DRN-4811269

The complaint

Mr W opened a self-invested personal pension ("SIPP") with Carey Pensions UK LLP now Options UK Personal Pensions LLP ("Options"). Mr W transferred his existing personal pensions to the SIPP to invest in ABC Bonds and Best Group Car Parks ("BGCP"). Mr W's complaint is that Options failed to treat him fairly when accepting his SIPP application and investments.

What happened

I will first set out my understanding of the various parties involved and their roles and the investments in this complaint.

Carey, now Options

Options is a SIPP provider and administrator, regulated by the Financial Conduct Authority ("FCA"). Options is authorised, in relation to SIPPs, to arrange (bring about) deals in investments, deal in investments as principal, establish, operate or wind up a pension scheme and make arrangements with a view to transactions in investments.

Options is not authorised to advise on investments.

Mr W

Mr W is the complainant in this case.

Mr W has told us that in April 2013 he received a telephone call from the Introducer and then later met with Mr C (see further details about the Introducer and Mr C below). Mr W says he was impressed with the high returns offered by the alternative investments that Mr C dealt with in comparison to his current pension. He says he was told that the investments offered by the Introducer were risk free.

Mr W says he did speak to a financial adviser but was discouraged by the low growth rates they quoted in comparison to the Introducer.

Mr W says Mr C then organised the SIPP application to Options and the investments in the ABC Bond and BGCP.

Mr W's SIPP with Options was opened in April 2013. He switched two personal pensions worth around £85,000 to the Options SIPP a short time later. A further £28,000 was also switched to the SIPP from another personal pension in October 2013.

Mr W invested £64,000 into the ABC Bond in May 2013 and £26,000 into BGCP via the SIPP in November 2013. It appears that Mr W also took tax free cash from the pension after the transfer to Options.

Firm A

Firm A was a UK based company. It was involved in the “distribution” of an overseas property-based investment called Oasis - Salinas Sea. It was not regulated by the FCA. It was not therefore authorised to advise on investments covered by the Financial Services and Markets Act 2000 (“FSMA”) in the UK.

One of the directors of Firm A was Mr C.

As I understand it, Options relationship with Firm A began in April 2011. Firm A was an introducer of business to Options and Options has said it received 91 introductions between April 2011 and November 2013.

The Introducer

The Introducer was another UK based company. It purported to operate a pension review service. It was not regulated by the FCA.

The director of the Introducer was someone I will call Mr X. But Mr C of Firm A (above) was involved with the Introducer and featured on the documentation obtained by Options – e.g. on the identification check documentation.

We’ve also been provided with notes of a meeting between Options, Mr X and Mr C from 2012. The notes indicate that the Introducer and Firm A operated together. I’ll comment more on this below.

Mr C became a director of the Introducer in December 2013.

Options’ says its relationship with the Introducer began in November 2013. As I’ll explore in more detail below, this doesn’t match with the facts in this case where Options said that Mr W’s application was introduced by the Introducer in April 2013.

Options says its relationship with the Introducer ended in “early 2014” when it says it decided to stop accepting business from unregulated introducers.

The Introducer was dissolved following liquidation on 4 December 2021.

I referred to the Introducer as “Firm B” in my provisional decision – but think it’s easier to simply refer to it as the Introducer in this final decision.

The ABC Bond and BGCP

The ABC Bond was based on investing in a company owning, operating and managing overseas serviced business centres. This was an unregulated investment operated by the Best International group of companies. The bond offered fixed returns over a 3-5 year period.

I understand the ABC Bond went into administration in 2017 and investors have suffered significant losses.

BGCP was also an unregulated property investment involving car parking spaces in Dubai.

SIPP investors in BGCP would purchase a 99 year lease from the freeholder for “guaranteed” returns over five years. Best International managed the car parking spaces.

Investors could remain invested in BGCP after the initial five years or they could attempt to sell the investment if a purchaser could be found.

As I understand it, BGCP ran into difficulties when the management company went into administration in around 2017. It's likely that investors have suffered a significant loss.

The due diligence carried out by Options on the Introducer

Options has provided us with a document titled "Business Profile for Non-Regulated Introducers" that the Introducer completed in November 2013. This was effectively a questionnaire. At the top of this form, the following was set out by Options:

> *"As an FCA regulated pensions company, we are required to carry out due diligence as best practice on unregulated introducer firms looking to introduce clients to us, to gain some insight into the business they carry out. We therefore request that a Director/Partner of the Firm complete and sign this Profile questionnaire and our Terms of Business agreement as part of our internal compliance requirements."*

The profile questionnaire was signed by Mr X. The following are the main responses from the Introducer to the questions posed in the questionnaire:

- The Introducer had been trading for two years at that point.
- The Introducer had nine agents who were self-employed. The investments promoted by the Introducer were "Best International: ABC Bond, Borge Alle Vigne Bond, Dubai Car Parks, Student Property Bond, Salinas Sea and Dolphin". The Introducer said there were four other SIPP providers which had accepted those products.
- The Introducer got its clients by direct marketing and an in-house call centre and that they took prospects through a "process of educating them about alternative investments".
- The Introducer's average client was 40-60 years old, either employed or self-employed, with an average salary of £30,000-£50,000. "Almost all" its business involved pensions.
- The Introducer earned 7-9% commission from the companies that own the investments.
- The Introducer aimed to grow its client base by 100 clients a month.
- The Introducer's agents/consultants regularly undertook "full product and process training". The Introducer said that the consultants have a "good knowledge of the 'traditional' pension market". Mr X or Mr C would call each client before completion of the transfer of their pension "to ensure that they have been treated responsibly and fairly".
- The Introducer worked with a regulated firm called "Firm X".
- The Introducer's documentation "describes clearly and without ambiguity" that it does not undertake any regulated activities.

