complaint

Mr R complained about the transfer of his existing personal pensions to a newly opened self-invested personal pension (SIPP).

It's said Mr R has suffered a loss and that St Martin's Partners LLP (SMP) are responsible for this.

background

Mr R says he was introduced to SMP by an adviser who had previously arranged personal pension plans for him. The adviser recommended Mr R should open a SIPP and consolidate his pension plans, by transferring them into this SIPP. This would then enable an investment to follow. Mr R says this adviser came to his home with the paperwork which they completed together. The adviser then took the completed papers away with him. Mr R says that the adviser also recommended the investment and that he followed everything he was advised to do.

SMP sent the application to the providers in September 2012 and a Guardian SIPP was set up. Transfers from Mr R's existing pension plans with Co-op (CIS) and Abbey Life were subsequently received. The statement from Mr R's SIPP provider captures the following information:

- 11 September 2012 SIPP opened
- £36,401.49 transfer into the SIPP from CIS on 25 September 2012
- £11,337.48 transfer in from Abbey Life on 26 September 2012
- £498 SIPP establishment and annual fee taken 9 October 2012
- £1,432 IFA fees paid to the name Alternative Asset Finance on 11 October 2012
- £44,350 purchase of bond in agricultural activities on 29 October 2012
- £24,849.61 transfer in from CIS on 25 January 2013
- £568 IFA fee paid to the name Alternative Asset Finance on 30 January 2013

From 15 April 2013 Mr R started making monthly contributions of £30.

So a total of £47,738.97 was transferred from Mr R's pension plans in September 2012. An investment into an unregulated overseas bond in agricultural activities followed (the Merco Bond fund). In January 2013 a further £24,849.61 was transferred in from a CIS plan. All remaining funds not invested in the bond remained in cash.

SMP invoiced the SIPP provider in October 2012 for £1,432, said to be for the setting up of the SIPP. An additional adviser's fee of £568 was paid to SMP following the January 2013 transfer.

A complaint was made in November 2016 on behalf of Mr R. This set out that SMP were the relevant regulated and liable party. The complaint suggested SMP had attempted to operate and service on an execution only basis; but it was said this hadn't been properly or appropriately completed.

Mr R's complaint was rejected by SMP in January 2017. They said Mr R had been dealt with on an execution only basis. In their final response letter SMP said they'd taken legal advice on the services being provided to the client by Alternative Asset Finance (aaf) as being execution only and were confident there was no basis to the complaint.

It has previously been explained that it isn't clear to this service if the reference to legal advice was referring to legal advice at the time SMP took over aaf as a trading style, or when they provided Mr R (or anyone) with a service, or at a later date; such as after a complaint had been made.

The background in summary (as presented by and on behalf of SMP) is that Alternative Asset Finance (aaf) became a trading style of SMP on 28 August 2012 having previously been a trading style of Finance in Medicine Ltd. (FIM). SMP say aaf used an execution only business model.

SMP have also said:

"*In transferring the Client's pension fund into a SIPP (Transaction) AAF were carrying out, at the request of the Client, a purely administrative service on an execution-only basis. Neither we nor AAF have at any time given advice to the Client relating to the transfer of the Client's pension or any investments subsequently made through the SIPP*.

The Financial Conduct Authority's definition of an execution-only transaction is 'a transaction executed by a firm upon the specific instructions of a client where the firm does not give advice on investments relating to the merits of the transaction and in relation to which the rules on assessment of appropriateness do not apply.'

And SMP have highlighted the guidance provided by this service relating to execution only business states that "*clear and credible*" evidence that an investment transaction is execution-only is required. They said the guidance goes on to say this is normally provided in the form of an execution only notice.

SMP said aaf complied with all relevant regulatory requirements from the outset. They told us that Mr R was aware on what basis the services were being provided and in their view he fully understood.

SMP stressed Mr R signed an execution only notice clearly setting out that no advice would be given and setting out in plain language what this means. SMP have said this notice was sent and not simply presented at a meeting to be signed immediately. As such, they think, clients (Mr R) were afforded time to appreciate the implications.

It was said aaf had gone beyond the requirement to provide *'clear and credible*' evidence, citing three separate documents setting out that the transaction was on an execution only basis and setting out the consequences; noting these were signed by Mr R. So they thought there was no basis to his representative's claim the transaction was not completed as an execution-only service.

SMP thought the reference by Mr R's representatives as to an expectation to see an execution only statement in the client's own hand writing using their own words, was made with the benefit of hindsight. SMP considered this may now be common practice and in line with subsequent decisions of the Financial Ombudsman, but it wasn't at the time of the transaction.

SMP also rejected any suggestion of a failure to comply with the regulator's conduct of business rules. On the basis that neither aaf nor themselves had provided any advice and so the rules didn't apply.

An adjudicator at this service looked at Mr R's complaint. He thought it should be upheld. He didn't accept SMP had provided a purely administrative service on an execution-only basis.

Adjudicator's view

The adjudicator wasn't persuaded by SMP's submissions. In his view the adjudicator considered the regulator's Principles for Business together with information and the guidance in relation to execution only business available in 2012.

The Principles for Businesses were set out in the Financial Services Authority's (FSA) handbook and are now in the FCA handbook. The adjudicator quoted the description of them being *'a general statement of the fundamental obligations of firms under the regulatory system*' (PRIN 1.1.2G). He said they applied, and continue to apply, to all firms, including SMP.

The adjudicator thought Principles 1, 2, 6 and 8 were of particular relevance here and he set them out. In summary:

- *Principle 1 – integrity – A firm must conduct its business with integrity.*
- *Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.*
- *Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly.*
- *Principle 8 – A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client.*

He also set out detail he considered relevant on the topic of *execution only business.* And said the term "*Execution only*" is used by the financial services regulator to describe sales where a consumer has requested a specific investment and has chosen not to receive advice at that time.

The adjudicator's view was that the regulatory framework allows for such work as there are people who know enough about investments to make their own decisions and/or who do not want to explain their circumstances to investment companies.

To an extent SMP went on to agree and reflect this conclusion in some later submissions.

The adjudicator didn't accept Mr R could be described in this way. He also set out that the FSA, the regulator at the time, described *"Execution only" as:*

"... a transaction executed by a firm upon the specific instructions of a client where the firm does not give advice on investments relating to the merits of the transaction and in relation to which the rules on assessment of appropriateness ("COBS 10") do not apply."

The adjudicator provided the same guidance on execution only work that has also been stressed by SMP; that a business needs to provide *clear and credible* evidence that an investment transaction is execution only to avoid the regulatory obligations that apply when providing investment advice.

The requirement for execution only notices had been clarified by PIA Regulatory Update 33 in the context of pensions and the adjudicator considered it reasonable and usual to conclude the required standard of evidence is the same for other investments. He set out what this service often considers when asked to decide whether the required standards were satisfied. This includes looking at the rules that were in place at the time of the transaction. As was later acknowledged by SMP, this information is available on our website.

In summary the "*clear and credible*" evidence that a business usually provides is in the form of an "*execution only*" notice. This is a statement signed by the consumer, agreeing that:

• they are aware the transaction is "*execution only*";

• they have not asked for or received advice;

• it is their decision alone to take out the investment; and

• the business is taking no responsibility for the product's suitability.

But that when we consider complaints involving "*execution only*" sales, it's fair to begin by taking into account the consumer's background. For example where they don't appear to have an investment history and there is no apparent connection to the investment industry, then we'd usually expect a case will usually require further investigation.

