DRN-5440807

The complaint

Mrs S complains through her representative that Options UK Personal Pensions LLP didn't carry out appropriate due diligence on the business that introduced her to it and recommended investments to her.

What happened

Although Mrs S is represented and her representatives have provided information on her behalf, I will refer to Mrs S throughout for ease of reference. I set out below the roles of the various parties 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.

Innovative Products Partnership Ltd ("IPP") – an unregulated introducer of clients to Options.

Best International Group Ltd ("BIG") – an unregulated company that describes its purpose as to helping companies access new investment capital and providing investment administration services to businesses to help them develop.

Best Group Car Parks (Dubai) ("BGCP")– An investment offered by BIG through which investors funds were invested in car park spaces in Dubai.

The Property Store ("TPS") – a limited company incorporated in Dubai which managed car parking spaces on behalf of the owners of the spaces.

In 2013 Mrs S was introduced to Options by an agent of IPP (Mr L), having signed an application for an Options SIPP on 28 March 2013 which Options says was received on 2 April 2013 and a welcome pack sent to her the same date. A transfer of £32,633 was then received from her personal pension and Mrs S thereafter signed an application to invest £26,000 in BGCP on 15 April 2013. On 22 April 2013 Mrs S signed an Options 'SIPP Member Instruction and Declaration' as to her investment in BGCP. This included an indemnity from Mrs S as to any liability which Options incurred as to the investment.

Mrs S and Options signed an agreement with TPS for it to manage the car parking space under which, as well as providing management services to Mrs S, it also guaranteed the payment of the rental income set out in the agreement. BIG wrote to Options on 30 April 2013 acknowledging receipt of the operating and lease park agreements for BGCP and of the sum of £26,000 with the first rental payment for the car park space she had invested in being stated to be due at the end of October 2013.

Mrs S received a total of seven payments from BGCP, with the last payment being received in April 2016. In September 2016 Options wrote to Mrs S to inform her that it had received a communication from BIG stating that TPS hadn't paid the rent due and that Options would be in contact when it heard further from BIG. It wrote to Mrs S again on 6 December 2016

enclosing a letter from BIG which stated that three companies in the TPS Group had been put into administration. Options wrote to Mr S again on 12 September 2017 to inform her that legal action had been commenced against TPS.

Mrs S complained to Options in April 2020, saying that IPP wasn't authorised to provide pension switching advice or recommend investments and that Options shouldn't have allowed the pension transfer or the unregulated investment to take place.

In its final response letter Options, in summary, made the following points.

- It is an execution only SIPP administrator and as such it would have been in breach of COBS 11.2.19R if it hadn't executed Mrs S's specific investment instructions.

- It isn't permitted to provide advice nor comment on the suitability of a SIPP or the underlying investment, or that of the introducer a customer has chosen to use.

- It undertook due diligence on IPP on a number of occasions. It carried out checks on it, an introducer profile was completed and an introducer agreement was signed which set out Options' terms of business and the conduct it expected of IPP as an introducer. It had no reason to think it shouldn't accept introductions from that business as a result of its investigations.

- It had strict processes in place when dealing with unregulated introducers when accepting introductions, which were followed.

- Mrs S claims she received from IPP but it can't comment on this as it wasn't a party to her discussions and had no control over the information provided to Mrs S by IPP.

- The documentation Options provided recommended that she seek independent regulated financial advice.

- Mrs S was treated as a direct client who had not used a financial adviser and it hasn't at any point accepted any instructions from IPP in relation to her SIPP with all correspondence about her decisions coming from her directly.

- At no point during the application process did Mrs S indicate she had received advice and if she had it would expect her to have completed the adviser details in the application form.

- As Mrs S wasn't investing in a standard regulated investment portfolio, she had to complete an 'Alternative Investment' member declaration.

- Options isn't able to provide any form of advice but it did provide sufficient risk warnings.

- Mrs S signed the member declaration confirming her understanding of various matters, such as her understanding that she was purchasing an unregulated alternative investment that is high risk and speculative.

