DRN-5314391

The complaint

Mr W complains, through his representatives, that Options UK Personal Pensions LLP ("Options") - previously Carey Pensions UK – accepted his application for a Self-Invested Personal Pension ("SIPP") when it shouldn't have because it didn't carry out adequate due diligence.

What happened

Although Mr W is represented and his representatives have provided information on his behalf, I will refer to Mr W throughout for ease of reference. I set out below the roles of the various parties that I will be referring to.

Options – a regulated SIPP operator and administrator providing an execution only service to retail clients and operating a platform through which its clients could invest their SIPP monies themselves or through an investment manager.

Prospect Data Mining ("PDM") – an unregulated introducer of clients to Options based in Spain.

Cornhill Capital Trading ("Cornhill") – the investment manager that Mr W originally opened an advisory stockbroking account with but which he didn't then use.

Templeton Securities Limited ("Templeton") – an appointed representative of Alexander David Securities between 15 July 2013 and 19 August 2015 and the investment manager that Mr W subsequently opened an advisory stockbroking account with and which purchased the investments within his SIPP.

Eligere Investments Plc – incorporated on 6 March 2013 and listed on the GXG Market – a market regulated by the Danish Financial Supervisory Authority but closed down in August 2015 – and suspended from trading in June 2015 with a liquidator appointed to carry out a voluntary winding up in April 2017. The company was dissolved in April 2020.

Emmit Plc – incorporated on 10 March 2005 and admitted to the AIM market on 1 July 2005. Suspended from trading on AIM on 9 April 2013 with Administrators being appointed on 5 July 2013 who proposed a Creditors Voluntary Arrangement through which the debt of the company would be converted to shares and the company relisted on AIM as an investing company. Following this the company was relisted on AIM in early 2014. The FCA provided a warning in respect of investing in the company on 14 October 2014, referring to individuals having been encouraged to transfer money from work pension schemes into SIPPs to buy shares in the company with some investors being offered 'cash back' in order to do so. The company was then suspended from trading again in November 2014. It was dissolved on 12 October 2024.

Mr W's relationship with Options

Mr W was introduced to Options by PDM, signing an application for an Options SIPP on 7 January 2014 to transfer his existing pension into, which appears to have been sent to

Options in March 2014 along with a signed authority dated 6 February 2014 for PDM to be provided with any information it requested about his pensions.

The SIPP application was for direct clients – clients establishing a SIPP without advice. Under the heading 'Investments' it stated that *"Your investment choices are the sole responsibility of you and/or your Professional Financial Adviser/Investment Manager".* Cornhill is thereafter named as the investment manager that Mr W wanted to instruct on an advisory basis. Mr W also ticked a box in the application confirming he wished to waive his right to cancel the SIPP within 30 days.

On 25 March 2014 Options telephoned Mr W and went through what I understand to have been a pro-forma checklist that it used when dealing with a direct application for a SIPP, with the SIPP account being opened the following day. I haven't seen the pro-forma-checklist itself or a transcript of the call but on 3 April 2014 Options emailed Mr W to confirm what was discussed. The email included the following statements:

- Options understood that Mr W had signed a terms of business with PDM and it had been explained to him that PDM is based in Spain and isn't regulated and it can't give financial advice.

- Mr W had confirmed he hadn't received any inducements.

- Options doesn't provide financial advice as to the establishment of a SIPP or the underlying investments he chooses to make.

- That investment decisions were solely his responsibility and neither Options nor PDM are responsible for these.

- It had been explained to Mr W that he had the opportunity to seek independent financial advice and confirmed he had spoken to his financial adviser but didn't want him involved in the SIPP.

- Mr W wished to proceed with the establishment of a SIPP with Options on an execution only basis without financial advice.

Options sent the transfer form to Mr W's pension provider on 28 March 2014 and the transfer of his pension monies into his SIPP account took place on 15 April 2014 - amounting to £25,544 with £24,467 then being available for investment after deduction of fees.

Mr W signed an application appointing Cornhill as his investment manager on 7 April 2014 which was received by Options on 14 April 2014 following which it sent him a member declaration for him to complete confirming his instruction of Cornhill - which he duly returned.

However, on 9 May 2014 Mr W emailed Options informing it that he wanted to change investment manager from Cornhill to Templeton and thereafter completed a new members declaration confirming his instruction on 15 May 2014. On 30 May 2014 Options emailed to confirm that it had sent Templeton £24,467 that day.

Mr W emailed Templeton on 4 June 2014 asking it to invest £12,233.50 in each of Eligere and Emmit which it duly did.

As noted above, Eligere was suspended from trading only a few months later, in November 2014, with Emmit being subsequently suspended from trading in June 2015. Both companies are now dissolved.

Mr W complained to Options saying amongst other things that it had failed to carry out sufficient due diligence. Options didn't uphold Mr W's complaint. In short it made the following key points:

- It provides execution only SIPP administration services as confirmed in the various documents it provided to her such as its Terms and Conditions.

- COBS 11.2.19R made it mandatory for it execute an order received from a client and in doing so it is deemed to have complied fully with the regulations and has treated is customer fairly.

- It does not and cannot provide advice to any clients in relation to the establishment of a SIPP, transfers of any previous arrangements into the SIPP or the underlying investments.

- It had no relationship with PDM other than administering SIPPs on behalf of members that were introduced by that business.

