DRN-5329681

The complaint

Miss R complains, through her representatives, that Options UK Personal Pensions LLP ("Options") previously Carey Pensions UK - didn't carry out adequate due diligence as regards her Self-Invested Personal Pension (SIPP).

What happened

Although Miss R is represented and his representatives have provided information on his behalf, I will refer to Miss R 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 Miss R 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 Limited** between 15 July 2013 and 19 August 2015 and the investment manager that Miss R 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 – regulated by the Danish Financial Supervisory Authority but closed 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' to do so. The company was then suspended from trading again in November 2014. It was finally dissolved on 12 October 2024.

Miss R's relationship with Options

Miss R says she was initially approached by a person I will refer to as Mr M by way of cold call. I am aware from other complaints to our service that Mr M was associated with an unregulated business. He discussed her existing pension saying it was *"sat there doing*

nothing" and that she could invest this a low-risk investment and 'bump up' her pension pot. She says that she cannot now recall if Options was mentioned but she signed an application for an Options SIPP on 5 January 2014.

The 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 Miss R wanted to instruct on an advisory basis. Miss R also ticked a box in the application confirming she wished to waive her right to cancel the SIPP within 30 days.

Miss R also signed an authority for Options to provide any information about her pensions to PDM, on the same date as the Options SIPP application. Options telephoned Miss R on 21 March 2014 and went through what I understand was a pro-forma checklist that it used at the time when dealing with direct clients. I haven't seen the pro-forma checklist or a transcript of the call, but Options emailed Miss R on 25 March 2014 referring to what was discussed. In summary the email included the following statements:

- We understand that you signed a terms of business with PDM on a non-advised basis and it had been explained to you that PDM is based in Spain and isn't regulated and it can't give financial advice.

- You confirmed you hadn't been offered any inducements.

- You understand that Options doesn't provide financial advice either as to the establishment of a SIPP or the underlying investments you choose to make.

- Neither Options or PDM are responsible for the investment decisions you make, and these are solely your responsibility.

- It was explained to you that you have the opportunity to seek independent financial advice in relation to both the establishment of a SIPP and any underlying investments and the reason you have decided not to take advice was because you felt sufficiently informed to proceed without this as you have carried out your own research.

- You wish to proceed with the establishment of a SIPP with Options on an execution only basis without first seeking financial advice.

Options opened a SIPP account for Miss R on 22 March 2014, sending her a welcome pack confirming this on 24 March 2014. Miss R completed an application to open a trading account with Cornhill on 27 March 2014 with a second application signed by trustees of the Carey Pension Trustees UK Ltd on 9 April 2014, confirming that Miss R was authorised to place trades on behalf of the trust. Options emailed Miss R on 7 April 2014 to confirm that £24,942 was received into her SIPP account. And she completed a SIPP member instruction and declaration the same date instructing Options to open an account with Cornhill for a consideration of £23,840.

However, Miss R thereafter emailed Options on 9 May 2014 informing it that she wanted to instruct Templeton instead and it sent her a revised SIPP member declaration and instruction for Templeton which she signed and retuned the same date. She also signed a further form of authority for PDM to be provided with any information it requested as to her pensions on 9 May 2014.

Miss R sent an instruction to Templeton on 22 May 2014 for it to invest £11,765 in Eligere

and the same amount in Emmit. 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.

Miss R made a complaint to Alexander David Securities as the principal of Templeton, which complaint was then referred to our service. An ombudsman upheld the complaint. The ombudsman said that whilst Templeton wasn't responsible for advising Miss R it had other regulatory obligations under the Principles which it hadn't complied with. He said that Templeton shouldn't have accepted Miss R's execution only instruction to invest in Eligere and Emmit given it had received multiple instructions to invest SIPP monies in those same niche shares which weren't the type of investments normally expected to form a significant part of anyone's pension.

The ombudsman said this should have led Templeton to look closer at the transaction and that if it had done so it would have concluded she had been advised to invest by an unregulated person and given the clear risk of consumer detriment from this should have declined her instruction. The ombudsman awarded redress but Alexander David Securities went into liquidation before this was paid. A claim was made to the FSCS but as Miss R had a potential claim against Options it declined the claim.

Miss R then complained to Options but it didn't uphold her complaint. In short, it said that it had carried out full due diligence on PDM and there was nothing that gave any cause for concern and that as an execution only SIPP administrator it had to execute investment instructions provided by Miss R as COBS 11.2.19R made this mandatory. It referred to its call back procedure through which Miss R was asked a series of questions to ensure she understood certain facts before it processed her SIPP application and to the due diligence it carried out on Templeton before accepting her application for it to be her investment manager. It also said it wasn't copied into the instruction Miss R provided to Templeton to invest in Eligere and Emmit so was unaware of those investments at the time she made them.

