DRN-3804520

The complaint

Mr J complains that Options UK Personal Pensions LLP ('Options' – formerly Carey Pensions UK LLP) failed to conduct adequate due diligence on both his adviser and selected investment when it accepted his application to open a self-invested personal pension ('SIPP') and invest in an overseas property investment.

What happened

Mr J says he received a call from a firm, who I'll call the introducer, offering pension advice. He recalls a representative of the introducer coming to his home late one evening to arrange everything. He then received paperwork in the post *"with sticky notes on where to sign."*

Mr J lives in the UK. The introducer was regulated in Gibraltar and authorised to carry on certain regulated business in the UK by the then regulator, the Financial Services Authority ('FSA'), under a 'MiFID passport' arrangement.

Mr J says the introducer advised him to transfer his existing stakeholder pension to an Options SIPP to enable him to invest in property in the Cayman Islands with Crown Acquisitions Worldwide Limited ('Crown').

Mr J applied for an Options SIPP in January 2012. The introducer was recorded as the financial adviser for the SIPP.

Around the same time, Mr J signed a document headed:

> *"CROWN ACQUISITIONS WORLDWIDE*
> *ALTERNATIVE INVETSMENT* [sic] *MEMBER DECLARATION & INDEMNITY"*

A representative of the introducer was recorded as the adviser on the document. By signing the document, Mr J instructed Options to purchase land in the Cayman Islands via Crown.

The document contained several declarations including that Mr J:

- Was fully aware the investment was an alternative investment and therefore *"considered High Risk and / or Speculative."*
- Confirmed he had read and understood the documentation regarding the investment and had taken appropriate advice.
- Was fully aware that Options acted on an execution-only basis and hadn't provided any advice in respect of the investment.
- Confirmed the land would be sold prior to any residential development.
- Would indemnify Options against any liability arising from any aspect of the purchase.

In February 2012, Options received the proceeds from the stakeholder pension Mr J was transferring into the SIPP. Soon after, around £50,000 was sent from Mr J's SIPP to Crown. This represented almost the entirety of the funds in Mr J's newly opened SIPP.

The investment involved a plot of land in the Cayman Islands on which Crown had obtained planning permission to develop the property into a subdivision comprising various residential lots. Crown had arranged the preparation of plans for the construction of residential lots and agreed to obtain necessary approvals for those plans to develop the individual lots. Investors could buy individual lots and those bought via a SIPP were to be sold from the SIPP before any residential building work commenced.

In May 2014, Options wrote to Mr J and explained that Crown's *"re-sales division"* wasn't generating the desired level of interest and so Crown was prepared to withdraw the plot it was listing for him and refund the fees paid from his SIPP. Options asked Mr J to let it know if he wished to appoint another sales agent.

In October 2015, Options contacted Mr J and informed him there was further legal work and costs to be paid to complete the investment and that it had obtained estimates for those costs from two law firms in the Cayman Islands.

As I understand it, there were then further problems with the Crown project – though I don't currently know the details. In May 2017, Options wrote to investors with a report from lawyers relating to the problems with the investment. It mentioned there was a court case being brought by a different SIPP operator against Crown. It suggested obtaining valuations for the property.

In June 2020, Mr J made a complaint to Options about the advice to transfer to the SIPP and invest with Crown. He felt this exceeded the amount of risk he was prepared to take with his pension. Options issued a response only stating that the complaint had been made out of time.

In October 2021, a claims management company ('CMC') raised a complaint with Options on Mr J's behalf. The CMC made the following points, amongst others:

- Mr J was advised by an unregulated introducer to transfer his pension to an Options SIPP and invest the proceeds with Crown.
- The recommended investment was unregulated, high risk and illiquid.
- Mr J wasn't an experienced investor and didn't appreciate that the introducer was unregulated nor the complexity of the investment.
- Options had acted negligently and in breach of its statutory duty by accepting the instruction from the unregulated introducer, causing Mr J significant losses.
- Options failed to identify the risks involved in the introduction and to relay these to Mr J.
- Options had disregarded several of the Financial Conduct Authority ('FCA')'s Principles for Businesses.
- Options had caused Mr J detriment and he was seeking to be put into the position he would now be in had Options acted appropriately. In addition, he was seeking compensation for the worry and distress caused by the significant loss of his pension.

In its final response, Options said it considered the complaint had been raised out of time, on the basis that:

- Mr J's SIPP was established in January 2012 and the Crown investment was made in February 2012. So, Mr J had raised his complaint more than six years after the events he was complaining about.
- In October 2015, it sent Mr J a letter informing him of the additional costs and requirements for completing on the land purchase and that he would need to appoint a solicitor to assist with the associated legal work. Therefore, Mr J was put on notice of his cause for complaint more than three years before the date of his complaint.
- Options didn't wish to exercise its right to waive the relevant time limits.