- It carried out full due diligence on PDM and had full terms of business in place - in line with its introducer process at the time - and there was no indication from the due diligence it carried out that it shouldn't accept introductions from PDM.

- It was not party to any discussions between Mr W and any other third parties.

- Mr W completed the application for direct clients and confirmed he wasn't involving a financial adviser, so he understood he wasn't receiving advice and didn't wish to.

- It contacted Mr W because PDM was an unregulated introducer in accordance with its usual process in those circumstances, to ensure he was aware of what he was applying for and that PDM was an unregulated introducer based in Spain. It informed him he should seek advice to ensure the transaction he was instructing it to make was suitable.

- It has always acted appropriately and has processed the specific instructions Mr W gave it to establish a SIPP, transfer his previous pension plan and appoint Templeton – which is FCA regulated - as his investment manager.

- It carried out due diligence on Mr W's chosen investment, which was an advisory trading account provided by an FCA regulated investment manager holding the appropriate permissions.

- By signing the SIPP application form Mr W confirmed that he understood that he was establishing his SIPP on an execution only basis and he agreed its terms and conditions and the SIPP scheme rules – which set out the legally binding terms between Options and Mr W.

- Had Mr W instructed it in respect of his desired trades it would have declined to place the trades, as one of the investments wasn't acceptable to Options and Mr W's language in the instruction to Templeton wasn't that of a retail client but was more sophisticated language used by traders.

- It wasn't aware of Mr W's instruction to Templeton until Templeton informed it of the situation with the Emmit Plc shares and it was unaware there was any holding with Emmit Plc or Eligere Investments Plc until Templeton provided a copy of Mr W's email instruction.

- In the circumstances Mr W contributed to his own loss by not including Options in his email instruction. If he had done so, it would have been able to stop the transactions as a result of the unacceptable share purchase and because of the sophisticated language used in the instruction when Mr W was an unsophisticated investor.

Mr W referred his complaint to our service but it was initially put on hold because he had also complained to Alexander David Securities about Templeton's actions. That complaint was upheld by an ombudsman. The firm then went into liquidation before any redress was paid and a claim was made to the FSCS. However, it said that Mr W currently didn't have a valid claim because that potential claim he had against Options and that he needed to exhaust that complaint first.

One of our Investigators considered the complaint and thought it should be upheld. She found that whilst Options had carried out some due diligence on PDM and Templeton it should have done more. The Investigator said that there was a high risk of consumer detriment, as Mr W was giving up an existing personal pension to open a restricted investment SIPP with Options through which he invested in high-risk investments.

The investigator found that Options should have had concerns about PDM as an unregulated introducer located outside the UK. She said the fact that by March 2014 Options had received around 19 introductions from PDM should have prompted it to raise further questions. The investigator said that Options should also have been concerned about Mr W not wanting to involve his financial adviser and this should have led to it raising further questions as to why this was.

The Investigator said that by the time of Mr W's application Options had received enough applications for its SIPP as a result of introductions from PDM for it to consider whether it should accept his application. And that if it had considered why Mr W wanted to open a SIPP and what his and other clients dealings with PDM were it would have concluded there was a high risk of consumer detriment.

The Investigator also thought that the change in investment manager from Cornhill to Templeton should have led Options to make further enquiries and if it had done so this would have led to it questioning whether it should allow the SIPP funds to be invested and what the intended investments were. She said that if had done so it would have learned the intended investments were high risk publicly traded shares which appeared to be suspicious, as later identified by the FCA as regards Emmit.

The Investigator found that if Options had rejected Mr W's application for its SIPP it was unlikely he would have switched pensions and would instead have remained with his previous pension provider.

The Investigator also found that section 27 of the Financial Services and Markets Act (FSMA) 2000 provided a further basis on which it would be fair and reasonable to conclude that the complaint should be upheld.

Options didn't provide any response to the opinion of the Investigator, so the matter was referred to me for review and decision. I issued a provisional decision on 20 December 2024 upholding the complaint. In short, I found that Options shouldn't have accepted the introduction of Mr W's SIPP business from PDM because it should already have concluded that there was a risk of consumer detriment if it accepted referrals of business from PDM, from the due diligence it should have carried out on referrals received before Mr W made his application. I was satisfied that if Options hadn't accepted Mr W's SIPP application he wouldn't have transferred out of his personal pension or invested as he did. I therefore awarded redress on the basis he would have remained in his personal pension. I also said

Options should pay him £300 for the distress and inconvenience caused.

I gave both parties the opportunity of responding to my provisional findings and providing any further information they wanted me to consider before making my final decision. Mr W confirmed he had no further comments. Options asked for some additional time to respond which was agreed but didn't then provide any response.

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.

In doing so, I've taken into account relevant law and regulations; relevant regulators' rules guidance and standards; codes of practice; and, where appropriate, what I consider was good industry practice at the relevant time. But I think it's important to note that while I take all those factors into account, in line with our rules, I'm primarily deciding what I consider to be fair and reasonable in all the circumstances of the case.

It is for me to decide what weight to give evidence a party relies on and where there is a dispute about the facts my findings are made on a balance of probabilities – what I think is more likely than not.

The purpose of my decision isn't to address every point raised and if I don't refer to something it isn't because I've ignored it but because I'm satisfied that I don't need to do so to reach what I think is the right outcome. Our rules allow me to do this, and it simply reflects the informal nature of this service as a free alternative to the courts.

