DRN-5573554

The complaint

Mr T complains, through his representative, that Options SIPP UK LLP failed to comply with its regulatory obligations in allowing investment into a product that wasn't appropriate for his SIPP.

What happened

Although Mr T is represented and his representatives have provided information on his behalf, I will refer to Mr T 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 unregulated 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 2012 Mr T was introduced to Options by an agent of IPP (Mr R), having signed an Options scheme application for direct (non-advised) clients on 29 October 2012 as well as a 'SIPP Member Instruction and Declaration – Alternative Investment' document on 30 October 2012 instruction Options to invest £25,000 in BGCP.

The documents were sent to Options who issued a welcome pack to Mr T on 13 November 2012 confirming this as the start date of his SIPP. A transfer of £36,701 was received from his existing pension scheme by Options and he signed an application to invest £25,000 in BGCP.

On 13 February 2013 Mr R emailed Options with confirmation Mr T wanted to invest £10,000 in the ABC Corporate Bond II, from the cash in his SIPP. He signed a further alternative investment instruction for Options to invest in the bond on 26 February 2013. However, this further investment didn't then proceed, with Mr T instead taking £7,000 out of his SIPP a few months later as his Pension Commencement Lum Sum ("PCLS") – the tax-free lump sum he was entitled to take from his pension. He received seven 'dividend' payments from TPS for his investment in BGCP, between Juley 2013 and June 2016, totalling £6,670.

Mr T complained to Options in August 2020, saying that had failed to comply with its

regulatory obligations because it had failed to ensure the investment held in the SIPP was appropriate and that this had led Mr T into investing £25,000 into an unregulated product.

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 Mr T'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.

- Mr T signed to confirm his understanding that it didn't provide advice or assess suitability and it isn't for Options to look beyond his signature or decline his instruction on the basis he didn't understand what he was signing when there was nothing to indicate this.

- The aim of the documentation Options provides to customers is to provide them with the information needed to make an informed decision and it was his choice to ignore its guidance to seek regulated financial advice.

- The purpose of the member declaration he signed was for him to provide his investment instructions and confirm he understood the terms of the investment, he had read and understood all the documentation involved and that he understood the risk warnings that Options considered the investment to be high risk and speculative.

- It undertook due diligence on BIG and this included its Investment Committee reviewing the legal paperwork, product information company background checks and obtaining an independent report from an external third-party compliance entity, as a second layer of review.

Mr T referred his 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 from 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 reactive and extremely limited and it is fair and 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 Mr T 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 Mr T to sign an indemnity as to Options not having any liability arising from his 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 Mr T's application to open a SIPP and if it had informed him of this, he is unlikely to have tried to find another SIPP operator at the time.

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

Options didn't respond to the opinion of the investigator, and the matter was referred to me for decision. I issued a provisional decision upholding the complaint. In short, I found that:

- If Options had carried out the due diligence that it should have done to properly understand IPP's business it should have concluded that it shouldn't accept referrals of business from IPP because consumer detriment was likely to arise if it did so.

- IPP was promoting high risk unregulated investments to retail clients and Options has provided no evidence it satisfied itself IPP wasn't in breach of section 21 of FSMA in doing so.

- Options should have known the investments clients were investing in weren't appropriate for retail clients to be investing most of their pension monies into, so when it started to receive such applications from clients referred by IPP it should have concluded it shouldn't accept referrals of business from IPP.

- Even if the nature of the investments wasn't of itself enough for Options to conclude it shouldn't accept referrals of business from IPP it should have realised that the retail clients IPP was referring who were making direct applications for a SIPP were unlikely to all have decided to transfer their pensions to an Options SIPP and waive their cancellation rights without any advice.

- If Options had made the enquiries that it should have done it is more likely than not it would have concluded some clients at least were being advised by someone who wasn't authorised in breach of the general prohibition. There was an obvious risk of consumer detriment arising from it accepting referrals of business from IPP in those circumstances and it shouldn't therefore have accepted such referrals.

- Even if clients weren't being advised IPP was carrying out the regulated activity of arranging deals in investments when it wasn't authorised to do so in breach of the general prohibition and Options shouldn't have accepted referrals of business from IPP because of this.

- In the circumstances Options failed to comply with good industry practice, act with due skill, care and diligence and control its affairs responsibly, or treat Mr T fairly in accepting his SIPP application.

