DRN-5368270

The complaint

Mr W is unhappy that Redswan Limited ('Redswan') failed to exercise sufficient due diligence before accepting his investment into Emmit Plc ('Emmit' – later known as International Water Services plc) within his self-invested personal pension ('SIPP'), causing him a financial loss.

For simplicity, I will largely refer to Mr W throughout, even where the submissions I'm referring to were made by his representative.

What happened

While I've considered all the information provided, I've focused throughout on what I consider to be key to reaching my decision.

The transactions

In July 2014, Mr W applied for a Redswan SIPP. The next month Mr W transferred in just over £42,500 from existing pension schemes and he applied to open a stockbroking account vua his SIPP. On Mr W's stockbroker form, he said he was a retail client. And when given the option to select an execution only, advisory or managed service, he chose execution only, which meant Mr W would provide his investment instructions without advice.

On 1 September 2014, Mr W told Redswan, amongst other things, that he was initially considering shares to make his investments work a bit harder. The next day Redswan asked Mr W for a bit more information about the intended shares. And Mr W said he was considering investing in Arthur Muary and/or Quantam Genomics via his stockbroking account and that 'A friend of mine has given me a few pointers…'.

On 3 September 2014, the stockbroker got in touch with Redswan and said that Mr W had tried to purchase shares directly with it in Arthur Muary, an illiquid French stock on a restricted market. They had concerns about the investment and that Mr W wanted to use most of his SIPP pension monies to invest in this. It seems the stockbroker spoke with Redswan again that day and expressed concern at Mr W's proposed stock, as trading in this was very infrequent, can take a few months to liquidate and didn't trade on a main stock exchange. The stockbroker said it had concerns this investment might not be appropriate for Mr W in the circumstances. And Redswan told the stockbroker it wouldn't authorise the transaction.

A call note reflects that Redswan spoke to Mr W on 4 September 2014 and said that it didn't think that Arthur Muary was a prudent investment for his SIPP and that it wouldn't be prudent to proceed with it, due to the concerns about selling the stock and because Mr W wanted to invest all his SIPP monies in this. It was noted that Mr W agreed to consider alternatives.

The same call note reflects that Redwan spoke with Mr W's stockbroker again that day. The stockbroker told Redwan that Mr W now wanted to invest in Emmit, an AIM company, which was on a recognised stock exchange. And the stockbroker confirmed it didn't have any

concerns about Emmit. The call note reflects that Redwan then did a 'quick check' on Emmit's trading information and noted there had been trading over the last few days.

And, in September 2014, Mr W went on to invest just under £40,500 of his Redswan SIPP pension monies into shares in Emmit, a company admitted to trade on AIM, a market operated and regulated by the London Stock Exchange ('LSE').

On 31 October 2014, the Financial Conduct Authority ('FCA') (previously Financial Services Authority) ('FSA') issued a statement about the promotion of shares in Emmit. Amongst other things, the FCA said that:

- It had been made aware that inexperienced individuals were being targeted and encouraged to transfer money from pension schemes into SIPPs to invest in Emmit.
- Some investors were being offered "cash back" on their investments of up to 30% of the transfer value, paid by a third party, as an incentive. Investors could suffer significant financial loss if they have invested without fully understanding what they were doing. And the cash incentive received could incur a significant tax liability to the investor.
- Its review of the trading of Emmit shares has shown pension investors constitute a significant proportion of the demand, which may have impacted the normal supply and demand balance, with these shares trading at 6p in December 2013 and at 97p when suspended (having risen to over 200p earlier in the year). And, according to Emmit's last unaudited interim accounts its liabilities exceeded its assets as at 30 June 2014.
- LSE had undertaken a precautionary suspension of the trading of the shares in Emmit on 17 October 2014.
- The FCA was grateful to have received proactive reports from FCA authorised firms, which helped it bring the issue to investors attention. And it asked SIPP operators to be vigilant and do proper due diligence to assess higher risk and unusual investments.

From at least 2016, Mr W's statements valued his Emmit investment at £0.

The complaint

After engaging his representative in or around April 2018, Mr W complained to Redswan in February 2019 about the lack of due diligence it carried out into the introducer and on the Emmit investment. He said that no risks nor fees were discussed with him and since inception he received no communication, except for a few statements, from Redswan and the stockbroker. He said he'd like a return of his original investment amount, plus interest.

In April 2019, Redswan sent Mr W its final response letter not upholding his complaint. And, unhappy with this response, Mr W referred his complaint to our Service in July 2019.