Options also commented that Mr J was introduced by and received advice from two FCA regulated entities and had received Financial Services Compensation Scheme ('FSCS') compensation in respect of one of the entities.

The complaint was referred to the Financial Ombudsman Service and assigned to one of our Investigators. They asked Mr J if he had received any compensation from the FSCS and he confirmed he had not. The Investigator went on to consider the complaint and thought it should be upheld. In summary, they:

- Noted that to be aware of their cause for complaint, a complainant would need to know there was a problem, that they had or may suffer loss and who was responsible for that loss.
- Didn't consider that Mr J, or a reasonable retail investor in his position, would have been aware, nor ought reasonably to have been aware, of Options' due diligence obligations upon receipt of the October 2015 correspondence. Therefore, Mr J wouldn't have been aware, nor ought reasonably to have been aware, that Options might be responsible for issues with his investment.
- Said it wasn't until Mr J instructed a CMC that he became aware of Options' due diligence obligations. So, they were satisfied the complaint had been made in time and moved on to consider the merits.
- Acknowledged that Options wasn't able to advise Mr J on either the suitability of the pension switch or the investment. Instead, what they were determining was if Options acted fairly and reasonably in accepting Mr J's application from the introducer.
- Set out the considerations relevant to reaching their view on the merits of Mr J's complaint, including the FCA's Principles for Businesses, publications issued by the FCA (and its predecessor, the FSA), and relevant case law.
- Said that refusing to accept business doesn't amount to advice.
- Noted the introducer had an EEA passport to provide certain services in the UK, including investment advice. But this didn't cover advice to switch pensions which required additional permissions, not held by the introducer.
- Noted that Options had explained on other cases that the introducer didn't provide advice and acted only on an execution-only basis.

- Said Options was aware it was the introducer's intention to introduce non-advised clients to it in order to invest in the Crown investments which were esoteric and high risk.

- Thought Options should have identified that such investments were unlikely to be suitable for most retail investors.

- Considered the introducer's business model of introducing such investments for retail investors should have been a concern to Options, and if it had acted fairly and reasonably it wouldn't have accepted Mr J's application. And had it not done so, Mr J wouldn't have suffered the losses he's experienced to his pension.

The Investigator set out how Options should put things right, by calculating if Mr J would have been better off remaining in the defined contribution scheme he transferred to the SIPP and paying him compensation. They also said Options should pay Mr J £500 for the distress caused to him by its failings.

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

- Mr J's complaint is time-barred under DISP 2.8.2 R and Options doesn't consent to the Financial Ombudsman Service considering it. He made his complaint more than six years after the events he is complaining about. He also made his complaint more than three years after he was aware, or ought reasonably to have been aware, of his cause for complaint, given in May 2014, Options informed him the investment wasn't performing as expected.

- The Ombudsman must take account of the legal and contractual context of the relationship between it and Mr J. Options acts on a strictly execution-only/non-advised basis and is member directed throughout.

- Options doesn't give advice and the Ombudsman shouldn't come to a finding that places a legal duty on it that doesn't exist.

- The Investigator's findings are based on duties that wouldn't be recognised by a court, without explaining why that's appropriate.

- The complaint had been considered based on guidance which hadn't been published at the time of the events in this case.

- No evidence had been provided to demonstrate that the introducer carried on regulated activities.

- Even if the introducer gave advice, it held the necessary permissions to do so. There was no pension transfer, as defined in the rules, in this case. This was a pension switch from one defined contribution pension to another.

- In any event, SIPP operators are permitted to accept introductions from non-regulated introducers.

- There was no breach of duty by Options.

- Against this background, it's unfair and unreasonable to place liability for the losses flowing from the investment on the execution-only SIPP operator. It's unfair to make a SIPP operator responsible for the member's poor investment choices.

- Options didn't cause Mr J to suffer a loss. It's likely Mr J was keen to proceed with the investment and would have done so even if Options hadn't accepted business from the introducer.

- The redress methodology suggested by the Investigator is unfair. The index proposed is higher than the approach used in other cases.

- Options request an oral hearing in order to properly determine Mr J's complaint. It's procedurally unfair and inappropriate that a fact-sensitive matter such as this should be decided wholly on the papers.

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

What I've decided – and why

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

I've considered all the points made by the parties. However, I've not responded to them all below, instead concentrating on what I consider to be the key issues.

Options' request for an oral hearing

Options says an oral hearing is necessary to explore issues such as how Mr J came to hear about the investment, his understanding of it and the roles played by the parties, and his motivation for entering into the transaction.