At the time he issued his view in 2017, the adjudicator thought SMP was receiving business from unauthorised introducers. And the adjudicator thought it was reasonable to think SMP should have known the consumers would not have received advice from regulated individuals.

The adjudicator thought SMP ought to have known that pension transfers can be complex and few retail customers have enough knowledge to weigh up the risks and benefits of pension transfers without receiving advice. This would include how the fund will be invested, as without a SIPP here, there could be no investment. And he thought SMP ought to have known that consumers like Mr R would be at risk of suffering a financial loss if Mr R either transferred a pension without taking any advice at all or transferred after taking advice from someone not authorised to give such advice.

So the adjudicator concluded SMP should be liable for any loss suffered by Mr R; as he thought they hadn't done enough. He didn't think SMP had been right in processing Mr R's SIPP and transfer application without doing more. He thought at the very least SMP should have contacted Mr R, to be satisfied, to a reasonable level, that Mr R was aware what the term 'execution only' meant and that he was clear on the consequences of this.

In the absence of this, the adjudicator thought SMP ought to have refused to accept the SIPP and transfer applications. And he thought if they had done he didn't think an investment into the bond would have followed and he doubted the transfers would have gone ahead. The adjudicator concluded it was more likely Mr R's plans would have remained with their original providers. He thought it unlikely Mr R would have approached another business and proposed or insisted on opening a SIPP and transferring his plans on an '*execution only*' basis; let alone going on to make the investment.

The adjudicator said that if Mr R had sought regulated advice provided in the usual form, it was most likely he would have been told that transferring his existing plans and investing most of his funds in a single unregulated asset was unsuitable for him. And the adjudicator concluded Mr R was likely to have followed such advice.

So his final view was that if SMP had acted as they should have, no transfer would have taken place; and Mr R would not have suffered a loss. The adjudicator set out what he thought SMP should do next.

SMP didn't accept the adjudicator's view. They sent in some reasoning and material in support. At this stage the material provided and relied on by SMP was:

- A document headed "*aaf alternative asset finance- Execution only SIPP facility*"

  This starts with the information:

  "*Alternative Asset Finance has been set up to offer a highly competitive service for our clients. AAF are able to consolidate all of your various pension pots and bring them under one roof thus enabling you to purchase your chosen unique investment as discussed with your Product Specialist.*

  Alternative Asset Finance is a trading style of St Martin's Partners LLP who are authorised and regulated by the Financial Services Authority, however the work carried out by Alternative Asset Finance is carried out on an execution only basis and all investments are subject to this effect".

  The document then sets out the fees and payment arrangements. This includes the hope a client's journey with them will be smooth over the next few months but the details of the cancellation fee should the client withdraw from the process.

  The bottom of each page has a document reference which reads here as "*Pensions Technical 6 April 2012*".

  The remainder of the document sets out some of the history and workings of SIPPs.

  Save for the last section headed in relation to their client agreement on arranging execution only SIPPS. This document sets out that alternative asset finance is a trading style of St Martin's Partner's LLP and gives a contact email address of SMP's adviser as provided to this service. And a phone number which is understood to be the London SMP phone number.

  This is followed by a short summation on regulation, communications, services, and payments and other details.

  The copy of the agreement supplied to us by SMP at this stage (and on which we were asked to rely) was blank and unsigned. As was the addendum piece entitled "*Points to Remember*" which SMP have later pointed to as being an important document to support their submissions that all services they provided were on an execution only basis.

At this stage SMP also provided us with the following:

- An email (hereafter known as 'the FSA email').

  This email has been provided in respect of Mr R's case [as well as in relation to a number of other complaints]. In summary it's said to show the regulator had approved the relevant business model and how this was implemented.

  What has been provided is a photocopy of an email header from a man with an apparent Financial Services Authority (FSA) email address, addressed to several parties into an email dated 1 March 2012.

- The FSA email provided is an apparent continuation of an ongoing correspondence.

  The main body of the email text said to be from the FSA and relied on in submissions for SMP in summary, thanks a person (who has the same first name as one of the Directors of FIM) for the acknowledgement and response and says they now intend to close the matter. It goes on to say they intend to:

  "*allow the firm to put in place the new procedures etc. we have discussed and agreed. As I have previously mentioned given the business model and the concerns we had, we may choose to review the firms progress in this matter in the future and you should ensure that all documentation to support the changes made is retained for this purpose.*

  I would again take this opportunity to remind you that given the execution only business model and the relationship with AAA you need to be comfortable that there is no regulatory risk to your firm. We have discussed how you can do this and the ongoing due diligence, and I am pleased to note your comments that you will involve ..[a named compliance business].. in reviews to provide further external challenge. My one final comment on the process is to consider the risk that the client may contravene current pension's regulations or HMRC rules as a result of the transaction and how you ensure the client is aware of this risk".

It's said this email shows the FSA were aware of the work being undertaken and business model of aaf and had approved it. And so, by inference, SMP should have had no concern and/ or indeed the regulator approved the work and approach.

This service hasn't been told when SMP say they first saw this email.

SMP have sent in submissions and comments intended to provide group responses it appears to more than one complaint made against them. I have looked at Mr R's complaint on its own merits; but where it appears to me to be intended, I have taken account of all SMP and their representatives have said. But I have stressed the need to directly identify where a submission is made in respect of a particular complaint.

An email was provided to us by SMP (dated 8 December 2016). This service understands this email to have been provided by SMP to demonstrate what information was known by SMP about aaf and their work and to show their efforts in obtaining information for this service. I have previously indicated this understanding, and haven't been told this is wrong.

This email is headed as having been sent by one of the named Directors of aaf and is addressed to two people (both Directors of SMP and one of whom, we understood, was the original SMP compliance officer). The email subject is *"aaf*".

The writer of the email confirms he is happy to provide the requested information; and goes on to say:

"*AAF were originally approached by Alternative Asset Alliance, who had been known to us for a number of years, to provide an administrative service to their agents, who wished to provide their clients with access to various alternative unregulated investments for their pension funds.*

This could only be achieved if an (unregulated) SIPP was set up on their behalf and this was the only service that they required. This is because prior to January 2013, SIPP plans were then unregulated, and therefore it was possible for an individual to make their decisions for their own SIPP funds, following their own research or discussions with agent(s) representing available investments.

Because in order to achieve the investment of their choice they had to have their pension funds within a SIPP, at this time AAF agreed to provide an administrative facility such that anyone wished to transfer their pension funds into a SIPP for the purpose of such investment, they could achieve this.

We were however, always totally transparent that we would only provide this if we were explicitly requested to do this on an execution only basis, such that no advice was requested and no advice was provided by AAF at any point".

The email goes on to set out what the writer says was the regulator's meaning of execution only. And says that as would be expected by the regulator they never met any of the clients and were only contacted via their agent.

The email goes on to say that "*due to our cautiousness*" in respect of those who might seek redress apparently in relation to performance disappointment, they "*ensured that anyone wishing to use this service provided us with written documentation confirming that they understood the term execution only, they agreed with its terms, and they wished to proceed on this basis*".

The writer of the email says "*you have copies of each of these files that were placed via St Martin's Partners, you were given all these at the time and subsequently you have been given them all again on a memory stick*".

The email then suggests that they'd also taken "*the precaution*" of obtaining the written opinion of the regulator approving their systems and paperwork. It might be inferred this is a reference to the 1 March 2012 email as both this email and the FSA email were provided to us by SMP at the same time, and there is nothing else that might be similarly regarded that has been provided. Having previously indicated this, we haven't been told this inference is wrong.