And although not provided to our investigator on this case, I'm aware from other cases that Options has responded to queries and has said of its relationship with the Introducer and the due diligence checks it carried out that:

- The relationship with the Introducer began in November 2013
- Options obtained Terms of Business from the Introducer signed by Mr W on 8 November 2013.
- Options also obtained anti-money laundering identification documents for Mr W and Mr C.
- Options understood the Introducer to be an introducer only. The Introducer's clients were obtained by a "UK Distribution Network" or by clients making contact via online contact request.
- Options paid no commission to the Introducer.
- Options proceeded on the basis that the Introducer did not give advice as they were not regulated to do so.
- The Introducer introduced 20 clients to Options.
- None of the clients introduced by the Introducer related to transfers in from Occupational Pension Schemes.
- 3.18% of the Introducer's introductions invested in non-mainstream investments. [NB I have assumed this response is an error as the Introducer dealt only with non-mainstream investments.]

The due diligence carried out by Options on BGCP and the ABC Bond

Options says:

> *"it completed appropriate due diligence in respect of the investments by ensuring that they were suitable to be held in a UK registered pension scheme, which they were. This included a review of the investment information, company background checks and also an independent report from an external third party compliance entity."*

Options has provided a number of documents about the investments that it obtained as part of its review process. As I understand it, Options decided that as a result of its review, all investors in the two investments should complete its "Alternative Member Declaration and Indemnity".

I will refer to that declaration again below. It is enough to say here that because of its checks on the investments, Options considered them to be high risk, speculative, unregulated alternative investments.

Mr W's dealings with Options

Mr W completed a Options SIPP application form in April 2013.

Options says its records show Mr W used the Introducer as his introducer.

Options says that as the Introducer is not a regulated adviser and acted only as an introducer Mr W was classified as a direct client of Options.

Options has also provided the declarations (see above) signed by Mr W for each of the ABC Bond and BGCP investments. Both declarations listed *Mr C of Firm A* as being the introducer. In the declarations:

- Mr W confirmed Options was acting on an execution only basis and had not given advice.
- Mr W understood that the investments were each "an Unregulated Alternative Investment" and as such were considered "High Risk and Speculative."
- Mr W acknowledged and confirmed his understanding that the investments may prove difficult to value and/or sell /realise.
- Mr W confirmed he had reviewed and understood the information relating to the investments.
- Mr W confirmed that he had taken his own advice, including but not limited to, financial advice, investment and tax advice regarding the investments and its value, taxes, costs and fees.

The declaration also included an agreement by Mr W to indemnify Options against any claims in connection with the investments.

Mr W transferred his pension away from Options to another SIPP operator in December 2014 as he wanted to make another unregulated investment (Dolphin Property) that the Introducer introduced to him but that wasn't permitted by Options. I understand his investments in the ABC Bond and BGCP were transferred "in Specie" to the new operator. Mr W has received compensation from the Financial Services Compensation Scheme ("FSCS") for the Dolphin Property investment, but not the earlier investments he made via the Options SIPP.

In May 2018 Mr W complained to Options. His complaint was that Options failed to carry out its regulatory duties to act with due care, skill and diligence in working with an unregulated introducer and allowing the unregulated "toxic" investments in his SIPP.

Options did not uphold Mr W's complaint. In summary, it said that:

- Options provided an execution only SIPP administration service and this was clearly explained to Mr W in all the documentation provided to him.
- Mr W signed documentation to confirm that he was not appointing an adviser. Mr W was therefore fully aware that he was not receiving advice from the Introducer or anyone else.
- By signing the declarations, Mr W confirmed that he understood the risks associated with his choices and that Options was not responsible for his decisions to establish the SIPP, transfer his pensions and make the unregulated investments.
- Options acted properly in accepting introductions from the Introducer. Options was permitted to accept introductions from unregulated introducers and it had strict processes for dealing with such introductions. At the time, it had no reason to believe that it should not accept introductions from the Introducer. Options did later cease to accept introductions, but only because it updated its policy as a result of later FCA guidance - not because of any concerns about the conduct of the Introducer.

- Options did undertake due diligence of the investments.

The complaint to the Financial Ombudsman Service

Mr W then referred his complaint to the Financial Ombudsman Service.

The investigator thought the complaint should be upheld. He made a number of points including:

- The Principles for Business and in particular Principles 2, 3 and 6 are relevant.

