DRN-5004832

The complaint

Mr P complains, with the help of a representative, that Novia Global Limited ('Novia') failed to undertake sufficient due diligence before accepting his self-invested personal pension ('SIPP') application and executing his subsequent investment instructions.

What happened

Mr P has told us that following an enquiry with his bank about a lost pension, he received a cold call from a separate firm, which I'll call the introducer. Mr P wasn't sure how this firm obtained his contact details but assumed it was linked to the enquiry with his bank. Mr P says the introducer put him in contact with an international adviser.

Mr P has explained that a representative of one of the firms visited him at home and showed him documents and brochures in relation to a SIPP with Novia. He's said he was advised that by transferring, he *"would see an increase in value up to retirement and* [he] *would be charged less."* And *"he would be able to access* [his] *pension sooner."* He's also said he was told this was *"a low risk solution"*, with his investments *"being managed by a professional."*

The meeting led to Mr P agreeing to switch three personal pensions held with the same provider to a Novia SIPP. Mr P has told us he *"had no interest in* [transferring] *prior to contact, as it was not something I had considered due to my pensions being invested in companies that provided me* [with] *regular updates."*

Mr P has said he didn't receive an incentive payment for transferring his pensions.

Mr P applied for a Novia SIPP around the start of March 2021. The summary of his application, completed online, confirmed that:

- He would be transferring four pensions to the SIPP, with a total estimated transfer value of around £154,000 (but he ultimately didn't transfer the largest of these pensions, with an estimated transfer value around £110,000).

- His intermediary wasn't the introducer, but a firm I'll refer to as Firm W, and the advice had been provided from Cyprus. Firm W was regulated in Cyprus but authorised to carry on certain regulated business in the UK by the industry regulator, the Financial Conduct Authority ('FCA'), under a Markets in Financial Instruments Directive ('MiFID') II passport arrangement. He would be paying Firm W 5% of the total transferred into the SIPP, as well as an ongoing charge of 1% per year.

Around £49,000 was received into Mr P's SIPP towards the end of March 2021 from the three personal pensions. The SIPP was then invested in a model portfolio made up of five funds. The portfolio was managed by Firm W acting in the capacity of a Discretionary Fund Manager ('DFM'). The DFM fee was 0.5% per year.

Around the start of April 2021, Mr P took approximately £12,000 from his SIPP as a pension commencement lump sum ('PCLS').

Around November 2021, the intermediary registered to Mr P's account was changed from Firm W to a firm I'll call Firm T, which was regulated in the UK. A letter sent by Firm W to explain the change to its clients said:

> *"We are pleased to announce that* [Firm W] *have reached agreement with* [Firm T]*, a UK based, FCA regulated company…to provide IFA services of all our clients in the UK…*
>
> *Whilst* [Firm W] *is regulated in the UK under the* [Temporary Permissions Regime]*, it is our intention that* [Firm T]*, which is a FCA regulated IFA, be the IFA on record for our UK clients to provide local expertise and superior service."*

The latest statement I have seen for Mr P's SIPP is from October 2023 and shows a value around £27,000.

Mr P's complaint

In December 2022, a professional representative raised a complaint with Novia on Mr P's behalf. The representative made the following points, amongst others:

- Mr P agreed to transfer as he was told this would be the easiest way to access his PCLS. This was incorrect – Mr P would still be entitled to his PCLS whether he transferred or not.
- The transfers were recommended by an international adviser which didn't have the required permissions to advise on them.
- Novia had a duty of care to Mr P, and in allowing business recommended by an unauthorised adviser, had acted negligently.
- In allowing the transfers, Novia had breached several FCA rules.
- Novia was liable under section 27 of the Financial Services and Markets Act 2000 ('FSMA') and relevant case law for accepting business from an unregulated adviser.
- The investment strategy, provided by the adviser in a DFM capacity, had lost Mr P capital, which wouldn't have happened had he not transferred.
- Mr P was seeking to be put back into the position he would now be in had he not transferred to the SIPP.

Novia issued its final response to the complaint in February 2023. It said the adviser was authorised in the EU and had passporting rights into the UK. And there was no limitation on advising on UK products with passported permissions. It also noted that Mr P had chosen to take advice from his adviser before Novia had become involved.

The complaint was referred to the Financial Ombudsman Service and assigned to one of our Investigators. They thought it should be upheld. In summary, they:

- Set out the considerations relevant to reaching their view on the merits of Mr P's complaint, including the FCA's Principles for Businesses and regulatory publications.
- Acknowledged that it wasn't Novia's responsibility to ensure the pension switches or investments were suitable for Mr P. However, they said that to meet its regulatory

obligations when conducting SIPP business, Novia had to decide whether to accept or reject particular investments and/or referrals of business with the Principles in mind.

- Noted that Novia had conducted some due diligence on Firm W, which was good practice. But they said they hadn't seen any evidence from Novia setting out exactly what Firm W's regulatory permissions were.

- Explained that Firm W was based in Cyprus and held a MiFID passport at the time of Mr P's application, allowing it to carry on some regulated activities in the UK. However, they didn't think this was sufficient to advise on pension switches and pension investments without a top-up permission, which Firm W didn't have.

- Thought that as part of its due diligence, Novia should have checked Firm W had the requisite permissions to advise on pensions in the UK. And queried why it was receiving new business from Firm W when it had told Novia it would only be servicing existing clients. They believed if Novia had done this, it would have likely revealed that the introducer, not Firm W, was advising new clients to switch to Novia SIPPs.

- Said that had Novia rejected Mr P's application based on Firm W not having the requisite permissions, he wouldn't have transferred his pensions.

The Investigator set out how Novia should put things right, by calculating if Mr P would have been better off remaining in the pensions he transferred to the SIPP and paying him compensation. They also said Novia should pay Mr P £300 for the distress caused to him by its failings.

Novia didn't agree with the Investigator. It made a number of points in response, including:

- The Investigator had failed to adequately explain the existence, nature and extent of Novia's due diligence duty, which wasn't recognised in law. The Investigator had also relied on regulatory rules and publications which couldn't be relied on in a legal claim.

- Novia conducted extensive due diligence on Firm W and had rigorous controls and safeguards in place in relation to the investments available in its SIPPs.

- As a provider of a non-advised platform, Novia ought to have been able to rely upon the adviser to ensure Mr P received suitable advice as to the wisdom of the pension switches and investments.

- The Investigator had failed to consider whether sufficient due diligence was undertaken on the investments in Mr P's SIPP. Had they done so, they would have found that Novia only permits standard investments in its SIPP that are regulated by the FCA or the Bank of Ireland.

- There was no loss as the investments in Mr P's SIPP were standard investments. These investments could fluctuate in value, but so would the investments in his pensions had he not transferred.

- Mr P had said in his complaint that he *"received negligent advice and has suffered a loss as a result"*. Any loss was exclusively a consequence of allegedly unsuitable investment advice and investment loss was Mr P's adviser's responsibility. The Financial Ombudsman Service must not decide a case on a basis which hadn't been pleaded and/or correct the complainant's pleaded case.

- Firm W intended to introduce new business and advise clients.

- In the second quarter of 2021, the FCA held numerous meetings with Firm W. Novia understood the FCA raised concerns that Firm W didn't have appropriate permissions to conduct certain regulated activities, warned Firm W of the consequences of taking introductions from an unregulated entity and asked Firm W to cancel all applications in its pipeline. The FCA also ordered a skilled person review of Firm W's business during which Firm W accepted liability for complaints related to its shortfall in permissions, including Mr P's.

