

### **The complaint**

Mr N has a self-invested personal pension (SIPP) with Gaudi Regulated Services Limited (Gaudi). Mr N says Gaudi failed to carry out appropriate due diligence checks on his application to open the SIPP and invest in non-mainstream investments which have since failed causing his pension to lose all its value.

### **What happened**

Gaudi is the operator and administrator of a SIPP called The EasySIPP (Version 2).

In March 2014 Mr N applied for an EasySIPP. He applied to transfer an existing personal pension to the SIPP. It was valued at around £30,000. It was estimated that this was around 30% of Mr N's total pensions savings. It was recorded that Mr N wanted to take benefits from his pension at age 67. Mr N was aged between 45-50 at the time.

As part of the application Mr N gave details of his financial adviser as "BlueInfinitas Ltd". BlueInfinitas was a regulated financial advice firm shown on the FCA register as authorised [between] January 2014 and January 2016. As I understand it, BlueInfinitas went into liquidation in 2015.

As part of the application form Mr N agreed to the following declarations:

*"I authorise the EasySIPP from [Gaudi] Administration team to open a transactional account with SVS Securities Plc."*

And:

*"I acknowledge the receipt of the SVS Securities Plc Terms of Business and Affinity Bond addendum which describe and control the basis upon which dealing within the SIPP will be undertaken, and I have been notified of the charges for such dealings with the transactional account."*

Accordingly, as part of the application process an account was opened with SVS Securities (SVS) and Gaudi has provided a copy of a document dated the same day as the Gaudi application which is headed:

*"SVS Securities plc Terms of Business  
Appendix G  
Discretionary Managed Service"*

This document begins:

*"These terms shall apply if You have an account that falls within the SVS Discretionary Managed Service and should be read in conjunction with the service features and risk warnings as indicated in the Discretionary Managed Service product brochure and the SVS Securities Terms of Business ("Standard Terms"). Where applicable, these terms shall apply in addition to the Standard Terms. Where*

*any conflict arises between these terms and the Standard Terms, these terms shall prevail.”*

I cannot see that any box has been ticked or any other process used to say the discretionary managed service applies but the form is signed by Mr N. This would tend to indicate that the discretionary service did apply in addition to the Standard Terms.

As mentioned below, it is Gaudi's position that SVS was Mr N's investment manager in this case. On the basis that the discretionary managed service did apply, Mr N gave SVS the power to make investments on his behalf.

Also as part of that application process, on the same day, Mr N signed a letter printed on Gaudi's notepaper that included the following:

*“Scheme Name: The EasySIPP from [Gaudi]*

*Investment Name: Affinity Bond*

*I, [Mr N] being the prospective member/member of the above Scheme write to instruct Gaudi Regulated Services Limited acting on behalf of Gaudi Trustee Limited to purchase Affinity Series I Bonds, as indicated in my separate application, on my behalf for the above Scheme.*

*I confirm that I will receive no personal benefit as a result of my SIPP making the investment and there is no form of pensions liberation associated with the making of this investment.*

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

*I understand that connected party loans are not a permissible investment of a SIPP and therefore myself or any connected party...cannot receive a loan from Affinity either directly or indirectly.*

*I acknowledge that I have been recommended to seek professional advice from a suitably qualified and authorised adviser and have done so via the adviser detailed in my SIPP application.*

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

I will refer to the above as the disclaimer letter.

A “position statement” from SVS Securities showing the position on the SVS account to September 2018 shows just over £21,000 was paid into the SVS account by Gaudi in April 2014 and £21,000 was invested in Affinity Properties Series 1 Bond.

On 4 April 2014 “initial adviser remuneration relating to Easy SIPP” of £1,000 was paid to BlueInfinitas by Gaudi.

A further £8,000 was paid into the SVS account by Gaudi in May 2014. This was invested in various shares in June 2014. Nearly £7,000 was invested in three non-main market shares

and most of the remainder split in investments of £100 into eight FTSE 100 shares. There were no further sales of investments of note after 2014. The three non-main market securities are all shown as delisted by the end of the period covered by the statement ie by September 2018. (For convenience I will refer to these investments as the SVS shares.)

A payment of “annual adviser remuneration” of around £250 was paid by Gaudi to BlueInfinitas in April 2015.

In August 2018 a claims management company (CMC) acting for Mr N made a subject access request to Gaudi under the Data Protection Act.

In December 2018 Gaudi was contacted by the Financial Services Compensation Scheme (FSCS) asking for information in relation to a claim made by Mr N. That letter did not specify which firm the FSCS was considering a claim about.

In January 2019 (ie within six years of the events complained of in 2014) the CMC wrote a letter of complaint to Gaudi on behalf of Mr N. It made a number of points including:

- Mr N invested in an investment called Affinity which is unregulated and high risk and not suitable for non-sophisticated low risk investors such as Mr N.
- The investments were selected for Mr N and Gaudi failed to carry out sufficient checks on those anomalous investments.

Gaudi did not uphold the complaint. It replied, also in January 2019, and made a number of points including:

- The adviser firm responsible for establishing the SIPP went into administration and applied to cancel its authorisation in 2015.
- It was the adviser who assessed Mr N’s risk profile and made their recommendations based on it.
- Gaudi wrote to Mr N in June 2015 explaining the position with BlueInfinitas and recommended clients obtain alternative independent advice as (it said) the assets held in their SIPP required active management.
- Mr N did not appoint another adviser and so his investments have been unmanaged.
- Affinity is still paying interest and had paid interest as recently as October 2018.
- The investment was accepted as a non-standard investment by Gaudi and its due diligence on the investment was checked by the FCA in as part of the third Thematic Review of SIPP Operators and it was informed its due diligence was sufficient to allow clients to continue to invest.
- The other investments made by Mr N were all listed on either the London Stock Exchange or AIM.

Mr N referred his complaint to the Financial Ombudsman Service. We asked Mr N for details of the claim he had made to the FSCS.

In return for the payment of compensation by the FSCS he was required to assign to it his right to make claims against other third parties such as Gaudi. In August 2021 the FSCS reassigned those rights to Mr N, but a term of that re-assignment is that that he must repay the money he received from FSCS from any money he receives from any third party he makes a successful claim against.

Mr N provided a copy of a document headed "Claim Summary" relating to his FSCS claim in relation to BlueInfinitas. On the form when asked to describe why he was making his claim Mr N wrote:

*"I wish to make this claim based on the poor advise [sic] I was given to transfer my pension believing there was no risk involved into SVS Securities which I now know has failed. I was told that my pension would continue to work for me but with better returns because the areas invested in were secure."*

Mr N also explained that he was awarded almost £37,000 in December 2018 and a further (approximately) £13,000 in August 2020 bringing his total award to £50,000 which was the maximum FSCS award at the time Mr N made his claim.

As I understand it, the FSCS paid the lower sum in 2019 because it assessed Mr N's holding of the Affinity Series 1 Bonds to have a value of £21,000 as the SVS portfolio valuation still showed the Bond has having that value. This initial loss calculation also showed Mr N's pension would have been worth around £60,000 if it had not been transferred to Gaudi and invested through SVS in the way it was. The calculation also said Mr N had liquid assets in his SVS portfolio (the SVS shares) worth around £2,000.

In 2019 the FSCS made a second calculation this time it valued the Affinity Bond at zero and calculated Mr N's total loss at almost £58,000.

