DRN-3043061

Complaint

Ms P complains that Corporate & Professional Pensions Limited ("C&PP") accepted business from unregulated financial advisors. Ms P says the business C&PP had dealings with, in relation to her pension, was selling personal pensions illegally, as it was not regulated by the Financial Services Authority. She also says C&PP later explained to her on the phone that it had suspicions about the scheme she invested in. But it went ahead and made the investment anyway.

Background

Ms P applied for a Self Invested Personal Pension (SIPP) with C&PP, after being contacted by a business called Portwood Financial Services Ltd. After Ms P's existing personal pensions were switched to the SIPP, she invested the majority of the value (around £132,000) in an investment offered by Sustainable AgroEnergy ("SA"). Shortly after this, Ms P was paid around 25% of the amount she had invested by a business calling itself Liquid Financial Limited. I have set out further detail of the events and those involved below.

C&PP

C&PP is a self-invested personal pension (SIPP) provider and administrator. At the time of the events in this complaint, C&PP was regulated by the Financial Services Authority (FSA), which later became the Financial Conduct Authority (FCA). C&PP was authorised, in relation to SIPPs, to arrange (bring about) deals in investments, to deal in investments as principal, to establish, operate or wind up a pension scheme, and to make arrangements with a view to transactions in investments.

SA

SA offered investments based on trees grown in Cambodia. The investments involved leasing plots of land, along with the trees planted on them, and receiving a return either as annual income payments or additional land plots.

In February 2012 the Serious Fraud Office (SFO) obtained company and freezing orders against SA, as part of a criminal investigation. The company entered receivership in March 2012. The SFO later brought charges and three men (one of whom, Stuart John Stone, was the introducer to C&PP in this case) were found guilty and given prison sentences. The investigation focused on the sale and promotion of SA's products, including the one Ms P invested in. The SFO found that investors had been deliberately misled about the nature of the investment and a person responsible for sales (Stuart John Stone) had obtained commission rates of 65% of the amounts invested. It also noted that SA was effectively insolvent by mid-2011.

C&PP and SA

C&PP says it received an independent report which said the investment was suitable for inclusion in a SIPP. It has provided a copy of this report, which is dated 22 July 2011 and was produced by a business called Enhanced Support Solutions (ESS).

C&PP has also sent us a copy of a due diligence report by Citadel Trustees Limited, which is dated "August 2011". It has not said when it obtained a copy of this report.

Portwood Financial Services Ltd (also known as otheroptions.co.uk)

This was an unregulated business. It was incorporated in February 2006 and dissolved in April 2014.

S J Stone Ltd

This was another unregulated business, incorporated in October 2010, and dissolved in January 2017. Stuart John Stone was the sole director.

Protea Wealth Management

This was also an unregulated business. It was incorporated in November 2010 and dissolved March 2014. Stuart John Stone was the co-director. C&PP has told us it was its understanding that, at the time of the events in this complaint, Protea had applied for authorisation from the FSA, and says Mr Stone gave it a reference number for an application he said had been made to the FSA.

Liquid Financial Limited

Ms P received a letter with this company name in the letterhead, advising her that the switches from her existing pensions to the SIPP were to be shortly completed. However, the company registered with this name was not incorporated until 2012, and it deals in sports equipment. It therefore seems likely there was no such registered company at the time of the events this complaint is about.

Stuart John Stone

As mentioned, Mr Stone was prosecuted, following an investigation by the Serious Fraud Office. In August 2013 it was announced he had been charged with various offences relating to fraud and bribery, and sentenced to imprisonment.

In the decision I have referred to Stuart John Stone as "Mr Stone" and S J Stone Ltd as "S J Stone"

C&PP and Stuart John Stone

C&PP initially told us:

- It had no formal arrangement with Mr Stone (or the businesses he was associated with) as he was simply acting as an introducer of business whilst his FSA application (for authorisation) was being processed.

- It had face to face meetings with Mr Stone at its offices on 7 July 2011 and 25 July 2011 and he provided personal identification and also demonstrated that he was a registered individual with the FSA under reference SJS01363, and had submitted an application to the FSA for the authorisation of Protea Wealth Management ("Protea").

- Until Protea was authorised Mr Stone was not going to give any investment advice.

- It has no formal notes on the meetings between it and Mr Stone but it did visit SA's offices in London to verify its existence.

C&PP has told us it received 185 introductions from S J Stone in total.

C&PP has more recently told us (via its then representative) that its relationship was only with S J Stone and:

- S J Stone acted as an introducer of investment clients to C&PP from 20 July 2011 to 5 September 2011.

- C&PP accepted no new introductions from S J Stone after 5 September 2011.

- No documented introducer agreement was put in place between S J Stone and C&PP until late October 2011 (i.e. after it stopped accepting business from S J Stone).

- Mr Stone told it that he acquired clients through a website that helped connect potential investors interested in green biofuel with relevant investment opportunities.

- At the time initial contact was made they already knew of Mr Stone by reputation and that he was regularly introducing clients to SIPP operators.

- On several occasions C&PP met Mr Stone face to face. Mr Stone was a director of Protea and told C&PP that it was his intention that Protea acquire advisory permissions from the FCA and then introduce clients to SIPP operators as a regulated advisor.

- An enormous amount of detail was provided by Mr Stone about his various businesses and their plans and ambitions. Not only were there no red flags, but Mr Stone appeared to be a fit and proper person possessing business integrity and well aware of the regulatory environment in which he operated.

- C&PP also knew Mr Stone had been an IFA in the past with Pengwern Wealth Management LLP

C&PP has provided us with copies of meeting notes and correspondence from late September and early October 2011. These notes detail undertakings and reassurances from SA and Mr Stone that no cash incentives or loans were being offered to those investing in SA. No contemporaneous evidence of its earlier interactions with Mr Stone and SA has been provided.

The transaction

Ms P says she was attracted to the idea of amalgamating her pensions as she didn't actually know who was looking after them and had no idea of how much they were worth. She thought to have them in one pension sounded like a good idea.

Ms P says she was contacted by phone by Portwood Financial Services Ltd ("Portwood"). She spoke to a person there called Pauline who she says was very friendly and persuasive. Ms P says Pauline told her she had just put all her pensions together and earnt a "commission" for doing so. Pauline explained that changes from the government allowed people to move their private pensions where they liked and earn this commission. Ms P says she understood there were "no terms" - just a commission for investing her pensions with them.

Ms P says she never met or spoke with Stuart Stone. She was instructed by Pauline at Portwood to contact her pension providers to find out how much was in each pension pot then email her with the amounts. Ms P says she then had hardly any communication with Pauline and was eventually contacted by a person who said she would come to her house, so she could sign the pension documents. Ms P says that when this person arrived she said she represented S J Stone. And the person explained Ms P's pension would be invested to buy trees or land and trees in Cambodia for bio fuels. Ms P says she was concerned by this, but the person allayed her concerns and so she signed the documents.

Ms P says she never heard from Pauline at Portwood again after this and eventually got a brief letter from Liquid Financial saying the switches from her existing pensions to the SIPP would happen soon.

Ms P says HMRC contacted her soon after her pensions were switched to the SIPP and that she received a huge tax bill, which she has been paying off for some time. She says she never questioned the payment she received at the time as she was told by Pauline at Portwood (and by a friend) that due to a change in government legislation people were entitled to move their pensions and even earn money from doing so.

C&PP has told us (through its then representative) that S J Stone contacted Ms P in around June 2011 and offered a pension review, where she was informed about the opportunity to invest in the SA investment. It says that Ms P was advised that in order to do so she would have to transfer her pensions to a SIPP. It also says Ms P signed the SIPP application form on 6 July 2011 and the transfer of her two Prudential pension plans worth £89.299.74 and £9,931 was completed on 26 July 2011, with her Phoenix Life pension fund of £33,501.24 completing on 1 August 2011, and the investment into SA being made on 1 September 2011.

C&PP's SIPP application form featured a number of declarations including:

- *I fully understand that in all the circumstances:*
    - *I am solely responsible for all decisions relating to the purchase, retention and sale of the investments held in the Plan for my benefit; and*
    - *I fully indemnify [C&PP] against any claim in respect of such decisions….*

- *I will not require, nor attempt to require, the withdrawal of funds held to provide benefits for me under the Plan, or the income on those funds, other than in accordance with the rules of the Plan. In the event that an unauthorised payment is made, I agree to [C&PP] deducting the amount of any scheme sanction or charge, or other charge levied by HMRC on [C&PP] from the funds held for me under the Plan in order to pay the charge to HMRC. If there are insufficient funds held for me under the Plan, I agree to pay [C&PP] the amount by which the charge exceeds the value of my funds under the Plan.*

C&PP has provided the text of a letter it says it sent to all consumers who were introduced to it by S J Stone. The text is as follows:

We are writing to provide you with copies of documentation that you should have received when you opened your SIPP account with Corporate & Professional and to ensure that you have our contact details.

As you are aware, a SIPP is a "Registered Pension Scheme" under the Finance Act 2004 and, as such, is eligible for all current tax reliefs and exemptions available in the UK to Registered Pension Schemes. HMRC grant this status once a number of conditions have been met and they are responsible for monitoring the ongoing compliance of registered pension schemes.

It has been brought to our attention that some members have received commission payments as an incentive for making an investment in one of Sustainable Wealth Groups products. If you did receive a payment then you must declare this to HMRC as it will be taxable income and you may need to pay income tax on the payment.

There is also a possibility that this payment may be treated by HMRC as an "Unauthorised Payment" and again this may result in a substantial tax charge.

We were unaware that any payments were being made to members for making investments and so that we are aware of any payments that you may have received would you kindly notify us as soon as possible.

Your co-operation in this matter is greatly appreciated.

We look forward to hearing from you.

C&PP has not provided a copy of a letter using this text which was sent to Ms P, or any other evidence showing such a letter was sent to Ms P. CL&P has also not provided any general evidence on when this letter was sent to customers who had made SA investments in its SIPP, although it has recently reiterated the letter was sent. Ms P says she does not recall receiving such a letter.

Our initial investigation of Ms P's complaint

An adjudicator at this service investigated Ms P's complaint initially, and first concluded it should be upheld. He then changed his view and concluded it should not be upheld. The file was closed but Ms P contacted us several times to dispute the adjudicator's view. The file was later reopened, as a result of Ms P's contacts. C&PP disputed the reopening of the file. This was, ultimately, considered by an ombudsman, who wrote to both parties to explain his view was that it was appropriate to reopen the file, and that the case was one we can and should consider. Ms P's complaint was then allocated to an investigator for further consideration.