- The Investigator had taken at face value representations made by Firm W, without testing their validity or giving Novia an opportunity to respond to them. Had this been investigated further, Novia believes the Investigator would have become aware that Firm W intended to give advice and continued to conduct activities after the FCA made it aware of its position.

- The Investigator should have at least asked Mr P to disclose any correspondence between him and Firm W regarding his motivations for switching and allowed Novia the chance to respond to it.

- At the very least, the Financial Ombudsman Service should apportion any loss between the adviser and Novia, and consideration of this would lead to a conclusion that Novia is only responsible for a small part of any loss suffered, particularly given the skilled person review in which Mr P was included.

- The Investigator had reached an unsubstantiated conclusion that Mr P would have remained with his previous provider. In Novia's view, it was just as plausible that he would have been accepted by another platform provider, and it was also equally as plausible that that platform provider wouldn't have carried out the investment due diligence that Novia carried out so well. Further, it was equally plausible that Mr P would have ended up invested in assets that were inherently unsuitable for him and suffered material loss or detriment.

- There was no indication provided by Mr P, in either his original complaint or his referral to the Financial Ombudsman Service, that he would have remained with his previous pension provider had Novia refused to accept the introduction from Firm W. Mr P took a full PCLS three days after transferring to Novia, so it's likely that his intention was to access pension freedoms by taking a PCLS and remaining invested. With this motivation, it's unlikely Mr P would have kept his pensions with his previous provider.

- It wasn't fair nor reasonable to come to the conclusion that Mr P wouldn't have switched, but to calculate the redress using a benchmark that aims for capital growth and includes some investment risk.

The Investigator asked Mr P if he had received correspondence from Firm W following the skilled person review. Mr P responded that he didn't receive any correspondence of this nature.

The Investigator considered Novia's arguments but ultimately wasn't persuaded to change their opinion.

As no agreement could be reached, the complaint was passed to me to decide.

My provisional decision

I recently issued a provisional decision on this complaint. I concluded that Mr P's complaint should be upheld. Mr P didn't provide any further submissions. Novia didn't accept the provisional decision and made further submissions. In summary, amongst other things, Novia said:

- The Novia SIPP was suitable for Mr P – and no finding had been made otherwise – however it's highly likely Mr P's existing pension plans were not. No meaningful assessment had been conducted into whether it would have been fair and reasonable for Novia to reject Mr P's application, resulting in him remaining in unsuitable plans.

- If we reviewed the skilled person review, we would be able to make an informed decision on what Mr P would have done if Novia had declined his application. It believes he would have sought pension freedoms, most likely through another firm, and paid for advice. The skilled person review clearly set out that *"Flexi access is not available with the client's existing schemes"*.

- We should liaise with the FCA so we're aware of the full circumstances of Mr P's complaint. The burden shouldn't be on Novia to prove that Firm W has compensated Mr P or to chase Firm W to compensate him.

- The SIPP offered Mr P access to his PCLS without having to take his entire fund and therefore avoided a tax bill (which it assessed would be in the region of £6,000).

- It was highly likely that Mr P was invested in a managed fund which was no longer aligned to his attitude to risk and so moving to a managed portfolio was better aligned to his attitude to risk. Mr P's original complaint said that given his age at the time of transfer he ought to have been gearing towards retirement through a shift to lower risk funds in a scheme with minimal charges, to preserve capital. Given Mr P's stated knowledge and experience (he had said he had no knowledge of the risks involved in transferring his pension in his original complaint) he would have needed to seek and pay for advice in order to transfer his pension.

- It was implausible that Mr P was contacted by the introducer because of an enquiry with his bank. If we knew the actual reason why Mr P came into contact with the introducer, we may better understand his motivation for moving his pension.

- The FCA saw no need to contact Novia, alert it or hold it accountable for Firm W's lack of permissions so it does not (and seemingly neither did the FCA) consider this was something it was required to bring to Mr P's attention. It's also notable that Firm W are still operating under FCA run-off permission and supervision.

- The cost of Mr P's advice was within Novia's decency limits. The upfront fee was just over £2,500 which many would consider is reasonable for retirement advice and the fee was agreed with Mr P in advance. It's inappropriate to consider percentages and not monetary values and the cost of giving advice.

- Investment due diligence hadn't been considered in the provisional decision but if Novia had made non-standard or high-risk investments available these undoubtedly would have been added to the list of anomalies. Novia had been afforded no credit for providing a platform with only standard assets which protects its customers.

- The redress calculation in the provisional decision referenced illiquid assets in Mr P's SIPP, of which there are none.

- The complaint and provisional decision were premised on Mr P suffering a loss. If the SIPP had suffered any loss compared to Mr P's previous plans, it was due to charges, de-risking and fund manager investment decisions.

- We can't assume that Mr P wouldn't have suffered a loss had he remained with his previous provider. It was unknown how Mr P was invested in his previous plans, and his investments could have been inherently unsuitable leading to him suffering a loss.

- It strongly contends that the circumstances of Mr P's transfer don't reflect any actionable loss. We hadn't considered whether the investments in the Novia SIPP were suitable for him. It wasn't fair for us to reach a decision without undertaking that analysis.

- The circumstances of Mr P's complaint were clearly distinguishable from the recent judgment in *Options UK Personal Pensions LLP v Financial Ombudsman Service Limited* [2024] EWCA Civ 541. In that case, the SIPP provider accepted business from an unregulated and unsafe introducer which there was a warning about on the regulator's website. The investment was also high-risk and illiquid. This differs from Mr P's complaint as Novia only deals with regulated introducers and only permits standard investments.

What I've decided – and why

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

I've carefully considered the points Novia has raised in response to my provisional decision. Although I've considered everything it's said, I don't intend to respond to all the points in detail when reaching my final decision. This isn't intended to be discourteous. But the Financial Ombudsman Service's role is to resolve disputes quickly and with minimum formality. So, I've concentrated on the issues I consider to be necessary for me to reach a fair and reasonable decision on Mr P's complaint. I shall, however, make the following comments on Novia's response, which I hope are helpful in explaining why I have reached the decision I have:

- Mr P's complaint is that Novia should have performed appropriate due diligence and shouldn't have accepted his application for the SIPP. Had Novia not accepted Mr P's SIPP application, I've found it's most likely that he would have remained with his previous provider, given he's told us he had *"no interest"* in transferring prior to speaking with the introducer. There's no evidence to the contrary, or that he had any concerns with his existing provider.

- I'm not persuaded that accessing his PCLS was an objective for Mr P prior to speaking with the introducer. At the time he applied for the SIPP, Mr P had been able to access his pension benefits for over three years, yet it appears he had taken no action to transfer his pension to a new provider that allowed flexi-access drawdown (if it truly was his objective to access his PCLS and leave the remainder of his fund invested), or to take benefits from his existing plans. I think it's more likely than not that the adviser put forward accessing the PCLS as a benefit of transferring, as Mr P has said.

- I make no comment on whether Mr P's previous schemes were suitable for him – he

isn't complaining about this, and I don't think it's relevant to my decision. His complaint is that Novia should never have accepted his SIPP application and that as a result he thinks he's suffered a loss. That's what I'm considering in this decision.

- For these reasons, I remain satisfied that the redress calculation should involve a comparison between the SIPP and Mr P's previous schemes.

- I don't agree that Mr P's recollections of how he came into contact with the introducer are unreasonable – he may have been dealing with his bank about the lost pension and then received a completely unrelated cold call from the introducer. That may have been a coincidence – but that doesn't mean it's implausible.