As neither party has provided any further information, I can see no reason to depart significantly from the main findings I made in my provisional decision or the conclusion I reached.

Relevant considerations

The rules under which Options operate include the FCA's Principles for Businesses (PRIN) as set out in its Handbook. The Principles *"are a general statement of the fundamental obligations of firms under the regulatory system"* (PRIN1.1.2G). The Principles themselves are set out under PRIN 2 and I think the following are of particular relevance in this complaint.

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 interest of its customers and treat them fairly.

I am satisfied that I am required to take the Principles into account when determining whether Options did anything wrong in accepting Mr W's SIPP application and/or the investments he made within his SIPP in the course of it providing its execution only service to him.

In coming to that conclusion I have considered the judgment in the case of *R (British Bankers Association) v Financial Services Authority (2011) EWHC 999 (Admin) ("BBA")* in

which Ouseley J said it would be a breach of statutory duty for the Ombudsman to reach a view on a case without taking the Principles into account in deciding what was fair and reasonable redress to award. At paragraph 184 of his judgment he said:

"The width of the Ombudsman's duty to decide what is fair and reasonable, and the width of the materials he is entitled to call to mind for that purpose, prevents any argument being applied to him that he cannot decide to award compensation where there has been no breach of a specific rule, and the Principles are all that is relied on."

I have also considered the judgments in the following cases, which relate specifically to SIPP operators: *R (Berkley Burke SIPP Administration Ltd) v Financial Ombudsman Service (2018) EWHC 2878 ("BBSAL"), Adams v Options SIPP (2020) EWHC 1229 (Ch) (Adams High Court), Adams v Options UK Personal Pensions LLP (2021) EWCA Civ 474 ("Adams Appeal")* and *Options UK Personal Pensions LLP v Financial Ombudsman Service Limited (2024) EWCA Civ 541 ("Options")*

In the BBSAL case Jacobs J confirmed that the decision by the Ombudsman that under the Principles and in accordance with good industry practice Berkeley Burke should have undertaken due diligence on the investment it accepted within its SIPP was lawful. At paragraph 109 of his judgment he said:

"The Ombudsman has the widest discretion to decide what was fair and reasonable, and to apply the Principles in the context of the particular facts before him."

Neither the Adams High Court case nor the Adams Appeal case addressed the application of the Principles. However, the application of COBS 2.1.1R - which states that *'a firm must act honestly, fairly, and in accordance with the best interests of its client*' - was considered by HHJ Dight in the High Court. In his judgment he rejected the argument that Options SIPP had failed to comply with that rule on the facts of the case. The Court of Appeal didn't allow Mr Adams appeal on that issue but did so on his claim made pursuant to section 27 of FSMA, which provision I discuss in more detail later in my findings.

However, although there is an overlap between COBS 2.1.1R and the Principles I have identified above as being a relevant consideration for me in this complaint – in particular Principle 6 – there are significant differences to the breaches of COBS 2.1.1R alleged in the Adams cases and the issues in this complaint.

I have also considered the Court of Appeal's judgment in the Options Appeal case, which refers to the case law I mention above and approved the decision of the Ombudsman in the case in question.

The courts have consistently ratified our approach where this has been considered in the cases I have referred to above. The various arguments that have previously been put as to why our approach was wrong have been rejected in the cases I have referred to above and those arguments can now reasonably be regarded as resolved, with the courts accepting that our approach in cases such as this one is appropriate and lawful.

The regulatory publications and good industry practice

The regulator has over the years issued a number of publications reminding SIPP operators of their obligations, setting out how they might achieve the outcomes envisaged by the Principles. These publications include:

- The 2009 and 2012 Thematic Review reports.

- The October 2013 finalised SIPP operator guidance.

- The July 2014 Dear CEO letter.

I have considered the publications in their entirety but set out below relevant extracts from them.

The 2009 Thematic Review report included the following:

"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 (IFAs)."

"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 customers and treat them fairly') insofar as they are obliged to ensure the fair treatment of their customers.

And:

"We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs."

The report included examples of measures that SIPP operators could consider, which were stated to be from examples of good practice that the regulator had observed and suggestions that it had made to firms. These were:

- *Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm's clients, and that they do not appear on the FSA website listing warning notices.*

- *Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.*

- *Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified.*

- *Being able to identify anomalous investments, e.g. unusually small or large transactions or more 'esoteric' investments such as unquoted shares, together with the intermediary that introduced the business. This would enable the firm to seek appropriate clarification, e.g. from the client or their adviser, if it is concerned about the suitability of what was recommended.*

- *Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely.*

- *Routinely identifying instances of execution-only clients who have signed disclaimers taking responsibility for their investment decisions and gathering and analysing data regarding the aggregate volume of such business.*

- *Identifying instances of clients waiving their cancellation rights, and the reasons for this.*

I don't think it is necessary for me to comment at length on the other publications from the regulator that I have considered. In the 2012 Thematic Review the regulator said that:

"As we stated in 2009, we are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Business."

This reinforced what I think had already been made clear in the 2009 Thematic review report that what the regulator was saying was directed at firms such as Options that provide an execution only service, not just those providing an advisory service.

The regulator identified one of the ongoing issues as a lack of evidence of adequate due diligence being undertaken for introducers and investments.