We asked Mr W and his representative several questions about, for example, what happened at the time of the events complained of. And, as part of the response and in his other submissions to our Service, he said, amongst other things, that:

- Mr W made enquiries online and then received a cold call from an unregulated third-party offering a pension review. While he wasn't specifically interested in changing his pension, he was looking to find a way to access tax free cash from this as he had credit card debts to clear.
- He was advised that he'd receive good returns and that it was a sound investment within a robust company. He wasn't told it was a high-risk investment – no risks were

discussed and he thought there was none. And he wasn't too concerned with how the investment operated as he trusted what he'd been told and had lot going on at the time in his personal life.

- This was Mr W's only retirement provision. He was in his mid-forties, had minimal savings and was living in rented accommodation. He had no investment experience and given his financial circumstances he had a low risk tolerance and no capacity for loss.
- Mr W thought Redswan was the 'middle man' between the investment and himself.
- He received a £5,000 incentive payment when moving his pension, which he can't recall informing Redswan of.

Redswan has said, in its responses and submissions in respect of Mr W's complaint, in summary, that:

- Mr W came to it as a direct client, with no evidence of an introducer. It can't take responsibility for unregulated third parties in the background. And it had no reason to doubt the information provided to it by Mr W.
- Redswan wouldn't have been possessed, nor was it obligated to possess, knowledge of Mr W's investment experience nor risk tolerance. It wasn't providing advice and that is an adviser's remit.
- The level of due diligence upon it must reflect the nature and circumstances of the investment. Only one of its customers – Mr W – invested in Emmit. These shares were traded on AIM – a share exchange of LSE. While AIM listed shares can be higher risk than those listed on the main LSE exchange, AIM is a recognised and respected exchange of LSE. The Emmit shares are a standard asset based on today's definitions, of which the share price is independent and market driven. While Emmit is now delisted from AIM, it is still an active, albeit now private, company. And while Mr W has placed weight on the sale price history of Emmit, there had been recent trading activity.
- There's nothing to suggest AIM listed shares aren't suitable for retail clients and there are no restrictions on such customers investing in these. And it isn't unusual for a SIPP member to invest into a single investment, particularly where the investment is a mainstream and listed one, as Emmit was. So any lack of diversification wouldn't therefore, in itself, represent a red flag or have caused Redswan to have prevented Mr W's investment into this.
- While the stockbroker was instructed on an execution only basis, it's clear from the events that it conducted a degree of fact checking and it had no concerns in respect of Emmit and raised no red flags with Redswan about this.
- It couldn't have reasonably foreseen the issues the FCA commented on in its warning in respect of Emmit. The reason the issues came to light may be because another SIPP provider identified a number of separate trades into this because they had multiple members wanting to invest in Emmit and therefore identified a potential systemic issue. However, as set out, Mr W was Redswan's only customer to do so.
- It took appropriate steps to investigate the stockbroker and Mr W's generic investment choice to satisfy itself that they wouldn't give rise to a tax charge. As part of this it did consider its FCA responsibilities in making enquiries of the proposed investment. The steps it took provide no clue that anything untoward was happening. Quoted equities are extremely commonplace as SIPP investments.
- The documentation makes it clear that all investment decisions and responsibilities are the client's, who had the ability to self-direct from the wide range of investments allowed by HMRC.
- With acts of fraud usually extensive steps are taken by the perpetrators to conceal what is going on. There was nothing unusual in Mr W's application and choice of stockbroker. And Redswan had to reason to decline the investment prior to the FCA

warning notice.

Our Investigator looked into Mr W's complaint and ultimately said that they didn't uphold it, for the following reasons. They said, in summary, that while Mr W said he was advised by an unregulated introducer, he hasn't provided any information about who this was. There's no suggestion or mention of an introducer on the correspondence from the time, of which there was plenty between Mr W and Redswan and from which it seemed Mr W acted of his own volition with no mention of any other party being involved. So Redswan wouldn't have been made reasonably aware that an unregulated introducer was involved.

In respect of Mr W's Emmit investment, our Investigator said he was the only customer to invest in this with Redswan and that the investment was listed on a recognised exchange, so they didn't expect Redswan's due diligence to be stringent. A regulated stockbroker was involved and Redswan was able to take comfort that they didn't raise any concerns with it about Emmit, unlike with Arthur Muary. Issues didn't arise with Emmit until October 2014 and there was nothing to make Redswan aware there might be issues with this at the time. Redwan checked Emmit was listed on a main stock exchange and noted recent trading.

