DRN-5401924

The complaint

Mr F complains that IPS Pensions Limited trading as James Hay Partnership ("James Hay") didn't carry out reasonable due diligence on his investment in the Stirling Mortimer No 4 Cape Verde fund ("SMCV4 fund"), the EEA Life Settlements fund ("the EEA fund") and the Harvester Opportunities fund ("the Harvester fund") held within the Self Invested Personal Pension (SIPP) it operated.

What happened

In 2007 Mr F was advised by LJ Financial Planning Limited ("LJFP") – now known as Corbel Partners Limited - to transfer his defined benefit occupational pension scheme ("OPS") to a James Hay SIPP. His initial instructions about investment of his pension monies were to invest in the SMCV4 fund and another Stirling Mortimer fund, with the balance to be invested on the Selestia platform.

LJFP later informed James Hay in an email dated 21 August 2007 that Mr F wanted to invest just in the SMCV4 fund and Selestia and not in the other Stirling Mortimer fund. On 31 August 2007 £148,102.69 was transferred into his SIPP; £100,000 was transferred to the Selestia platform and invested in a mix of funds and £40,000 was invested in the SMCV4 fund.

On 27 November 2008 Mr F transferred a further sum of £29,507 into the SIPP from a personal pension. He surrendered the investments in Selestia in June 2009 for £95,560 and at around the same time opened an investment management account with Nucleus, £68,000 was initially transferred to that account. A further £18,000 was transferred to that account on 16 September 2009. The funds in the account with Nucleus were then used to invest in the EEA fund and the Harvester fund.

Mr F complained to LJFP on 28 January 2016, initially about the advice to invest in the SMCV4 fund but subsequently about the overall advice to transfer his OPS to a SIPP. That complaint was then referred to our service and an ombudsman issued a decision upholding the complaint and awarding redress on the basis that the advice to transfer from his OPS to a SIPP was unsuitable for Mr F. Mr F has confirmed that LJFP paid the maximum amount that our service could award at the time of £150,000.

Mr F complained to James Hay in a letter dated 16 January 2019, in which he made reference to several regulatory failings but with the main issue being its failure to carry out due diligence on the investments within his portfolio. James Hay didn't uphold the complaint. In its final response letter of 13 March 2019 it made the following points:

- Mr F signed a sophisticated investor certificate and was in receipt of independent professional financial advice and it reasonably considered the document could be relied on and took a great deal of comfort from this.

- It doesn't provide advice and as such doesn't assess the suitability of investments but did have responsibility to carry out some due diligence checks.

- The SMCV4 fund could be held in a SIPP, there were no fraud indicators and it was listed on a HMRC recognised exchange – the Channel Islands Stock Exchange.

- The fraud investigation into the fund by the Serious Fraud Office was ongoing from 2014 but concluded in April 2018 with no charges, as there wasn't enough evidence.

- Mr F was responsible for monitoring his investments and would have been aware of the ongoing performance of his investments as this would have formed part of the regular reviews carried out by his financial adviser.

- James Hay received no communication about the investment in either the EEA fund or the Harvester fund and reasonably expected Mr F and his financial adviser to have considered the appropriateness and suitability of investments Nucleus was instructed to purchase.

- It was for Mr F and his financial adviser to monitor the investments held with Nucleus.

- The suitability, size and allocation of the investments made via Nucleus and their timing was and remains a matter for LJFP as Mr F's financial adviser.

Mr F referred his complaint to our service and it was considered by one of our investigators who didn't think it should be upheld. The investigator said that he was only considering the investment in the SMCV4 fund. He set out the rules that James Hay had to comply with which required it to carry out due diligence on introducers and investments. He also referred to various publications issued by the regulator in which it gave examples of what was expected of SIPP operators to comply with the rules.

The investigator said that so far as due diligence on LJFP as the introducer was concerned, it was authorised by the regulator and had the necessary permissions to provide advice, and there was nothing for James Hay to be concerned about. As to the due diligence on the SMCV4 fund, the investigator said that whilst it was not covered by the regulator, it was covered by the Guernsey Financial Services Commission. The investigator also said the fund was listed on the Channel Islands Stock Exchange ("CISX") which was a HMRC recognised stock exchange.