The writer goes on to reiterate his views on the service provided, and how liability and regulation lies in relation to aaf, and why they have never needed to have any professional liability insurance for their administrative service.

I've seen there is also reference to one of SMP's directors having been trying to unsuccessfully contact the writer of the email. The writer of the email says that aaf have been closed for over a year, although the email address was kept live for a further year but

has now been closed. He suggests he will assist but also suggests SMP have all the information.

Summary of SMP's further submissions

SMP and their representatives have sent in a stream of submissions and queries. These have also been punctuated by requests for further time. In summary it's said by or on behalf of SMP that:

- The procedure and documentation for the carrying of the execution only transfer was set up with the knowledge and approval of the FSA. And they relied on the FSA email to support this.

- Client's clearly requested aaf ceased dealing with them after completion of the transfers. And clients were informed in simple terms of what they might be giving up by using this route and given generic information on SIPPS to help them understand, which was [SMP said] as per the FSA guidelines.

- SMP acknowledged a number of complaints had been made, but that some of these had been made outside the time SMP say they took on "*alternative asset finance*" [aaf] as a trading style (28 August 2012).

  SMP highlight that prior to 28 August 2012 aaf was used as the trading style of FIM (a regulated financial advice firm). And it has been said this service should look to this firm (who are no longer trading or in operation) or the SIPP provider to meet any liability for Mr R's loss; not that SMP agree that any business did anything wrong.

  The register also shows Alternative Asset Finance as having been a previous name of SMP from 28 August 2012.

- SMP say the regulator has highlighted concerns about business being obtained via unregulated introducers and how liability may follow from this. They have suggested to us the language used by the regulator implies a potential liability falling onto a SIPP provider and not SMP who had no knowledge of any investments.

In early 2018 we were made aware that SMP had appointed representatives to make submissions to this service on their behalf. These also followed over an extended period of time.

We were later informed SMP had appointed a new, part-time compliance officer. He also sent in a number of submissions. In addition he told us about contacting the people / person behind aaf to get answers to our questions and waiting for their reply (which it appears was never forthcoming) and other reasons for the need for further time. Including requests for this service to provide copies of all views issued, details of complaints made and other documents and of a review apparently taking place. It's understood he left SMP in late 2018.

In a letter dated 14 September 2018 SMP's representatives sent in a response specifically directed towards Mr R's complaint.

In it they said (in summary):

- It wasn't alleged in anything they had seen that Mr R had been advised on investment by SMP. So they took issue with what the adjudicator concluded in his view.

- They said the information provided in the adjudicator's view mainly came from this service's website and so wouldn't have been available at the time the SIPP was set up. And they said in any event, failing to follow good practice and guidelines as set out by this service, couldn't amount to any liability on SMP's part.

- Mr R had instructed FIM and not SMP. And they said all regulatory responsibility for aaf lay with FIM from 7 March 2011 until 28 August 2012.

  And a subsequent adviser can't be held responsible for any failings of a previous adviser. A subsequent adviser isn't required to review (or not immediately) previous advice. Unless anything has been agreed under a retainer, which it was said on behalf of SMP, this hadn't been the case here.

  So where a client agreed something in conjunction with FIM, no liability could attach to SMP.

It was said that based on the documentation:

- Mr R had been introduced to FIM and not SMP in June/ July 2012.

- Mr R instructed FIM on 9 July 2012 to set up the SIPP, obtain transfer papers and proceed with the transfers, at which point the firms role would cease.

- On 26 July 2012 the relevant papers were sent to Mr R.

- On 27 July 2012 Mr R signed the agreement for the execution only transfer.

And SMP's representatives sent the papers they said they relied on to demonstrate this.

SMP and/ or their representatives concluded Mr R signed the further execution only statement and points to remember document at the time of the transfer documentation being provided and suggested this happened on 6 September 2012. It's submitted this date, being only a week after SMP took over the trading style of aaf, was insufficient to expect SMP to have known or done anything further.

And it's said this service has often recommended three months to be a reasonable period of time to be taken for a firm to review a new client.

- It was said the fact SMP took a final fee for these transactions was irrelevant. This was part of the acquisition agreement of aaf; and not an indication of acceptance of past liability.

The submissions then set out an understanding of the regulatory position and what would have been understood at the time in 2012. They said the primary concern of the regulator related to firms using claims of execution only to hide behind or not sufficiently explaining how services (execution only/ non-advised) were being provided. It wasn't a concern about execution only services per se. And a copy of an article from City Wire 2012 was attached; which it was said was a useful guide on execution only work. This had "*followed the banning*

of an adviser who sought to use the term 'execution only' to mis-lead clients when advice had been provided".

It was said that Citywire gave sensible reasons why someone might want to proceed on an execution only basis:

- Wish of the client to make their own decision
- A desire not to share personal financial details with their adviser
- A preference not to pay the additional costs that would be associated with such work

And it was said SMP had done all that was suggested as necessary based on the guidelines. Clear and credible explanations had been provided to Mr R and a written agreement provided by Mr R.

A copy of this service's update from early 2006 was also attached which included commentary on execution only work and the PIA Update 33 from 1997.

SMP went on to highlight the further steps taken by the regulator and within the industry and referred to a 2013 Moneymarketing report of a round table discussion held with the industry. SMP said it was right to adopt the commentary and approach set out by the industry commentator in the article:

"In practice, the customer's perception is a very key determinant of whether it is advice or not. One of our lawyers, within what was the FSA, said to me "If it looks and feels like advice, it probably is advice", and that is actually quite a good test".

And they said:

"This fully ties in with our comments above that the test to be applied in determining whether or not SMP has any liability in connection with its 2012 execution-only business is whether or not Mr R would have been clear that he was not receiving advice or would have thought he was being advised. The question is not what was it established was the degree of financial experience of the client".

It's said there was no way Mr R could think what he received looked like or felt like advice.

The submissions then set out some of the contents of documents relied upon. In addition it was suggested that even if the complaint was upheld any redress should be capped up to the time of the bond investment; and said this was clearly Mr R acting and investing on his own initiative and responsibility.

Overall it's said that Mr R had discussions with a third party and it isn't fair for SMP to be held liable just because aaf filed papers several weeks after joining SMP.

Attached to the submissions was included:

- A signed copy of aaf's "*statement for an execution only client*" and "*points to remember*" documents. Purportedly signed and dated 3 September 2012 by Mr R and his wife.

This document had the generic apparent internal draft reference of January 2012 and the contact details that have been associated with aaf.

- In addition a signed copy of a document said to be the "*client agreement for arranging execution only transactions*" was also attached. This purports to have been signed by Mr R on 27 July 2012.

  All pages of this document have the generic apparent internal draft reference "*client agreement use with SCDD V2- 0110 August 2012*"; save for the last page with the purported signed and dated entry which has "*January 2012*" as the document ref date.

- Typed letter dated 9 July 2012 said to be from Mr R to aaf and said to confirm his instruction on an execution only and non-advised basis to set up a SIPP. It also confirms instruction to act on transfer and that aaf's role is to cease on transfer. It sets out that Mr R understands that once this happens it will be his responsibility to make investment decisions once the funds are in the wrapper. The letter also sets out that a signed letter of authority is attached.

- Letter dated 26 July 2012 from aaf to Mr R. Confirming sending of the transfer documents and asking for Mr R's signature to enable the transfers to proceed and asking him to also sign the letter of authority.

  This letter is signed aaf as a trading style of Finance in Medicine.