One of our investigators considered the complaint and thought it should be upheld. She set out Options' regulatory obligations and publications that gave examples of good industry practice as well as relevant case law that supported our approach in cases involving execution only SIPP operators.

She found that whilst Options wasn't responsible for ensuring pension switches or investments Miss R made were suitable for her circumstances, it was responsible for carrying out appropriate due diligence checks and deciding whether to accept or reject particular investments and/or referrals of business following such checks.

The investigator said that Options had carried out some due diligence on PDM and Templeton but that it should have done more. She said she would expect Options to have in place systems and controls to make sure it was unlikely there would be consumer detriment, especially where consumers weren't receiving advice or where an unregulated party is involved.

The investigator found that Options should have had concerns about PDM as an unregulated introducer located outside the UK prompting her to do this. She said the fact that by March 2014 Options had received around 19 introductions from PDM which should have led to it raising further questions.

The investigator said that Options had received enough applications from clients referred by PDM by the time it received Miss R's application to consider whether it should accept her application even after it spoke to her on the telephone. She said that if Options had

considered why Miss R wanted to open a SIPP with it and what her and other client's dealings with PDM were it should have concluded there was a high risk of consumer detriment if it proceeded with her application.

The investigator found that if Options had rejected Miss R's application for its SIPP it was unlikely she would have switched pensions and would instead have remained with her previous pension provider. She 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.

Miss R confirmed she had nothing further to add in response to the investigator's opinion. Options raised an issue about the complaint having been referred too late as Miss R hadn't signed the complaint form, saying that we didn't have jurisdiction to consider the complaint. The investigator confirmed that Miss R had made an email declaration and sent a copy of this to Options. It didn't provide any other response to her opinion and as it didn't agree with her the matter was referred to me for review and decision.

I issued a provisional decision explaining why I thought the complaint should be upheld. In short, I found that Options shouldn't have accepted the referral of Miss R's SIPP application because it should already have concluded through its due diligence that there was a risk of consumer detriment if it accepted referrals of business from PDM. I was satisfied that if Options hadn't accepted Miss R's application she wouldn't have transferred out of her personal pension or invested as she did. I therefore awarded redress on the basis she would have remained in her personal pension. I also said Options should pay her £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. Miss R confirmed that she accepted the provisional decision and had nothing further to add. Options didn't provide any response in the time provided to it to do so.

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 findings I made in my provisional decision or the conclusion that 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 during it accepting Miss R's SIPP application and providing its execution only service to her.

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 Appeal")

In the BBSAL case Jacobs J confirmed that the decision by the Ombudsman that under the Principles and in accordance with good industry practice Berkely 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.

Although COBS 2.1.1R does overlap with 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 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 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.

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 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 but will do so briefly. 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."

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, the ability to identify the number of investments, the nature of those investments, the amount of funds under management, spread of introducers and 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 Miss R had been onboarded by Options as a client and appointed Templeton as his investment manager and 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 guidance However, the publications I have referred to explained what the regulator thought SIPP operators should be doing to comply with their obligations under the Principles and to 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 Miss R or of the investments she invested in. However, it was required to carry out due diligence on introducers and investments in accordance with the Principles and good industry practice and having done so decide – based on the conclusions it should reasonably have come to following such due diligence - whether to accept referrals of business or investments.

Put another way, if Options should have reasonably concluded, having carried out reasonable due diligence and 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 doesn't seek to argue that it wasn't required to carry out due diligence on introducers such as PDM or on businesses such as Cornhill and Templeton to comply with its regulatory obligations - or on investments that its SIPP clients were investing pension monies into.

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 and that they weren't offered an inducement.

Moreover, I don't think it is in issue that the purpose of such due diligence was so that Options could decide whether to accept a referral of business or an investment. Options' terms and conditions specified that investments are made at its discretion and in the course of this complaint (and others) it has said that if it had been aware of the instruction to Templeton to invest in Eligere and Emmit it would have been able to stop the transactions. It has said it would have done so because one of the transactions wasn't acceptable to it in any event and also because the language used in the email instruction to Templeton by Miss R (and other clients) wasn't consistent with that of a retail client.

