

complaint

Mr P has complained about Beckford James LLP's handling of a transfer from his personal pension to a self-invested personal pension (SIPP) in 2011. The transfer was to allow an investment into a land venture overseas.

background

A brief summary of the circumstances leading to this complaint, and my initial conclusions, were set out in my two provisional decisions, both of which are attached and form part of this final decision.

In short, Mr P wanted to use his pension fund to invest in an overseas land venture. However, he couldn't make the investment through his existing personal pension. He had to first transfer his pension to a SIPP that permitted the proposed investment. His initial engagement was with an unregulated business – company "S" – but S couldn't arrange the pension transfer. So it referred Mr P to Beckford James. Beckford James says it wasn't aware of Mr P, or his intentions, until a completed SIPP application form and instructions arrived at its offices, unsolicited, in July 2011.

Beckford James then had a telephone call with Mr P. It says it offered to advise Mr P but he declined. The parties agreed to proceed on an execution only basis. An execution only agreement was signed by Mr P on 17 July and the SIPP application form was sent on to a SIPP provider (provider "A").

On 15 August, A wrote to Beckford James to say that it wouldn't be accepting the transfer following advice from its professional indemnity (PI) insurer. S then found a new SIPP provider (provider "B"). New forms were completed and sent to Beckford James to forward on to B. The forms were signed on 9 September. Beckford James spoke to Mr P on 16 September. As before, it says it offered to advise Mr P but this was again declined so the parties agreed to continue on an execution only basis. Beckford James wrote to Mr P on the same day to confirm next steps and to reiterate that no advice had been given.

The transfer to SIPP provider B, and the investment in the land venture, went ahead shortly afterwards. The amount transferred was approximately £23,000.

In 2017 Mr P complained to Beckford James. He raised a number of concerns about the suitability of the underlying investment and the lack of due diligence undertaken by Beckford James. Beckford James rejected the complaint arguing (in summary) that the transaction had been completed on an execution only basis so it wasn't responsible for ensuring its suitability or for the due diligence checks suggested by Mr P.

In my first provisional decision, I explained why I was intending to uphold Mr P's complaint. I invited both parties to provide further comments. Mr P didn't have anything further to add. Beckford James made a number of comments, which I addressed in my second provisional decision. Beckford James also responded to my second provisional decision. I address these additional comments below. Mr P didn't have anything further to add.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

The regulator (the FCA) requires firms to treat their customers fairly and act in their best interests. In my first provisional decision, I found that Beckford James hadn't treated Mr P fairly or acted in his best interests by helping to facilitate his transfer. I pointed to a number of reasons why Beckford James should, reasonably, have been concerned about the transaction. Crucially, I also concluded that Beckford James thought as much as well because it told Mr P during two phone calls that it wouldn't likely have recommended the transfer. I therefore provisionally decided to uphold Mr P's complaint.

I also said it looked like Beckford James had strayed into giving Mr P advice. I didn't pursue this line of enquiry any further because I concluded it wasn't material to the outcome of the complaint. I thought the complaint should be upheld whether the transaction was on an execution only basis or on an advised basis.

In response to my first provisional decision, Beckford James pointed me to the judgment in *Adams vs Carey*, which was handed down by the High Court after my first provisional decision was sent out. The judgment prompted me to reconsider some aspects of Mr P's complaint because it covered, in part, the interplay between execution only sales and the regulatory requirement to act in a customer's best interests. I thought it was therefore a *possibility* that the outcome of the complaint could be affected given the judgment's findings in this area (although the law is only one of a number of factors I'm required to take into account when reaching decisions). With this in mind, I thought it prudent to revisit the issue of whether the transaction should be treated as execution only or advised. And I concluded that the sale had indeed strayed into advice.

In coming to that conclusion, I referred to the FCA's definition of execution only sales:

"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"

I also referenced the notes Beckford James took following the telephone conversations it had with Mr P on 10 July 2011 and 16 September 2011. The 10 July call note said the following (the September note was similar):

*"I explained the options available to him:
To take full advice which would mean we would review his current situation and future objectives and most likely recommend that he either stay with his current scheme or transfer into a risk based portfolio of managed funds which would then be reviewed on a monthly basis by Beckford James."*

I provisionally concluded the following:

"In twice saying to Mr P that there were other options that he would likely have been better off pursuing – staying in his personal pension or investing in a portfolio of managed funds – Beckford James was giving advice on "investments relating to the merits of the transaction" because it was saying Mr P's proposed investment, and transaction, didn't have much merit in its view. Beckford James's comments, and alternative recommendations, were also specific to Mr P and his situation and weren't 'generic' risk warnings as it has argued. As such, I'm satisfied this should be treated as an advised sale."

It follows from this that Beckford James had to ensure the transaction was suitable for Mr P. I recognise it didn't investigate Mr P's circumstances and needs. Nevertheless, Beckford James still knew enough to form the opinion that it wouldn't likely have recommended the transfer. It said as much at the time, as evidenced by the telephone notes described previously. So, all things considered, I'm satisfied the transaction wasn't suitable for Mr P."

In response, Beckford James referred to the following from the FCA:

"In the FCA's view, advice requires an element of opinion on the part of the adviser. In effect, it is a recommendation as to a course of action. Information, on the other hand, involves statements of fact or figures"

Beckford James said it only passed on information to Mr P and its language was subjunctive in case, using words such as "likely", "might" and "other options". Given its language, and the FCA's definition of advice – and, indeed, a dictionary definition of advice – it doesn't see how its actions can be construed as advice.

