DRN-3741113

The complaint

Mr S complains that Options UK Personal Pensions LLP ('Options', formerly Carey Pensions) didn't carry out sufficient due diligence when it accepted his application to transfer his occupational defined benefit ('DB') pension scheme benefits into a self-invested personal pension ('SIPP').

Mr S is represented here by a claims management company ('CMC') but for ease, I'll refer only to Mr S.

What happened

I've outlined the key parties involved in Mr S's complaint.

Options

Options is a SIPP provider and administrator. At the time of these events, Options was regulated by the Financial Services Authority ('FSA'), later becoming the Financial Conduct Authority ('FCA'). Options 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.

'Firm G' / Financial Provision Solutions Limited ('FPSL')

Firm G was an 'Introducer Appointed Representative' of FPSL from 24 February 2014 to 30 October 2015. An Introducer Appointed Representative can only introduce customers to another firm or members of the firm's group, and/or give out certain kinds of marketing material.

At the time of the events complained about, FPSL was an FCA regulated financial adviser. An introducer agreement was made between FPSL and Options. On 3 March 2014, an 'Introducer Profile – Regulated Financial Services Firm' document was signed, which set out the type of business FPSL would be introducing. On the same date, a Terms of Business was signed, which set out Options' terms of business and the conduct it expected of FPSL. A fee schedule intended for clients was also produced, titled, "*The Carey Pension Scheme SIPP Fee Schedule 2014 Financial Provision Solutions (for ex-Armed Forces)".*

Options has told us its agreement with FPSL ended when, in February 2017, FPSL ceased to be regulated by the FCA. In September 2019, FPSL went into Financial Services Compensation Scheme ('FSCS') default.

'Firm C'

Firm C is an investment manager based in the Isle of Man. It agreed to manage or provide oversight of investments taken out by Mr S after he had transferred his DB pension into his SIPP.

'Firm J'

Firm J is regulated in the UK by the FCA. It provided the investments into which Mr S's SIPP monies were invested.

Mr S's dealings with Firm G, FPSL and Options

Mr S had an armed forces occupational DB pension. Mr S says, amongst other things, that he was 'cold-called' by Firm G about a pension review. He says Firm G already knew details of his DB pension and told him that it was 'frozen' and not making any money. And that Firm G made him worry about his pension, so he agreed to a pension review.

Mr S says that before this, he'd not thought about changing his pension or been interested in doing so. And that he'd no idea about investments. But Firm G told him his funds would be safely invested and would perform much better and increase his pension.

On 19 June 2014, Mr S's DB scheme wrote to Mr S saying that *"An application has been received from [Firm G] requesting the transfer of your accrued pension rights in the* [DB scheme]*"* and went on to set out the details, including the transfer value, of his DB scheme benefits.

Mr S says Firm G made all the contact and arranged for the documents to be signed. That he didn't receive any written advice from Firm G - instead it talked him through the process and why it was better for him to transfer. Mr S says FPSL then gave him advice to transfer. And that he didn't receive any payment for moving his pension.

It's not disputed that FPSL gave Mr S advice. However, I've not been provided with a copy of its advice.

An Options branded SIPP application form was completed for Mr S in late 2014. This included the following information:

- The 'Transfers' section set out the details of Mr S's DB scheme to be transferred. A box which stated *"Have you taken advice on the transfer of this policy?"* was answered as *"Yes",* and Mr M of FPSL was recorded as the adviser who'd given that advice.

- The 'Transfers' section also stated *"For any Final Salary/Defined Benefit occupational scheme transfer you are required to seek appropriate advice from a regulated professional adviser and provide us with a copy of the TVAS* [transfer value analysis] *report and the advice. If the recommendation in the TVAS report and advice is not to transfer a Final Salary/Defined benefit scheme, then, Carey Pensions UK will not process the transfer request."*

- The 'Investments' section of the SIPP application form recorded that Firm C had been appointed as Mr S's Investment Manager and had 'discretionary' investment authorisation, meaning that it would manage Mr S's pension funds. This section also recorded that 100% of Mr S's investment would be in an investment named "*Balanced*" – this was the investment later made with Firm J.

- The 'Professional Financial Adviser Agreement' section again recorded that Mr M of FPSL was Mr S's financial adviser. It also recorded that FPSL would be paid an initial fee of just over £3,000 from Mr S's new SIPP, with no ongoing fees.

- The 'Declaration' section signed by Mr S said, amongst other things:

- *"I hereby consent to Carey Pensions UK LLP requesting the transfer of my policies listed in the application;"*
- "*I understand that it is my sole responsibility to make decisions relating to the purchase, retention or sale of any investment held within the Carey Pension Scheme"*.
- *"I agree to indemnify Carey Pensions UK LLP 'The Administrator' and Carey Pension Trustees UK Ltd against any claim in respect of any decision made by myself and/or my Professional Financial Adviser/Investment Manager or any other professional adviser I choose to appoint from time to time".*
- *"I confirm that I am establishing the Carey Pension Scheme on an execution only basis."*

Mr S's new Options SIPP opened in December 2014. In April 2015, just under £60,000 was transferred into it from his DB pension scheme. A few days later, just over £55,000 of Mr S's SIPP monies were used to purchase an investment with Firm J, with the remainder left to cash in Mr S's SIPP account.

Some time later, Mr S submitted a claim to the FSCS regarding FPSL. In November 2019, the FSCS calculated Mr S's total loss was just over £95,000 and paid him £85,000 in compensation, its maximum amount at that time. The FSCS later provided Mr S with a reassignment of rights to enable him to pursue a complaint against Options.

In February 2020, Mr S complained to Options. In summary, he said Options was also responsible for his financial loss in addition to FPSL, as he thought it hadn't carried out sufficient due diligence on FPSL and its business model, or on the investment he made with his SIPP monies. Mr S thought Options should put him back into the financial position he'd be in but for its failings, and also compensate him for the distress its failings had caused him.

Options issued its final response to Mr S's complaint in April 2020, which didn't uphold it.

Unhappy with this, Mr S referred his complaint to the Financial Ombudsman Service in May 2020.

Submissions from Options

Options has made a number of points in relation to Mr S's complaint and in other separate complaints brought to our Service about Options featuring FPSL as the regulated advising introducer. For ease, I've brought these points together here. Amongst other things, they include that:

- Options is concerned our Service is determined to conclude Options should be liable for the client's losses, to such an extent that we disregard any evidence which doesn't support that conclusion.

- Fundamentally, as an execution-only (i.e. non-advised) provider, Options would have been in breach of COBS 11.2.19 had it not followed Mr S's instruction to invest.

- Options made clear to Mr S that it provided execution-only services. Mr S had signed to confirm that: he'd taken, or had the opportunity to take, advice regarding the suitability of the SIPP and the underlying investment; he was instructing Options to establish a SIPP, transfer his pension and make the investment; and, that he understood the risks associated with his choices, and Options was not responsible for any of those decisions because it acted on an execution-only basis.

- The documentation Options provided to Mr S recommended he take independent financial advice, and made clear that Options considered he was an advised client who'd used an FCA regulated adviser to advise on the transaction he was instructing

Options to make. Mr S had also signed to confirm that he'd received advice from FPSL but had not received any advice from Options.

- Mr S claims he was advised by FPSL, but Options can't comment on that or on any interactions Mr S had with third parties, as Options wasn't party to those interactions.

- Our Service must take into account the legal and contractual context of the relationship Options has with its members, being one of a self-invested personal pension scheme in which Options acts on a strictly execution only/non-advised basis and is member-directed throughout. Options acts only as the administrator of the SIPP. Options is not permitted to provide any advice or comment in relation to the establishment of a SIPP, the underlying investment(s), performance or transfers of any previously held arrangements into the SIPP. Nor is it permitted to assess suitability for a client's individual circumstances. Or to advise or comment on the suitability of the introducer a client has chosen to use. Our Service should not reach a finding that imparts on Options a legal duty which does not exist.

- Our Service failed to take account of relevant law and regulations as required by section 228(2) of FSMA and DISP 3.6.4R, or explain why we had departed from the relevant law. In particular, we didn't state whether the due diligence duty we found to exist is one recognised by law (rather than some broader professional standards) and, if so, the legal foundation of the duty. The duties suggested would not be recognised in a Court and legal liability would not be established.

- Even if the 2009 Thematic Review Report had been statutory guidance (which it wasn't), the breach of such statutory guidance wouldn't give rise to a claim for damages under FSMA S.138D.