- It doesn't believe section 27 of FSMA applies as no evidence has been provided that IPP provided advice and it wasn't aware that it was making recommendations and to the extent that section 27 does apply a court would exercise its discretion under section 28 FSMA and enforce the agreement.

- Mrs S claims she was advised by IPP but interacted with Options directly and it isn't

fair and reasonable to hold it responsible for matters it wasn't aware of because Mrs S failed to inform it.

- Mrs S has contributed to her own potential losses by not being open and honest with it and can't hold Options responsible accountable for something she did without its knowledge and of her own free will.

- It is entitled to accept Mrs S's signature confirming her understanding of the various documents referred to at face value.

- The documents provide the full extent of information and warnings that it is permitted to provide and it isn't responsible if Mrs S chose not to heed those warnings.

Mrs S referred her complaint to our service and it was considered by one of our investigators who thought it should be upheld. He 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. In short, the investigator upheld the complaint for the following reasons:

- Options should have carried out due diligence on IPP and its agents which was consistent with good industry practice and its regulatory obligations at the time and used the knowledge it gained form its due diligence to decide whether to accept or reject a referral of business or investment.

- The due diligence that Options carried out on IPP took place after the relationship with IPP began.

- The due diligence undertaken by Options after it started accepting business from IPP was extremely limited and it is reasonable to conclude it failed to carry out adequate due diligence and didn't comply with best practice or its regulatory obligations.

- Options didn't have adequate systems in place to monitor the type of business it was receiving from IPP and the fact that IPP was promoting unregulated products and Mrs S was referred by an unregulated introducer should have raised a red flag.

- Options failed to meet its regulatory obligations when deciding to accept introductions from IPP agents given the type of investor introduced as well as the type of investment.

- Options argument about the effect of COBS 11.2.19R isn't relevant given he has found it shouldn't have accepted the referral of business from IPP in the first place.

- Options didn't act fairly in asking Mrs S to sign an indemnity as to Options not having any liability arising from her investment.

- Section 27 of FSMA provides a further and alternative basis for upholding the complaint given IPP was unregulated and undertook the regulated activity of advising. on investments and arranging deals in investments.

- Had Options acted fairly and reasonably it should have concluded that it shouldn't accept Mrs S's application to open a SIPP and if it had informed her of this, she is unlikely to have tried to find another SIPP operator.

- Mrs S therefore wouldn't have continued with the SIPP had it not been for Options' failings.

Options didn't respond to the investigators opinion and the matter was referred to me for decision.

I issued a provisional decision upholding the complaint. In short, I found that Options shouldn't have accepted the referral of Mrs S's business from IPP because it should have concluded that there was a risk of consumer detriment arising from it accepting referrals of business from IPP from the due diligence it should have carried in accordance with its regulatory obligations and good industry practice. I gave both parties the opportunity of responding and providing any further information they wanted me to consider before making my final decision. Options provided no response but Mrs S responded and said she agreed with my provisional decision although she asked for redress to be paid directly to her so as not to conflict with any existing protection or allowance.

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.

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.

However, before discussing merits, I want to make clear that I have considered whether this complaint has been made in time and am satisfied that it has been and that it comes within our jurisdiction.

Turning to the merits, I have come to the same conclusion as the investigator. In short, I am persuaded that the due diligence carried out by Options on IPP was inadequate and didn't accord with good industry practice and that if it had carried out reasonable due diligence it would have concluded that it shouldn't accept the referral of Mrs S's business from IPP. I set out below how I have come to that conclusion.

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 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 in accepting Mrs S'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 several 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 have considered the fact that the 2013 finalised SIPP operator guidance and 2014 Dear CEO letter were published after Options had accepted Mrs S's SIPP application but what was set out in those publications related to what SIPP operators should already have been doing, not just what they should be doing going forwards. In the circumstances, I am satisfied that the examples of good practice set out are relevant to this complaint.