So, in short, I am satisfied that what Options was obliged to do in practice was to carry out due diligence that was consistent with good industry practice and its regulatory obligations 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 particular investments within Miss R's SIPP.

The due diligence carried out by Options

Having concluded that Options was required by its regulatory obligations and standards of good practice to carry out due diligence on PDM I have considered the due diligence it actually carried out. From what it has said and the evidence I have seen this included the following.

- It obtained a completed introducer profile to understand PDM's business.
- It had an agreement in place with PDM as from February 2014.
- It confirmed with PDM and Miss R that PDM wasn't providing advice.
- It reviewed World Checks carried out on the individuals it was dealing with at PDM as identified in the introducer profile.
- It ensured 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.
- It confirmed 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 and standards of good practice, I am not persuaded that what it did went far enough, for the reasons I explain below.

It seems to me that it is reasonable to have expected Options in carrying out its due diligence to have made the enquiries needed to properly understand PDM's business. It was dealing with an unregulated overseas business and there was an obvious potential risk of consumer detriment given this as clients would have no recourse in the event PDM wasn't acting in their interests. In the circumstances, to meet its regulatory obligations Options should have treated the business with caution and been careful to understand how the business operated. I am not satisfied that it did this through the limited enquiries it made.

The introducer profile provided very limited information on PDM's business. For example, Options has said it made no payment to PDM, so it was obviously being funded by someone else and Options made no attempt to establish the basis of its funding. Also, the limited information that the introducer profile did provide showed that PDM would be referring ordinary retail clients, rather than high net worth or sophisticated clients, with an average pension pot of only £35,000 but Options made no attempt to find out how PDM was identifying such clients in the first place.

I also think a reasonable conclusion for Options to have reached based on the limited information that was provided within the introducer profile is that it was unlikely that the type of client that PDM would be referring would fully understand the implications of transferring their pension monies to a SIPP or would have all made that decision without advice of some sort. So, when Options started to receive referrals from PDM it should have identified an obvious issue that these clients were all making direct (unadvised) applications for a SIPP. I say this with the 2013 finalised SIPP operator guidance in mind, one of the examples of

good practice within this being that SIPP operators have processes in place that allow them to identify possible instances of consumer detriment.

The guidance goes on to give examples of the management information that firms should consider, including 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.

The exact date the agreement between Options and PDM started hasn't been confirmed but Options' overseas introducer terms of business was signed on behalf of PDM on 4 February 2014. Options has informed us that it received a total of 34 referrals from PDM, amounting to 21% of new business for it over the period in question. It has also been able to confirm that it received 14 of these referrals by the middle of February 2014.

It isn't clear when it received Miss R's application. I have been provided with two versions of the first page of her SIPP application, the first being date stamped 4 February 2014 and the second date stamped the 27 February 2014. However, the second version has Miss R's address handwritten on the form along with her signature whereas the earlier version doesn't identify her at all.

I am also mindful that the explanation as to why Miss R wanted to establish a SIPP without an adviser set out in the later version of the first page is consistent with the information in the email sent by Options following it telephoning Miss R about her application, which I refer to further below. In the circumstances I have taken the later version of the first page as being the valid page and have therefore treated the application as having been received by Options on 27 February 2014. In this regard I also note that in its FRL Options referred to the date of receipt of the SIPP application as being 27 March 2014, which was likely simply a mistake as to the month of receipt.

Options has said it had received 14 applications by the middle of February 2014 - within less than two weeks of PDM having signed its terms of business. If Options had analysed the information in the applications that it was receiving to identify any trends, as it should have done, it is more likely than not it would have identified that all clients referred by PDM were making direct (unadvised) SIPP applications and at the same time indicating they wanted to waive their cancellation rights. The explanation in the applications as to why advice wasn't being sought by clients also tended to be similar - such as the client had 'carried out their own investigation' as Miss R in her application.

The similarity in the applications it had received from purportedly unadvised clients whose only connection was that had been referred by PDM were an obvious concern which Options should have identified through its due diligence. There is no good reason that clients which had no connection apart from an unregulated introducer would have all completed their applications in the same way. Options was aware from the introducer profile that PDM was referring ordinary retail clients with small pension pots and for all such clients to be apparently willing to transfer their pensions to a SIPP without advice whilst waiving their cancellation rights was in my view clearly anomalous and should have been identified by Options as creating a risk of consumer detriment. That clients were providing similar explanations as to why they weren't seeking advice in my view made this risk even clearer.