- Regulatory publications cannot found a claim for compensation in themselves and do not assist in construction of the Principles.

- It was Mr S's choice to use FPSL, and he engaged FPSL before contacting Options.

- FPSL was regulated. It provided full advice on the transfer of the client's pension, the establishment of the SIPP, the investment and the investment manager. And this was made clear in the SIPP application the client completed and signed.

- Options carried out due diligence on FPSL on a number of occasions. It carried out internet searches, FCA register checks and World Check searches. In addition, an Introducer Profile was completed and a Terms of Business was signed. Options understood that FPSL's client profile would vary depending on the source of the enquiry received but it expected many to be ex-armed forces personnel with deferred pension benefits with an average value of around £35,000, that FPSL would advise on both DB and defined contribution transfers, including advising on the ongoing investment strategy which would be through FCA regulated investment managers. And at the time Mr S was introduced, Options found no reason to reject FPSL introductions.

- After its initial agreement with FPSL, Options did not have any further discussions with FPSL about the client process or the business it was referring.

- Options did not request copies of any suitability reports/pension transfer reports provided to the clients.

- FPSL were regulated by the FCA and Options was entitled to accept its introductions and/or take at face value that it was behaving as a reasonably prudent regulated firm would, and providing appropriate advice. It wasn't Options' responsibility to monitor an FCA regulated entity introducing or advising clients when that entity was permitted to do so. For our Service to suggest it was, is to impose material obligations and requirements on Options which go far beyond the duties it owed at the relevant time, and even now.

- Given the proper scope of Options' regulatory duties, as established in *Adams*, there can be no breach of those duties on Options' part as a result of its decision to accept customers introduced by FPSL, a regulated entity. In the light of their conclusions on the scope of Options' duties, the judge in *Adams* rejected the proposition that Options owed duties of the kinds now being relied upon by reference to any legally actionable COBS rules.

- FPSL introduced 38 clients to Options, and 75% of these involved the transfer of an occupational DB pension scheme.

- Our Service contended that FPSL was targeting customers who held armed forces pensions and commissions were paid, but hasn't provided any evidence to support this. Our Service hadn't evidenced that there was a risk the client would be exposed to some purported harm arising from FPSL purportedly targeting certain customers or paying commissions.

- Options had no control over the information FPSL provided to Mr S.

- Options had no relationship with Firm G and was not aware it was involved in the client's transaction - none of the paperwork the client or FPSL provided to Options mentioned Firm G. So it's not fair or reasonable to suggest Options was aware of Firm G's involvement where the client and FPSL did not inform Options about Firm G. Options didn't carry out due diligence on Firm G or have Terms of Business with it, as it didn't know about it. FPSL likely had Terms of Business with Firm G, if indeed Firm G was involved at all. So FPSL should be held responsible for any potential losses the client claims to have suffered as a result of Firm G's involvement.

- In any event, the regulatory regime has never prohibited SIPP providers from accepting introductions from unregulated firms. Indeed, at the time the FSA thought Options' approach to accepting such business was acceptable. This was made clear in the *Adams* first instance judgment, and weren't called into question by the appeal judgment.

- The client's entry into the Options' SIPP and onward investment cannot have been either caused by, or 'in consequence of any action' of Firm G, as required by section 27 of the FSMA.

- This complaint should be directed to FPSL, because it was the regulated party that had provided advice. And the FSCS agreed FPSL was the liable party, given it had compensated the client in relation to FPSL.

- Options did not carry out due diligence into the underlying funds held in the SIPP. Mr S invested in a standard regulated investment portfolio provided by a regulated financial provider and managed by a regulated investment manager, so Options didn't consider this to be an 'alternative' or 'high risk' investment. And it was for Firm C to select appropriate underlying investments in line with the client's risk appetite.

So Options wouldn't necessarily know at any one time what underlying funds the client was invested in, as it may constantly change.

- The client's alleged loss is within the realms of possible performance of an investment. The mere underperformance of an investment does not create a wrong or a liability.

- Options has no control over the investment, its performance or any decision in relation to it. Any complaint regarding the investment should be directed to Firm C as the regulated firm that managed the investment.

- It was reasonable for Options to rely on Mr S's signed declaration that he understood the various documents - he shouldn't have signed them if he'd not agreed with them or understood them, and the transactions wouldn't have proceeded without Mr S signing these documents. The documents were clear and highlighted many of the issues Mr S now complains of.

- Options is acutely aware of the standards it must meet as a SIPP provider. It had met them and had acted appropriately at all times as the client's SIPP provider. And it had administered the SIPP in line with its terms and conditions.

- Mr S *"continued to interact with Options Pensions directly without explaining the additional relationship that* [Mr S] *is now claiming to have with Financial Provision Solutions Limited".* So Mr S has contributed to his own potential losses by not being open and honest with Options, and Options is not accountable for something Mr S did without its knowledge and of his own free will.

- Our Service said Options shouldn't have accepted the client's business in the first place so is liable for all of his loss. But the contract between the client and Options relieved Options of any liability it might otherwise bear - concluding otherwise would render void and unenforceable a validly concluded contract. No other legally recognised duty (e.g. in tort or under COBS 2.1.1R) would justify the conclusion our Service reached. And restitution under section 27 of the FSMA would not be available in this case, not least because the case-specific factors relied upon by the Court of Appeal in *Adams* for refusing section 28 relief are absent in this case.

- The client was determined to proceed, and it was wrong to suggest that another SIPP provider couldn't legitimately have accepted the client's investment instruction. So the outcome would be the same as it was.

- Once the client made his transfer request, the loss of his DB benefits was assured from that point, even if Options had asked him if he wanted to proceed. So the client must bear the loss of these benefits, as his decision couldn't have been prevented even if Options had acted as our Service suggested it should.

- The client received £85,000 compensation from the FSCS, more than his original investment.

- If any compensation is awarded, the client must bear some responsibility for his decisions, in particular in the light of the application form he signed which set out Options' responsibilities to him. So any compensation awarded should be reduced to reflect that responsibility, and also reduced to reflect the compensation the client received from the FSCS.

- It hadn't been evidenced that the client had suffered any distress and inconvenience compensation for distress and inconvenience, and in any event distress and inconvenience was not reason for a monetary award.

- If our Service's current conclusions stand, Options would be penalised for failing to act in a way which was inconsistent with the contractual and regulatory scheme.

- And there is also a real unfairness if the SIPP provider is liable for the poor investment choices of consumers, since its business is structured on the provision of execution-only services, and its fees reflect that. Further, where a consumer chooses an execution only service, it would be unfair if the SIPP provider couldn't rely on express representations the consumer made when signing contractual documentation, such as those made by the client here.

- As Mr S's complaint is in relation to an execution-only SIPP, it should be heard by The Pensions Ombudsman ('TPO').

One of our Investigator's considered Mr S's complaint and upheld it. Ultimately, he said Options hadn't conducted adequate due diligence on FPSL and its business model – in particular, Options hadn't asked any questions about its apparent targeting of clients with armed forces DB pensions, about FPSL's processes, or about how clients were being introduced to FPSL. Overall, he thought Options shouldn't have accepted any business from FPSL. To put things right, he said Options should carry out a redress calculation for Mr S and pay him £500 compensation for the distress and inconvenience its failings caused him.

Mr S acknowledged receiving our Investigator's view, but didn't provide any further comments or evidence in response.

Options said it intended to respond in full to the Investigator's view, but no such response was received by our Service.

As agreement couldn't be reached, this complaint was passed to me.

I issued a provisional decision in which I said I had decided not to exercise my discretion to refer this complaint to TPO. I then concluded this complaint should be upheld. In summary, I said Options ought to have had significant concerns about the introductions it was receiving from FPSL and shouldn't have accepted Mr S's business from it. And if it had rejected Mr S's business, he wouldn't have established an Options SIPP, transferred his DB scheme monies into it or invested with Firm J. I said it was fair and reasonable for Options to compensate Mr S for the full measure of the loss he's suffered as a result of Options accepting his business from FPSL. So Options should undertake redress calculations for Mr S, and also pay him £500 compensation for his distress.

Mr S told us he accepted the provisional decision. But Options didn't provide our Service with any response to the provisional decision, despite being provided with the opportunity to do so.

I'm now in a position to make my decision.

What I've decided – and why

Should the complaint be referred to TPO?

Firstly, I'll address Options' argument that this complaint should be heard by TPO rather than the Financial Ombudsman Service. For the avoidance of doubt, I've considered this point on

the basis of the applicable rules and law and not on the basis of what is fair and reasonable in all the circumstances.