Our investigator's view

Our investigator concluded Ms P's complaint should be upheld. He said it was fair and reasonable to conclude C&PP should not have accepted Ms P's application. He said, in summary:

- C&PP had a responsibility to understand the way business was being referred to it. C&PP had no agreement in place with S J Stone so it wasn't clear to either party what the responsibilities of each were.

- C&PP did meet with the director of S J Stone, Mr Stone, but this was in his capacity as director of another firm, Protea Wealth Management (Protea). There doesn't appear to have been any discussions about S J Stone's business model, for example how it would receive referrals of business or where these referrals would come from.

- At the point of Ms P's application C&PP knew that:

    - Consumers were transferring their pensions and investing in this high risk investment without receiving any regulated advice.

    - All of the consumers S J Stone introduced invested their pensions into SA – an unregulated, high risk, esoteric and illiquid investment.

    - S J Stone were introducing consumers at a frequency that should have given significant concern about their motivations and the quality of the service it was offering.

- In light of the above, C&PP should have had cause for concern and ought to have been reasonably aware that the business being introduced by S J Stone posed a significant risk of consumer detriment.

- If C&PP had drawn reasonable conclusions from the information it knew and the information it should have acquired about S J Stone's business model, it wouldn't have accepted the application from it, as it posed a significant risk to customers.

- C&PP has said that it relied on third party due diligence reports into SA from Citadel Trustees Limited and Enhance Solutions Limited.

- Citadel was an FCA regulated business. However, its report appears to have been instructed by SA and provided to C&PP by SA. It is not clear what, if any, independent due diligence was carried out by C&PP.

- The Enhance Support Solutions Limited report identified the high risk, illiquid nature of the investment. It highlighted that this was an unregulated investment which meant that no investor protection would apply. It also recommended that where this investment was to be made via a SIPP *"a scheme member 'high risk/ illiquid' disclaimer could be considered."*

- This alongside the issues identified with the introducer S J Stone should've alerted C&PP of a considerable risk of consumer detriment in accepting this business.

- At least some of the issues that led to the failure of the investment – or at least the significant risk of them occurring – would have been discoverable at the time of Ms P's investment through sufficient due diligence.

- C&PP should reasonably have concluded the SA investment wasn't acceptable for Ms P's pension scheme (that is, it shouldn't have added it to the list of permitted investments for Ms P's SIPP) because:

    - There was a risk the investment might be fraudulent – it wasn't clear how such high returns could be offered.

    - There was no independent verification that SA's assets were real and secure, or the investment operated as claimed.

- The land leases, if they existed, might have been difficult to independently value, both at the point of purchase and subsequently. It was also possible that there might be no market for them. So it was possible Ms P might not have been able to take benefits from her pension, or make changes to it, if she wanted to.

- The investment in SA would allow Ms P's SIPP to become a vehicle for a high-risk and speculative investment that wasn't a secure asset and could have been a scam.

- C&PP has pointed out that Ms P received a payment on completion of the transfer of her SIPP and investment in SA and argues that she should've known that this was inappropriate. C&PP say that this was the reason for Ms P agreeing to the transfer and investment and that had she informed C&PP of the payment it would've put a stop to the business.

- But Ms P has said that this was explained to her as an 'introducers fee' and said that she had no reason to believe there was anything inappropriate about the payment. Given her lack of experience in pensions and investments this alone would not have caused her concern.

- C&PP has said it had no option but to make the investment the COBS rules obliged it to. But C&PP would only have got to the point of executing the specific instruction if it had accepted the application. If it hadn't accepted the application the question of it having to follow any specific instruction from Ms P would not have arisen.

- He was satisfied that but for C&PP's failings, Ms P would never have moved to the C&PP SIPP in the first place and would've remained in her existing pensions. It was therefore fair to ask C&PP to compensate Ms P for her loss.

C&PP's response to the investigator's view

C&PP did not accept the investigator's view. Its then representative responded on its behalf. I have considered its response in its entirety, but have only included a brief summary here:

- C&PP was under an obligation to follow the instructions of its 'execution-only' client, who accepted that the investment decision was hers and hers alone.

- C&PP conducted due diligence into S J Stone to a satisfactory standard and the evidence before it entitled it to conclude that it was a bona fide introducer. Indeed, given the evidence that Stuart Stone is a fraudster, and would have evaded further probing, it is difficult to think what more C&PP could have done that would have made a difference to the outcome.

- The SA investment, at the time it was assessed by C&PP, seemed to be genuine and legitimate and capable of being held in a SIPP tax wrapper. C&PP's duty did not extend beyond this.

- Should it be found that more should have been done by C&PP, that would have required it to have conversations with Ms P and persuade her to think again about the nature of the investment. It is very unlikely that, given the things it is reasonable to expect C&PP to have said to her, Ms P would have altered her course of conduct. As result any failure to say those things could not have caused Ms P's loss. Ms P was motivated by the prospect of receiving a cash payment of £30,000.

- The current law on this matter is to found in the Adams v Carey decision (this refers to the High Court judgement - Adams v Carey [2020] EWHC 1229 (Ch)). We have a statutory duty to have regard to this.

- In the context of the agreement it entered into with Ms P, C&PP also acted fairly and professionally toward her.

- Ms P's loss was caused not by the conduct of C&PP but by the fraudsters with whom she came into contact. It was open for the FCA to create rules which (for example) compelled SIPP operators to question clients' execution-only decisions or which required them to refuse to follow instructions unless the client was given advice. But the FCA has not made such rules and on the facts of this case it is very unlikely that they would have made any difference to the outcome

Ms P's response to the investigator's view

Ms P accepted the investigator's view, and made no further comments.

My provisional decision

I issued a provisional decision, in which I concluded Ms P's complaint should be upheld. I will only set out a very brief summary of my findings here, as I revisit them below. In summary, my provisional findings were:

- To meet its regulatory obligations and standards of good practice C&PP should have carried out due diligence on SA and S J Stone, before deciding whether to accept or reject particular investments and/or referrals of business.

- Based on what C&PP either knew, or ought to have known had it carried out sufficient due diligence on SA and S J Stone, I thought it fair and reasonable to conclude C&PP should not have accepted Ms P's application.

- I did not think it was fair and reasonable for C&PP to progress regardless, on the basis of declarations or disclaimers it had asked Ms P to sign.

- In the circumstances it was fair to ask C&PP to compensate Ms P for her losses – I was satisfied she would not have switched to the SIPP and/or made the SA investment had C&PP acted properly.

C&PP's response to my provisional decision

C&PP appointed a new representative, following my provisional decision. The representative said, in summary:

On my general approach:

- Insufficient weight has been given to C&PP's disclaimers that they are not responsible for the investment decisions. The effect of my approach is to impose a duty of investigation as to the suitability of an investment although C&PP was not permitted to give any such advice.

- To seek to distinguish between acceptance of an application and advice on its suitability is artificial. Support for this can be found in Adams v Carey [2020] EWHC 1229 (Ch) at [159].

- The FCA's Principles for Business and COBS rules need to be addressed in the context of the specific area in which C&PP was acting. C&PP was not under a duty to advise and was under no duty not to do business with unregulated entities at the relevant time.

- I should not consider regulatory standards which post-date the relevant events. If they represented good practice at the relevant time, they would have been reflected in the 2009 material.

- I have not given sufficient distinction to the difference between good and or best industry practice and the minimum regulatory standards expected of C&PP. To the extent that it is found that best practice, with the benefit of hindsight, was not followed, it does not follow that what happened fell below the minimum regulatory standards. Since there is no clear guidance, rule or regulation that specifies what was required of C&PP at the relevant time, the regulatory publications do not provide a basis for how C&PP is to be judged for the purposes of this complaint.

- The 2009 Thematic Review Report refers to "good practice" which SIPP operators "could consider". It does not provide that not following good practice is in of itself a breach of the minimum regulatory standard which amounts to a breach of the Principles.

- The report says there is an expectation that at least some controls and procedures are in place to identify financial crime. This is not the same as setting a minimum regulatory standard in terms of investigation and vetting. In so far as a minimum regulatory standard exists, it was met by the due diligence carried out by C&PP.

- Considering the decision in Adams, the regulatory publications cannot be used as a proper aid to statutory construction of the COBS Rules [162-163].

- It is irrelevant whether the Principles were pleaded in Adams because the Principles could not themselves have formed a cause of action. Also it is an error in law to say because in Adams the Principles were not pleaded, the decision does not apply to the Principles. To seek to distinguish Adams v Carey in this manner is artificial and ignores the fact that the Principles are reflected in the COBS.

- What is said in Adams about a breach of duty under FSMA to comply with the Conduct of Business Sourcebook Rules ('COBS'), applies equally to the Principles.

- Finding that C&PP ought to have identified a significant risk of consumer detriment arising from business brought about by S J Stone is an example of failing to apply the contractual context to the regulatory obligations on C&PP. Insofar as there was a contractual relationship between C&PP and Ms P, Ms P adopted responsibility for the investment choices. The COBS obligations must be viewed accordingly.

- The proper approach is to acknowledge that the advice to transfer Ms P's pension benefits to the SIPP did not originate from C&PP, Ms P accepted she was solely responsible for the decisions relating to the SIPP, and C&PP carried out the appropriate level of due diligence at the time when considered against the correct level of regulatory standard.

- C&PP is being treated unduly harshly, and its activities only viewed through the lens of hindsight, when those who bear real culpability are elsewhere. This is particularly so given C&PP's extremely limited role as SIPP Operator and remuneration being limited to £350 + VAT.

On my finding that C&PP should not have accepted the application from S J Stone:

- There were insufficient 'red flags' to justify a refusal to accept the application.

- C&PP met with Mr Stone face to face in his capacity as director of S J Stone. There was no reason to believe that Mr Stone was not a fit and proper person to be carrying out the work he did. C&PP was entitled to take comfort from the fact that Mr Stone had a historic entry on the FCA register.

- I have given undue weight to whether S J Stone was carrying out regulated activities and what this meant for C&PP. As has been accepted in the provisional decision, C&PP's application form envisages that a financial advisor or investment manager would be involved. However, it was not C&PP's responsibility to ensure that this was the case or act as a regulator to S J Stone.

- The provisional decision fails to consider the fact that there is no requirement that individuals are advised prior to making a SIPP investment. C&PP's Key Features Document dated 2011 recommended customers take advice from a qualified IFA before establishment of the SIPP.

