DRN-5177377

The complaint

Mr D complains that Novia Financial Plc ("Novia") failed to carry out sufficient due diligence when it allowed him to transfer his existing pensions to a Self-Invested Personal Pension ("SIPP") and invest in several non-standard investments.

Mr D is being represented in the complaint but for ease I'll refer to all representations as being made by Mr D.

What happened

Involved parties

Novia

Novia is a regulated pension provider and administrator. It's been authorised by the regulator – the Financial Conduct Authority ("FCA") - since 16 September 2008.

Shah Wealth Management Ltd ("Shah")

Shah was authorised by the FCA between 22 July 2010 and 15 January 2018. Shah went into liquidation in 2016 and has since been declared in default by the Financial Services Compensation Scheme ('FSCS').

Cherish Wealth Management Ltd ("Cherish")

At the time of the events in this complaint, Cherish was registered as an appointed representative ('AR') of Shah. Cherish ceased being an AR when Shah's FCA authorisation ceased on 15 January 2016. Cherish went into liquidation in 2016.

Hypa Management LLP ("Hypa")

Hypa was the provider of a number of unregulated investments. In the case of Mr R, he invested in the following bonds:

- Lakeview UK Investments Plc ("Lakeview") – this was an unregulated 5 year bond offering investors an 11.5% return. An Investment Review Simplified document, completed for Novia by a third party firm, dated 1 July 2015, stated that "*This investment may be deemed to be a non-mainstream pooled investment by the FCA*" and that "*The investment is restricted to sophisticated or high net worth investors*".
- Biomass Investments Plc ("Biomass") – this was an unregulated 3 year bond offering investors a 12.5% return. An Investment Review Simplified document completed for Novia by a third party firm, dated 2 July 2015, stated that "*This investment may be deemed to be a non-mainstream pooled investment by the FCA*" and that "*The investment is restricted to sophisticated or high net worth investors*".
- Brisa Investment Plc ("Brisa") – this was an unregulated 5 year bond offering investors a 11% return. The Offering Memorandum for this investment set out that "*Investment in the Bonds is therefore relatively illiquid and involves a high degree of risk. Subscription for*

Bonds should be considered only by pre qualified suitable and/or sophisticated investors who are financially able to maintain their investment and can afford to lose all or a substantial part of their investment in the Bonds.".

- Motion Picture Global Investments Plc ("Motion") – this was an unregulated 10 year bond offering investors a 10% return. The Offering Memorandum for this investment set out that "*Investment in the Bonds is therefore relatively illiquid and involves a high degree of risk. Subscription for Bonds should be considered only by pre qualified suitable and/or sophisticated investors who are financially able to maintain their investment and can afford to lose all or a substantial part of their investment in the Company*".
- Strategic Residential Developments Plc – ("Strategic Residential") this was an unregulated 5 year bond offering investors an 11% return.

Product literature for each of the above bonds contained the following risk warning:

> *"It is not anticipated that there will be an active secondary market for the Bonds and it is not expected that such a market will develop as the Bonds are non-transferable. In addition, there are limitations on transfers and Bonds are only redeemable under limited circumstances as set out in this Offering Memorandum. Investment in the Bonds is therefore relatively illiquid and involves a high degree of risk."*

The transaction

In 2015 Mr D met with Cherish after it offered him a free pension review. After the review Cherish advised Mr D to transfer three personal pensions he held to a SIPP with Novia. Mr D accepted Cherish's recommendation and around £97,000 was transferred to Novia from his existing personal pensions. Two SIPP wrappers were established at that time, with funds in one being invested in a number of standard investments. Funds in the other wrapper were invested in a number of investments including the following non-standard investments ("NSIs"):

- Lakeview - £4,600
- Biomass - £4,600
- Real Estate - £4,600
- Brisa - £4,600
- Motion - £4,600

After Cherish ceased to be regulated, Mr D's financial adviser changed. This new adviser arranged a number of other investments for Mr D. This decision deals solely with Novia's due diligence when the SIPP and investments were arranged by Cherish.

Additional background information

When asked about the due diligence it carried out on Cherish (and its principle, Shah), Novia has told us that:

- Cherish accepted Novia's Terms of Business and signed an Adviser Application Form in September 2013.
- Novia only accepts business from FCA authorised financial advisers. Its due diligence confirms the adviser's regulatory status before it accepts the adviser's business. It subscribes to the FCA register data service which validates the adviser firm's continuing authorisation status.
- The end of Cherish's FCA authorisation led to the end of Novia's Terms of Business with Cherish in January 2018.