- Section 27 of FSMA provides an alternative basis for upholding the complaint.

I awarded redress based on Mr T being put back in the position he would have been in if he transferred his pension to an Options SIPP and also said Options should pay Mr T £500 for distress and inconvenience.

I gave both parties the opportunity of responding to my provisional decision and providing any further information they wanted me to consider before making my final decision. Mr T accepted my provisional decision and Options said that it accepted my provisional decision 'under protest' but provided no further explanation. Options was left to calculate the redress due and pay this to Mr T but its subsequent offer to him didn't include the award for distress and inconvenience of £500. Mr T didn't accept the offer so the matter has come back to me for final decision.

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.

Given Mr T has agreed with my provisional decision and Options has provided no information or argument in response to the findings in my provisional decision I can see no reason to depart significantly from the findings I made in my provisional decision or the conclusion I came to that the complaint should be upheld.

I am satisfied that it is fair and reasonable to uphold this complaint for the reasons set out below.

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 Mr T's SIPP application and providing its execution only service to him.

In coming to that conclusion I have considered the judgment in the case of *R (British Bankers Association) v Financial Services Authority (2011) EWHC 999 (Admin) ("BBA")* in which Ouseley J said it would be a breach of statutory duty for the Ombudsman to reach a view on a case without taking the Principles into account in deciding what was fair and reasonable redress to award. At paragraph 184 of his judgment he said:

"The width of the Ombudsman's duty to decide what is fair and reasonable, and the width of the materials he is entitled to call to mind for that purpose, prevents any argument being

applied to him that he cannot decide to award compensation where there has been no breach of a specific rule, and the Principles are all that is relied on."

I have also considered the judgments in the following cases, which relate specifically to SIPP operators: *R (Berkley Burke SIPP Administration Ltd) v Financial Ombudsman Service (2018) EWHC 2878* ("BBSAL"*), Adams v Options SIPP (2020) EWHC 1229 (Ch) (*Adams High Court*), Adams v Options UK Personal Pensions LLP (2021) EWCA Civ 474 ("*Adams Appeal*")* and *Options UK Personal Pensions LLP v Financial Ombudsman Service Limited (2024) EWCA Civ 541* ("Options 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 Mr T'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 Mr T or of the investment he 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 due diligence with good industry practice in mind, that a referral of business from an introducer or an investment could involve financial crime or consumer detriment then as an execution only SIPP operator it could be expected to refuse the referral of business or an investment.

Options 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 – in its final response it set out its due diligence as regards BIG and BGCP. And in the course of this complaint, it has responded to queries we made as to its due diligence on IPP – as I refer to below - and said that it had no reason to believe it shouldn't accept referrals of business from IPP following its due diligence.

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 from the information available to it following such due diligence, decide whether to accept a referral of business from IPP or permit investments within a SIPP.

Did Options comply with its regulatory obligations?

In its FRL Options made no comment on the due diligence it carried out as regards IPP but when asked about this it said the following:

- It had an introducer agreement in place as from 17 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 but it appears that Options may have worked with IPP before this. I have seen an email sent by Options to Mr G (a director of IPP as from 2004) on 22 March 2012 in which the writer refers to being glad to see he is back in business and reminding him that he was going to provide a 'current list' of 'IPP products' to ensure these have been accepted into the pension scheme.

Options has made reference to the relationship ending when it stopped accepting

introductions from unregulated introducers and in correspondence with us Options has said to us that it was fully aware that IPP wasn't an FCA registered firm. However, it has also made more than one reference to IPP advising clients. If that was what IPP was doing 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 also mindful that Options says it checked the FCA register and I think it is likely it will have done so and that it should therefore have been aware IPP wasn't regulated. I am also mindful that in the four complaints I am dealing with involving IPP the clients made direct (unadvised) SIPP applications – so on the face of the documentation they weren't advised.

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 actually aware that IPP were advising clients in breach of section 19 of FSMA when accepting referrals of business from it. 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."* 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 on one side the conflicting information that Options has provided in answer to the questions we put to it, the due diligence it has identified amounts to it checking the FCA register, asking IPP to provide a list of the products it was promoting, completing an introducer profile, having an introducer agreement in place as from May 2012 and obtaining AML documentation. This due diligence was limited and, in my view, fell short of what it should have done with good practice and its regulatory obligations in mind.