- The fact that a specific investment was introduced is not, in and of itself, a red flag, especially given that a distribution agreement was in place with the relevant investment, and C&PP was aware of this at the relevant time.

- The fact that S J Stone introduced several clients is not, in and of itself, a red flag, especially given the existence of the distribution agreement.

- The fact C&PP sought undertakings and assurances as to cash payments being received by customers after accepting their applications does not demonstrate earlier knowledge of this on the part of C&PP. C&PP did not have concerns about S J Stone at the time of receiving the relevant applications.

On my findings on the investment due diligence:

- CP&P carried out the appropriate level of due diligence, when considered against the correct standards in force at the relevant time. There was no breach of the relevant Principles.

- Citadel was an FCA authorised firm. Accordingly, it can be taken at its face to be adhering to the relevant regulatory standards which would prevent it acting purely in self-interest. Its involvement also provided comfort to C&PP.

- Before any applications to open SIPPs, C&PP had two face to face meetings with Mr Stone. One of those meetings included Gary West, a director of SAE. C&PP also visited the head office of SAE. Contact was also made with Citadel's Managing Director.

- Comfort was also taken from the fact that one member, after making the investment, sought to take his tax free cash (as he had reached 55 years) and this was provided to him. This gave C&PP comfort that funds could be realised.

- A letter from solicitors to HMRC confirms that the investment products fall within the permitted range applicable to SIPPs and that the Sustainable Growth Group is a strong and growing company. This letter post-dates the acceptance of Ms P's applications, but it demonstrates that even with a solicitor's examination taking place, red flags were not raised in respect of the investments.

- The ESS report is sufficient to meet the minimum standards applicable to C&PP at the time and considering C&PP's other actions in respect of S J Stone.

- Had C&PP sought to evaluate the investment's track record and proposed revenue, the viability of the business model, applicable domestic laws, accounts and other matters, it would have strayed beyond its contractual role and regulatory authorisation

- Any red flags that may have been present were insufficient to compel C&PP to refuse the application. Even if this meant C&PP should have warned Ms P as to it being a high-risk investment, it does not follow that the investment would not have been made anyway, and that the losses would not have followed. There is no real causal connection between any failings (which are not accepted) of C&PP, and the losses occasioned by others through fraud.

- It is contradictory to find that C&PP should have concluded that the investment wasn't acceptable for the SIPP whilst conceding that C&PP did not need to assess the suitability of the investment.

The representative also made an additional point relating to the COBS rules:

- COBS 11.2.19 at the relevant time said "Whenever there is a specific instruction from the client, the firm must execute the order following the specific instruction". Therefore, once an application had been received which was in effect the instruction, C&PP was mandated to act accordingly.

On the actions of Ms P:

- In terms of the letter sent by C&PP to Ms P regarding a SIPP being a Registered Pension Scheme and no commission payments being permitted, whilst C&PP cannot provide specific evidence at this late stage that the letter was sent to Ms P, it confirms that it was sent to every customer following approval of the letter from HMRC.

- It reiterates C&PP's concern that Ms P failed to disclose that she was receiving a payment in respect of the transaction. Ms P knew at the time of signing the application that she was to receive a payment. If C&PP had been alerted to this then it would have refused to process the application. So Ms P's own actions have at the very least contributed towards the eventual losses.

- It would be wrong to not properly consider relevant aspects of Ms P's behaviour, even if the application should not have been accepted by C&PP. Where a complainant has contributed to the losses and consequences it is fair and appropriate to take this into account. Ms P's receiving a tax-free payment without C&PP's knowledge or involvement was wholly outside C&PP's control or influence.

- The situation is comparable to that of the Claimant in Adams in terms of causation and loss at [164], a point which received approval in the Court of Appeal judgment [2021] EWCA Civ 474 at [126].

- C&PP's Key Features 2011 document clearly states "*We would like to make you aware that the Trustees of the C&P SIPP do not approve of member's taking loans against their pension funds or receiving remuneration via incentives of any kind as this could lead to an unauthorized payments charge being levied on the pension funds by HMRC*."

Finally, the representative said no regard had been given to the unfair prejudice to C&PP resulting from Ms P's complaint being reopened, and C&PP's legitimate expectation that the matter had been concluded in its favour.

Ms P's response to my provisional decision

Ms P accepted my provisional decision, and made no further comments.

My findings

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

In considering what is fair and reasonable in all the circumstances of this complaint, I have taken into account 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.

As a preliminary point I should say that I note C&PP's point that it has suffered unfair prejudice as a result of us reopening Ms P's complaint. Whether Ms P's complaint should be reopened was considered in detail by another ombudsman who set out his reasons for deciding the complaint should be reopened in a letter to both parties. I agree with the decision of the other ombudsman and, as C&PP has not detailed what prejudice it feels it has suffered, and I have not seen any evidence of it having suffered prejudice, I do not think I need to say anything more on this point here.

The Principles

In my view, the FCA's Principles for Businesses are of particular relevance to my decision. 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 1.1.2G). And, I consider that the Principles relevant to this complaint include Principle 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 have 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 requirement 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), 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 had not treated its client fairly.

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

> *"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 BBA judgment also considers section 228 of Financial Services & Markets Act 2000 ("FSMA") and the approach an ombudsman is to take when deciding a complaint. The judgment of Jacobs J in the Berkeley Burke case 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 view 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 Berkeley Burke. I also note C&PP acknowledges there were "regulatory standards", and says it took these seriously. So I think it reasonable to say it would agree the Principles are a relevant consideration.

On 18 May 2020, the High Court handed down its judgment in the case of Adams v Options SIPP [2020] EWHC 1229 (Ch). Mr Adams subsequently appealed the decision of the High Court and, on 1 April 2021, the Court of Appeal handed down its judgment in Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 474. I have taken account of both these judgments when making this decision on Ms P's case.

I note that the Principles for Businesses did not form part of Mr Adams' pleadings in his initial case against Options SIPP. And, HHJ Dight did not consider the application of the Principles to SIPP operators in his judgment. The Court of Appeal also gave no consideration to the application of the Principles to SIPP operators.

C&PP says it is an error in law to say because in Adams the Principles were not pleaded, the decision in Adams does not apply to the Principles. It says that to seek to distinguish Adams in this manner is artificial and ignores the fact that the Principles are reflected in COBS. And it adds that what is said in Adams about a breach of duty to comply with the COBS applies equally to the Principles.

I remain of the view that neither of the judgments say anything about how the Principles apply to an ombudsman's consideration of a complaint. But, to be clear, I do not say this means Adams is not a relevant consideration *at all.* As noted above, I have taken account of both judgments when making this decision on Ms P's case.

I acknowledge that COBS 2.1.1R (*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 2.1.1R, 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.

The Court of Appeal rejected Mr Adams' appeal against 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 did not so much represent a challenge to the grounds on which HHJ Dight had dismissed the COBS claim, but rather was an attempt to put forward an entirely new case.

I note that there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Ms P's complaint. The breaches were summarised in paragraph 120 of the Court of Appeal judgment. In particular, as HHJ Dight noted, he was not asked to consider the question of due diligence before Options SIPP agreed to accept the store pods investment into its SIPP. The facts of the case were also different.

So I have considered COBS 2.1.1R - alongside the remainder of the relevant considerations, and within the factual context of Ms P's case, including C&PP's role in the transaction. However, I think it is 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 am 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 Adams v Options SIPP. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

Regulatory publications

The FCA (and its predecessor, the 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:

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

I have set out below what I consider to be the key parts of the publications (although I have considered them in their entirety).

The 2009 Thematic Review Report

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 clients' interests in this respect, with reference to Principle 3 of the Principles for Business ('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 adviser, if it is concerned about the suitability of what was recommended.*

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

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

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

The later publications

In the October 2013 finalised SIPP operator guidance, the FCA states:

"This guide, originally published in September 2009, has been updated to give firms further guidance to help meet the regulatory requirements. These are not new or amended requirements, but a reminder of regulatory responsibilities that became a requirement in April 2007.

All firms, regardless of whether they do or do not provide advice must meet Principle 6 and treat customers fairly. COBS 3.2.3(2) is clear that a member of a pension scheme is a "client" for SIPP operators and so is a customer under Principle 6. It is a SIPP operator's responsibility to assess its business with reference to our six TCF consumer outcomes."

The October 2013 finalised SIPP operator guidance also set out the following:

"Relationships between firms that advise and introduce prospective members and SIPP operators

Examples of good practice we observed during our work with SIPP operators include the following:

- *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for un-authorised business warnings.*
- *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*
- *Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.*
- *Being able to identify irregular investments, often indicated by unusually small or large transactions; or higher risk investments such as unquoted shares which may be illiquid. This would enable the firm to seek appropriate clarification, for example from the prospective member or their adviser, if it has any concerns.*
- *Identifying instances when prospective members waive their cancellation rights and the reasons for this.*

Although the members' advisers are responsible for the SIPP investment advice given, as a SIPP operator the firm has a responsibility for the quality of the SIPP business it administers.

Examples of good practice we have identified include:

- *conducting independent verification checks on members to ensure the information they are being supplied with, or that they are providing the firm with, is authentic and meets the firm's procedures and are not being used to launder money*
- *having clear terms of business agreements in place which govern relationships and clarify responsibilities for relationships with other professional bodies such as solicitors and accountants, and*
- *using non-regulated introducer checklists which demonstrate the SIPP operators have considered the additional risks involved in accepting business from non-regulated introducers*

In relation to due diligence the October 2013 finalised SIPP operator guidance said:

"Due diligence

Principle 2 of the FCA's Principles for Businesses requires all firms to conduct their business with due skill, care and diligence. All firms should ensure that they conduct and retain appropriate and sufficient due diligence (for example, checking and monitoring introducers as well as assessing that investments are appropriate for personal pension schemes) to help them justify their business decisions. In doing this SIPP operators should consider:

- *ensuring that all investments permitted by the scheme are permitted by HMRC, or where a tax charge is incurred, that charge is identifiable, HMRC is informed and the tax charge paid*
- *periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme*
- *having checks which may include, but are not limited to:*
    - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*
    - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*
- *ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified*
- *good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and*
- *ensuring these benchmarks clearly identify those instances that would lead a firm to decline the proposed business, or to undertake further investigations such as instances of potential pension liberation, investments that may breach HMRC tax-relievable investments and non-standard investments that have not been approved by the firm"*

The July 2014 *"Dear CEO"* letter provides a further reminder that the Principles apply and an indication of the FCA's expectations about the kinds of practical steps a SIPP operator might reasonably take to achieve the outcomes envisaged by the Principles.