One of our investigators then sent out her opinion about Mr N's complaint. She thought it should be upheld. She made several points including:

- The regulator has issued reports and guidance on and to SIPP operators in 2009, 2012, 2013 and 2014. These set out the regulators expectations and are relevant considerations when considering what is fair and reasonable in all of the circumstances of Mr N's complaint.
- Gaudi was obliged to carry out due diligence on the "SVS investment platform" and the Affinity Bond investment. She had not however considered whether Gaudi should have accepted business from BlueInfinitas because it was her view that Gaudi should not have held investments with SVS within its SIPP.
- Gaudi had serious concerns about SVS in 2012 ie before Mr N invested in 2014. It carried out a review and identified that all its clients with SVS had invested in the same narrow range of investments - mostly AIM listed securities including in SVS itself. It also discovered that an adviser at a third-party business was apparently involved in advising the clients. Given those concerns Gaudi should not have allowed Mr N to invest via SVS.
- Although Gaudi said it carried out due diligence on the Affinity investment it asked Mr N to sign a declaration that said the Affinity Bond was high risk and/or speculative and may be illiquid or difficult to sell which might impact Mr N's ability to take his pension and Mr N was asked to confirm that he wished to proceed. The investigator was concerned that Gaudi still permitted this investment against the background of it having concerns about SVS.
- In other cases, Gaudi had said that SVS was acting as an execution only broker. If that is so someone else, presumably BlueInfinitas, picked the investments but it was not authorised to do so. So, Gaudi should not have accepted such business.
- But in the circumstances given what the investigator thought about the checks in relation to SVS, the investigator did not need to consider whether Gaudi had carried out adequate checks on BlueInfinitas.

- The investigator said Mr N would not have invested through SVS or in the Affinity Bond but for Gaudi's errors. The investigator said Gaudi should compensate Mr N for the losses he has suffered, and the investigator explained how she thought things should be put right by Gaudi.

Gaudi did not agree with the investigator. It made points in response, including:

- The investigator has misunderstood the roles of the various parties referred to.
- BlueInfinitas was not an introducer. It was a regulated independent financial adviser. Gaudi carried out adequate in the circumstances checks on that business. It was registered, had no adverse disciplinary history and no adverse comments found online. The adviser had the relevant permissions to give advice.
- There was no reason to refuse to accept business from BlueInfinitas.
- Gaudi wrote to Mr N in 2015 to invite him to appoint another adviser when BlueInfinitas ceased trading in 2015. That letter shows Gaudi's understanding of BlueInfinitas' role. The letter included:
  - *"The purpose of this letter is to reassure you that the monies invested in your pension remain invested. Your pension is operated by Gaudi Regulated Services Limited who are regulated by the Financial Conduct Authority and all assets, including any cash, are held with a regulated custodian. Both companies are in no way linked to BlueInfinitas who acted purely in giving advice for you to take out your current pension and identifying the initial investments. All assets continue to be held with fully regulated third party custodians and any cash that remains uninvested is held in a deposit account within your pension arrangement. The fact BlueInfinitas has ceased trading in no way impacts on the security of your pension."*
- Mr N did not challenge the letter or the point that it was BlueInfinitas that gave advice at the time.
- The investigator should not refer to submissions made in other complaints. It is Gaudi's position in this case that SVS was acting as Mr N's investment manager. It is not Gaudi's position that SVS was acting as an execution only broker.
- It was BlueInfinitas' role to place instructions with SVS. There is no suggestion that BlueInfinitas acted with discretion and picked investments without Mr N's involvement.
- The comments made about Gaudi's review of SVS relates to a different complaint and is not relevant to this one. Gaudi's concern related to investment in SVS itself – and shares in unlisted companies connected to SVS. Mr N did not invest in that security and at no point has it been alleged that the third-party adviser who was mentioned in that review gave advice to Mr N.
- The FCA handbook Notice 29 issued in 2015 said that an investment with a discretionary fund manager can be regarded as a standard investment provided arrangements were in place to ensure that it only invested in standard assets. Gaudi did this and so its obligations were fulfilled.
- The Financial Ombudsman Service is obliged to take that guidance into account.
- The Affinity investment was actioned by SVS and so no input was required from Gaudi.
- Nevertheless, Gaudi has provided details of the due diligence that was carried out.
- Another regulated firm approved the investment memorandum and it's appropriate

for a regulated firm to rely on the representations made by another regulated firm. Given the success of other investments of that other regulated firm, the Affinity investment did not raise any fraud or financial crime indicators during this due diligence process.

- Gaudi carried out its own due diligence on the Affinity Corporation Properties Bonds I, II and III.
- Gaudi checked that the investment was what it said it was. Gaudi required any sales to be fully advised or promoted by a regulated firm. In this case BlueInfinitas was noted as the regulated financial adviser with full permissions to provide pension transfer and investment advice.
- Written risk warnings were provided to potential investors and had to be signed before proceeding with the investment. Mr N signed the warnings in this case.
- Gaudi identified the investment as high risk, told the customer that, and required the customer to acknowledge that before permitting the investment to go ahead.
- Mr N transferred from a defined contribution arrangement to another pension that was similarly reliant on investment returns. Gaudi does not have the regulatory permission to assess the suitability of one compared to another.
- Gaudi complied with its obligations under COBS 11.2.19R in acting on its clients written instructions to switch his pension rights and transfer funds to SVS which were subsequently invested in Affinity. To decline to do so would have been akin to assessing suitability requiring Gaudi to investigate the full extent of Mr N's financial circumstances etc. Gaudi did not have regulatory permission to carry on such work.
- The above point is reflected in the terms and conditions agreed with Mr N.
- In all the circumstances Gaudi could not reasonably have alerted Mr N to any suitability issues. It did all it could which was to put Mr N on notice of the risks of investing in high risk and/or illiquid and/or speculative shares and suggest that independent advice be taken.
- The situation is entirely different to one involving an obvious fraud. With situations such as this one it is far less clear on what basis Gaudi would turn down the application. Gaudi could not do so on suitability grounds.
- Gaudi does not recommend or provide advice on any investments which are held in the SVS managed account. The client and/or his adviser were responsible for giving instructions to SVS Securities. Gaudi was not involved in that process. The assessment of suitability was the responsibility of Mr N.
- This was explained in the terms and conditions which included:
  - “*Gaudi will normally only allow investments into the following:*
    - *Cash and FSA registered funds*
    - *Shares listed on LSE, AIM, or an HMRC recognized overseas exchange. This includes corporate bonds, investment trusts, OEICs, PIBs and REITs*
    - *FCA registered unit trusts*
    - *Certain other investments which have been pre-arranged by Gaudi which includes Affinity Series I Bonds*”
- Similarly, the key features of the Easy SIPP stated:
  - “*What can I invest in?*

- *You, or your advisers, can choose from a range of investments and investment providers as detailed below. This list will change from time to time and Gaudi Regulated Services Limited reserves the right to refuse certain investments. The investments and investment providers currently permitted are:*
- *Bank account with Royal Bank of Scotland*
- *A dealing account will be opened with SVS securities through which any investment into the Affinity Bond will be transacted.”*
- Mr N was informed on at least four occasions in the key features document that he or his adviser were responsible for the choice of investment and the subsequent management of the investment. He also signed a declaration to say he had read and understood the terms and conditions. It has not been explained why the normal legal principle that someone is bound by the documents he signs has not been followed.
- Either Mr N read and ignored the warnings, or failed to read them, or was advised to invest in any event by BlueInfinitas. Gaudi should not be held responsible in any of these scenarios.
- It is understood that Mr N has made a claim to the FSCS, but it is not clear who the claim was made in respect of or whether a payment was paid and if so whether the right to make a claim has been reassigned to Mr N.
- The approach to redress taken by the investigator suggests Gaudi should have rejected the application. There is no basis for comparing to the ceding scheme. The application did not state how Mr N intended to invest. From Gaudi's point of view the funds were transferred to SVS and SVS was to invest the funds elsewhere. SVS was considered a standard asset so there was no reason for Gaudi to be concerned and Gaudi had carried out due diligence on SVS (and Affinity) in any event.
- In summary Gaudi had carried out adequate due diligence on BlueInfinitas, SVS and Affinity. Gaudi complied with the duties on it.

I considered Mr N's complaint and issued a provisional decision in February 2023. I explained why I thought Mr N's complaint should be upheld. I provisional decision included:

As an opening comment I make clear that the Financial Ombudsman Service is an informal dispute resolution body that does not have strict process rules and is not bound by the usual rules of evidence. This means that in considering this complaint I can consider things Gaudi has said or provided in other complaints if I consider them relevant. The important point is that I give the parties the opportunity to comment before I make a final decision so that the parties know what I have considered relevant and they have an opportunity to comment and, for example, get the chance to correct what they think may be misunderstandings, before I make a final decision. In considering what is fair and reasonable in all the circumstances of this complaint, I have taken into account relevant 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.