I've considered Beckford James's comments carefully. However, I think any reasonable reading of the telephone notes referred to earlier would conclude that Beckford James wasn't just passing on information to Mr P. It knew what Mr P wanted to do. It said it wouldn't likely recommend that course of action. It recommended two very specific alternatives, both of which meant *not* investing in the overseas land venture. And it did this twice. So it was, to use the FCA's language quoted above, offering an "element of opinion". And it was recommending a "course of action" to Mr P – that course of action being to not proceed as originally intended.

I think Beckford James's concluding comments on this issue are helpful in this respect. It says:

"At no point, as you contend, did we say he would be better off pursuing other options as we did not have the information to substantiate any advice. We did twice state that there could be other options he may wish to consider and might be better BUT he declined."

However, Beckford James said, twice, that it would "most likely recommend" two specific options rather than the one Mr P was planning on taking. I don't see how this can be anything other than a firm steer that Mr P would be better off pursuing other options.

I think it's worth revisiting at this point Beckford James's argument that it didn't have a view on Mr P's proposed transfer and subsequent investment in an overseas land venture. It was, in its words, "agnostic", on the matter because it didn't have enough information on Mr P to make any sort of judgement on the suitability of the transaction. I'm not persuaded. It clearly was the case that Beckford James had limited information on Mr P because he refused its offers of advice. However, as I said above, it still seems to have had enough information to have indicated to Mr P that his proposed course of action wouldn't have been one it would likely recommend. As I said in my second provisional decision, and repeat now, I don't know the reasons why Beckford James came to that conclusion. But the fact that it did, demonstrably, come to that conclusion is the key point here.

In short, I remain satisfied that Beckford James's actions did stray into advice, and its responsibilities should therefore be seen in that light. As such, it means Beckford James's argument about not having to assess appropriateness because it met the list of requirements under COBS 10.4 that meant it didn't have to do this (for instance, in relation to the

transaction being initiated by the client) doesn't apply here because the first item on that list is for the transaction to be execution only. For the reasons given above, I'm satisfied that wasn't the case here.

Beckford James has gone on to argue that adverts, mailshots and other financial literature must therefore also be considered "advice" because they're providing non-personalised information to individuals which is what Beckford James said it was doing in this case. I'm not persuaded by the parallels. Marketing materials of the like Beckford James is referring to don't consider a person's specific, imminent, plans and they don't offer up personalised alternatives to those plans in the way that has happened in this case.

Beckford James has also repeated its argument that, in giving Mr P options to consider, it was acting in line with PRIN 2.1 (6) which requires firms to pay due regard to the interests of its customers and to treat them fairly. I covered this in both of my provisional decisions, in which I acknowledged the difficulties that Beckford James faced when dealing with someone who didn't want advice but who had come to it to facilitate a transaction that it wouldn't likely have recommended. However, my view was – and remains – that there wasn't an option for a firm to both indicate its likely recommendations and then go on to transact on an execution only basis. As soon as a firm starts to comment on the merits of a transaction, it has strayed into giving advice. Continuing the transaction on an execution only basis would no longer be an option in such a scenario even though – as Beckford James has pointed out – clients may well feel aggrieved to be told this.

In my second provisional decision, I said the judgment in the *Adams vs Carey* case didn't apply in this complaint. Beckford James has, however, referred to the judgment to support its argument that consumers should be responsible for their actions. It says:

"There has to be a point when people are responsible for their own financial decisions and it is not always the fault of the adviser."

I agree. And I *may* have written something similar if the transaction had truly been on an execution only basis. However, for the reasons given above, I'm satisfied that wasn't the case here and, as such, different considerations – discussed above – must apply.

Finally, Beckford James has pointed to its good complaint record and says its actions in this case weren't due to any unfair intent to gain financially. For the avoidance of doubt, I haven't questioned Beckford James's motives, or its overall track record. I've limited my findings to the specifics of Mr P's complaint, the evidence provided by both parties and the rules I need to follow when dealing with complaints such as this. As a result, I think Beckford James should have properly advised Mr P but, if that wasn't possible, it should have said to Mr P that it couldn't facilitate the transaction. Either way, I'm satisfied Mr P wouldn't have transacted as a result. It follows that I uphold Mr P's complaint.

fair compensation

In assessing what would be fair compensation, my aim is to put Mr P (as far as reasonably possible) in the position he would now be in if hadn't been for Beckford James's actions.

It's not possible to say precisely what Mr P would have done differently. But I take the view that he wouldn't have transferred to the SIPP and invested in the land venture but would, instead, have retained his personal pension plan and the funds it held prior to the transfer. I also note that staying in the personal pension was one of the options Beckford James would

have recommended. With this in mind, and taking everything into consideration, I'm satisfied what I've set out below is a fair and reasonable approach to compensation.

what should Beckford James do?

To compensate Mr P fairly, Beckford James must:

- Compare the performance of Mr P's investment with that of the benchmark shown below and pay the difference between the *fair value* and the *actual value* of the investment. If the *actual value* is greater than the *fair value*, no compensation is payable.

Beckford James should also pay interest as set out below.

If this shows that redress is due, then this should be paid to Mr P's pension plan. The payment should allow 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 the payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr P as a lump sum after making a deduction of 15%. The payment would otherwise have been used to provide pension benefits, 25% of which would be tax free and the rest would have been taxed according to his likely tax paying status in retirement – presumed to be 20%, so the 15% deduction adequately reflects this.