- The regulator has issued a number of publications which discussed the Principles and gave examples of good industry practice in relation to SIPP operators.

- Options was not responsible for giving Mr W advice. Nor was it responsible for checking any advice to him was suitable for his individual circumstances and requirements. But declining business does not amount to advice.

- Options was obliged to safeguard consumers against facilitating SIPPs that are unsuitable or detrimental to them and make enquiries about the nature or quality of proposed investments before deciding whether to accept them into their SIPPs.

- Options had not answered questions relating to its due diligence carried out on the Introducer and the investigator said he was entitled to draw an inference from this.

- The investigator was not convinced that Options had taken the steps it should have done to prevent consumer detriment when accepting introductions from the Introducer.

- The investigator also believed that Options should have concluded the Introducer was giving advice or have suspected it was. He said that section 27 FSMA therefore provided a further basis to uphold the complaint.

- In all the circumstances it was not fair and reasonable for Options to accept Mr W's application from the Introducer.

The investigator thought it was unnecessary to go on to consider the due diligence (if any) carried out by Options on the ABC Bond and BGCP. The investigator then set out how he thought Options should put things right. A further view from another investigator set out further details about the application of section 27 FSMA.

As Options did not respond to the investigators views, the matter was passed to me to make a decision.

I issued a provisional decision on 7 May 2024 setting out why I thought the complaint should be upheld.

Mr W responded to say he accepted my decision. Options did not respond.

As a result, my findings below remain the same as in my provisional decision. I have made a slight amendment to the redress section to make it clearer that regard should be had to any tax free payment that Mr W has already taken from his pension.

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.

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Relevant considerations

When considering what is fair and reasonable in the circumstances, I need to take account of relevant 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 goes wider than the rules and guidance that come under the remit of the FCA. Ultimately, I'm required to make a decision that I consider to be fair and reasonable in all the circumstances of the case.

In my view, the FCA's Principles for Businesses are of particular relevance. 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"* (see PRIN 1.1.2G). Principles 2, 3 and 6 are of particular relevance here, in my view. These 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*."

Ouseley J in *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin) 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 *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878). I am therefore satisfied that the Principles are a relevant consideration that I must take into account when deciding this complaint.

The *Berkeley Burke* judgment also considers section 228 FSMA and the approach an ombudsman is to take when deciding a complaint. The judgment of Jacobs J 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.

On 18 May 2020, the High Court handed down its judgment in the case of *Adams v Options SIPP* [2020] EWHC 1229 (Ch). Mr Adams subsequently appealed the decision of the High Court and, on 1 April 2021, the Court of Appeal handed down its judgment in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474. I have taken account of both these judgments when making this decision on Mr W's case.

The Conduct of Business Sourcebook ("COBS") at 2.1.1R says that a firm must act honestly, fairly and professionally in accordance with the best interests of its client. I acknowledge that this 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 SIPP owed him a duty to comply with COBS 2.1.1R, a breach of which, he argued, was actionable pursuant to section 138(D) FSMA ("the COBS claim"). HHJ Dight rejected this claim and found that Options SIPP had complied with the best interests rule on the facts of Mr Adams' case.

The Court of Appeal rejected Mr Adams' appeal against HHJ Dight's dismissal of the COBS claim on the basis that Mr Adams was seeking to advance a case that was radically different to that found in his initial pleadings. The Court found that this part of Mr 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 also note that in *Adams*, HHJ Dight found that the factual context of a case would inform the extent of the duty imposed by COBS 2.1.1R.

I think it is important to emphasise that I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And, in doing that, I am required to take into account relevant considerations which include: law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. This is a clear and relevant point of difference between this complaint and the judgments in *Adams*. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

The regulatory publications

The FCA (and its predecessor, the Financial Services Authority) 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.

These reports provide a reminder that the Principles apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications which set out the regulator's expectations of what SIPP operators should be doing also go some way to indicate what I consider amounts to good industry practice, and I am, therefore, satisfied it is appropriate to take them into account.

In determining this complaint, I need to consider whether, in accepting Mr W's SIPP application, Options complied with its regulatory obligations as set out by the Principles to act with due skill, care and diligence, to take reasonable care to organise its business affairs responsibly and effectively, to pay due regard to the interests of its customers, to treat them fairly, and to act honestly, fairly and professionally. And, in doing that, I'm looking to the rules and the publications listed above to provide an indication of what Options could have done to comply with its regulatory obligations and duties.

Taking account of the factual context of this case, it is my view that in order for Options to meet its regulatory obligations (under the Principles and COBS 2.1.1R), it should have undertaken sufficient due diligence checks to consider whether to accept or reject particular applications for investments, with its regulatory obligations in mind.

I do not say that Options was under any obligation to advise Mr W on the SIPP and/or the underlying investment in the ABC Bond or BGCP. Refusing to accept an application or permit an investment is not the same thing as advising Mr W on the merits of investing and/or switching to the SIPP.

What did Options' obligations mean in practice?