### ***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*" (PRIN1.1.2G). 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 have 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 BBA 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.

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 Berkeley Burke. So the Principles are a relevant consideration here and I will consider them in the specific circumstances of this complaint.

### ***The Adams Court cases***

I have taken account of the judgment of the High Court in *Adams v Options SIPP* [2020] EWHC 1229 (Ch) and the Court of Appeal judgment in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474. I note the Supreme Court refused Options permission to appeal the Court of Appeal judgement.

I've considered whether these judgments mean that the Principles should not be taken into account in deciding this case. And, I am of the view they do not. In the High Court case, HHJ Dight did not consider the application of the Principles and they did not form part of the pleadings submitted by Mr Adams. One of the main reasons why HHJ Dight found that the judgment of Jacobs J in BBSAL was not of direct relevance to the case before him was because “*the specific regulatory provisions which the learned judge in Berkeley Burke was asked to consider are not those which have formed the basis of the claimant’s case before me.*” Likewise, the Principles were not considered by the Court of Appeal. So, the judgments say nothing about the application of the FCA’s Principles to the ombudsman’s consideration of a complaint.

I acknowledge that COBS 2.1.1R (*A firm must act honestly, fairly and professionally in accordance with the best interests of its client*) overlaps with certain of the Principles and that this rule was considered by HHJ Dight in the High Court case. Mr Adams pleaded that Options 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 had complied with the best interests rule on the facts of Mr Adams’ case.

Although Mr Adams’ appeal of the High Court judgment was partially successful, the Court of Appeal rejected the part of Mr Adams’ appeal that related to 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 Adams' 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.

I note that, in the High Court judgment, HHJ Dight found that the factual context of a case would inform the extent of the duty imposed by COBS 2.1.1R. HHJ Dight said at para 148:

*"In my judgment in order to identify the extent of the duty imposed by Rule 2.1.1 one has to identify the relevant factual context, because it is apparent from the submissions of each of the parties that the context has an impact on the ascertainment of the extent of the duty. The key fact, perhaps composite fact, in the context is the agreement into which the parties entered, which defined their roles and functions in the transaction."*

The issues in Mr N's complaint are different from the issues as pleaded in Adams. There are also significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and from the issues in Mr N's complaint. The breaches were summarised in paragraph 120 of the Court of Appeal judgment. In particular, HHJ Dight considered the contractual relationship between the parties in the context of Mr Adams' pleaded breaches of COBS 2.1.1R that happened after the contract was entered into. In Mr N's complaint, I will, amongst other things, consider whether Gaudi ought to have identified that applications from via BlueInfinitas involved a risk of consumer detriment and, if so, whether it ought to have ceased accepting introductions from BlueInfinitas before it entered into a contract with Mr N.

On this point I think it is also 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; regulator's 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.

To be clear, I have proceeded on the understanding that Gaudi was not obliged – and not able – to give advice to Mr N on the suitability of its SIPP or the Affinity investment, or the other investments held by SVS, for him personally. But I am satisfied Gaudi's obligations included deciding whether to accept particular investments into its SIPP and/or whether to accept introductions of business from particular businesses. And this is consistent with Gaudi's own understanding of its obligations at the relevant time.

### ***The regulatory publications***

The FCA (and its predecessor, the FSA) has issued a number of publications which remind SIPP operators of their obligations and which set out how they might achieve the outcomes envisaged by the Principles, namely:

- The 2009 and 2012 thematic review reports.
- The October 2013 finalised SIPP operator guidance.

- The July 2014 “Dear CEO” letter.

### ***The 2009 Thematic Review Report***

The 2009 report included the following statement:

*“We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses (‘a firm must pay due regard to the interests of its clients and treat them fairly’) insofar as they are obliged to ensure the fair treatment of their customers. COBS 3.2.3(2) states that a member of a pension scheme is a ‘client’ for COBS purposes, and ‘Customer’ in terms of Principle 6 includes clients.*

*It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six TCF consumer outcomes.*

*We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the member to confirm the position, or by contacting the firm giving advice and asking for clarification. Moreover, while they are not responsible for the advice, there is a reputational risk to SIPP operators that facilitate the SIPPs that are unsuitable or detrimental to clients.*

*Of particular concern were firms whose systems and controls were weak and inadequate to the extent that they had not identified obvious potential instances of poor advice and/or potential financial crime. Depending on the facts and circumstances of individual cases, we may take enforcement action against SIPP operators who do not safeguard their clients’ interests in this respect, with reference to Principle 3 of the Principles for Business (‘a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems’).*

*The following are examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms:*

- *Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm’s clients, and that they do not appear on the FSA website listing warning notices.*
- *Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries*

*introducing SIPP business.*

- *Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified.*
- *Being able to identify anomalous investments, e.g. unusually small or large transactions or more ‘esoteric’ investments such as unquoted shares, together with the intermediary that introduced the business. This would enable the firm to seek appropriate clarification, e.g. from the client or their adviser, if it is concerned about the suitability of what was recommended.*
- *Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for advice, having this information would enhance the firm’s understanding of its clients, making the facilitation of unsuitable SIPPs less likely.*
- *Routinely identifying instances of execution-only clients who have signed disclaimers taking responsibility for their investment decisions, and gathering and analysing data regarding the aggregate volume of such business.*
- *Identifying instances of clients waiving their cancellation rights, and the reasons for this.”*

### ***The later publications***

In the October 2013 finalised SIPP operator guidance, the FCA states:

*“This guide, originally published in September 2009, has been updated to give firms further guidance to help meet the regulatory requirements. These are not new or amended requirements, but a reminder of regulatory responsibilities that became a requirement in April 2007.*

*All firms, regardless of whether they do or do not provide advice must meet Principle 6 and treat customers fairly. COBS 3.2.3(2) is clear that a member of a pension scheme is a “client” for SIPP operators and so is a customer under Principle 6. It is a SIPP operator’s responsibility to assess its business with reference to our six TCF consumer outcomes.”*

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

#### ***“Relationships between firms that advise and introduce prospective members and SIPP operators***

*Examples of good practice we observed during our work with SIPP operators include the following:*

- *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and*

*that the firm does not appear on the FCA website listings for un-authorised business warnings.*

- *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*
- *Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.*
- *Being able to identify irregular investments, often indicated by unusually small or large transactions; or higher risk investments such as unquoted shares which may be illiquid. This would enable the firm to seek appropriate clarification, for example from the prospective member or their adviser, if it has any concerns.*
- *Identifying instances when prospective members waive their cancellation rights and the reasons for this.*

*Although the members' advisers are responsible for the SIPP investment advice given, as a SIPP operator the firm has a responsibility for the quality of the SIPP business it administers. Examples of good practice we have identified include:*

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

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

### ***“Due diligence***

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

- *ensuring that all investments permitted by the scheme are permitted by HMRC, or where a tax charge is incurred, that charge is identifiable, HMRC is informed and the tax charge paid*

- *periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme*
- *having checks which may include, but are not limited to:*
  - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*
  - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*
- *ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified*
- *good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and*
- *ensuring these benchmarks clearly identify those instances that would lead a firm to decline the proposed business, or to undertake further investigations such as instances of potential pension liberation, investments that may breach HMRC tax-relievable investments and non-standard investments that have not been approved by the firm”*

The July 2014 “Dear CEO” letter provides a further reminder that the Principles apply and an indication of the FCA’s expectations about the kinds of practical steps a SIPP operator might reasonably take to achieve the outcomes envisaged by the Principles.

The “Dear CEO” letter also sets out how a SIPP operator might meet its obligations in relation to investment due diligence. It says those obligations could be met by:

- *Correctly establishing and understanding the nature of an investment*
- *Ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation*
- *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)*

Although I’ve referred to selected parts of the publications, to illustrate their relevance, I have considered them in their entirety.

