dunas Beach investment 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 Mr D 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. I therefore consider it unlikely that Mr D would have suffered the same loss if PSFM had refused to accept his application.

Conclusion

In light of what PSFM knew, or ought to reasonably have known about Mr H and his principal Openwork before it received Mr D's SIPP application, in my view it didn't comply with good industry practice, act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr D 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 D. I accept that PSFM had no obligation to give advice to Mr D, or otherwise ensure the suitability of a pension product or investment for him. My finding is not that PSFM should have concluded the investment or the SIPP was not suitable for Mr D. Rather it is that PSFM did not meet its regulatory obligations, or treat Mr D fairly, by accepting his application for a SIPP introduced by Mr H.

Putting things right

My aim is that Mr D should be put as closely as possible into the position he would reasonably be in if things had not gone wrong. In my view that means comparing Mr D's present position to the position he would be in if he had not moved his existing personal pension. It is therefore my decision that Punter Southall SIPP Limited should put things right as follows:

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

1. Obtain the notional transfer value of Mr D's previous pension plan if it had not been transferred to the SIPP.
2. Obtain the actual transfer value of Mr D's SIPP, including any outstanding charges.
3. Pay a commercial value to buy the Dunas Beach Resort investment (or treat it as having a zero value in the compensation calculations).
4. Pay an amount into Mr D'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. Punter Southall SIPP Limited should also refund to Mr D any fees or charges he has paid from money other than the money originally transferred in from his personal pension together with 8% simple interest per year from the date the fee or charge was paid until the date of this decision.
7. Pay Mr D £300 for the distress and inconvenience the avoidable problems with his pension will have caused him. Difficulties with a pension are naturally very worrying especially when all or most of the value seems to have been lost. This is even more distressing when the consumer wants to take their pension and are unable to do so.

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

If Punter Southall SIPP Limited 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 Punter Southall SIPP Limited may ask Mr D to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the investment. That undertaking should allow for the effect of any tax and charges on the amount Mr D may receive from the investments and any eventual sums he would be able to access from the SIPP. Punter Southall SIPP Limited will need to meet any costs in drawing up the undertaking.

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

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

The compensation resulting from this loss assessment must be paid to Mr D or into his SIPP within 28 days of the date Punter Southall SIPP Limited receives notification of his acceptance of this final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation is not paid within 28 days.

My final decision

My decision is that Mr D's complaint should be upheld for the reasons I have set out above and that Punter Southall SIPP Limited should pay fair compensation and interest as set out above under the heading 'Putting things right.'

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 16 January 2023.

Yolande Mcleod
Ombudsman