In this case, the business Options was conducting was its operation of SIPPs. I am satisfied that meeting its regulatory obligations when conducting this business would include deciding whether to accept or reject particular investments and/or referrals of business. The regulatory publications provided some examples of good industry practice observed by the FSA and FCA during their work with SIPP operators including being satisfied that a particular introducer is appropriate to deal with.

It is clear from Options' non-regulated introducer profile/questionnaire in this case that it understood and accepted that as a non-advisory SIPP operator its obligations meant it had a responsibility to carry out due diligence on the Introducer and that it could and should decide not to do business with an introducer if it thought that was appropriate.

I am satisfied that, in order to meet the appropriate standards of good industry practice and the obligations set by the regulator's rules and regulations, Options should have carried out due diligence on the Introducer. And in my opinion, Options should have used the knowledge it gained from its due diligence to decide whether to accept or reject a referral of business.

Was the due diligence carried out by Options on the investments adequate?

Because of what I say below about Firm A and the Introducer I do not need to refer to the due diligence carried out by Options of the ABC Bond and BGCP investments. But I think it's relevant that Options understood the investments as unregulated alternative investments that were high risk and speculative which might be difficult to sell/realise.

And this understanding of the investments formed (or should have formed) part of the context in which the checks made by Options on the Introducer were carried out or should have been carried out.

Was the due diligence carried out by Options on the Introducer adequate?

Before I begin this section, I want to make clear that I have considered the possibility that it was Firm A that actually introduced Mr W's business to Options – not the Introducer. That's because this would fit with the timeline that Options set out in other cases (i.e. that Firm A introduced business until November 2013 and that the Introducer introduced business thereafter). It would also explain why Firm A is mentioned on the investment declarations in this complaint. But, both Options and Mr W are clear that it was the Introducer that introduced his application. And the Introducer is noted on a letter of authority sent to Options in April 2013. And so I've proceeded on the basis that the introduction of Mr W's application was by the Introducer.

Options was permitted to accept business from unregulated introducers. It was not therefore at fault simply because it accepted business introduced from the Introducer.

Options doesn't dispute that it still needed to undertake due diligence on the Introducer. Despite this Options has not provided any evidence that it carried any specific due diligence on the Introducer on or before April 2013 when it accepted Mr W's application. Nor did Options have in place any Terms of Business with the Introducer until November 2013.

So my starting point is that Options did not meet the appropriate standards of good industry practice and the obligations set by the regulator's rules and regulations when it first accepted introductions from the Introducer, including that of Mr W.

But I still think it's reasonable to look at what Options knew or ought to have known about the Introducer in April 2013.

It's important here to highlight that the Introducer was not a completely new unknown entity to Options in April 2013. Options knew that Mr C of Firm A was integrally involved with the Introducer, even if he was not a director of the Introducer at the time (he became one in December 2013). Mr C and Firm A had been making introductions to Options since April 2011 for investments by customers in Oasis - Salinas Sea.

Options knew that the Introducer and Firm A worked together to generate leads and investments. This is evidenced by a meeting note from as early as October 2012 between Mr C, Mr X and Options. The short-hand manuscript meeting note set out that:

- Mr X was at Firm A until 2008.
- Firm A was the "Distribution Business for Oasis". This was the Oasis - Salinas Sea investment that the Introducer also said it promoted.
- The Introducer was the lead generator of pension reviews and works with Firm Y and Firm Z.
- In respect of Firm Y – "*Direct Clients – Only accept with robust process that includes client confirming execution only and has rev'd, read, understood KFD, T&C, Fees"*.

The investment declarations signed by Mr W in this case also noted that his introducer was Mr C of Firm A – not the Introducer. This is consistent from other complaints we've seen where the documentation surrounding the applications and instructions to Options from individual customers feature the Introducer and Firm A interchangeably.

An internal Options email dated 25 November 2013 we've been provided on another case is also illustrative of the relationship between Firm A and the Introducer – and Options knowledge of the relationship. The Options employee writes regarding an application submitted by Mr C:

> *"I didn't think we were taking on new business through* [Firm A] *which I notice* [Mr C] *is emailing from. From my discussion with* [another Options colleague] *I understand that any new business will be coming in via* [the Introducer] *and should come from a* [the Introducer] *e-mail account. That said,* [the Introducer] *are yet to be approved as introducers.*
>
> *…how are we progressing with* [the Introducer] *and the take on process?"*

So, I think it's reasonable to conclude that the Introducer and Firm A were largely synonymous. They worked together to introduce customers to "alternative" unregulated investments and Mr C was the critical link between the two entities. I think Options knew this.

My view is therefore that any due diligence undertaken by Options on the Introducer before accepting introductions should have involved analysis of Firm A, including what Options already knew about Firm A.

Should Options have been concerned about Firm A?

Our service has decided a number of cases involving Firm A. I don't intend to set out the findings of those decisions in detail, but in summary we have concluded (based on evidence we've seen) that:

- Options carried out a proforma based assessment on Firm A. It didn't do this at the start of its relationship with Firm A in 2011 – but it should have done so.

- In any event, once it had carried out the assessment if Options had acted reasonably and in a way that was consistent with its obligations in that role under the Principles and with good industry practice, it would not have accepted business from Firm A.