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 did not constitute formal guidance does not 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 regulators expectations of what SIPP operators should be doing, also goes some way to indicate what I consider amounts to good industry practice and I am, therefore, satisfied it is appropriate to take them into account.

It is relevant that when deciding what amounted to have been good industry practice in the BBSAL case, the ombudsman found that *“the regulator’s reports, guidance and letter go a long way to clarify what should be regarded as good practice and what should not.”* And the judge in BBSAL endorsed the lawfulness of the approach taken by the ombudsman.

Although the dear CEO letter of July 2014 was published after the events subject to this complaint, the Principles that underpin it existed throughout, as did the obligation to act in accordance with the Principles.

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

I note that HHJ Dight in the Adams case did not consider the 2012 thematic review, 2013 SIPP operator guidance and 2014 “Dear CEO” letter to be of relevance to his consideration of Mr Adams’ claim. But it does not follow that those publications are irrelevant to my consideration of what is fair and reasonable in the circumstances of this complaint. I am required to take into account good industry practice at the relevant time. And, as mentioned, the publications indicate what I consider amounts to good industry practice at the relevant time.

That doesn’t mean that, in considering what is fair and reasonable, I will only consider Gaudi’s actions with these documents in mind. 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. To be clear, I do not say the Principles or the publications obliged Gaudi to ensure the pension transfer was suitable for Mr N. It is accepted Gaudi was not required to give advice to Mr N, and could not give advice. And I accept the publications do not alter the meaning of, or the scope of, the Principles. But they are evidence of what I consider to have been good industry practice at the relevant time, which would bring about the outcomes envisaged by the Principles.

### ***The investigator’s view***

I understand the approach taken by the investigator in concentrating on one issue and not dealing with others after finding Gaudi at fault. However in this case that does leave open the possibility that even if Gaudi had not done business with SVS in this case would the same investments have been made in the SIPP in any event?

I have therefore thought about things in the round. I have considered Gaudi's dealings with SVS, BlueInfinitas and Affinity and then come to a view about whether Mr N has been treated fairly and reasonably by Gaudi in this case.

### ***A typical SIPP arrangement***

The way in which a SIPP might typically be used is as follows:

- A consumer (client) consults a financial adviser and it is agreed that the client wants to invest his or her pension in a way that is not possible in their existing personal pension. The consumer might for example want to have an actively managed portfolio of shares.
- The adviser might then recommend a SIPP for such an arrangement and advise the consumer to switch his existing personal pension to a SIPP with a particular SIPP operator and recommend a stockbroker or other investment manager to act as a discretionary fund manager (DFM) of the SIPP portfolio for the client.
- Assuming this goes ahead, the DFM would typically enter into a discretionary management agreement with the client. This is an agreement giving the DFM the power to buy and sell investments at its discretion on behalf of the client without first seeking his or her agreement for the deal to go ahead.
- And there would typically be an agreement between the DFM and the SIPP operator allowing the DFM to manage the funds that are held within the SIPP.
- Typically the SIPP operator will put some restrictions on the types of investment the SIPP operator will permit the DFM to hold within the SIPP.
- The DFM then chooses the investments and makes those investments which might be held in its nominee account but within the SIPP wrapper. When holding those investments for the client the DFM might be referred to as a custodian.

So in brief the financial adviser recommends the SIPP operator and the switch of funds to the SIPP operator. And the financial adviser recommends the DFM. And the DFM then chooses the investments.

### ***The SIPP arrangement in this case***

In this case there are parties who, in principle, fit the above typical roles.

Mr N's adviser was BlueInfinitas. It advised Mr N to switch his pension to a SIPP operated by Gaudi. And SVS was appointed as DFM.

But things are less clear cut in this case than in the description of a typical case I have given above. For example the majority of the funds were invested in Affinity Bond which was recommended by BlueInfinitas before SVS was appointed, leaving only a small proportion of Mr N's funds to be invested under the DFM arrangement.

### ***The Affinity investment***

As mentioned above, Mr N transferred around £30,000 from an existing pension and £21,000 was invested in Affinity Bond series I in April 2014.

The Affinity Bond series 1 was a fixed income bond paying 6% per year with a ten-year term. It was launched in June 2013. The bond was an unsecured non-transferrable bond backed by UK commercial real estate managed by Affinity Commercial LLP described as a specialist asset manager to banks and private clients with over £200m under management.

The Bonds were referred to in their promotional document as highly illiquid. The investments would therefore, generally, be seen as higher risk investments. This does not in and of itself mean that the bonds were unsuitable for pension investments. Suitability depends on the individual circumstances of investors, and it was not Gaudi's role to consider the suitability of investments for its members. It does however mean that Gaudi would, or should, have been aware that these investments might not be suitable for all investors and that there was the potential for consumer detriment if this type of investment were recommended to investors in an inappropriate way.

Affinity was in contact with Gaudi about Affinity investments in 2013. Gaudi carried out some checks on Affinity and the directors of that company. It met with them and considered the investment proposal. Gaudi noted the following in August 2013 as part of a review of the Affinity investment:

*"Stated Risk Factors*

- No operating history*
- Dependence on key personnel*
- Funding and gearing – seeking a range of sources or capital*
- Potentially limited investment opportunities and competition for these and tenants*
- A range of other standard issues relevant to the property sector e.g. valuation movements, defaults and vacancies, interest rates, liquidity etc.*

And it noted the following points:

*"Key mitigants*

*It has been stated by [Gaudi] that all applicants will need to receive advice from an authorised firm / individual to include pension and investment advice. Identity of the adviser is awaited so we can discuss target market / distribution plans / appropriateness"*

Soon after this Gaudi met with an adviser I will call Mr C. It was noted that he was in the process of becoming an appointed representative of 2Plan.

Gaudi noted the following as part of its review of the Affinity investment:

- "At the conference call ... the two key questions that were raised were around Affinity's financial model and the advice process which would accompany any sales (as it has been agreed that only cases that had been through an advice process would be accepted).*
- The response received on the above points were discussed.*
  - On the financial model, Affinity has provided a rationale for the assumption of an 8% yield, that they would undertake a range of measures to add value to investments through a range of*

*measures which were documented to us, confirmation of their assumptions over costs of gearing and the fact that they had not assumed any rent inflation. Whilst these answers were straightforward they did confirm that the model had not been subject to sensitivity testing. Our analysis was that it would become unviable under extreme economic circumstances, which would be possible if there were a repeat of the 2009 economic crisis. Given the other answers and the fact that [name of accountancy firm] had verified the model, the financial aspects of the proposition were deemed to be acceptable albeit this was categorized as a high risk consumer investment. Therefore, the sales approach including advice and ensuing customer understanding of the risk, would be key to our deciding to proceed.*

- *With regards to the advisory process it had been confirmed that an adviser, [Mr C], was in the process of gaining AR [appointed representative] status with 2Plan and he would be responsible for advice on both the pension and investment. He further confirmed that a rigorous 2 Plan mandated risk profile exercise would be undertaken and that these would be provided to us for as long as required. Further due diligence was undertaken on the adviser and nothing untoward was discovered.*
- *A discussion of the risks to both investor and [Gaudi] then took place. From the investor's perspective it was considered that the due diligence that had been undertaken and the fact that all cases would be advised including a risk profiling exercise, that the investment would be approved. From a Gaudi perspective [name given] outlined the monthly monitoring that he felt was necessary should the investment be approved and it was agreed that this was necessary and should be reviewed.*
- *Given the above it was agreed that the investment should be approved..."*

I have also seen evidence that Gaudi checked the nature of the investment and was concerned to make sure the investment was not an unregulated collective investment scheme (UCIS). And that it had decided to reject all UCIS investments.