The Financial Ombudsman Service provides a scheme under which certain disputes may be resolved quickly and with minimum formality (s.225 of the Financial Services & Markets Act 2000 ('FSMA')). DISP 3.5.5 R of the FCA's Dispute Resolution rules provides:

> *"If the Ombudsman considers that the complaint can be fairly determined without convening a hearing, he will determine the complaint. If not, he will invite the parties to take part in a hearing. A hearing may be held by any means which the Ombudsman considers appropriate in the circumstances, including by telephone. No hearing will be held after the Ombudsman has determined the complaint."*

Given my statutory duty under FSMA to resolve complaints quickly and with minimum formality, I'm satisfied that it wouldn't normally be necessary for me to hold a hearing in most cases (see the Court of Appeal's decision in R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service [2008] EWCA Civ 642).

The key question for me to consider when deciding whether a hearing should be held is whether or not *"the complaint can be fairly determined without convening a hearing"*.

We don't operate in the same way as the Courts. Unlike a Court, we have the power to carry out our own investigation. And the rules (DISP 3.5.8 R) mean I, as the Ombudsman determining this complaint, am able to decide the issues on which evidence is required and how that evidence should be presented. I'm not restricted to oral cross-examination to further explore or test points.

If I decide particular information is required to decide a complaint fairly, in most circumstances we're able to request this information from either party to the complaint, or even from a third party.

I've considered the submissions Options has made. However, I'm satisfied that I'm able to fairly determine this complaint without convening a hearing. In this case, I'm satisfied I have sufficient information to make a fair and reasonable decision. So, I don't consider a hearing is required. The key question is whether Options should have accepted Mr J's application at all. Mr J's understanding of matters is secondary to this.

In any event – and I make this point only for completeness – even if I were to invite the parties to participate in a hearing, that would not be an opportunity for Options to cross-examine Mr J as a witness. Our hearings don't follow the same format as a Court. We're inquisitorial in nature and not adversarial. And the purpose of any hearing would be solely for the Ombudsman to obtain further information from the parties that they require in order to fairly determine the complaint. The parties wouldn't usually be allowed direct questioning or cross-examination of the other party to the complaint.

Jurisdiction

Options has argued that Mr J has raised his complaint late and it shouldn't be considered.

We can't consider all complaints brought to this service. Before we can consider something, we need to check, by reference to the FCA's DISP rules and the legislation from which those rules are derived, whether the complaint is one we have the power to look at and whether it's a complaint we should consider.

DISP 2.8.2 R sets out that:

> *"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:*
> *…*
>
> *(2) more than:*
>
> > *(a) six years after the event complained of; or (if later)*
> >
> > *(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;*
>
> *unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;*
>
> *unless:*
>
> *(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R…was as a result of exceptional circumstances; …*
>
> *(5) the respondent has consented to the Ombudsman considering the complaint where the time limits in DISP 2.8.2 R…have expired"*

This means that, we *can't* consider a complaint where it's been brought:

- More than six years after the event took place; *or (if later)*
- More than three years after the complainant became aware, or *ought reasonably* to have become aware, that they had cause for complaint; unless
- The business consents to us looking into the complaint despite it having been brought out of time; or
- Exceptional circumstances apply, for example, where the complainant has been incapacitated – and, as a result of this, was unable to bring the complaint to this service within the applicable time limits.

Mr J complained to Options about its acceptance of his SIPP application and investment instruction in October 2021, which is more than six years after the events he is complaining about. For completeness, I note that Mr J made an earlier complaint to Options in June 2020, but as I'm satisfied that was materially different (being, as it was, about the advice he'd received) it doesn't alter my view about when he made *this* complaint about Options. So, I've gone on to consider the three-year limb of DISP 2.8.2 R.

To be aware of their cause for complaint, a complainant should reasonably know there is a problem, that they have or may suffer loss, and that someone else is responsible for the problem – along with who that someone is. So, to have knowledge of his cause for complaint about Options, Mr J needed to be aware, or ought reasonably to have been aware, that there was a problem which had or may have caused him loss, and that Options was responsible.

In its response to the Investigator's view, Options argued that its May 2014 letter made Mr J aware, or ought reasonably to have made him aware, of his cause for complaint. Whereas in its final response dated December 2021, it pointed to its October 2015 letter. I've seen copies of both pieces of correspondence.

The May 2014 letter explained:

> *"Crown World have informed us that the re-sales division is not generating the interest that they would like and therefore, they are prepared to withdraw your plot(s) they are listing for you and refund the fees that were paid from your pension scheme.*
>
> *Please advise if you wish the agent to take your plot(s) off the market and refund of your listing fee.*
>
> *If you wish to appoint another agent in the Cayman Islands to market your plot, please advise us of the name and contact details of the new agent."*

Although I accept that this letter informed Mr J his investment wasn't generating the interest desired by the provider, Crown, I don't agree it made him aware, or ought reasonably to have made him aware, that there was a problem with his investment.