- Options knew that Firm A:

  - was a "distributor" of the Oasis - Salinas Sea investment.
  - was not authorised to give regulated investment advice.
  - apparently worked with regulated IFAs in some circumstances but not in all cases and that it would make direct introductions to Options on the basis that the client was acting on an execution only basis.
  - had mostly clients that could not reasonably be classified as high net worth or as sophisticated investors.
  - was receiving commission of around 8%.

- Options knew that Firm A purported to work with two regulated firms – Firm Y and Firm Z. Options did not explore this relationship further. But had it done so, it would have realised that these firms operated a "restricted advice" model.

  This was a model whereby the firms received introductions from unregulated introducers who typically promoted investments such as overseas property investments. The firms would then give advice on the suitability of switching an existing pension to a SIPP to make that investment. They did not give advice on the suitability of the investment. This type of restricted advice does not meet regulatory requirements.

  So Options knew or should have known that the business model Firm A was involved in lacked the safeguard of effective independent regulated advice. So the involvement of the IFAs with its business model ought to have been a red flag that should have given Options concerns.

- Options knew or should reasonably have known the Oasis – Salinas Sea investment was likely to be highly illiquid. It knew or should have known the investment was likely to be difficult to value and that it might well be difficult to sell when the member wanted to take benefits from their pension.

- Options knew or should have known that it is unlikely that an ordinary retail investor client would choose to transfer their personal pension to a SIPP without advice. And Options knew or should have known that it did not have a good understanding of the way Firm A operated and in particular how it found its clients.

- Options also knew that investing in an unregulated alternative investment that is high risk and speculative is unsuitable for most retail investors and that it is only likely to be suitable for high net worth or sophisticated investors on the basis that such an investment makes up only a small proportion of their portfolio.

- When Options agreed to accept business from Firm A it did not impose conditions on it such as for example only accepting such business where regulated advice had been given and/or only business involving high net worth or sophisticated investors, and/or only allowing a limited proportion of the SIPP fund to be invested in Oasis – Salinas Sea.

I've reviewed the evidence relating to Firm A and I agree with the findings summarised above.

So my view is that, taking all these points into account, Options knew or should have known when agreeing to accept introductions from Firm A there was a real risk of customer detriment. The fair and reasonable approach would have been to decline to accept business from Firm A.

What impact should this have had on Options accepting business from the Introducer?

Given the relationship between the Introducer and Firm A and what I've said above, I think the starting point for Options' assessment of the Introducer should have been that it would decline business from the Introducer too.

I think it would only have been fair and reasonable for Options to accept introductions if it was satisfied, based on additional evidence and safeguards, that the risks associated with Firm A had been comprehensively addressed.

However, having considered the available evidence, I'm not satisfied that this was the case.

My reasons are as follows:

- As mentioned, Options didn't carry out any due diligence on the Introducer and its business model in April 2013 when it accepted Mr W's application. Neither did it have in place any Terms of Business. So it did not satisfy itself that the Introducer's business model did not expose its customers to the risk of significant consumer detriment.

- If Options had asked the Introducer to complete the questionnaire in April 2013 that was eventually completed in November 2013, it would have discovered further reasons to decline introductions from the Introducer. I say this because it's reasonable to assume that the Introducer would have provided the same answers and my comments in the further bullet points below reflect this.

- The questionnaire showed that the investments promoted by the Introducer included Oasis- Salinas Sea but also other investments. All the investments were high risk, unregulated speculative overseas property-based investments that were likely to have liquidity issues. These would likely not be suitable for the vast majority of retail investors.

- The questionnaire showed that the Introducer's client base of customers with an average salary of £30,000-£50,000 were likely not sophisticated, experienced or high net worth. So it would be unlikely that the Introducer's client base was the kind of demographic for whom the investments promoted by the Introducer would be suitable and there was a real risk that they would suffer detriment through poor investment decisions.

- Options did not at any point explore with the Introducer what the “full product and process training” its agents had supposedly undertaken and how they had a “good knowledge of the traditional pensions market”. So Options could not be satisfied that the Introducer’s method of taking clients through a “process of educating them about alternative investments” could be undertaken without risk of the Introducer being involved in making investment recommendations.

- This risk was heightened as the Introducer stood to earn significant commissions of 7-9% from the investment companies. In other words, there was a risk of a hard sell and that the Introducer might stray into recommending or advising on investments.

- Options knew or should have known that it is unlikely that ordinary retail investor clients would choose to transfer their personal pension to a SIPP without advice.

- I’ve already highlighted above the issues relating to the regulated advice firms connected to Firm A. The meeting notes from 2012 suggest these same firms were connected to the Introducer. Furthermore, although another firm – Firm X - is mentioned in the questionnaire response from the Introducer, Options did not undertake any checks on that firm or its business model vis-à-vis the Introducer.

- The Introducer’s business model did not require its clients to obtain regulated advice. And Options did not insist on this as a condition for accepting the Introducer introductions. None of the cases I’ve reviewed involved a regulated adviser.