The *"Dear CEO"* letter also sets out how a SIPP operator might meet its obligations in relation to investment due diligence. It says those obligations could be met by:

- *Correctly establishing and understanding the nature of an investment*
- *Ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation*
- *Ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable)*
- *Ensuring that an investment can be independently valued, both at point of purchase and subsequently*
- *Ensuring that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc)*

C&PP says my provisional decision gave insufficient distinction to the difference between good and/or best industry practice and the minimum regulatory standards expected of C&PP. It says that to the extent that it is found that best practice was not followed, it does not follow that what happened fell below the minimum regulatory standards. It says there was no clear guidance, rule or regulation that specifies what was required of C&PP at the relevant time and so the regulatory publications do not provide a basis for how C&PP is to be judged for the purposes of this complaint. C&PP also says that, considering the decision in Adams, the regulatory publications cannot be used as a proper aid to statutory construction of the COBS Rules.

I acknowledge that the 2009 report (and the 2012 report and the *"Dear CEO"* letter) are not formal guidance (whereas the 2013 finalised guidance is). However, I remain of the view the fact that the reports and *"Dear CEO"* letter did not constitute formal (i.e. statutory) guidance does not mean their importance or relevance should be underestimated.

I also think it is important to again 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 am required to take into account relevant considerations which include: 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 again highlight that this is a clear and relevant point of difference between this complaint and the judgments in Adams v Options SIPP.

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 to produce the outcomes envisaged by the Principles. In that respect, I remain satisfied these publications also go some way to indicate what I consider amounts to good industry practice at the relevant time. I therefore remain satisfied it is appropriate to take them into account when considering what is fair and reasonable in the circumstances of this complaint.

C&PP says I should not consider regulatory standards which post-date the relevant events. It says if they represented good practice at the relevant time, they would have been reflected in the 2009 material.

I note that HHJ Dight in the Adams case did not 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 I remain of the view it does not follow that those publications are irrelevant to my consideration of what is fair and reasonable in the circumstances of this complaint. I am required to take into account good industry practice at the relevant time – unlike the court in the Adams case. And, as mentioned, the publications indicate what I consider amounts to good industry practice at the relevant time.

I remain of the view the fact that the later publications (i.e. those other than the 2009 Thematic Review Report), post-date the events that are the subject of this complaint does not mean that the examples of good industry practice they provide were not good practice at the time of the relevant events. It is clear from the text of the 2009 and 2012 reports, (and the “Dear CEO” letter published in 2014), that the regulator expected SIPP operators to have incorporated the recommended good industry practices into the conduct of their business already. So, whilst the regulators’ comments suggest some industry participants’ understanding of how the standards shaped what was expected of SIPP operators changed over time, it is clear the standards themselves had not changed.

The later publications were published after the events subject to this complaint, but the Principles that underpin them existed throughout, as did the obligation to act in accordance with those Principles.

I would also add that I remain of the view that even if I took the view that any publications or guidance that post-dated the events subject of this complaint do not help to clarify the type of good industry practice that existed at the relevant time (which I don’t), that does not alter my view on what I consider to have been good industry practice at the time. That is because I find that the 2009 report together with the Principles provide a very clear indication of what C&PP could and should have done to comply with its regulatory obligations that existed at the relevant time before accepting any introduction from S J Stone and/or allowing the SA investment into the SIPP.

My view that the regulatory publications are a relevant consideration doesn’t mean that in considering what is fair and reasonable, I will only consider C&PP’s actions with these publications in mind. The reports, Dear CEO letter and guidance gave non-exhaustive examples of good industry practice. They did not 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.

Ultimately, in determining this complaint, I need to consider whether C&PP complied with its regulatory obligations as set out by the Principles to act with due skill, care and diligence, to take reasonable care to organise its business affairs responsibly and effectively, to pay due regards to the interests of its customers, to treat them fairly, and to act honestly, fairly and professionally. And, in doing that, I’m looking to the Principles and the publications listed above to provide an indication of what C&PP could reasonably have done to comply with its regulatory obligations.

I should again make it clear that I do not say the Principles (or the rules otherwise) or the publications obliged C&PP to ensure the investment in SA was suitable for Ms P. It is accepted C&PP was not required to give advice to Ms P, and could not give advice. And I accept the publications do not alter the meaning of, or the scope of, the Principles (or the rules otherwise). 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 (and, for that matter, COBS 2.1.1R).

What did C&PP's obligations mean in practice?

In this case, the business C&PP was conducting was its operation of SIPPs. I am 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.

I note that in Adams v Options SIPP, HHJ Dight found that the factual context of a case would inform the extent of the duty imposed by COBS 2.1.1R. 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."*

Referring to this, C&PP says the Principles and COBS rules need to be addressed in the context of the specific area in which it was acting. It says it was not under a duty to advise and was under no duty not to do business with unregulated entities at the relevant time.

As mentioned, I do not say that C&PP was under any obligation to advise Ms P on the SIPP and/or the underlying investment. To be clear, I also do not say that it was obliged to reject *any* application introduced by an unregulated business. I say only that to meet its regulatory obligations when operating its SIPP it had to give consideration to whether to accept or reject particular investments and/or referrals of business.

C&PP says that to seek distinguish between acceptance of an application and advice on its suitability is artificial. In support of this point it refers me to paragraph 159 of Adams. *Moreover, to ascertain the suitability or otherwise of the investment for the claimant himself the defendant would have had to make detailed enquiries about the claimant's financial circumstances and, in my view, take advice on the value of the investment, evaluate the risks inherent in and lastly make a judgment call on the question of whether those risks were appropriate for the claimant in the light of the information which they had obtained about his financial situation and appetite for risk. That was not the role which the parties had agreed in the contract that the defendant would have. COBS Rule 2.1.1 cannot, in my view, be interpreted as requiring the defendant to take those steps.*

In my view this simply says that the obligation to act in a client's best interests set by COBS 2.1.1R does not oblige a firm to give advice on the suitability of an investment for an individual investor, where the firm was not contracted to provide advice. That is consistent with the approach I have taken to this complaint. In this section of the judgment, the alleged breach of COBS 2.1.1R under consideration was taking into the SIPP a manifestly unsuitable underlying investment, where suitability meant suitability for Mr Adams. The judge does not say the SIPP operator was not obliged to give *any* consideration to whether to accept or reject an application. Only that such consideration did not need to include the suitability of the intended investment for the individual investor. It does not follow from this, for example, that the SIPP operator was not obliged to consider whether the introducer might be breaching the General Prohibition, or whether there was a risk the investment might be fraudulent. And, in my view, refusing to accept an application in such circumstances, is not the same thing as advising Ms P on the merits of investing and/or switching to the SIPP – there is a difference.

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 and a particular investment is an appropriate one for a SIPP.

So I remain satisfied that, to meet its regulatory obligations and good industry practice, when conducting its business, C&PP was required to consider whether to accept or reject particular referrals of business. I note this appears to be consistent with C&PP's own understanding at the time, as it did eventually stop accepting introductions from S J Stone and/or SA investments.

C&PP's due diligence

The due diligence on S J Stone

As set out above, the 2009 Thematic Review Report deals specifically with the relationships between SIPP operators and introducers or "*intermediaries".* And it gives non exhaustive examples of good practice. I remain of the view, to meet these standards, and its regulatory obligations, set by the Principles, C&PP ought to have identified the significant risk of consumer detriment arising from business brought about by an unregulated business which appeared to be specialising in one unusual unregulated investment (about which C&PP ought to have had concerns, as I have set out below), where no regulated financial advisor was involved. And so C&PP ought to have ensured it thought very carefully about accepting business from S J Stone Ltd.

I think it is fair and reasonable to say such consideration should have involved C&PP getting a full understanding of the business model of the introducer, satisfying itself that the introducer would not be carrying out regulated activities, putting a clear agreement in place between it and the introducer and ensuring careful thought was given to the risk generally posed to consumers by the introducer.

I remain of the view that if C&PP had carried out adequate due diligence on S J Stone, and drawn reasonable conclusions from this, it ought to have been aware of several points of concern and to have concluded it should not accept business from S J Stone.

S J Stone was, essentially, Stuart Stone. It appears he sometimes used agents or representatives to help him out with applications – I note Ms P recalls meeting a woman. But it seems all of C&PP's initial interactions were with Mr Stone.

C&PP says it checked the FSA Register and that Mr Stone appeared on there. But, although Mr Stone appeared on the Register, his entry was a historic one. He held the CF30 controlled function from 23 Jun 2010 to 7 Mar 2011. So he had no regulatory status at the time he approached C&PP. Nor did S J Stone. Neither Mr Stone nor S J Stone were authorised persons. C&PP should therefore have considered whether to accept introductions of business from S J Stone on this basis.

I note C&PP says it could take comfort from the fact Mr Stone had a historic entry on the FSA Register. C&PP may have taken some comfort from the fact Mr Stone had at one stage met the criteria to become authorised to carry out certain regulated activities by the FSA. But, if what Mr Stone/S J Stone was intending to do (or was doing) in relation to SA involved regulated activities, or appeared to be inconsistent with regulatory standards, I do not think C&PP could have taken any comfort from Mr Stone's former authorised status.

I accept C&PP was able to accept introductions from unregulated businesses. But I think the lack of any regulated status here was a serious concern, in the light of what S J Stone intended to do, and what C&PP would have seen it was doing. And that C&PP ought to have been aware, or was aware, of further significant points of concern. Given this, I do not think it was fair and reasonable for C&PP to accept Ms P's application from S J Stone. I say this for a number of reasons.

Regulated activities

The available contemporaneous evidence indicates S J Stone was carrying out regulated activities. Rights under a personal pension scheme are a security. Under Article 25(1) Regulated Activity Order (RAO), making arrangements for another person to buy and sell these types of investments is a regulated activity. And under Article 25(2) 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, S J Stone was carrying out regulated activities within Article 25 of the RAO – and this ought to have been clear to C&PP at the time. C&PP in fact appears to accept that arranging was taking place. But it says – in its response to another complaint about its acceptance of an SA investment from S J Stone - that its understanding was that unregulated people can make arrangements and that it checked this with its solicitor. It has not provided any detail of what it asked the solicitor, or what it received in reply.

