DRN-4820338

The complaint

Mr N opened a self-invested personal pension ("SIPP") with Carey Pensions UK LLP now Options UK Personal Pensions LLP ("Options"). Mr N transferred his existing personal pensions to the SIPP to invest in three unregulated investments. Mr N'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 N

Mr N is the complainant in this case.

Mr N has told us that in 2014 he received a telephone call from Mr C of the Introducer and then later met with Mr C (see further details about the Introducer and Mr C below). Mr N says Mr C "strongly recommended" a number of alternative investments that he said Mr N could make by switching his pension to a Options SIPP. He says he was told that the returns from the investments were far better than he would otherwise make from his pension.

Mr N says Mr C then organised the SIPP application to Options. The SIPP was opened in January 2014 and two personal pensions totalling approximately £115,000 were transferred to the SIPP the following month.

The following investments were then made in the SIPP in March 2014:

- £27,000 into Best Group Car Parks ("BGCP")
- £20,000 into a Dolphin Trust Loan Note ("Dolphin")
- £18,000 into a corporate bond with a project called Borgo Alle Vigne (the "BAV Bond")

It appears that Mr N 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.

Mr C (the same Mr C as above) and someone I will call Mr X were directors of the Introducer.

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.

Options' says its relationship with the Introducer began in November 2013. But it appears from other cases that we've seen that Options did accept introductions earlier than this.

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 investments

BGCP was 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.

Dolphin was a loan note investment that involved the purchase and development of property in Germany. This too was an unregulated investment offering fixed rate returns and security by way of first legal charges over property.

Dolphin also ran into serious difficulties from around 2019 onwards.

The BAV Bond was based on investment in the development of an existing resort in Italy. Investors in the bond would receive a "minimum" return of 7.24% over 2-3 years. Security was to be provided to investors by way of a debenture and guarantee.

The BAV Bond was also an unregulated investment.

The current status of the BAV Bond is unclear but it appears that in 2017 that the investment provider was unable (at that time at least) to meet its obligations to investors.

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, Borgo 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 X on 8 November 2013.

- Options also obtained anti-money laundering identification documents for Mr X 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 the investments

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 its SIPPs 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 N's dealings with Options

Mr N completed a Options SIPP application form in January 2014. It is not in dispute that his application was introduced to Options by the Introducer.

Options has provided the declarations (see above) signed by Mr N for each of the unregulated investments he went on to make. In the declarations:

- Mr N confirmed Options was acting on an execution only basis and had not given advice.

- Mr N understood that the investments were each "an Unregulated Alternative Investment" and as such were considered "High Risk and Speculative."

- Mr N acknowledged and confirmed his understanding that the investments may prove difficult to value and/or sell /realise.

- Mr N confirmed he had reviewed and understood the information relating to the investments.

- Mr N 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 N to indemnify Options against any claims in connection with the investments.

In August 2020, Mr N complained to Options via a professional representative. 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, high risk investments that were not suitable for retail customers like Mr N.

Options did not uphold Mr N's complaint. It said that he'd made the complaint too late under the regulatory rules.

The complaint to the Financial Ombudsman Service

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

The investigator thought the complaint had been made in time and should be upheld. He made a number of points including:

- The complaint had been made within the relevant time limits. Mr N may have known he had a problem in his SIPP with his investments in 2016-2017 – which was more than three years before his complaint. But his complaint in 2020 was within three years of when he ought reasonably to have known that Options might be responsible.

- 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 N 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 provided evidence 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 N’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 investments. The investigator then set out how he thought Options should put things right.

Options did not agree with the investigator. It said (in summary):

- The investigator was wrong to approach the time limit rules in the way he had. Mr N knew he had a problem more than three years before his complaint and the rules did not set out that he needed to identify Options as a possible respondent.

- The Ombudsman must take account of the legal and contractual context of the relationship between it and Mr N. Options acts on a strictly execution-only/non-advised basis and is member directed throughout.

- Options doesn’t give advice and the Ombudsman shouldn’t come to a finding that places a legal duty on it that doesn’t exist.

- The Investigator’s findings are based on duties that wouldn’t be recognised by a court, without explaining why that’s appropriate.

- The complaint had been considered based on guidance which hadn’t been published at the time of the events in this case.

- No evidence had been provided to demonstrate that the Introducer carried on regulated activities. It was evident that Mr N was not advised by the Introducer, and did not believe at the time he established his SIPP or made his investments that he had been advised by the Introducer.

- Options carried out a telephone call with Mr N at the time to confirm that he was aware that the Introducer was not regulated to give advice and that the SIPP was being established on an execution only basis.

- SIPP operators are permitted to accept introductions from non-regulated introducers.

- There was no breach of duty by Options.

