DRN-5395660

The complaint

Mr F had a self-invested personal pension ('SIPP') with James Hay Administration Company Limited ('James Hay'). Mr F complains that, before allowing it, James Hay didn't carry out sufficient due diligence on an investment made within his SIPP and this has caused him a financial loss.

Mr F is represented in this complaint, but for ease I'll refer only to Mr F.

What happened

Mr F says a third party introduced him to 'Adviser P' (at that time an appointed representative of a regulated adviser I'll call 'Principal N'). In February 2018, Mr F was advised by Adviser P to switch three existing pensions to a James Hay SIPP and invest in a bespoke portfolio with a discretionary fund manager ('DFM') I'll call 'DFM T'. Two of the three pensions were defined contribution pensions with no safeguarded benefits. But the advice records that the other pension was invested into two with-profits funds and one of these benefitted from a guarantee of 4% growth each year before charges.

Mr F followed the advice. His James Hay SIPP application recorded Adviser P as his financial adviser, and that he intended to transfer in three pensions and appoint DFM T. His James Hay SIPP opened in February 2018, and three personal pensions totalling about £260,000 were transferred into it.

In March 2018, Mr F took a £40,000 pension commencement lump sum ('PCLS'), and £205,000 of his SIPP monies were sent to DFM T. DFM T invested Mr F's monies into a bespoke portfolio of stocks and shares.

Following further advice from Adviser P, in November 2018 Mr F's DFM T portfolio was encashed and £186,000 received back into his SIPP. He took a further PCLS of £15,000. And about £175,000 of his SIPP monies were invested into a portfolio managed by a new DFM. For clarity, Mr F is not complaining here about this investment.

In April 2019 Mr F changed adviser. I understand that in October 2019, his investment portfolio was encashed and his SIPP's full cash balance (about £190,000) was transferred to a new SIPP with 'Provider H'. I understand various investments were then made within his Provider H SIPP.

In July 2022 the regulator, the Financial Conduct Authority ('FCA'), issued a Final Notice to DFM T (then in liquidation) and fined it. This was for failing to ensure it had effective systems and controls to identify and reduce the risk of financial crime and money laundering in relation to trading for clients of a particular firm between January 2014 and November 2015.

In November 2023, Mr F complained to James Hay and to our Service that James Hay had breached the regulator's Principles for Businesses and guidance by failing to carry out sufficient due diligence on the DFM T investment, before allowing him to invest in it. He thought James Hay ought to have identified it was high-risk, considered whether it was appropriate for a pension scheme, and ensured that he (as a retail client) wasn't investing

the vast majority of his pension into a high risk investment. He thought this failure had caused him a financial loss of about £19,000.

Mr F also complained that James Hay failed to carry out sufficient due diligence on the transfer to a SIPP with Provider H, and about some of the firms involved in events that took place after that transfer. Our Service is dealing with those complaints separately.

In addition, Mr F complained about Adviser P's advice. An Ombudsman at our Service upheld this complaint, saying its advice to transfer pension monies to a James Hay SIPP and invest in the DFM T portfolio had been unsuitable because the SIPP was more expensive, Mr F lost guarantees present in an existing pension, his attitude to risk was incorrectly assessed as 'high medium', and he'd likely not needed a PCLS. The Ombudsman said Principal N (as principal of Adviser P) should compensate Mr F for his distress and inconvenience and carry out a redress calculation to see whether he'd suffered an investment loss between his transfer to James Hay and receiving further advice in April 2019 – and if so, it should also compensate him for this loss. Mr F accepted the Ombudsman's decision. However, it is my understanding that Principal N has not yet paid Mr F compensation as directed by the Ombudsman. And in February 2024, the FCA cancelled Principal N's authorisation because it thought it was not carrying out regulated activities.

In February 2024, James Hay issued its final response to Mr F's complaint. In this, and its contact with our Service, James Hay's submissions included the following:

- James Hay was not responsible for any loss. The terms and conditions of its SIPP made clear Mr F was responsible for all investment decisions. And whether the investment through DFM T was suitable and appropriate for Mr F was a matter for him and Adviser P.