- The Introducer’s response to the Options questionnaire set out that Mr X and Mr C called each consumer before each pension switch to make sure they’d been treated fairly and reasonably by their agents. But this was obviously not an adequate safeguard as it was not an independent process.

  I’m aware that Options contacted (by telephone) at least some customers introduced by the Introducer to ask templated questions about whether they understood the risks involved in the investments proposed and to confirm that the Introducer had not given the customer advice.

  Whilst I think this step of Options contacting consumers was a reasonable one, it was not done consistently. After all, it doesn’t look like Mr W was contacted. And clearly there was a risk that customers - who were already keen enough to undertake the paperwork for the pension switch - might be coached about how to respond to questions or not understand the implications of what they were being asked. For example, consumers may not realise that the giving of advice need not take the form of a formal written recommendation in order for the regulated activity of “giving advice” to have been undertaken.

  Furthermore, this step was taken after Options began to accept introductions from the Introducer. It should have satisfied itself about this important matter before accepting *any* instruction.

  So overall, I think this telephone check had limited value in the context of the relationship with the Introducer as a whole.

- Even if the Introducer was not involved in advice, I think there was a clear and obvious risk that it was involved in another regulated activity – making arrangements for a personal pension.

Under Article 25 of The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("RAO") the following are regulated activities:

> *(1) Making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite a particular investment which is—*
>
> > *(a) a security,*
> > *(b) a relevant investment, or*
> > *(c) an investment of the kind specified by article 86, or article 89 so far as relevant to that article,*
>
> *is a specified kind of activity.*
>
> *(2) Making arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting investments falling within paragraph (1)(a), (b) or (c) (whether as principal or agent) is also a specified kind of activity.*

There is an exclusion under Article 26 RAO of "arrangements which do not or would not bring about the transaction to which the arrangements relate".

Rights under a personal pension scheme are a security.

Mr W's evidence is that the Introducer arranged his SIPP application to Options. The "call-centre" nature of the Introducer's business, that it was involved in "pension reviews" and then submitting applications to Options on behalf of customers means that, even if it were not providing advice, the Introducer was likely arranging the pensions switches and investments.

I think the following parts of the Court of Appeal's judgement in the *Adams* case are of particular relevance here.

Paragraph 99:

"…..*The fact remains that CLP "pre-completed the application form so that* [Mr Adams] *could just sign it" (to quote Mr Adams' witness statement). It also told Mr Adams of documents he would need to supply for anti-money laundering purposes and explained that the "completed forms and [his] anti money laundering documents will be collected by courier and taken to Carey Pensions UK". "Arrangements" being a "broad and untechnical word" in article 25 of the RAO as well as section 235 of FSMA, it is apt to describe what CLP did."*

Paragraph 100

"I consider, too, that the steps which CLP took can fairly be said to have been such as to "bring about" the transfers from Friends Life and into the Carey SIPP. Contrary to the Judge's understanding, it does not matter that CLP's acts "did not necessarily result in any transaction between [Mr Adams] *and* [Carey]*" or that "the process was out of CLP's hands to control in any event". Nor is it determinative whether steps can be termed "administrative".*

CLP's "procuring the letter of authority", role in relation to anti-money laundering *requirements and (especially) completion of the Carey application form were much more closely related to the relevant transactions than, say, the advertisement which originally prompted Mr Adams to contact CLP. It is to be remembered that CLP filled in sections of the application form dealing with "Personal Details", "Occupation & Eligibility", "Transfers", "Investments" and "Nomination Of Beneficiaries". In my view, what CLP did was thus significantly instrumental in the material transfers. In other words, there was, in my view, sufficient causal potency to satisfy the requirements of article 26 of the RAO."*

I'm satisfied that Options ought to have realised that, similar to *Adams,* the Introducer's business model meant that it might fairly be said to have been such as to "*bring about*" the switch from personal pensions into the Options SIPP and subsequent investments - they had sufficient causal potency to satisfy the requirements of Article 26 of the RAO.

I am therefore satisfied that the Introducer likely carried out regulated activities without authorisation or, at the very least, there was a significant risk that it would do so.

What Options ought to have decided?

Given all of the concerns surrounding Firm A and the Introducer, if Options had acted reasonably, in a way that was consistent with its role as a non-advisory SIPP operator, in a way that was consistent with its obligations in that role under the Principles and with good industry practice, it should have come to the conclusion not to accept introductions from the Introducer before Mr W's application.

Options knew or should have known when agreeing to accept introductions from the Introducer there was a real risk of customer detriment. All of the issues that it ought to have been aware of regarding Firm A were relevant for the Introducer and had not been mitigated or sufficiently addressed. And it's likely that Firm A itself was probably involved in the transaction as well given that it was named on the investments declarations.

Options response to this was to require potential clients to sign the declaration I referred to above and to call some consumers. In my view that was not a fair and reasonable approach bearing in mind the Principles for Business and good industry practice. In my view the fair and reasonable approach would have been to decline to accept business from the Introducer from the outset.