I've carefully reconsidered Options' submissions on this point, and I'm still satisfied that Mr S's complaint is one we can and should consider. We have a statutory duty to resolve complaints referred to us which are within our jurisdiction, subject to certain discretions which are set out in our rules. The rules set out in the FCA Handbook, at DISP 3.4.1R, say:

"The Ombudsman may refer a complaint to another complaints scheme where:

(1) he considers that it would be more suitable for the matter to be determined by that scheme; and

(2) the complainant consents to the referral."

I could now refer the complaint to TPO on the basis of DISP 3.4.1R if I take the view it's more suitable for TPO and if, in the light of that view, Mr S consents to a referral to TPO.

But I don't consider this is a complaint that would be more suitable for determination by TPO. This complaint requires consideration to be given to the rules and principles set down by the regulator. In my view, these are matters which the Financial Ombudsman Service is particularly well placed to deal with. I'm also satisfied we possess the necessary knowledge and expertise to fairly determine the complaint. Our investigation is also well advanced. So I don't think it would be more suitable for the subject matter of this complaint to be considered by TPO.

In reaching this conclusion I've considered the Memorandum of Understanding ('MoU') between the Financial Ombudsman Service and TPO. The MoU is a document about practical cooperation where there's remit overlap between the two organisations – however the MoU doesn't determine the jurisdiction of either organisation. Ultimately, DISP 3.4.1R says that I *may* refer the complaint to another complaints scheme, not that I *must*. So I have discretion to decide what I'll do in the circumstances. And, for the reasons I've given above, I've decided to exercise my discretion not to refer Mr S's complaint to TPO.

So, I don't consider that it would be more suitable for this complaint to be determined by TPO, and I've decided not to exercise my discretion to refer it. Therefore, I've gone on to consider the merits of Mr S's complaint.

The merits of Mr S's complaint

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

Relevant considerations

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

Before I set out the reasoning for my decision, it's important for me to say that 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.

In my view, the FCA's Principles for Businesses are of particular relevance. The Principles for Businesses, which are set out in the FCA's Handbook "*are a general statement of the fundamental obligations of firms under the regulatory system"* (PRIN 1.1.2G – at the relevant date). Principles 2, 3 and 6 provide:

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

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

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

And at paragraph 77 of BBA Ouseley J said:

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

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

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

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

covering all possible circumstances, but instead to impose general duties such as those set out in Principles 2 and 6."

The *BBSAL* judgment also considers section 228 of the FSMA and the approach an Ombudsman is to take when deciding a complaint. The judgment of Jacobs J in *BBSAL* upheld the lawfulness of the approach taken by the Ombudsman in that complaint, which I've 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's fair and reasonable in all the circumstances of a case. And, Jacobs J adopted a similar approach to the application of the Principles in *BBSAL*. I'm therefore satisfied that the Principles are a relevant consideration that I must take into account when deciding this complaint.

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've taken account of both these judgments and the judgment in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 1188 when making this decision on Mr S's case.

I've considered whether *Adams* means that the Principles should not be taken into account in deciding this case. I note that the Principles for Businesses didn't form part of Mr Adams' pleadings in his initial case against Options SIPP. And, HHJ Dight didn't 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. So, neither of the judgments say anything about how the Principles apply to an Ombudsman's consideration of a complaint. But, to be clear, I don't say this means *Adams* isn't a relevant consideration at all. As noted above, I've taken account of the *Adams* judgments when making this decision on Mr S'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 the 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 didn't 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 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."

I note that there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Mr S's complaint. The breaches were summarised in paragraph 120 of the Court of Appeal judgment. In particular, HHJ Dight considered the contractual relationship between the parties in the context of Mr Adams' pleaded breaches of COBS 2.1.1R that happened *after* the contract was entered into. And he wasn't asked to consider the question of due diligence *before* Options SIPP agreed to accept the Storepods investment into its SIPP.

In Mr S's complaint, amongst other things, I'm considering whether Options ought to have identified that accepting introductions from FPSL involved a significant risk of consumer detriment and, if so, whether it ought to have declined to accept introductions from FPSL *before* it received Mr S's application.

The facts of Mr Adams' and Mr S's cases are also different. I make that point to highlight that there are factual differences between *Adams v Options SIPP* and Mr S's case. And I need to construe the duties Options owed to Mr S under COBS 2.1.1R in light of the specific facts of Mr S's case.

So I've considered COBS 2.1.1R – alongside the remainder of the relevant considerations, and within the factual context of Mr S's case, including Options' role in the transaction.

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

I also want to emphasise that I don't say that Options was under any obligation to advise Mr S on the SIPP and/or the underlying investments. Refusing to accept an application isn't the same thing as advising Mr S on the merits of the SIPP and/or the underlying investments. But I am satisfied Options' obligations included deciding whether to accept an introduction from a firm and whether to accept particular investments into its SIPP. And I don't accept that it couldn't make such an assessment without straying into giving the member advice.

Overall, I'm satisfied that COBS 2.1.1R is a relevant consideration – but that it needs to be considered alongside the remainder of the relevant considerations, and within the factual context of Mr S's case.

Options may point out that a contravention of the Principles cannot in itself give rise to any cause of action at law. That may be true. However, I am dealing with a complaint, not a cause of action, and what I am seeking to identify here is what is relevant to my consideration of what is fair and reasonable in the circumstances of this case. And I'm satisfied that the FCA's Principles are a relevant consideration that I must take into account when deciding this complaint.

The regulatory publications

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

- The 2009 and 2012 Thematic Review Reports.
- The October 2013 finalised SIPP operator guidance.
- The July 2014 *"Dear CEO"* letter.

I've considered the relevance of these publications. And I've set out material parts of the publications here, although I've 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 clients 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 members 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 SIPPs that are unsuitable or detrimental to clients.

Of particular concern were firms whose systems and controls were weak and inadequate to the extent that they had not identified obvious potential instances of poor advice and/or potential financial crime. Depending on the facts and circumstances of individual cases, we may take enforcement action against SIPP operators who do not safeguard their customers' interests in this respect, with reference to Principle 3 of the Principles for Businesses ('a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems').

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

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

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

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

- *Being able to identify anomalous investments, e.g. unusually small or large transactions or more 'esoteric' investments such as unquoted shares, together with the intermediary that introduced the business. This would enable the firm to seek appropriate clarification, e.g. from the client or their 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."*

Although I've referred to selected parts of the publications, to illustrate their relevance, I've considered them in their entirety.

I acknowledge that the 2009 and 2012 Thematic Review Reports and the *"Dear CEO"* letter aren't formal guidance (whereas the 2013 finalised guidance is). However, the fact that the reports and *"Dear CEO"* letter didn't constitute formal guidance doesn't mean their importance should be underestimated. They provide a reminder that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications which set out the regulators' expectations of what SIPP operators should be doing also go some way to indicate what I consider amounts to good industry practice, and I'm therefore satisfied it's appropriate to take them into account.

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

At its introduction the 2009 Thematic Review Report says:

> *"In this report, we describe the findings of this thematic review, and make clear what we expect of SIPP operator firms in the areas we reviewed. It also provides examples of good practices we found."*

And, as referenced above, the report goes on to provide "…*examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms."*

So, I'm satisfied that the 2009 Report is a *reminder* that the Principles apply and it gives an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. The Report set out the regulator's expectations of what SIPP operators should be doing and therefore indicates

what I consider amounts to good industry practice at the relevant time. So I'm satisfied it's relevant and therefore appropriate to take it into account.

Options may argue that many of the matters which the Report invites firms to consider are directed at firms providing advisory services. But, to be clear, I think the Report is also directed at firms like Options acting purely as SIPP operators. The Report says that *"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses…"* And it's noted prior to the good practice examples quoted above that *"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."*

The remainder of the publications also 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, these publications also go some way to indicate what I consider amounts to good industry practice at the relevant time. I'm therefore satisfied it's appropriate to take them into account too. And I note that these publications were issued prior to the events Mr S complains of.

It's also clear from the text of the 2009 and 2012 Thematic Review Reports (and the *"Dear CEO"* letter in 2014) that the regulator expected SIPP operators to have incorporated the recommended good practices into the conduct of their business already. So, whilst the regulators' comments suggest some industry participants' understanding of how the good practice standards shaped what was expected of SIPP operators changed over time, it's clear the standards themselves hadn't changed.