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 Mrs S 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 IPP to comply with its regulatory obligations - or on investments that its SIPP clients were investing pension monies into. However, it argues that it carried out appropriate due diligence on IPP and that its investigations didn't disclose any reason why it should accept referrals of business from it.

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 IPP or permit investments within Mrs S's SIPP.

The due diligence carried out by Options

Options said in its final response that its due diligence on IPP included the following:

- Carrying out checks on IPP
- Completing an introducer profile.
- Agreed an Introducer Agreement with IPP that set out Options' terms of business and the conduct it expected of IPP as an introducer.

It also provided the following responses to questions we put to it about its due diligence on IPP:

- It had an introducer agreement in place as from May 2012.
- It obtained a completed introducer profile and terms of business detailing the

introducer's obligations.

- It obtained AML identification documentation for parties involved.
- It checked the FCA register to ensure the introducer had appropriate permissions.
- The client would formally appoint the introducer as their financial adviser and

investment manager and it was their expectation that IPP would provide the client with relevant advice in relation to transactions they intended to make.

- IPP would submit any application and instructions, including investment to us,

endorsing the client's decision following their advice to them.

- It checked the FCA register to ensure the introducer was still regulated before

accepting any new applications.

- It didn't pay any commission to unregulated introducers.
- It didn't request copies of any suitability reports from the introducer or client.
- Its client appointed the FCA regulated introducer to provide holistic advice, which included the establishment of the SIPP, the pension transfers and on the investment.
- Its client also appointed the FCA regulated introducer to select and purchase the underlying investments.
- IPP introduced a total of 21 clients all of whom were invested in non-mainstream investments.
- It stopped accepting instructions from unregulated introducers in April 2014 and the relationship with IPP ended at that time.

Options hasn't referred to any due diligence carried out before 2012 although it appears that IPP may have worked with IPP before this, as in an email in March 2012 from Options to Mr G (a director of IPP as from 2004) it refers to being glad to see he is back in business and asking to see a 'current list' of 'IPP products' to ensure these have been accepted into the pension scheme.

IPP was an unregulated introducer and Options has referred to the relationship ending when it stopped accepting introductions from unregulated introducers. However, it has also referred to IPP providing holistic advice to clients about the transfer of their pensions to a SIPP and the investments. If that was what IPP was doing then it would be clearly have been a breach of 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. And if Options was aware this is what IPP was doing it could be expected to reject any referral of business from it - because there would be a clear risk of consumer detriment

from it accepting SIPP applications from clients who were acting on advice from an unregulated introducer.

However, I am mindful that Options says it did check the FCA register and it seems likely to me it would have done so and as such it should have been aware that IPP wasn't regulated and therefore not able to provide advice. And in all four complaints I am dealing with the clients made direct (non-advised) applications for a SIPP, so on the face of the

documentation they were not advised - although, as I discuss below, I think Mrs S was given advice by IPP.

So, I am prepared to accept that the reference to IPP advising clients in the answers Options has provided to us doesn't mean that Options was aware that IPP were advising clients in breach of section 19 of FSMA. That having been said, this confusion within Options as to IPP's regulatory status is also apparent in 2012. I say this because in an internal Options email dated 27 September 2012 the writer states *"The clients seem to be direct rather than advised, but are with the IFA team, so at first I thought IPP were an IFA outfit."* The email response dated 3 October 2012 sought to clarify the position, explaining that Mr G (IPP) is a product promoter using both regulated and unregulated agents and that it is the agents that need the introducer forms not IPP. I think this uncertainty over IPP's regulatory status shown

by the email provides some evidence that Options' due diligence didn't provide a proper understanding of IPP's business and as such fell short of what it needed to do to comply with its regulatory obligations.