- Mr P is entitled to choose which party he complains to and given Novia was the regulated party involved, it isn't surprising he's chosen to complain to it. We've asked Mr P if he's been compensated by Firm W and he's confirmed that he hasn't been. If Novia considers other parties are wholly or partly responsible for the loss, it's free to pursue those other parties itself. I've provided for an assignment of rights in the redress to assist with this if Novia requires.

- It's not incumbent on the FCA to warn businesses when they are doing something wrong. It's for a regulated firm to take appropriate action to prevent consumer detriment.

- In my view, considering the charges as a percentage of the fund isn't inappropriate. For example, a charge of £2,500 has much more impact on an investment valued around £50,000, than it would on an investment valued around £500,000. In any event, it's clear that the initial and ongoing charges for Mr P's move to the Novia SIPP have potentially had a detrimental effect on the value of his pension fund. Without regulated advice, which Firm W was unable to give, Mr P wasn't in a position to make an informed decision on whether a SIPP was suitable for him and indeed whether he should have transferred his pensions in the first place.

- As I set out in my provisional decision, the fact that there were only standard investments in Novia's SIPP may well reduce the level of any compensation payable, as any loss will likely be less than had Novia permitted Mr P to invest in high-risk, unregulated assets. Whether or not this complaint should be upheld is, however, not a question of the degree of loss that Mr P has suffered or whether the assets he was allowed to invest in were more or less risky. What must be determined is whether Mr P is likely to be worse off as a result of the transfer, which on the face of it, it appears he may well be. But that cannot be finally determined until the calculation I have provided for in my redress award is undertaken.

- The illiquid assets section of the redress calculation is included for completeness. It's not unheard of for investment funds considered standard to become illiquid. For example, the suspension of property funds during the coronavirus pandemic.

- The Financial Ombudsman Service doesn't uphold or reject complaints based on whether there is a proven loss. We decide SIPP due diligence complaints based on whether something has happened that wouldn't have, were the respective parties to have taken the actions they reasonably should have. If the redress calculation shows there is no loss, then Novia won't be required to compensate Mr P, other than with respect to the distress and inconvenience he's been caused. However, that doesn't mean Novia isn't required to carry out the calculation to determine whether there is a loss. In my provisional decision, I explained that there were a number of charges Mr P incurred by transferring that he wouldn't have incurred had he remained with his

existing provider. These may well factor into any loss and it's right that they are considered as part of that loss calculation.

- Although I accept there are differences between Mr P's complaint and the recent Court of Appeal judgment, for instance with the type of investments within the SIPP, I don't agree that there are no similarities. While Novia thought it was dealing with a regulated introducer, that doesn't change the fact that Firm W wasn't authorised to carry out the activities it was undertaking. In terms of the activities it was undertaking, it was, in effect, unregulated. Again, some of the facts of the complaints that we see are more egregious than others. But that doesn't mean that only the worst examples of consumer harm should lead to a complaint being upheld. What's important for an Ombudsman to consider is whether a regulated party's actions have been such that any loss may have been prevented had they acted fairly and reasonably and in accordance with regulatory requirements and good industry practice.

For these reasons, I haven't been persuaded to depart from my provisional findings. So, I've repeated those findings below, with a few minor changes, to reflect my final decision.

When considering what's fair and reasonable in the circumstances, I need to take account of relevant law and regulations, regulators' rules, guidance and standards, codes of practice and, where appropriate, what I consider to have been good industry practice at the relevant time.

In deciding what's fair and reasonable in the circumstances, it's appropriate to take an inquisitorial approach. And, ultimately, what I'll be looking at here is whether Novia took reasonable care, acted with due diligence and treated Mr P fairly, in accordance with his best interests. And what I think's fair and reasonable in light of that. And I think the key issue in Mr P's complaint is whether it was fair and reasonable for Novia to have accepted his SIPP application in the first place. As part of that, I need to consider whether Novia carried out appropriate due diligence checks on Firm W *before* deciding to accept Mr P's SIPP application from it.

Relevant considerations

I've carefully taken account of the relevant considerations to decide what's fair and reasonable in the circumstances of this complaint.

The Principles

In my view, the FCA's Principles for Businesses are of particular relevance. The Principles for Businesses, which are set out in the FCA's handbook *"are a general statement of the fundamental obligations of firms…under the regulatory system"* (PRIN 1.1.2 G). And I consider that the Principles relevant to this complaint include Principles 2, 3 and 6 which say:

> *"Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.*
>
> *Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.*
>
> *Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly."*

I've carefully considered the relevant law and what this says about the application of the FCA's Principles. *In R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin) ('BBA') Ouseley J said at paragraph 162:

> *"The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirements they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules."*

And at paragraph 77 of BBA Ouseley J said:

> *"Indeed, it is my view that it would be a breach of statutory duty for the Ombudsman to reach a view on a case without taking the Principles into account in deciding what would be fair and reasonable and what redress to afford. Even if no Principles had been produced by the FSA, the FOS would find it hard to fulfil its particular statutory duty without having regard to the sort of high level Principles which find expression in the Principles, whoever formulated them. They are of the essence of what is fair and reasonable, subject to the argument about their relationship to specific rules."*

In *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878 ('BBSAL'), Berkeley Burke brought a judicial review claim challenging the decision of an Ombudsman who had upheld a consumer's complaint against it. The Ombudsman considered the FCA Principles and good industry practice at the relevant time. He concluded that it was fair and reasonable for Berkeley Burke to have undertaken due diligence in respect of the investment before allowing it into the SIPP wrapper, and that if it had done so, it would have refused to accept the investment. The Ombudsman found Berkeley Burke had therefore not complied with its regulatory obligations and hadn't treated its client fairly.

Jacobs J, having set out some paragraphs of BBA including paragraph 162 set out above, said (at paragraph 104 of BBSAL):

> *"These passages explain the overarching nature of the Principles. As the FCA correctly submitted in their written argument, the role of the Principles is not merely to cater for new or unforeseen circumstances. The judgment in BBA shows that they are, and indeed were always intended to be, of general application. The aim of the Principles-based regulation described by Ouseley J. was precisely not to attempt to formulate a code covering all possible circumstances, but instead to impose general duties such as those set out in Principles 2 and 6."*

The BBSAL judgment also considers section 228 FSMA and the approach an Ombudsman is to take when deciding a complaint. The judgment of Jacobs J in BBSAL upheld the lawfulness of the approach taken by the Ombudsman in that complaint, which I have described above, and included the Principles and good industry practice at the relevant time as relevant considerations that were required to be taken into account.

As outlined above, Ouseley J in the BBA case held that it would be a breach of statutory duty if I were to reach a decision on a complaint without taking the Principles into account in deciding what is fair and reasonable in all the circumstances of a case. And Jacobs J adopted a similar approach to the application of the Principles in BBSAL. So, the Principles are a relevant consideration that I must take into account when deciding this complaint.

The Adams court cases and COBS 2.1.1 R

I confirm I have taken account of the judgment of the High Court in the case of *Adams v Options SIPP* [2020] EWHC 1229 (Ch) and the Court of Appeal judgment in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474. I note the Supreme Court refused Options permission to appeal the Court of Appeal judgment.

I've considered whether these judgments mean the Principles should not be taken into account in deciding this case. And I am of the view they do not. In the High Court case, HHJ Dight didn't consider the application of the Principles and they didn't form part of the pleadings submitted by Mr Adams. One of the main reasons why HHJ Dight found that the judgment of Jacobs J in BBSAL wasn't of direct relevance to the case before him was because *"the specific regulatory provisions which the learned judge in Berkeley Burke was asked to consider are not those which have formed the basis of the claimant's case before me."*

Likewise, the Principles weren't considered by the Court of Appeal. So, the *Adams* judgments say nothing about the application of the FCA's Principles to the Ombudsman's consideration of a complaint.