- Novia wasn't expected to understand an introducer's business model because the introducer, in this case Cherish, was an FCA regulated financial adviser and was therefore expected to manage its business in accordance with FCA principles and rules.
- Novia can rely upon other regulated businesses and it doesn't have to understand how they fulfil their regulatory obligations.
- As an advised platform business, Novia expects the financial adviser to have provided advice in relation to all new business instructions to Novia.
- Investment decisions are solely the responsibility of the advising firm and they can recommend suitable investments from the broad range of investments Novia makes available to support a wide range of customer investment objectives.
- Novia is not responsible for the suitability of the advice and therefore it has no requirement to request copies of suitability reports/pension transfer reports.
- Novia is not required to audit or monitor the actions of other FCA authorised firms and the FCA rules permit firms to rely upon the actions of other regulated businesses.
- Cherish introduced 239 clients to Novia, 6 of those involved a transfer from a Defined Benefit ('DB') scheme.
- Just under 85% of clients introduced by Cherish invested in non-mainstream investments.

When asked about the due diligence it completed on the investments held within Mr D's SIPP. Novia has previously told us that:

- Novia's investment committee ensures that it conducts effective and appropriate due diligence checks on all investments on its platform taking into account its proposition (advised clients only) and a broad range of client types.
- It takes reasonable steps to ensure that all assets are genuine, and not part of a fraud or scam. If it believed an investment would be detrimental to customers, then it would not allow it onto the platform.
- It only makes investments available through it service to FCA authorised financial advisers. It remains the adviser's responsibility to recommend suitable investments from all those available.
- The due diligence is specific to each product but follows the same process. That is to:
    - obtain and review the legal documentation from the investment manager
    - obtain an independent report into the investment, as this may identify information about the investment that is not known to Novia
    - assessment of the individuals connected to the investment taking account of any financial or other irregularities from information available in the public domain
    - consideration of possible investment security arrangements and operational requirements.
- Novia would not ask the client to sign any risk warnings. The FCA financial adviser is responsible for recommending suitable investments to the client taking account of their investment objectives and attitude to risk. Novia reminds financial advisers of the important consideration for certain investments and Non-Standard Investments are included in this cohort.

<u>Mr D's complaint</u>

Mr D has told us that during a meeting with a new financial adviser in October 2019, his adviser reviewed his existing investments and advised that some had likely been mis-

sold. At the time, Mr D's annual statements were still showing a value for the Hypa investments, although these have since been reduced to £nil.

In 2020, Mr D instructed his representative and a claim was made to the FSCS about the advice provided by Cherish. The FSCS awarded Mr D £50,000 compensation for his claim against Cherish. This was the maximum award he could receive under the FSCS's award limits at that time. But it didn't cover the full extent of his losses.

The FSCS gave Mr D a reassignment of rights in which, amongst other things, it explained it was transferring back to Mr D any legal rights it held against Novia.

In March 2022 Mr D complained to Novia about its due diligence. Novia didn't uphold the complaint so Mr D referred the matter to this Service.

One of our Investigators reviewed the complaint and thought that it should be upheld as they didn't think Novia should have accepted Mr D's business from Cherish. The Investigator recommended that Novia carry out a calculation to establish if Mr D had suffered a loss. And they said that any loss identified should be paid into Mr D's pension, if that was possible.

Novia didn't respond to the Investigator's opinion.

Mr D responded. He didn't agree with the redress the Investigator had recommended. He said that as he's been compensated by the FSCS, a large proportion of the compensation will need to be paid back to the FSCS. So a payment into the pension is an unsuitable remedy, as withdrawing the amount needed to return funds to the FSCS will result in serious tax implications. Mr D therefore asked that he be compensated in cash so he can repay the FSCS without tax.

The matter has been passed to me to reach a final decision.

What I've decided – and why

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

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.