The letter doesn't explain the cause of the less than desired interest or say it's due to investment underperformance in place of other factors. It doesn't set out how much the interest is below expectations. It doesn't confirm whether the less than desired interest is a short or long-term issue and whether it may be resolved in the future. It suggests this may be due to the performance of a sales department and that it could potentially be resolved by appointing a new agent.

Turning to the October 2015 letter, this stated:

> *"As outlined in the investment brochure, which you received prior to making the investment, there are a number of completion costs attributable to your investment, for example Stamp Duty Land Tax and other costs as there is with any property or land purchase. This letter provides you with more information about those costs and the next steps in the process."*

The letter then explained that Options had obtained quotes for arranging completion from two law firms in the Cayman Islands. Options asked Mr J to either select one of the firms or a firm of his own choosing.

The letter says these are standard costs which apply with property purchases, and which had already been disclosed to Mr J prior to his investment. So, I also don't agree this letter made Mr J aware, or should have made him aware, that there was a problem with his investment.

Even if I was to agree that these letters made Mr J aware there was a problem with his investment (which to be clear, I don't), I don't think either letter, at the time it was sent, made Mr J aware, or ought reasonably to have made him aware, that Options could be responsible. Mr J was advised by the introducer – not Options – about setting up his SIPP, transferring his existing pension and making the investment. And nothing in the correspondence outlined above indicated that Options were responsible.

The regulator published the results of two thematic reviews on SIPP operators in 2009 and 2012, and guidance for SIPP operators in 2013. It also wrote to the CEOs of SIPP operators in July 2014. A common theme of these communications was that the regulator considered SIPP operators had obligations to their customers even when not providing advice, and that many SIPP operators had a poor understanding of these obligations.

In this context, I don't consider that at the time of receiving either the May 2014 letter or October 2015 letter, Mr J, or a reasonable retail investor in his position, should have understood the obligations SIPP operators were under.

Overall, I've seen nothing that suggests Mr J knew, or ought reasonably to have known, of his cause for complaint against Options more than three years before he complained to it in October 2021 about its acceptance of his SIPP application and investment instruction (i.e. before October 2018). And I've seen nothing else that suggests Mr J complained outside of the time limits which apply to referring a complaint to this service. As I agree with the Investigator and am satisfied the complaint falls within our jurisdiction, I'll now turn to the merits.

Relevant considerations

I'm required to determine this complaint by reference to what I consider to be fair and reasonable in all the circumstances of the case. When considering what is fair and reasonable, I'm required to take 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.

With that in mind, I'll start by setting out what I have identified as the relevant considerations in deciding what is fair and reasonable in this case.

The Principles

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

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

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

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

And at paragraph 77 of BBA Ouseley J said:

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

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

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

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

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

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

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

The Adams court cases and COBS 2.1.1 R

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

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

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

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

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

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

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

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

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

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

Regulatory publications

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

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

The 2009 report included the following statement:

"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses ('a firm must pay due regard to the interests of its customers and treat them fairly') insofar as they are obliged to ensure the fair treatment of their customers. COBS 3.2.3(2) states that a member of a pension scheme is a 'client' for COBS purposes, and 'Customer' in terms of Principle 6 includes clients.

It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six TCF consumer outcomes…

We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the member to confirm the position, or by contacting the firm giving advice and asking for clarification. Moreover, while they are not responsible for the advice, there is a reputational risk to SIPP operators that facilitate the SIPPs that are unsuitable or detrimental to clients.

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

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

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

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

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

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

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

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

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

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

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

Like the Ombudsman in the BBSAL case, I don't think the fact the publications (other than the 2009 Thematic Review report) post-date the events that took place in relation to Mr J's complaint, mean that the examples of good practice they provide weren't good practice at the time of the relevant events. Although the later publications were published after the events subject to this complaint, the Principles that underpin them existed throughout, as did the obligation to act in accordance with the Principles.

It's also clear from the text of the 2009 and 2012 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, while the regulator's 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 that HHJ Dight in the *Adams* case didn't consider the 2012 thematic review, 2013 SIPP operator guidance and 2014 *"Dear CEO"* letter to be of relevance to his consideration of Mr Adams' claim. But it doesn't follow that those publications are irrelevant to my consideration of what's fair and reasonable in the circumstances of this complaint. I'm required to take into account good industry practice at the relevant time. And, as mentioned, the publications indicate what I consider amounts to good industry practice at the relevant time.