The possibility of someone who wasn't regulated being involved in the completion of the applications was an obvious risk that was apparent from just a basic analysis of the applications Options had been receiving. This is something that Options, acting with its regulatory obligations and standards of good practice in mind, should have been aware of. The risk of consumer detriment arising from an unregulated person being involved in client

applications for a SIPP into which clients were transferring existing pensions was clear. The only reasonable conclusion I think Options could have come to faced with that information would have been to refuse to accept any referral of business from PDM and that is a conclusion it should have reached before it received Miss R's application.

Even if Options argues that I am wrong and that this wouldn't have been enough for it to conclude that it shouldn't accept referrals of business from PDM, it should have led it to it considering carefully the other information provided to it.

That information included the Cornhill applications. From those that I have seen in complaints referred to our service, including that of Miss R, these showed that clients PDM was referring generally didn't have any, or any significant, investment experience and were selecting medium risk, as Miss R did – or in some cases both medium risk and high risk – when selecting their risk appetite, whilst at the same time answering yes to the statement:

"Cornhill Capital Limited focuses primarily on high risk products. Are you prepared to accept a higher degree of risk for your investments with Cornhill Capital in pursuit of higher potential returns."

I accept that ordinary retail clients with little or no investment experience and a medium risk appetite may choose to invest some of their pension monies in high-risk investments alongside other lower risk investments. But an investment manager that 'focussed' on high-risk investments in my view would clearly be looking to invest the bulk of pension monies in such investments. To invest the bulk of pension monies in high-risk investments would be questionable for most retail client pension in my view, but for a client like Miss R who had no or little investment experience and whose risk appetite has been identified as medium this was an obvious anomaly which Options should have identified though its due diligence.

Moreover, it seems to me that Options should have reasonably concluded from the overall information available to it that it was very unlikely that the clients PDM was referring to it would have decided to transfer their pensions to a SIPP, waive their cancellation rights, and invest their pension monies through an investment manager whose focus was on high-risk investments all without advice. It should therefore have identified an obvious issue with such clients making direct applications for a SIPP and the possibility that clients were receiving advice from someone who wasn't authorised to provide such advice.

The above issues in my view should have reasonably led Options to conclude that there was a serious risk of consumer detriment arising from it accepting referrals from PDM and that it consequently shouldn't do so - and before it accepted Miss R's SIPP application.

Even if Options argues that the issues that I have identified above weren't enough for it to have concluded it shouldn't accept referrals of business from PDM, it should have led it to make further enquiries to satisfy itself that the apparent risk of consumer detriment wouldn't arise if it accepted such referrals.

One example of good practice identified in the 2009 Thematic review report was "*identifying instances of clients waiving their cancellation rights, and the reasons for this* (my emphasis)". Moreover, it seems to me the need to establish the reasons behind clients waiving their cancellation rights should have been apparent to Options when all the clients PDM was introducing were seeking to do this whilst making direct applications.

If Options had made the enquiries that it should have done it is more likely than not in my view that it would have concluded that clients were being directed as to what to include within their SIPP applications. The risk of consumer detriment arising from clients being directed by someone else as to what to include within their SIPP applications when they

were supposedly not receiving advice is obvious in my view. It would be reasonable to expect Options with good practice and its regulatory obligations in mind to have concluded that it shouldn't continue to accept referrals of business from PDM in the circumstances.

I acknowledge that Options did telephone clients following receipt of the SIPP applications as part of its due diligence. But from other complaints referred to our service my understanding as to this call is that it is based on a pro-forma checklist of statements, some of which simply require a yes or no response. I haven't been provided with the checklist or a record of the call itself in Miss R's case, but Options did seek to confirm what was discussed in a follow up email to her dated 25 March 2014 in which reference is made to a conversation on 21 March 2014, which email I have seen.

This refers to Options' understanding that Miss R had signed a 'terms of business' on a non-advised basis and that it had been explained to her that PDM isn't an FCA regulated firm and isn't able to provide advice in relation to the SIPP or any investments. The email also states that Options do not provide financial advice as to establishing a SIPP or the underlying investments. The email makes reference to Miss R not seeking advice because she had carried out her own research.

I think the shortcomings in the discussions that Options had with Miss R and other clients referred by PDM is apparent, given it was based on a pro-forma checklist. In my view the discussion didn't go far enough to address the risk of consumer detriment as the email makes clear that Options made no attempt to discuss the issues which I have identified above which were all apparent from the information available to it. Options made no enquiries that explored the nature of interactions between Miss R and PDM or the basis on which she decided on the course of action she did, supposedly without advice – namely to transfer her pension to a SIPP whilst waiving her cancellation rights and instructing an investment manager that focussed on high-risk investments when she was a medium risk investor. In my view her course of action was clearly out of the ordinary and raised obvious questions given she was an ordinary retail client.