I have taken into account a number of considerations including, but not limited to:

- The Financial Services and Markets Act 2000 ("FSMA").
- Court decisions relating to SIPP operators, in particular Options UK Personal Pensions LLP v Financial Ombudsman Service Limited [2024] EWCA Civ 541 (*"Options"*) and the case law referred to in it including:
    - Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 474 ("*Adams"*)
    - R (Berkeley Burke SIPP Administration) v Financial Ombudsman Service EWHC 2878 (*"Berkeley Burke"*)
    - Adams v Options SIPP UK LLP [2020] EWHC 1229 (Ch) (*"Adams – High Court"*)
- The FCA (previously Financial Services Authority) ("FSA") rules including the following:

    - PRIN Principles for Business
    - COBS Conduct of Business Sourcebook
    - DISP Dispute Resolution Complaints
- Various regulatory publications relating to SIPP operators and good industry practice.

The legal background:

As highlighted in the High Court decision in *Adams* the factual context is the starting point for considering the obligations the parties were under. And in this case it is not disputed that the contractual relationship between Novia and Mr D is a non-advisory relationship.

Setting up and operating a SIPP is an activity that is regulated under FSMA. And pensions are subject to HM Revenue and Customs rules. Novia was therefore subject to various obligations when offering and providing the service it agreed to provide – which in this case was a non-advisory service.

I have considered the obligations on Novia within the context of the non-advisory relationship agreed between the parties.

The case law:

I'm required to determine this complaint by reference to what is in my opinion fair and reasonable in all the circumstances. I am not required to determine the complaint in the same way as a court. A court considers a claim as defined in the formal pleadings and they will be based on legal causes of action. The Financial Ombudsman Service was set up with a wider scope which means complaints might be upheld, and compensation awarded, in circumstances where a court would not do the same.

The approach taken by the Financial Ombudsman Service in two similar (but not identical) complaints was challenged in judicial review proceedings in the *Berkeley Burke* and the *Options* cases. In both cases the approach taken by the ombudsman concerned was endorsed by the court. A number of different arguments have therefore been considered by the courts and may now reasonably be regarded as resolved.

It is not necessary for me to quote extensively from the various court decisions.

The Principles for Businesses:

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). The Principles apply even when the regulated firm provides its services on a non-advisory basis, in a way appropriate to that relationship.

Principles 2, 3 and 6 are of particular relevance here. They provide:

> "*Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.*
>
> *Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.*
>
> *Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly*."

I am satisfied that I am required to take the Principles into account (see *Berkeley Burke*) even though a breach of the Principles does not give rise to a claim for damages at law (see *Options*).

The regulatory publications and good industry practice:

The regulator issued a number of publications which reminded SIPP operators of their obligations, and which set out how they might achieve the outcomes envisaged by the Principles, namely:

- The 2009 and 2012 Thematic Review Reports.
- The October 2013 finalised SIPP operator guidance.
- The July 2014 *"Dear CEO"* letter.

The 2009 Report included:

> *"We are concerned by a relatively widespread misunderstanding among SIPP operators that they bear little or no responsibility for the quality of the SIPP business that they administer, because advice is the responsibility of other parties, for example Independent Financial Advisers…*
>
> *We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses ('a firm must pay due regard to the interests of its clients and treat them fairly') insofar as they are obliged to ensure the fair treatment of their customers."*

I have considered all of the above publications in their entirety. It is not necessary for me to quote more fully from the publications here.

The 2009 and 2012 Thematic Review Reports and the *"Dear CEO"* letter aren't formal guidance (whereas the 2013 finalised guidance is). However all of the publications provide a reminder that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications which set out the regulators' expectations of what SIPP operators should be doing also go some way to indicate what I consider amounts to good industry practice, and I'm therefore satisfied it's appropriate to take them into account (as did the ombudsman whose decision was upheld by the court in the *Berkeley Burke* case).

Points to note about the SIPP publications include:

- The Principles on which the comments made in the publications are based have existed throughout the period covered by this complaint.
- The comments made in the publications apply to SIPP operators that provide a non-advisory service.
- Neither court in the *Adams* case considered the publications in the context of deciding what was fair and reasonable in all the circumstances. As already mentioned, the court has a different approach and was deciding different issues.
- What should be done by the SIPP operator to meet the regulatory obligations on it will always depend upon the circumstances.

Due diligence on the investment

Novia had a duty to conduct due diligence and give thought to whether an investment itself is acceptable for inclusion into a SIPP. That's consistent with the Principles and the regulators' publications as set out earlier in this decision. It's also consistent with HMRC rules that govern what investments can be held in a SIPP.