Income tax may be payable on any interest awarded.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
SIPP	still exists	performance of the funds Mr P was already in prior to transfer	date investment commenced	date of my final decision	8% simple per year from date of final decision to date of settlement (if compensation is not paid within 28 days of the business being notified of acceptance)

actual value

This means the actual value of the SIPP at the end date.

My aim is to return Mr P to the position he would have been in but for the actions of Beckford James. This is complicated where an investment is illiquid (meaning it cannot be readily sold on the open market) as appears to be the case here. It would be difficult to know the *actual value* of the investment. In such a case the *actual value* should be assumed to be nil to arrive at fair compensation. Beckford James should take ownership of the illiquid investment by paying a commercial value acceptable to the pension provider. This amount should be included in the actual value of the SIPP used in the calculation.

If Beckford James is unwilling or unable to purchase the investment the *actual value* should

be assumed to be nil for the purpose of calculation. Beckford James may wish to require that Mr P provides an undertaking to pay Beckford James 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. Beckford James will need to meet any costs in drawing up the undertaking.

fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark. This means Beckford James will need to contact Mr P's original pension provider to obtain this value.

Any additional sum paid into the investment should be added to the *fair value* calculation from the point in time when it was actually paid in.

Any withdrawal, income or other payment out of the investment should be deducted from the *fair value* at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there are a large number of regular payments, to keep calculations simpler, I will accept if Beckford James totals all those payments and deducts that figure at the end when determining the fair value instead of deducting periodically.

why is this remedy suitable?

I have decided on this method of compensation because:

- If the SIPP transfer hadn't gone ahead Mr P would most likely have remained invested in his existing plan and the same funds.
- Mr P has not yet used his pension plan to purchase an annuity.

The SIPP only exists because of the underlying investment. In order for the SIPP to be closed and further SIPP fees prevented, this investment needs to be removed. But if Beckford James can't buy it Mr P is faced with future SIPP fees. I think it is fair to assume five years of future SIPP fees. So, if Beckford James can't or won't buy the investment, it should pay an amount equal to five years of SIPP fees based on the current tariff. This is in addition to the compensation calculated using a nil value for the investment.

my final decision

For the reasons given above, I'm upholding Mr P's complaint. Beckford James LLP must now pay Mr P compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 6 November 2020.

Christian Wood
ombudsman

COPY OF SECOND PROVISIONAL DECISION

complaint

Mr P has complained about Beckford James LLP's handling of a transfer from his personal pension to a self-invested personal pension (SIPP) in 2011. The transfer was to allow an investment into a land venture overseas.

background

A brief summary of the circumstances leading to this complaint, and my initial conclusions, were set out in my first provisional decision, a copy of which is attached.

In short, Mr P wanted to use his pension fund to invest in an overseas land venture. However, he couldn't make the investment through his existing personal pension. He had to first transfer his pension to a SIPP that permitted the proposed investment. His initial engagement was with an unregulated business – company "S" – but S couldn't arrange the pension transfer. So it referred Mr P to Beckford James. Beckford James says it wasn't aware of Mr P, or his intentions, until a completed SIPP application form and instructions arrived at its offices, unsolicited, in July 2011.

Beckford James then had a telephone call with Mr P. It says it offered to advise Mr P but he declined. The parties agreed to proceed on an execution only basis. An execution only agreement was signed by Mr P on 17 July and the SIPP application form was sent on to a SIPP provider (provider "A").

On 15 August, A wrote to Beckford James to say that it wouldn't be accepting the transfer following advice from its professional indemnity (PI) insurer. S then found a new SIPP provider (provider "B"). New forms were completed and sent to Beckford James to forward on to B. The forms were signed on 9 September. Beckford James spoke to Mr P on 16 September. As before, it says it offered to advise Mr P but this was again declined so the parties agreed to continue on an execution only basis. Beckford James wrote to Mr P on the same day to confirm next steps and to reiterate that no advice had been given.

The transfer to SIPP provider B, and the investment in the land venture, went ahead shortly afterwards. The amount transferred was approximately £23,000.

In 2017 Mr P complained to Beckford James. He raised a number of concerns about the suitability of the underlying investment and the lack of due diligence undertaken by Beckford James. Beckford James rejected the complaint arguing (in summary) that the transaction had been completed on an execution only basis so it wasn't responsible for ensuring its suitability or for the due diligence checks suggested by Mr P.

In my first provisional decision, I explained why I was intending to uphold Mr P's complaint. I referred to the regulatory requirement for a firm to treat its customers fairly and act in their best interests. I concluded Beckford James hadn't done this in Mr P's case.

I invited both parties to provide further comments. Mr P didn't have anything further to add. Beckford James made a number of comments, which I address below.

my provisional findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I'm intending to uphold Mr P's complaint although my reasoning is slightly different from my earlier provisional decision. I explain why below.

overview of my first provisional decision

The regulator requires firms to treat their customers fairly and act in their best interests. In my first provisional decision, I found that Beckford James hadn't treated Mr P fairly or acted in his best interests by helping to facilitate his transfer. I came to this conclusion because:

1. Beckford James would, or should, have been aware of the following:
 - Mr P was transferring a relatively modest amount even though the higher cost of a SIPP, and the cost of transferring, typically make such transactions the preserve of much larger fund values.
 - Mr P was planning to invest in plots of land overseas. Schemes like this would ordinarily be considered quite high-risk.
 - Mr P was receiving recommendations from an unregulated source (firm S).
2. Even though it didn't have the opportunity to investigate Mr P's circumstances and needs, Beckford James still knew enough to have twice indicated to Mr P that it would likely recommend two other options – not transferring or investing in different assets – rather than the one he was proposing to take. It told Mr P this during telephone calls on 10 July and 9 September. Beckford James's file note for the 10 July call is as follows (the September note is similar):

*"I explained the options available to him:
To take full advice which would mean we would review his current situation and future objectives and most likely recommend that he either stay with his current scheme or transfer into a risk based portfolio of managed funds which would then be reviewed on a monthly basis by Beckford James."*

I thought if Beckford James didn't think it was right for Mr P to transfer, it can't have been acting fairly or in his best interests if it nonetheless helped him to achieve that.