The FCA's Perimeter Guidance Manual perimeter 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 S J Stone's activities here amounted to the regulated activity of "making arrangements" for the SIPP under one or both of the Article 25 provisions. We do not have the application documents for Ms P. But, in other complaints about S J Stone, it sent the application with a covering letter which says it attaches:

- *C&P SIPP Application Form*
- *Transfer Form*
- *Clydesdale Bank Form*
- *Certified copies of Money Laundering*
- *Transfer Letter/Forms*
- *Platinum Agroforestry Programme - Application Form & Lease Agreement*
- *Platinum Agroforestry Rental Agreement Form*

In the other cases S J Stone also certified the money laundering documentation. It is also clear in those other cases that S J Stone corralled all the documentation required for things to proceed and sent this to C&PP. And also assisted with the completion of the forms.

I think it likely this is also what happened here, based on what Ms P says. She says someone who said they were representing S J Stone came to her home, and asked her to sign the necessary documents. So S J Stone was making arrangements that would have the direct effect that a particular transaction is concluded, and also enabling or assisting Ms P to deal with or through a particular firm. This ought to have been clear to C&PP.

C&PP should therefore have readily identified that S J Stone was carrying out regulated activities without authorisation from the regulator and so there was a clear risk of consumer detriment in accepting introductions in these circumstances.

I note C&PP says – in its response to another complaint about its acceptance of an SA investment from S J Stone – that it did give some thought to this and concluded that arrangements did not need to be made by an authorised person. I think C&PP ought reasonably to have had a full understanding of the rules, and to have been able to ascertain when regulated activities were taking place and to have understood the limits on who could undertake regulated activities. In other words, C&PP ought to have known and understood the RAO and associated rules and guidance. It therefore ought to have been aware that the arrangements were activities specified at Article 25 RAO, and could therefore only be undertaken by an authorised person where they related to investments specified in the RAO (such as personal pensions, which include SIPPs. C&PP should also have known – or knew – that neither SJ Stone nor Mr Stone were an authorised person.

I also think C&PP should have been alive to the risk that S J Stone might be giving advice on switches or transfers to its SIPP. It is difficult to see how otherwise people were ending up in its SIPP, and making the SA investment. I have not seen any evidence to show C&PP took steps to understand how the business was coming about. I note for example, C&PP says S J Stone said it would connect potential investors interested in green biofuel with relevant investment opportunities. It is not clear how that translated to applications to transfer or switch existing pension arrangements to a C&PP SIPP and invest in SA, without advice being given.

C&PP also said, in submissions to us made via its previous representative that its understanding was S J Stone contacted Ms P and offered her a pension review, where she was informed about the opportunity to invest in the SA investment. And that Ms P was advised that in order to make the SA investment she would have to transfer her pensions to a SIPP. It is not clear whether it arrived at this understanding at the time or subsequently. But this shows on C&PP's own understanding S J Stone was giving advice – and I think it should have arrived at this understanding at the time.

C&PP says I have given undue weight to whether S J Stone was carrying out regulated activities and what this meant for C&PP. It points out that its application form envisages that a financial advisor or investment manager would be involved and it was not its responsibility to ensure that this was the case or to act as a regulator to S J Stone.

I again note that C&PP's application appears to envisage applicants having a financial advisor or investment manager. As noted above, the application says:

I understand that it is the responsibility of my Financial Adviser to disclose to me all commission and Adviser Remuneration earned by my Adviser in respect of my SIPP.
It also says:

You will be responsible for your own investment decisions in association with your Financial Adviser and/or Fund Manager and you will agree to the services to be provided with your advisers

But I do not think it follows from this that C&PP could reasonably presume that advice had been given to Ms P by an authorised firm. In this case I have not seen any evidence to show C&PP could reasonably have concluded Ms P had received advice from an authorised firm.

I do not say C&PP should have acted as a regulator of S J Stone but I do think it is fair and reasonable to say this was a significant risk factor or "red flag". At the very least, it calls into question the motivations and competency of S J Stone Ltd.

C&PP says I have failed to consider that there is no requirement that individuals are advised prior to making a SIPP investment. I acknowledge that Ms P was not required to take advice. But, in the circumstances of this case, the absence of advice from an authorised firm and the risk that advice had been given by a firm which wasn't authorised were factors which C&PP should have considered when deciding whether to accept introductions from SJ Stone.

All in all, I am satisfied it is fair and reasonable to attach significant weight to this point and to say that C&PP, had it acted in accordance with its regulatory obligations and the standards of good practice at the time, ought to have known S J Stone was carrying out regulated activities relating to arranging, and ought to have known or suspected it was giving advice. And that it was not fair and reasonable for C&PP to accept Ms P's application in such circumstances.

The nature of the introductions from S J Stone

C&PP says the fact that SJ Stone introduced several clients is not, in and of itself, a red flag. It is not clear why it has made this point. In my provisional decision I said that although applications for SIPPs to facilitate the SA investment were brought to C&PP in large volumes at a high frequency by S J Stone it was not clear where Ms P sits in the overall volume – particularly as C&PP has told us it began accepting applications from S J Stone on 20 July 2011 but has also said Ms P's application was made on 5 July 2011. I said I thought it fair to assume that C&PP had *not* seen a high number of applications by the time of Ms P's application. C&PP has not commented on this or provided any further evidence. So I remain of this view this is a fair assumption.

But I also remain of the view I do not think it follows that C&PP should not have seen the business S J Stone was introducing as anomalous.

As I've explained above, the 2009 report says that SIPP operators should, as an example of good practice, be:

"Routinely recording and reviewing the type (ie 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.

…and

…able to identify anomalous investments eg unusually small or large transactions or more 'esoteric' investments such as unquoted shares, together with the intermediary that introduced the business."

As mentioned, S J Stone was not regulated/authorised and acted as an “introducer” to one esoteric unregulated investment - SA. This should have been identified as anomalous because such investments are high risk and are therefore unlikely to be suitable for the vast majority of retail investors (such investments are only likely to be suitable, if at all, for a very small element of the investment portfolio of a sophisticated investor).

C&PP has referred to the fact S J Stone had a distribution agreement with SA. But this does not persuade me to change my view that C&PP should have viewed this business as anomalous. If anything, the fact S J Stone, an unregulated business, had an agreement to distribute an investment and was clearly targeting pension investors further highlights why C&PP should have had cause for concern. I note, for example, the agreement envisages S J Stone giving advice:

7.3 *The Intermediary …… shall be responsible for satisfying itself as to (i) the suitability of the Products having regard to the Client's financial position, understanding of the risks involved and investment objectives.*

The agreement also confirms that S J Stone would be paid commission (although it is not clear at what rate that would be paid on the product Ms P invested in). This creates a potential conflict of interest where S J Stone is acting as the consumer’s agent (and likely advising them), but is also engaged by SA to sell its products.

I think that an agreement for an unregulated business to distribute an investment, which envisages advice being given and confirms commission will be paid, and which was clearly being enacted by targeting pension investors, was cause for concern – a further “red flag”.

As set out above, Principle 3 of the Principles says that a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems. So, I think C&PP ought to have identified that introductions relating to one unregulated and esoteric investment from one unregulated introducer was unusual and, given the nature of the investment, involved a high risk of consumer detriment.

So, if C&PP was meeting its regulatory obligations, it ought to have had adequate risk management controls in place to have allowed it to conclude very quickly that there was a high probability that much, if not all, of the business introduced by S J Stone carried with it a high risk of significant consumer detriment. I do not think it was fair and reasonable for C&PP to accept Ms P’s application in such circumstances.

Protea’s application for authorisation

I remain of the view that CP&P’s understanding that Mr Stone’s other business, Protea, was pending authorisation and S J Stone was effectively an interim solution, until the authorisation was confirmed (it seems it never was), was a further point of concern. I think this was highly unusual, and significant cause for concern.

The use of an unregulated businesses as an interim measure, whilst awaiting regulatory authorisation, is not a step which could be reasonably be expected to be undertaken by a legitimate business. If it is anticipated that the business it is going to be undertaking requires regulatory authorisation then I think the only reasonable approach is for no such business to be conducted until that authorisation has been granted. Instead, C&PP appears to have agreed to accept business from S J Stone, pending the authorisation of Protea, on the basis of an unwritten assurance that S J Stone would not give advice (I note this assurance did not appear to extend to arrangements), which C&PP ought to have known or suspected was not being met.

In my view it was not fair and reasonable for C&PP to accept Ms P's application in such circumstances. Particularly given what I say above about regulated activities and the anomalous nature of the business introduced using this supposedly interim measure by the time of Ms P's application.

Cash payments

C&PP says the fact it sought undertakings and assurances as to cash payments being received by customers after accepting their applications does not demonstrate earlier knowledge of this on its part. C&PP says it did not have concerns about this at the time of receiving Ms P's application.

I remain of the view it is likely that by a certain point C&PP knew, or suspected, cash payments were being made. It remains the case that I cannot think of any other reasonable explanation of why it would have asked for undertakings and assurances that cash payments would not be offered.

C&PP stopped accepting introductions from S J Stone (or, it seems, any further SA investments) on 5 September - only a few days after it sent Ms P's money to SA. I remain of the view that this suggests C&PP knew or suspected there was a problem with S J Stone and/or SA by this time. I am still not persuaded that C&PP was not aware of a problem or at least had cause to suspect there was a problem when it dealt with Ms P's application.

My conclusion on the due diligence on S J Stone

Taken together or individually I think these issues ought to have indicated a real and serious possibility of detriment to consumers. I think C&PP should have refused to accept Ms P's SIPP application from S J Stone irrespective of any documents or disclaimers that Ms P had signed (I'll discuss this further below). By failing to do so, I don't think C&PP met its regulatory obligation to treat Ms P fairly.

The due diligence on SA

As I have set out above, I think that if due diligence which was consistent with C&PP's regulatory obligations and the standards of good practice at the time had been carried out on S J Stone, that ought to have led to the conclusion C&PP should not accept applications from S J Stone at all. So it doesn't necessarily follow that the due diligence on the SA investment needs to be considered. I have however, for completeness, reconsidered *all* of C&PP's due diligence – and have therefore considered what it did and ought to have done and concluded in relation to the SA investment.

When setting out what due diligence it carried out on SA, C&PP has referred to the ESS report, dated 12 July 2011 and the Citadel Trustees report, dated "*August 2011*". It has also referred to visiting SA's offices and to SA being "*approved by solicitors*" (it has referred to a letter from solicitors to HMRC confirming that the investment products fall within the permitted range applicable to SIPPs and that the Sustainable Growth Group is a strong and growing company).