The NSIs held within Mr D's SIPP don't appear to have been fraudulent or a scam. But this doesn't mean that Novia did all the checks it needed to do. And, as I understand, Novia now accepts that it failed to carry out sufficient due diligence when allowing the Hypa

NSIs in Mr D's SIPP. Therefore, it's not necessary for me to reach a finding on this particular aspect.

Due diligence on Cherish

Novia accepts that it shouldn't have allowed a number of NSIs, including the Hypa investments, to be held in its SIPPs. However, as the Hypa investments weren't the only investments arranged by Cherish, I've also gone on to consider whether Novia should have accepted Mr D's business from Cherish in the first place.

Novia has told us that it only accepted introductions from FCA authorised firms. And as an advised platform business, it expected the financial adviser to have provided advice in relation to all new business instructions to it.

It has also said that typically it would meet with proposed advisers to understand their business, for example its systems and controls, and to see if the adviser would be a good 'fit' for Novia. Where appropriate, Novia would offer training to advisers. Only if deemed acceptable would advisers become approved on Novia's panel.

In the case of Cherish, Novia hasn't been able to provide notes of any meetings that it says would have taken place between it and Cherish before Novia accepted business from it. But it does appear to have carried out the following checks:

- Checking the FCA register to ensure that Cherish was regulated and authorised to give financial advice.
- It asked Cherish to accept its Terms of Business and for it to sign an 'Adviser Application Form'.

I've seen a copy of the Novia 'Adviser Application Form' which Cherish completed and signed. I can see that it asked Cherish to agree to a declaration confirming, amongst other things, that it had read, understood and agreed to the Novia 'Terms of Business for Firms'.

I've also seen a copy of Novia's 'Terms of Business for Firms' document, which was effective from 5 January 2015. I don't intend to set out what I think are the relevant sections of the '*Terms of Business for Firms'* document. This is because I don't think these Terms alone were reasonable or sufficient to meet Novia's regulatory obligations and good industry practice.

It's clear from the above that Novia understood that it needed to carry out some due diligence on Cherish but I don't think these checks went far enough. And given the circumstances involved here, I don't think Novia took appropriate steps or drew reasonable conclusions from the information that was available to it before accepting Mr D's business.

I think Novia was aware of, or should have identified potential risks of, consumer detriment associated with business introduced by Cherish, including the following, before it accepted Mr D's business:

- Cherish was introducing ordinary retail clients to Novia, where in many cases, and certainly in the case of Mr D, a significant amount of their SIPP funds were being invested in NSIs.
- The volume of introductions, relating mainly to consumers investing in NSIs, was unusual – particularly from a small IFA business. And Novia should have considered how a small IFA business introducing this volume of higher-risk business was able to meet regulatory standards.

85% of the clients Cherish introduced to Novia invested in NSIs. I think it's highly unusual for such a large proportion of a regulated advice firms' introductions to a SIPP provider to involve pension switches so as to invest in NSIs. I think it's fair to say that most advice firms don't transact this kind of business in significant volumes, certainly not for ordinary retail investors, like Mr D. And I think this ought to have been a red flag for Novia.

Novia ought to have had concerns about how Cherish was able to introduce so many ordinary retail clients for investment in NSI, whilst complying with the regulator's rules. Particularly in the absence of any information from Cherish about the type of customers it dealt with, which could explain the pattern of high-risk business it was introducing.

I note the brochures and/or the Offering Memorandums for these investments explicitly stated that potential investors should note that these Bonds are high risk and are unlikely to be suitable for those who do not have the experience or understanding to be able to evaluate the chances of success of start-up companies. So I think it was clear from the product literature that these investments were specialist and wouldn't therefore be suitable for all investors.

Novia also employed a third party firm to complete checks on some of the investments provided by Hypa. These reports said, amongst other things, that:

- Biomass – may be deemed to be a NMPI by the FCA and the investment was restricted to sophisticated and high net worth investors.
- Lakeview – may be deemed to be a NMPI by the FCA and the investment was restricted to sophisticated and high net worth investors.
- Real Estate – "*The structure utilised by the Bond Issuer is such that the Bonds may be deemed by the FCA to be a non-mainstream pooled investment once policy statement PS 03/13 is implemented in January 2014. This may therefore have a restriction on to whom this investment may be marketed to.*

  We suggest that SIPP Operators consider requesting that the investment be subjected to a detailed review by SIPP Investment Platform, rather than using this simplified review"