- In transferring in his three personal pensions and sending funds for investment to DFM T, James Hay had acted on Mr F's instructions. James Hay had no reason to reject his instructions, and it didn't select or provide any of the investments.

- Mr F received advice at all material times, personal to him and his individual circumstances. The FCA required financial advisers to give suitable advice about both the SIPP and the investment to be held within it, so it was reasonable for James Hay to expect that Adviser P advised on the DFM T investment.

- James Hay carried out due diligence checks on Adviser P. It checked the FCA register to make sure it had the requisite permissions, and it agreed terms of business with Adviser P. James Hay also continuously monitored Adviser P to ensure it remained FCA authorised and wasn't subject to any disciplinary action.

- James Hay didn't ask for copies of any suitability reports provided to clients. It doesn't have the regulatory permissions to consider the suitability of the financial advice Mr F received from Adviser P in his particular circumstances - this was Adviser P's role and responsibility.

- Adviser P introduced 56 clients to James Hay between September 2017 and February 2019; for context, James Hay opened a total of 8,003 SIPPs in this period. Mr F was the 30th introduction from Adviser P. And of the 56 introductions, 33 transferred from defined benefit ('DB') pension schemes and 41 chose to invest through DFM T. James Hay's relationship with Adviser P is ongoing.

- DFM T was FCA authorised, regulated and subject to regulatory obligations at all

times, which James Hay reasonably took comfort from. It had also signed James Hay's terms of business, under which the choice of investment was limited to those on James Hay's permitted list – this list allowed investments to be held by third-party stockbrokers like DFM T, for example stocks and shares traded on the London Stock Exchange, AIM or other recognised stock exchanges. Mr F's DFM T investment was in listed stocks traded on HMRC recognised stock exchanges, these were permitted and met the FCA's definition of a standard asset. James Hay received regular data files from DFM T and there was nothing in the type of shares, volumes invested, or activity undertaken that suggested any problem.

- Mr F hadn't evidenced how he'd calculated his alleged loss. In any case, the value of investments can rise and fall, and a fall isn't evidence that an investment had failed or that James Hay had failed in its due diligence checks.

Unhappy with James Hay's final response to his complaint, Mr F asked our Service to investigate. He said Adviser P's involvement didn't diminish James Hay's regulatory obligations, and the SIPP terms and conditions James Hay pointed to appeared to be an attempt to absolve it of all liability. Mr F added that he'd not been made aware Principal N and DFM T were linked by having the same director, and James Hay ought to have realised this was a conflict of interest.

One of our Investigators considered Mr F's complaint about James Hay's investment due diligence. He didn't uphold it. He said James Hay was responsible for ensuring the investment was suitable to be held in a SIPP, not for ensuring the investment was suitable for Mr F individually. That James Hay had carried out sufficient due diligence on Adviser P, and the underlying investments made by DFM T were into standard assets in line with James Hay's permitted investments. He acknowledged Mr F's concerns about a conflict of interest, but said it wasn't uncommon for an advisory firm to have a DFM service and this alone wouldn't lead to customer detriment. And Adviser P had provided the advice and set the investment mandate based on its assessment of Mr F's attitude to risk, and DFM T had invested in line with that mandate.

Mr F disagreed and asked for this complaint to be referred to an Ombudsman for a decision. He maintained James Hay hadn't carried out sufficient due diligence on the DFM T investment and disputed it was common practice for a legitimate adviser working in their client's best interest to also be director of the investment they were advising on -he thought this was a significant conflict of interest which James Hay ought to have been concerned about when accepting his pension transfer. He also thought James Hay ought to have known the director in question had been a director of 'a string of wealth companies', many of which were now in liquidation or dissolved, with Principal N having its licence revoked by the FCA. So James Hay ought to have been concerned about this director's capacity to have sufficient oversight of each company and about the possibility of 'phoenixing', and he pointed to the FCA's July 2022 disciplinary actions in relation to DFM T.