- Against this background, it’s unfair and unreasonable to place liability for the losses flowing from the investment on the execution-only SIPP operator. It’s unfair to make a SIPP operator responsible for the member’s poor investment choices.

- Options didn’t cause Mr N to suffer a loss. It’s likely Mr N was keen to proceed with the investment and would have done so even if Options hadn’t accepted business from the Introducer.

- Options request an oral hearing in order to properly determine Mr N’s complaint. It’s procedurally unfair and inappropriate that a fact-sensitive matter such as this should be decided wholly on the papers.

A further view from another investigator set out further details about the application of section 27 FSMA.

As agreement could not be reached, the case was passed to me to decide. I issued a provisional decision on 9 May 2024 setting out why I thought the complaint should be upheld.

Mr N 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.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I've considered all the points made by the parties. However, I've not responded to them all below, instead concentrating on what I consider to be the key issues.

Preliminary issue - Time limits

This part of my decision is about our jurisdiction and the application of our complaints rules to the facts. It does not involve an analysis of what is "fair and reasonable".

The rules about time limits and whether our Service can look into the merits of a complaint are set out in the DISP section of the FCA's Handbook. DISP 2.8.2R says:

> *"The ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:*
> *…*
> *(2) more than:*
> *(a) six years after the event complained of; or (if later)*
> *(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint*
>
> *unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;"*

Mr N's SIPP application to Options in January 2014 and the investments in March 2014 were made more than six years before his complaint in August 2020. So Mr N has complained more than six years after the events he's complaining about took place and so his complaint was referred too late under the first limb of the time limit rules above.

The issue for me to decide is whether the complaint is also out of time for the purposes of DISP 2.8.2(2)(b) which sets out the three-year rule. So the crucial thing is when Mr N became (or ought reasonably to have become) aware that he had cause for complaint and whether this was more than three years before August 2020 (i.e. before August 2017).

When we say *cause for complaint*, we mean that the customer had, or ought reasonably to have knowledge of the following:

- A problem
- That they have suffered or may suffer a loss

- And that someone else is responsible for this problem (and who that someone is)

There is dispute about what Mr N knew about his investments and his SIPP in general. Mr N says he wasn't receiving correspondence from Options until around 2019. On the other hand, Options says that Mr N would have known from 2016 that the BGCP investment had failed and so should have realised then that he had a problem and cause for complaint.

I haven't considered in detail the issue of what information Mr N would have known and been sent about his investments. That's because, regardless of whether Mr N should have been aware of a problem and/or loss in his SIPP, I don't think he would have known that Options might be responsible for that complaint before August 2017.

As I'll explain in more detail below, in 2009 and 2012 the regulator published reports on the results of two thematic reviews on SIPP operators. It also issued guidance for SIPP operators in 2013 and wrote to the CEOs of SIPP operators in 2014. A common theme of those communications is that the regulator considered SIPP operators had obligations in relation to their customers even where they do not give advice, and that many SIPP operators had a poor understanding of those obligations.

In the circumstances I do not consider Mr N should have had an understanding of the obligations SIPP providers were under before August 2017 (the relevant date in this complaint). There is no evidence that he ought to have known, at that stage, that Options might have failed in its duties to carry out due diligence on the introducer or investments or that any wrongdoing or error on the part of Options might have played a causative role in his loss.

Mr N complained to Options in August 2020. And, taking account of everything I've explained above, I've seen nothing to suggest he was aware, or ought reasonably to have been aware, he had cause to complain about Options more than three years earlier, i.e., before August 2017. So I think Mr N has made his complaint within our time limits and I've gone on to consider the merits of the complaint. But first, I'll set out my thoughts on Options' request for an oral hearing.

Preliminary issue - Options' request for an oral hearing

Options says an oral hearing is necessary to explore issues such as how Mr N came to hear about the investment, his understanding of it and the roles played by the parties, and his motivation for entering into the transaction.

The Financial Ombudsman Service provides a scheme under which certain disputes may be resolved quickly and with minimum formality (section 225 FSMA). DISP 3.5.5 R of the FCA's Dispute Resolution rules provides:

> *"If the Ombudsman considers that the complaint can be fairly determined without convening a hearing, he will determine the complaint. If not, he will invite the parties to take part in a hearing. A hearing may be held by any means which the Ombudsman considers appropriate in the circumstances, including by telephone. No hearing will be held after the Ombudsman has determined the complaint."*

Given my statutory duty under FSMA to resolve complaints quickly and with minimum formality, I'm satisfied that it wouldn't normally be necessary for me to hold a hearing in most cases (see the Court of Appeal's decision in *R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service* [2008] EWCA Civ 642).

The key question for me to consider when deciding whether a hearing should be held is whether or not *"the complaint can be fairly determined without convening a hearing"*.