- Invoice from aaf to the SIPP provider re Mr R "Case 388" dated 5 October 2012.

  This invoiced £1,432 for setting up the SIPP. It is signed with thanks "E&OE". My understanding is this acronym is commonly understood to mean "*errors and omissions excepted*" I am not sure how this applies or was intended to apply here.

  The invoice provides payment details of a Barclays account. The address of the business is given.

  The title of the firm is printed as "*Alternative Asset Finance is a trading style of St Martins Partners LLP*" with the ref number provided as 4002376.

  This number is the Companies House registration number for Finance in Medicine.

On 9 November 2018 SMP sent us some further documents. They said this bundle was the case file we had been requesting. The attachments comprised of:

- A confirmation of identity document where introduction was completed by a regulated firm containing Mr R's personal details and said to have been completed by an FIM Director (associated also with aaf) on 9 July 2012. The introducing firm is said to be Finance in Medicine with the address seen elsewhere. The regulator reference number is given as 469095 (the FIM number).

- A further confirmation of identity document where introduction was completed by the same individual linked to FIM and aaf as above, a regulated firm confirming Mr R's details and said to have been completed by on 16 October 2012. Here the

introducing firm is said to be St Martin's Partners LLP with their regulator reference number of 537904.

- Copy of signed statement for execution only client and points to remember (previously supplied)

- Copy of purported letters of 9 and 26 July 2012 and invoice dated 5 October 2012 (previously supplied).

Following this correspondence we reminded SMP again of material we'd previously requested and set out some of the history and what was asked for.

SMP have more recently told us that of the commission money received from the SIPP provider, most of this money wasn't technically paid to SMP or any of their employees. It's said the people behind aaf took the larger proportion of all commission and went on to pay a proportion (12.5% is implied from the spreadsheet provided) to SMP.

It appears to be said by SMP that an individual who used to run FIM, continued to be associated with/ working under the name of aaf, after it was taken over/ used by SMP. But SMP don't appear to entirely accept this individual worked for or was associated with SMP.

SMP have also more recently (February 2019) provided an email which they say was sent to SMP. This email appears to have been sent by aaf email address to a named individual (apparently an SMP director) on 19 September 2012 at 16:28. Another person is copied in. It was sent with the subject header in bold.

It reads:

"*Hi.. I attach a spreadsheet of all cases that have been submitted under your FSA number – these will not be paid though for a couple of months as it takes time to filter through – is this what you are looking for? Once the cases have been paid and completed – we will forward to you electronic file for your records.*
Best wishes".

We have been told little more about the context of this email. A spreadsheet, that it's said was attached to this email has also been provided. This spreadsheet contains details under the following headers; case numbers, client names, SIPP provider, full commission, SMP commission @ 12.5% and date documents sent to SIPP provider.

SMP's representative's also sent in further queries. We had previously explained that this service considered these queries mainly central to issues of merit on the complaints and that as such didn't intend to answer the queries in an email. We had previously extended timetables and requests for information, but felt that parties had had adequate time.

Provisional decision

On 23rd April 2019 I issued a provisional decision on this case. In this I set out a summary of a number of the matters raised and why I intended to uphold the complaint. I also set out what I thought SMP ought to be required to do.

SMP responses

On behalf of SMP, my provisional decision was rejected. It was thought there was "*little to be gained in dealing with every point*" and didn't accept the relevance of all the contents. It was felt this service had been determined since the first adjudicator's view to regard SMP as non-compliant as opposed to focussing on another business for liability.

They continued to stress two points:

- FIM were responsible for the relevant advice (or failure to give advice).
- The relevant execution only business was compliant and applied the regulatory expectations at the time.

It was said that they didn't think I'd been sufficiently clear about why Mr R ought to be considered SMP's client in respect of the SIPP being set up and how their activities meant SMP ought to bear responsibility for all losses suffered.

They didn't think the chronology supported what I'd said. And they continued to say that any advice on transferring pension arrangements and making arrangements wasn't given by SMP (nor did they think it looked like anyone at aaf had advised either). It was after this, they say, Mr R decided to set up a SIPP and transfer his funds in conjunction with the AAF advisers under the auspices of FIM.

It's accepted aaf advisers submitted documentation under the auspices of SMP; but they don't think this gives rise to liability on behalf of SMP. They say the breach or negligence had already happened when the decisions were taken (with or without advice). And responsibility for this remained with FIM.

It's said that I ought not to uphold this complaint because to do so would be in contravention of the law. It's suggested the consequence of my decision is to decide that aaf (under the auspices of SMP) were in breach/ negligent by failing to rectify an original breach and reversing a decision to transfer and enter into a SIPP.

So it's suggested that at most, a failure here wasn't a new breach. And so any failure of a professional to advise on its own breach, doesn't amount to a further breach (a headnote of a Court of Appeal decision was provided).

Therefore, it's said, this leaves only a single breach, (that of the original aaf/FIM breach) that it's said formed the basis for the decision being made to transfer. They say "*it's the decision to agree with Mr R to set up the SIPP to accommodate the transfer that is the negligent act or omission. There is not a further breach by aaf/SMP and ..no basis on which to attach liability to SMP*".

Further or alternatively, it's also said, that at no point did SMP enter into any form of retainer or agreement with Mr R that included the revisiting of previous decisions and / or the acts, errors or omissions of a previous advisers (FIM). And, as per the judgment they'd referred to. There was no duty on SMP to review a decision previously taken by Mr R in the absence of an express retainer on this. So again, it's said, liability lies with FIM.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Based on what I have seen, I haven't been persuaded to change my thinking from my provisional decision.

Overall I tend to agree that SMP didn't do everything they ought reasonably to have been expected to have done. And in my view, were it not for their acts and omissions, I don't think Mr R would have opened a SIPP or transferred his personal pension plans from their original providers, or go on to make the highly risky, unregulated overseas investment.

I have read and considered everything that has been provided to us with real care. But I hope it will be understood that it's not practical to set everything out in my decision.

This service is an alternative to the court process. It's intended to be informal and is intended to be accessible to all, including those who are not legally or financially qualified for example.

A number of submissions were made to this service by SMP and their representatives, which appeared to relate to a number of complaints made by different individuals. There are some shared characteristics between some of these complaints; but as I've previously highlighted, I consider each case on its own merits. So I asked that care was taken to ensure it was clear enough when submissions were intended to be applied to a particular complaint. I don't think this was always as clear as it could be; however I have considered everything that has been provided and applied it where it has appeared to be so intended.

In reaching my current thinking I have taken into account everything that has been said and provided to this service. I have also seen that a number of my queries and requests for further information went unanswered. I have only drawn inferences from this where it has appeared reasonable for me to so do.

I think Mr R's complaint has properly been set up against SMP. I understand some of the submissions made suggested it shouldn't have been and that this service ought not to look at a complaint made against SMP. I don't agree, I accept Mr R was a consumer and a client of SMP's, during the relevant time, and certainly from 28 August 2012. It doesn't appear to me, having looked at what was said following my provisional decision that SMP disagree with this.

I think Mr R is properly categorized as having been a client receiving the services of SMP on matters pertaining to the setting up of an investment. This involved a SIPP being opened and funds being transferred; as well as the investment that followed. Here there was a later transfer of further funds. And Mr R was reasonably entitled to expect and receive a level of service and care that I think fell short.