Mr F didn't agree with the opinion of the investigator. In summary he made the following points:

- James Hay shouldn't have processed two significant documents relating to his investment in the SMCV4 fund because both had been amended post signature.

- The ombudsman in his complaint to LJFP referred to the SMCV4 fund as a high risk UCIS which shouldn't have been sold to an ordinary retail customer so the reference to the investment being a standard investment is confusing.

- SIPP operators have an obligation to ensure that an investment isn't just capable of being held in a SIPP but is also suitable.

- The investment didn't match his risk profile yet around 27% of his initial pension funds were invested in it.

- James Hay had enough information about the problems with the SMCV4 fund and should have contacted him and advised him of this.

- SIPP operators also have an obligation to provide realistic annual valuations on

assets held within a SIPP and since the SMCV4 fund was deregulated in 2014 James Hay haven't been able to give a valuation that reflects the financial position of the investment and have relied on valuations based on unit values prior to 2016 and even this was incorrect.

As Mr F didn't agree with the investigator, the matter was referred to me for review and decision.

I asked James Hay to provide further information to assist me in coming to a fair and reasonable decision. In its response it repeated arguments as to the complaint being outside our jurisdiction. It also provided the following information through its written response and the appendices attached.

- It has been unable to find a copy of terms of business with LJFP at the time Mr F was introduced.

- Around 1300 clients opened SIPPs in 2007 and of those 29 invested in a Stirling Mortimer fund and LJFP was the introducer of 15 of those clients – James Hay hasn't included three clients who were also Independent Financial Advisers ("IFAs").

- Eight clients introduced by LJFP opened a SIPP and invested in Stirling Mortimer funds before Mr F opened his SIPP – James Hay hasn't included two clients who were also IFAs.

- In 2007 it would have permitted direct investments into the EEA fund and Harvester fund.

- It has found three communications to LJFP about issues with SMCV4 sent in 2012 and 2013 but there was also information in the public domain about the fund.

- The accuracy or not of the valuations provided to LJFP is a moot point given Mr F says he didn't see annual valuations until around two years after he had complained to LJFP.

- This brings into question the information provided to him by LJFP but he clearly understood there was a problem with SMCV4 given his complaint to the adviser.

I then issued a provisional decision the findings from which are set out below.

"Before I can consider the merits of the complaint, I need to be satisfied that we have jurisdiction to consider this complaint. James Hay has previously raised an issue about the complaint having been made too late under the rules that govern our jurisdiction – there being no other jurisdiction issue arising in this case. This wasn't addressed in the opinion of the investigator and I asked James Hay to confirm whether this was still an issue. It confirmed that its position is still that the complaint has been made too late.

The relevant rules can be seen in the Dispute Resolution rules ("DISP") section of the regulator's Handbook. The time limits that apply to complaint referred to us are set out in DISP 2.8.2R, which states:

"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

> *(1) more than six months after the date on which the respondent sent the complainant its final response, redress determination or summary resolution*

communication; or

(2) more than:

(a) six years after the event complained of; or (if later)

(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;

unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;"

Under the rules we can consider a complaint made outside the time limits where the respondent consents or there are exceptional circumstances why the complaint wasn't made in time. However, James Hay hasn't consented and I have seen no evidence that exceptional circumstances arise in this case. In the circumstances, if I decide the complaint wasn't made in time, we will not be able to consider the merits.

There isn't any dispute about the complaint Mr F made to James Hay being referred to our service within time under the six-month time limit. There also isn't any dispute that the complaint in 2019 has been made too late under the six-year time limit - given it is about the failure by James Hay to carry out due diligence on investments he made between 2007 and 2010.

That leaves me to consider whether the complaint has been made too late under the three-year time limit. That time limit starts to run at the point that Mr F was aware, or ought reasonably to have been aware, that he had cause to complain to James Hay. Mr F complained to James Hay by letter dated 16 January 2019. So, if Mr F was aware, or ought reasonably to have been aware, he had cause to complain to James Hay more than three years before this, his complaint will have been made too late.