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

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

The regulator also issued an alert in 2013 about advisers giving advice to consumers on SIPPs without consideration of the underlying investment to be held in the SIPP. The alert (*"Advising on pension transfers with a view to investing pension monies into unregulated products through a SIPP"*) set out that this type of restricted advice didn't meet regulatory requirements. It said:

> *"It has been brought to the FSA's attention that some financial advisers are giving advice to customers on pension transfers or pension switches without assessing the advantages and disadvantages of investments proposed to be held within the new pension. In particular, we have seen financial advisers moving customers' retirement savings to self-*

invested personal pensions (SIPPs) that invest wholly or primarily in high risk, often highly illiquid unregulated investments (some which may be in Unregulated Collective Investment Schemes).

…

Financial advisers using this advice model are under the mistaken impression that this process means they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect.

The FSA's view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes."

The alert was issued prior to the events Mr S complains of. And again, it didn't set new standards. It highlighted that advisers using the restricted advice model discussed in the alert generally weren't meeting *existing* regulatory requirements and set out the regulator's concerns about industry practices at the time.

To be clear, I don't say the Principles or the publications obliged Options to ensure the transactions were suitable for Mr S. It's accepted Options wasn't required to give advice to Mr S, and couldn't give advice. And I accept the publications don't alter the meaning of, or the scope of, the Principles. But as I've said above they're 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. I note the FCA's Enforcement Guide says publications of this type *"illustrate ways (but not the only ways) in which a person can comply with the relevant rules".* And so it's fair and reasonable for me to take them into account when deciding this complaint.

It's important to keep in mind the judge in *Adams v Options* didn't consider the regulatory publications in the context of considering what's fair and reasonable in all the circumstances bearing in mind various matters including the Principles (as part of the regulator's rules) or good industry practice.

And in determining this complaint, I need to consider whether, in accepting Mr S's application to establish a SIPP, Options complied with its regulatory obligations: to act with due skill, care and diligence; to take reasonable care to organise and control its affairs responsibly and effectively; to pay due regard to the interests of its customers and treat them fairly; and to act honestly, fairly and professionally. In doing that, I'm looking to the Principles and the publications listed above to provide an indication of what Options should have done to comply with its regulatory obligations and duties.

Taking account of the factual context of this case, it's my view that in order for Options to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), amongst other things it should have undertaken sufficient due diligence into FPSL/the business FPSL was introducing *before* deciding to accept Mr S's applications.

And what I'm looking at here is whether Options took reasonable care, acted with due diligence and treated Mr S fairly, in accordance with his best interests. And what I think is fair and reasonable in light of that. And I think the key issue in Mr S's complaint is whether it was fair and reasonable for Options to have accepted his SIPP application in the first place. So, I need to consider whether Options carried out appropriate due diligence checks on FPSL before deciding to accept Mr S's application.

And the questions I need to consider include whether Options ought to, acting fairly and reasonably to meet its regulatory obligations and good industry practice, have identified that consumers introduced by FPSL were being put at significant risk of detriment. And, if so, whether Options should therefore not have accepted Mr S's application for the Options SIPP.

The contract between Options and Mr S

Options argues that I am retrospectively imposing new duties of due diligence on it and that these duties are inconsistent with the contract Mr S entered. Options also argues that it had very limited obligations to undertake due diligence on FPSL or the underlying investment(s). And that the contract between Mr S and Options relieved Options of any liability it might otherwise bear, and concluding otherwise would render void and unenforceable a validly concluded contract.

I've carefully considered these arguments. For clarity, my decision is made on the understanding that Options acted purely as a SIPP operator. I don't say Options should (or could) have given advice to Mr S or otherwise have ensured the suitability of the SIPP or the investments for him. I accept that Options made it clear to Mr S that it wasn't giving, nor was it able to give, advice and that it played an execution-only role in his SIPP investment. And that forms it appears Mr S signed confirmed, amongst other things, that Options was not responsible for the decisions to make the transactions because it acted on an execution-only basis.

I've not overlooked or discounted the basis on which Options was appointed. And my decision on what's fair and reasonable in the circumstances of Mr S's case is made with all of this in mind. So, I've proceeded on the understanding that Options wasn't obliged – and wasn't able – to give advice to Mr S on the suitability of the SIPP or the investment.

What did Options' obligations mean in practice?

In this case, the business Options was conducting was its operation of SIPPs. I'm satisfied that meeting its regulatory obligations when conducting this business would include deciding whether to accept or reject particular investments and/or referrals of business. The regulators' reports and guidance provided some examples of good practice observed by the FSA and FCA during its work with SIPP operators. This included being satisfied that a particular introducer/investment is appropriate to deal with/accept. That involves conducting checks – due diligence – on introducers and investments to make informed decisions about accepting business. This obligation was a continuing one.

Options says it carried out checks on FPSL by carrying out internet, World Check and FCA register searches. In addition, an Introducer Profile was completed and a Terms of Business was signed. So Options did take some steps towards meeting its regulatory obligations and good industry practice.

However, I don't think those steps that we've seen evidence of went far enough, or were sufficient, to meet Options' regulatory obligations and good industry practice. As set out earlier, to comply with the Principles, Options needed to conduct its business with due skill, care and diligence; organise and control its affairs responsibly and effectively; and pay due regard to the interests of its clients (including Mr S) and treat them fairly. Its obligations and duties in this respect weren't prescriptive and depended on the nature of the circumstances, information and events on an ongoing basis.

And I think that Options understood this at the time too, as it did more than just check the FCA entries for FPSL to ensure it was regulated to give advice. It also entered into a Terms

of Business agreement with FPSL. And it's apparent that Options had access to some information about the type and volume of introductions it was receiving from FPSL, as it's been able to provide us with information about this when requested.

For clarity, I don't think simply keeping records about the number and nature of introductions that FPSL made without scrutinising that information would have been consistent with good industry practice and Options' regulatory obligations. As highlighted in the 2009 Thematic Review Report, the reason why the records are important is so that potentially unsuitable SIPPs can be identified.

So, and well before the time of Mr S's application in late 2014, I think that Options ought to have understood that its obligations meant that it had a responsibility to carry out appropriate checks on FPSL to ensure the quality of the business FPSL was introducing.

What due diligence did Options carry out on FPSL?

Options says it carried out checks on FPSL on a number of occasions.

It says it checked FPSL's entry on the FCA register. However, the only detailed or documentary evidence Options has provided to support this is a copy of an FCA search for FPSL dated 9 May 2016, which is more than two years after Options entered into its agreement with FPSL.

Options also says it carried out internet searches. Again, the only detailed or documentary evidence Options has provided to support this is a copy of a Companies House search for FPSL dated 9 May 2016, more than two years after Options entered into its agreement with FPSL.

Options also says it searched World Check (a risk intelligence tool which allows subscribers to conduct background checks on businesses and searches for individuals). But, Options hasn't provided any detailed or documentary evidence to support that it carried out this search, or to show what business(es) and/or individual(s) it searched for and what information was returned.

In March 2014 FPSL completed an 'Introducer Profile – Regulated Financial Services Firm' document. Options has provided a copy of this, and I can see it asks a number of questions. I've set out what I think are the relevant questions it asked, along with FPSL's responses in bold:

- *"What type of clients you advise and may introduce to Carey Pensions"*
  "Individuals"

- *"Please indicate the type of pension product you advise on"*
  "SIPP; SSAS; Workplace Pensions."

- *"Please indicate your average client profile and transfer value"*
  "Will vary depending on source of enquiry, but many clients will be ex armed forces moving their **[armed forces occupational DB scheme]** ***benefits – average £35000".***

- *"Do you advise on occupational pension transfers?"*
  "Yes"

- *"If applicable, when advising on the establishment of a pension, do you also advise on the underlying investments?"*
  "Yes"

- *"Please indicate the type of investments you are looking to utilize [sic]"*
  From a list of options, only ***"FCA regulated DFM"*** was chosen in response.

- *"Please can you outline how you monitor the quality and suitability of the advice you provide"*
  "We have set up a process for dealing with enquiries that will be followed. Also, the process will be checked by our compliance providers and the FCA will be invited in to check the process".