In addition I have seen a letter from the Financial Services Compensation Scheme (FSCS) in respect of a claim made to that service along similar lines to this one made about SMP, about FIM. This letter sets out FSCS' finding that they couldn't consider the claim, as it ought properly to be made to SMP. This letter has previously been seen by SMP. I accept this letter was not provided in respect of Mr R's case; nor was it a finding made in respect of Mr R's case. I have also seen what has been said by SMP about liability attaching to a SIPP provider.

I am not drawing any conclusions about any liability that may or may not properly attach to people involved in FIM or any other firm or individual or provider. And there is nothing to follow as a consequence of my decision about Mr R's complaint about SMP that should prevent SMP pursuing anyone they may wish to.

I've seen that SMP's submissions against the liability of a subsequent adviser for any failings of a previous adviser; have included their view that a subsequent adviser isn't required to review (or not immediately) previous advice. SMP expanded on this on more than one occasion. They told us that this service often concludes three months is a reasonable time for a new adviser to review a new client. And have also gone on to add this wasn't the case *unless* anything had been agreed under a retainer. It was said on behalf of SMP, this hadn't been the case here.

I have gone on to look at what's said further below. But in respect of any retainer, or anything agreed, I think it could be a reasonable understanding of the thrust of some of SMP's submissions to now be to suggest SMP had considered the issue of liability for ongoing clients or previous advice when taking over/ taking on aaf and their work and clients. I think this would have been the usual and expected (and prudent) approach. But despite repeated requests from this service, we have never been informed of the arrangements and agreements by which SMP came to take over/use aaf as a trading style and their work.

I would consider it to be unlikely that a regulated firm could consider they were properly fulfilling their duties when taking over or taking on a business, business model and client book if they didn't review the nature of the work, clients and reach an agreement on any ongoing liability.

I have also previously highlighted that I haven't seen anything that makes me think SMP took any steps to introduce themselves to Mr R (or any of the so- purported 'aaf clients') as new advisers; let alone provided any contact or service information. I am left overall with the impression that SMP's relationship with Mr R was kept very much at a distance. I can't see anything that suggests to me Mr R would have necessarily known or understood who his actual advisers were when SMP were in place.

I've looked at what was done by SMP and under the auspices of SMP. I have concluded that there was a model of work being used here, of which SMP played an integral role. Mr R was a client of SMP's and the work done for him was done in furtherance of this model of work. I understand SMP haven't addressed some of the points previously made about the regulatory duties owed to Mr R (or others). But I think they were required to act in his best interests and they failed to do this. I think it was or would have been sufficiently clear that there were areas that ought to have attracted real concern. Due to the nature of the model and what I think was known here, I don't accept that it's reasonable or fair to conclude SMP ought not to be responsible for things done for their client within such a short space of time after Mr R became their client.

It appears to be said by SMP that an individual who used to run FIM, continued to be associated with the model used under the name of aaf, after it was taken over/ used by SMP. SMP didn't appear to me to entirely accept this individual worked for or was associated with SMP. But I don't think this distinction can be made out, based on what happened.

I think SMP played a sufficient role in the activities that led to a SIPP being started in Mr R's name and his funds being transferred into it, that they should reasonably bear responsibility for any loss sustained. Without SMP's service and role it wouldn't have happened. I accept the reason the SIPP was opened was with a view to enabling Mr R's funds to be transferred in to go on to make the investment that later followed. The work can't be said to have be done and completed under the mantle of FIM.

I don't accept Mr R can reasonably be described as a true execution only client. This was part of a model used and the model's generic documents said to demonstrate Mr R was an execution only client tend to support my thinking. I don't consider the evidence provided meets the clear and credible test. It doesn't use Mr R's words for example, indeed Mr R is one of a number of clients where the same words and documents were used. I don't think it is a credible submission Mr R was in a position to conduct or direct these steps on an execution only basis, and I don't think that's what happened here. I don't accept the hallmarks of what I'd expect to see, for true execution only work, are present. I think there was enough for SMP to have been alerted. IN any event I tend to think SMP were aware of the model and work.

We have been told that at the time Mr R made these arrangements he was in his late fifties, married with no children. He had an outstanding mortgage and no other pension arrangements. We've also been told he had no savings and no previous investment experience; and that he had debts of around £2,000.

I've also seen the SIPP application form set out some personal details of Mr R at the time. It suggested he was aged 58 and a working as a store manager earning £28,000 a year. He intended to retire at 65 and was married, and his wife was his nominated beneficiary.

On the face of it, Mr R was not someone who I would expect to be acting on and choosing an execution only service. It appears to me to be highly unsuitable based on my understanding of Mr R and his circumstances at the time. There's nothing that makes me think he had any relevant expert experience; nor that he had any desire to keep his personal financial circumstances private.

I looked with real care at the documents provided by and on behalf of SMP. Because it seems to me they are really at the centre of whether Mr R was an execution only client.

As part of my considerations I am asked to accept the FSA email indicates the regulator at the time approved the business model used by aaf (this seems to me to be suggested to include the documents and overall approach).

I don't accept that's a reasonable interpretation of the FSA email. I have repeatedly asked SMP to provide me with more information about this email, including the complete thread. Nothing further has been provided; albeit I accept it might be that the trail may have only included aaf personnel and that this took place prior to SMP officially taking on aaf. Equally I would expect SMP to have asked for more information; particularly if they intended to rely on it.

In relation to the FSA email, it isn't clear to me when this email was provided to SMP or their representatives; but I find it difficult to reasonably conclude this email would have been the only information requested by, or provided to, any business taking on a financial advice business or portfolio of ongoing work and clients. I can't conclude this would have been reasonable or sufficient.

I don't accept the inferences I am asked to draw from the email. I don't consider it reasonable or likely to accept this email, the FSA email, as provided to this service, should be understood to approve of the model used by aaf/ SMP.

Having carefully balanced what's said and how it has been presented to this service, I think it's reasonable to think that SMP have asked me to accept they knew what the aaf business model was. I think SMP have based many of their submissions on the basis that the business model was a sound, compliant and approved model.

For completeness there has been reference to the people behind aaf leaving SMP in 2013 when the regulator sent out further guidance. We were also told that when the aaf people left SMP in 2013 they took records and/ or documentation with them. However we haven't received anything further of substance on this issue since we asked about this and why this had been allowed. I can't conclude SMP acted properly in allowing this or knowing this had happened if this is a sustained submission or explanation. As it hasn't been referred to in later submissions, I don't know if it is sustained.

It is potentially inconsistent with information suggested in the email dated 9 November 2016 provided to this service by SMP. In this email someone purporting to write on behalf of aaf suggested SMP were provided with electronic copies of all documents/files at the time and that they have been provided with further copies. Nothing further was sent to this service following my provisional decision on this.

Primarily I don't think it's a reasonable inference to say the regulator approved of the business model and what was being done. Not only do I not have any information on what the regulator had been provided with, I don't know what the regulator was told the FIM model was. Nor do I think the body of the email can be said to be approving of whatever has been discussed, I think new procedures to approach a business model had been agreed and were to be put in place. I accept there is reference to there being an execution only model, but the writer of the email specifically highlights the potential for a regulatory risk, in addition to other risks. And without further information I don't think there is anything I can satisfactorily conclude about business models, proposals and agreements.

In any event it's impossible to know whether the model apparently being discussed in the email, was the same as the one used by SMP.

I've also seen the FSA mail purports to refer to the intended use of an external compliance and support firm to review; nothing has been provided in respect of this. This tends to highlight my overall concern about how SMP can to a satisfactory level conclude they complied with their duties in respect of due diligence.

In my provisional decision, I highlighted references made to "AAA" and not aaf. Nothing further was supplied to me about this.