Mr F complained to LJFP on 28 January 2016 about its unsuitable investment advice and from what he has said he first had concerns about the investments he had been advised to invest in around late 2013. However, having awareness that he had cause to complain to his financial adviser doesn't mean that Mr F was aware or ought reasonably to have been aware he had cause to complain to James Hay as well.

The connection between what has gone wrong with an investment and the financial adviser that recommended it is an obvious one but the obligations of a SIPP operator as regards such investments are very different to that of a financial adviser. Most retail clients are unlikely to have had a good understanding of the due diligence obligations of SIPP operators at the time of Mr F's complaint to LJFP and there is no reason for Mr F to have thought that because his adviser had provided unsuitable advice James Hay had also failed in its obligations to him – or, indeed, for him to reasonably have become aware of its obligations to him.

Mr F has said he wasn't aware he had cause to complain to James Hay until later in 2018 following research he carried out. I accept what he has said and it is of note that in late 2018 there was a significant judgment in a judicial review challenge to a decision by our service about the due diligence obligations of SIPP operators. I am referring to the case of R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service (2018) EWHC 2878 ("BBSAL") which was published on 30 October 2018.

Although Mr F hasn't specifically referred to that case, given he has referred to research

carried out in late 2018 it seems likely that the publicity following the judgment formed part of that research. I am not satisfied that anything before this ought reasonably to have made him aware he had cause to complain about James Hay.

In the circumstances, I am satisfied that this complaint made in January 2019 has been made in time under the time limits that apply to complaints to our service and that we have jurisdiction to consider the merits.

Should the complaint be dismissed?

James Hay has raised a second possible argument as to why our service shouldn't consider the merits of this complaint. It has argued that Mr F has been compensated in full for losses arising from the investments he made and that it is unreasonable for him to pursue the exact same losses against it and that this would amount to double recovery.

Under DISP 3.3 I have the power to dismiss a complaint in certain circumstances. The grounds for dismissal for this complaint are set out in DISP 3.3.4A, one of which is where dealing with such a type of complaint would otherwise seriously impair the effective operation of our service. There might be cases where a complainant has previously recovered the entirety of their losses in a previous complaint such that no award would be due even if the complaint was upheld and these might be seen as cases that might seriously impair our effective operation.

However, James Hay hasn't provided any evidence that Mr F has been fully compensated for his losses through his complaint to LJFP and it is his evidence that this isn't the case. He has said that LJFP only paid him up to our maximum award at the time of the decision in his complaint against LJFP and this wasn't the full extent of his losses. And, given the sums involved when the transactions took place and that Mr F has lost valuable safeguarded benefits, it is not unlikely that the total losses that he has suffered, in connection with the transactions about which he complains, are in excess of the £150,000, which he says LJFP paid him.

If I uphold this complaint on the merits then it should be possible for me to give directions to ensure that there isn't double recovery. In the circumstances I am not satisfied that there is a basis for me to dismiss this complaint without consideration of the merits.

The merits of the complaint

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.

Although the complaint Mr F has made isn't just about the investment in the SMCV4 fund but encompasses his later investment into the EEA fund and Harvester fund I am not going to

make findings as regards those later investments. They were made as part of a separate transaction that took place around three years later, after the establishment of the SIPP and investment in SMCV4 and as such any complaint as regards failings on the part of James Hay as regards those investments should be dealt with as a separate complaint if Mr F wishes to pursue this.

Relevant considerations

The rules under which James Hays 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.

Principle 7 – Communications with clients: A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.

I am satisfied that I am required to take the Principles into account when determining whether James Hay did anything wrong in accepting Mr F's SIPP application or investments it was instructed to invest SIPP monies into.

I also consider that COBS 2.1.1R - which states that 'a firm must act honestly, fairly, and in accordance with the best interests of its client' - is a relevant consideration.