I acknowledge that COBS 2.1.1 R (*"A firm must act honestly, fairly and professionally in accordance with the best interests of its client"*) overlaps with certain of the Principles and that this rule was considered by HHJ Dight in the High Court case. Mr Adams pleaded that Options SIPP owed him a duty to comply with COBS 2.1.1 R, a breach of which, he argued, was actionable pursuant to section 138(D) of FSMA ('the COBS claim'). HHJ Dight rejected this claim and found that Options SIPP had complied with the best interests rule on the facts of Mr Adams' case.

Although the Court of Appeal ultimately overturned HHJ Dight's judgment, it rejected that part of Mr Adams' appeal that related to HHJ Dight's dismissal of the COBS claim on the basis that Mr Adams was seeking to advance a case that was radically different to that found in his initial pleadings. The Court found that this part of Mr Adams' appeal was not a challenge to the grounds on which HHJ Dight had dismissed the COBS claim, but was rather an attempt to put forward an entirely new case.

I note that HHJ Dight found that the factual context of a case would inform the extent of the duty imposed by COBS 2.1.1 R. HHJ Dight said at paragraph 148:

> *"In my judgment in order to identify the extent of the duty imposed by Rule 2.1.1 one has to identify the relevant factual context, because it is apparent from the submissions of each of the parties that the context has an impact on the ascertainment of the extent of the duty. The key fact, perhaps composite fact, in the context is the agreement into which the parties entered, which defined their roles and functions in the transaction."*

The facts in Mr P's case are different from those in *Adams*. There are also differences between the breaches of COBS 2.1.1 R alleged by Mr Adams and the issues in Mr P's complaint. The breaches were summarised in paragraph 120 of the Court of Appeal judgment. In particular, HHJ Dight considered the contractual relationship between the parties in the context of Mr Adams' pleaded breaches of COBS 2.1.1 R that happened after the contract was entered into. In Mr P's complaint, I'm considering whether Novia ought to have identified that business introductions from the introducer and Firm W involved a risk of consumer detriment and, if so, whether it ought to have ceased accepting introductions from the introducer and Firm W prior to entering into a contract with Mr P.

On this point, I think it's also important to emphasise that I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And, in doing that, I'm required to take into account relevant considerations which include law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. This is a clear and relevant point of difference between this complaint and the judgments in both *Adams* cases. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

To be clear, I've proceeded on the understanding Novia was not obliged – and not able – to give advice to Mr P on the suitability of its SIPP or the underlying investments for him personally. But I'm satisfied Novia's obligations included deciding whether to accept particular investments into its SIPP and/or whether to accept introductions of business from particular businesses.

Regulatory publications

The FCA (and its predecessor, the Financial Services Authority ('FSA')) has issued a number of publications which remind SIPP operators of their obligations and set out how they might achieve the outcomes envisaged by the Principles, namely:

- The 2009 and 2012 thematic review reports.
- The October 2013 finalised SIPP operator guidance.
- The July 2014 *"Dear CEO"* letter.

The 2009 report included the following statement:

> *"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses ('a firm must pay due regard to the interests of its customers and treat them fairly') insofar as they are obliged to ensure the fair treatment of their customers. COBS 3.2.3(2) states that a member of a pension scheme is a 'client' for COBS purposes, and 'Customer' in terms of Principle 6 includes clients.*
>
> *It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six TCF consumer outcomes…*
>
> *We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the member to confirm the position, or by contacting the firm giving advice and asking for clarification. Moreover, while they are not responsible for the advice, there is a reputational risk to SIPP operators that facilitate the SIPPs that are unsuitable or detrimental to clients.*
>
> *Of particular concern were firms whose systems and controls were weak and inadequate to the extent that they had not identified obvious potential instances of poor advice and/or potential financial crime. Depending on the facts and*

circumstances of individual cases, we may take enforcement action against SIPP operators who do not safeguard their customers' interests in this respect, with reference to Principle 3 of the Principles for Businesses ('a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems').

The following are examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms:

- *Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm's clients, and that they do not appear on the FSA website listing warning notices.*

- *Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.*

- *Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified.*

- *Being able to identify anomalous investments, e.g. unusually small or large transactions or more 'esoteric' investments such as unquoted shares, together with the intermediary that introduced the business. This would enable the firm to seek appropriate clarification, e.g. from the client or their introducer, if it is concerned about the suitability of what was recommended.*

- *Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely.*

- *Routinely identifying instances of execution-only clients who have signed disclaimers taking responsibility for their investment decisions, and gathering and analysing data regarding the aggregate volume of such business.*

- *Identifying instances of clients waiving their cancellation rights, and the reasons for this."*

Although I've quoted from the 2009 review, I've considered all of the publications I referred to above in their entirety.

I acknowledge that the 2009 and 2012 reports and the *"Dear CEO"* letter aren't formal 'guidance' (whereas the 2013 finalised guidance is). However, the fact that the reports and *"Dear CEO"* letter didn't constitute formal guidance doesn't mean their importance should be underestimated. They provide a reminder that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it's treating its

customers fairly and producing the outcomes envisaged by the Principles. In that respect the publications, which set out the regulators' expectations of what SIPP operators should be doing, also go some way to indicate what I consider amounts to good industry practice and I'm therefore satisfied it's appropriate to take them into account.

It's relevant that when deciding what amounted to good industry practice in the BBSAL case, the Ombudsman found that *"the regulator's reports, guidance and letter go a long way to clarify what should be regarded as good practice and what should not."* And the judge in BBSAL endorsed the lawfulness of the approach taken by the Ombudsman.

I note that HHJ Dight in the *Adams* case didn't consider the 2012 thematic review, 2013 SIPP operator guidance and 2014 *"Dear CEO"* letter to be of relevance to his consideration of Mr Adams' claim. But it doesn't follow that those publications are irrelevant to my consideration of what's fair and reasonable in the circumstances of this complaint. I'm required to take into account good industry practice at the relevant time. And, as mentioned, the publications indicate what I consider amounts to good industry practice at the relevant time.

That doesn't mean that, in considering what is fair and reasonable, I'll only consider Novia's actions with these documents in mind. The reports, "*Dear CEO"* letter and guidance gave non-exhaustive examples of good industry practice. They didn't say the suggestions given were the limit of what a SIPP operator should do. As the annex to the *"Dear CEO"* letter notes, what should be done to meet regulatory obligations will depend on the circumstances.

To be clear, I don't say the Principles, or the publications, obliged Novia to ensure the SIPP application, pension switches and SIPP investments were suitable for Mr P. It's accepted Novia wasn't required to give advice to Mr P, and couldn't give advice. And I accept the publications don't alter the meaning of, or the scope of, the Principles. But they are evidence of what I consider to have been good industry practice at the relevant time, which would bring about the outcomes envisaged by the Principles.

What did Novia's obligations mean in practice?

In this case, the business Novia was conducting was its operation of SIPPs on a non-advisory basis. I'm satisfied that meeting its regulatory obligations when conducting this business would include deciding whether to accept or reject particular investments and/or referrals of business.

The regulatory publications provided some examples of good industry practice observed by the FSA and FCA during their work with SIPP operators including being satisfied that a particular introducer is appropriate to deal with.

As I explain further below, I think Novia ought to have identified that Firm W was most likely carrying out regulated activities relating to arranging and advising on investments.

Firm W's regulatory status

In determining whether Firm W had the appropriate UK regulatory permissions to provide the advice that it has purported to on the transfer of Mr P's pensions to the Novia SIPP and subsequent investments, as part of its due diligence, I would have expected Novia to check that Firm W had the appropriate passported permissions, it being an overseas regulated firm.