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

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

What did Options' obligations mean in practice?

In this case, the business Options was conducting was its operation of SIPPs on a non-advisory basis. I'm satisfied that meeting its regulatory obligations when conducting this business would include deciding whether to accept or reject particular investments and/or referrals of business. The regulatory publications provided some examples of good industry practice observed by the FSA and FCA during their work with SIPP operators including being satisfied that a particular introducer is appropriate to deal with.

It's clear from Options' *"Independent Financial Adviser Introducer Profile"* that it understood and accepted its obligations meant that it had a responsibility to carry out due diligence on the introducer. The introductory paragraph at the head of the form says the following:

> *"As an FSA regulated pensions company we are required to carry out due diligence on independent financial adviser firms looking to put business with us and gain some insight into the business they carry out. We therefore request that you, or the appropriate individual in your firm complete and sign this Profile questionnaire and our Terms of Business agreement as part of our compliance requirements.*
>
> *Thank you for taking the time to complete these documents to ensure the FSA requirements are met."*

I'm satisfied that, to meet its regulatory obligations, when conducting its business, Options was required to consider whether to accept or reject particular referrals of business, with the Principles in mind. This seems consistent with Options' own understanding. I note in submissions on other complaints Options has told us that *"adherence to TCF"* is something it had in mind when considering its approach to introducer due diligence i.e. the question of whether it should accept business from a particular introducer.

All in all, I'm satisfied that, in order to meet the appropriate standards of good industry practice and the obligations set by the regulator's rules and regulations, Options should have carried out due diligence on the introducer and the investment which was consistent with good industry practice and its regulatory obligations at the time. And in my opinion, Options should have used the knowledge it gained from its due diligence to decide whether to accept or reject a referral of business or particular investment.

Options' position in broad terms:

In very broad terms, Options' position is:

- It carried out due diligence to a degree that was appropriate for its role as non-advisory SIPP operator.

- There is no evidence the introducer gave advice to Mr J.
- Even if the introducer did advise Mr J, it had the regulatory permissions to do so.
- It's unfair to hold Options responsible for Mr J's losses.

Due diligence carried out by Options on the introducer:

Options did carry out some due diligence on the introducer. Amongst other things, it carried out an assessment of the introducer using a questionnaire it called an *"Introducer Profile"*. This was completed in October 2011. That questionnaire recorded a number of points relating to the introducer including the following:

- It was regulated in Gibraltar.
- It had no pensions advisers and no pensions specialists.
- It essentially carried on no pensions business.
- It had recently *"employed a new appointed rep specialising in SIPPs business but all on an execution only basis".*
- Its typical clients were *"HNW clients"* – meaning high net worth.
- It was intending to use SIPPs to hold investments with Crown.

Options doesn't seem to have asked about the new *"appointed rep"* who specialised in SIPPs despite that person being the source of the new business that would be referred to it. It didn't seem to ask about, or at least record on that form, expected levels of business or how that business would be sourced by the *"appointed rep"*.

Options was satisfied from the checks it made that the introducer was regulated in Gibraltar and had permission to carry on regulated activities in the UK as a result of an EEA passport.

Due diligence carried out on the investment:

This investment involved buying a lot(s) on a larger parcel of land all of which was to be developed.

I'm satisfied that Options knew enough about the investment to understand that, from the point of view of a UK based pensions investor, the investment should be regarded as high risk and esoteric. It was likely to be difficult to value and illiquid. I note that Options largely referred to the investment in these terms on the Member Declaration it required Mr J to sign as part of the application process.

From its assessment of the investment, Options ought to have understood it was unlikely to be suitable for most retail investors, and even for high net worth investors and/or sophisticated investors it was unlikely to be suitable for more than a small proportion of their pension.

I don't say Options was under any obligation to assess the suitability of the investment for individual members. But it should have been aware that there was a considerable risk of consumer detriment if this investment was sold to investors for which it wasn't suitable.

Options also ought to have been sceptical about the likelihood of investors choosing to invest their pensions in such an investment without being advised or possibly unfairly encouraged to do so.

In my view, Options should have been concerned about the introducer's new business model which involved a new *"appointed rep"* who apparently specialised in SIPP business, but only on an execution-only basis, where the SIPPs were being set up in order to invest in Crown investments.

Did the introducer give advice in this case?