It is clear from the above that Gaudi had given the Affinity investment careful thought, and considered it acceptable for its SIPP in certain circumstances only. Those circumstances were when there had been advice to the client. So it follows that if no advice was given, as with UCIS, Gaudi intended to reject such applications. And it seems reasonable and consistent with the note to say that Gaudi's condition would or should only be met where Gaudi reasonably thought that an appropriate advice process had been followed by an authorised adviser.

That is not to say that Gaudi considered itself under an obligation to check the suitability of the advice given to individual clients. It was concerned that there was a process in place under which it was likely that suitable advice would be given but that the adviser would be responsible for the suitability of the advice.

It was consistent with Gaudi's role as non-advisory SIPP operator to set requirements for the investments it would allow in its SIPP and the evidence indicates Gaudi considered it could reject applications that did not meet its requirement without giving investment advice to the individual member or potential member.

I have not seen anything to show that the Affinity Bond had to be set up in conjunction with a dealing account with SVS. But that said, as I discuss below, it is clear that an arrangement developed under which the Affinity Bond was recommended by BlueInfinitas to investors in conjunction with the SVS account and the granting of DFM powers to SVS.

As I understand it, Affinity later changed its name to Anilana International Developments and Anilana appointed liquidators in May 2020. I will, for convenience, continue to refer to the investment as the Affinity Bond even if its name changed later. As I understand it the Affinity Bond 1 has failed and is now worthless.

### ***The adviser – BlueInfinitas***

When responding to the complaint to the Financial Ombudsman Service, Gaudi said, in its letter dated 8 February 2019:

*“The adviser was responsible for all investment decisions on behalf of the client. They were also responsible for physically executing those investment decisions.*

*Those investment decisions comprised a recommendation to invest in an unlisted bond called Affinity Series 1. Our due diligence files in respect of this investment were inspected by the FCA during the Third Thematic Review and we were told that this due diligence was of sufficient standard to enable us to continue to accept investment in this bond...*

*Despite our due diligence, due to the unlisted nature of the bond we presented specific risk warnings to the client regarding these and asked him to confirm that he understood the risks before we accepted this business.”*

### ***Due diligence in respect of BlueInfinitas***

In October 2013 Gaudi was in contact with an adviser I will call Mr B in relation to BlueInfinitas introducing or referring business to Gaudi. Gaudi has, on another case, provided copies of documents recording its due diligence in respect of Mr B.

Mr B is not the adviser, Mr C, referred to above, ie the adviser Affinity had introduced to Gaudi and with whom it had discussed his approach to advice relating to Affinity and who was recorded as planning on joining 2Plan. That adviser did however later become an adviser at BlueInfinitas and was the adviser in this case. But Mr C was not a registered individual with BlueInfinitas in 2013 when Gaudi was first carrying out its checks on BlueInfinitas.

Similarly Mr B was not referred to by Affinity when it was seeking Gaudi's approval as an investment to be held in its SIPP's in August 2013. Be that as it may, Affinity's plans seem to have evolved from the use of a single named adviser (Mr C) on whom Gaudi had made some checks to also include Mr B.

Gaudi has provided a copy of the FCA's Register from October 2013 which shows Mr B as authorised to advise on investments in relation to the firm in his own name. I have also looked at the FCA register. It shows Mr B had been an adviser with True Potential in 2011-2012. It also shows him as having his own directly regulated firm in his own name with a trading name BlueInfinitas from March 2012. The register does not for example show Mr B's firm as being an appointed representative of True Potential.

A “new adviser vetting checklist” was completed by Gaudi in relation to Mr B in October 2013.

It was recorded on the form that Mr B had only been trading since July 2013. Gaudi also noted the following:

*“He will be receiving referrals from Affinity as well as generating them from his own call centre functions.*

*All clients will undergo a full advice process on both pension + investment - quote “My role is to advise each client individually based upon my standard advice process and my analysis of needs, objectives and attitude to risk. There is by no means a one size fits all assumption with regard [to] the investment and suitability for each client.”*

On 15 November Gaudi emailed Mr B as follows:

*“Thanks for sending over the material on some of the investments that you would wish to promote.*

*In order that we can successfully move forward I need to make sure that I have understood the situation correctly. If not let me know.*

*If I understand it correctly:*

- *you wish to offer all of these investment opportunities to clients on a ‘fund of funds’ basis i.e. each client buys a little piece of each*
- *you realistically expect to provide us with 50+ new clients every week*

*I have therefore reviewed the suggested opportunities in this light but also in the knowledge that the FCA is currently, perhaps for good reason, closely scrutinizing the entire SIPP market and holding providers to account for the consumer protection.*

*Consequently, whilst I could imagine us approving a fair number of the proposed investments when evaluated by their own terms, we feel less comfortable knowing that they will be packaged together and promoted as an acceptable asset to a very large and potentially disparate audience, particularly with the ‘riskiness’ of the investment in mind i.e. the actual investments are only one half of the conversation in this instance, distribution is another. Before proceeding further I would be grateful if you could provide me with a written explanation of how you will:*

1. *identify a suitable client*
2. *describe to me what a suitable target client ‘looks like’*
3. *ensure that the proposed investment is suited to the client’s needs taking into account e.g. age, maturity needs, risk profile, ability to accommodate investment loss etc.*
4. *ensure that the client is fully cognizant of the risk/rewards in general and to them specifically*
5. *protect the client against liquidity constraints especially in the event of e.g. death.*

*Once we have understood the distribution model we can revisit the investments.*

*This may not be the response that you were anticipating, but hopefully you can understand the rational..."*

Mr B replied as follows:

*"My responses are as follows*

1. *I am the preferred IFA for a number of investment firms, as such, I am being provided with leads they generate from a number of sources.*
2. *A suitable client typically has 50K plus in pensions, does not have an advisor and is not currently reviewing their pension. The client will have expressed interest in investing for growth, exploring non mainstream investments and will be willing to take advice. I am also dealing with a number of clients who have final salary schemes and want more from their pensions.*
3. *Clients must have 5 years until they require benefits, if not, the SIPP is tailored to ensure full access to PCLS and/or income when required. In respect of losses, it is clarified in the ATR. ATR results must be at the riskier end, if not, we have low cost SIPP's on TP with a full suite of regulated investments to recommend them. TP now have a now [sic] cost SIPP with James Hay.*
4. *By focusing in the main on property, the investments I advise on tend to be easier to understand by the majority, and people have their own preconceptions. The returns and exit strategies if the investment fails are explained, along with the time commitment to the investment required to achieve the returns. I am looking to split the investments between different funds, with at least 30% in fully regulated investments. Whilst this takes additional explaining to the client, it does help them appreciate the need for diversification and the potential for return can come from a number of sources.*
5. *The 30% in regulated and cash investments will aid a spouse looking to take benefits, income generated by the investments will aid ongoing income requirements. If a death payment has to be made, then the costs associated with disinvestment must be met, clients are made aware of this point, however, most people prefer the chance of a larger pot as they plan on living, rather than the potential charges when they are dead.*

*I hope this helps."*

I understand the reference to TP above are reference to True Potential.

On 20 November 2013 Mr B sent an email to Gaudi headed "Business Model Information". It explained that Mr B continued to work with True Potential, using its cloud-based system and compliance systems and support "*leaving him to concentrate upon the advice*".

Mr B said,

*"The remote nature of True Potential has enabled me to set up admin teams in Poole and Manchester. More importantly, it has given me the ability to employ an outsource paraplanning team. The files are checked remotely in*

*accordance with business submission procedures and processed if they meet the required standard.*

*The benefit to me of using this outsourced team is that the basis of the business model is to adhere to the submission process and not be pressured into submitting business; they will not deal with firms who do not comply with this and have their own PI insurance in place to guarantee their work. I believe that this arms length approach helps me as the outsourced team will not be caught up in the culture on my business and will always provide a positive check and balance on the business submitted. Introducers have no contact with the paraplanners, cannot chase through business and have to accept my process.*

*Another strength is that I am not partnered with any of the investments, I am happy to advise on them, but will not be dictated too [sic]. I take leads and assess each case individually, obvious no goes are favourable guarantees, DB schemes, and some instances where income/PCLS payments are required. I am currently turning away over 10% of leads coming through an explaining to the introducers why, hopefully, this will mean a lower decline rate in the future.*

*I have also been able to put in place a portfolio approach when advising these clients. Firstly, I want to see 30% plus going into regulated investments with the remainder being split between 2-4 of the unregulated propositions, giving a diverse pension investment. Whilst I am happy with the investments, I feel on the scale I am giving it is sounder with this approach. The potential for 1 investment not to perform will have a smaller impact across the board, rather than a big impact on a potentially significant proportion of clients. The investment companies see the logic and appreciate spreading smaller investments over a larger pool of clients will be just as lucrative for them.”*

Gaudi has also explained that it did not ask Mr B/BlueInfinitas for copies of its recommendation reports. It did ask him about the remuneration he was taking so that it could provide illustrations on that basis.