Asking Mr W to sign the declaration and indemnity absolving Options of all its responsibilities when it ought to have known that Mr W's dealings with the Introducer were putting him at significant risk of detriment was not the fair and reasonable thing to do. And it was not an effective way for Options to meet its regulatory obligations in the circumstances. It was not fair and reasonable to proceed on that basis.

Further I do not consider it fair and reasonable for Options to avoid responsibility now on the basis of the indemnity Mr W signed. Had Options acted appropriately in the circumstances Mr W should not have been able to proceed with his application. And he should not have got to the stage of signing the declaration.

So, for the above reasons, I think Mr W's complaint should be upheld.

Is it fair to ask Options to compensate Mr W?

In deciding whether Options is responsible for any losses that Mr W has suffered I need to look at what would have happened if Options had done what it should have done i.e. had not accepted Mr W's SIPP application in the first place.

Had Options acted fairly and reasonably it should have concluded that it should not accept Mr W's application to open a SIPP. That should have been the end of the matter – it should have told Mr W that it could not accept the business. And I am satisfied, if that had happened, the arrangement for Mr W would not have come about in the first place, and the loss he suffered could have been avoided. In my view, it would not be fair to say Mr W's actions in the indemnity and other documentation mean he should bear the loss arising as a result of Options' failings.

The financial loss has flowed from Mr W transferring out of his existing pensions and into a SIPP. I am satisfied that had Options explained to Mr W why it would not accept the application from the Introducer or was terminating the transaction, I find it very unlikely that Mr W would have tried to find another SIPP operator to accept the business.

So I'm satisfied that Mr W would not have continued with the SIPP, had it not been for Options' failings, and would have remained in his existing pension. And, whilst I accept that the Introducer is responsible for initiating the course of action that has led to his loss, I consider that Options failed unreasonably to put a stop to that course of action when it had the opportunity and obligation to do so.

I am not asking Options to account for loss that *goes beyond* the consequences of its failings. I am satisfied those failings have caused the full extent of the loss in question. That other parties might also be responsible for *that same loss* is a distinct matter, which I am not able to determine. However, that fact should not impact on Mr W's right to fair compensation from Options for the full amount of his loss.

Putting things right

My aim is to return Mr W to the position he would now be in but for what I consider to be Options due diligence failings.

In light of the above, I think that Options should calculate fair compensation by comparing the current position to the position Mr W would be in if he hadn't transferred from his existing pension plans.

We haven't received anything to suggest Mr W's previous pension plans were anything other than defined contribution plans without any guarantees attached.

The ABC Bond and BGCP investments and the balance of Mr W's Options SIPP was transferred to a new SIPP provider in December 2014. The Options SIPP was subsequently closed.

I've proceeded on the basis that although Mr W received compensation from the FSCS in relation to the new SIPP provider and events and investments made after December 2014, this did not compensate him for the initial pension switch to Options and the investments in the ABC Bond and BGCP. I have therefore also proceeded on the basis that Mr W did not assign over his rights to being this complaint against Options to the FSCS. Neither party to the complaint has disputed this.

As I understand it, the ABC Bonds and BGCP investments are illiquid and there was likely no secondary market for the investments from the moment they were purchased in Mr W's SIPP. So, given my findings above, I think it's fair and reasonable that Options compensate

Mr W for the losses arising from these investments up to the *date of my final decision* – notwithstanding that Mr W transferred to a new SIPP operator in December 2014.

However, Options is not responsible for losses arising from new investments that were made *after* monies were transferred to the new SIPP provider. And so to address this, I think it is appropriate to cap Options' liability for losses arising from any funds transferred to Options but not invested in the ABC Bond or BGCP as at the date of the transfer to the new SIPP operator in December 2014.

I've taken account of the fact that Mr W was in his mid-60s at the time of the transfer of his personal pensions to Options. So, he could have exercised a number of different options regarding pension benefits but for the illiquid investments in the ABC Bond and BGCP within a short time of the transfer. However, I can't be certain what he would have done and when – after all one of the options he might have exercised was to keep his pension invested and not crystalised any benefits for some time. Having carefully considered this issue, and given the lack of certainty on this point, for the purposes of quantifying redress in this case I think the fair and reasonable approach is to assume that the monies in question would have achieved a return equivalent to the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return index). I'm satisfied that's a fair and reasonable proxy for the type of return that could have been achieved over the periods in question.

Options should do the following:

<u>In respect of the monies invested in the ABC Bond and BGCP</u>

1. Options should calculate the return the monies transferred to the Options SIPP and invested in the ABC Bond and BGCP would notionally have achieved had the monies instead been invested (on the same dates) in line with the FTSE UK Private Investors Income Total Return Index through until the date of my final decision.

2. Any income payments received by Mr W from the investments can be deducted from the notional calculation above from the date they were actually paid. Any such monies must only be allowed for in this part of the calculations and must not also be counted as part of the value in step 1 of the second part of the calculations below.

3. Pay Mr W the sum arrived at from the calculation of the notional value set out above.

4. The illiquid investments should be removed from Mr W's SIPP. The valuation of the illiquid investments may prove difficult, as there is no market for them. For calculating compensation, Options should establish an amount Mr W's current SIPP provider is willing to accept for the investments as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investment/s.