We don't operate in the same way as the Courts. Unlike a Court, we have the power to carry out our own investigation. And the rules (DISP 3.5.8 R) mean I, as the Ombudsman determining this complaint, am able to decide the issues on which evidence is required and how that evidence should be presented. I'm not restricted to oral cross-examination to further explore or test points.

If I decide particular information is required to decide a complaint fairly, in most circumstances we're able to request this information from either party to the complaint, or even from a third party.

I've considered the submissions Options has made. However, I'm satisfied that I'm able to fairly determine this complaint without convening a hearing. In this case, I'm satisfied I have sufficient information to make a fair and reasonable decision. So, I don't consider a hearing is required. The key question is whether Options should have accepted Mr N's application at all. Mr N's understanding of matters is secondary to this.

In any event – and I make this point only for completeness – even if I were to invite the parties to participate in a hearing, that would not be an opportunity for Options to cross-examine Mr N as a witness. Our hearings don't follow the same format as a Court. We're inquisitorial in nature and not adversarial. And the purpose of any hearing would be solely for the Ombudsman to obtain further information from the parties that they require in order to fairly determine the complaint. The parties wouldn't usually be allowed direct questioning or cross-examination of the other party to the complaint.

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 N'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 N'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 N on the SIPP and/or the underlying investments. Refusing to accept an application or permit an investment is not the same thing as advising Mr N 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 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?

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 when it first began to accept introductions from the Introducer. Options has said that it first accepted introductions in November 2013, but I'm aware of some cases where it appears that introductions were accepted earlier. And it's important here to highlight that the Introducer was not a completely new unknown entity to Options in November 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".*

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:

- The introducer 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 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) Mr N to ask templated questions about whether he understood the risks involved in the investments proposed and to confirm that the Introducer had not given him advice.

  Whilst I think this step of Options contacting consumers was a reasonable one, it was not done consistently as I've seen cases where there is no evidence of any such call. 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 N'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 N'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.

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 N to sign the declaration and calling him with templated questions when it ought to have known that Mr N'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 declaration Mr N signed. Had Options acted appropriately in the circumstances Mr N 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 N's complaint should be upheld.

Is it fair to ask Options to compensate Mr N?

In deciding whether Options is responsible for any losses that Mr N 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 N's SIPP application in the first place.

Had Options acted fairly and reasonably it should have concluded that it should not accept Mr N's application to open a SIPP. That should have been the end of the matter – it should have told Mr N that it could not accept the business. And I am satisfied, if that had happened, the arrangement for Mr N 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 N'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 N transferring out of his existing pensions and into a SIPP. I am satisfied that had Options explained to Mr N why it would not accept the application from the introducer or was terminating the transaction, I find it very unlikely that Mr N would have tried to find another SIPP operator to accept the business.

So I'm satisfied that Mr N would not have continued with the SIPP, had it not been for Options' failings, and would have remained in his existing pensions. 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 N's right to fair compensation from Options for the full amount of his loss.

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 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 N would be in if he hadn't transferred from his existing pension plans.

We haven't received anything to suggest Mr N's previous pension plans were anything other than defined contribution plans without any guarantees attached. So I've proceeded on the basis that there were no such guarantees.

I've taken account of the fact that Mr N reached state pension age in 2022. So, by now he could have exercised a number of different options regarding pension benefits but for the illiquid investments in his SIPP and he's mentioned that he looked into his draw down options in 2019. However, I can't be certain what he would have done and when. Overall, I think the most pragmatic and reasonable way of addressing the impact of the delay in the availability of his full retirement choices is a compensation award for his distress and inconvenience.

In summary, Options should:

1. Obtain the current notional value, as at the date of this decision, of Mr N's previous pension plans, if they hadn't been transferred to the Options SIPP.

2. Obtain the actual current value of Mr N's SIPP, as at the date of this decision, less any outstanding charges.

3. Deduct the sum arrived at in step 2) from the sum arrived at in step 1).

4. Pay a commercial value to buy any illiquid investments (or treat them as having a zero value).

5. Pay an amount into Mr N's SIPP, so that the transfer value of this is increased by an amount equal to the loss calculated in step 3). This payment should take account of any available tax relief and the effect of charges. The payment should also take account of interest as set out below.

6. Pay Mr N £750 for the distress and inconvenience the problems with his pension have caused him.

I've explained how Options should carry out the calculation, set out in steps 1 - 6 above, in further detail below:

1. Obtain the current notional value, as at the date of this decision, of Mr N’s previous pension plans, if they hadn’t been transferred to the Options SIPP.

Options should ask the operator of Mr N’s previous pension plans to calculate the current notional value, as at the date of this decision, had he not transferred into the SIPP. Options must also ask the same operator to make a notional allowance in the calculations, so as to allow for any additional sums Mr N contributed to, or withdrew from, his Options SIPP since the outset. To be clear this doesn’t include SIPP charges or fees paid to third parties like an adviser.