Chapter 12 of the then FSA's, now FCA's, Perimeter Guidance Manual ('PERG') provided guidance to firms, such as Options, running personal pension schemes. The guidance at the time of Mr J's application included:

> ***"Q2. What is a personal pension scheme for the purposes of this regulated activity?***
>
> *The term is defined in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the Regulated Activities Order) as any scheme other than an occupational pension scheme (OPS) or a stakeholder pension scheme that is to provide benefits for people:*
>
> - *on retirement; or*
> - *on reaching a particular age; or*
> - *on termination of service in an employment.*
>
> *…This will include self-invested personal pension schemes ('SIPPs') as well as personal pensions provided to consumers by product companies such as insurers, unit trust managers or deposit takers (including free-standing voluntary contribution schemes)."*

So, under the Regulated Activities Order ('RAO'), Mr J's Options SIPP comes within the definition of a personal pension. And Article 82 of the Regulated Activities Order provides that rights under a personal pension are a specified investment.

Advising a person in his capacity as an investor or potential investor to buy or sell such an investment is a regulated activity under Article 53 RAO.

And making arrangements for another person to buy or sell such an investment is a regulated activity under Article 25 RAO. So too is making arrangements with a view to a person who participates in the arrangements buying or selling such an investment.

As explained by Andrews LJ in the Court of Appeal in the *Adams* case, the question of whether there has been advice under Article 53 should be approached by standing back and looking at what the consumer was told in a realistic and common sense manner. And Newey LJ said:

> *'"advice on the merits" need not include or be accompanied by information about the relevant transaction. A communication to the effect that the recipient ought, say, to*

> *buy a specific investment can amount to "advice on the merits" without elaboration on the features or advantages of the investment."*

And the court said a holistic assessment of the behaviour should be made when considering whether there has been making of arrangements under Article 25.

Mr J says the introducer called him and offered him pension advice. A representative then came to his home to arrange everything. And shortly after this, he received paperwork in the post *"with sticky notes on where to sign."* Options suggests it's unlikely Mr J was called unexpectedly and that he's likely to have done something, made some kind of enquiry, during which he provided his contact details. Whatever the case, I'm satisfied the introducer made contact with Mr J and met with him. This in turn led to Mr J agreeing to transfer his existing stakeholder pension to an Options SIPP, in order to invest with Crown.

Mr J wasn't a high net worth investor. Nor was he a sophisticated investor. He was a normal retail investor. And it's difficult to see why such a retail investor would choose to move his stakeholder pension to a SIPP – which is a fairly specialist pension arrangement – to invest in a property-based investment in the Cayman Islands unless he was advised to do so. It's not plausible that such a retail investor would choose to act in that way without advice and would instruct a firm, based in Gibraltar, to arrange that for him on an execution-only basis.

This also wasn't a one-off. The introducer entered into an introducer arrangement with Options in order to introduce members who were going to invest in Crown's property-based investments. It therefore seems the reality was that it was the introducer's intention to act as an introducer of business to Crown. Or put another way, it had a business interest in encouraging people to invest in Crown investments.

In this case, the SIPP application form was sent to Options by Crown rather than the introducer. This suggests that the introducer first sent the application to Crown to ensure that Crown was aware that the application to invest, which would soon come from Options, had been introduced by it.

I note the introducer was named on the SIPP application form as the financial adviser and investment manager for the SIPP. And a representative of the introducer was named as the adviser on the Member Declaration.

On balance, I consider Mr J's version of events – that the introducer advised him to transfer his pension to the SIPP so he could invest in the Crown investment it had recommended – to be plausible.

The evidence supports that the introducer advised Mr J to make the Crown investment. And that it advised him to open a SIPP with Options, close his existing pension and transfer his funds to Options and that was all one single piece of advice.

It's also my view that Options should have realised there was a real risk that the introducer would give such advice when introducing consumers to it to take out SIPPs in order to invest in Crown investments.

It's possible that the Crown investment isn't a specified investment under FSMA. However, that doesn't mean regulated investment advice wasn't given. In my view, the situation here is essentially the same as that considered by the Court of Appeal in the *Adams* case where Newey LJ said:

"82. In short, CLP's recommendation that Mr Adams invest in storepods carried with it advice that he transfer out of his Friends Life policy and put the money into a Carey SIPP. Investment in storepods may have been the ultimate objective, but it was to be gained by transferring out of the Friends Life policy and into a Carey SIPP. CLP thus proposed that Mr Adams undertake those transactions too and, in so doing, gave "advice on the merits" of selling a "particular investment which is a security" (viz. the Friends Life policy) and buying another "particular investment which is a security" (viz. a Carey SIPP). Although, therefore, the advice to invest in storepods was not of itself covered by article 53 of the RAO, CLP nonetheless gave Mr Adams advice within the scope of article 53 and so acted in contravention of the general prohibition."

As well as giving advice, the introducer arranged the deal it recommended. It entered into an arrangement with Options under which it would refer such business to it. And I note that as part of that arrangement the introducer was able to submit applications to Options – albeit in this case this was via Crown.