As Mr F requested, this complaint has been passed to me.

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.

Relevant considerations

I'm required to determine this complaint by reference to what I consider to be fair and reasonable in all the circumstances of the case. When considering what is fair and

reasonable in the circumstances, I need to take account of relevant law and regulations, regulator's rules, guidance and standards, codes of practice and, where appropriate, what I consider to have been good industry practice at the relevant time.

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

- The agreement between the parties.
- The Financial Services and Markets Act 2000 ("FSMA").
- Court decisions relating to SIPP operators, in particular Options UK Personal Pensions LLP v Financial Ombudsman Service Limited [2024] EWCA Civ 541 (*"Options"*) and the case law referred to in it including:
    - Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 474 ("*Adams"*)
    - R (Berkeley Burke SIPP Administration) v Financial Ombudsman Service [2018] EWHC 2878 (*"Berkeley Burke"*)
    - Adams v Options SIPP UK LLP [2020] EWHC 1229 (Ch) (*"Adams – High Court"*)
- The FSA and FCA rules including the following:
    - PRIN Principles for Businesses
    - COBS Conduct of Business Sourcebook
    - DISP Dispute Resolution Complaints
- Various regulatory publications relating to SIPP operators, and good industry practice.

The legal background

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

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

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

The case law

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

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

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

The Principles for Businesses

The Principles for Businesses, which are set out in the FCA's Handbook "*are a general statement of the fundamental obligations of firms under the regulatory system"* (see PRIN 1.1.2G). The Principles apply even when the regulated firm provides its services on a non-advisory basis, in a way appropriate to that relationship.

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

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

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

The regulatory publications and good industry practice

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

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

The 2009 Report included:

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

The Report also included:

> *The following are examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms:*

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

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

Points to note about the SIPP publications include:

- The Principles on which the comments made in the publications are based have existed throughout the period covered by this complaint.
- The comments made in the publications apply to SIPP operators that provide a non-

advisory service.

- Neither court in the *Adams* case considered the publications in the context of deciding what was fair and reasonable in all the circumstances. As already mentioned, the court has a different approach and was deciding different issues.
- What should be done by the SIPP operator to meet the regulatory obligations on it will always depend upon the circumstances.

What did James Hay's obligations mean in practice?

I'm satisfied that to meet its regulatory obligations when conducting its operation of its non-advisory SIPP business, James Hay was required to consider whether to accept or reject particular investments and/or referrals of business with the Principles in mind. I say this based on the overarching nature of the Principles (as is clear from the case law) and based on good industry practice. I am also satisfied that, bearing in mind the Principles and good industry practice, this obligation was not confined *only* to rejecting an investment on the basis it was not allowed by the SIPP Trust or HMRC regulations.

I am satisfied that to meet its regulatory obligations when conducting its operation of its non-advisory SIPP business a SIPP operator should for example reasonably refuse an investment if the SIPP operator had serious concerns about *"possible instances of financial crime and consumer detriment such as unsuitable SIPPs".* Or, for example if, the SIPP operator had concerns that the investment might not be genuine, or not be secure or might be impaired in some way.

I am satisfied that a non-advisory SIPP operator could decide not to accept a referral of business or a request to make an investment without giving advice. And I am satisfied that in practice many non-advisory SIPP operators did refuse to accept business and/or refuse to make investments without giving advice.

I am satisfied that, in order to comply with its regulatory obligations, a non-advisory SIPP operator should have due diligence processes in place to check any firms introducing business to them and the investments they are asked to make on behalf of members or potential members. And James Hay should have used the knowledge it gained from its due diligence checks to decide whether to accept such business and/or allow a particular investment.

As set out above, to comply with the Principles, James Hay needed to conduct its business with due skill, care and diligence; organise and control its affairs responsibly and effectively; and pay due regard to the interests of its clients (including Mr F) and treat them fairly. Its obligations and duties in this respect weren't prescriptive and depended on the nature of the circumstances, information and events on an ongoing basis.