My thinking on this is supported by the email I've seen and referred to above, dated 8 December 2016. SMP provided this to us as part of their knowledge and explanation on the work done by aaf: In it, it appears someone purporting to have knowledge about aaf says:

"*AAF were originally approached by Alternative Asset Alliance, who had been known to us for a number of years, to provide an administrative service to their agents, who wished to*

provide their clients with access to various alternative unregulated investments for their pension fund".

I previously explained I think it's reasonable to infer AAA were Alternative Asset Alliance. AAA were the Developer's agents for the unregulated overseas investment the Rimondi Grand. This was the alternative investment on Mr R's SIPP application form being considered as well as the bond. In relation to Mr R I haven't seen the developer's information on the Merco Bond, but taking into account what's said about aaf's business model overall, I think it's more likely than not that the FSA email refers to AAA and aaf's knowledge that the SIPP's were to be set up to accept funds in and thus enable unregulated investments to follow.

There was nothing in the response I received to my provisional decision that addressed my thinking on this issue. I think aaf were aware the clients being dealt with under this work had been recommended unregulated investments and had been advised on what to do to enable these investments to be made. The work undertaken was done with the intention of assisting this. This included the completion of various documentation; some of which I have no doubt involves the documents provided to us by SMP. I think SMP were integral in enabling this to take place. Aaf were SMP from 28 August 2012. SMP took responsibility for what was done and even if it was accurate (which I don't necessarily accept) to conclude SMP didn't know what the group of people characterised as the aaf group were doing; they ought reasonably to have understood or suspected and enquired further about this. There isn't enough for me to conclude that aaf and SMP directly advised; and the evidence tends to suggest the model being used, involved direct contact being made by unregulated parties. But SMP did work and played a significant and sufficient role in relation to the setting up of a SIPP and an investment for Mr R. And they didn't do what they should have done. The work and Mr R can't properly be described execution only.

SMP at certain times referred to having no knowledge of any investments. This is inconsistent here with what was entered on Mr R's SIPP application form. This form was completed under SMP. And set out the names of the two alternative unregulated investments that the funds would be used to invest in.

Albeit I appreciate the thrust of the submission might be a repetition of SMP's apparent approach to distance themselves overall from aaf and the suggestion they can be distinguished from aaf even after 28 August 2019. I don't accept this.

Additionally when SMP contacted us with a copy of the FSA email in August 2017 and their submissions, they attached a copy of a 12 page document entitled "*aaf Execution only SIPP facility*". I understood from the correspondence this service was asked to infer this document had been provided to and approved by the regulator. I haven't seen anything that enables me to conclude this is correct.

I think this document is inconsistent with other submissions. This 12 page document sets out that aaf is a trading style of SMP. So if this was the document submitted to and purportedly approved by the regulator (prior to the supposed regulator's email of March 2012), aaf was using the name SMP to the regulator and was using it before late August 2012.

I note also the use on the version provided to us that includes the SMP adviser's direct email address at SMP and the SMP phone number. So it seems more likely to me than not, that if this was the document being used prior to late August 2012 it would be likely SMP might have received some enquiries. There is a further inconsistency as the notes at the bottom of

the 12 page document set out this is a generic document entitled "*Pensions Technical 6 April 2012*". So this also tends to suggest SMP were already linked with aaf in April 2012.

I didn't receive any responses to this thinking from my provisional decision. I can see other potential explanations as to how SMP's details were on a draft of this document. But this still wouldn't explain how SMP would be aware some version of the document had been supplied to the regulator (based on what I've seen). It also demonstrates the importance and relevance of SMP's role in transactions as part of the model.

There has been some suggestion that SMP didn't have any real understanding of what aaf, under the regulated umbrella of SMP, were doing until sometime later; 2016 was one date suggested. As I've already set out, I don't think that's a satisfactory or sufficient explanation. I think it's reasonable for SMP to have had an understanding of aaf's work, any business models and their client book and ongoing work, as a matter of basic due diligence, prior to, let alone at the time of taking over regulatory responsibility and benefitting from aaf.

I can't accept SMP would have reasonably started using aaf as a trading style without any knowledge or without there being a potential benefit for SMP. I have seen what's said about industry awareness and concern about execution only work at the time, and I agree and accept this. I think there was an awareness and expectation that pre-dated this time in any event. In any event this highlights the care I would have expected of SMP in ensuring their clients could properly be treated as being execution only. I don't think Mr R was such a client; and if SMP had met their regulatory requirements, I don't accept Mr R would have been treated as such or that he would have ended up in the position he is now in.

I understand SMP suggest this service has recommended advisers should be entitled to have three months to acquaint themselves with a new client and his or her circumstances.

There may be circumstances where three months may be a reasonable period of time for a new adviser to acquaint themselves with a new client and their needs and circumstances and review their current position. Each case turns on its own facts.

But I wouldn't consider this to be a sufficient reason alone or taken in conjunction with any of the other submissions made, such as to absolve SMP of responsibility here.

In any event, the submissions that SMP ought to be provided with three months to acquaint themselves with a new client and review and advise is, in my view, inconsistent with other submissions. For example SMP say there was no duty on them to rectify an earlier breach.

Firstly I think it's reasonable to expect SMP to have gained sufficient understanding of the work they would be taking on under the mantle of aaf. And this would have been in advance of their regulatory link and responsibility from 28 August 2012. I think it reasonable to expect this to have included a review of the nature of the ongoing work. And according to what we've seen, the intention of aaf work (at FIM and SMP) was to provide (the purported) execution only service, and apparently nothing further.

So it seems unlikely SMP wouldn't have known this. It doesn't appear to be suggested this was the case. And, as I've said, I'd expect SMP to have known this.

This alone I would have expected to have attracted real concern and caution on the part of SMP when they came to take on the ongoing work and clients and the work model.

I think a basic review would have demonstrated that a number of applications for new SIPPs and transfers were being submitted. And this should have reasonably led SMP to ensure they were satisfied this was appropriate. And in Mr R's case, I think the most basic enquiry might reasonably have caused concern and properly caused the ongoing activity to be paused for a full review. Had this taken place it would have been sufficiently clear Mr R wasn't a true execution only client and that the arrangements ought not properly to continue.

I haven't seen anything in any event that leads me to be persuaded SMP should be afforded any time (up to three months) as being the time in which they intended to review and get to know their new client Mr R (and advise). SMP don't suggest, in any other submissions, they intended to provide an ongoing service. I also haven't seen anything to suggest they introduced themselves as being a new firm to Mr R, or let him know what they could or would do for him.

Here it appears they did provide some sort of ongoing contact or service to Mr R; albeit nothing has been said by anyone about this. Nor was anything added after I highlighted this in my provisional decision. In January 2013 (more than three months after the initial activity), a further sum was transferred from a personal pension into Mr R's SIPP and a further amount of commission was paid to SMP.

I don't understand how this came about. But it certainly doesn't support SMP's contention that whatever conclusions I reach, I should allow a period of three months for them to get to know their client. I've also seen that the first sum of commission seems to have been primarily described as representing a fee for setting up the SIPP. This is inconsistent with the second sum and proportion being taken from Mr R's [already established] SIPP here.

The general payment of commission was highlighted to SMP as an example of their involvement early on in the complaints and our investigation process. There was some suggestion, early on to this service, that SMP hadn't received any financial benefit from this work. This submission is inconsistent with what appears to be the current position.