The 2013 finalised SIPP Operator Guidance made clear that it didn't provide new or amended requirements but was a reminder of regulatory responsibilities that became a requirement in April 2007. It repeated what was stated in the previous thematic reviews about SIPP operators needing to comply with Principle 6. And under the heading 'Management Information' stated:

"We would expect SIPP operators to have procedures and controls in place that enable them to gather and analyse MI (Management Information) that will enable them to identify possible instances of financial crime and consumer detriment."

The guidance goes on to give examples of MI firms should consider, such as; the ability to identify trends in the business submitted by introducers; ability to identify the number of investments; the nature of those investments; the amount of funds under management; spread of introducers; the percentage of higher risk or non-standard investments.

And under the heading 'Due Diligence' the FCA said the following:

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

The July 2014 Dear CEO letter followed a further Thematic Review carried out by the regulator the key findings from which were annexed to the letter. It again made reference to the need for all firms to conduct their business with due skill, care, and diligence in accordance with Principle 2.

The letter came after Mr W had been onboarded by Options as a client and appointed Templeton as his investment manager and was invested in Eligere and Emmit. However, it referred to existing obligations for SIPP operators under the Principles, not new obligations, and as such it is a relevant consideration for me in this complaint.

The only formal guidance in the above publications is the 2013 finalised SIPP Operator Guidance. However, the other publications I have referred to explained what the regulator

thought SIPP operators should be doing to comply with their obligations under the Principles and deliver the outcomes envisaged. I am satisfied that as such they provide examples of what amounts to good industry practice, and it is appropriate for me to take them into account. In saying that I want to make clear that the examples in the publications are just that and are not the limit of what might amount to good industry practice.

What did Options' obligations mean in practice?

As a SIPP operator providing an execution only service, Options wasn't required to assess the suitability of the SIPP for Mr W or of the investments he invested in. However, it was required to carry out due diligence on introducers and investments in accordance with the Principles and good practice and having done so decide – based on the conclusions it should reasonably have come to following such diligence – whether to accept a referral of business or investments.

Put another way, if Options should have reasonably concluded, having carried out reasonable due diligence with good industry practice in mind, that a referral of business from an introducer or an investment could involve financial crime or consumer detriment then as an execution only SIPP operator it could be expected to refuse the referral of business or an investment.

Options hasn't argued that it wasn't required to carry out due diligence on introducers such as PDM or on investment managers such as Cornhill and Templeton to comply with its regulatory obligations – or on investments that SIPP clients wanted to invest their pension monies into. Rather it seeks to argue that the due diligence it did carry out was adequate and complied with its regulatory obligations.

I explain below why I consider its due diligence was inadequate but the argument that Options has made makes it clear in my view that Options accepts that as an execution only SIPP operator it was required to carry out due diligence. This is also supported by the actions it did take, such as agreeing terms of business with PDM and Templeton, obtaining an introducer profile from PDM and telephoning clients that PDM had introduced with a view to confirming with those clients such matters as PDM being unable to provide advice.

I also don't think it is in issue that the purpose of the due diligence was so that Options could decide whether to accept a referral of business and/or an investment within a SIPP. Its terms and conditions specified that investments are made at its discretion and it has confirmed in this complaint and others that if it had been aware of the instruction Mr W gave to Templeton to invest in Eligere and Emmit it would have been able to stop the transactions - because one was unacceptable to it and the language in the instruction wasn't consistent with that of a retail investor.

So, in short, I am satisfied that what Options was obliged to do in practice was to carry out due diligence in accordance with its regulatory obligations and which was consistent with good industry practice and, based on the conclusions that it should reasonably have come to following such due diligence, decide whether to accept a referral of business from PDM or permit the investments Mr W wanted to make in his SIPP.

The due diligence carried out by Options

Having concluded that Options was required by the Principles and good industry practice to carry out due diligence on PDM I have considered the due diligence it did then carry out. From the evidence available this included the following.

- Obtaining a completed introducer profile to understand PDM's business.

- Having an agreement in place with PDM as from February 2014.

- Confirming with PDM and Mr W that PDM wasn't providing advice.

- Reviewing World Checks carried out on the individuals it was dealing with at PDM as identified in the introducer profile.

- Ensuring all clients introduced by PDM received a call back to ensure they understood that PDM was unregulated and couldn't provide advice and guided them to seek advice from a regulated adviser.

- Confirming what was discussed in the telephone call in an email.

However, whilst I accept that the above shows Options did carry out some due diligence with a view to complying with its regulatory obligations, I am not persuaded that what it did went far enough, for the reasons I explain below.

The introducer profile provided limited information on PDM's business and in my view wasn't enough for Options to have properly understood the business. It showed that PDM's typical client wasn't high net worth or sophisticated and that the average value of their pension was only £35,000. Options should reasonably have concluded from this that PDM was likely to be introducing ordinary retail clients.

The examples of good practice referred to in the 2013 finalised SIPP operator guidance included that SIPP operators have processes in place that allowed them to gather and analyse management information that allowed them to identify possible instances of consumer detriment. As I noted above when setting out excerpts from the guidance, it goes on to give examples of management information firms should consider which included, the ability to identify trends in the business submitted by introducers, ability to identify the number of investments, the nature of those investments, the amount of funds under management, the spread of introducers and the percentage of higher risk or non-standard investments.