3. SIPP provider A decided against receiving Mr P's transfer monies following advice from its PI insurer. I thought the explanation given by provider A for not wanting to transact should have given Beckford James another reason to be concerned about the transfer.

So I thought there were more than enough reasons for Beckford James to have been concerned about the transaction. Crucially, I concluded Beckford James thought as much as well because it told Mr P it wouldn't likely have recommended the transfer. I therefore provisionally decided to uphold Mr P's complaint.

Beckford James provided a detailed response. I have considered everything it has said. However, as part of its response, Beckford James pointed me to the judgment in the *Adams v Carey* case which was handed down by the High Court after my first provisional decision was sent out. The judgment has prompted me to reconsider some aspects of Mr P's complaint. As a result, some of the comments made by Beckford James are no longer relevant so I won't be addressing everything it has said in my decision. However, I am aware that I will be covering new ground, so Beckford James (and Mr P) can respond to my comments.

Adams v Carey

The judgment in the *Adams v Carey* case was handed down by the High Court after my first provisional decision. Beckford James has referred to it to support its position that a client entering into an execution only agreement should be accountable for their decisions.

The judgment covers several areas but the relevant section in relation to Beckford James's arguments is headed "The COBS Claim" and covers the interplay between execution only sales and COBS 2.1.1R (the 'best interests rule' referred to earlier and in my first provisional decision).

In short, the claimant in *Adams v Carey* (a consumer) argued that the defendant (his SIPP provider) had breached COBS 2.1.1R in establishing his SIPP, in agreeing to take an unsuitable investment into his SIPP, and in failing to follow guidance contained in the FCA's 'thematic review' of SIPPs. The defendant's argument was that it set up and administered the SIPP on an execution only basis, so its duties to the client were therefore limited and its obligations under COBS 2.1.1R should only be seen in that light. The judge found in favour of the defendant.

In my provisional decision, I treated Mr P's transaction as being execution only. However, I also said it looked like Beckford James had strayed into giving Mr P advice. I didn't pursue this line of enquiry any further because I concluded it wasn't material to the outcome of the complaint. I thought the complaint should be upheld whether the transaction was on an execution only basis or on an advised basis.

Adams vs Carey has changed my thinking on my approach to this issue. The judgment examines the reach of COBS in execution only cases. So I'd need to carefully consider the judgment, and any read-across it might have, if I was treating Mr P's transaction on an execution only basis. Whilst the law is only one of a number of things I'm required to take into account when reaching decisions, it's a *possibility* the outcome of the complaint would be affected as a result. The issue of whether the transaction should be treated as execution only or advised, therefore, becomes more critical. With this in mind, I think it prudent to revisit the matter.

The FCA's definition of execution-only is as follows:

"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"

In twice saying to Mr P that there were other options that he would likely have been better off pursuing – staying in his personal pension or investing in a portfolio of managed funds – Beckford James was giving advice on "investments relating to the merits of the transaction" because it was saying Mr P's proposed investment, and transaction, *didn't* have much merit in its view. Beckford James's comments, and alternative recommendations, were also specific to Mr P and his situation and weren't 'generic' risk warnings as it has argued. As such, I'm satisfied this should be treated as an advised sale.

It follows from this that Beckford James had to ensure the transaction was suitable for Mr P. I recognise it didn't investigate Mr P's circumstances and needs. Nevertheless, Beckford James still knew enough to form the opinion that it wouldn't likely have recommended the transfer. It said as much at the time, as evidenced by the telephone notes described previously. So, all things considered, I'm satisfied the transaction wasn't suitable for Mr P.

Beckford James has said it didn't have enough information to have formed any sort of reasonable judgment about the transfer. By way of example, it says a relatively small transfer could be low risk if it's just a small part of a person's total pension. But, because Beckford James didn't have this information for Mr P, or any understanding of his attitude to risk, it wasn't able to make a fair assessment. It says it is now being judged in hindsight, using information that Mr P has now provided – but didn't provide at the time – and using contemporary standards to judge actions taken nearly a decade ago.

However, Beckford James knew when it initially started to work with Mr P that it wouldn't likely have recommended the transfer. I don't know why it came to that conclusion (although, as outlined in my earlier provisional decision, there were several areas of potential concern). The key point is that it did come to that conclusion. So I'm satisfied Beckford James isn't being judged using contemporary standards and information that has only subsequently come to light. It's its own actions, taken with information available to it at that time, that's telling here.

Beckford James has also argued that offering up possible alternatives to the transfer should be considered as treating Mr P fairly (as per PRIN 2.1). In Beckford James's view, providing *some* information on alternative courses of action must have been better than not providing that information at all. However, the rules didn't allow for a watered-down advice process of the type Beckford James seems to be hinting at. As outlined above, as soon as a firm starts to comment on the merits of a transaction, it has strayed into giving advice. In such a situation, continuing the transaction on an execution-only basis is no longer an option. As Beckford James has pointed out, I'm sure Mr P wouldn't have taken kindly to being an advised client. But, in the circumstances, helping him proceed with the transaction in the way it did wasn't the right response.