In June 2013, the FCA issued a policy statement (PS13/3 'Restrictions on the retail distribution of unregulated collective investment schemes and close substitutes'). At its introduction, the policy statement said:

> *"1.1 In Consultation Paper (CP) 12/19 the Financial Services Authority (FSA) – our predecessor organisation – proposed a solution to serious problems identified in the distribution of high-risk, complex investments to ordinary retail investors. While sophisticated or high net worth retail clients may be better able to protect their own interests, ordinary retail investors face significant risk of detriment from these investments.*
>
> *1.2 The CP proposed to ban the promotion of unregulated collective investment schemes (UCIS) and close substitutes in relation to ordinary retail investors in the UK. The investments captured by this marketing restriction are collectively referred to in this paper as 'non-mainstream pooled investments' or NMPIs.*
>
> *1.3 Having considered the feedback we received to the consultation, we (the FCA) are now making rules based on the FSA proposals. In this paper, we summarise this feedback and set out our response to it.*
>
> *Who does this affect?*

1.4 This Policy Statement (PS) will be of interest to:

- *firms promoting products, now classified as NMPIs, to retail customers ;*
- *product providers offering these products or which allow access to them through investment wrappers;….*

Non-mainstream pooled investments

2.3 The rule changes proposed in the CP aim to improve retail consumer outcomes by ensuring that NMPIs are recognised as specialised products unsuitable for general promotion in the UK retail market. ***As providing financial advice generally includes making a financial promotion, by limiting the ability of firms to bring these products to the attention of consumers, the FSA also aimed to limit the scope for retail clients being wrongly advised to invest in them*** [bold is my emphasis]*."*

From January 2014, following PS13/3, the FCA updated the rules, placing restrictions on the promotion of NMPIs to ordinary retail clients. These were set out in the FCA handbook under COBS 4.12. As can be seen from the above, PS13/3 said that it would be of interest to "product providers offering these products or which allow access to them through investment wrappers", So Novia ought to have been aware of these restrictions.

Novia hasn't said that it disputed the third party's statement that some of these Hypa investments may be NMPIs, and that they were restricted to sophisticated and high net worth investors. Although I do note that in its submissions to this Service it's referred to the investments as non-standard, rather than NMPIs.

I think it's fair to say that, whether the Hypa investments were NMPIs or NSIs, such investments are highly unlikely to be suitable for the vast majority of retail clients. I note the product literature for each bond stated that it didn't anticipate that there would be a secondary market for the bonds, that they were relatively illiquid and involved a high degree of risk. These types of investments will generally only be suitable for a small proportion of the population. And I think Novia understood, or ought to have understood, this.

Novia has said that it reminded Financial Advisers arranging certain types of investments, including NMPIs and non-standard investments, of the important considerations. It says it did this by displaying an online notice before the advisers were able to access these types of investments. The notice highlighted that the eligibility for these investments remained the advisers' responsibility. It also stated that Novia would only accept trade instructions for NSI and NMPIs from firms that had satisfactorily completed the additional due diligence required by Novia.

I've not been provided with any information or evidence to suggest that any additional due diligence was carried out on Cherish. But even if it was, I think Novia still needed to ask further questions of Cherish about the customers it was introducing through asking questions and through independent checks.

I've seen no evidence that Mr D was a sophisticated or high net-worth investor. Or that Novia asked Cherish when it introduced clients for investment in the various Hypa investments to confirm the investors' status.

Novia's Terms of Business required all clients to have received advice, prior to taking out a SIPP and investing. But it's told us that it didn't ask Cherish for copies of the advice it was providing to the clients it was introducing to Novia – even though the

Terms of Business Novia had agreed with Cherish entitled it to do so.

So I'm satisfied Novia couldn't be certain what advice Cherish was offering to the clients it was introducing to Novia, or that Cherish's advice model was in fact operating in line with Novia's assumptions.

I'd like to stress here that I'm not saying Novia should have checked any advice that was given – but it should have taken steps to ascertain if a reasonable process was in place and consumers were taking these steps on an informed basis. And, in order for Novia to meet its own regulatory obligations, it needed to satisfy itself that Cherish was appropriate to deal with.

I've not been provided with any information or evidence to suggest that any additional due diligence was carried out on Cherish. But even if it was, I think Novia still needed to ask further questions of Cherish about the customers it was introducing through asking questions and through independent checks.