In the circumstances, it's my view that the acts carried out by the introducer were sufficiently instrumental in the overall transaction – the transfer from Mr J's existing pension to the SIPP and the investment with Crown – as to amount to the regulated activity of arranging deals in investments under Article 25 RAO.

The regulatory status of the introducer:

The Introducer Profile didn't identify where the introducer was intending to carry on the execution-only business that would lead to referrals of business to Options, but it would need to be authorised in the UK for any regulated activity it carried on in the UK. And Options satisfied itself that the introducer was authorised in the UK. It had an EEA passport under the MiFID Directive to carry on certain activities in the UK including *"investment advice"* relating to certain investments.

At the time of Mr J's SIPP application (and at the time the Introducer Profile was completed) SUP App 3 in the regulator's handbook set out guidance on passporting issues including a table at SUP App 3.9.5 G which included the following setting out the investments and activities covered by MiFID/a MiFID passport:

*"**Services set out in Annex I to MiFID***

SUP App 3.9.5 G

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

Accordingly, arranging deals in investments under Article 25 and advising on investments under Article 53 RAO aren't covered by a MiFID passport if the activity relates to Article 82 investments i.e. rights under a personal pension.

And guidance at SUP 13A.1.2 G of the handbook, in existence at the time of Mr J's application and when the Introducer Profile was completed, made clear that an EEA firm that wanted to carry on activities in the UK outside the scope of its EEA rights would require a *"top-up permission"*.

Options' understanding was that the introducer would introduce business to it, leading to the establishment of SIPPs for the purpose of investing in the Crown investments. The introduction of applications to Options to establish a SIPP and the instruction to make investments in that SIPP would likely amount to arranging deals in investments.

If the introducer gave advice on the merits of taking out the SIPP or making the investment this would amount to advising on investments.

Accordingly, the introducer would need the relevant top-up permission if it carried on either one or both of those activities in the UK. And carrying on either one or both of those activities was a realistic possibility in the circumstances of the introducer arrangement between the introducer and Options. Although Options thought the introducer was regulated to carry on those activities in the UK, it didn't have the necessary top-up permissions to carry on those activities in relation to the rights under personal pensions.

My view so far:

In summary, it's my view that Options should have:

- Had serious concerns about the business model of the introducer.
- Considered there was a real risk that the introducer, despite saying it would only act on an execution-only basis, would very likely stray into giving advice to take out the Crown investments and advising consumers to set up a SIPP with Options and to transfer their existing pensions to it in order to make the Crown investments.
- Understood that the introducer didn't have the necessary top-up permissions to advise on or arrange deals in relation to rights in personal pensions.
- Considered that it was exposing its customers to an unacceptable level of risk of unsuitable SIPPs, and the real risk of considerable detriment which might include serious, possibly complete, loss of their pension.

In all the circumstances, it's my view that Options should have decided not to accept business from the introducer.

And it shouldn't have accepted Mr J's application for a SIPP or his instruction to request the transfer of his existing pension to it or his instruction to invest in the Crown investment.

Is it fair to ask Options to compensate Mr J?

In deciding whether Options is responsible for any losses that Mr J has suffered on the Crown investment, I need to look at what would have happened if Options had done what it should have done i.e. hadn't accepted Mr J's SIPP application in the first place.

When considering this I’ve taken into account the Court of Appeal’s supplementary judgment in *Adams* ([2021] EWCA Civ 1188), insofar as that judgment deals with restitution/compensation. But ultimately, it’s for me to decide what’s fair and reasonable in the circumstances.

I’m required to make the decision I consider to be fair and reasonable in all the circumstances of the case and I don’t consider the fact that Mr J signed an indemnity means he shouldn’t be compensated if it’s fair and reasonable to do so.

Had Options acted fairly and reasonably it should have concluded that it shouldn’t accept Mr J’s application to open a SIPP. That should have been the end of the matter – it should have told Mr J that it couldn’t accept the business. And I’m satisfied, that had that happened, the arrangement for Mr J wouldn’t have come about in the first place, and the loss he suffered could have been avoided. The financial loss has flowed from Mr J transferring out of his existing pension and into a SIPP. For the reasons I set out below I’m satisfied that, had the SIPP application not been accepted, the loss would not have been suffered.

Had Options explained to Mr J why it wouldn’t accept the application from the introducer or was terminating the transaction, I find it very unlikely that Mr J would have tried to find another SIPP operator to accept the business. It seems that Mr J was persuaded to make the investment after receiving a call from the introducer and would more likely have dropped the idea if Options had rejected the application, rather than do anything he could to make the investment in some other way with some other pension provider.

