DRN-4960966

The complaint

Mr O opened a self-invested personal pension ("SIPP") with Carey Pensions UK LLP now Options UK Personal Pensions LLP ("Options"). Mr O transferred his existing personal pensions to the SIPP and made two investments. Mr O's complaint is that Options acted unfairly by failing to undertake appropriate due diligence and he's suffered a loss in his SIPP as a result.

What happened

There is limited documentation available to me. That's because Options didn't take the opportunity to provide its files in relation to Mr O, nor to elaborate on its position with regards to Mr O's case specifically. So, in considering this case I've also taken into account relevant submissions made to our service by Options in other, similar complaints involving the same parties.

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 O

Mr O is the complainant in this case. He is represented by claims representative, but I'll refer to Mr O throughout.

Mr O has told us that he was cold called by a business I'll call the "Introducer" (see further details about the Introducer below) who said he could achieve better pension returns by switching his pensions to Options.

We don't have all the documentation but it appears that in around December 2013, Mr O made the application to open the Options SIPP.

The SIPP was opened in December 2013 and Mr O's personal pensions of approximately £67,000 were transferred to the SIPP by February 2014.

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

- £27,000 in Best Group Car Parks ("BGCP")
- £25,000 in Dolphin Loan Notes

These were both unregulated, high risk investments based overseas. There is some paperwork relating to a potential investment in Oasis – Salinas Seas. But it doesn't look like that investment ultimately went ahead.

It appears that when making the investments, Mr O was required by Options to sign "Alternative Member Declaration and Indemnity" declarations. We don't have the final signed and dated versions of these declarations – but the unsigned, undated copies provided by Mr O show that

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

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

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

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

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

It appears that Mr O took a tax free lump sum of around £15,000 in June 2015.

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 X was a director of the Introducer. Mr C (the same Mr C as above) also became a director in December 2013.

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' has said in other cases that its relationship with the Introducer began in November 2013. And that 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.

The due diligence carried out by Options on the Introducer

On other cases, 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.

I'm also aware from other cases that Options 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 complaint

Mr O complained to Options in May 2021 after he'd suffered losses from the investments. He said Options failed to undertake due diligence and didn't treat him fairly when accepting his SIPP and investment instructions.

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

- Options provided an execution only SIPP administration service and this was clearly explained to Mr O in all the documentation provided to him.
- Options was obliged to execute Mr O's instructions because of the rule in the Conduct of Business Sourcebook ("COBS") at 11.2.19.
- Mr O signed documentation to confirm that he was not appointing an adviser. Mr O was therefore fully aware that he was not receiving advice.
- By signing the investment declarations, Mr O 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 undertook the necessary due diligence in respect of the investments.

The complaint to the Financial Ombudsman Service

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

An investigator looked at the case and obtained evidence from Mr O regarding the Introducer's role in Mr O's SIPP. The Introducer's involvement hadn't been raised by Mr O previously nor addressed by Options.

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

- The Principles for Businesses 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 O 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 believed that Options should have concluded the Introducer was carrying out regulated activities.
- In all the circumstances it was not fair and reasonable for Options to accept Mr O's application from the Introducer.

The investigator thought it was unnecessary to go on to consider the due diligence carried out by Options on the investments. The investigator then set out how he thought Options should put things right.

Options did not respond to the investigator's view. As agreement couldn't be reached, the matter was passed to me to decide.

I issued a provisional decision on 16 July 2024 setting out why I thought the complaint should be upheld and Options should pay Mr O compensation.

Mr O replied to say he agreed with my decision. Options didn't respond at all. And so, having considered matters again, my conclusion is the same as my provisional decision, save for some minor changes below.

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 O's SIPP application to Options in December 2013 and the investments in March 2014 were made more than six years before his complaint in May 2021. So Mr O 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 O became (or ought reasonably to have become) aware that he had cause for complaint and whether this was more than three years before May 2021 (i.e. before May 2018).