Putting this on one side, the due diligence Options has identified amounts to it checking the FCA register, completing an introducer profile, having an introducer agreement in place as from May 2012, and obtaining a list of products IPP was promoting to clients – it has referred to AML documentation but this related to the client not IPP. However, it hasn't provided a copy of any introducer profile in this or any of the other three complaints that I am considering involving IPP as an

introducer. Nor has it provided a copy of the introducer agreement it says was agreed in May 2012. The only terms of business I have seen is a 'Non-Regulated Introducer Agreement Terms of Business' signed by a person, who identified himself as a managing agent for IPP, on 18 November 2012 – so after IPP started referring business to it.

So, there isn't evidence to support the limited due diligence that Options says it did carry out and I am not satisfied on the evidence that it did carry out the enquiries it needed to understand how IPP operated. Based on the available evidence I am of the view that its due diligence fell short of what it should have done to comply with its regulatory obligations with good industry practice in mind, as I explain below.

As referred to in the internal email of 3 October 2012 I refer to above, IPP acted through agents, some of whom were supposedly regulated. As I have already said, in this and the other three complaints I am dealing with the application for a SIPP was direct (non-advised) so there was no apparent involvement of a regulated adviser. However, the fact that agents used by IPP could either be regulated or not emphasised the importance in my view of Options making the enquiries needed for it to properly understand IPP's business model before accepting referrals of business from it.

In the absence of any introducer profile completed by IPP there is nothing to show that Options made any enquiries into how IPP's business model operated or the relationship between it and its agents. And, in my view there is reason to find it didn't make the necessary enquiries. In the internal email of 3 October 2012 the writer states that *"IPP – Mr G (name anonymised) are a product promoter who uses agents….."*. So, it is apparent that Options was aware that IPP was promoting investment products to potential clients. This raises the possibility that IPP was acting in contravention of section 21 of the Financial Services and Markets Act 2000 ("FSMA").

This prohibits the communication of an invitation or inducement to engage in investment activity (promotion) save where the person making the communication is authorised – which IPP wasn't – or the content of the communication has been approved by an authorised

person, or the communication is exempt under an order made by the Treasury.

There is nothing to suggest Options made any enquiries of IPP to clarify whether it was acting in breach of the above provision in promoting products to potential clients It is possible that IPP might have been able to show it wasn't in breach of the above provision if using regulated agents, although this is speculative. However, that cannot have been the case where the agent in question was unregulated, as with Mr L, the agent who acted for Mrs S.

Added to this is the fact that Options didn't make any payments to IPP for the referrals so it was aware that IPP was being funded in some other way. It seems to me that this should have raised an obvious possibility with Options that IPP was being funded by the product providers which in my view emphasised the need for it to make further enquiries to understand the relationship between IPP and those product providers and establish whether IPP was acting in breach of section 21 of FSMA.

There was a clear risk of consumer detriment in Options accepting referrals of business from IPP if it was promoting products to clients when it shouldn't have been in breach of section 21 of FSMA. That risk of consumer detriment was even greater given the nature of the investments that IPP was promoting to clients it referred to Options. As Options asked IPP to provide this and presumably received this, it will have been aware that these were high-risk, non-mainstream, unregulated products. Options has confirmed in this complaint that every client referred by IPP invested in non-mainstream products.

Even if further enquiries by Options didn't establish that IPP was acting in breach of section 21 of FSMA and that IPP was doing nothing wrong in promoting such high-risk, non-mainstream and unregulated investments to clients such as Mrs S, there were further due diligence failings on its part in my view.

Options has said that 21 clients were referred by IPP and I am dealing with four complaints involving referrals from IPP, including this one all of whom completed a direct application for a SIPP and sought to waive their cancellation rights. Options has informed us. In the four cases I am considering all clients invested in BGCP - with two of the other complaints involving investment in other high-risk, non-mainstream, and unregulated investments involving overseas commercial property. In all cases the clients invested a large proportion of their pension monies in such investments.