SMP's Director and regulated adviser was the name of the regulated adviser used on paperwork as part of the transfer and SIPP application process, (certainly after 28 August 2012).

More recently (February 2019) we were provided with the spreadsheet and an email regarding payments (set out above). In relation to Mr R, the spreadsheet gives a case reference of "388" and the sum entered in the list of full commission was £1,400 and in the SMP commission list is set out as £175. The date of 10 September 2012 is entered for the date documents sent to the SIPP provider.

Having looked at the transaction history from the SIPP provider this spreadsheet is inconsistent with the "IFA" fee they show on the SIPP statement paid to aaf of £1,432. And there is no reference to the later transaction and payment.

My understanding of this is that it's said the loose group of people comprising of the aaf part of SMP received the commission into their account and then paid a smaller proportion to SMP. Based on the name used (SMP's regulated advisers name) I understand it to be said, this was the proportion agreed to be due from the work to SMP. Thus logically SMP are trying to say that aaf profited in a more substantial way than SMP. But this isn't how the regulatory responsibility can be accurately described.

We also have not been told by or on behalf of SMP why this information wasn't provided to this service at an earlier date. Nor have we been told anything further about the context of this; for example why SMP had been looking for this information historically (at the time). Nor how any split of commission had been agreed, or if it's being suggested SMP's regulated advisers name was being used by another with or without his knowledge.

Having reflected on this information I accept it may indicate that individuals who became involved with SMP via aaf may have financially benefitted from Mr R's transfer and the opening of the SIPP; but this is in addition to SMP. And it is clear enough to me that it was the use of SMP that enabled this business and Mr R's transfer and investment to proceed.

I consider, and I think it's accepted SMP have a duty to provide clear and credible evidence in relation to the work being execution only. And if this was part of a portfolio of work or business they took over responsibility for, I can't readily be persuaded that ignorance could be any defence to assuming liability.

This requirement isn't something new. Indeed the pension review guidance provided in PIA Regulatory Update 33 of 1997 (which has been referenced on the part of SMP as well as by our adjudicator) highlighted the care needed around purported execution only business. The update set out that:

"*It should be noted that any significant body of these cases will require substantial justification as "true" execution only cases…*

You should be particularly alert to doubts about the reliability of claims of "execution only" if there are danger signals such as a high level of apparent execution-only cases (more than 5 per cent of all transfer policies sold by the individual in question and/or by the Member as a whole), the use of technical terms by investors unfamiliar with them, or numbers of investors apparently couching their comments in the same phraseology".

Whilst I decide every case upon its individual facts, it is of real concern and relevance here that SMP conducted or assisted in a substantial number of purported execution only cases within a very short space of time. We asked SMP what proportion of work these cases made up of SMP's work at the time, but haven't received an answer. I find it hard to accept it was less than 5 percent. Indeed it seems to have been suggested the work made up 100% of aaf's services. We were told:

"There were 13 cases where all substantive documentation and the process was completed by AAF under the FIM banner, but a final completion letter was sent whilst AAF was operating under the SMP banner. There were 28 cases where the process was undertaken and the substantive decision taken whilst AAF operated under the FIM banner, but the procedural requirements were completed under the SMP banner. There were 35 cases where the whole process was undertaken by AAF operating under the SMP banner. There are some cases where the whole process was completed by AAF under the FIM banner but the fee was received by AAF after it began operating under the SMP banner".

I think this information underlines the important role SMP played and was intended to play in enabling the transactions to go ahead.

This amount of work highlights my earlier conclusion that any satisfactory review of aaf's work would have disclosed this client work. The acquisition of a trading style with ongoing business, using the model it is said was being used, should, in my view, have immediately

attracted proper attention and consideration from the outset. SMP should reasonably have been particularly concerned by such a significant amount of purported execution only clients. Even if they could persuade or satisfy me that SMP shouldn't have been aware of this, prior to acquiring the trading style and client book; which they can't.

As the PIA update set out at the time:

The "*PIA's view is that genuine "Execution Only" cases should be the exception rather than the rule with each member only having a small percentage of such business in this form*".

This wasn't a new or evolving regulatory approach.

For completeness I think the documents relied on comprise of generic, pro forma communications between adviser and client and the use of technical terms and phraseology is apparent here. I don't accept the letter said to have been sent by Mr R was written by him, it is almost identical in substance to others being sent at the time to aaf/ SMP. Based on what I've seen overall I think it derived from aaf- otherwise I can't satisfy myself as to why they wouldn't have been concerned. I take into account all the other standard pro forma documents used and relied on to explain the work of aaf. I think this was something an adviser and any basic review should have been alive to.

I also don't accept it can be reasonably said the documentation was clear enough to ensure Mr R understood the nature of his relationship with aaf, let alone SMP; nor how services were being provided to him. I don't think it can be said SMP were in a position to reasonably, responsibly or properly conclude Mr R was an execution only client of theirs.

I don't accept Mr R knew or ought to have known based on what happened here and what was provided, that he was not being assisted, advised or provided a service by a regulated firm.

I have previously explained that I've various matters raised about MiFID and the Conduct of Business (COBs- especially COBS 10) rules in great detail and whether they are properly to be applied, how or otherwise. Submissions haven't been consistent on this; albeit I've read all that has been said with care. I previously indicated I didn't think I needed to go on to say anything further on these submissions; and no party has suggested otherwise in any responses. I don't think there have been adequate responses either to what was said about how SMP ought to have conducted themselves under the Principles of business.

I appreciate SMP say the rules at the time permitted people to open execution-only SIPPs in the way Mr R did.

From my understanding I think SMP suggested at some point that they complied with the appropriateness rules under MiFID for non-advised sales. And that this would mean in some cases, even true execution only sales, a business can be required to ask the consumer for more information to allow them to decide if the consumer has the necessary knowledge and experience to understand the risks involved in the transaction. Equally there have been some submissions referencing that MiFID and COBs don't apply.

I've also seen it said by SMP that "*clients clearly requested that AAF ceased dealing with them on completion of the requested transfer(s) and that the Investment of the funds available was their sole responsibility… Because we had no dealings with the investment of*

the SIPP funds we are unaware of where they are/were invested and have no authority over any of the SIPPS or the investments which complies with the clients written instructions".

As I've explained in this case, these submissions aren't supported by the direct contemporaneous evidence. Section 12 of Mr R's SIPP application form asks about the intended activity of the SIPP and the timeframe. This has been completed in blue pen, hand writing and states:

"*The client wishes to invest in either the Rimondi Grand or the Merco Bond".*

These were both unregulated overseas investments, usually only suitable for the experienced and high net worth investor who was willing and had capacity to undertake a high level of investment risk. Even then usually proportions of 3-5% in such unregulated schemes are often considered more suitable as a proportion of an investment portfolio; none of these things being apparently true for Mr R. I have no difficulty in concluding it is extremely unlikely Mr R would have come across either of these investments on his own or been in a position to assess and make any meaningful decisions about them. In any event, I think the use of the blue pen reflects information being added when the forms were being completed by another person.

I also don't think the usual type of individual who would act on an execution only basis, open a SIPP and make an unregulated investment with over 50% of their pension funds, would be the type of person who would later start making monthly contributions of £30 or leave the remainder of the SIPP in cash.

Nor does it sit comfortably with the motivation behind why aaf was set up and operated; which I think must have or ought to have been known by SMP.

Here the investment was made shortly after the transfer. And I accept overall the credibility of Mr R's description of a person coming to visit him with papers to sign, which were then taken away. In the context of the volume and nature of the work being done here, it was clear enough pro forma approaches were being used.