At the same time, Terms of Business were agreed between Options and FPSL and I've been provided with a copy of these. They say FPSL's responsibilities included:

- *"To evaluate your client's financial circumstances and based on this assess their suitability for what, if any, of the Carey Pension range is appropriate;"*

- *"To document your recommendation together with suitable alternatives that could have been appropriate and why rejected in favour of the recommended product;"*

- *"Where a transfer is recommended, all options considered and the advice provided to the client in line with regulatory requirements;"*

- *"To provide the necessary documentation to your client about our product you are recommending – this will include, where appropriate, Key Features, personal illustration, Schedule of Fees, Terms and Conditions and product brochures;"*

- *"Where required, to provide any additional information we require about your client to enable us to join your client to our Scheme;"*

- *"Where requested, to inform us whether advice has been given and if requested, provide clarification on the advice provided;"*

- *"Where your client seeks advice, to provide fully documented advice to your client on the suitability of the Scheme investments, taking account of their financial objectives and attitude to investment risk;"*

- *"To ensure you have the correct FCA authorisations to provide the investment advice;"*

Was this sufficient due diligence in the circumstances?

Given the circumstances involved here, I don't think the above alone was reasonable or sufficient to meet Options' regulatory obligations and good industry practice. Crucially, I don't think Options took appropriate steps or drew reasonable conclusions from the information that was available to it before accepting Mr S's application.

I think Options was aware of, or should have identified potential risks of, consumer detriment associated with business introduced by FPSL, including the following, before it accepted Mr S's application:

- The nature of the business being introduced. FPSL appeared to be targeting particular clients who were members of a DB scheme – it said many clients would be ex-armed

forces transferring their armed forces occupational pension benefits.

- How FPSL was able to meet its regulatory standards, particularly given that it was a small IFA firm.

- The risk of a business that wasn't authorised by the FCA to give pension transfer or investment advice being involved in the transfer and investment process.

Options knew all of this, or else ought to have known it from the information available, but it didn't then make further appropriate checks of FPSL's business model, either at the start of its relationship or on an ongoing basis.

I think Options should have taken steps to address these risks (or, given these risks, have simply declined to deal further with FPSL). Such steps should have involved getting a full understanding of FPSL's business model – through requesting information from FPSL and through independent checks. Such understanding would have revealed there *was* a significant risk of consumer detriment associated with introductions of business from FPSL.

In the alternative, FPSL may not have been willing to provide the required information, or fully answer the questions about its business model. In either event Options should have concluded it shouldn't accept introductions from FPSL.

I've set out below some more detail on the potential risks of consumer detriment I think Options either knew about or ought to have known about *before* it accepted Mr S's SIPP application. These points overlap, to a degree, and should have been considered by Options cumulatively.

<u>The nature of the business introduced by FPSL</u>

The Introducer Profile makes clear FPSL was targeting clients who were members of armed forces DB schemes, as it said "…*many clients will be ex armed forces moving their* [DB scheme] *benefits…"*

I think Options was aware of this targeting, to the extent that an Options branded fee schedule was produced which was seemingly tailored to this group of FPSL-introduced clients. As this was titled,

> *"The Carey Pension Scheme SIPP Fee Schedule 2014*
>
> *Financial Provision Solutions (for ex-Armed Forces)"*

In addition, Options' submissions in another, similar, complaint say that 38 clients were introduced by FPSL and the vast majority (75%) of these involved the transfer of an occupational DB pension scheme.

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. In my view, to meet these standards, and its regulatory obligations, set by the Principles, Options ought to have identified a significant risk of consumer detriment arising from business introduced to Options by a firm which appeared to be specialising in pension transfers from one occupational DB pension scheme. And so Options ought to have ensured it thought very carefully about accepting applications from FPSL and, therefore, Mr S.

I think Options should have been concerned, and before it received Mr S's SIPP application, about the volume of introductions from FPSL involving the transfer of occupational pensions with defined benefits, as was the case with Mr S. At the relevant date COBS 19.1.6G stated:

"When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme whether to transfer or opt-out, a firm should start by assuming that a transfer or opt-out will not be suitable. A firm should only then consider a transfer or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer or opt-out is in the client's best interest".

While I acknowledge this aims to define the expectation of a regulated financial adviser when determining the suitability of a pension transfer, it emphasises the regulator's concern about the potential detriment such a transaction could expose a consumer to. Given the nature of its business and regulatory status, I'd expect Options to have been familiar with the guidance contained in the COBS – even if it didn't apply directly to it. Mr S's pension transfer involved defined benefits, and Options has told us that the majority of the other applications introduced by FPSL did so too. This was a further clear and obvious potential risk of consumer detriment.

Options says it had no control over the information FPSL provided to Mr S. And that it can't comment on any interactions Mr S had with FPSL or other third parties, as Options wasn't party to those interactions.

But a DB transfer is a complex transaction. It also involves many risks, and potentially the loss of significant guaranteed benefits. For this reason, advice on such transactions is tightly regulated in the UK and there are standards of good practice that those giving the advice are expected to follow. This means several steps need to be taken as part of the advice process and documentation such as fact-finds, suitability reports, TVAS reports, and illustrations, all of which generally feature in the advice process. The purpose is to ensure any advice given takes into account all relevant factors, is suitable, and the recipient of the advice is in a fully informed position, where they understand the benefits they are giving up and the risks associated with the transfer.

I think Options, acting fairly and reasonably, should have satisfied itself that a similar process was being followed here by FPSL. I say this because FPSL's starting point appears to have been that the consumers it dealt with would be transferring out of the DB scheme (i.e. it seems to have taken the view a transfer was suitable for all), since the Introducer Profile said many of its clients would be ex-armed forces transferring their occupational armed forces pension benefits. There was a clear risk of consumer detriment if consumers were not in a fully informed position and therefore not able to understand the risks associated with such a transfer.

I acknowledge that Options' Introducer Profile asked FPSL to outline how it monitored the quality and suitability of the advice it provided, and FPSL answered that it had set up a process for dealing with enquiries and that the process would be checked by its compliance providers and the FCA would be invited to check the process.

But I've not seen that Options asked any further questions about any of this or asked for any documentary evidence of the process or checks that FPSL said would be carried out. And I note Options told us that, after its initial agreement with FPSL, it didn't have any further discussions with FPSL about the client process or the business it was referring. And Options has also told us it didn't ask FPSL for copies of the advice it was providing to the clients it was introducing to Options – even though the Terms of Business Options had agreed with FPSL entitled it to do so.

Options may argue that these types of pension transfers were one of FPSL's specialisms, and that FPSL's introductions represented only a small percentage of total introductions for Options at that time. But I think it's highly unusual for most or all of a regulated advice firms' introductions to a SIPP provider to involve DB pension transfers so as to invest with the same firm and managed by the same investment manager. This FPSL-introduced business may have only represented a small percentage of Options' overall business but I think it's fair to say that most advice firms, particularly small firms like FPSL, don't transact this kind of business in these volumes.

Given all this, I'm satisfied Options couldn't be certain what advice FPSL was offering to the clients it was introducing to Options, or that FPSL's advice and business model was in fact operating in line with Options' assumptions. I think Options should have been concerned about how FPSL was able to meet its regulatory standards, particularly given that FPSL was a small IFA firm. I think this was a clear and obvious potential risk of consumer detriment. Especially since Mr S was transferring just under £60,000 out of his DB pension scheme - a move which was highly unlikely to be suitable for the vast majority of retail clients, as indicated by COBS 19.1.6G.

I do not say Options should have checked the advice that was given – but it should have taken steps to ascertain if a reasonable process was in place and consumers were taking these steps on an informed basis. And I think if it had undertaken such steps and carried out even a cursory investigation of the individuals being introduced to it, then it would have become aware no reasonable process was in place and consumers were not fully informed of the risks, which I'll come to.

The risk of an unregulated business being involved

Options argues there was nothing preventing SIPP providers from accepting business from unregulated introducers. But as I'll explain, while I think it's likely Firm G was involved from the start here and that Options was, or ought to have been, aware of this, the due diligence Options may or may not have carried out on Firm G isn't the basis on which I'm upholding Mr S's complaint, or something I've relied on in reaching my conclusions.

Options also argues that it had no relationship with Firm G and was not aware it was involved in the client's transaction – that none of the paperwork the client or FPSL provided to Options mentioned Firm G. So it says it's not fair or reasonable to suggest Options was aware of Firm G's involvement where the client and FPSL did not inform Options about Firm G. Options says it didn't carry out due diligence on Firm G or have Terms of Business with it, as it didn't know about it. And that FPSL likely had Terms of Business with Firm G, if indeed Firm G was involved at all. So in Options' view, FPSL should be held responsible for any potential losses the client claims to have suffered as a result of Firm G's involvement.