Chapter 12 of the FCA's Perimeter Guidance Manual ('PERG') offers guidance to those involved in the running of personal pension schemes, like the Novia SIPP. The guidance in place at the time the application was made for Mr P's SIPP confirms that a personal pension scheme, for the purpose of regulated activities (PERG 12.2):

> *"…is defined in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the Regulated Activities Order)* [the 'RAO'] *as any scheme other than an occupational pension scheme (OPS) or a stakeholder pension scheme that is to provide benefits for people:*
>
> - *on retirement; or*
> - *on reaching a particular age; or*
> - *on termination of service in an employment".*

It goes on to say:

> *"This will include self-invested personal pension schemes ('SIPPs') as well as personal pensions provided to consumers by product companies such as insurers, unit trust managers, contractual scheme managers or deposit takers (including free-standing voluntary contribution schemes)".*

So, under the RAO, a SIPP is a personal pension scheme. Article 82 of the RAO (Part III Specified Investments) provides that rights under a personal pension scheme are a specified investment.

Novia had, and still has, regulatory permission to establish and operate personal pension schemes – a regulated activity under Article 52 of the RAO.

At the time of Mr P's SIPP application, SUP App 3 in the regulator's Handbook set out guidance on passporting issues including a table at SUP App 3.9.5 G which included the following setting out the investments and activities covered by MiFID/a MiFID passport:

> *"**Services set out in Annex I to MiFID***
>
> ***SUP App 3.9.5 G***

Table 2: MiFID investment services and activities		*Part II RAO Investments*	*Part III RAO Investments*
	A MiFID investment services and activities		
1.	*Reception and transmission of orders in relation to one or more financial instruments*	*Article 25*	*Article 76-81, 82B, 83-85, 89*
5.	*Investment advice*	*Article 53(1)*	*Article 76-81, 82B 83-85, 89"*

Despite the similar article number, article 82B isn't related to rights under a personal pension scheme – it relates to emission allowances.

Annex I to MiFID II also doesn't list pensions as a 'financial instrument'. Further, at the time of Mr P's SIPP application, PERG 10.4A of the Handbook explained that *"beneficial interests in financial instruments held under the trusts of a pension scheme will not themselves be financial instruments under MiFID. And rights under a personal pension or stakeholder pension scheme are also not financial instruments. So, advice given to scheme members or prospective members should not be investment advice under MiFID"*.

The guidance at SUP 13A.1.2 G of the Handbook at the time of Mr P's SIPP application explained that an EEA firm wishing to carry on activities in the UK outside the scope of its EEA rights (i.e. its passporting rights) would require a *"top-up"* permission under Part 4A of the Act (the Act being FSMA). In other words, it needed *"top-up"* permissions from the regulator to carry on regulated activities which weren't covered by its MiFID passport rights.

The relevant rules regarding *"top-up"* permissions could be found in the Handbook at SUP 13A.7. At the time of Mr P's application SUP 13A.7.1 G stated:

> *"If a person established in the EEA:*
>
> *(1) does not have an EEA right;*
>
> *(2) does not have permission as a UCITS qualifier; and*
>
> *(3) does not have, or does not wish to exercise, a Treaty right (see SUP 13A.3.4 G to SUP 13A.3.11 G);*
>
> *to carry on a particular regulated activity in the United Kingdom, it must seek Part 4A permission from the appropriate UK regulator to do so (see the appropriate UK regulator's website: www.fca.org.uk/firms/authorisation/apply-authorisation for the FCA and www.bankofengland.co.uk/pra/Pages/authorisations/newfirm/default.aspx for the PRA). This might arise if the activity itself is outside the scope of the Single Market Directives, or where the activity is included in the scope of a Single Market Directive but is not covered by the EEA firm's Home State authorisation. If a person also qualifies for authorisation under Schedules 3, 4 or 5 to the Act as a result of its other activities, the Part 4A permission is referred to in the Handbook as a top-up permission."*

The guidance at SUP App 3 of the FCA's Handbook (which I've set out above) was readily available in 2021 and clearly illustrated that EEA-authorised firms may only carry out specified regulated activities in the UK if they have the relevant EEA passport rights.

In Firm W's situation, the regulated activities in question didn't fall under MiFID passporting, and Firm W required FCA permission to conduct them in the UK. Novia, acting in accordance with its own regulatory obligations, should have ensured it understood the relevant rules, guidance and legislation I've referred to above, (or sought advice on this, to ensure it could gain the proper understanding), when considering whether to accept business from Firm W, which was an EEA firm passporting into the UK. It should therefore have known – or have checked and discovered – that a business based in Cyprus that was EEA-authorised needed to have *"top-up"* permissions to give advice and make arrangements in relation to personal pensions in the UK. And that *"top-up"* permissions had to be granted by the UK regulator, the FCA.

The activities undertaken by Firm W

I think the available evidence indicates Firm W was carrying out regulated activities. Rights under a personal pension scheme are a security and relevant investment. Under Article 25(1) of the RAO, making arrangements for another person to buy and sell these types of investments is a regulated activity. And under Article 25(2) of the RAO, making arrangements with a view to a person who participates in the arrangements buying and selling these types of investments is also a regulated activity.

In my view, Firm W was carrying out regulated activities within Article 25 of the RAO – and this ought to have been clear to Novia at the time.

PERG says the following about Article 25(1):

> *"The activity of arranging (bringing about) deals in investments is aimed at arrangements that would have the direct effect that a particular transaction is concluded (that is, arrangements that bring it about)."*

It then says the following about Article 25(2):

> *"The activity of making arrangements with a view to transactions in investments is concerned with arrangements of an ongoing nature whose purpose is to facilitate the entering into of transactions by other parties. This activity has a potentially broad scope and typically applies in one of two scenarios. These are where a person provides arrangements of some kind:*
>
> *(1) to enable or assist investors to deal with or through a particular firm (such as the arrangements made by introducers); or*
>
> *(2) to facilitate the entering into of transactions directly by the parties (such as multilateral trading facilities of any kind…exchanges, clearing houses and service companies (for example, persons who provide communication facilities for the routing of orders or the negotiation of transactions))."*

I think Firm W's activities here amounted to the regulated activity of *"making arrangements"* for the SIPP under one or other, or both, of the Article 25 provisions.

But even if I thought that Firm W wasn't acting beyond its permissions by making arrangements (which I don't), I think it was also undertaking another regulated activity for which it didn't have the requisite permissions. I say this because, I think Firm W was advising on Mr P's pension switches.

Under the RAO, a SIPP is a personal pension scheme. Article 82 of the RAO (Part III Specified Investments) provides that rights under a personal pension scheme are a specified investment. As set out above, Article 82 investments aren't covered by MiFID.

I think it's most likely that Firm W advised Mr P on the switches and subsequent investments, given on his SIPP application, Firm W was listed as his *"intermediary"* and the ongoing advice charge from the SIPP was to be paid to it. I also note that when Firm W stopped being Mr P's intermediary around November 2021, it said it had reached agreement with another firm to provide *"IFA services"* for its clients – IFA meaning independent financial adviser. Additionally, Novia has told us it only allowed advised clients on its platform and its understanding was that Firm W had advised Mr P. Moreover, Mr P said in his complaint to Novia that the introducer put him in contact with an *"international adviser"*.