COBS 9.2.6 is important here. It says a firm shouldn't make a recommendation if it doesn't have the necessary information to assess suitability. So Beckford James was in breach of COBS 9.2.6 if it felt obliged to treat this as an advised sale but found Mr P wasn't willing to give enough information for it to make a fully-fledged recommendation, rendering it only able to hint at what it thought he should probably do instead. This underlines why declining to act at all, even in the face of likely opposition from Mr P, was the only reasonable option at this point.

Finally on this issue, Beckford James has argued that the approach it took (by which I take to mean a lighter-touch approach to advice) is now a concept that has been formalised by the regulator for transfers from defined benefit pension schemes. I make no comment on Beckford James's interpretation of the current regulatory landscape, and how it would apply in a case like this, other than to say I have to consider the rules as they were at the time, not how they've subsequently evolved.

Role of other parties

Beckford James remains disappointed that it is being held responsible for what happened given the involvement and (in its view) culpability of other parties. It even says S "colluded" with SIPP provider B.

However, my position was – and remains – that Beckford James was in a position to have stopped the transfer and, as a regulated entity, it should have done so. For the reasons given above, Beckford James strayed into giving Mr P advice. So it had a regulatory duty to provide Mr P with suitable advice or, if that wasn't possible, decline to act on Mr P's behalf. It did neither. As such, I'm satisfied Beckford James is responsible for the losses Mr P may have suffered as a result.

SIPP fees

In my first provisional decision, I set out my thoughts on what fair compensation should be in Mr P's case. I said (amongst other things) that Beckford James should pay Mr P five years of SIPP fees if it wasn't able, or wasn't willing, to take ownership of the asset that prompted Mr P's complaint. I said this because the SIPP wouldn't have been opened, and Mr P wouldn't be paying its fees, if it wasn't for Beckford James's actions. But closing the SIPP may prove difficult if the underlying asset is illiquid.

In response, Beckford James says it should only pay two years of SIPP fees. It says this is because our approach in the past has been along these lines and because two years should be enough time to realise the assets, and close the SIPP, given there is "some secondary market demand".

I should point out that paying five years of SIPP fees only applies if Beckford James can't, or won't, take on the underlying asset in the SIPP. If it is able, and willing, to purchase the asset then it doesn't need to refund the SIPP fees. However, as outlined in my provisional decision, Beckford James would only have 28 days to pay compensation before interest starts to apply.

If Beckford James can't, or won't, take ownership of the asset, then my original instructions stand. Even if there is some secondary market in the asset, I still think it reasonable to allow Mr P the five years to arrange the closure of his SIPP. The reason it's an issue in the first place is because of

Beckford James’s actions, so I don’t think it unreasonable to be cautious in this regard. And, of course, Mr P may not be able to sell the investment (notwithstanding Beckford James’s comments), in which case five years is fair and reasonable compensation for having to keep the SIPP open for an indeterminate amount of time.

In short, I’m satisfied my approach to compensation is fair and reasonable given the circumstances of the complaint and in line with what we would award on other complaints with similar issues.

fair compensation

In assessing what would be fair compensation, my aim is to put Mr P (as far as reasonably possible) in the position he would now be in if hadn’t been for Beckford James’s actions.

It’s not possible to say precisely what Mr P would have done differently. But I take the view that he wouldn’t have transferred to the SIPP and invested in the land venture but would, instead, have retained his personal pension plan and the funds it held prior to the transfer. I also note that staying in the personal pension was one of the options Beckford James would have recommended. With this in mind, and taking everything into consideration, I’m satisfied what I’ve set out below is a fair and reasonable approach to compensation.

what should Beckford James do?

To compensate Mr P fairly, Beckford James must:

- Compare the performance of Mr P’s investment with that of the benchmark shown below and pay the difference between the *fair value* and the *actual value* of the investment. If the *actual value* is greater than the *fair value*, no compensation is payable.

Beckford James should also pay interest as set out below.

If this shows that redress is due, then this should be paid to Mr P’s pension plan. The payment should allow 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 the payment into the pension isn’t possible or has protection or allowance implications, it should be paid directly to Mr P as a lump sum after making a deduction of 15%. The payment would otherwise have been used to provide pension benefits, 25% of which would be tax free and the rest would have been taxed according to his likely tax paying status in retirement – presumed to be 20%, so the 15% deduction adequately reflects this.

Income tax may be payable on any interest awarded.

investment name	status	benchmark	from (“start date”)	to (“end date”)	additional interest
SIPP	still exists	performance of the funds Mr P was already in prior to transfer	date investment commenced	date of my final decision	8% simple per year from date of final decision to date of settlement (if compensation is not paid within 28 days of the business being notified of acceptance)

actual value

This means the actual value of the SIPP at the end date.

My aim is to return Mr P to the position he would have been in but for the actions of Beckford James. This is complicated where an investment is illiquid (meaning it cannot be readily sold on the open market) as appears to be the case here. It would be difficult to know the *actual value* of the investment. In such a case the *actual value* should be assumed to be nil to arrive at fair compensation. Beckford James should take ownership of the illiquid investment by paying a commercial value acceptable to the pension provider. This amount should be included in the actual value of the SIPP used in the calculation.