The SIPP application form has been pre-populated in a similar manner using a similar typeface to a number of similar applications completed by aaf. It indicates personal pension details and indicates Mr R intends to make monthly contributions of £30.from 15 October 2012. In fact this didn't start until 2013, but again I think this shows the involvement of another person.

Section 13 of the SIPP application form asked for the name of the authorised adviser, and this was given as the SMP regulated adviser. The details for the name and address of the regulated firm are alternative asset finance t/s St Martins Partners LLP but using an address associated with the aaf group with the regulator's number for SMP.

I don't accept this information was entered against SMP's agreement or knowledge. I think this intrinsically links SMP with the responsibilities to ensure things were done properly. aaf was a trading style and cannot and should not be distinguished as separate entity acting in such a way that SMP weren't responsible.

I accept the box for "*non-advised*" on the SIPP application form has been prepopulated and ticked. I don't accept this was a satisfactory reflection of the circumstances.

I have seen the document from the SIPP provider headed "*Deduction of fee agreement*". This goes on to say that this form should be completed if an individual wishes to appoint "*an FSA regulated financial adviser and their fees to be deducted from your fund*".

There is then a typewritten instruction on naming the firm appointed and detailing the role the company is to provide, namely providing the client with advice and manage the investments held within the SIPP.

I accept the typewritten form instructions on this have been struck through by hand- albeit the space for the name of the firm has been completed as "*ALTERNATIVE ASSET FINANCE T/S OF ST MARTIN'S PARTNERS LLP*".

I think it's likely this strike through was an addition made by the individual (not Mr R) completing the forms. I don't believe Mr R would have understood what this striking through was intended to achieve.

This writing is the same as the remainder of the handwritten additions containing Mr R's name and the payment details (3% of the initial investment with a "*MINIMUM OF £500 MAXIMUM £2000*"").

This document is signed and dated 3/9/12. I accept this is a short time after aaf became a trading style of SMP. This doesn't absolve SMP of responsibility or liability.

The pattern and fact of a number of purported execution only transfers and starting of SIPPs (later followed by unregulated investments) taking place within such a short space of time tends to make me think this was deliberate at worst; and poorly regulated at best.

I accept Mr R's account as being credible. I have considered everything provided, and I think the number and nature of the inconsistencies and unanswered queries does have a reasonable impact on my thinking, and overall, I don't consider SMP's account of what they say happened and what I should conclude as credible.

I understand SMP's recent submissions suggest that the consequence of my decision is to decide that aaf (under the auspices of SMP) were in breach/ negligent by failing to rectify an original breach and reversing a decision to transfer and enter into a SIPP. They say this is wrong. It's also said that any failure on the part of SMP wouldn't amount to a new breach here; so the failure of a professional to review and advise on their own breach isn't a new breach.

I accept that in relation to Mr R, he was initially a client of FIM. Albeit it might have been Mr R might have only been aware of aaf as a name. I also understand why it might be said that FIM's actions might be open to review. But these aren't things I've needed to look at any further here. But I don't agree that the application to open a SIPP and all that flowed from this and the payments received fail to demonstrate, for example how liability attaches to SMP. I think I have been clear enough that SMP acted in furtherance of arranging an investment here. In relation to Mr R's case specifically, prior to 28 August 2012 the SIPP application hadn't been submitted, which was to hold the funds for the investment; and in this case the investment was even named on the application. It was clear enough this activity was being done to enable an investment to be made; even if, SMP were removed as advisers prior to any investment being made. Albeit here, I've seen the further monies transferred into the SIPP and commission paid (again to SMP).

I've seen what SMP have also said in the alternative about the absence of any agreement to revisit or review; I accept there's nothing here to suggest there was explicit agreement, but where no further documentation has been provided on other agreements, I don't think pointing to an absence here to be particularly persuasive. However this isn't at the centre of my conclusions.

For completeness there was some concern expressed by SMP about how Mr R came to be represented and how this may be linked to other people. I don't consider this a relevant matter to my thinking, which has solely been about Mr R's complaint and whether SMP did anything wrong such as to make them liable.

what SMP need to do

For the reasons given, I uphold Mr R's complaint. SMP need to complete the following loss calculation exercise to assess if Mr R has suffered a loss. If he has SMP will need to address this.

In assessing what would be fair compensation, my aim is to put Mr R as close as possible to the position he would probably now be in if he had been dealt with adequately. I don't think Mr R would have open a SIPP, proceeded with the transfers or made the investment that followed: and his funds would have remained in the original personal pensions (CIS and Abbey Life), had he been adequately dealt with.

In the circumstances the following loss calculation needs to be completed by SMP and redress should follow:

- Contact the former providers and obtain, at the date of my final decision, the notional transfer value of each plan had they remained where they were.

  If there is difficulty in obtaining the notional valuations then the return from the FTSE UK Private Investors Income total return index (formerly known as the FTSE WMA Stock Market Income Total Return Index) over the same period should be used. This is a reasonable proxy for the return that could have been achieved had suitable funds been selected.

- Obtain the current transfer value of Mr R's SIPP at the date of my final decision including any outstanding charges.

  To calculate compensation, SMP should assess the Merco Bond investment and assign an amount as a commercial value. If the bond is illiquid it should be given a nil value for the purpose of calculating compensation.

If the current value of Mr R's SIPP (including the Merco bond investment) is less than the values of the hypothetical values of his previous plans, then Mr R has suffered a loss. I think this is likely here.

If Mr R has suffered a loss the payment should be made into his SIPP to increase it by this amount. If this is not possible payment may be made direct to Mr R but adjustment should be made for the tax that would otherwise be paid on income derived from the SIPP. The notional tax should be calculated by applying Mr R's assumed marginal rate of tax in retirement (here assumed to be basic rate).

If, at the calculation date, the investment is illiquid (meaning it cannot be readily sold on the open market), it may be difficult to find the *actual value* of the investment. So, the *actual value* should be assumed to be nil for calculation purposes. SMP will need to take ownership of the illiquid investment by paying a commercial value acceptable to the pension provider. This amount should be deducted from the compensation and the balance paid as above.

If SMP are unable to purchase the investment the *actual value* should be assumed to be nil for the purpose of calculation. SMP may wish to require that Mr R provides an undertaking to pay them any amount he may receive from the investment in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. SMP will need to meet any costs in drawing up the undertaking.

It would not be fair if Mr R has to continue to pay the annual SIPP fees if there are illiquid holdings preventing the SIPP from being closed. Ideally, SMP would take over any illiquid holdings, thus allowing the SIPP to be closed as appropriate now. So, I intend to say that to give certainty to all parties, if there are illiquid holdings and SMP is unable to buy them from the SIPP, then it is fair that SMP pay Mr R an upfront lump sum equivalent to five years of SIPP fees (calculated using the previous year's fees). This gives a reasonable period to arrange for the SIPP to be closed.

All payments should take into account any available tax relief and the effect of charges.

SMP are required to pay interest at 8% simple on any loss sum outstanding 28 days from the date of confirmation of acceptance of my final decision.

In addition SMP need to pay Mr R £450 for the distress and trouble he has been caused.

my final decision

So for the reasons given I uphold Mr R's complaint against St Martin's Partners LLP.

SMP need to complete the loss calculation set out above and pay all sums due. In addition they must pay Mr R £450 to reflect the real distress and inconvenience he has been caused.

Under our rules, I'm required to ask Mr R to accept or reject my decision before 3 August 2019.

Louise Wilson
ombudsman