In coming to the conclusion that the above rules are relevant considerations for me, 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: the BBSAL case I have already referred to, 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 Berkeley Burke should have undertaken due diligence on the investment it accepted within its SIPP, was lawful. At

paragraph 109 of his judgment he said:

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

Neither the Adams High Court case nor the Adams Appeal case addressed the application of the Principles. The application of COBS 2.1.1R 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.

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

The courts have consistently ratified our approach 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 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.

I acknowledge that the regulatory publications I have referred to were all published after Mr F applied for a SIPP with James Hay and invested in the SMCV4 fund. However, this doesn't mean the examples of good practice identified in the publications weren't good practice at the time and only applied going forwards. I think the wording of the publications makes this clear.

What did James Hay's obligations mean in practice?

As I have indicated above, to comply with its regulatory obligations, 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 customers and treat them fairly. What that means in practice will depend on the circumstances of the case.

In this case, as a SIPP operator providing an execution only service James Hay wasn't required to assess the suitability of the SIPP for Mr F or of the investments he invested in. However, I am satisfied that the Principles and good practice did require it to decide whether it was appropriate to accept business from an introducer such as LJFP and/or whether the investments were appropriate to accept within the SIPP it administered.

And I am also satisfied that to make those decisions James Hay needed to carry out due diligence on LJFP and on the investments. In short, it needed to make enquiries that, for example, enabled it to understand LJFP's business and/or whether an investment was genuine or impaired in some other way. The requirement for it to carry out such due diligence was an ongoing obligation.

Put another way, if James Hay should have reasonably concluded from its due diligence that an investment shouldn't be permitted in a SIPP or that it shouldn't accept a referral of business from an introducer because there was a risk of financial crime or consumer detriment arising, then as a SIPP operator providing an execution only service it could be expected to refuse to accept that investment within its SIPP or the referral of business from the introducer.

James Hay doesn't seek to argue that it wasn't required to carry out due diligence on a firm such as LJFP which was referring clients to it, or on investments such as the SMCV4 fund - it acknowledged in a letter to our service dated 26 June 2019 that it was required to carry out due diligence on the fund but argues that having done so there was no reason for it to refuse to accept the investment within Mr F's SIPP.

The due diligence carried out by James Hay

Due diligence on LJFP as the introducing business

As I have said, James Hay hasn't argued it wasn't required to carry out due diligence on LJFP or the investments that Mr F made in his SIPP but it isn't clear from the information provided in this complaint what due diligence it undertook on LJFP. I have therefore considered what James Hay would have been aware of if it had carried out due diligence in accordance with good practice and the regulatory obligations I have referred to above.

James Hay could be expected to check that LJFP was regulated and if it had done so this would have shown that LJFP was authorised to provide advice on pension transfers and investments. It could also have been expected to check that the firm or individuals within the firm hadn't been the subject of any disciplinary or regulatory action. And consideration of the financial services register would have shown this was the case.

In the circumstances I am satisfied that due diligence on LJFP by James Hay wouldn't have disclosed that it was acting outside of its regulatory permissions or any warnings or regulatory actions which would have led to the conclusion that James Hay shouldn't accept referrals of business from the firm. It could take some assurance from the fact that Mr F had the benefit of advice from a regulated firm with a clean regulatory record.

In coming to that conclusion I have considered whether the SIPP applications James Hay received from clients referred by LJFP before Mr F's application, where clients invested pension monies in a Stirling Mortimer fund, should have raised concerns with James Hay about accepting the referral of Mr F's business.

From the information provided by James Hay, ten clients referred by LJFP before James Hay received Mr F's application invested in a Stirling Mortimer fund - between 26 March 2007 and 27 June 2007. In Mr F's case he didn't invest most of his pension in SMCV4.

In the circumstances, on the evidence available, I am unable to say that the information available to James Hay from referrals of business already received by the time of Mr F's initial application should have led it to conclude it shouldn't accept Mr F's SIPP application.

Due diligence on the SMCV4 fund

Before I address the due diligence that James Hay carried out on the SMCV4 fund, I think it is important to clarify what the investment involved. The SMCV4 fund was one cell of the Stirling Mortimer Global Property Fund PCC Limited ("SMGP") - a protected cell company registered in Guernsey and incorporated on 9 March 2007. The principal memorandum for the company was issued on 26 March 2007. It identified that the company was a closed ended investment company.