I don't think Novia made appropriate checks of Cherish's business model, either at the start of its relationship or on an ongoing basis. And it should have taken steps to address this risk of consumer detriment (or, given this risk, have simply declined to deal further with Cherish). Such steps should have involved getting a full understanding of Cherish's business model prior to accepting business from it – through requesting information from Cherish and through independent checks. I'm satisfied that such understanding would have revealed there was a significant risk of consumer detriment associated with some introductions of business from Cherish.

If Cherish had been unwilling to provide the required information, or fully answer the questions about its business model, Novia should have concluded it shouldn't accept introductions from Cherish, where the intended investment was in NSIs.

Novia has said that it can rely upon other regulated businesses and it doesn't have to understand how they fulfil their regulatory obligations. And in the case of Cherish, because it was an FCA regulated financial adviser, Novia says that it didn't need to understand its business model.

At the relevant date, COBS 2.4.6R (2) provided a general rule about reliance on others:

> "*A firm will be taken to be in compliance with any rule in this sourcebook that requires it to obtain information to the extent it can show it was reasonable for it to rely on information provided to it in writing by another person*."

And COBS 2.4.8G says:

> "*It will generally be reasonable (in accordance with COBS 2.4.6R (2)) for a firm to rely on information provided to it in writing by an unconnected authorised person or a professional firm, unless it is aware or ought reasonably to be aware of any fact that would give reasonable grounds to question the accuracy of that information*."

So, it would generally be reasonable for Novia to rely on information provided to it in writing by Cherish, unless Novia was aware or ought reasonably to have been aware of any fact that would give reasonable grounds to question the accuracy of the information.

However, while Cherish's regulatory status and its acceptance of Novia's Terms of Business go some way towards meeting Novia's regulatory obligations and good

industry practice, I think Novia needed to do more in order to satisfy itself that it was fair and reasonable to accept introductions from Cherish.

It's not reasonable to take so much comfort from a firm's regulated status that it is thought that no monitoring is called for because, for example, the firm is under a regulatory duty to treat its customers fairly. There had been, prior to the events in this case, examples of regulated firms fined for various forms of poor conduct where the regulated firms failed to act in their clients' best interest.

And it is an obvious point that rules alone are not enough. Relevant behaviour must be observed or monitored to ensure that only permitted behaviour occurs. I'm satisfied this can only be done through effective monitoring. And I'm satisfied this is the case even if the party being monitored is a regulated firm.

I've considered what Novia has said about FCA regulated financial advisers being expected to manage their business in accordance with FCA principles and rules. But, as I've explained above, I'm satisfied that Novia didn't comply with its regulatory obligations, good industry practice or treat Mr D fairly by failing to undertake adequate due diligence on Cherish.

And I'm satisfied that had it undertaken adequate due diligence Novia ought reasonably to have been aware of facts that should have caused it to decline to accept Mr D's business from Cherish. In other words, I'm satisfied that if Novia had undertaken adequate due diligence on Cherish it ought to have been privy to information about Cherish and the business it was introducing which didn't reconcile with what Novia says it was able to rely upon. And, in failing to take this step, I think it's fair and reasonable to conclude that Novia didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr D fairly.

What checks should Novia have carried out?

The 2009 Thematic Review Report explained that the regulator would expect SIPP operators to have procedures and controls, and for management information to be gathered and analysed, so as to enable the identification of, amongst other things, "*consumer detriment such as unsuitable SIPPs*". Further, that this could then be addressed in an appropriate manner *"…for example by contacting the members to confirm the position, or by contacting the firm giving advice and asking for clarification*."

The October 2013 finalised SIPP operator guidance gave an example of good practice as: *"Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with*."

I think that Novia, before accepting Mr D's business from Cherish, should have checked with Cherish about things like:

- how it came into contact with potential clients;
- how and why ordinary retail clients were interested in making these NSIs;
- what Cherish was telling its clients about the NSIs.

In light of what I've said above, it would also have been fair and reasonable for Novia, to meet its regulatory obligations and good industry practice, to have taken independent steps

to enhance its understanding of the introductions it was receiving from Cherish. For example, it could have asked for copies of correspondence relating to the advice.