Options has been able to confirm that it received a total of 34 introductions from PDM and that this amounted to just over 21% of new business for Options during the period in question. It has also been able to confirm it received 14 introductions by the middle of February 2014 – so nearly half of all the introductions it received. However, it hasn't suggested that it did anything more than just capture this basic information. There is nothing to suggest it paid any regard to the actual information within the applications or sought to analyse this, which I think it needed to do for it to comply with good industry practice and its regulatory obligations.

I am aware that the applications that Options received from clients referred by PDM (including Mr W) were direct (unadvised) SIPP applications in which clients confirmed they wanted to waive their cancellation rights. I am also aware from other complaints to our service that applications contained similar explanations as to why customers weren't using a financial adviser – such as 'they had carried out their own research' or 'they were satisfied with the recommendations of the broker'. I haven't been provided with the first page of Mr W's application so am unable to say what if any statement he made but the fact that by the time Options received his application it had already received multiple applications with similar explanations as to why advice was an obvious concern that Options should have identified from its due diligence.

As I have said, the introducer profile had made clear the nature of the clients PDM was introducing – ordinary retail clients with small pension pots. For all such clients – whose only

connection on the face of it was that PDM was the introducer - to be apparently willing to open a SIPP without advice and at the same time waive their cancellation rights was in my view clearly unusual and having received 14 applications by the middle of February 2014 should have then identified that, contrary to the direct applications it was receiving, clients were being advised and being told what to put in their applications by someone who wasn't authorised – there being no regulated adviser involved.

The fact that many of those clients were also then providing similar explanations as to why they weren't seeking advice emphasised this risk. It seems to me that this should have led to Options concluding that there was a serious risk of consumer detriment if it accepted applications form clients referred by PDM and that it shouldn't accept such referrals – and before it accepted Mr W's application. Even it is argued that this isn't a conclusion that it is reasonable to expect Options to have come to from the information in the introducer profile and the SIPP applications it was receiving, it should have led to it considering carefully other information it was provided with.

That information included applications for Cornhill to act as investment manager. I don't know whether Options was provided with applications for Cornhill to act as investment manager for all clients referred by PDM. However, the information in those Cornhill applications that Options did receive, which I am aware of from other complaints to our service, provided further reasons for it to conclude that consumer detriment would arise if it accepted referrals of business from PDM.

These applications showed that the clients that PDM was introducing didn't generally have any or any significant investment experience but nevertheless selected either medium or medium/high risk – or both as in the case of Mr W – for their risk appetite. Clients then answered 'yes' to a question as to being prepared to accept a 'higher risk', with the application stating that Cornhill 'focuses primarily on high-risk products'.

Whilst I accept that ordinary retail clients with little or no investment experience may choose to invest some of their pension monies in high-risk investments, the investment of pension monies through an investment manager that 'focussed' on high-risk investments by such clients was in my view an obvious anomaly, especially where this wasn't consistent with the risk profiles shown in the applications.

I am not saying that high-risk investments are necessarily inappropriate for a pension, or that someone with a medium risk appetite should never invest in a high-risk investment. However, it is one thing to invest part of a pension in a high-risk investment alongside other investments with lower risks, it is another thing to use an investment manager wholly focussed on high-risk investment.

This was further evidence that should have led Options to reasonably conclude that consumer detriment could arise form it accepting referrals from PDM and led to it deciding that it shouldn't therefore accept such referrals – and before it processed Mr W's SIPP application.

There was in my view further reason for Options to be concerned about PDM's involvement in the SIPP applications clients it referred were making and question what it was doing. This is because clients – including Mr W - provided Options with a signed authority for it to provide information about their pensions to PDM. In my view it should have been obvious to Options that there was no good reason for PDM to be provided with information if it was acting only as an unregulated introducer. In the circumstances the fact that clients were providing a signed authority for it to be provided with information raised an obvious concern that its involvement in clients deciding to transfer their pensions to a SIPP went beyond that of simply introducing the clients to Options.

Even if Options argues that the information in the documents provided to it wasn't enough of itself for it to conclude that it shouldn't continue to accept business from PDM, it should reasonably have led to it making further enquiries.

Options said that after the initial agreement with PDM it didn't have any further discussions with PDM about the business it was referring or carry out any ongoing checks. The reason it has put forward for not carrying out any ongoing due diligence is that the agreement it had was in place for less than a year. But regardless of how long the agreement was in place for the obligation to carry out due diligence was ongoing and there was an obvious need for it to make further enquiries of PDM after completion of the introducer profile, given the issues I have referred to above.

Also, in the introducer profile PDM had identified that clients would be investing in quoted shares as decided by a regulated stockbroker, suggesting that PDM had already discussed with a regulated stockbroker what customers were going to be invested in. Options should in my view also have also had in mind how PDM was being funded - Options has confirmed that it didn't pay any fees to PDM, so it was on notice that PDM was likely being funded by someone else. In the circumstances I think it is reasonable to have expected Options, as part of its due diligence, to have sought information about any agreement PDM may have had with anyone else so that it had a proper understanding of its business.

One example of good practice identified in the 2009 Thematic Review report of 2009 identified one example of good practice was "*identifying instances of clients waiving their cancellation rights, and the reasons for this* (my emphasis)". Moreover, regardless of this being specifically identified as good practice in the Thematic review it should have been apparent to Options that it needed it needed to establish why all clients referred by PDM were requesting to waive their cancellations rights as for all the supposedly unadvised and ordinary retail clients PDM was referring to be electing to do this independently was, in my view, obviously anomalous.