Mr W didn't agree. His representative said in its submissions on his behalf, in summary, that:

- Mr W hasn't retained evidence of the introducer's identity, as he no longer has access to the email account used at the time and he accepts the introducer wasn't on the documents. While the FCA's Emmit announcement makes it clear an unregulated introducer must have been involved to, for example, pay Mr W the incentive payment, he accepts Redswan didn't have direct knowledge of an introducer's involvement. So Mr W accepts our Investigator's findings in respect of this. And his complaint is now only directed to the due diligence Redswan carried out on Emmit.
- Redswan, rather than the stockbroker, prevented Mr W from investing in Arthur Muary and it fulfilled its due diligence obligations in doing so. Whereas Redswan's due diligence in respect of Emmit only extended to a 'quick check' on trading data, when it ought to have indicated to Mr W that it also wouldn't accept his application to invest in this.
- The concerns Redswan had in respect of Mr W's initially intended investment in Arthur Muary ought to have also been present in respect of Emmit because, just like Arthur Muary, Mr W's intended investment in Emmit also lacked diversification – he was again seeking to invest his entire SIPP pension monies in this.
- The Emmit trading data that Redswan obtained showed an extraordinary increase in price in March 2014, with a year low of 5.5p, a current price of 142p and a year high of 285p. By that time there had been a lot of activity about boiler room scams and this a huge price inflation over a short period was a clear indication of such a possibility. The trading data also confirmed limited availability of accounting information or data to justify such a share increase.
- AIM was a submarket of LSE, specifically for emerging or smaller companies. And AIM investments carry inherently higher default risks. So there were similar potential liquidity concerns for Emmit as Arthur Muary. And the past trading activity Redswan obtained about Emmit shouldn't have given it sufficient comfort.
- While the FCA notice was published after the events complained, the SIPP operators who reported the Emmit scam to the FCA were in the same position as Redswan, but had carried out sufficient due diligence leading to concerns. And had Redswan acted similarly then Mr W's investment wouldn't have gone ahead.
- Emmit had previously been in administration, its December 2013 accounts were showing historic losses and there's evidence of a substantial allotment of new shares in 2014. Further checks would have revealed this type of information.
- The information Redswan received from the stockbroker about Emmit was something

it was entitled to consider as part of its due diligence, but this ought not to have been the only information it considered. Redswan knew the stockbroker was acting on an execution only basis and owed Mr W no duty in respect of investment suitability.
- If Redswan had spoken to Mr W, it would have become aware of the incentive payment.

As no agreement could be reached, Mr W's complaint has been referred to me for a decision.

What I've decided – and why

Our time limits

Our Service doesn't have a free hand to consider every complaint brought to us. We must follow the rules we're bound by, known as the Dispute Resolution ('DISP') Rules – found in the FCA's handbook. And DISP 2.8.2R sets out the time limits in which we can and can't consider complaints. It doesn't seem to be in dispute that Mr W's complaint has been made in time for our Service to consider it. And, for completeness, I think Mr W's complaint has been made in time for our Service to be able to consider it and I haven't considered this any further.

Relevant considerations

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

I'm required to determine this complaint by reference to what I consider to be fair and reasonable in all the circumstances of the case. When considering what is fair and reasonable in the circumstances, I need to take account of relevant law and regulations, regulator's rules, guidance and standards, codes of practice and, where appropriate, what I consider to have been good industry practice at the relevant time.

I have taken into account a number of considerations including, but not limited to:

- The agreement between the parties.
- The Financial Services and Markets Act 2000 ('FSMA').
- Court decisions relating to SIPP operators, in particular Options UK Personal Pensions LLP v Financial Ombudsman Service Limited [2024] EWCA Civ 541 (*'Options'*) and the case law referred to in it including:
    - Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 474 ('*Adams'*)
    - R (Berkeley Burke SIPP Administration) v Financial Ombudsman Service [2018] EWHC 2878 (*'Berkeley Burke'*)
    - Adams v Options SIPP UK LLP [2020] EWHC 1229 (Ch) (*'Adams – High Court'*)
- The FCA rules including the following:
    - PRIN Principles for Businesses
    - COBS Conduct of Business Sourcebook
    - DISP Dispute Resolution Complaints
- Various regulatory publications relating to SIPP operators and good industry practice.

The legal background:

As highlighted in the High Court decision in *Adams* the factual context is the starting point for considering the obligations the parties were under. And in this case it is not disputed that the contractual relationship between Redswan and Mr W is a non-advisory relationship.

Setting up and operating a SIPP is an activity that is regulated under FSMA. And pensions are subject to HM Revenue and Customs rules. Redswan was therefore subject to various obligations when offering and providing the service it agreed to provide – which in this case was a non-advisory service.

I have considered the obligations on Redswan within the context of the non-advisory relationship agreed between the parties.

The case law:

I'm required to determine this complaint by reference to what is in my opinion fair and reasonable in all the circumstances. I am not required to determine the complaint in the same way as a court. A court considers a claim as defined in the formal pleadings and they will be based on legal causes of action. Our Service was set up with a wider scope which means complaints might be upheld, and compensation awarded, in circumstances where a court would not do the same.

The approach taken by our Service in two similar (but not identical) complaints was challenged in judicial review proceedings in the *Berkeley Burke* and the *Options* cases. In both cases the approach taken by the ombudsman concerned was endorsed by the court. A number of different arguments have therefore been considered by the courts and may now reasonably be regarded as resolved.