Having carefully considered the available evidence, including the SIPP application forms I've seen in this and other complaints brought to us against Options where FPSL was the introducing adviser, I think it's more likely than not that most, if not all, FPSL-introduced Options consumers were doing the same thing. By which I mean that application forms to establish an Options SIPP were being submitted for FPSL-introduced Options consumers recording that advice had been given by FPSL on the DB transfer, that pension monies were then being transferred into the newly established Options SIPPs for those consumers, and, subsequently, the consumers SIPP monies were being invested with Firm J and managed by Firm C.

To be clear, I don't think it's credible that most, or all, of these FPSL-introduced consumers were independently determining to transfer their DB pensions and to invest their pension monies with Firm J and to be managed by Firm C without any input from another party.

Given what Options ought reasonably to have identified about the business it was receiving from FPSL had it undertaken adequate due diligence, I think this should have been a significant cause for concern for Options and caused it to consider the business it was receiving from FPSL very carefully.

I think that Options ought to have been alive to the risk that an unregulated third party might have been involved in promoting the transfer and investments to investors, like Mr S. And I've seen that in a separate but similar complaint brought to our Service about Options where FPSL was the introducing adviser, the consumer has provided our Service with a copy of a Firm G branded fact find titled 'Pension Review Questionnaire – Armed Forces Veterans', which captured information about the consumer's current circumstances and objectives. The 'Declaration' section of this fact find says,

> *"The information contained within this document is accurate to the best of my knowledge (member and partner) and that I consent to my information being provided to third parties for purposes relating to my pension only *".*
>
> The indicated footnote read,
> *"* We engage with fully regulated and qualified third parties in order to create an accurate suitability report that is bespoke to your circumstances. We require your consent to disclose the information you provide to those third parties."*

What fair and reasonable steps should Options have taken in the circumstances?

Options could simply have concluded that, given the potential risks of consumer detriment – which I think were clear and obvious at the time – it should not accept applications from FPSL. That would have been a fair and reasonable step to take in the circumstances. Alternatively, Options could have taken fair and reasonable steps to address the potential risks of consumer detriment. I've set these out below.

Requesting information directly from FPSL

Options says it was Mr S's choice to use FPSL, and he engaged FPSL before contacting Options. And that Options had no control over the information FPSL provided to Mr S.

But given the significant potential risk of consumer detriment I think that, as part of its due diligence on FPSL, Options ought to have found out more about how FPSL was operating long before it received Mr S's application. And mindful of the type of introductions it was receiving from FPSL from the outset, I think it's fair and reasonable to expect Options, in line with its regulatory obligations, to have made some specific enquiries and obtained information about FPSL's business model.

As set out earlier, the 2009 Thematic Review Report explained that the regulator would expect SIPP operators to have procedures and controls, and for management information to be gathered and analysed, so as to enable the identification of, amongst other things, *"consumer detriment such as unsuitable SIPPs".* Further, that this could then be addressed in an appropriate manner *"…for example by contacting the members to confirm the position, or by contacting the firm giving advice and asking for clarification."*

The October 2013 finalised SIPP operator guidance gave an example of good practice as: *"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."*

And I think that Options, before accepting further applications from FPSL, should have checked with FPSL about things like:

- how it came into contact with potential clients,
- what agreements it had in place with its clients,
- whether all of the clients it was introducing were being offered advice,
- what its arrangements with any unregulated businesses were,
- how and why retail clients were interested in making these investments,
- whether it was aware of anyone else providing information to clients,
- how it was able to meet with or speak with all its clients, and
- what material was being provided to clients by it.

I think it's more likely than not that *if* Options had asked FPSL for this type of information that FPSL would have provided the information sought. And that, amongst other things, Options would have then have been told that Firm G, an unregulated firm, had introduced the clients to FPSL in the first place – that Firm G was cold-calling clients, gathering their details and then passing them to FPSL for regulated advice in relation to transferring their DB pensions.

But if Options had been unable to obtain the information sought from FPSL, then I think it's fair and reasonable to say that Options should have then concluded that it was unsafe to proceed with accepting business from FPSL in those circumstances. In my opinion, it wasn't reasonable, and it wasn't in-line with Options' regulatory obligations, for it to proceed with accepting business from FPSL if the position wasn't clear.

Making independent checks

I think, in light of what I've said above, it would also have been fair and reasonable for Options, to meet its regulatory obligations and good industry practice, to have taken independent steps to enhance its understanding of the introductions it was receiving from FPSL. For example, it could have asked for copies of correspondence relating to the advice.

The 2009 Thematic Review Report said that (with my emphasis):

> *"…we would expect* (SIPP operators) *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 members to confirm the position, or by contacting the firm giving advice and asking for clarification****."*

So I think it would have been fair and reasonable for Options to speak to some applicants, like Mr S, directly.

I accept Options couldn't give advice. But it had to take reasonable steps to meet its regulatory obligations. And in my view such steps included addressing a potential risk of consumer detriment by speaking to applicants, as this could have provided Options with further insight into FPSL's business model. This would have been a fair and reasonable step to take in reaction to the clear and obvious risks of consumer detriment I've mentioned. And I think Options recognised the need to take such steps, given its SIPP application form stated its requirement for the client to provide it with a copy of the advice - although Options didn't follow its own process here.

And, on balance, I think it's more likely than not that if Options *had* contacted Mr S to 'confirm the position', Mr S would have told Options that he had been cold-called by Firm G

and offered a pension review, that Firm G told him his DB pension was frozen and not making any money, and made him worry about this. And that Firm G talked him through why it was better for him to transfer and told him his funds would be safely invested and would perform much better and increase his pension.

Had it taken these fair and reasonable steps, what should Options have concluded?

If Options had undertaken these steps I think it ought to have identified, amongst others, the following risks before it received Mr S's application:

- The SIPP business introduced by FPSL appeared to target particular DB scheme transfers.
- The risk that FPSL was not meeting its regulatory standards, particularly given that it was a small IFA firm.
- The risk of an unregulated business being involved in the transfer and investment process.
- FPSL was having business referred to it by introducers, like Firm G, and it was then introducing business to Options.
- A third party, like Firm G, might have 'sold' to consumers the idea of transferring occupational DB scheme pensions before the involvement of any regulated parties.
- These features I've mentioned above carried a significant risk of consumer detriment.

Each of these in isolation was significant, but cumulatively I think they demonstrate that there *was* a significant risk of consumer detriment associated with introductions from FPSL. I think that Options ought to have had real concerns that FPSL wasn't acting in customers' best interests and wasn't meeting its regulatory obligations.

Options didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr S fairly by accepting his application from FPSL. To my mind, Options didn't meet its regulatory obligations or good industry practice at the relevant time, and allowed Mr S to be put at significant risk of detriment as a result. Options should have concluded, and *before* it accepted Mr S's business from FPSL, that it shouldn't accept introductions from FPSL. I therefore conclude it's fair and reasonable in the circumstances to say that Options shouldn't have accepted Mr S's application from FPSL at all.

Due diligence on the underlying investments

Options had a duty to conduct due diligence and give thought to whether an investment itself is acceptable for inclusion into a SIPP. That's consistent with the Principles and the regulators' publications as set out earlier in this decision. It's also consistent with HMRC rules that govern what investments can be held in a SIPP.

I accept that the Firm J investment, managed by Firm C, doesn't appear to be fraudulent or a scam. But this doesn't mean that Options did all the checks it needed to do. Indeed, in its submissions in another, similar, complaint featuring the same firms here, Options says it did not carry out due diligence into the underlying funds held in the SIPP.

However, given what I've said about Options' due diligence on FPSL and my conclusion that it failed to comply with its regulatory obligations and good industry practice at the relevant

time, I don't think it's necessary for me to also consider Options' due diligence on the investment. I'm satisfied that Options wasn't treating Mr S fairly or reasonably when it accepted his application from FPSL, so I've not gone on to consider the due diligence it may have carried out on the investment and whether this was sufficient to meet its regulatory obligations. And I make no findings about this issue.

Was it fair and reasonable in all the circumstances for Options to proceed with Mr S's application?

For the reasons given above, I think Options should have refused to accept Mr S's application from FPSL. So things shouldn't have got beyond that.

In its submissions to our Service, Options has referred to forms that clients like Mr S signed and suggests these indemnify Options. For completeness, in my view it's fair and reasonable to say that just having Mr S sign 'indemnity' declarations wasn't an effective way for Options to meet its regulatory obligations to treat him fairly, given the concerns Options ought to have had about his introduction.