If Options had made the enquiries that it should have done then I think it is more likely than not it would have concluded that clients were being directed as to what to include in their SIPP applications. This would have provided further reason for it to conclude it shouldn't accept referrals of business from PDM, given it wouldn't be expected that the content of SIPP applications would be determined by anyone other than the client when they were supposedly acting on their own initiative without advice.

I acknowledge that Options did telephone clients on receipt of a SIPP application as part of its process. It hasn't provided a record of the call with Mr W, but I am aware from other complaints to our service that the telephone discussion was based on a pro-forma checklist of questions, some of which required yes or no answers. Options did then confirm what was supposedly discussed in the telephone call in an email to clients and I have seen the email Mr W was sent.

This refers to Options' understanding that Mr W had signed a 'terms of business' on a non-advised basis and that it had been explained to him that PDM isn't an FCA regulated firm and isn't able to provide advice in relation to the SIPP and any investments. The email also states that Options do not provide financial advice in relation to establishing a SIPP or the underlying investments he chooses to make.

I am not satisfied that the discussions that Options had with clients as indicated by the email went far enough. It was based on a pro-forma series of questions rather than an open discussion with the customer as to what had transpired. There was obviously some mention of PDM not being able to provide advice and Options also confirmed with PDM that it didn't provide advice.

However, there is nothing to suggest that Options made any attempt to properly understand what had happened and the circumstances behind ordinary retail clients deciding they wanted to transfer their pensions to a SIPP, waive cancellation rights and use an investment manager that focussed on high-risk investments – all supposedly without advice from a financial adviser.

If Options had made further enquiries of Mr W, as I think it should have done if it hadn't already concluded it shouldn't accept the SIPP application then the question that then arises is what information it would have been provided with. Mr W has said that he was initially contacted by cold call in which he was offered a pension review, was told his pension wasn't performing well and that it would be in his best interests to transfer to an Options SIPP. He says he was advised he would have better returns for his retirement and that he wasn't aware that the introducer and Options weren't connected. He said he hadn't thought about transferring before this.

I acknowledge that he is recalling events from a long time ago and his recollection may not be entirely accurate because of this. However, I still think what he has said is likely to reflect the nature of the discussion that took place at the time and the circumstances behind his decision to transfer his pension to a SIPP. And, if Options had made further enquiries of Mr W, as I think it should have done, there is no reason to think he wouldn't have provided the explanation I have set out above. I think if he had done so it would have been clear to Options that Mr W hadn't decided to transfer his pension to a SIPP and instruct Cornhill as his investment manager independently, but rather had been advised to do so by someone who wasn't authorised. I also think it is likely Options would have become aware that the information within the SIPP application and Cornhill application it received from Mr W was in large part dictated by someone other than Mr W.

There was an obvious risk of serious consumer detriment arising from Options accepting Mr W's application in those circumstances which should have led to it rejecting his application.

Moreover, I am aware from other complaints referred to our service that other clients introduced by PDM have also provided explanations of what happened which suggest they were advised by someone who wasn't authorised and told what to include in applications. So, if Options had made the enquiries of clients that it should have done when it first started receiving applications from clients PDM introduced, it would more likely than not have concluded there was a risk of consumer detriment from it accepting referrals of business from PDM and that it shouldn't accept any business from PDM before it even received Mr W's application.

I think there were further failings by Options in terms of its due diligence following its acceptance of Mr W's application for a SIPP, as I explain below. This is a secondary issue, given I am satisfied that if Options had acted in accordance with its regulatory obligations and good industry practice it would have already concluded that it shouldn't accept referrals of business from PDM.

Having applied for an advisory stockbroking account with Cornhill Mr W subsequently informed Options about a month later that he wanted to change investment manager to Templeton and signed the SIPP member instruction and declaration on 15 May 2014. Options due diligence was limited to it checking that Templeton was an ongoing business and authorised to provide the services Mr W wanted it to provide. It didn't make any enquiries of Mr W or carry out any other due diligence as I think it should have done especially given that other clients PDM had referred also requested a change of investment manager to Templeton at around the same time. Options should have realised that it was very unlikely that the clients PDM had referred would unilaterally have decided to use Templeton instead of Cornhill and it should have been apparent that someone else was

involved in that decision and that person was unregulated.

Also, in contrast to the Templeton application, the Templeton application showed previous investment experience, with Mr W ticking to confirm he had between one to five years of experience investing in funds and had previous advisory broking experience. Moreover, I am aware that other clients applying for Templeton to be their investment in place of Cornhill also identified they had previously invested in funds and ticked to indicate previous advisory broking experience. The similarity in the applications of those applying to open an account with Templeton was an obvious issue that Options should have identified.

This provided further reason for Options to conclude that someone other than the client being involved in the decision to use Templeton and that person being unregulated. This should not only have led Options to conclude that it shouldn't accept the application for Templeton to act as investment manager it should also have led it to question PDM's involvement in the SIPP application and conclude that it shouldn't continue to accept Mr W's application for a SIPP.

For the reasons I have set out above I am satisfied that Options failed to comply with good industry practice, act with due skill, care and diligence and control its affairs responsibly, or treat Mr W fairly in accepting his application and, in the circumstances, it is fair and reasonable to uphold this complaint accordingly.