It is not necessary for me to quote extensively from the various court decisions.

The Principles for Businesses:

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"* (see PRIN 1.1.2G). The Principles apply even when the regulated firm provides its services on a non-advisory basis, in a way appropriate to that relationship.

Principles 2, 3 and 6 are of particular relevance here. They provide:

> "*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 am satisfied that I am required to take the Principles into account (see *Berkeley Burke*) even though a breach of the Principles does not give rise to a claim for damages at law (see *Options*).

The regulatory publications and good industry practice:

The regulator issued a number of publications which reminded SIPP operators of their obligations, and which 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.

I have considered all the above publications in their entirety. It is not necessary for me to quote from the publications here.

The 2009 and 2012 Thematic Review Reports and the *"Dear CEO"* letter aren't formal guidance (whereas the 2013 finalised guidance is). However all of the publications 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 is treating its customers fairly and produce 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 (as did the ombudsman whose decision was upheld by the court in the *Berkeley Burke* case).

Points to note about the SIPP publications include:

- The Principles on which the comments made in the publications are based have existed throughout the period covered by this complaint.
- The comments made in the publications apply to SIPP operators that provide a non-advisory service.
- Neither court in the *Adams* case considered the publications in the context of deciding what was fair and reasonable in all the circumstances. As already mentioned, the court has a different approach and was deciding different issues.
- What should be done by the SIPP operator to meet the regulatory obligations on it will always depend upon the circumstances.

What did Redswan's obligations mean in practice?

I'm satisfied that to meet its regulatory obligations when conducting its operation of its non-advisory SIPP business, Redswan was required to consider whether to accept or reject particular investments and/or referrals of business with the Principles in mind. I say this based on the overarching nature of the Principles (as is clear from the case law) and based on good industry practice. I am also satisfied that bearing in mind the Principles and good industry practice that this obligation was not confined *only* to rejecting an investment on the basis it was not allowed by the SIPP Trust or HMRC regulations.

I am satisfied that to meet its regulatory obligations when conducting its operation of its non-advisory SIPP business, a SIPP operator could decide not to accept a referral of business or a request to make an investment without it giving the customer advice. And I am satisfied that in practice many did refuse to accept business and/or refuse to make investments without giving advice.

I am satisfied that, to comply with its regulatory obligations, a non-advisory SIPP operator should have due diligence processes in place to check any firms introducing business to them and the investments they are asked to make on behalf of members or potential members. And that they should use the knowledge gained from the due diligence checks to decide whether to accept such business and/or allow a particular investment.

The merits of Mr W's complaint

I've looked at everything, including all the points made by the parties, and taken this into account alongside the considerations I've detailed above. I have not, however, responded to all the points made below; I have concentrated on what I consider to be the main issues.

And, having done so, while I understand this will be disappointing for Mr W and particularly when he's unwell, I'm not upholding his complaint for the below reasons, which are largely the same as those given by our Investigator.

Looking at the available information, I think Mr W's applications were presented as coming directly from him. When corresponding with Redswan and the stockbroker, there was no indication an introducer was involved. And Mr W has recognised and accepted this position.

Mr W has said though, amongst other things, that other SIPP providers recognised concerns with investments being made into Emmit prior to the FCA notice. And, while that may be so, I note that Mr W was the only customer of Redswan's that invested in Emmit. So, in the particular circumstances of this case, there was no pattern of business available to Redswan to suggest to it that pension investors might be being targeted and impacting on the demand for the shares, for example, when it accepted Mr W's application to invest in this.

I recognise it might be considered unusual that a retail client, like Mr W, was seeking to invest his SIPP pension monies almost entirely in one high risk investment – Emmit. And I understand that this was raised as a concern when Mr W previously sought to do so with Arthur Muary. But I can see this was raised as such because Arthur Muary was considered an illiquid French stock on a restricted market, with very infrequent trading, and which didn't trade on a main stock exchange.

Whereas, while I recognise Mr W feels that Redswan should've been concerned about Emmit's trading information and that it should have carried out further due diligence into this, Emmit was a standard investment on a listed stock exchange that was considered readily realisable. While the share price did fluctuate, this isn't atypical, and I think it's reasonable in the particular circumstances that Redswan considered this a sign that the share was being traded subject to market forces. And, in addition, a registered stockbroker – whose opinion I think it was reasonable for Redswan to take into account – told Redswan that it didn't have any concerns about the Emmit investment. And I think Redswan could take comfort from these things.

So, in the particular circumstances of this case and having considered all the information and points Mr W has made, I don't think there is enough to say that Redswan ought reasonably to have refused to accept Mr W's application to invest in Emmit.

My final decision

For the reasons given, my final decision is that I don't uphold Mr W's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 31 March 2025.

Holly Jackson
Ombudsman