If Beckford James is unwilling or unable to purchase the investment the *actual value* should be assumed to be nil for the purpose of calculation. Beckford James may wish to require that Mr P provides an undertaking to pay Beckford James 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. Beckford James will need to meet any costs in drawing up the undertaking.

fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark. This means Beckford James will need to contact Mr P's original pension provider to obtain this value. If either party thinks this is an insurmountable problem, they should say so in response to this provisional decision.

Any additional sum paid into the investment should be added to the *fair value* calculation from the point in time when it was actually paid in.

Any withdrawal, income or other payment out of the investment should be deducted from the *fair value* at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there are a large number of regular payments, to keep calculations simpler, I will accept if Beckford James totals all those payments and deducts that figure at the end when determining the fair value instead of deducting periodically.

why is this remedy suitable?

I have decided on this method of compensation because:

- If the SIPP transfer hadn't gone ahead Mr P would most likely have remained invested in his existing plan and the same funds.
- Mr P has not yet used his pension plan to purchase an annuity.

The SIPP only exists because of the underlying investment. In order for the SIPP to be closed and further SIPP fees prevented, this investment needs to be removed. But if Beckford James can't buy it Mr P is faced with future SIPP fees. I think it is fair to assume five years of future SIPP fees. So, if Beckford James can't or won't buy the investment, it should pay an amount equal to five years of SIPP fees based on the current tariff. This is in addition to the compensation calculated using a nil value for the investment.

my provisional decision

For the reasons given above, and subject to any further comments and evidence I may receive, I intend to uphold this complaint.

If I do uphold this complaint, I will be asking Beckford James LLP to calculate and pay compensation as set out above.

COPY OF FIRST PROVISIONAL DECISION

Mr P has complained about Beckford James LLP's handling of a transfer from his personal pension to a new self-invested personal pension (SIPP) in 2011. This was to allow an investment into a land venture overseas.

background

In 2011, Mr P wanted to use his pension fund to invest in an overseas land venture. His initial engagement was with an unregulated business (company "S"). However, he couldn't make the investment through his existing personal pension. He had to first transfer his pension to a SIPP that permitted the proposed investment. S couldn't arrange this so it referred Mr P to Beckford James to facilitate the pension transfer. Beckford James wasn't aware of Mr P, or his intentions, until a completed SIPP application form and instructions arrived at its offices, unsolicited, in July 2011.

Beckford James had a telephone conversation with Mr P on 10 July. It offered to advise Mr P but he declined. The parties agreed to proceed on an execution only basis. An execution only agreement was signed by Mr P on 17 July and the SIPP application form was sent on to a SIPP provider (provider "A").

On 15 August, A wrote to Beckford James to say that it wouldn't be accepting the transfer following advice from its professional indemnity (PI) insurer. S then found a new SIPP provider (provider "B"). New forms were completed and sent to Beckford James to forward on to B. The forms were signed on 9 September. Beckford James spoke to Mr P on 16 September. As before, it offered to advise Mr P but this was again turned down so the parties agreed to continue on an execution only basis. Beckford James wrote to Mr P on the same day to confirm next steps and to reiterate that no advice had been given.

The transfer to SIPP provider B, and investment in the land venture, went ahead shortly afterwards. The amount transferred was approximately £23,000.

In 2017 Mr P complained to Beckford James. He raised a number of concerns about the suitability of the transaction and the lack of due diligence undertaken by Beckford James. Beckford James rejected the complaint arguing (in summary) that the transaction had been completed on an execution only basis so it wasn't responsible for ensuring suitability or for the due diligence checks suggested by Mr P.

Mr P referred his complaint to us. Our adjudicator thought the complaint should be upheld. Beckford James disagreed so the matter has been referred to me for a decision.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, my provisional decision is to uphold Mr P's complaint.

My starting point here is the regulator's handbook that sets out the principles and requirements that a regulated business (such as Beckford James) must adhere to. Of particular interest are the regulator's principles as outlined in "PRIN 2.1", one of which says:

"A firm must pay due regard to the interests of its customers and treat them fairly."

And the Conduct of Business Sourcebook ("COBS"), which states that:

"A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule)." (COBS 2.1)

The funds Mr P was transferring were relatively modest. I don't think it would be a stretch to say the higher fees and charges associated with a SIPP, and the actual cost of transferring, make transferring to a SIPP, typically, the preserve of much larger fund values. Beckford James was also aware that Mr P was planning to invest in plots of land overseas. Such schemes would generally be considered quite high-risk. And Mr P was receiving recommendations from an unregulated source (firm S). Beckford James had even done some "basic research" on S to satisfy itself that the transaction wasn't part of a pension scam, so it's likely it would have known about S's status.

So Mr P appears to have been receiving encouragement from an unregulated source to transfer a relatively small pension fund into a product that was likely to be significantly more expensive than his existing personal pension. And he was intending to transfer in order to invest in a high-risk overseas land venture. As such, I'm satisfied there were enough reasons here to say the transaction should have rung alarm bells with Beckford James.

I add in to the above the actions of SIPP provider A which ultimately decided against receiving Mr P's transfer monies. The letter from A to Beckford James dated 15 August said the following:

"We have recently reviewed our investment proposition and following advice from our PI insurers we have been advised not to proceed with any further investments into [the land investment in question]"

In itself, a business walking away from a transaction doesn't necessarily mean it's flawed in some way. There may be a number of reasons why a SIPP provider decides against accepting new business. But I think the above statement suggests there is something specific about Mr P's situation or proposed investment that has prompted the change of heart. It doesn't appear to have been a more generic trading decision. And the fact that a PI insurer prompted the rethink points in the same direction. That is, the refusal was due to the potential risks of this particular transaction rather than a more generic business decision. On balance, therefore, I think the decision taken by A, and the reasons it gave for that decision, should have caused Beckford James to have seriously questioned Mr P's transfer.