Gaudi has explained that it accepted business from Mr B/BlueInfinitas for about 18 months until April 2015 when BlueInfinitas ceased trading.

During that period Gaudi received 332 applications from this adviser. None of the applications involved transfers from occupational pension schemes. 248 clients were “placed into non-mainstream investments as part of a wider portfolio (the remaining investments being listed equities)”.

During the period Gaudi had around 2,000 applications in total and business from BlueInfinitas was less than 20% of that total.

In my view Gaudi was right to have concerns about Mr B’s application to become an introducer of business to it. In my view the information he disclosed showed a business model that seem to involve finding clients that were suited to his proposed investment model rather than finding solutions that were suitable to the client’s objectives. While this process can lead to satisfactory matching of needs to solution it starts with a solution in mind which is likely to lead to skewed outcomes. It also involved dealing with clients who were introduced to him by unspecified introducers with little to no information about who those introducers were and how they worked and how they found their leads and what they said to them.

BlueInfinitas seemed to be proposing to introduce large volumes of work to Gaudi. In the event it did not make referrals at that rate. But 50 referrals a week would be over 2,000 a year which was more than Gaudi's total applications from all sources and ought to have raised concerns about the quality of such referrals coming from a new and relatively small adviser firm. Mr B's talk of admin centres in Manchester and Poole and an outsourced paraplanner team sounds similarly ambitious on the one hand but vague on the other and does not make clear to what extent those qualified and authorised to carry on the controlled function of giving investment advice would be involved in the process leading to recommendations of Gaudi SIPP.

Some of those clients apparently wanted to improve on (which would seem to mean transfer away from to seek better pension benefits) defined benefit pensions which is not generally a good idea. Mr B seemed to give the impression in one email he would deal with such clients and in the other gave the impression that he would not. And while I note that in the event Gaudi did not accept this type of business from BlueInfinitas the inconsistency on the point should have been a concern.

So too should Mr B's comments about liquidity especially in the event of the member's death. Investing 30% of the fund in liquid assets was not really going to provide a satisfactory solution and its comment about client's not being concerned about charges on death but preferring growth missed the point of Gaudi's question.

Also of note is the receiving of referrals from Affinity and being the preferred IFA of a number of investment firms. These points raise concerns about the independence of the advice Mr B/BlueInfinitas would be giving in relation to those investments.

And to repeat a point made above, Gaudi knew or should have known that there was a risk of consumer detriment in relation to a higher risk investment such as the Affinity Bond if it was recommended to investors in an inappropriate way.

### ***The DFM – SVS Securities***

SVS Securities was a stock broking firm authorised to deal in, advise on, manage and safeguard investments. In 2019 it went into administration and in 2020 assets formerly held for clients by SVS were transferred to ITI Capital Limited. I will however continue, for convenience, to refer to the SVS shares in this case as the SVS shares regardless of whether they were later transferred to ITI Capital.

Gaudi says FCA handbook Notice 29 issued in 2015 said that an investment with a discretionary fund manager can be regarded as a standard investment provided arrangements were in place to ensure that it only invested in standard assets. And Gaudi considers that it fulfilled these obligations.

In 2011/12 (ie more than two years before the events in this complaint) Gaudi had a business relationship with SVS. Gaudi operated a SIPP marketed by SVS which Gaudi described as a straightforward arrangement under which SVS's clients would take out a SIPP and could then trade shares in a dealing account with SVS within the SIPP wrapper. The intention was that SVS would act on an execution only basis.

Gaudi became aware that the SIPP was marketed by SVS to some advisers for use by their clients. This does not seem to have been part of Gaudi's original expectations for their relationship.

In May 2012 Gaudi became concerned that holders of the SVS SIPP were investing in a narrow range of shares and that SVS was corporate broker to all the companies concerned. So this would give concerns about possible conflicts of interest. Also a number of clients had invested in shares in SVS itself which were not listed shares, and Gaudi had agreed with SVS that only listed securities would be held within the SIPP. Again this also raises concerns about conflict of interests between SVS and its and Gaudi's mutual clients. And it should have been a serious concern that SVS had broken the agreement about the type of securities to be held in the SIPP – an agreement that was there (at least in part) for the protection of Gaudi's clients.

Gaudi started to investigate matters and found that advisers had seemingly been giving advice but were denying any involvement. Gaudi was concerned and as it was unable to get satisfactory answers to enquiries it decided to stop accepting further business into the SVS SIPP.

Gaudi did not however cease doing business with SVS altogether. As is clear from this case, by 2014 Gaudi was party to an arrangement in which it knew that BlueInfinitas was introducing clients to it in order for the clients to:

- open a SIPP with it
- open an account with SVS
- invest in Affinity Bonds to be held in the SVS account
- and invest in other securities in the SVS account in relation to which SVS was to be appointed DFM.

This arrangement was an existing arrangement in place at the time Mr N's business was introduced to Gaudi as shown by:

- The existing printed Gaudi SIPP application form which included the request to open a "transactional account" with SVS.
- The provision of the SVS account application form, which included granting DFM powers, with the Gaudi application form, and the written acknowledgement of receipt of the SVS terms of business within the Gaudi SIPP application form.
- The reference to Affinity Bonds within the Gaudi SIPP application form.
- The reference to Affinity Bond as a pre-agreed investment in the Gaudi Terms of Business (according to Gaudi's submissions).
- The reference to both SVS and the Affinity bond in the Key Features of the EasySIPP (according to Gaudi's submissions).
- The reference to Affinity Bonds in the pre-prepared Gaudi headed note paper disclaimer letter signed on the same day as the SIPP application form and as part of the application process.

So this is not a situation where Gaudi just happened to receive an application to open a SIPP from a potential client who just happened to want to appoint SVS and Gaudi just went along with the client's request on a one-off basis. This was a situation where Gaudi chose to be part of an arrangement (I use the term loosely not in any technical sense) in which it knew BlueInfinitas was recommending Affinity investments and the use of SVS, and Gaudi agreed to allow its SIPPs to be used as part of that arrangement. This means Gaudi chose to continue to have a business relationship with SVS despite its reasonable concerns about SVS in 2012.

As mentioned above, it is not clear that the Affinity Bond had to be held in a dealing account with a stockbroker. And it is not yet clear to me when, how or why Gaudi agreed to be part of the arrangement in which SVS came to be DFM and the custodian to hold the Affinity Bonds recommended by BlueInfinitas.