Options hasn't provided a copy of any introducer profile in any of the complaints that I am dealing with, nor has it provided a copy of terms of business agreed with IPP in May 2012. The only terms of business I have seen is a 'Non-Regulated Introducer Agreement Terms of Business' signed by Mr R on 18 November 2012 as 'managing agent' of IPP – so after IPP started referring business to Options and Mr T was introduced to it. So, it hasn't provided evidence of the due diligence it has suggested it did carry out.

In any event, with good practice and its regulatory obligations in mind Options should have made enquiries that allowed it to have a proper understanding of how IPP's business model operated, given IPP was itself unregulated but was allegedly using agents that could be either regulated or unregulated - an internal email dated 3 October 2012 in response to the email of 27 September 2012 I refer to above states "*IPP – Mr G (*name anonymised*) are a product promoter who uses agents….."* and goes on to say that these can be regulated or unregulated agents.

The email goes on to state that it is the agents that need the introducer forms not IPP. I think Options needed to understand how IPP's relationship with the agents and its overall business operated. It is possible that such information was obtained through the introducer profile Options says was completed but as this hasn't been provided to me, I am unable to say this was the case. And I have seen no evidence that suggests Options did make such enquiries. It shouldn't have accepted referrals of business from IPP without having a proper understanding of its business and whether this could cause consumer detriment.

Moreover, the email of 3 October 2012 I have referred to shows that Options was made aware that IPP, an unregulated introducer, was promoting investment products to potential clients. Section 21 of the Financial Services and Markets Act 2000 ("FSMA") prohibits promotion of an investment save where the person making the communication is authorised, the content of the communication has been approved by an authorised person, or the communication is exempt under an order made by the Treasury.

As Options asked IPP to provide a list of the products it was promoting it will have known these were high-risk non-mainstream and unregulated investments. I have been provided with no evidence that Options checked that in promoting such products to clients investing their pension monies IPP wasn't in breach of FSMA. Given the absence of such evidence I am not satisfied that this is something Options did check. It shouldn't have accepted any referral of business from IPP when it hadn't satisfied itself that IPP wasn't promoting products to clients in breach of section 21 FSMA.

Even if Options did obtain evidence showing that IPP wasn't promoting investments when it shouldn't have been, there are further reasons why Options shouldn't have accepted referrals of business from IPP.

I am dealing with four complaints involving clients referred to Options by IPP, including this one. In all four cases, the client completed a direct application for a SIPP, so were supposedly acting without an adviser. They also waived their cancellation rights. Mr T and one of the other complainants invested most of their pension monies just in BGCP. In the other two complaints the clients invested in equally high-risk, non-mainstream, and unregulated investments alongside their investment in BGCP.

Moreover, as I have already referred to, Options was aware that IPP was promoting such investments and has confirmed in this complaint and others that IPP referred 21 clients in total all of whom also invested in non-mainstream investments. Such investments might be appropriate when forming a small part of the pension pots of sophisticated or high net worth investors but were obviously not appropriate for most retail clients to invest most of their pension pots into. And, from the complaints that I am dealing with IPP wasn't just referring sophisticated or high net worth clients to Options and in any event, clients weren't investing only a small part of their pension pots in these investments.

In accordance with good 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 more likely than not have identified that clients referred by IPP were investing most of their pension monies in high-

risk, non-mainstream, and unregulated investments that weren't appropriate for their pensions. This was clearly anomalous and created a risk of consumer detriment and having identified this Options could be expected to conclude it shouldn't accept referrals from IPP – and before it received the referral of Mr T's business, given he was the tenth of the twenty one clients referred by IPP.

Even if Options was to argue that the nature of the investments clients IPP referred were making wasn't enough of itself to have concluded that it shouldn't accept referrals from IPP – and I think it was – from the complaints I am dealing with the clients referred by IPP were making direct applications. In other words clients were on the face of it making SIPP applications without advice. They were also at the same time specifying that they wanted to waive their cancellation rights.

In fulfilling its regulatory obligations and with good practice in mind Options should have made enquiries to establish why clients who were supposedly acting without advice were deciding to transfer their pension funds to an Options SIPP and invest most of their pension monies in a way that was generally not appropriate whilst also waiving their cancellation rights.

Options should have had in mind the possibility that despite making direct applications for a SIPP, clients were being advised and by someone who wasn't authorised to provide advice – there being no evidence of the involvement of a regulated adviser in any of the complaints I am dealing with.