The ESS report appears to post-date Ms P's application. But I remain of the view it was of limited value, in any event.

I note C&PP says the report is sufficient to meet the minimum standards applicable at the time. But the report appears only to be a summary of SA's marketing and application material. It says it is based on a review of the application/terms and conditions, the rental agreement and a fact sheet. So there does not appear to have been any independent checking of the investment. The report also says its objective is to identify whether the investment is likely to be acceptable based on HMRC rules. The report says it's "*likely*" that the investment will be acceptable to HMRC, and gives the caveat that the authors "*are not tax experts*".

So it remains my view that if C&PP relied on this report in any significant way to demonstrate that it had undertaken adequate due diligence on SA, C&PP didn't meet its regulatory obligations and didn't act fairly and reasonably in its dealings with Ms P.

C&PP says Citadel Trustees was an FCA authorised firm and accordingly can be taken to be adhering to the relevant regulatory standards which would prevent it acting purely in self-interest, and comfort could be taken from its involvement.

Insofar as this point relates to the Citadel Trustees report C&PP has provided, this report is only dated "*August 2011*". So it is not clear when C&PP first saw this. But it clearly post-dates C&PP's decision to accept SA investments, and post-dates Ms P's application. Furthermore, I have still seen no contemporaneous evidence from C&PP such as internal memos, meeting notes, emails etc making any reference to this report. I also note the report expressly states it is not to be relied on by third parties and is no substitute for independent advice. The report carries a disclaimer on each page which says:

This document is for internal use only. If shown to third parties it should be made clear that the content is for information purposes only and should not be relied upon or substituted for independent legal advice.

And the chairman of Citadel said, in May 2012, following reports about the failure of SA:

Citadel has never held itself out as being an expert in the field of sustainable energy projects and neither has it confirmed at any time that any firm, company or individual is entitled to rely on the due diligence information provided.

So I remain of this view it is unlikely the report would have been provided to C&PP to form a basis for due diligence on SA. I am not therefore persuaded C&PP had regard to the Citadel report at any time before it sent Ms P's money to SA. Rather, I think it is likely something it obtained later, once the issues with SA were known. And, in any event, if C&PP did see this report at any time before sending Ms P's money to SA, I am not persuaded it could reasonably have placed much reliance on it, given the clear disclaimers it contained.

However, for completeness, I have reconsidered what would be fair and reasonable in the circumstances, if C&PP could reasonably have relied on the report (and did so).

The report began with a summary of how the investment purported to work, provided by its promoter. In this respect, the report is similar to the ESS report.

The report then contains four sections.

Section 1 is titled "*summary conclusions*", which are stated as follows:

1.1 SWI have several nursery and plantation assets in Cambodia that are professionally managed and the company appears to enjoy good relations with the local community.

1.2 The nurseries are well organized and display a disciplined approach to seedling production.

1.3 Local employees appear satisfied with their working conditions and local community leaders are enthusiastic about the opportunity for local farmers to participate in Jatropha grow out.

Section 2 is titled "*introduction*", and says:

2.1 [name 1] *of the Citadel office in Bangkok flew to Phnom Phen to undertake a due diligence visit to a small portion of the 776,629.6 (still to be verified) hectares of land in the Kingdom of Cambodia that SWI has arranged or will arrange for Citadel to take into Trust by means of a lease agreement between Citadel's UK non trading Special Purpose Vehicle (owning Company) and several cooperatives of Cambodian farmers who own the land.*

2.2 From Phnom Penh, [name 2] *of International Green Energy Co Ltd, which is involved in the management of some of the plots (IGE), drove* [name 1] *to Banteay Meanchey which is 6 hours from Phnom Phen in the Northwest of Cambodia.* [names 1 and 2] *were accompanied on the trip by* [name 3]*, the independent lawyer appointed by Citadel to carry out due diligence checks on the above mentioned land in Cambodia.*

2.3 There were four nursery visits in total. The first nursery was at Chan Noun CCF Pie, situated at Chak Drey Village, Phnom Proek District, Battambang Province and measured 5.5 hectares. The second was at King Kong Nursery No 3. CCF Pie situated at Bak Chunchean Village, Bakan District, Pursat Province and measured 7 hectares. The third is a nursery under the supervision of [name of an army general] *situated at Ta Ben Village, Siar Kram District, Banteay Meanchey province measuring 5.7 hectares and the final nursery is at the Headquarters Of SAE Pie and Training Center for all Organizations and Communities and measures 7.5 hectares.*

2.4 Banteay Meanchey and Battambang are part of the Tonie Sap Biosphere Reserve established in 1997 as an area devoted to conservation, the development of sustainable projects and with a mandate to develop demonstration projects relevant to conservation and sustainable development.

2.5 SAE have arranged the consolidation of approximately 6000ha of land in the Banteay Meanchey province to be used for Jatropha plantations. So far SAE advises that 1000ha have been planted.

Section 3 was titled "*observations*". It features a few photos of Jatropha seeds, saplings and young trees, and makes some general points about the importance of a water supply to the plants and it being possible to use the seeds as animal feed.

Finally, section 4 was titled "*economic development*" and made some general observations about the potential importance of plantations to the local economy.

The report also included some legal opinions – from a UK counsel about the status of the investment (this concludes it is not a collective investment scheme) and from a Cambodian lawyer who had been engaged by SA and Citadel, which says Carbon Credited Farming ("CCF Plc" a former name of SA) has the right to enter a lease agreement with Citadel over some land in Cambodia and that the agreement complies with Cambodian laws.

On the face of it, these elements of the report go some way towards meeting the standards of good practice and regulatory obligations at the time. But I do not think that, overall, the report, in itself, was sufficient to meet these standards and obligations. And I think, in any event – particularly when it is considered alongside everything else – the contents of the report ought to have given C&PP cause for concern, rather than it offering a basis for C&PP to conclude the SA investment was one it should accept into its SIPP.

I say this because, whilst the report involved some checking, it is not independent – the Cambodian lawyer was working for both Citadel and SA, and much of the report was based on what SA had told Citadel (rather than any independent checks). And C&PP, if it considered the report, ought to have had number of further concerns. In summary:

- The opinion from the Cambodian lawyer says CCF Plc has the right to enter into a lease agreement with a firm called Citadel Trustees CC Ltd for 6,079 hectares of land situated at Banteay Meanchey Province. The opinion is not entirely clear, but it suggests this right arises not from a land concession with the government of Cambodia but through CCF Plc having established a Cambodian company called International Green Energy (which is referred to in section 2 of the report only as "*involved in the management of some of the plots"*) which CCF PLC owned 95% of the shares of. The final part of the opinion says the registration of farming land "*belonging to the people*" was only required to be at "*village-commune*" or "*village-commune-district*" and the lease would be registered on this basis, with Citadel being notified if a third party attempts to secure the land.

- This seems to me to be an opaque and complex structure that cannot be readily understood by anyone who is not an expert in Cambodian law and is not easily reconciled with the other available information about the investment. And it is not at all clear from the opinion how Ms P's SIPP would acquire title to land in Cambodia (or if it would, ultimately, acquire title at all).

- The due diligence visits appear to have been to nurseries, rather than operating plantations, so do little to demonstrate SA was operating as claimed – only that it had grown a relatively small number of saplings and young trees.

- These visits appear to have involved only around 25 hectares out of a claimed 776,629 hectares leased by SA. It is not clear if all these hectares were intended for initial investments or later plantations (I note the capital builder investment offered to pay high returns in the form of additional plots) and if only the 6,079 hectares referred to in the legal opinion was intended for initial investment. But, either way, it is still only a very small portion of the overall land.

- The report says these visits took place from 7 to 8 April 2010 – some 16 months prior to the report being created.

- If land other than the nurseries was visited (and this is not clear from the report), there is nothing to say any of that land was being operated as plantations at the time.

- There is nothing to show SA was harvesting crops, and generating returns.

- The report says SA had advised it had 1,000 hectares of actual plantations. There appears to have been no independent check of this (and I note it was later reported that in fact only around 300 hectares had been planted by the time SA went into receivership in 2012, and the plantations were not capable of generating returns for investors). But, taken at face value, this suggests that as of August 2011 plantations had been created on only a small portion of the land SA had leased. It was therefore possible there was not sufficient operating plantations to support the number of investments being made.

- Only a small portion of the land had been transferred to Citadel, to be put in trust. Only a vague statement is made about the remainder - the report only says that the process will be undertaken in stages and is already underway. So it is not clear that Citadel had sufficient title to the leases that formed the investment Ms P made, at the time of the investment being made. I also note Ms P's lease and rental agreements don't specify which plots she was acquiring or where the plots were located.

- The report refers to an option to sell back the lease at the original purchase price in years 5, 6, 7, 8, 9 and 10 (assumedly whilst retaining any returns earned). But it is not clear how this works in practice or how it would be funded. This "buy back" option was likely be of very limited value, and there was a risk it was misleading investors about the level of risk associated with the investment.

C&PP has said that, when it visited SA's offices, it received information about the proposed SA investments and it noticed that Citadel was involved in the project and "checking allocations etc." . C&PP has clarified that what it has earlier described as SA being "*approved by solicitors*" relates to a letter dated 27 October 2011 from a firm of solicitors to HMRC. C&PP has highlighted the following conclusion drawn by the solicitors:

"*It was clear from our meeting with Mr West* (the Chief Operating Officer of SA) *that the Sustainable Growth Group is a strong and growing company within the world of ecology based investments. We are also satisfied that the investment products on offer by Sustainable AgroEnergy fall within the permitted range applicable to SIPP's under the HMRC Manual."*

The letter confirmed the review the solicitors had undertaken involved:

1. *Reviewing the documentation that C & P SIPP requested and reviewed as part of their due diligence process prior to their agreement to such being purchased by reference to the SIPP.*
2. *Conducting research on Sustainable AgroEnergy.*
3. *Meeting with Gary West, the Chief Operating Officer of Sustainable AgroEnergy.*
4. *Discussing the investment with Stuart Stone of Stuart Stone Limited, the main introducer of members wishing to invest in Sustainable AgroEnergy.*

C&PP says that although this letter post-dates the acceptance of Ms P's application it demonstrates that even with a solicitor's examination taking place, red flags were not raised in respect of the investments.