Taking everything into account, I think Novia's understanding at the time of the transactions which are the subject of this complaint, was that Firm W was giving advice on the switches to the SIPP, and the initial investment of monies post-transfer, and that it was permitted to do so. Novia should reasonably have understood the applicable regulations and, therefore, have readily identified that Firm W was carrying out regulated activities without the requisite permissions from the regulator. It should therefore have known that there was a clear risk of consumer detriment in accepting introductions in these circumstances. That's because Firm W, holding only MiFID permissions, was advising on article 82 investments without *"top-up"* permissions.

I don't find it plausible that Firm W's advice was limited to advising on the Novia SIPP wrapper or the investments within it. Indeed, the available evidence indicates that it wasn't. That advice was only made possible by way of the pension switches into the SIPP. That was the source of the monies in respect of which the investment advice was being given; *but for* the switches, the investment advice wouldn't have been possible because there wouldn't have been funds available for investment – any separation of the two under the circumstances would be artificial.

I'm satisfied that Firm W was appointed as Mr P's financial adviser in respect of his SIPP as noted in his SIPP application. And that it was providing him with advice in respect of this transaction.

Overall, I'm satisfied that Firm W was advising on the pension switches and that Novia understood this to be the case or would have understood this to be the case if it had undertaken sufficient due diligence into Firm W.

All in all, I think it's fair and reasonable to say that Novia, had it acted in accordance with its regulatory obligations and the standards of good practice at the time, ought to have known Firm W was carrying out regulated activities involving arranging and advising in relation to personal pensions in the UK, for which it didn't have the requisite permissions. In turn, taking everything into account, given the lack of regulatory permissions and the danger that Mr P hadn't been appropriately advised, it wasn't fair and reasonable for Novia to accept Mr P's application in such circumstances.

Checks Novia undertook on Firm W

On a similar complaint to Mr P's, Novia has provided this service with the evidence it reviewed when determining whether to accept business from Firm W in November 2020. This included:

- Proof of identity of Firm W's directors and shareholders.
- 'World-Check' on each of Firm W's owners and directors to check for any criminal or disciplinary action against the firm or individuals.
- Novia intermediary application form, completed by Firm W.
- Register of directors.
- Register of shareholders.
- Company structure.
- Articles of Association.

- Certificate of incorporation.

Novia has confirmed that its checks found no issues, so it agreed to accept business from Firm W towards the end of November 2020.

However, I haven't seen evidence which shows that Novia checked Firm W's regulatory permissions on the FCA Register. I consider that Novia ought to have checked this – and had it done so, it's *most likely* that it would have discovered that Firm W didn't have the necessary *"top-up"* permissions.

In the unlikely eventuality that the Register didn't make it clear whether Firm W had the necessary top-up permissions – for example, if the 'Permission' page had erroneously been left blank – Novia ought to have taken further steps to independently verify what the correct position was. For example, by contacting the FCA. And I think the FCA would have confirmed whether Novia held any *"top-up"* permissions.

Alternatively, if Novia was unable to independently verify Firm W's permissions, I think it's fair and reasonable to say that Novia should have then concluded that it was unsafe to proceed with accepting business from Firm W in those circumstances. In my opinion, it wouldn't be reasonable, and it wouldn't be in line with Novia's regulatory obligations, for it to proceed with accepting business from Firm W if the position wasn't clear.

Summary

So, to summarise, I think that Firm W carried on activities for which it didn't have regulatory permission in the UK. I think it advised Mr P to switch to the SIPP from his existing pension plans and made arrangements for the switches to take place. This has since led to Mr P suffering a loss that he alleges he wouldn't have suffered had he stayed with his existing pension provider.

In the circumstances, I think Novia should have known what activities Firm W was carrying out and that it didn't have the regulatory permissions to do so. Acting fairly and reasonably, I think that Novia should have rejected this business. And if it had, I think that Mr P would have remained with his existing pension provider. So, I think it's fair and reasonable to uphold Mr P's complaint on this basis alone. However, for completeness, I've also gone on to consider what other conclusions Novia should have drawn if acting fairly and reasonably and in the best interests of its potential clients.

The nature of the introduction from Firm W (anomalous features)

There were anomalous features in the business Firm W introduced to Novia that ought to have given rise to concerns about the risk of significant consumer detriment.

The domicile of Firm W

Pension business from a UK client, advised by a Cypriot advisory firm despite no obvious connection with the country, is anomalous in and of itself.

The fact that Firm W was domiciled *outside the United Kingdom* was a conspicuous and anomalous feature, in light of the business it referred to Novia. In my view, that fact ought to have highlighted the need to make sure the EEA firm had the correct permissions to conduct the business being proposed – i.e., a heightened check on the firm's permissions (as above).

Adviser remuneration

Firm W received an initial payment of 5% of the monies Mr P invested with Novia. On top of this, Firm W would also receive an annual investment adviser fee of 1% of the policy value.

I consider the level of remuneration paid to Firm W in this case to have been an anomalous feature. While there's no absolute benchmark for reasonable adviser charging, it's my view that a 5% initial, and 1% ongoing, fee in these circumstances was higher than what I would consider to be reasonable. And, at the very least, I think that Novia ought to have flagged at the outset that the initial charges imposed on Mr P's pension monies were potentially quite high, particularly given the ongoing fees that Mr P would be likely to incur both in relation to his investments as well as the SIPP fees payable to Novia.

Summary

In summary, I'm satisfied Novia either knew, or ought to have known, if it had acted fairly and reasonably to meet its regulatory obligations, that:

- Firm W was undertaking regulated activities beyond the scope of its permissions.
- The domicile of Firm W, as opposed to the consumer Firm W introduced to Novia, was an anomalous feature.
- The high level of remuneration Firm W was taking was an anomalous feature.

And I don't think it was fair and reasonable for Novia to accept Mr P's application in such circumstances. At the very least, it should have conducted further investigations into Firm W and the arrangements with the introducer before deciding to accept what I understand to be a number of clients from them.

To be clear, I've focused on what I consider to be the main failure on Novia's part here – it's failure to ensure that Firm W had the requisite permissions to be conducting the activities that it was in relation to the business it was introducing to Novia.

Did the introducer advise Mr P?

From the available evidence I've set out above, I think it's most likely that Firm W advised Mr P. But even if I'm wrong about that and it was the introducer that recommended the switches, I still don't think Novia should have proceeded with Mr P's application, given the introducer's passporting permissions were cancelled in September 2020 and it wasn't regulated by the FCA in any capacity when Mr P applied for his SIPP. A similar analysis to that which I've set out above for Firm W could equally be applied to the introducer.

In conclusion

Novia ought to have identified that Firm W needed *"top-up"* permissions to advise on and make arrangements for personal pensions in the UK, and taken all the steps available to it to independently verify that Firm W had the required permissions to give advice or make arrangements for personal pensions in the UK.

Had it done so, I'm satisfied that Novia would have established Firm W didn't have the permissions it required, or that it was unable to confirm whether Firm W had the required permissions.

In either event, it wasn't in accordance with its regulatory obligations or good industry practice for Novia to proceed to accept business from Firm W.

Additionally, Novia ought to have considered the anomalous features of this business I've outlined above. These were further factors relevant to Novia's acceptance of Mr P's application which emphasised the need for adequate due diligence to be carried out on Firm W.

I'm therefore satisfied it's fair and reasonable to conclude that Novia shouldn't have accepted Mr P's application from Firm W.

Due diligence on the underlying investments

In light of my conclusions about Novia's regulatory obligations to carry out sufficient due diligence on introducers – and, given my finding that in the circumstances of this complaint Novia failed to comply with these obligations – I've not considered Novia's obligations under the Principles in respect of carrying out sufficient due diligence on the underlying investments. It's my view that had Novia complied with its obligations under the Principles to carry out sufficient due diligence checks on Firm W, then this arrangement wouldn't have come about in the first place. So, the investments would never have been made.