The 2009 Thematic Review Report said that:

> *"…we would expect (SIPP operators) to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the members to confirm the position, or by contacting the firm giving advice and asking for clarification."*

So I also think it would have been fair and reasonable for Novia to speak to some applicants, like Mr D, directly.

I accept Novia couldn't give advice. But it had to take reasonable steps to meet its regulatory obligations. And in my view such steps included addressing a potential risk of consumer detriment by speaking to applicants, as this could have provided Novia with further insight into Cherish's business model. This would have been a fair and reasonable step to take in reaction to the clear and obvious risks of consumer detriment I've mentioned.

Novia hasn't confirmed how many introductions it received from Cherish before Mr D was introduced. But given the date the SIPP was established, and what I know from other complaints I've seen against Novia involving introductions from Cherish, I'm satisfied a significant number of clients were introduced before Mr D.

And, on balance, I think it's more likely than not that if Novia had contacted some of these clients to 'confirm the position', they would have told Novia that, in many instances, they had been contacted out of the blue by Cherish and offered a free pension review. And that they had not been told about the high-risk nature of the Hypa NSIs.

Overall, I think if Novia had completed adequate due diligence it would have realised that some introductions from Cherish, including Mr D's, carried a significant risk of consumer detriment. And I think that Novia ought to have had real concerns that Cherish wasn't acting in customers' best interests and wasn't meeting its regulatory obligations.

Novia didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr D fairly by accepting his business from Cherish. To my mind, Novia didn't meet its regulatory obligations or good industry practice at the relevant time, and allowed Mr D to be put at significant risk of detriment as a result. Novia should have concluded that it shouldn't have accepted Mr D's business from Cherish at all.

Is it fair to ask Novia to pay Mr D compensation in the circumstances?

I accept that Cherish had some responsibility for initiating the course of action that led to Mr D's loss. However, I'm satisfied that it's also the case that if Novia had complied with its own distinct regulatory obligations as a non-advisory SIPP operator, the arrangement for Mr D wouldn't have come about in the first place and I don't think any of his pension monies would have been transferred to Novia or his SIPP wrappers established.

Novia's failure to act in accordance with its regulatory obligations and good industry practice has caused Mr D to suffer financial loss in his pension and to suffer distress and inconvenience. I consider the loss of a significant proportion of his pension provision will inevitably have caused him considerable worry and upset.

How should any redress be paid to Mr D?

I've considered the submissions Mr D has made about his preference being for redress

monies not to be paid into his pension arrangement.

Mr D was previously paid money by the FSCS as part of his claim against Cherish. And he has subsequently entered into a reassignment of rights agreement with the FSCS. As part of that process Mr D would have been aware, or ought to have been aware, that the terms of his reassignment of rights would require him to return compensation paid by the FSCS in the event this complaint is successful. It was, and is, Mr D's responsibility to make any arrangements needed to ensure he can fulfil that agreement he entered into. And he will need to liaise with the FSCS about the repayment of these funds.

I appreciate Mr D will be disappointed. But his pension monies suffered the loss this complaint concerns and I remain satisfied that, subject to what I've said below about existing protections or allowances, if possible redress monies should be paid back into Mr D's SIPP. So, I'm satisfied that the approach to redress, as set out below is the fair and reasonable approach to redress in this case.

Putting things right

I'm upholding this complaint. I consider Novia failed to comply with its own regulatory obligations and good industry practice in not refusing Mr D's SIPP business. My aim in awarding fair compensation will be to put Mr D back into the position he would likely have been in had it not been for Novia's failings.

As I've already mentioned above, had Novia carried out sufficient due diligence on the NSIs and Cherish, I'm satisfied the investment would not have gone ahead and Mr D would've retained his existing pension plans.

In light of the above, Novia should calculate fair compensation by comparing the current position to the position Mr D would be in if he hadn't transferred his existing pension plans to the Novia SIPP. In summary, Novia should:

1. Obtain the current notional values, as at the date of the final decision, of Mr D's previous pension plans, if they hadn't been transferred to the SIPP.
2. Obtain the actual current value of Mr D's SIPP, as at the date of my final 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 Mr D's share in any investments that cannot currently be redeemed.
5. Pay an amount into Mr D's SIPP, so that the transfer value of the SIPP 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 D £500 for the distress and inconvenience the problems with his pension have caused him.