I think at this point it is worth again noting that C&PP accepted no new introductions from S J Stone after 5 September 2011. So, although C&PP has offered no evidence of this point (other than to say it wasn't aware cash payments were being made), in my view it is likely it was aware of what, in its view, were "red flags" as it is difficult to see why otherwise it did not accept applications despite the apparent assurance offered by the solicitor's letter. This does not support its point that no red flags were discoverable, even with the involvement of a solicitor.

In any event, I am not persuaded the solicitor's letter is sufficient evidence to show that adequate due diligence at the outset would have shown there was no significant cause for concern. For the reasons given, I think a number of points of concern ought to have been identified. And even if none of these points, in itself, was a "red flag" I think cumulatively they ought to have given significant cause for concern – particularly when considered alongside what was known or ought to have been known about S J Stone.

C&PP says comfort was taken from the fact that one member, after making the investment, sought to take his tax free cash and as this was provided to him. It is not clear whether it pre or post dates Ms P's application. Setting that aside, I do not think C&PP could take much comfort from one investor being able to withdraw around a quarter of the amount they invested.. In any event, any comfort it could reasonably have taken from this was not sufficient to override all the concerns I have outlined.

I am also not persuaded that any comfort C&PP could have taken from Citadel's regulated status overrides all the points of concern.

In short, based on the current evidence, I remain unpersuaded C&PP met its regulatory obligations by carrying out sufficient due diligence on SA and I think it therefore did not act fairly and reasonably in its dealings with Ms P, as it did not carry out sufficient due diligence on SA. Furthermore, I am satisfied that if C&PP did have regard to the Citadel report at the relevant time, it ought to have identified a number of concerns about the SA investment.

Had sufficient due diligence been done (as I consider it ought to have been, had C&PP been acting fairly and reasonably towards Ms P), C&PP should have identified a number of points of concern in relation to the SA investment, in addition to those which I've listed above which should have been apparent to it if it read Citadel's report. For example:

- The investment purported to offer a very high return through oil produced by jatropha trees.

- There appears to be no basis for the high projected return. I don't expect C&PP to have been able to say the investment would be successful. But a high projected return without any apparent basis should have given C&PP cause to question the investment's credibility.

- SA had no track record, and jatropha plants hadn't previously been used to make money on the scale proposed.

- There was information available which called into question the viability of the proposed business model (particularly in light of the very high projected returns). There was negative commentary in the public domain about investments that purported to offer high returns through investment in jatropha plants. Some of these articles warned investors against being seduced by high returns that might not be achievable, and questioned whether it was possible to make money from growing jatropha at all.

- The SFO issued a report in early 2012. It noted the auditor of SA had warned in June 2011 of "*financial difficulties caused by the failure to plant sufficient jatropha trees to have any prospect of generating returns for investors*". C&PP could have taken the auditor's comments into account.

- It isn't clear how a lease of a parcel of land in Cambodia could be valued or realised. How would an investor be able to take benefits from their pension? And what would happen if they died?

If C&PP had considered these points, alongside the other issues I have highlighted, it should reasonably have concluded the SA investment wasn't acceptable for its SIPPs (that is, it shouldn't have added it to the list of permitted investments for its SIPP) because:

- There was a risk the investment might be fraudulent – it wasn't clear how such high returns could be offered.

- The land leases, if they existed, might have been difficult to independently value, both at point of purchase and subsequently. It was also possible that there might be no market in them. So it was possible that an investor might not have been able to take benefits from their pension, or make changes to it, if they wanted to.

- The investment in SA would allow C&PP's clients' SIPPs to become a vehicle for a high-risk and speculative investment that wasn't a secure asset, and could have been a scam.

The investment's failure was confirmed when SA's companies were put into receivership in early 2012. The management receiver's letter sent to investors on 27 April 2012 said:

> *"…neither the (SA) Companies nor any other Sustainable Group entity had any title whatsoever to the Cambodian land. Nor was there any way in which the business model on which the project was built could operate."*
>
> *"…most of the site was unsuitable for jatropha products and very considerable work needed to be undertaken on infrastructure, drainage and irrigation which would be very expensive. No income from the sale of the crops grown in Cambodia had been recorded in Sustainable Agroenergy PLC's records to date. The guaranteed returns apparently offered to UK investors were illusory."*

And the letter concluded:

> *"… the land at present is entirely unsuitable for palm oil production and requires very substantial investment before any significant returns can be made from agriculture. Of particular concern is that the land is unsuitable for the growing of jatropha. All that the Companies own in Cambodia are some plant and equipment of little, if any, realisable value."*

I think this emphasises the importance of sufficient due diligence and the inadequacy of the Citadel report. Citadel itself accepted they were not an expert in sustainable energy products and specifically said that no firm company or individual was entitled to rely on the due diligence information provided.

If despite what Citadel have said, if C&PP's position is that they had regard to the report prior to accepting Ms P's application and are relying on it to demonstrate that they undertook adequate due diligence on SA, then for the reasons I've set out above I do not agree. There were enough red flags and ambiguities in the report that meant C&PP should have had significant concerns about accepting the investment. To my mind it certainly should not have accepted SA into the SIPP without conducting further due diligence in order to address the clear questions that remained outstanding.

Overall, based on the available evidence at the time I think there were sufficient points of concern associated with the investment, which ought to have been apparent, based on what was known by C&PP and what it ought to have known had sufficient due diligence been undertaken, to reasonably lead it to conclude there was a significant risk of consumer detriment.

I note C&PP says it is contradictory to find that C&PP should have concluded that the investment wasn't acceptable for the SIPP whilst conceding that C&PP did not need to assess the suitability of the investment. It adds that had it sought to evaluate the investment's track record and proposed revenue, the viability of the business model, applicable domestic laws, accounts and other matters, it would have strayed beyond its contractual role and regulatory authorisation.

In response to this I think I can only reiterate what I say earlier in this decision. I am satisfied there is a difference between accepting or rejecting a particular investment for a SIPP and advising on its suitability for the individual investor. And I accept C&PP was not expected to, and was unable to, give advice to Ms P on the suitability of the SIPP and/or SA investment for her personally.

To be clear, I'm not making a finding that C&PP should have assessed the *suitability* of the SA investment for Ms P. I accept C&PP had no obligation to give advice to Ms P, or to ensure otherwise the suitability of an investment for her. My finding isn't that C&PP should have concluded that Ms P wasn't a candidate for high-risk investment. It's that C&PP should have concluded the investment wasn't *acceptable* for its SIPP and thereby failed to treat Ms P fairly or act with due skill, care and diligence when accepting the investment.

I am satisfied C&PP could have identified the concerns I have mentioned, and ought to have drawn the conclusion I have set out, based on what was known at the time. I do not say that C&PP should have known SA was a fraud at the time – only that it ought to have identified significant points of concern, and these ought to have led it to conclude it should not accept SA investments. It ought to have known there was a high risk of consumer detriment.

C&PP says that any red flags that may have been present were insufficient to compel it to refuse the application. It is surprising that C&PP's view is that something it ought to have considered a red flag – a warning of a problem or danger – did not compel it to refuse Ms P's application. But, setting that aside, for the reasons I have set out, I am satisfied the concerns C&PP should have identified should have led it to conclude it should not accept the SA investment.

In any event, if it is not accepted that C&PP should not have allowed SA into its SIPP at all, I think the factors I have listed are still reasons why C&PP should have given particularly careful thought to accepting the investment. The nature of the investment is something that should have been at the forefront of its mind when considering whether or not to accept introductions of business from S J Stone.

COBS 11.2.19R

I note that C&PP has made the point that COBS 11.2.19R obliged it to execute investment instructions. It effectively says that once the SIPP has been established, it is required to execute the specific instructions of its client.

It is my view that the crux of the issue in this complaint is whether C&PP should have accepted the SIPP application and established Ms P's SIPP in the first place. In any event, C&PP's argument about having to execute the transaction as a result of COBS 11.2.19R was considered and rejected by the judge in BBSAL. In that case Jacobs J said, at [122]:

'The heading to COBS 11.2.1R shows that it is concerned with the manner in which orders are to be executed: i.e. on terms most favourable to the client. This is consistent with the heading to COBS 11.2 as a whole, namely: "Best execution". The text of COBS 11.2.1R is to the same effect. The expression "when executing orders" indicates that it is looking at the moment when the firm comes to execute the order, and the way in which the firm must then conduct itself. It is concerned with the "mechanics" of execution; a conclusion reached, albeit in a different context, in Bailey & Anr v Barclays Bank [2014] EWHC 2882 (QB), paras [34] – [35]. It is not addressing an anterior question, namely whether a particular order should be executed at all. I agree with the FCA's submission that COBS 11.2 is a section of the Handbook concerned with the method of execution of client orders, and is designed to achieve a high quality of execution. It presupposes that there is an order being executed, and refers to the factors that must be taken into account when deciding how best to execute the order. It has nothing to do with the question of whether or not the order should be accepted in the first place.'

I therefore don't think that C&PP's argument on this point is relevant to its obligations under the Principles (and the rules otherwise) to decide whether or not to accept an application to open a SIPP in the first place or to execute the instruction to make the SA investment.

In conclusion

After considering these points, I don't regard it as fair and reasonable to conclude that C&PP acted with due skill, care and diligence, or treated Ms P fairly by accepting the investment in SA or accepting the application from S J Stone Ltd. C&PP didn't meet its regulatory obligations or the standards of good industry practice at the time, and it allowed Ms P's funds to be put at significant risk as a result.

Did C&PP act fairly and reasonably in proceeding with Ms P's instructions?

C&PP says I gave insufficient weight to its disclaimers that they are not responsible for the investment decisions when reaching my provisional decision, and repeats that Ms P failed to disclose that she was receiving a payment in respect of the transaction. It says if it had been alerted to this then it would have refused to process the application.

C&PP says the situation is comparable to that in Adams at [164]:

The claimant accepted that he had been warned, more than once, that the underlying investment was high risks (sic) *and speculative before committing himself to the SIPP. He understood, as I have found, the limited role which the defendant was to perform and he agreed to contract with them on that basis. Thus in my view the defendant complied with the best interests rule. It was not part of their duty, in my view, to refuse to accept this particular underlying investment at the stage when the claimant asked to include it within a SIPP. He also accepted that he nevertheless went ahead with the investment because he wanted to extract cash from his pension fund. There is no basis on which, even if there had been a breach of duty by the defendant, that I could have come to the conclusion that it was causative of loss, the claimant did not suffer loss as a result of the alleged contravention of the rule but because of his motivation in entering into the transaction.*

C&PP says this point received approval in the Court of Appeal judgment [2021] EWCA Civ 474 at [126].