I also appreciate what Novia has said about only allowing standard investments into its SIPP. And it thinks that this is relevant to whether or not this complaint should be upheld. But I don't agree. The nature of the investments isn't material to the outcome, given my findings in relation to the adviser due diligence – but it may turn out to be relevant to the potential loss that Mr P has suffered.

Mr P won't have seen a complete failure of his SIPP investment like we see in some SIPP due diligence complaints, but he may still have lost out on returns that he might otherwise have achieved if he'd stayed with his original provider. He also would have avoided the quite substantial transfer charges and ongoing fees. So the nature of the investments will effectively be taken into account in the calculation of redress as I've provided for below.

Is it fair to ask Novia to pay Mr P compensation in the circumstances?

Would the business have still gone ahead if Novia had refused the application?

Mr P went through a process with Firm W that culminated in him completing paperwork to set up a new Novia SIPP, with the expectancy that monies from his existing pension plans would be transferred into the newly established SIPP. Having gone to the time and effort of doing this, I think it's *most likely* that if the Novia SIPP wasn't then established, and his pension monies weren't then transferred to Novia, Mr P would have wanted to find out why from Firm W and Novia.

And I think it's fair and reasonable to conclude that one or more of the parties involved would have explained to Mr P that his application hadn't been accepted as Firm W didn't have the necessary permissions it needed to provide the advice. Or alternatively that Novia wasn't satisfied that Firm W had the necessary *"top-up"* permissions to provide the advice. And that Mr P wouldn't then have continued to accept or act on pensions advice provided by Firm W.

In *Adams v Options SIPP*, the judge found that Mr Adams would have proceeded with the transaction regardless. HHJ Dight says (at paragraph 32):

> *"The claimant knew that it was a high risk and speculative investment but nevertheless decided to proceed with it, because of the cash incentive…"*

But, in this case, I'm not satisfied that Mr P proceeded in the knowledge that the investments he was making were high risk and speculative (which they weren't), and that he was determined to move forward with the transaction in order to take advantage of a cash incentive offered by Firm W. Mr P has said he was told the SIPP was *"a low risk solution"* and that he didn't receive an incentive payment.

Novia has said it's plausible another SIPP operator would have accepted Mr P's application from Firm W, had it declined it. But I don't think it's fair and reasonable to say that Novia shouldn't compensate Mr P for any loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found it did. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore *wouldn't* have accepted Mr P's application from Firm W.

Further, and in any eventuality, even if another SIPP provider had been willing to accept Mr P's application from Firm W, that process would still have needed Mr P to be willing to continue to do business with Firm W after Novia had rejected his application for another application to proceed. And, for the reasons I've given above, I'm not satisfied that Mr P would have continued to accept or act on pensions advice from Firm W in such circumstances.

I note Novia's comment that it's likely Mr P was motivated to switch from his previous provider so he could take a PCLS, but he's said that he wasn't looking to do anything with his pensions until he was contacted by the introducer and Firm W.

In the circumstances, I'm satisfied it's fair and reasonable to conclude that if Novia had refused to accept Mr P's application from Firm W, the transaction wouldn't have gone ahead.

The involvement of Firm W and the introducer

In this decision, I'm considering Mr P's complaint about Novia. While it may be the case that Firm W and/or the introducer gave unsuitable advice to Mr P, Novia had its own distinct set of obligations when considering whether to accept Mr P's application for a SIPP.

Firm W had a responsibility not to conduct regulated business that went beyond the scope of its permissions. Novia wasn't required to ensure Firm W complied with that responsibility. But Novia had its own distinct regulatory obligations under the Principles. And this included checking that firms introducing advised business to it had the regulatory permissions to do so. In my view, Novia failed to comply with these obligations in this case.

I'm satisfied that if Novia had carried out sufficient due diligence on Firm W and acted in accordance with good practice and its regulatory obligations by independently checking Firm W's permissions before accepting business from it, Novia wouldn't have done any SIPP business with Firm W in the first place.

I also think that if Mr P had been told that Firm W was acting outside its permissions in giving pensions advice, or alternatively that Novia wasn't satisfied that Firm W had the necessary *"top-up"* permissions to provide such advice, he wouldn't have continued to accept or act on advice from it. And, having taken into account all the circumstances of this case, it's my view that it's fair and reasonable to hold Novia responsible for its failure to identify that Firm W didn't have the required *"top-up"* permissions to be giving advice and making arrangements on personal pensions in the UK.

The DISP rules set out that when an Ombudsman's determination includes a money award, then that money award may be such amount as the Ombudsman considers to be fair

compensation for financial loss, whether or not a court would award compensation (DISP 3.7.2 R).

As I set out above, in my opinion it's fair and reasonable in the circumstances of this case to hold Novia accountable for its own failure to comply with the relevant regulatory obligations and to treat Mr P fairly.

The starting point, therefore, is that it would be fair to require Novia to pay Mr P compensation for the loss he's suffered as a result of its failings. I've considered whether there's any reason why it wouldn't be fair to ask Novia to compensate Mr P for his loss, including if it would be fair to hold another party liable in full or in part. And I'm satisfied it's appropriate and fair in the circumstances for Novia to compensate Mr P to the full extent of the financial losses he's suffered due to its failings.

I accept that it may be the case that Firm W and/or the introducer is responsible for initiating the course of action that led to Mr P's loss. However, it's also the case that if Novia had complied with its own distinct regulatory obligations as a SIPP operator, the arrangement for Mr P wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

If it wishes, I've provided in the redress below that Novia can have the option to take an assignment of any rights of action Mr P has against Firm W and/or the introducer in respect of the events this complaint concerns *before* compensation is paid. And the compensation can be made contingent upon Mr P's acceptance of this term.

The key point here is that but for Novia's failings, Mr P wouldn't have suffered the loss he's suffered. So, even if an assignment of action against Firm W and/or the introducer proves worthless, this wouldn't lead me to change my overall view on this point. And I'm satisfied that it's appropriate and fair in the circumstances for Novia to compensate Mr P to the full extent of the financial losses he's suffered due to *its* failings, and notwithstanding any failings by Firm W and/or the introducer. And, taking into account the combination of factors I've set out above, I'm not persuaded that it would be appropriate or fair in the circumstances to reduce the compensation amount that Novia is liable to pay to Mr P.

Novia has said that during a skilled person review, Firm W accepted liability for complaints relating to its shortfall in permissions. However, Mr P has told us that Firm W hasn't contacted him in regard to this. I think it's fair that if Novia can evidence that Mr P has received compensation from Firm W, for example via confirmation from the FCA, it should be able to reduce any liability it owes so that Mr P isn't overcompensated. But if Novia is unable to obtain confirmation that Firm W has compensated Mr P, then it should compensate him to the full extent of any loss he's suffered.

Mr P taking responsibility for his own investment decisions

I'm satisfied that it wouldn't be fair and reasonable to say Mr P's actions mean he should bear the loss arising as a result of Novia's failings.

Mr P took advice from an authorised adviser (albeit one acting outside the permissions it held) and used the services of a regulated personal pension provider, Novia.

I'm satisfied that if Novia had undertaken reasonable due diligence measures and drawn appropriate conclusions about the business Firm W was undertaking (acting beyond its permissions), it shouldn't have accepted Mr P's business from Firm W.

Novia has said that the Investigator should have asked Mr P to disclose any correspondence between him and Firm W to determine his motivations for transferring. But the key question is whether Novia should have accepted Mr P's application at all. Mr P's understanding of matters is secondary to this.