In accordance with good industry practice and its regulatory obligations Options should have had in place procedures and controls that enabled it to gather and then analyse management information. If such procedures had been in place, it would have established that the clients referred by IPP were all investing a substantial part of their pension monies in high-risk, non-mainstream and unregulated overseas property investments. This was clearly anomalous, as such investment wouldn't be appropriate for most if not all retail client pensions. This presented an obvious risk of consumer detriment which Options should have identified and which should have led to it concluding it shouldn't accept referrals of business from IPP - and before it received the referral of Mrs S's business, given that it has said she was the twentieth of the twenty one clients referred by IPP.

Even if Options argues that the nature of the investments clients referred by IPP were putting their pension monies into wasn't enough of itself to have concluded that it shouldn't accept referral from IPP – and I think it was - it should have led to it making further enquiries of those clients and IPP. There was an obvious need for it to understand why clients were investing significant proportions of their pension monies in products that weren't, on the face of it, appropriate for their pensions. There was an obvious risk in my view that some at least of those that clients were acting on advice as to the transfer of their pensions and the

investments they should make and by someone who wasn't regulated – there being no evidence of the involvement of a regulated adviser in the decision to transfer or the investments then made in the complaints I have considered.

It is also of note that in the four complaints I am dealing with, all four clients specified that they wanted to waive their cancellation rights. With good practice in mind Options should have identified that it needed to make further enquiries to understand why supposedly unadvised clients were seeking to transfer their pension monies to a SIPP and invest in high-risk, non-mainstream and unregulated overseas investments whilst waiving their cancellation rights.

Mrs S has explained that she decided to transfer her pension monies to a SIPP following a discussion with Mr L in which she was led to believe that her investment would grow and she would receive a greater income at retirement that otherwise and also that the investment in BGCP was fully secured in property and she understood from discussion with Mr L that she couldn't lose any of her money invested. I am mindful Mrs S is recalling events form a long time ago but I think what she has said likely reflects the nature of what was discussed with Mr L and I think this amounted to advice. If Options had made enquiries as to the circumstances behind her decision to transfer to a SIPP and waive her cancellation rights and invest in BGCP it is more likely than not in my view that it would have become aware of this.

There was an obvious risk of consumer detriment arising from it accepting the referrals of Mrs S's business when she had been advised by someone who wasn't authorised to provide advice and as such Options could be expected to reject such referral if it had carried out the due diligence it should have done.

Moreover, I think it is unlikely that all the retail clients that IPP referred would have decided to transfer their pensions to an Options SIPP and waive their cancellation rights without advice and it therefore is unlikely in my view that Mrs S is the only client referred by IPP that made a direct application for a SIPP following a discussion with an agent for IPP that amounted to advice when that person wasn't authorised to provide advice.

So, if Options had carried out the due diligence that it should have done when it started receiving referrals of business from IPP - to understand why clients were transferring to a SIPP and waiving cancellation rights - it seems likely that it would have become aware that at least some clients making direct applications were being advised by IPP agents when they shouldn't have been. And the conclusion it shouldn't accept referrals of business from IPP because of the risk of consumer detriment arising from this was one that it should probably have come to before it received the referral of Mrs S's business.

In summary I think it is fair and reasonable to uphold this complaint because Options failed to comply with good industry practice, act with due skill, care and diligence and control its affairs responsibly, or treat Mrs S fairly in accepting her SIPP application.

The application of section 27/Section 28 FSMA

This potentially 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 them under the agreement and compensation for any loss.

I have already identified in my findings above that the general prohibition is a reference 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 it provides that in considering this the court must have regard to whether the authorised person was aware that the third party in carrying out the regulated activity was contravening the general prohibition.

I have already made reference to IPP carrying out the regulated activities of advising on investments and arranging deals in investments. In the circumstances 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 Mrs S 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 Options' were not barred from accepting introductions from unregulated sources, section 27 of FSMA was designed to throw risks associated with doing so onto the providers. Authorised persons are at risk of being unable to enforce agreements and being required to return money and other property and to pay compensation regardless of whether they had had knowledge of third parties' contraventions of the general prohibition;"

I accept that in considering the application of that section a court would take into account that Options didn't know that 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 direct applications which included clients waiving their cancellation rights and where the clients were investing most of their pension monies into high-risk unregulated non-mainstream investments involving overseas property. 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 refuse 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 Mrs S's instructions?