It appears that James Hay understood it was required to carry out some checks on the introducer and the investment proposal before accepting it into the SIPP because it has explained the process that was followed. But I think that James Hay also ought to have understood that its obligations meant that it had a responsibility to also carry out appropriate checks on introducers to check the quality of the business it was introducing.

I also think that it's fair and reasonable to expect James Hay to have looked carefully at the investment it was allowing Mr F's pension fund to be invested in. To be clear, for James Hay to accept the investment without carrying out a level of due diligence that was consistent with its regulatory obligations, wouldn't in my view be fair and reasonable or sufficient. And if James Hay didn't look at an investment in detail, and if such a detailed look would have revealed that the investment might not be secure, might be fraudulent, or that the investment couldn't be independently valued, or that it was impaired, it wouldn't in my view be fair or

reasonable to say James Hay had exercised due skill, care and diligence – or treated its customer fairly – by accepting such an investment.

Due diligence checks on Adviser P

James Hay has provided evidence of the due diligence checks it carried out on advising introducer, Adviser P. It checked the FCA register to ensure Adviser P had the requisite permissions, and it agreed terms of business with Adviser P. James Hay says it also continuously monitored Adviser P to ensure it remained FCA authorised and wasn't subject to any disciplinary action, and I can see that it again checked the FCA register at the time of Mr F's introduction. Based on this, I'm satisfied that at the time of Mr F's introduction and investment through DFM T, Adviser P was authorised and regulated by the FCA with no disciplinary action. And I think James Hay could reasonably take some comfort from that.

I'm mindful that James Hay says it didn't ask for copies of any suitability reports Adviser P provided to clients, and suggests this was because it doesn't have permissions to consider the suitability of the financial advice given and this was the adviser's responsibility anyway. But while I accept James Hay wasn't responsible for the advice provided to Mr F, I think it's fair and reasonable to say that having copies of the suitability report would have enhanced its understanding of Mr F as a client. That said, even if James Hay had asked for a copy of Adviser P's February 2018 suitability report for Mr F, I don't think it would have seen anything of concern, bearing in mind that James Hay wasn't required to check the suitability of the advice given to Mr F - it would instead have seen that Mr F had received advice on both the transfers and the investment in his individual circumstances.

I've also considered whether James Hay ought to have refused the introduction it received from Adviser P on the basis of Mr F's investing all of his SIPP in the DFM T bespoke portfolio. But the underlying investments within the portfolio were mainstream investments and, as I say, James Hay wasn't required to check the suitability of the advice given to Mr F.

Based on what I've seen, I'm not persuaded there was anything that ought to have given James Hay concern about accepting Mr F's introduction of business from Adviser P. So, on receipt of Mr F's SIPP and investment application, I don't think James Hay should've reasonably had any concerns about the potential for consumer detriment associated with this introduction. And I don't think there were any other concerning features about Mr F's application such that James Hay should've carried out further checks on this occasion before accepting it.

Mr F says James Hay ought to have been concerned about a conflict of interest arising from Principal N and DFM T having the same particular director, and I've considered all of Mr F's submissions about this. I've not seen evidence that James Hay investigated this potential conflict of interest when it first decided to accept introductions from Adviser P or when it accepted Mr F's introduction. But even if James Hay had carried out additional checks, I'm not persuaded it would have made a difference to this complaint. Because it is the information that would've likely been discovered as a result of carrying out those checks that's important here, and whether the information discovered ought to have led James Hay to reject the SIPP application or decide the investment was not an appropriate asset to be held in the SIPP.

I accept that the particular person Mr F points to was a director of Adviser P's principal (Principal N) and a controlling director at DFM T. But this person was not the only director of DFM T at the relevant time. And he was not a director of Adviser P and was not the person who gave Mr F advice - Mr F's adviser and the director of Adviser P was a different person. I acknowledge the regulatory action taken in relation to DFM T in July

2022 and to Principal N in February 2024. But ultimately, I haven't been able to find any adverse information about Adviser P, DFM T or the director Mr F points at, at the time Mr F made his James Hay SIPP application and DFM T investment. So, overall, I'm not persuaded there was any information in the public realm at that time that ought reasonably to have given James Hay cause for concern about a conflict of interest, such that it ought to have refused either the introduction of Mr F's business from Adviser P or the instruction to invest his SIPP monies through DFM T.