So there were more than enough reasons here for Beckford James to have reconsidered its actions. Transferring a relatively small amount into a SIPP *and* knowing that the underlying investment was going to be relatively high risk *and* knowing Mr P had been referred by an unregulated introducer *and* knowing at least one SIPP provider had doubts about the transaction is, in my view, too long a list to ignore.

It's also telling that my conclusions on this aren't any different from those reached by Beckford James back in 2011. Even though it didn't have the opportunity to investigate Mr P's circumstances and needs, Beckford James still knew enough to have indicated to Mr P – on two occasions – that it would likely recommend two other options ahead of the one he was proposing to take. The first time it told Mr P this was during the 10 July telephone call which was recorded in a file note as follows:

*"I explained the options available to him:
To take full advice which would mean we would review his current situation and future objectives and most likely recommend that he either stay with his current scheme or transfer into a risk based portfolio of managed funds which would then be reviewed on a monthly basis by Beckford James."*

The second time was during a telephone conversation on 9 September. The file note is worded along very similar lines to the one above. It all suggests Beckford James knew Mr P's proposed transaction wasn't right for him. And if Beckford James didn't think it was right for Mr P, I fail to see how it was treating him fairly or acting in his best interests by letting the transfer and investment go ahead.

Given all the above, I'm minded to uphold Mr P's complaint.

Beckford James has argued strongly that it gave no advice and the transaction was carried out on an execution only basis. It says all it essentially did was receive the completed SIPP application forms from S and then post them off to the new SIPP provider. It said it made it clear to Mr P that it wasn't

providing advice and ensured Mr P signed an execution only agreement. It also says it followed guidelines set by the regulator for execution only transactions. And Beckford James quotes the following from COBS 10 which it says is applicable in this case:

"A firm is not required to ask its clients to provide information or assess appropriateness if the service only consists of execution and/or the reception and transmission of client's orders, with or without ancillary services, it relates to particular financial instruments and is provided at the initiative of the client."

In essence, Beckford James is saying that it did enough to fulfil its regulatory obligations with regards to execution only transactions and, because it was an execution only transaction, it shouldn't be held responsible for what followed as a result.

First of all, with regards COBS 10, I don't think Beckford James did fulfil its duties. The paragraph quoted by Beckford James is, in isolation, misleading because COBS 10 goes on to say that the appropriateness of the product should be assessed if the product in question can't be classified as "non-complex" (in other words, the product is complex). I'm satisfied this would apply here meaning the appropriateness of what Mr P wanted to do should have been considered by Beckford James. And, for the reasons given above, I don't think Beckford James could, reasonably, have concluded that it was appropriate for Mr P. Under COBS 10, this wouldn't necessarily have precluded the transfer taking place. But Beckford James would have to have warned Mr P that it wasn't appropriate, and it would have had to have considered whether to go ahead "having regard to the circumstances". I don't think a reasonable consideration of the circumstances would have concluded that the transfer should have proceeded.

However, as outlined above, there's also the broader issue here regarding a business's obligations to treat customers fairly and act in their best interests. PRIN 2.1 and COBS 2 are clear on this. For the reasons given above, I don't think Beckford James did treat Mr P fairly or act in his best interests. The fact that Mr P was keen to go ahead with the transfer, refused the offer of advice, and signed execution only paperwork doesn't absolve Beckford James of these broader regulatory responsibilities.

This was broadly the line our adjudicator took. In response Beckford James questioned the circumstances that would allow an execution only transaction to take place given a customer such as Mr P – seemingly committed to a course of action and willing to go it alone – wouldn't be allowed to transact in this way. In Beckford James's view, there's a danger of the industry coming to a "standstill" if consumers are prevented from acting independently. I have some sympathy with Beckford James on this. It can be a difficult balancing act. However, in this particular case, I don't think the situation was that difficult to judge. There was an accumulation of evidence that really should have pointed in one direction – Beckford James should have chosen to not facilitate Mr P's transfer.

what would Mr P have done?

Beckford James says Mr P would have found another business to facilitate the transfer and investment if it had refused to assist him. So it is arguing that it hasn't caused Mr P any detriment because Mr P would have taken the same action anyway, whatever Beckford James's involvement.

Of course, there's no way of knowing what would have happened in such a scenario. However, I think Mr P would have taken on board the fact that a professional, regulated, adviser wasn't willing to help him, especially as SIPP provider A had already taken the same stance. And even if Mr P had tried other firms, they would have been operating under the same regulatory obligations as Beckford James so he would likely have ended up in the same position – he wouldn't have been able to transfer. It is interesting to note that Beckford James says it subsequently declined to act on referrals from S on the advice of its PI insurer and a firm of compliance advisers. I think this is telling because it suggests others within the industry were beginning to treat this business with caution. So, all things considered, I think Beckford James's involvement is crucial here. I think it unlikely Mr P would have transferred without it.

Other issues

For the sake of completeness, it's worth pointing out that there is a strong case for saying Beckford James strayed from execution only and actually gave advice to Mr P. I raise this because a significant amount of the correspondence between our adjudicator and Beckford James was on this subject, with our adjudicator arguing that Beckford James did give advice and Beckford James arguing to the contrary.