In a different complaint involving Gaudi, BlueInfinitas and SVS, the investigator asked Gaudi why it allowed the consumer in that case to invest “into SVS Securities in September 2014” after Gaudi had had concern about SVS in May 2012. Gaudi replied:

*“The issues with SVS related to their involvement in the selection of investments. This is totally separate from a situation in which they were acting purely as custodian of investment directed by this adviser - who I would reiterate, made all the investment decisions. To be clear [the consumer] did not invest into SVS securities – they acted purely as custodian and we had no concerns with their ability to perform this limited function.”*

I have difficulty with this explanation. First SVS’s role in 2011-2012 in relation to the SVS SIPP operated by Gaudi was supposed to be limited. It acted as custodian in those cases. SVS was not a DFM in that arrangement and it was not supposed to be giving investment advice. Despite this, it turned out clients were investing in a small spread of AIM listed shares in companies for which SVS was corporate broker. The natural suspicion is that somehow SVS was recommending the shares directly or indirectly to the clients (or using a formal or informal DFM mandate to make those investments). In any event, these would have been higher risk, AIM listed, shares in relation to which SVS had a conflict of interest. And an essentially unacceptable situation was compounded by clients investing in the unlisted shares of [SVS] itself contrary to obvious good practice and contrary to the agreement with Gaudi not to hold unlisted shares in the SIPP. Again this is a high-risk investment in relation to which SVS has a clear conflict of interest and where the risk of consumer detriment was high. Gaudi was right to have concerns about what was going on. And it says that as it did not get a satisfactory explanation it stopped accepting more of that business.

That decision is understandable. But Gaudi ought to have been wary of doing *any* further business with SVS. When given an opportunity to explain why it was willing to do further business with SVS Gaudi has said the business was different. It has said SVS was only a custodian in 2014 in relation to the BlueInfinitas cases. But that is not right. In this case Gaudi had been given DFM powers. Gaudi has said in this case:

*“...it is our... position that SVS were not acting on an execution-only basis and instead, were the Complainant’s investment manager.”*

So SVS was not acting purely as custodian. It was in a position to make investment decisions for the client – a role in which Gaudi ought reasonably to have had serious doubts about the reliability and integrity of SVS. It should have decided that as it could not be sure that SVS would do the right thing in 2012, and keep to an agreement it had with it about unlisted securities, it should have had very serious concerns about trusting it to do the right thing and act in its clients’ best interests in 2014. The possibility of consumer detriment was just as great, if not more so, when SVS was appointed custodian and DFM of the Gaudi SIPP as it was when SVS was the custodian of the SVS SIPP operated by Gaudi.

In 2019 The FCA published a “First Supervisory Notice” relating to SVS. In effect the regulator closed SVS down “*to ensure an appropriate degree of protection for consumers*”. This followed concerns originally dating back to 2017 and 2018. The concerns covered concentration risk, conflicts of interest and governance. The FCA considered that SVS was not conducting its business with integrity and in compliance with proper standards, did not have competent and prudent management and could not demonstrate that it conducts its affairs with due skill, care and diligence.

It is fair to say that the events the regulator’s concerns related to events that occurred after the events in this case and so could not have been something Gaudi could have taken into account in relation to Mr N’s application in 2014. However the concerns Gaudi had in 2012 foreshadowed those events – the concerns about concentration risk, conflicts of interest and concerns about governance. They show that Gaudi was right to have serious concerns in 2012. And it should have continued to have those serious concerns in 2014 when Mr N applied for his SIPP.

### ***My view so far***

Looking at things in the round, as Gaudi should have done at the time, it is my view that Gaudi was in error in deciding to accept Mr N’s application. Gaudi did have concerns about the Affinity investment and would only accept applications to invest in it if the member or potential member was advised. For the reasons I have mentioned it should have been concerned about whether the business model of BlueInfinitas would mean that advice that was in the best interests of the client was being provided. Added to those concerns should have been concerns about any process in which BlueInfinitas was recommending the use of SVS as having any involvement at all and especially in the DFM role given the serious concerns Gaudi had or should have had about that firm.

These concerns about SVS could and should reasonably have caused concerns about any arrangement of which SVS was a part.

Given the concerns Gaudi had about the possibility of consumer detriment in relation to the Affinity investment, and in relation to SVS, and which it ought to have had about BlueInfinitas, Gaudi should not have accepted Mr N’s application. It is my view that in doing so Gaudi failed to act with skill, care and diligence, failed to take reasonable care to organise and control its affairs responsibly with adequate risk management, and failed to act in its customers best interests or treat Mr N fairly.

### ***Did Gaudi act fairly and reasonably in proceeding with Mr N’s instructions?***

Gaudi argues it was reasonable to proceed with Mr N’s application because of the disclaimer he signed and that it was obliged to carry out his instructions by COBS 11.2.19R.

Gaudi says it complied with its obligations under COBS 11.2.19R in acting on its clients written instructions to switch his pension rights and transfer funds to SVS which were subsequently invested in Affinity. Gaudi says to decline to do so would have been akin to assessing suitability requiring Gaudi to investigate the full extent of Mr N’s financial circumstances etc. Gaudi did not have regulatory permission to carry on such work.

I do not agree. Gaudi could have refused Mr N’s application without giving advice, or acting in a way that was akin to giving advice, just as it would have done if the

application had instead involved a UCIS investment. And such a refusal would have been consistent with its role as a non-advisory SIPP operator.

As the court made clear in the BBSAL case, COBS 11.2.19R is concerned with the method of execution of a client's order. It does not regulate the question of whether or not an order should be accepted in the first place.

As I consider that Gaudi should not have accepted Mr N's application, I do not consider it fair and reasonable for Gaudi to rely on the disclaimer Mr N signed saying he instructed Gaudi to make the investment and that he knew it was high risk etc. Things should never have reached that stage. If Gaudi had acted in its customer's best interests Mr N would never have been put in the position where he was asked to sign that disclaimer.

### ***The FSCS claim***

As mentioned above, Mr N has made a successful claim to the FSCS. He did not however recover his losses in full. As part of that claim Mr N was required to assign his rights of action/complaint against third parties to the FSCS. Those rights have been reassigned to Mr N by the FSCS and a condition of that reassignment is that Mr N is required to repay to FSCS the money it paid to him if he recovers redress from a third party. In the circumstances no deduction should be made from the loss calculation referred to below to account for the payment received from the FSCS.

I went on to explain how I thought Gaudi should put things right. And I invited Mr N and Gaudi to let me have any comments they wished to make in response to my provisional decision.

Mr N had no further comments.

Gaudi does not agree with my provisional decision and solicitors made a number of comments on its behalf. Gaudi's points include:

- There are two factual inaccuracies in the provisional decision:
  - It was not Gaudi's policy only to accept applications to invest in Affinity where regulated advice had been given. It was Gaudi's policy to accept applications for investment into Affinity where the applicant had either taken regulated advice or been introduced by a regulated introducer.
  - I referred to investment in the unlisted shares of Gaudi by SVS at one point when I should have said the unlisted shares of SVS.
- The provisional decision discusses BlueInfinitas, and Affinity but does not conclude Gaudi was wrong to accept investments into Affinity or introductions from BlueInfinitas.
- This means that a conclusion must have been reached because of something about the complainant. Is this a suggestion that Gaudi should have known the advice from BlueInfinitas was unsuitable? Any consideration of the suitability for Mr N would have amounted to advice and Gaudi could not give such advice.
- It is not fair or reasonable to conclude that the investment was unsuitable for Mr N in his circumstances.
- In the circumstances it is not clear why Gaudi should have rejected Mr N's application. Gaudi is being judged on standards that have not been articulated.

- The criticisms regarding Gaudi's continued relationship with SVS are noted but the causal connection between them and the loss complained of are not clear.
- The complaint relates specifically to the Affinity Bond and SVS essentially acted on an execution-only basis in relation to that investment.
- SVS was not acting as DFM in relation to the Affinity investment. It is not fair or reasonable to conclude that SVS's role as custodian over the Affinity investment has any causal link to Mr N's loss. Nor is it fair or reasonable to conclude that Gaudi ought to have been concerned about SVS acting as custodian over the Affinity investment.
- It is not fair or reasonable to cite Gaudi's prior concerns over SVS as DFM as a reason Gaudi ought to have rejected Mr N's application.

### **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.

As I explained in my provisional decision, in considering what is fair and reasonable in all the circumstances of this complaint, I have taken into account relevant 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.

Gaudi says this complaint relates specifically to the Affinity investment. However Mr N's complaint has, from the outset been about his investments in the plural. For example in his complaint form he said the "majority" of his "investments" have been delisted.