If Options had made further enquiries of Miss R as it should have done the question then is what she would have said to it. She has said in this complaint that she was cold called by Mr M who said that her pension was sat doing nothing and that she could invest in a low-risk investment and bump up the pension pot for when she was going to retire. She said that she thought that she had been contacted by a bona-fide financial advice company who were advising her. She said that she hadn't been interested in transferring her pension before being contacted by Mr M.

I acknowledge that Miss R is recalling events from some time ago so her recollection is unlikely to be complete. I also think it is fair to say that she doesn't have a detailed recollection. However, I accept what she has said about her decision to transfer her pension to an Options being because she was persuaded to do so on the basis that her pension would do better as a result – in her words that she had been told her pension was sat doing nothing and that transferring it would 'bump up' her pension pot. So, if Options had made enquiries of Miss R as I have found it should have done, I think it's more likely than not she would have provided this explanation to it.

A reasonable conclusion for it to have come to from this would have been that Miss R had been advised to transfer her pension to an Options SIPP by someone who wasn't authorised to provide advice – there being no suggestion that a regulated adviser was involved in the process. The risk of consumer detriment arising from this is obvious, such that if Options had been aware of this – as it would have been if it had made the enquiries that it should have done - it would be reasonable to have expected it not to accept Miss R's application.

Moreover, I am aware from other complaints to our service that other clients introduced by PDM have provided similar explanations as to how they came to use PDM's services and transfer their pensions to an Options SIPP. So, if Options had made the enquiries that it should have done when it first started receiving referrals of business from PDM it would, more likely than not, have come to the conclusion that clients referred by PDM had in fact been advised to transfer their pensions to an Options SIPP by someone who wasn't authorised to provide advice. So, in my view it should have concluded that consumer detriment would arise from it accepting referrals of business from PDM and it shouldn't therefore accept such referrals before it even received Miss R's application.

I think there were further failings by Options in terms of its due diligence following its acceptance of Miss R's application as I explain below. This is very much a secondary issue, given I am satisfied that if Options had carried out due diligence as it should have done and acted in accordance with good industry practice it would have concluded that it shouldn't accept referrals of business from PDM before she even made her application.

Following the opening of her advisory stockbroking account with Cornhill Miss R subsequently informed Options that she wanted to change investment manager to Templeton. Options did carry out some due diligence on that firm following this but this was in effect limited to checking that Templeton was an ongoing business and authorised to provide the services Miss R wanted it to provide.

This change of investment manager by an ordinary retail client such as Miss R who was supposedly acting without advice should have raised concerns with Options in my view, given that other ordinary retail clients referred by PDM also decided to change investment manager from Cornhill to Templeton around the same time. I think Options should have realised that it was unlikely that ordinary retail clients referred by PDM who were supposedly acting without advice would have unilaterally decided that they each wanted to instruct Templeton instead of Cornhill. The involvement of someone else in that decision and that person being unregulated was in my view apparent, as was the risk of consumer detriment arising from this.

Moreover, Miss R's Cornhill application didn't suggest any previous investment experience whereas the Templeton application identified that she had between one to five years of experience investing in funds and had previous experience of using an advisory broker. Putting on one side that the information about Miss R's investment experience didn't appear consistent and the need for Options to address this, I am aware from other complaints referred to us that other clients referred by PDM put the same information as Miss R in their Templeton applications as to having one to five years of experience of investing in funds as well as previous experience of using an advisory broker. This similarity in the information in applications of separate clients whose only connection was PDM should have been identified by Options as a concern in my view. There is no good reason that supposedly unadvised clients would all have provided the same information as to previous investment experience in their Templeton applications.

In the circumstances, the likelihood that someone else was involved in the completion of the applications was obvious in my view and as the clients were all acting without a financial adviser it follows that whoever was involved in completing client applications wasn't regulated. Options could reasonably have been expected to pick up on this if it had analysed the information, as it should have done in accordance with good industry practice and its regulatory obligations. The involvement of an unregulated person in the applications to appoint Templeton as investment manager didn't just mean Options would have had reason to reject the application Miss R had made to appoint Templeton because of the risk of consumer detriment. It would also, in my view, have given it reason to question her overall SIPP application.