The application of section 27/Section 28 FSMA

This provides an additional reason for upholding this complaint. I will comment on this as briefly as I can. As I referred to briefly above, the Court of Appeal in the Adams Appeal case overturned the judgment of HHJ Dight in the High Court on the claim made pursuant to section 27 of FSMA. The Court of Appeal found that Mr Adams could unwind his investment and claim damages against Options under section 27 of FSMA and that Options wasn't entitled to relief under section 28 of FSMA.

Section 27 of FSMA applies where an agreement is made by an authorised person in the course of carrying on a regulated activity where that agreement has been made as a consequence of something said or done by a third party in the course of a regulated activity which is in contravention of the 'general prohibition'. In that situation section 27 provides that the agreement is unenforceable against the other party and the other party is entitled to recover any money or property paid or transferred by them under the agreement and compensation for any loss.

The reference to the general prohibition is to section 19 of FSMA, which states that no person may carry on a regulated activity in the UK or purport to do so unless they are an authorised person or an exempt person.

Section 28 allows a court to grant relief from section 27 and the agreement to be enforced or money and property to be retained by the authorised person where this is just and equitable but provides that in considering this the court has to have regard to whether the authorised person was aware that the third party in carrying out the regulated activity was contravening the general prohibition.

Given the findings I have already made as to Mr W being advised to transfer his pension to a SIPP by someone who wasn't authorised, I am satisfied that it is more likely than not a court would find that section 27 applies for the following reasons:

- Options carried out the regulated activity of operating a personal pension scheme and entered into an agreement with Mr W in the course of that activity.

- The agreement was entered into as a result of a person who wasn't authorised saying or doing something in the course of carrying on a regulated activity (advising) in breach of the general prohibition.

I have considered the application of section 28 of FSMA. In doing so it is appropriate to refer to what the Court of Appeal said when refusing relief to Options under section 28 in the Adams Appeal case. The reasons for refusing relief were set out under paragraph 115 of the judgment and included:

"i) *A key aim of FSMA is consumer protection. It proceeds on the basis that, while consumers can to an extent be expected to bear responsibility for their own decisions, there is a need for regulation, among other things to safeguard consumers from their own folly. That much reduces the force of Mr Green's contentions that Mr Adams caused his own losses and misled Carey;*

ii) While SIPP providers were not barred from accepting introductions from unregulated sources, section 27 of FSMA was designed to throw risks associated with doing so onto the providers. Authorised persons are at risk of being unable to enforce agreements and being required to return money and other property and to pay compensation regardless of whether they had had knowledge of third parties' contraventions of the general prohibition;"

I accept that in considering the application of that section a court would take into account that Options didn't know that there had been a contravention of the general prohibition. But, as the excerpt above indicates, lack of knowledge doesn't necessarily mean relief should be granted.

In this case the reason Options wasn't aware the general prohibition had been breached was because it didn't make the enquiries it should have done when it started to receive SIPP applications from clients referred by PDM, as I have explained above.

I think a court would more likely than not conclude that if Options had made the enquiries that it should have done it would have become aware that the general prohibition had been breached and as such would refuse relief under section 28 accordingly. So, I am satisfied a court would not conclude it is just and equitable for the agreement between Mr W and Options to be enforced in any event.

In the circumstances I am satisfied that section 27 of FSMA provides another reason why it is fair and reasonable for me to uphold this complaint and award redress.

Did Options act fairly and reasonably in proceeding with Mr W's instructions?

Options made more than one reference in its final response letter and subsequently to it acting on an execution only basis and to it being Mr W's decision to transfer his pension, instruct Templeton and invest in Eligere and Emmit.

It has argued that COBS 11.2.19R meant that it COBS 11.2.19R made it mandatory for it execute an order received from a client and that in doing so it is deemed to have complied fully with the regulations and has treated is customer fairly. This argument is only relevant if Options should have accepted Mr W's SIPP application in the first place, and I have found that it shouldn't have done so.

In any event this argument was considered and rejected by Jacobs J in BBSAL in which he said at paragraph 122 of his judgment:

"The heading to COBS 11.2.1R shows that it is concerned with the manner in which orders

are to be executed: i.e. on terms most favourable to the client. This is consistent with the heading to COBS 11.2 as a whole, namely: "Best execution". The text of COBS 11.2.1R is to the same effect. The expression "when executing orders" indicates that it is looking at the moment when the firm comes to execute the order, and the way in which the firm must then conduct itself. It is concerned with the "mechanics" of execution; a conclusion reached, albeit in a different context, in Bailey & Anr v Barclays Bank [2014] EWHC 2882 (QB), paras [34] – [35]. It is not addressing an anterior question, namely whether a particular order should be executed at all. I agree with the FCA's submission that COBS 11.2 is a section of the Handbook concerned with the method of execution of client orders, and is designed to achieve a high quality of execution. It presupposes that there is an order being executed, and refers to the factors that must be taken into account when deciding how best to execute the order. It has nothing to do with the question of whether or not the order should be accepted in the first place."

I am satisfied that the argument that Options has made in relation to COBS 11.2.19R isn't relevant to its obligations under the Principles to decide whether or not to accept an application to open a SIPP in the first place or to execute the instruction to make the investments i.e. to proceed with the application.