Options 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 Mrs S'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 Mrs S?

Options might say that if it hadn't accepted Mrs S's business from IPP that the transfer of her pension would still have been taken place through a different SIPP Operator and she would still have invested in BGCP. However, I don't think it would be fair and reasonable to find that Options shouldn't compensate Mrs S 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 IPP.

Moreover, I am mindful that I have found that Mrs S 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 unregulated agent she spoke to at the outset. It seems likely to me that if the Options she had been directed to had said it wasn't going to accept her application Mrs S 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 operator in any event.

I have also considered whether it would be fair and reasonable for Options to pay the full amount of Mrs S's losses. Having done so I am satisfied that it would be fair and reasonable for it to do so - given that if it had complied with good industry practice and its regulatory obligations, she wouldn't have invested in BGCP. In short, I am satisfied that Options failings have caused all of Mrs S's losses.

Putting things right

Your text here The aim of the redress I award is to put Mrs S, 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 Mrs S wouldn't have transferred her pension to a SIPP and invested in BGCP. I have seen no evidence that Mrs S 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 Mrs S fairly Options must:

- Obtain the notional transfer value of Mrs S's previous transferred pension plan.
- Obtain the actual transfer value of Mrs S's SIPP including any outstanding charges.
- Pay a commercial value to buy the illiquid investment (or treat them as having zero value)
- Pay an amount into Mrs S's Options SIPP, to increase its value to equal the notional value established. The payment should allow for the effect of charges and any available tax relief.
- If the SIPP needs to be kept open only because of the illiquid investment and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.
- Pay Mrs S £500 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.

Treatment of the illiquid assets held within the SIPP

I think it would be best if the illiquid assets could be removed from the SIPP. Mrs S would then be able to close the SIPP, if she wishes. That would then allow her to stop paying the fees for the SIPP. The valuation of the illiquid investment may prove difficult, as there is no market for it. For calculating compensation, Options should establish an amount it's willing to accept for the investment as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investment.

If Options can purchase the illiquid investment, then the price paid to purchase the holding will be allowed for in the current transfer value (because it will have been paid into the SIPP to secure the holding).

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

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

Options should first contact the provider of the plan which was transferred to the SIPP and ask it to provide a notional value for the plan as at the date of calculation. For the purposes of the notional calculation the provider should be told to assume no monies would've been transferred away from the plan, and the monies in the policy would've remained invested in an identical manner to that which existed prior to the actual transfer.

Any contributions or withdrawals Mrs S has made to his SIPP will have to be taken into account whether the notional value is established by the ceding 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 Mrs S 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, then Options should 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 value of Mrs S's existing plan if monies hadn't been transferred (established in line with the above) less the current value of the SIPP (as at the date of calculation) is Mrs S's loss.

Pay an amount into Mrs S's SIPP so that the transfer value is increased by the loss calculated above

If the redress calculation above demonstrates a loss, the compensation should, if possible be paid into Mr S's pension plan, allowing for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance and I note in this regard that Mrs S has indicated that such a conflict does exist.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid direct to Mrs S as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his 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.

SIPP fees

If the investment can't be removed from the SIPP, and because of this it can't be closed after compensation has been paid, then it wouldn't be fair for Mrs S to have to continue to pay annual SIPP fees to keep the SIPP open. So, if the SIPP needs to be kept open only because of the illiquid investment and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.

Distress and inconvenience

Mrs S lost most of the money transferred from her existing pension plan and this will no doubt have impacted her plans and caused her distress and inconvenience. I consider an award of £500 for this is appropriate in the circumstances.

Interest

The compensation that Options calculates is payable to Mrs S in accordance with what I have set out above must be paid into Mrs S's SIPP, or directly to her, 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 Mrs S 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 Mrs S.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S to accept or reject my decision before 27 April 2025.

Philip Gibbons
Ombudsman