I've explained how Novia 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 D's previous pension plans, if they hadn't been transferred to the SIPP.*

Novia should ask the operators of Mr D's previous pension plans to calculate the current notional values of Mr D's plan, as at the date of this decision, had he not transferred them into the SIPP. Novia must also ask the same operators to make a notional allowance in the calculations, so as to allow for any additional sums Mr D has contributed to, or withdrawn

from, his Novia 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 Novia SIPP by Mr D.

If there are any difficulties in obtaining a notional valuation from the operators of Mr D's previous pension plans, Novia should instead calculate a notional valuation by ascertaining what the monies transferred away from the plan would now be worth, as at the date of the final decision, had they achieved a return from the date of transfer equivalent to the FTSE UK Private Investors Income Total Return Index (prior to 01 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 D has contributed to, or withdrawn from, his Novia SIPP since the outset.

I acknowledge that Mr D has received a sum of compensation from the FSCS, and that he has had the use of the monies received from the FSCS. The terms of Mr D's reassignment of rights require him to return compensation paid by the FSCS in the event this complaint is successful, and I understand that the FSCS will ordinarily enforce the terms of the assignment if required. So, I think it's fair and reasonable to make no *permanent* deduction in the redress calculation for the compensation Mr D received from the FSCS. And it will be for Mr D to make the arrangements to make any repayments he needs to make to the FSCS.

However, I do think it's fair and reasonable to allow for a *temporary* notional deduction equivalent to the payment Mr D actually received from the FSCS for a period of the calculation, so that the payment ceases to accrue any return in the calculation during that period.

As such, if it wishes, Novia may make an allowance in the form of a notional deduction equivalent to the payments Mr D received from the FSCS following the claim about Cherish the date the payments were actually paid to Mr D. Where such a deduction is made there must also be a corresponding notional addition at the date of my final decision equivalent to the FSCS payments notionally deducted earlier in the calculation.

To do this, Novia should calculate the proportion of the total FSCS payment that it's reasonable to apportion to each transfer into the SIPP, this should be proportionate to the actual sums transferred in. And Novia should then ask the operator of Mr D's previous pension plans to allow for the relevant notional deduction in the manner specified above. The total notional deductions allowed for shouldn't equate to any more than the actual payments from the FSCS that Mr D received. Novia must also then allow for a corresponding notional addition as at the date of my final decision, equivalent to the accumulated FSCS payments notionally deducted by the operators of Mr D's previous pension plans.

Where there is any difficulty in obtaining a notional valuation from the previous operators, Novia can instead allow for both the notional deduction and addition in the notional calculation it performs, provided it does so in accordance with the approach set out above.

2. *Obtain the actual current value of Mr D's SIPP, as at the date of my final decision, less any outstanding charges.*

This should be the current value as at the date of my final 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 D's pension provisions.

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

It isn't clear whether the NSIs have now been closed and removed from the SIPP or if the SIPP remains open.

But for any illiquid holdings that remain within Mr D's Novia SIPP, Mr D's monies could be transferred away from Novia. In order to ensure the SIPP could be closed and further Novia SIPP fees could be prevented I think it would be best if any illiquid assets held could be removed from the SIPP. Mr D 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, Novia 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.

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

If Novia is unable, or if there are any difficulties in buying Mr D's illiquid investment, it should give the holdings a nil value for the purposes of calculating compensation. In this instance Novia may ask Mr D to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the relevant holdings. That undertaking should allow for the effect of any tax and charges on the amount Mr D may receive from the investments and any eventual sums he would be able to access from the SIPP. Novia will have to meet the cost of drawing up any such undertaking.

5. *Pay an amount into Mr D's SIPP, so that the transfer value of the SIPP 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.*

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

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

6. *Pay Mr D £500 for the distress and inconvenience the problems with his pension have caused him.*

In addition to the financial loss that Mr D has suffered as a result of the problems with his pension, I think that the loss suffered has caused him distress. And I think that it's fair for Novia to compensate him for this as well. I think £500 is a reasonable sum given that Novia's actions led to a significant loss to Mr D's pension, which will have been a great source of worry for him.

SIPP fees

If the investment 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 D 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 investment 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 D or into his SIPP within 28 days of the date Novia receives notification of Mr D's acceptance of this final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation isn't paid within 28 days.

My final decision

For the reason explained, I uphold this complaint and direct Novia Financial Plc to calculate redress due as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 17 April 2025.

Lorna Goulding
Ombudsman