Any notional contributions or notional withdrawals to be allowed for in the calculations should be deemed to have occurred on the date on which monies were actually credited to, or withdrawn from, the Options SIPP by Mr N.

If there are any difficulties in obtaining a notional valuation from the operator of Mr N’s previous pension plan, Options should instead calculate a notional valuation by ascertaining what the monies transferred away from this would now be worth, as at the date of this decision, had these achieved a return from the date of transfer 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 reasonable proxy for the type of return that could have been achieved over the period in question. And, again, there should be a notional allowance in this calculation for any additional sums Mr N contributed to, or withdrew from, his Options SIPP since outset.

2. Obtain the actual current value of Mr N’s Options SIPP, as at the date of this decision, less any outstanding charges.

This should be the current value as at the date of this decision.

3. Deduct the sum arrived at in step 2) from the sum arrived at in step 1).

The total sum calculated in step 1) minus the sum arrived at in step 2), is the loss to Mr N’s pension provision.

4. Pay a commercial value to buy Mr N’s share in any investments that cannot currently be redeemed.

I’m satisfied that Mr N’s Options SIPP only still exists because of the illiquid investments that are held within it. And that but for these investments Mr N’s monies could have been transferred away from Options. In order for the SIPP to be closed and further SIPP fees to be prevented, any remaining investments need to be removed from the SIPP.

To do this Options should reach an amount it’s willing to accept as a commercial value for the investments, and pay this sum into the SIPP and take ownership of the relevant investments.

If Options is unwilling or unable to purchase the investments, then the actual value of any investments it doesn’t purchase should be assumed to be nil for the purposes of the redress calculation. To be clear, this would include their being given a nil value for the purposes of ascertaining the current value of Mr N’s SIPP in step 2).

If Options doesn't purchase the investments and it doesn't limit compensation to the award limit (below), it may ask Mr N to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from these investments. That undertaking should allow for the effect of any tax and charges on the amount Mr N may receive from the investments, and any eventual sums he would be able to access from the SIPP. Options will need to meet any costs in drawing up the undertaking. If Options does limit the compensation to our limit and Mr N isn't fully compensated for his loss, Options may only draw up the undertaking so that Mr N only accounts to Options for any additional payments he receives from the investments once he's fully recovered his losses.

5. Pay an amount into Mr N's Options SIPP, so that the transfer value of this is increased by an amount equal to the loss calculated in step 3). This payment should take account of any available tax relief and the effect of charges. The payment should also take account of interest as set out below.

The amount paid should allow for the effect of charges and any available tax relief. Compensation shouldn't be paid into a pension plan if it would conflict with any existing protections or allowances.

If Options is unable to pay the compensation into Mr N's SIPP, or if doing so would give rise to protection or allowance issues, it should instead pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore, the compensation should be reduced to notionally allow for any income tax that would otherwise have been paid.

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

It's reasonable to assume that Mr N is likely to be a basic rate taxpayer at his selected retirement age, so the reduction would equal 20%. However, if Mr N would have been able to take a tax-free lump sum (or further tax-free lump sum), the reduction should only be applied to that portion of the compensation that couldn't have been taken as a tax-free lump sum. For example, if Mr N would have been able to take a tax-free lump sum of 25%, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

If either Options or Mr N dispute that this is a reasonable assumption, they must let us know as soon as possible – and by the deadline given – so that the assumption can be clarified and Mr N receives appropriate compensation. It won't be possible for us to amend this assumption once any final decision has been issued on the complaint.

6. Pay Mr N £750 for the distress and inconvenience the problems with his pension have caused him.

In addition to the financial loss that Mr N has suffered as a result of the problems with his pension, I think that the loss suffered to Mr N's pension provision has caused him distress. Mr N lost a significant proportion of his pension provision when he was in his 60's and affected his retirement choices, so I think this is likely to have caused him worry. And I think that it's fair for Options to compensate him for this as well.

SIPP fees

If the investment/s can't be removed from the SIPP, and because of this it can't be closed after compensation has been paid, then it wouldn't be fair for Mr N to have to pay annual SIPP fees to keep the SIPP open. So, if the SIPP needs to be kept open only because of the illiquid investments and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.

Interest

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

My final decision

For the reasons given above I uphold Mr N'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 £160,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £160,000, 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 N the amount produced by that calculation – up to a maximum of £160,000 (including the £750 to compensate for the distress and inconvenience Options' actions caused) plus interest as set out above if applicable.

Recommendation: If the amount produced by the calculation of fair compensation is more than £160,000, I recommend that Options pays Mr N the balance and 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 N can accept my decision and go to court to ask for the balance. Mr N 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 N to accept or reject my decision before 25 June 2024.

Abdul Hafez
Ombudsman