I note Gaudi's comments about factual errors in my provisional decision. I have corrected my error in referring to unlisted shares in Gaudi when I meant SVS when I quoted my provisional decision above. I apologise for my error and for any confusion I caused.

On the other point, Gaudi says it would accept applications to invest in Affinity where there was advice from a regulated adviser or where the business was introduced by a regulated adviser. Gaudi may have later changed its policy but it's clear that in August 2013, only a few months before Mr N's application, Gaudi wanted to mitigate the risk of possible consumer detriment from investing in Affinity by ensuring applicants received advice from a regulated adviser.

Even if Gaudi had changed its position by the time of Mr N's application, that change does not alter my view of Mr N's complaint. The important point is that Gaudi had identified that there was reason to have some concern about the Affinity investment. It was rightly identified by Gaudi as something in relation to which some caution should be exercised.

And it's Gaudi's position that BlueInfinitas was not just an introducer but was Mr N's adviser. That firm was identified as the adviser on the SIPP application form and Gaudi accepted the application on that understanding. So Gaudi took the view that advice from BlueInfinitas was a mitigating measure it was happy with.

I explained in my provisional decision why Gaudi should have had concerns about accepting business from BlueInfinitas. My view remains unchanged.

The points to be considered do not however end there as they might if this were a situation where BlueInfinitas made a one-off application to Gaudi without more being involved.

As I explained in my provisional decision, by the time of Mr N's application an arrangement existed that involved the introduction of clients to Gaudi to invest in Affinity and hold that investment in an SVS account with SVS to also act as DFM of other investments in the SIPP as well as holding the Affinity investment as custodian.

As I explained in my provisional decision, Gaudi should have had serious concerns about Gaudi based on its dealings with it in 2012. Gaudi should, as I have said, also have had concerns about BlueInfinitas recommending Affinity investments. When those recommendations were part of an arrangement in which SVS featured and was, or might be, given DFM powers, Gaudi should have decided that it was not an arrangement it wanted to be involved in. It should not have agreed to be part of such an arrangement, and it should have refused to accept such applications to open SIPPs from BlueInfinitas.

It is my view that when looked at cumulatively there was enough information for Gaudi to decide, and should have decided, that it would not accept business such as Mr N's application in this case. And this was information about Affinity, BlueInfinitas and SVS not information about Mr N and his own individual circumstances. I do not say Gaudi was required to give advice to Mr N or consider whether the investments were suitable for him. But it was required in its non-advisory capacity as SIPP operator to act with skill, care and diligence, and take reasonable care to organise and control its affairs responsibly with adequate risk management. And Gaudi was required to make its decisions consistent with those obligations when deciding what business it was prepared to accept. If Gaudi had made that decision as it should have done Mr N's application would not have been made in the first place. But if the application had been made Gaudi should have decided not to accept it.

In my provisional decision I said:

Looking at things in the round, as Gaudi should have done at the time, it is my view that Gaudi was in error in deciding to accept Mr N's application. Gaudi did have concerns about the Affinity investment and [initially at least] would only accept applications to invest in it if the member or potential member was advised. For the reasons I have mentioned it should have been concerned about whether the business model of BlueInfinitas would mean that advice that was in the best interests of the client was being provided. Added to those concerns should have been concerns about any process in which BlueInfinitas was recommending the use of SVS as having any involvement at all and especially in the DFM role given the serious concerns Gaudi had or should have had about that firm.

These concerns about SVS could and should reasonably have caused concerns about any arrangement of which SVS was a part.

Given the concerns Gaudi had about the possibility of consumer detriment in relation to the Affinity investment, and in relation to SVS, and which it ought to have had about BlueInfinitas, Gaudi should not have accepted Mr N's application. It is my view that in doing so Gaudi failed to act with skill, care and diligence, failed to take reasonable care to organise and control its affairs responsibly with adequate risk management, and failed to act in its customers best interests or treat Mr N fairly.

That remains my view. And it remains my view that Mr N's complaint should be upheld.

### **Putting things right**

My aim is to return Mr N to the position he would now be in but for what I consider to be Gaudi's failure to carry out and act upon adequate due diligence checks before accepting Mr N's SIPP application from BlueInfinitas or for not terminating the

transaction before completion.

In light of the above, Gaudi should calculate fair compensation by comparing the current position to the position Mr N would be in if he had not transferred from his existing pension. In summary, Gaudi should:

1. Calculate the loss Mr N has suffered as a result of making the transfer.
2. Take ownership of the Affinity Bond and the SVS shares if possible.
3. Pay compensation for the loss into Mr N's pension. If that is not possible pay compensation for the loss to Mr N direct. In either case the payment should take into account necessary adjustments set out below.
4. Pay Mr N £500 for the trouble and upset caused.

I'll explain how Gaudi should carry out the calculation set out at 1-3 above in further detail below:

1. *Calculate the loss Mr N has suffered as a result of making the transfer*

To do this, Gaudi should work out the likely value of Mr N's pension as at the date of this decision, had he left it where it was instead of transferring to the SIPP. Gaudi should ask Mr N's former pension provider to calculate the current notional transfer value had he not transferred his pension. If there are any difficulties in obtaining a notional valuation then the FTSE UK Private Investors Income Total Return index should be used to calculate the value. That is likely to be a reasonable proxy for the type of return that could have been achieved if suitable funds had been chosen.

The notional transfer value should be compared to the transfer value of the SIPP at the date of this decision and this will show the loss Mr N has suffered. The Affinity Bond and SVS shares should be assumed to have no value.

2. *Take ownership of the Affinity Bond and SVS shares*

Gaudi should take ownership of the Affinity Bond and SVS shares. If Gaudi is unwilling or unable to purchase the investments the *actual value* should be assumed to be nil for the purposes of the above calculation.

And Gaudi may ask Mr N to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the investment(s). That undertaking should allow for the effect of any tax and charges on the amount Mr N may receive from the investment(s) and any eventual sums he would be able to access from the SIPP. Gaudi will need to meet any costs in drawing up the undertaking.

3. *Pay compensation to Mr N for loss he has suffered calculated in (1).*

Since the loss Mr N has suffered is within his pension it is right that I try to restore the value of his pension provision if that is possible. So if possible the compensation for the loss should be paid into the pension. The compensation shouldn't be paid into the pension if it would conflict with any existing protection or allowance. Payment into the pension should allow for the effect of charges and any available tax relief. This may mean the compensation should be increased to cover the charges and reduced to notionally allow for the income tax relief Mr N could claim. The notional allowance should be calculated using

Mr N's marginal rate of tax.

On the other hand, Mr N may not be able to pay the compensation into a pension. If so compensation for the loss should be paid to Mr N direct. But had it been possible to pay the compensation into the pension, it would have provided a taxable income. Therefore, the compensation for the loss paid to Mr N should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mr N's marginal rate of tax in retirement. For example, if Mr N is likely to be 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 N would have been able to take a tax free lump sum, the notional allowance should be applied to 75% of the total amount.

4. *Pay Mr N £500 for the distress and inconvenience caused.*

Mr N has been caused distress and inconvenience by the loss of his pension benefits. Mr N's pension is now worthless. This is money Mr N cannot afford to lose and its loss will naturally have cause him much distress and inconvenience. I consider that a payment of £500 is appropriate to compensate for that.

*SIPP fees*

If the investments can't be removed from the SIPP and the SIPP has to remain open for that reason Gaudi should pay Mr N an amount equivalent to five years of future fees to ensure it is unlikely Mr N will have to pay further fees for holding the SIPP. Five years should allow enough time for any issues with the investments to be dealt with and for them to be removed from the SIPP. As an alternative to this Gaudi can agree to waive any future fees which might be payable for Mr N's SIPP.

*interest*

The compensation must be paid as set out above within 28 days of the date Gaudi receives notification of his acceptance of my final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation is not paid within 28 days.

**My final decision**

Your text here For the reasons I have set out above I uphold Mr N's complaint against Gaudi Regulated Service Limited should be upheld and it should pay Mr N fair redress as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 24 April 2023.

Philip Roberts  
**Ombudsman**