Options knew that Mr S had signed forms intended to indemnify it against losses that arose from acting on his instructions. And, in my opinion, relying on such indemnities when Options knew, or ought to have known, Mr S's dealings with FPSL were putting him at significant risk wasn't the fair and reasonable thing to do. Having identified the risks I've mentioned above, it's my view that the fair and reasonable thing to do would have been to refuse to accept Mr S's SIPP application.

The Principles exist to ensure regulated firms treat their clients fairly. And I don't think the paperwork Mr S signed meant that Options could ignore its duty to treat him fairly. To be clear, I'm satisfied that indemnities contained within the contractual documents don't absolve, nor do they attempt to absolve, Options of its regulatory obligations to treat customers fairly when deciding whether to accept or reject business.

COBS 11.2.19R

Options says that, as an execution-only (i.e. non-advised) provider, it would have been in breach of COBS 11.2.19 had it not followed Mr S's instruction to invest. And that it made clear to Mr S that it provided execution-only services.

However, in the circumstances it's my view that the crux of the issue in this complaint is whether Options should have accepted the SIPP application from FPSL and established Mr S's SIPP in the first place.

An 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:

> *"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."

So I don't think that Options' argument on this point is relevant to its obligations under the Principles to decide whether to accept Mr S's application to open a SIPP in the first place.

I'm satisfied that Mr S's SIPP shouldn't have been established and the opportunity to execute investment instructions or proceed in reliance on an indemnity shouldn't have arisen at all. And I'm firmly of the view that it wasn't fair and reasonable in all the circumstances for Options to proceed with Mr S's application.

Is it fair to ask Options to pay Mr S compensation in the circumstances?

The involvement of other parties

In this decision I'm considering Mr S's complaint about Options. However, I accept that other regulated parties were involved in the transactions complained about, including FPSL.

Mr S pursued an FSCS claim against FPSL. The FSCS upheld Mr S's claim, calculated his losses to be in excess of £85,000 and paid him its limit of £85,000 compensation. Following this the FSCS provided Mr S with a reassignment of rights.

Options contends that FPSL is really responsible for Mr S's losses. And that FPSL, as the principal business, would be the respondent for complaints about the activities Firm G undertook as its appointed representative. Options also says the FSCS agreed FPSL was the liable party, given it had compensated the client in relation to FPSL. But the Financial Ombudsman Service won't look at complaints against FPSL as it's been dissolved and no longer exists as a regulated business.

The DISP rules set out that when an Ombudsman's determination includes a money award, then that money award may be such amount as the Ombudsman considers to be fair compensation for financial loss, whether or not a court would award compensation (DISP 3.7.2R).

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

The starting point therefore, is that it would be fair to require Options to pay Mr S compensation for the loss he's suffered as a result of its failings. I've carefully considered if there's any reason why it wouldn't be fair to ask Options to compensate Mr S for his loss, including whether it would be fair to hold another party liable in full or in part. However, I'm satisfied it's the case that if Options had complied with its own distinct regulatory obligations as a SIPP operator, the arrangement for Mr S wouldn't have come about in the first place, and the loss he has suffered could've been avoided.

I want to make clear that I've carefully taken everything Options has said into consideration. And it's my view that it's appropriate and fair in the circumstances for Options to compensate Mr S to the full extent of the financial losses he's suffered. This is due to Options' failings, and that these failings have caused his losses. And, taking into account the combination of factors I've set out above, I'm not persuaded that it would be appropriate or fair in the circumstances to reduce the compensation amount that Options is liable to pay to Mr S.

To be clear, I'm not making a finding that Options should've assessed the suitability of the SIPP or the investment for Mr S. I accept that Options wasn't obligated, and indeed was not authorised to give advice to Mr S, or otherwise to ensure the suitability of the pension wrapper or investments for him. Rather, I'm looking at Options' separate role and responsibilities – and for the reasons I've explained, I think it failed in meeting those responsibilities.

Mr S taking responsibility for his own investment decisions

Options' final response letter to Mr S's complaint says Mr S *"continued to interact with Options Pensions directly without explaining the additional relationship that [Mr S] is now claiming to have with Financial Provision Solutions Limited".* Options said this means Mr S contributed to his own potential losses by not being open and honest with Options, and its not accountable for something Mr S did without its knowledge and of his own free will.

But it's not clear what additional relationship Options is referring to here. And despite my invitation, I've not been provided with any evidence that supports Options' contention that Mr S had an additional relationship with FPSL. So I'm not persuaded Mr S had an additional relationship with FPSL.

In any case, I've carefully considered Options' suggestion that consumers should take responsibility for their own investment decisions.

In reaching my conclusions in this case I've thought about section 5(2)(d) of the FSMA (now section 1C). This section requires the FCA, in securing an appropriate degree of protection for consumers, to have regard to, amongst other things, the general principle that consumers should take responsibility for their own investment decisions.

I've considered this point carefully and I'm satisfied that it wouldn't be fair or reasonable to say Mr S's actions mean he should bear the loss arising as a result of Options' failings.

In my view, if Options had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted Mr S's application from FPSL to open a SIPP *at all*. That should have been the end of the matter – if that had happened, I'm satisfied the arrangement for Mr S wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

As I've made clear, Options needed to carry out appropriate initial and ongoing due diligence on FPSL, and reach the right conclusions. I think it failed to do this. And just having Mr S sign forms that contained declarations wasn't an effective way of Options meeting its obligations, or of escaping liability where it failed to meet its obligations.

And I wouldn't consider it fair or reasonable for Options to have concluded that Mr S had received an explanation of the risks involved from FPSL, given what Options knew, or ought to have known, about FPSL's business model by the time it received Mr S's application.

I don't think it would be fair to say in the circumstances that Mr S should suffer the loss because he ultimately instructed the transactions be effected. I say this because FPSL was a regulated firm with the necessary permissions to advise on the transactions this complaint concerns. I'm satisfied that in his dealings with it, Mr S trusted FPSL to act in his best interests. Mr S also then used the services of Options - a regulated personal pension provider.

So overall, I'm satisfied that in the circumstances, for all the reasons given, it's fair to say Options should compensate Mr S for the loss he's suffered.

Had Options declined Mr S's business from FPSL, would the transactions complained about still have been effected elsewhere?

Options says that once the client made his transfer request, the loss of his DB benefits was assured from that point, even if Options had asked him if he wanted to proceed. So the client must bear the loss of these benefits, as his decision couldn't have been prevented even if Options had acted as our Service suggested it should.

But I don't agree. Mr S's SIPP application included a number of statements in the 'Declarations' section that he signed, including, *"I hereby consent to Carey Pensions UK LLP requesting the transfer of my policies listed in the application;"* – the policy listed in the SIPP application form was Mr S's armed forces DB pension, which wasn't transferred until April 2015. So on balance, I'm satisfied that when Options received Mr S's SIPP application form in December 2014, his DB pension benefits were still within his DB scheme and would only be transferred when Options set up his new SIPP.

Also, Options suggests Mr S would likely have proceeded with the transfer and investments regardless of the actions it took. That other SIPP providers were accepting such investments at the time. And that another SIPP operator would've accepted Mr S's application had Options declined it.

But I don't think it's fair and reasonable to say that Options shouldn't compensate Mr S for his loss on the basis of speculation that another SIPP operator would've made the same mistakes that I've found Options did. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted Mr S's application from FPSL.

Further, if Mr S had sought advice from a different adviser I think it's more likely than not that the advice would have been not to transfer his DB pension or establish a SIPP, bearing in mind the regulator's view that a transfer out of a DB pension won't usually be suitable. And I think it's more likely than not that Mr S would have acted in accordance with that advice. Alternatively, if Options hadn't accepted his business from FPSL and explained why, Mr S might have simply decided not to seek pensions advice elsewhere from a different adviser and still then retained his existing DB pension.

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

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

But, in this case, I'm not satisfied that Mr S proceeded knowing that the investment he was making was high risk and speculative, and that he was determined to move forward with the transactions in order to take advantage of a cash incentive.

It appears Mr S understood that his pension monies were being moved into a safe investment which would out-perform his existing DB pension. I've also not seen any evidence to show Mr S was paid a cash incentive. It therefore cannot be said he was incentivised to enter into the transaction. And, on balance, I'm satisfied that Mr S, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for himself. So, in my opinion, this case is very different from that of Mr Adams. And having carefully considered all of the circumstances, I'm satisfied it's fair and reasonable to conclude that if Options had refused to accept Mr S's application from FPSL, the transactions this complaint concerns would not have still gone ahead.