Even if this wasn't enough for Options to have concluded that it should reject not only Miss R's Templeton application but her overall SIPP application as well, it should at the very least have led to it making further enquiries of Miss R to understand what had happened. If Options had made further enquiries of Miss R when it received her Templeton application it is more likely, than not, she would have made it aware not only that that Mr M was involved in her Templeton application but was instrumental in her decision to transfer her pension to an Options SIPP and involved in every aspect of her SIPP application, as Miss R has indicated is the case. The involvement of an unregulated person in Miss R's decision to transfer her pension and as to what investment manager to use created an obvious risk of consumer detriment and the only reasonable conclusion for Options to have come to in those circumstances would have been not to continue to provide Miss R with a SIPP.

In summary, 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 Miss R fairly in accepting her SIPP application and, in the circumstances, it is fair and reasonable to uphold this complaint.

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 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 case section 27 provides that the agreement is unenforceable as against the other party and the other party is entitled to recover any money or property paid or transferred by him 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 Miss R being advised to transfer her pension to an Options SIPP by someone who wasn't authorised to provide advice, 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 Miss R in the course of that activity.

- The agreement was entered into as a result of an unauthorised person saying or doing something in the course of them carrying on a regulated activity 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 Options didn't actually know that the general prohibition had been contravened but as the excerpt above indicates, lack of knowledge doesn't mean relief should necessarily be granted.

In this case the reason Options wasn't aware the general prohibition had been contravened was because it didn't make the enquiries it should have done when faced with multiple direct applications from ordinary retail clients the content of which were very similar and included clients waiving their cancellation rights. 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 likely been contravened and refused relief under section 28 accordingly.

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 Miss R'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 Miss R's decision to transfer her pension, instruct Templeton and invest in Eligere and Emmit.

It has argued that COBS 11.2.19R made it mandatory for it to 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 its customer fairly. This argument is only relevant if Options should have accepted Miss R'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 way orders are to be executed: i.e. on terms most favourable to the client. This is consistent with the heading to COBS 11.2, 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 now 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 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 regulatory obligations, under which it needed 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 Miss R?

Options might say that if it hadn't accepted Miss R's business from PDM that the transfer of her pension would still have been taken place through a different SIPP provider and she 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 Miss R for her 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 Miss R didn't decide to transfer her pensions herself but was advised to do so by someone who wasn't authorised to provide advice and she didn't select Options as her SIPP provider herself but was directed to it by the unauthorised person she spoke to at the outset. It seems to likely to me that if the SIPP provider she had been directed to had said it wasn't going to accept her application Miss R would have had good reason to question the credibility of the person who had persuaded her to transfer her pension in the first place. I think in those circumstances she 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 Miss R's losses, given the potential responsibility of others for her 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 Miss R's losses in full, given that if it had complied with good industry practice and its regulatory obligations, she wouldn't have transferred her pension to a SIPP in the first place through which she could have invested in those companies. In short, I am satisfied that Options failings have caused the full extent of Miss R's losses.

Putting things right

The aim of the redress I award is to put Miss R, as far as possible, in the position she 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 Miss R wouldn't have transferred her pension to a SIPP and invested in Eligere and Emmit. I have seen no evidence that Miss R would otherwise have transferred out of her 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 Miss R fairly Options must:

- Obtain the notional transfer value of Miss R's previous transferred pension plan to

the date of decision had she stayed with her previous provider.

- Obtain the actual current value of Miss R'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 Miss R'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 Miss R £300 for the distress and inconvenience she 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 Miss R's existing pension to an Options SIPP.

Options should contact the provider of the pension plan that Miss R transferred into the SIPP and ask it 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 Miss R has made to her 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 Miss R took after her pension monies were transferred to Options.

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 Miss R's loss. Options should pay this amount into Miss R'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 Miss R 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 her 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

As the two companies that Ms R invested in have both now been dissolved there should be no reason the SIPP cannot be closed once compensation has been paid, in which case no ongoing SIPP fees will be payable. However, if that isn't the case and the SIPP cannot be closed following payment of compensation, any ongoing SIPP fees should be waived until it can be.

Distress and inconvenience

Miss R lost the entirety of the monies transferred from her existing pension plan into her SIPP and whilst she wasn't near retirement this will have impacted her plans and undoubtedly caused her 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 Miss R in accordance with what I have set out above must be paid into Miss R's SIPP, or directly to her if that isn't possible, within 28 days of the date that Options receives notification of her 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 Miss R 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 Miss R.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss R to accept or reject my decision before 21 March 2025.

Philip Gibbons
Ombudsman