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)

It's not clear when Mr O would have known that he'd suffered losses from the Dolphin loan notes investment. But Mr O has provided us with documentation he received that suggests that he ought to have known that the BGCP investment was in difficulty from around 2016 onwards.

However, just because Mr O ought to have known about a problem or loss in his pension, it doesn't mean he ought reasonably to have known who was responsible for the problem at that point too. 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 O should have had an understanding of the obligations SIPP providers were under before May 2018 (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 O complained to Options in May 2021. 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 May

2018. So I think Mr O has made his complaint within our time limits and I've gone on to consider the merits of the complaint.

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 reiterate that Options hasn't provided its client file nor responded to the investigator's view. So I've based my decision on the limited evidence available to me.

Mr O has provided documentation he received from the Introducer in the form of a "personal pension review" and other correspondence. So I've proceeded on the basis that Mr O was introduced to Options and the investments by the Introducer. I note that Options hasn't disputed this.

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 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 O's case.

COBS 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 O'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 its SIPP and investments, with its regulatory obligations in mind.

I do not say that Options was under any obligation to advise Mr O 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 O 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 referrals of business and/or particular investments. 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 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?

As mentioned, Options needed to carry out due diligence on the investments and draw reasonable conclusions from that. Because of what I say below about the Introducer I do not need to refer to the due diligence carried out by Options on the investments. But I think it's relevant that Options understood that the Introducer was introducing SIPPs that would be used to make unregulated alternative investments that were high risk and speculative which might be difficult to sell/realise.

And this understanding of the investments should have formed part of the context in which the checks made by Options on the Introducer were 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 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. 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 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 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. This is reflected in the "personal pension review" sent to Mr O by the Introducer was heavily weighted towards opening a SIPP and "taking control" of funds. I think this suggests that conversations between Mr O and the Introducer would have been unbalanced and recommended "alternative 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.

- 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.

  This was obviously not an adequate safeguard as it was not an independent process.

  I'm also aware that in some cases Options contacted customers to seek clarification that they'd not been advised. There's no evidence that Mr O was contacted by Options before his SIPP was opened. But in any event, 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.

  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.

  The 'call-centre' nature of the Introducer's business, that it was involved in obtaining pension information from existing pension providers and "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?

So, Options should have had serious concerns about 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 O'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 declarations 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 Businesses 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 O to sign the declarations when it ought to have known that Mr O'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 declarations Mr O signed. Had Options acted appropriately in the circumstances Mr O should not have been able to proceed with his application. And he should not have got to the stage of signing the declarations.

I'm aware that Options has cited COBS 11.2.19 to say that it was obliged to execute Mr O's investment instructions. This rule says:

> *"Whenever there is a specific instruction from the client, the firm must execute the order following the specific instruction. A firm satisfies its obligation under this section to take all reasonable steps to obtain the best possible result for a client to the extent that it executes an order, or a specific aspect of an order, following specific instructions from the client relating to the order or the specific aspect of the order."*

The court decision in the *Berkeley Burke* case referred to above makes it clear that the COBS rule 11.2.19 about the execution of orders only applies once the decision to execute an order is made. And that a SIPP operator is able to decide not to carry out the member's instructions if it thinks it's appropriate not to do so. In this case I think Options should have taken the decision not to carry out the instructions and so I don't agree with Options' argument about the applicability of this rule.

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

Is it fair to ask Options to compensate Mr O?

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

Had Options acted fairly and reasonably it should have concluded that it should not accept Mr O's application to open a SIPP. That should have been the end of this matter – it should have told Mr O that it could not accept the business.

I'm satisfied that had Options refused the SIPP application, Mr O wouldn't have made the investments and suffered a loss to his pension.

As set out above, it would not be fair to say Mr O's actions in signing the declaration and other documentation mean he should bear the loss arising as a result of Options' failings. The financial loss has flowed from Mr O transferring out of his existing pensions and into a SIPP.