The FCA's definition of execution-only 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 (COBS 10) do not apply"

In saying to Mr P on two occasions that there were other options that he would have been better off pursuing (staying in the personal pension or investing in a portfolio of managed funds), Beckford James was, implicitly, saying to Mr P that his proposed course of action wasn't optimal. It was, therefore, straying into advising on the "merits of the transaction".

I understand why Beckford James wanted to suggest alternative courses of action so my point here isn't to be critical. My point is to show the nature of the transaction wasn't as clear-cut as Beckford James has argued. Either way, it doesn't alter the outcome of the complaint because the requirements for an advised sale wouldn't have been met either (not least because Mr P wouldn't have given Beckford James the opportunity to advise him properly).

The above also shows the problems Beckford James was facing here. It knew Mr P's transfer wasn't the best course of action – but it also knew it couldn't advise him of this. Highlighting alternatives that it would have recommended may have seemed a pragmatic compromise. But doing so ran the risk of straying into an advice process that it was never in a position to properly deliver on. In the circumstances the simplest, and correct, thing to have done would have been to have refused to facilitate Mr P's transfer.

the role of other parties

Beckford James is also disappointed that it is being held responsible for what happened given the involvement and (in its view) culpability of other parties.

I recognise Beckford James wasn't responsible for Mr P's interest in the overseas land venture or for initiating Mr P's transfer to a SIPP. It looks like it was a combination of S and Mr P's friends that prompted him down this path. And I recognise Beckford James didn't choose the two SIPP providers either. I also take on board Beckford James's comments about failings at SIPP provider B that have subsequently come to light. So I understand why Beckford James is disappointed that it's now accountable for what happened.

However, Beckford James could have put a stop to the transaction. And it should have put a stop to the transaction because, as a regulated firm, it had certain obligations to fulfil. If it had acted in accordance with those regulatory obligations and treated Mr P fairly and in line with his best interests, I'm satisfied the transfer to the SIPP and the associated investment wouldn't have gone ahead. I therefore consider it fair and reasonable to hold Beckford James responsible for any losses that Mr P may have suffered as a result.

It follows from the above that my provisional decision is to uphold Mr P's complaint against Beckford James LLP.

fair compensation

In assessing what would be fair compensation, my aim is to put Mr P (as far as reasonably possible) in the position he would now be in if hadn't been for Beckford James's actions.

It's not possible to say precisely what Mr P would have done differently. But I take the view that he wouldn't have transferred to the SIPP and invested in the land venture but would, instead, have retained his personal pension plan and the funds it held prior to the transfer. With this in mind, and taking everything into consideration, I'm satisfied what I've set out below is a fair and reasonable approach to compensation.

what should Beckford James do?

To compensate Mr P fairly, Beckford James must:

- Compare the performance of Mr P's investment with that of the benchmark shown below and pay the difference between the *fair value* and the *actual value* of the investment. If the *actual value* is greater than the *notional value*, no compensation is payable.

Beckford James should also pay interest as set out below.

If this shows that redress is due, then this should be paid to Mr P's pension plan. The payment should allow 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 the payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr P as a lump sum after making a deduction of 15%. The payment would otherwise have been used to provide pension benefits, 25% of which would be tax free and the rest would have been taxed according to his likely tax paying status in retirement – presumed to be 20%, so the 15% deduction adequately reflects this.

Income tax may be payable on any interest awarded.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
SIPP	still exists	performance of the funds he was already in prior to transfer	date of investment	date of my decision	8% simple per year from date of decision to date of settlement (if compensation is not paid within 28 days of the business being notified of acceptance)

actual value

This means the actual amount payable from the investment at the end date.

My aim is to return Mr P to the position he would have been in but for the actions of Beckford James. This is complicated where an investment is illiquid (meaning it cannot be readily sold on the open market) as appears to be the case here. It would be difficult to know the *actual value* of the investment. In such a case the *actual value* should be assumed to be nil to arrive at fair compensation. Beckford James should take ownership of the illiquid investment by paying a commercial value acceptable to the pension provider. This amount should be deducted from the total payable to Mr P and the balance be paid as I have set out above.

If Beckford James is unwilling or unable to purchase the investment the *actual value* should be assumed to be nil for the purpose of calculation. Beckford James may wish to require that Mr P provides an undertaking to pay Beckford James any amount he may receive from the investment in the future.

notional value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

Any additional sum paid into the investment should be added to the *notional value* calculation from the point in time when it was actually paid in.

Any withdrawal, income or other payment out of the investment should be deducted from the *notional value* at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there are a large number of regular payments, to keep calculations simpler, I will accept if Beckford James totals all those payments and deducts that figure at the end instead of deducting periodically.

why is this remedy suitable?

I have decided on this method of compensation because:

- If the SIPP transfer hadn't gone ahead Mr P would most likely have remained invested in his existing plan and the same funds.
- Mr P has not yet used his pension plan to purchase an annuity.

The SIPP only exists because of the underlying investment. In order for the SIPP to be closed and further SIPP fees prevented, this investment needs to be removed. But if Beckford James can't buy it Mr P is faced with future SIPP fees. I think it is fair to assume five years of future SIPP fees. So, if Beckford James can't buy the investment, it should pay an amount equal to five years of SIPP fees based on the current tariff. This is in addition to the compensation calculated using a nil value for the investment.

my provisional decision

For the reasons given above, and subject to any further comments and evidence I may receive, I intend to uphold this complaint.

If I do uphold this complaint, I will be asking Beckford James LLP to calculate and pay compensation as set out above.