Mr Green argued that there is no justification for Mr Adams being permitted at this stage to advance a fundamentally different and new case, particularly since it would necessitate further factual and expert evidence. I agree. It follows that the appeal in respect of the COBS Claim must fail. I would add that Mr Adams might anyway have struggled to overcome the Judge's finding that any breach of duty was not causative of loss.

I note what C&PP says. But, in my view, the facts here are very different. I have not seen sufficient evidence to show Ms P understood she was making a high risk investment and was prepared to do this in order to secure a cash payment. Ms P was not asked here to make the sort of declarations Mr Adams was asked to make. C&PP's declarations did not include any risk warnings.

In any event, the Court of Appeal was aware of all the points about Mr Adams' conduct - see [113] of the judgment – but still exercised its discretion under s28 of FSMA in favour of Mr Adams. In particular, the Court of Appeal noted, at [115] i):

A key aim of FSMA is consumer protection. It proceeds on the basis that, while consumers can to an extent be expected to bear responsibility for their own decisions, there is a need for regulation, among other things to safeguard consumers from their own folly. That much reduces the force of Mr Green's contentions that Mr Adams caused his own losses and misled Carey;

I remain of the view, for the reasons given, C&PP simply should have refused to accept the SA investment into its SIPP. So things should not have got beyond that. Had C&PP acted in accordance with its regulatory obligations and best practice, it is fair and reasonable in my view to conclude that it should not have accepted Ms P's application to open a SIPP.

My remit is, of course, to make a decision on what I think is fair and reasonable in all the circumstances. And my view is that it's fair and reasonable to say that just asking Ms P to sign declarations was not an effective way for C&PP to meet its regulatory obligations to treat her fairly, given the concerns C&PP ought to have had about her introduction and the investment.

Having identified a risk, it is my view that C&PP should have refused to accept business from S J Stone and the investment in SA – not put in place a process asking customers to sign a declaration in an attempt to absolve itself of responsibility. I don't think the declaration Ms P signed meant that C&PP could ignore its duty to treat her fairly.

In any event, I do not consider the declaration Ms P was asked to give to have been clear. The part relating to cash payments said:

I will not require, nor attempt to require, the withdrawal of funds held to provide benefits for me under the Plan, or the income on those funds, other than in accordance with the rules of the Plan

Ms P understood she was receiving 25% introducer's commission. I think that was very unusual and a cause for concern, but I also think Ms P was naive and inexperienced in investment matters – that is clear from the detail of her recollections of events. And, as the cash that was paid to Ms P did not come directly out of her SIPP. Ms P would not therefore have necessarily understood she was engaged in the *withdrawal of funds…other than in accordance with the rules of the Plan* as she was asked to declare. In other words, I do not think there is sufficient evidence to show Ms P made a conscious effort to deceive C&PP when making the declaration.

I note C&PP has referred to its Key Features Document, which says:

"*We would like to make you aware that the Trustees of the C&P SIPP do not approve of member's taking loans against their pension funds or receiving remuneration via incentives of any kind as this could lead to an unauthorized payments charge being levied on the pension funds by HMRC*."

I think "*receiving remuneration via incentives of any kind"* might have been more readily linked by Ms P to receiving an introducer commission. But Ms P was not asked to make a declaration in these terms, not have I seen any evidence to show her attention was drawn to this aspect of the Key Features when she made the declaration.

But these are secondary points. As mentioned, it remains my view it was not fair and reasonable in the circumstances of this case to ask Ms P to make the declaration *at all*. The application should instead have been refused.

C&PP has also referred to a letter it says was sent to Ms P, asking her if she had received "*commission payments as an incentive for making an investment".* Ms P says she does not recall seeing such a letter, and C&PP has, in my view, still not provided sufficient evidence to show it was sent. But, even if I assume such a letter was sent, the primary point – that things simply should never have proceeded, as C&PP should have refused the application – applies. Going beyond that, the wording of the letter shows it is clearly an effort to deal with issues after the fact. If it was sent, it was clearly sent after the SA investment had been made and the damage had therefore been done. So I do not think C&PP sending this does anything to mitigate its original decision to accept Ms P's application, or that a lack of response from Ms P did anything to worsen the position she is now in.

I am also satisfied that, had C&PP not accepted Ms P's application to open a SIPP introduced from S J Stone Ltd, the arrangement for Ms P would not have come about in the first place, and the loss she suffered could have been avoided. S J Stone was clearly reliant on C&PP to facilitate things – but for C&PP's acceptance of the application, Ms P's business would not have been able to proceed.

In any event, I think it fair to say Ms P should simply have been unable to complete this transaction. I do not think any SIPP operator, acting properly, would have dealt with S J Stone or accepted SA investments.

C&PP might argue that another SIPP operator would have accepted Ms P's application, had it declined it. But I don't think it's fair and reasonable to say that C&PP should not compensate Ms P for her 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 the application from S J Stone Ltd.

For all the reasons I've set out, I remain satisfied that it would not be fair to say Ms P's actions mean she should bear the loss arising as a result of C&PP's failings. In the circumstances, I am satisfied that C&PP should not have asked her to sign the declaration at all. For the reasons I have set out, I am satisfied that the application should never have been accepted in the first place.

Putting things right

I am satisfied that C&PP's failure to comply with its regulatory obligations and industry best practice at the relevant time have led to Ms P suffering a significant loss to her pension. And, my aim is therefore to return Ms P to the pension position she would now be in but for C&PP's failings.

C&PP should calculate fair compensation by comparing the current position to the position Ms P would be in if she had not transferred from her existing pension. In summary, C&PP should:

1. Calculate the loss Ms P has suffered as a result of making the switch.

2. Take ownership of the SA investment if possible.

3. Pay compensation for the loss into Ms P's pension. If that is not possible pay compensation for the loss to Ms P direct. In either case the payment should take into account necessary adjustments set out below.

4. Pay £500 for the trouble and upset caused.

I'll explain how C&PP should carry out the calculation set out at 1-3 above in further detail below:

1. Calculate the loss Ms P has suffered as a result of making the transfer

To do this, C&PP should work out the likely value of Ms P's pension as at the date of this decision, had she left it where it was instead of switching to the SIPP.

C&PP should ask Ms P's former pension provider to calculate the current notional transfer value had she not switched her pension. If there are any difficulties in obtaining a notional valuation then the FTSE UK Private Investors Income Total Return index should be used to calculate the value. That is likely to be a reasonable proxy for the type of return that could have been achieved if suitable funds had been chosen.

The notional transfer value should be compared to the transfer value of the SIPP at the date of this decision and this will show the loss Ms P has suffered. The SA investment should be assumed to have no value. Account should however be taken of the cash back payment paid out to Ms P, and any return Ms P has received from the SA investment (I am aware, for example, that the SFO obtained some money from Mr Stone and others, which was distributed to some SA investors – although this is likely to have been a small sum).

2. Take ownership of the SA investments

If C&PP is unable to take ownership of the SA investment it should remain in the SIPP. I think that is fair because I think it is unlikely it will have any significant realisable value in the future. However, it would not be fair for Ms P to have any ongoing fees to pay in relation to the SIPP. So, in the event C&PP is unable to take ownership of the SA investment (and it can't otherwise be removed from the SIPP), it should waive any fees associated with the SIPP, until such a time as the SIPP can be closed.

3. Pay compensation to Ms P for loss she has suffered calculated in (1).

Since the loss Ms P has suffered is within her pension it is right that I try to restore the value of her pension provision if that is possible. So if possible the compensation for the loss should be paid into the pension. The compensation shouldn't be paid into the pension if it would conflict with any existing protection or allowance. Payment into the pension should allow for the effect of charges and any available tax relief. This may mean the compensation should be increased to cover the charges and reduced to notionally allow for the income tax relief Ms P could claim. The notional allowance should be calculated using Ms P's marginal rate of tax.

On the other hand, Ms P may not be able to pay the compensation into a pension. If so compensation for the loss should be paid to Ms P direct. But had it been possible to pay the compensation into the pension, it would have provided a taxable income. Therefore, the compensation for the loss paid to Ms P should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Ms P's marginal rate of tax in retirement. For example, if Ms P is likely to be a basic rate taxpayer in retirement, the notional allowance would equate to a reduction in the total amount equivalent to the current basic rate of tax. However, if Ms P would have been able to take a tax free lump sum, the notional allowance should be applied to 75% of the total amount.

4. Pay £500 for the trouble and upset caused.

Ms P has been caused some distress and inconvenience by the loss of her pension benefits. This is money Ms P cannot afford to lose and its loss has undoubtedly caused her distress. I consider that a payment of £500 is appropriate to compensate for that.

Interest

The compensation must be paid as set out above within 28 days of the date C&PP receives notification of her acceptance of my final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation is not paid within 28 days.

Tax

Ms P has been asked to pay additional tax, as a result of her receiving around 25% of the value of her pension as "introducer's commission". Ms P would have had to pay some tax on the amount she received, had it been taken from her pension fund legitimately. I think it fair to assume she would have paid income tax at a rate of 20%, given what is known about her circumstances. But it seems HMRC has asked Ms P to pay more than this, as it considers the payment was an unauthorised payment.

If C&PP had not accepted Ms P's application, she would not have received the cash payment. So, in addition to paying compensation as calculated above, C&PP should pay to Ms P (or, if it prefers, HMRC direct) the amount of tax Ms P has been required to pay by HMRC over and above the 20% she would likely have paid otherwise.

C&PP should also pay interest, at the rate of 8% simple, on any amounts of tax Ms P has had to pay over and above the 20% she likely would have paid otherwise. That should be paid from the date the tax was paid, to the date of this decision. If Ms P has made payments in instalments, the earliest instalments should be taken to be part of the 20% Ms P would have paid. In other words, the 8% simple should be paid on any amounts paid after an amount equivalent to 20% had been paid.

My final decision

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £150,000, I may recommend that Corporate & Professional Pensions Limited pays the balance.

Determination and award: My decision is that I uphold this complaint and consider that fair compensation should be calculated as set out above. I require Corporate & Professional Pensions Limited to pay the amount produced by that calculation up to the maximum of £150,000 plus any interest set out above.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that Corporate & Professional Pensions Limited pays Ms P the balance plus any interest on the balance as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms P to accept or reject my decision before 18 October 2021.

John Pattinson
Ombudsman