The Offer for Subscription for shares in the SMCV4 fund and supplemental memorandum was issued on 26 July 2007. This identified the objectives of the fund as investing its assets in right to purchase contracts in property developments within the Cape Verde islands. It explained that right to purchase contracts give the fund the right and obligation to purchase a property from a developer on completion, with the purchase price typically at a discount of

up to 30% of current market value.

The supplemental memorandum also explains that the right to purchase contracts are tradeable and that as such the fund can sell these rather than purchase the completed property and that this is what it intended to do. In other words, the fund never intended to own any property but instead intended to sell the right to purchase contracts it had entered into. The supplemental memorandum also made clear that the fund could borrow up to 150% of the net asset value of the fund. Put another way, the fund's debts could potentially exceed its value by as much as 50% of the value.

The extent of due diligence required will vary depending on the investment. The investigator identified the fund as a UCIS but I don't think that is right. A closed ended investment company isn't a collective investment scheme as it falls within one of the exemptions. The SMCV4 fund as a cell of SMGP wasn't therefore a UCIS in my view. However, regardless of this it was still a high-risk and non-standard offshore investment which was unregulated, and illiquid - and the due diligence carried out by James Hay needed to reflect this.

James Hay has referred to the fund being allowed within a SIPP and that there were no fraud indicators. It has also referred to it being listed on CISX, a HMRC recognised exchange. This would have given some assurance to James Hay that the investment was secure – not in the sense that Mr F's monies wouldn't be at risk through such investment but rather that it was a genuine investment with no obvious issues that gave concern.

I am mindful not only of the nature of the SMCV4 fund but also that it was a totally new product - SMGP being a new company incorporated only a few months previously. So, just checking that there were no fraud indicators and that the investment could be held in a SIPP and that it was to be listed on CISX didn't go far enough in my view.

However, even if James Hay had made further enquiries and looked further into the investment, I have seen nothing that makes me think this would have resulted in it being provided with information that ought to have led to it concluding the SMCV4 fund wasn't genuine or that it otherwise created a risk of consumer detriment that meant it shouldn't accept the investment within Mr F's SIPP.

In coming to that conclusion I have considered the fact that the SMCV4 fund along with two other SMPG funds were subsequently the subject of investigation by the Serious Fraud Office between 2014 and 2018. However, no action was taken following the investigation. Moreover, this isn't evidence that if James Hay had carried out further due diligence in 2007 or subsequently this would have led to it being provided with information that would reasonably have led it to concluding that the SMCV4 fund wasn't a genuine investment or that it shouldn't accept it within the SIPP for some other reason.

I have also taken into account various points raised by Mr F in support of his argument that James Hay failed in its regulatory obligations. He has referred to the investment instructions provided to James Hay being changed and to the investment in the SMCV4 fund being over double the amount he originally intended to invest in another Stirling Mortimer fund.

The original email instruction signed by Mr F was for investment in both the SMCV4 fund and the other Stirling Mortimer fund he is referring to, so the effect of the change in instruction was that instead of being invested in two Stirling Mortimer funds Mr F was invested in just one. Both were high risk unregulated, and illiquid investments that invested in a similar way – namely in right to purchase contracts in property developments. The change, in my view, wasn't something that should have led James Hay to conclude that the investment in SMCV4 wasn't then appropriate for Mr F's SIPP.

I acknowledge that Mr F didn't make the handwritten changes to the original investment instructions he had signed. However, LJFP emailed James Hay on 21 August 2007 setting out the change to the investment instructions. It seems likely that the handwritten changes to the original investment instruction were made by James Hay to reflect those email instructions. It may have been advisable for James Hay to have requested a further signed instruction from Mr F but it had no reason to think that the regulated firm he had appointed wasn't acting on his instructions.