So, I think that in the circumstances, for all the reasons given, it's fair to say Novia should compensate Mr P for any loss he's suffered. But for Novia's failings, Mr P wouldn't have switched his pensions to the Novia SIPP or made the investments that he did. And I don't think it would be fair to say in the circumstances that Mr P should suffer any loss because he ultimately instructed those investments be made.

Novia might say that any loss Mr P has suffered is a result of market movements in the investments he made. But it can't know the extent of the loss Mr P suffered before calculations are undertaken as to how his previous pension fund investments would have performed. It's also important to note the effect that the fees taken from Mr P's pension fund will have had on the performance of his investment portfolio. As I've identified above, the initial fee of 5% will have reduced quite significantly the level of funds that he had invested over the longer term, as would the ongoing advice and SIPP platform fees.

Putting things right

I consider that Novia failed to comply with its own regulatory obligations and didn't put a stop to the transactions that are the subject of this complaint. My aim in awarding fair compensation is to put Mr P back into the position he would likely have been in had it not been for Novia's failings. Had Novia acted appropriately, I think it's *more likely than not* that Mr P would have remained a member of the pension schemes he transferred into the SIPP.

In light of the above, Novia should:

- Obtain the actual transfer value of Mr P's SIPP, including any outstanding charges.
- Pay a commercial value to buy any illiquid investments (or treat them as having a zero value).
- Undertake loss calculations as set out below in respect of each of the schemes from which monies were transferred into the SIPP and pay any redress owing in line with the steps set out below.
- If the SIPP needs to be kept open only because of the illiquid investment/s and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.
- If Mr P has paid any fees or charges from funds outside of his pension arrangements, Novia should also refund these to him. Interest at a rate of 8% simple per year from date of payment to date of refund should be added to this.
- Pay Mr P £300 to compensate him for the distress and inconvenience he's been caused by its failings.

I've set out how Novia should go about calculating compensation in more detail below.

Treatment of the illiquid assets held within the SIPP

I think it would be best if any illiquid assets held could be removed from the SIPP. Mr P would then be able to close the SIPP, if he wishes. That would then allow him to stop paying the fees for the SIPP. For calculating compensation, Novia should establish an amount it's willing to accept for the investment/s as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investment/s.

If Novia is able to purchase the illiquid investment/s then the price paid to purchase the holding/s will be allowed for in the current transfer value (because it will have been paid into the SIPP to secure the holding/s).

If Novia is unable, or if there are any difficulties in buying Mr P's illiquid investment/s, it should give the holding/s a nil value for the purposes of calculating compensation. In this instance Novia may ask Mr P to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the relevant holding/s. That undertaking should only take effect once Mr P has been compensated in full, to include his receipt of any loss that may be above our award limit, and should allow for the effect of any tax and charges on the amount Mr P may receive from the investment/s and any eventual sums he would be able to access from the SIPP. Novia will have to meet the cost of drawing up any such undertaking and the reasonable costs of Mr P taking advice in relation to it.

Calculate any loss Mr P has suffered as a result of making the investments

Novia should first contact the provider of the plans which were transferred into the SIPP and ask it to provide notional values for the policies as at the date of calculation. For the purposes of the notional calculation the provider should be told to assume no monies would have been transferred away from the plans, and the monies in the policies would have remained invested in an identical manner to that which existed prior to the actual switches.

Any contributions or withdrawals Mr P has made from the SIPP will need to be taken into account whether the notional values are established by the ceding provider or calculated as set out below.

Any withdrawal out of the SIPP should be deducted at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. The same applies for any contributions made, these should be added to the notional calculation from the date they were actually paid, so any growth they would have enjoyed is allowed for. In this regard, the PCLS should be taken into account as a withdrawal from the account as at the date that it was made.

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

The notional value of Mr P's existing plans if monies hadn't been transferred (established in line with the above) less the proportion of the current value of the SIPP that's attributable to monies transferred in from the same existing plans (as at the date of calculation) is Mr P's loss.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into 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 a 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 notional deduction to allow for income tax that would otherwise have been paid. Redress paid to Mr P as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, Novia may make a notional deduction to cash lump sum payments to take account of tax that consumers would otherwise pay on income from their pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr P's likely income tax rate in retirement – presumed to be 20%.

I understand Mr P has already taken a tax-free lump sum from his pension. However, if Mr P would have been able to take a further tax-free lump sum, the reduction should only be applied to that portion of the compensation that couldn't have been taken as a tax-free lump sum. For example, if Mr P would have been able to take a tax-free lump sum of 25%, the reduction should only be applied to 75% of the compensation, resulting in an overall reduction of 15%.

SIPP fees

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

Fees or charges from funds outside of pension arrangements

If Mr P has paid any fees or charges from funds outside of his pension arrangements, Novia should also refund these to him. Interest at a rate of 8% simple per year from the date of payment to the date of refund should be added to this.

Income tax may be payable on any interest paid. If Novia deducts income tax from the interest, it should tell Mr P how much has been taken off. Novia should give Mr P a tax deduction certificate in respect of interest if he asks for one, so he can reclaim the tax on interest from HMRC if appropriate.

Interest

The compensation resulting from this loss assessment must be paid to Mr P or into his SIPP within 28 days of the date Novia receives notification of his acceptance of this final decision. The calculation should be carried out as at the date of the final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of the final decision to the date of settlement if the compensation is not paid within 28 days.

Distress & inconvenience

The uncertainty concerning his pension provision will have caused Mr P worry – that will no doubt have been intensified given his proximity to retirement. He will also have been inconvenienced. Novia should pay him £300 to compensate for this.

Assignment of rights

If Novia believes other parties to be wholly or partly responsible for the loss, it's free to pursue those other parties. So, compensation payable to Mr P can be contingent on the

assignment by him to Novia of any rights of action he may have against other parties in relation to his switches to the SIPP and the investments. The assignment should be given in terms that ensure any amount recovered by Novia up to the balance due to Mr P is paid to him. Novia should only benefit from the assignment once Mr P has been fully compensated for his loss (to be clear, this includes any loss that's in excess of our award limit). Novia should cover the reasonable cost of drawing up, and Mr P's taking advice on and approving, any assignment required.

Award limit

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £375,000, plus any interest and/or costs/interest on costs that I think are appropriate. If I think that fair compensation is more than £375,000, I may recommend that the business pays the balance.

Until the above calculation is carried out, I don't know what award it might produce. So, while I acknowledge that the value of Mr P's original investment fell well within our award limit, and the compensation may be nowhere near £375,000, for completeness I have included information below about what ought to happen if fair compensation amounts to more than our award limit.

Decision and award: I uphold this complaint. I think that fair compensation should be calculated as set out above. My final decision is that Novia Global Limited should pay Mr P the amount produced by that calculation – up to a maximum of £375,000. In addition to any losses subject to the award limit, if applicable, Novia Global Limited should pay the interest awards and any costs as set out above.

Novia Global Limited must provide details of its calculation to Mr P in a clear, simple format.

Recommendation: If the amount produced by the calculation of fair compensation is more than £375,000, I also recommend that Novia Global Limited pays Mr P the balance.

This recommendation doesn't form part of my determination or award. Novia Global Limited doesn't have to do what I recommend. It's unlikely that Mr P will be able to accept my decision and go to court to ask for the balance. Mr P may want to get independent legal advice before deciding whether to accept this final decision.

My final decision

My final decision is that I uphold the complaint. To put things right, Novia Global Limited must calculate and pay Mr P the award 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 3 October 2024.

Alex Salton
Ombudsman