So I'm satisfied that Mr O 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 Mr O's loss and other parties may also have been involved, 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 O's right to fair compensation from Options for the full amount of his loss.

Putting things right

My aim is to return Mr O 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 O would be in if he hadn't transferred from his existing pension plans.

We haven't received anything to suggest Mr O'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.

In summary, Options should:

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

2. Obtain the actual current value of Mr O'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) and relieve Mr O of any liabilities linked to the investments.

5. Pay an amount into Mr O'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 O £750 for the distress and inconvenience the problems with his pension has 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 O's previous pension plans if they hadn't been transferred to the Options SIPP.

Options should ask the operators of Mr O'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 operators to make a notional allowance in the calculations, so as to allow for any additional sums Mr O 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 O.

If there are any difficulties in obtaining a notional valuation from the operator of Mr O's previous pension plans, 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 O contributed to, or withdrew from, his Options SIPP since the outset.

2. Obtain the actual current value of Mr O'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 O's pension provision.

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

I think any illiquid assets held should be removed from the SIPP. Mr O would then be able to close the SIPP, if he wishes. That would then allow him to stop paying the fees for the SIPP. The valuation of the illiquid investment may prove difficult, as there is no market for it. For calculating compensation, Options should establish an amount it's 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 investments and ensure that in doing so it takes on or otherwise removes all liability Mr O may have for the investments.

If Options is able to purchase the illiquid investments then the price paid to purchase the holding will be allowed for in the current transfer value (because it will have been paid into the SIPP to secure the holding).

If Options is unable, or if there are any difficulties in buying Mr O's illiquid investments, it should give the holding a nil value for the purposes of calculating compensation. If the total calculated redress in this complaint is less than £160,000, Options may ask Mr O 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 allow for the effect of any tax and charges on the amount Mr O may receive from the investment 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.

If the total calculated redress in this complaint is greater than £160,000 and Options doesn't pay the recommended amount (set out below), Mr O should retain the rights to any future return from the investment until such time as any future benefit that he receives from the investments together with the compensation paid by Options (excluding any interest and/or costs) equates to the total calculated redress amount in this complaint. Options may ask Mr O to provide an undertaking to account to it for the net amount of any further payment the SIPP may receive from these investments thereafter. That undertaking should allow for the effect of any tax and charges on the amount Mr O may receive from the investment from that point, and any eventual sums he would be able to access from the SIPP. As above, Options will need to meet any costs in drawing up the undertaking.

5. Pay an amount into Mr O'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 O'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 O's actual or expected marginal rate of tax in retirement at his selected retirement age.

It's reasonable to assume that Mr O is likely to be a basic rate taxpayer at his selected retirement age, so the reduction would equal 20%. However, if Mr O would have been able to take a 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 O 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%.

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

In addition to the financial loss that Mr O has suffered as a result of the problems with his pension, I think that the loss suffered to Mr O's pension provision has caused him distress and worry. Mr O is now in his mid-70s and so these events and the distress have impacted him in retirement. 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 O 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 O or into his SIPP within 28 days of the date Options receives notification of Mr O’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 O’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.

Determination and money award: It’s my final decision that I require Options to pay Mr O compensation as set out above, up to a maximum of £160,000 plus any interest and/or costs payable.

Until the calculations are carried out, I don’t know how much the compensation will be, and it may be nowhere near £160,000, which is the maximum sum that I’m able to award in Mr O’s complaint. But I’ll also make a recommendation below in the event that the compensation is to exceed this sum, although I can’t require that Options pays this.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £160,000, I also recommend that Options pays Mr O the balance.

If Mr O accepts my final decision, the money award and the requirements of the decision will be binding on Options. My recommendation won’t be binding on Options.

Further, it’s unlikely that Mr O will be able to accept my final determination and go to court to ask for the balance of the compensation owing to him after the money award has been paid. Mr O may want to consider getting independent legal advice before deciding whether to accept any final decision I make.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr O to accept or reject my decision before 10 September 2024.

Abdul Hafez
Ombudsman