5. If Options is able to purchase the illiquid investments the price paid to purchase the holdings should be allowed for as a notional deduction, as at the date of my final decision, from the notional valuation calculated in step 1 (because it will have been paid into Mr W's SIPP to secure the illiquid investments).

6. If Options is unable, or if there are any difficulties in buying Mr W's illiquid investments, it should give the holding a nil value for the purposes of calculating compensation and, as such, there will be no notional deduction to allow for the purchase payment. In this instance Options may ask Mr W to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the relevant holding. That undertaking should only take effect once Mr W has been

compensated in full, to include any loss above our award limit, and should allow for the effect of any tax and charges on the amount Mr W may receive from the investment/s and any eventual sums he would be able to access from the SIPP. Options will have to meet the cost of drawing up any such undertaking.

<u>In respect of the remaining monies transferred to the Options SIPP but not invested in the ABC Bond and BGCP</u>

1. Options should obtain the value of these funds as at the date of the transfer to the new SIPP operator in 2014.

2. Options should obtain the value these funds would notionally have achieved had the monies instead been invested (on the same dates the monies were transferred to Options) in line with the FTSE UK Private Investors Income Total Return Index as at the date of the transfer to the new SIPP operator in 2014.

   Any contributions or withdrawals Mr W has made will need to be taken into account.

   Any withdrawal out of the SIPP should be deducted at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. The same applies for any contributions made, these should be added to the notional calculation from the date they were actually paid, so any growth they would have enjoyed is allowed for. To be clear withdrawals here doesn't include SIPP charges or fees paid to third parties like an adviser. But it would include any pension commencement lump sums or pension income Mr W actually took after his pension monies were transferred to Options.

3. The total sum calculated in step 2. minus the sum arrived at in step 1, is the loss to Mr W.

4. The loss established at 3. should then be valued from the date of the transfer to the new SIPP operator in 2014 to the date of my final decision as if it had been invested line with the FTSE UK Private Investors Income Total Return Index so as to bring that loss up to date. That is the sum payable to Mr W to fairly compensate him for that element of his loss.

<u>Pay an amount into Mr W's pension so that the value is increased by the loss calculated above</u>

If the redress calculations above demonstrate a loss, the compensation should if possible be paid into Mr W's pension. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr W as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr W's likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this. Any deduction should take into account any tax free sum Mr W has already taken from his pension.

<u>Pay Mr W £1000 for the distress and inconvenience the problems with his pension have caused him</u>

In addition to the financial loss that Mr W has suffered as a result of the problems with his pension, I think that the loss suffered to Mr W's pension provision has caused him distress. Mr W lost a significant proportion of his pension provision when he was in his 60's so I think this is likely to have caused him worry. Given the illiquidity of the majority of his funds, he will also not have been able to exercise the retirement choices he might have otherwise have done when he wanted to. And I think that it's fair for Options to compensate him for this as well. The sum of £1000 is adequate compensation for this. This payment can be made directly to Mr W and without any deduction for tax that would be applicable to his pension.

Illiquid investments/SIPP fees

It isn't clear whether Mr W's current SIPP remains open solely due to the illiquid ABC Bond and/or BGCP investments or whether it is also because of the subsequent investment in Dolphin. So I set out two alternatives to address this.

If Mr W is unable to close his current SIPP *solely* because the ABC Bond and/or BGCP, can't be removed from the SIPP, then it wouldn't be fair for Mr W to have to pay annual SIPP fees to keep the SIPP open.

So, if the SIPP needs to be kept open only because of *these* illiquid investments and is used only to hold these assets, then Options should pay Mr W an additional amount equal to five years' SIPP fees. Five years should give enough time for issues relating to the investments to be resolved. The amount should be calculated based on the last year's fee and there should be no deduction for tax.

However, if at the date the compensation is due to be paid, Mr W's current SIPP can't be closed for any other reason (including the Dolphin Bond being unable to be realised) it is not reasonable to hold Options responsible for the payment of future fees and no further payment will be due.

Interest

The compensation resulting from this loss assessment must be paid to Mr W or into his SIPP within 28 days of the date Options receives notification of Mr W's 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 isn't paid within 28 days.

My final decision

For the reasons given above I uphold Mr W's complaint against Options UK Personal Pensions LLP.

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £150,000, I may recommend that Options UK Personal Pensions LLP pays the balance.

Decision and award: I uphold the complaint. I think that fair compensation should be calculated as shown above. My decision is that Options UK Personal Pensions LLP should pay Mr W the amount produced by that calculation – up to a maximum of £150,000 (including the £1000 to compensate for the distress and inconvenience Options' actions caused but excluding costs) plus interest as set out above if applicable.

Recommendation: If the amount produced by the calculation of fair compensation is more than £150,000, I recommend that Options pays Mr W the balance, plus any interest on the balance. This recommendation is not part of my determination or award. Options doesn't have to do what I recommend. It's unlikely that Mr W can accept my decision and go to court to ask for the balance. Mr W may want to get independent legal advice before deciding whether to accept this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 21 June 2024.

Abdul Hafez
Ombudsman