Is it fair and reasonable to ask Options to compensate Mr W?

Options might say that if it hadn't accepted Mr W's business from PDM that the transfer of his pension would still have been taken place through a different SIPP provider and he would still have invested in Eligere and Emmit. However, I don't think it would be fair and reasonable to find that Options shouldn't compensate Mr W for his loss based on speculation that another SIPP operator would have also failed to comply with their regulatory obligations. Rather, I think it is fair and reasonable to say that another SIPP operator would have complied with its regulatory obligations and good industry practice and in doing so have concluded it shouldn't accept business from PDM.

Moreover, I am mindful that Mr W didn't select Options as his SIPP provider himself but was directed to it by the unregulated person/s he spoke to at the outset. It seems to me unlikely that if the SIPP operator that had been selected for him in the first place had said it wasn't going to accept his application, he would have had good reason to question the credibility of those who had persuaded him to transfer his pension. I think in those circumstances he is unlikely to have gone ahead with a different SIPP provider in any event.

I have also considered whether it would be fair and reasonable for Options to pay the full amount of Mr W's losses given the potential responsibility of others for his pension monies being invested in Eligere and Emmit. Having done so I am satisfied that it would be fair and reasonable for Options to pay Mr W's losses in full, given that if it had complied with good industry practice and its regulatory obligations, he wouldn't have transferred his pension to a SIPP in the first place through which he could have invested in those companies. In short, I am satisfied that Options failings have caused the full extent of Mr W's losses.

Putting things right

The aim of the redress I award is to put Mr W, as far as possible, in the position he would have been in but for the failings on the part of Options I have identified in my findings. I am satisfied that but for those failings Mr W wouldn't have transferred his pension to a SIPP and invested in Eligere and Emmit. I have seen no evidence that Mr W would otherwise have transferred out of his existing pension.

I cannot be certain that a value will be obtainable for what the transferred pension plan would have been worth, but I am satisfied that what I have set out below is fair and

reasonable in the circumstances.

To compensate Mr W fairly Options must:

- Obtain the notional transfer value of Mr W's previous pension plan to the date of decision had he stayed with his previous provider.

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

- If the actual value is greater than the notional value, no compensation is payable. If the notional value is greater than the actual value, there is a loss.

- Pay an amount into Mr W's Options SIPP, to increase its value by the amount of the loss. The payment should allow for the effect of charges and any available tax relief.

- Pay Mr W £300 for the distress and inconvenience he has suffered from Options' failings.

I set out below how Options should go about calculating compensation in more detail below.

Calculate the loss resulting from the transfer of Mr W's existing pension to an Options SIPP.

Options should contact the provider of the pension plan that Mr W transferred into the SIPP and ask them to provide a notional value for this as at the date of decision. For the purposes of the notional calculation the provider should be told to assume no monies would have been transferred away from the plan and the monies invested would have remained invested in an identical manner to that which existed prior to the transfer.

Any contributions or withdrawals Mr W has made to his SIPP will have to be taken into account, whether the notional value is established through the previous provider or calculated as set out below.

Any withdrawal out of the SIPP should be deducted at the point it was actually paid so it ceases to accrue a return in the calculation from that point on. To be clear, this doesn't include SIPP charges or fees paid to third parties, but it does include any pension lump sum or pension income Mr W took after his pension monies were transferred to Options. The £1000 cash back payment that Mr W says he received following his instruction to invest the monies in his SIPP should be treated as an income withdrawal payment.

Similarly, any contributions made to the SIPP should be added to the notional calculation from the date they were actually paid, so any growth they would have enjoyed is allowed for.

If there are any difficulties in obtaining a notional valuation from the previous provider Options should instead arrive at a notional valuation by assuming the monies would have enjoyed a return in line with the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017 the FTSE WMA Stock Market Income Total Return Index). I think that is a reasonable proxy for the type of return that could have been achieved over the period in question.

The notional valuation, as calculated above, less the value of the SIPP as at the date of decision is Mr W's loss. Options should pay this amount into Mr W's SIPP if possible, allowing for the effect of charges and any available tax relief. The compensation shouldn't be paid into the SIPP 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 direct to Mr W as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement, which it is reasonable to assume would be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this. If either party disputes this is a reasonable assumption they must explain why in response to this provisional decision.

SIPP fees

I have assumed that there is no reason that the SIPP cannot be closed by Mr W once compensation has been paid into it, given the two companies that he invested in have both now been dissolved.

Distress and inconvenience

Mr W lost almost the entirety of the monies transferred from his existing pension plan into his SIPP and whilst he wasn't near retirement this will have impacted his plans and undoubtedly caused him distress and inconvenience. I consider an award of £300 for this is appropriate in the circumstances.

Interest

The compensation that Options calculates is payable to Mr W in accordance with what I have set out above must be paid into Mr W's SIPP, or directly to him if that isn't possible, within 28 days of the date that Options receives notification of his acceptance of my final decision. Simple interest at 8% per year must be added to the compensation from the date of my final decision until payment if compensation isn't paid within 28 days.

Options must also provide the details of its redress calculation to Mr W in a clear and simple format

My final decision

I uphold this complaint for the reasons I have set out above. Options UK Personal Pensions LLP must calculate redress as set out above and pay this to Mr W.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 6 March 2025.

Philip Gibbons
Ombudsman