I cannot safely conclude that Mr T was one such client, based on the information he has provided in this complaint but I am satisfied in another of the complaints I am dealing with that advice was given to the client by someone who wasn't authorised. And, in the circumstances I am satisfied that if Options had made the enquiries that it should have done when it first started to receive referrals of business it is more likely than not it would have established that some clients were being advised by someone who wasn't authorised to provide advice.

This was a breach of the general prohibition in section 19 of FSMA. There was an obvious risk of consumer detriment arising from Options accepting referrals of business from IPP where clients it was referring had been advised in breach of the general prohibition. As such, if it had made the further enquiries that it should have done when IPP started referring business to it the only reasonable conclusion for Options to have come to would have been that it should refuse to accept such referrals of business.

Even if I am wrong and further enquiries from Options didn't establish that advice was being given, from the information available it seems agents for IPP helped clients in the completion of the necessary documentation to transfer their pensions and invest their pension monies in those investments.

The regulated activity of arranging deals in investments is set out in Article 25 of the Financial Services Act (Regulated Activities) Order 2001 and involves either arranging (bringing about) deals in investments (Article 25(1) or making arrangements with a view to transactions in investments (Article 25(2). I think it is more likely than not IPP did carry out the regulated activity of arranging deals in investments under Article 25(1) – what it did was to bring about the transfer to an Options SIPP and the subsequent investments. In the alternative I am satisfied it amounted to making arrangements with a view to transactions in investments and therefore came within Article 25(2). In my view it is reasonable to have expected Options to have identified this is what IPP was doing if it had carried out the due diligence it should have done when IPP started referring business to it.

And, as I have already made clear, as IPP wasn't authorised to carry out such activity and would have been in breach of the general prohibition in section 19 of FSMA in doing so. Given this Options could be expected to have concluded it should not accept referrals of business from IPP. There was an obvious risk of consumer detriment arising from it accepting referrals of business from an introducer that was acting in breach of the general prohibition, as I have already made clear, and it should have rejected Mr T's application accordingly.

In summary I think it is fair and reasonable to uphold this complaint because if Options had acted in accordance with good industry practice and with its regulatory obligations in mind it would have concluded that it shouldn't accept referrals of business from IPP including Mr T's SIPP application for the reasons I have set out above.

The application of section 27/Section 28 FSMA

This in my view 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 Mr T 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 Mr Ts' 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 Mr T'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 Mr T?

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

I have also considered whether it would be fair and reasonable for Options to pay the full amount of Mr T'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, he wouldn't have invested in BGCP. In short, I am satisfied that Options failings have caused all of Mr T's losses.

Putting things right

I consider that Options failed to comply with its own regulatory obligations and didn't put a stop to the transaction set out above. My aim in awarding fair compensation is to put Mr T back into the position he would likely have been in had it not been for Option's failings. Had Options acted appropriately, I think it's *most likely* that Mr T would have remained a member of the pension plan he transferred into the SIPP.

To compensate Mr T fairly Options must:

- Obtain the notional value of Mr T's previously transferred pension plan.
- Obtain the actual current transfer value of Mr T's SIPP, including any outstanding charges.
- Pay a commercial value to buy the illiquid investment (or treat it as having zero value)
- If the actual transfer value is greater than the notional transfer value, no compensation is payable. If the notional value is greater than the actual value, there is a loss.
- Pay an amount into Mr T's Options SIPP, to increase its transfer value to equal the notional value established. This 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 Mr T £500 for the distress and inconvenience he has suffered from Options' failings.

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

Treatment of the illiquid assets held within the SIPP

I think it would be best if the illiquid asset could be removed from the SIPP. Mr T would then be able to close the SIPP, if he wishes. That would then allow him 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 any illiquid investments, it should give the holding a nil value for the purposes of calculating compensation. In this instance Options may ask Mr T 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 Mr T may receive from the investment and any eventual sums he 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 Mr T '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 Mr T 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 Mr T took after his pension monies were transferred to Options.

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

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

The notional valuation, as calculated above, less the value of the SIPP as at the date of calculation is Mr T's loss.

If the redress calculation above demonstrates a loss, the compensation should, if possible be paid into Mr T'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.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid direct to Mr T 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% in Mr T's particular case. 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 Mr T 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

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

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

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 27 June 2025.

Philip Gibbons
Ombudsman