Furthermore, based on what I have seen, I am not persuaded that the change to investment instructions wasn't something agreed with Mr F in the first place. So, even if James Hay had made further enquiries about this, there is no basis for me finding that he wouldn't have confirmed to it that he wanted to invest in accordance with the revised instructions provided.

Mr F has also said that he wasn't a sophisticated investor despite having signed a certificate to that effect. In support of this he has said he has said he only ever had a moderate (or balanced) risk. A person's risk appetite doesn't determine if they are a sophisticated investor and there was no reason for James Hay to question Mr F's signing of the certificate. I am not saying that I don't accept that Mr F may not have been a sophisticated investor, as he says is the case. The point I am making is that James Hay was entitled to accept the certificate at face value, given it was provided, and countersigned, by his regulated adviser.

I have noted Mr F's reference to the certificate being crossed through with the initials "NPW". The explanation that has been provided as to this is that it means "Not Proceeded With" and from what has been said this appears to be because the certificate was provided for the proposed investment in the other Stirling Mortimer fund, which didn't go ahead. Mr F has suggested this handwritten annotation to the certificate should be considered a major non-compliance but it is more likely than not that the reason the certificate was provided initially and then crossed through was because the other Stirling Mortimer fund was identified as a UCIS (albeit incorrectly in my view) in the documentation about the fund.

The rules didn't permit promotion of such products but there were exemptions, one of which was that promotion to certified sophisticated investors. So, the certificate may well have been provided at the outset in support of the investment in that fund and was then crossed through when it didn't go ahead – with the SMCV4 fund not being identified (and not being) a UCIS and therefore there being no requirement for it to be shown that it came within an exemption to the rules about not promoting UCIS.

In the circumstances on the evidence available, whilst I am not satisfied that the due diligence carried out by James Hay on the SMCV4 fund went far enough, I'm not currently persuaded that additional due diligence would have disclosed anything that would reasonably have led it to conclude it shouldn't permit the investment in Mr F's SIPP.

The information about SMCV4

Mr F argues that James Hay should have contacted him when issues arose with the SMCV4 fund arose. James Hay could be expected to pass on relevant information it received about investments within his SIPP – such as when the SMCV4 fund was delisted from CISX - but any such communications will have been sent to LJFP as his financial adviser not directly to Mr F, as James Hay has pointed out.

Mr F also argues that James Hay didn't provide accurate information as to the value of his investment in the fund. He refers to it providing the same valuation for the fund in both 2017 and 2018. However, he also refers to James Hay informing him in 2018 that:

"Please note that whilst every effort is made to ensure the accuracy of the value used to

produce the Annual review Pack, we are reliant on the information we get from third parties. In this case we have had no reply from Stirling Mortimer Global Property and the value used is from the last valuation."

So Mr F was made aware as to why the 2017 and 2018 valuations were the same and he was aware, or should have been aware, that whilst James Hay endeavoured to provide an accurate valuation Stirling Mortimer hadn't provided information to allow it to do so, which is why it was using the previous year's valuation. It seems to me that James Hay didn't do anything wrong by using the valuation from the previous year when it didn't have any more up to date valuation from Stirling Mortimer. There was no other source it could have used to provide a valuation.

Even if it was argued that James Hay shouldn't have provided any valuation for the fund, when it didn't have an up-to-date valuation from Stirling Mortimer, there is nothing to suggest that Mr F would have been in any different position if it had done so. There was no realistic prospect of him being able to do anything with the investment as of 2017 in any event. So, informing Mr F that it couldn't provide a valuation wouldn't have altered the position he was in – namely with an investment that he couldn't do anything with."

I gave both parties the opportunity of responding and producing any further information they wished me to consider. James Hay said it didn't have anything further to add. Mr F responded staying he didn't agree with my provisional decision. I summarise below the main points he has made.

- The second pension amount transferred into his SIPP was originally the Guaranteed Minimum Pension amount under his OPS which his adviser said couldn't be held within a SIPP, so it was placed into a separate personal pension which then performed badly.

- He was misled by his financial adviser as to being protected if the fund failed and wouldn't otherwise have placed 27% of his pension fund into an investment that carried a high risk of failing.