In conclusion

So, overall, I do think it's fair and reasonable to direct Options to pay Mr S compensation in the circumstances. While I accept that other firms might have some responsibility for initiating the course of action that's led to Mr S's loss, I consider that Options failed to comply with its own regulatory obligations and didn't, when it had the opportunity to do so, put a stop to the transactions proceeding by declining Mr S's application from FPSL. And I'm satisfied that Mr S wouldn't have established the SIPP, transferred monies in from his existing DB pension, or invested with Firm J if it hadn't been for Options' failings.

Options didn't have to carry out an assessment of Mr S's needs and circumstances in order to meet its regulatory requirements, but it did have to treat Mr S fairly under the Principles. I'm satisfied that in the circumstances, and for all the reasons given, it's fair and reasonable to conclude that Options should compensate Mr S for the loss he's suffered.

In making these findings, I've taken into account the potential contribution made by other parties to the losses suffered by Mr S. In my view, in considering what fair compensation looks like in this case, it's reasonable to make an award against Options that requires it to compensate Mr S for the full measure of his loss. FPSL was reliant on Options to facilitate access to Mr S's pension. But for Options' failings, Mr S's pension transfer wouldn't have occurred in the first place.

As such, I'm not asking Options to account for loss that goes beyond the consequences of its failings. I'm satisfied those failings have caused the full extent of the loss in question. That other parties might also be responsible for that same loss is a distinct matter, which I'm not able to determine. However, that fact shouldn't impact on Mr S's right to fair compensation from Options for the full amount of his loss.

Taking all of the above into consideration, I think that in the circumstances of this case it's fair and reasonable for me to conclude that Options shouldn't have accepted Mr S's SIPP application. For the reasons I've set out, I also think it's fair to ask Options to compensate Mr S for the loss he's suffered.

I say this having given careful consideration to the *Adams v Options* judgment, but also whilst bearing in mind that my role is to reach a decision that's fair and reasonable in the circumstances of the case, having taken account of all relevant considerations.

Putting things right

My aim in awarding fair compensation is to put Mr S back into the position he would likely have been in had it not been for Options' failure to carry out adequate due diligence checks before accepting his SIPP application. Had Options acted appropriately, I think it's *more likely than not* that Mr S would have remained a member of the DB pension scheme that he transferred into the SIPP.

Options should calculate fair compensation by comparing the current position to the position Mr S would be in if he'd not transferred from his DB scheme. In summary, Options should:

1. Calculate the loss Mr S has suffered as a result of making the transfer.

2. Take ownership of any remaining investments that cannot be surrendered if possible.

3. Pay compensation for the loss either to Mr S direct or into his pension, depending

on what he chooses. In either case the payment should take into account the necessary adjustments set out below.

4. Pay Mr S £500 for the distress and inconvenience he's suffered.

I explain how Options should carry out these steps in further detail below.

1. Calculate the loss Mr S has suffered as a result of making the transfer

   Options suggests Mr S may have already been fully compensated for his financial loss by the FSCS, as it says the client received £85,000 compensation from the FSCS, more than the original investment.

   But to properly determine the financial loss Mr S has suffered, Options must undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in policy statement PS22/13 and set out in the regulator's handbook in DISP App 4: https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter.

   For clarity, it is my understanding that Mr S has not yet retired, and that he has no plans to do so at present. Neither Mr S or Options have disputed my understanding. So, compensation should be based on the scheme's normal retirement age, as per the usual assumptions in the FCA's guidance.

   This calculation should be carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr S's acceptance of the decision.

2. Take ownership of any investments held within the SIPP which cannot be surrendered

   In order for the SIPP to be closed and further SIPP fees to be prevented, any remaining investment(s) need(s) to be removed from the SIPP. To do this, Options should calculate an amount it is willing to accept as a commercial value for any investments that cannot be surrendered and pay that sum into the SIPP and take ownership of the relevant investments. This amount should be taken into account for the loss calculation.

   If Options is unwilling or unable to purchase the investment(s), the value of them should be assumed to be nil for the purposes of the loss calculation. Provided Mr S is compensated in full, Options may ask Mr S to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the investment(s). That undertaking should allow for the effect of any tax and charges on the amount Mr S may receive from the investment(s) and any eventual sums he would be able to access. Options should meet any costs in drawing up the undertaking and any reasonable costs for advice required by Mr S to approve it.

   If Options doesn't take ownership of the investment(s), and it/they continue to be held in Mr S's SIPP, there will be ongoing fees in relation to the administration of that SIPP. Mr S would not be responsible for those fees if Options hadn't accepted the transfer of his personal pension into the SIPP. So, I think it is fair and reasonable that Options must waive any SIPP fees until such a time as Mr S can dispose of the investment(s) and close the SIPP.

3. Pay compensation to Mr S for any loss he has suffered as calculated in (1)

If the redress calculation demonstrates a loss, as explained in policy statement PS22/13 and set out in DISP App 4, Options should:

- always calculate and offer Mr S redress as a cash lump sum payment,
- explain to Mr S before starting the redress calculation that:
  - his redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and
  - a straightforward way to invest his redress prudently is to use it to augment his defined contribution pension
- offer to calculate how much of any redress Mr S receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr S accepts Options' offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr S for the calculation, even if he ultimately decides not to have any of his redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr S's end of year tax position.

I acknowledge that Mr S has received a sum of compensation from the FSCS, and that he has had the use of the monies received from the FSCS. The terms of Mr S's reassignment of rights require him to return compensation paid by the FSCS in the event this complaint is successful, and I understand that the FSCS will ordinarily enforce the terms of the assignment if required. So, I think it's fair and reasonable to make no *permanent* deduction in the redress calculation for the compensation Mr S received from the FSCS. And it will be for Mr S to make the arrangements to make any repayments he needs to make to the FSCS. However, I do think it's fair and reasonable for some allowance to be made for the sum(s) Mr S actually received from the FSCS and has had the use of for a period of the time covered by the calculation.

As such, for the purposes of the calculation that's being carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4, if it wishes, Options *may* notionally, for the period from the point of their payment through until the valuation date (as per the DISP App 4 definition of that term), allow for the payment(s) Mr S received from the FSCS following the claim about FPSL, as an income withdrawal payment. Where such an allowance is made then Options must also, at the end of the calculation, allow for a notional addition to the overall calculated loss that's equivalent to the payment(s) Mr S received from the FSCS following the claim about FPSL. The effect of this notional addition will be to increase the overall loss calculated using the most recent financial assumptions in line with PS22/13 and DISP App 4, by a sum that's equivalent to the payment(s) Mr S received from the FSCS.

Redress paid directly to Mr S as a cash lump sum in respect of a future loss includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4.3.31G(3), Options may make a notional deduction to allow for income tax that would otherwise have been paid. Based on the evidence provided, at the time of the transfer Mr S was in his mid-forties and his pension provision was worth just under £60,000. So Mr S's likely income tax rate in retirement is presumed to be 20%. In line with DISP App 4.3.31G(1) this notional

reduction may not be applied to any element of lost tax-free cash.

4. Pay Mr S £500 for the distress he's suffered.

   I think it's fair to say Options' failings would have caused Mr S some distress. Those failings meant he transferred his pension away from a valuable DB pension to a SIPP, and lost a significant portion of his pension provision. So I think it's fair for Options to compensate Mr S for this distress, and I think £500 is a fair and reasonable amount in the circumstances.

My final decision

For the reasons given, it's my decision that Mr S's complaint should be upheld and that Options UK Personal Pensions LLP must pay fair redress as set out above.

Where I uphold a complaint, I can award fair compensation of up to £160,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £160,000, I may recommend that the business pays the balance.

Determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My decision is that Options UK Personal Pensions LLP should pay the amount produced by that calculation up to the maximum of £160,000 (including distress and/or inconvenience but excluding costs) plus any interest set out above.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £160,000, I recommend that Options UK Personal Pensions LLP pay Mr S the balance plus any interest on the balance as set out above.

The recommendation isn't part of my determination or award. Options UK Personal Pensions LLP doesn't have to do what I recommend. It's unlikely that Mr S could accept a final decision and go to court to ask for the balance and Mr S may want to get independent legal advice before deciding whether to accept a final decision.
Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 30 August 2024.

Ailsa Wiltshire
Ombudsman