Taking everything into account, I haven't seen sufficient evidence to persuade me that James Hay ought to have refused to accept Adviser P's introduction of Mr F's SIPP business.

Due diligence checks on the DFM T portfolio investment

As I've said above, James Hay also needed to carry out appropriate due diligence checks on the DFM T investment before allowing Mr F's application to invest in it to proceed. So, I've thought about the due diligence checks that James Hay ought to have carried out on the investment before it should've accepted it as an appropriate investment for a SIPP. And whether the information it ought to have gathered should have led it, if acting in line with the Principles and guidance, to decline to accept that investment into its SIPP.

As the regulator has made plain, SIPP operators have a responsibility for the quality of the SIPP business that they administer. So, SIPP operators should undertake appropriate independent enquiries about the nature or quality of an investment proposed before determining whether to accept or decline it into its SIPP, which would mean making checks that go beyond simply reviewing the investment literature.

I've considered what would constitute reasonable due diligence checks before accepting the DFM T bespoke portfolio investment into the SIPP. James Hay says DFM T was FCA authorised and regulated, and I can see it held the relevant permissions at the time in question. So again, I think James Hay could take some comfort from that. DFM T had also signed James Hay's terms of business.

The FCA has made it clear that the due diligence required on SIPP investments will vary depending on the nature of the intended investments. The investments DFM T made on behalf of Mr F were in line with those listed on James Hay's permitted list. Further, they comprised listed stocks traded on recognised stock exchanges and met the FCA's definition of a standard asset. So, I think James Hay could also take comfort from the fact that the investments were standard assets and had met the listing requirements of a recognised stock exchange.

Overall, considering the information available, I think James Hay could be satisfied that the assets behind Mr F's portfolio investments were genuine and not a scam, and that Mr F's investments were safe and secure. Taking everything into account, I haven't seen sufficient evidence to persuade me that James Hay should have refused to accept investments in the DFM T bespoke portfolio into its SIPPs at the time Mr F's investment in it was made.

Mr F says that James Hay shouldn't have allowed him to invest his pension in the DFM T portfolio because it was high-risk. But whether the investment carried a high degree of risk does not mean that James Hay, acting in line with the Principles and guidance, should not have permitted it to be held in its SIPP. SIPP investors may choose to invest in high-risk investments. And while I appreciate Mr F says this investment caused him a financial loss of about £19,000, I don't think James Hay should've reasonably refused to permit this investment in Mr F's case on the basis it might cause him a loss in the future; that is an inherent risk of all investments.

I acknowledge that Mr F's complaint about the suitability of Adviser P's February 2018 advice has been upheld. But that doesn't automatically mean he has a valid complaint against James Hay. Adviser P and James Hay are separate businesses and performed different roles here, and were subject to different regulations and expectations. I've explained above what was expected of James Hay when considering whether to accept Mr F's applications, and for the reasons given I don't think it was unreasonable for James Hay to accept them and allow the DFM T investment to proceed.

Summary

James Hay needed to carry out checks in accordance with the regulator's rules, Principles and good industry practice before accepting Mr F's introduction from Adviser P and the DFM T bespoke portfolio investment into its SIPPs.

Overall, I don't think there was anything at that time that ought reasonably to have caused James Hay concern about the introduction of Mr F's SIPP business from Adviser P or the DFM T investment.

Even if James Hay had carried out further independent checks, I haven't found anything that would've been discoverable to James Hay at the time that ought to have led it to refuse Mr F's introduction from Adviser P or the DFM T investment to be made within its SIPP.

So although I appreciate this is not the answer Mr F hoped for, taking everything into account, I'm not upholding this complaint.

My final decision

For the reasons set out above, I'm not upholding this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 10 April 2025.

Ailsa Wiltshire
Ombudsman