- It is incumbent on SIPP Operators to manage and assess risks particularly when firms are routinely pushing large volumes of clients into high-risk investments which appears to have been the case with LJFP.

- He questions why James Hay unable to find the terms of service agreed with LJFP given the importance of this.

- James Hay didn't have to accept the investment into the SIPP and should have had measures and controls in place that highlighted consumer detriment.

- James Hay failed to have procedures in place to identify instances of consumer detriment and didn't have regard to the quality of the business it was administering.

- He was not a party to the communications in 2012 and 2013 between James Hay and LJFP about issues with SMCV4 but given the gravity of the investigation by the SFO why wasn't he copied in?

- If James Hay had requested sight of the suitability report LJFP provided the investment in SMCV4 wouldn't have gone ahead as it would have shown he didn't fit any of the criteria required for this type of investment and wasn't a sophisticated investor.

- James Hay failed to monitor and analyse the type of business LJFP was introducing.

- James Hay was required to have processes in place to prevent consumer detriment. It knew the funds were transferred from his OPS and that the type of investment wasn't permitted to be introduced or sold to retail customers and did nothing to question this.

- If James Hay can't provide evidence of the due diligence that it carried out, how can it defend its case?

- If evidence cannot be provided of the due diligence undertaken this is a clear breach of Principle 2 and Principle 6.

- The FCA have found historic failings in the practices and advice provided by LJFP and if James Hay had monitored, analysed, and reviewed the type of business LJFP was referring this should have raised questions.

- Within a three month period James Hay allowed ten clients to invest in a new product that was unregulated with a high risk of illiquidity and it should have been alerted to the fact that LJFP was pushing through a number of clients into the same fund and the consumer detriment that could arise from this.

- James Hay should have carried out ongoing due diligence and concluded that the investments LJFP was pushing through were totally unsuitable for the majority of investors.

- Everything he has read refers to SMCV4 as a UCIS. It was an unregulated, high-risk, totally unsuitable investment for his attitude to risk.

- The FCA are clear that in cases involving unregulated investments, particularly where the account is execution only, enhanced due diligence is required.

- There is no other area of financial services or legal services that would process a transaction using an amended document crossed through with 'NPW'.

- The original investment instruction is unrecognisable and he questions the legality of this document.

- James Hay should have requested a newly signed and dated sophisticated investor certificate and if it had required proof of his status as such it would have identified he didn't satisfy the criteria and the investment in SMCV4 wouldn't have gone ahead.

- James Hay couldn't realistically value SMCV4 and the values it did provide were inflated.

I asked Mr F to provide a copy of the suitability report provided to him by LJFP which he did. He also made the following points:

- The report identified his balanced risk appetite and this would have raised questions as to why he had been advised to invest such a high proportion of monies from his OPS into a high-risk unregulated and complex investment.

- James Hay could have imposed conditions on LJFP before accepting the referral of his business from LJFP to safeguard him against potential financial risk or detriment, such as asking for a copy of the suitability report which would have shown he wasn't

a sophisticated investor.

- The transfer of his OPS and investment in SMCV4 was clearly not in his best interests.

- The type and quality of business LJFP were bringing James Hay' way should have raised red flags – investing client pension monies in high-risk and unregulated products.

- The investment in SMCV4 amounted to 27% of his portfolio and James Hay knew this was being transferred from his defined benefits OPS.

- The documentation James Hay had shows that he was only a retail investor and based on the information it already had James Hay could have asked him to complete its own Specialist Investor Questionnaire as an added safeguard and due diligence measure.

- If it had done so then the investment could not have been processed, as he didn't meet the criteria of a sophisticated investor and as a retail investor SMCV4 could not and should not have been sold to him.

- James Hay knew or should have known the type of product SMCV4 was, a UCIS, and that it was new and that this type of product carried a high risk of consumer detriment but accepted it without further checks.

- If James Hay has the appetite to accept non-standard, high-risk investments into its business it should have had robust due diligence measures in place to combat financial crime/consumer detriment such as a screening questionnaire for new investors.

- He has attached a document stating that he was a balanced investor and there is nothing which classified him as a sophisticated investor.

- James Hay could have protected him from harm but chose not to by accepting two critical documents that should have been seen as void.

I also asked James Hay to provide information about the clients who had invested in Stirling Mortimer funds up to when Mr F invested. It had previously identified that ten clients had invested but two of these had been IFAs. In response to my query it said it had got this wrong and three out of the ten had been IFAs. Of the other seven it provided details of the proportion of pension funds invested in Stirling Mortimer funds which showed this ranged from 26% through to 93%.

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.

Your text here I have considered what Mr F has said in response to my provisional decision. He has in large part repeated arguments previously raised by him and which were considered by me before I issued my provisional decision. Nothing he has said persuaded me that I should change the conclusion I reached that this complaint shouldn't be upheld and the findings in my provisional decision from part of the findings in this final decision unless I state to the contrary.

As I said in my provisional decision, 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. I also pointed out that I am not required to address every point made by a party.

I have considered the various breaches of the Principles and COBS rules that have been referred to by Mr F. I have not set them out when summarising the points he has made in response to my provisional decision as these are rules that I have considered in coming to a fair and reasonable decision in this complaint in any event. The same goes to his references to publications by the regulator which I have also considered.

Mr F argues again that James Hay should have placed no reliance on the sophisticated investor certificate which wasn't provided for his investment in SMCV4 but the other Stirling Mortimer fund he didn't invest in and which was crossed through with NPW – 'Not Proceeded With'. He argues that James Hay should have sought another, up to date, certificate for his investment in SMCV4.

As I made clear in my provisional decision, I don't agree with Mr F that James Hay couldn't take into account the sophisticated investor certificate he had previously signed. I have seen no information that would have given James Hay reason to question Mr F being a sophisticated investor. And in the absence of any such information it was in my view entitled to accept the certificate at face value given it was provided by Mr F's regulated adviser who had countersigned it.

I note the argument Mr F has made that no other area of financial services or legal services would process a transaction with an amended document crossed through with NPW. But, as I have said, it is more likely than not James Hay that put NPW on the certificate for the reasons I have already discussed. And I can see nothing wrong with it relying on it in the circumstances when it had reason to think Mr F wasn't a sophisticated investor.

Moreover, even if it hadn't done so and instead sought another such certificate for his investment in SMCV4 as Mr F suggests it should have done, there is no reason to think he wouldn't have signed this as well, given he knowingly signed the first one.

Mr F argues that if James Hay had sought a copy of the suitability report from LJFP, it would have concluded that he wasn't a sophisticated investor. I accept that one of the examples of good practice identified in the Thematic Review report of 2009 was SIPP Operators obtaining copies of suitability reports. But this doesn't in my view mean SIPP Operators need to obtain suitability reports for every client referred to them.

It is important to keep in mind that the purpose of a SIPP Operator doing this isn't to check the suitability of the advice provided or to check whether a sophisticated investor certificate is valid. It can provide a greater understanding of the client where this is necessary.

In this case James Hay had the benefit of seeing a sophisticated investor certificate signed by Mr F and countersigned by LJFP, the regulated firm advising him, in which he declared that he qualified as a sophisticated investor as regards the products listed in the certificate.

I acknowledge that Mr F says he wasn't a sophisticated investor but unless there was some reason for James Hay to question this - and I am not satisfied that there was – it wasn't for it to check this in my view. Moreover, even if James Hay had considered the report, I am not persuaded this provided any information that precluded Mr F being a sophisticated investor.

In summary, having taken everything into account, I am not persuaded that James Hay should have refused to accept the introduction of Mr F's business from LJFP or the SMCV4

investment. Whilst I am not satisfied that James Hay's due diligence was sufficient, I remain satisfied that, even if it had undertaken additional due diligence, it would not have uncovered anything that ought to have led it to refuse to accept Mr F's SIPP application or investment instruction.

My final decision

I don't uphold this complaint for the reasons I have set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 1 August 2025.

Philip Gibbons
Ombudsman