So I’m satisfied that Mr J wouldn’t have continued with the SIPP, had it not been for Options’ failings, and would have remained in his existing pension. And, while I accept that the introducer is responsible for initiating the course of action that has led to his loss, I consider that Options failed unreasonably to put a stop to that course of action when it had the opportunity and obligation to do so.

I’ve considered paragraph 154 of the *Adams* High Court judgment, which says:

> *“The investment here was acknowledged by the claimant to be high risk and/or speculative. He accepted responsibility for evaluating that risk and for deciding to proceed in knowledge of the risk. A duty to act honestly, fairly and professionally in the best interests of the client, who is to take responsibility for his own decisions, cannot be construed in my judgment as meaning that the terms of the contract should be overlooked, that the client is not to be treated as able to reach and take responsibility for his own decisions and that his instructions are not to be followed.”*

For all the reasons I’ve set out, I’m satisfied that it wouldn’t be fair to say Mr J’s actions mean he should bear the loss arising as a result of Options’ failings. I don’t say Options shouldn’t have accepted the application because the investment was high risk. I acknowledge Mr J was warned of the high risk and declared he understood that warning. But Options didn’t share significant warning signs with him so that he could make an informed decision about whether to proceed or not. In any event, Options shouldn’t have asked him to sign a SIPP Member Instruction and Indemnity (or shouldn’t have considered and accepted it) as the SIPP application should never have been accepted or alternatively the transaction should have been terminated at a much earlier stage in the process.

So I’m satisfied in the circumstances, for all the reasons given, that it’s fair and reasonable to conclude that Options should compensate Mr J for the loss he's suffered.

Options' failure has caused Mr J significant financial loss. The matter will have also caused him much worry and distress and Options should compensate him for this as well.

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 J's right to fair compensation from Options for the full amount of his loss.

Putting things right

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

In light of the above, Options should:

- Obtain the notional transfer value of Mr J's previous pension plan.
- Obtain the actual transfer value of Mr J's SIPP, including any outstanding charges.
- Pay a commercial value to buy any illiquid investments (or treat them as having a zero value).
- Pay an amount into Mr J's SIPP so as to increase the transfer value to equal the notional value established. This payment should take account of any available tax relief and the effect of charges.
- If the SIPP needs to be kept open only because of the illiquid investment and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.
- If Mr J has paid any fees or charges from funds outside of his pension arrangements, Options should also refund these to Mr J. Interest at a rate of 8% simple per year from date of payment to date of refund should be added to this.
- Pay Mr J £500 to compensate him for the distress and inconvenience he's been caused by Options' failings.

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

Treatment of the illiquid assets held within the SIPP

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

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

If Options is unable, or if there are any difficulties in buying Mr J's illiquid investment, it should give the holding a nil value for the purposes of calculating compensation. In this instance, Options may ask Mr J to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the relevant holding. That undertaking should allow for the effect of any tax and charges on the amount Mr J may receive from the investment and any eventual sums he would be able to access from the SIPP. Options will have to meet the cost of drawing up any such undertaking and any reasonable costs for advice required by Mr J to approve it. Options should only benefit from the undertaking once Mr J has been fully compensated for his loss (to be clear, this includes any loss that's in excess of our award limit).

Calculate the loss Mr J has suffered as a result of making the transfer

Options should first contact the provider of the plan which was transferred into the SIPP and ask it to provide a notional value for the policy as at the date of calculation. For the purposes of the notional calculation the provider should be told to assume no monies would have been transferred away from the plan, and the monies in the policy would have remained invested in an identical manner to that which existed prior to the actual transfer.

Any contributions or withdrawals Mr J has made will need to be taken into account whether the notional value is established by the ceding provider or calculated as set out below.

Any withdrawal out of the SIPP should be deducted at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. To be clear, this doesn't include SIPP charges, or any fees paid to the introducer. The same applies for any contributions made, these should be added to the notional calculation from the date they were actually paid, so any growth they would have enjoyed is allowed for.

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

The notional value of Mr J's existing plan if monies hadn't been transferred (established in line with the above) less the current value of the SIPP (as at date of calculation) is Mr J's loss.

Pay an amount into Mr J's SIPP so that the transfer value is increased by the loss calculated above.

Since the loss Mr J has suffered is within his pension, it's right that I try to restore the value of his pension provision if possible. So, if the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr J's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr J as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

SIPP fees

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

Fees or charges from funds outside of pension arrangements

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

Interest

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

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

Distress & inconvenience

It's evident from Mr J's communications with the Investigator that the loss of the entirety of his pension fund has caused him considerable worry and upset. A payment of £500 is appropriate to compensate him for that.

Assignment of rights

If Options believes other parties to be wholly or partly responsible for the loss, it's free to pursue those other parties. So, compensation payable to Mr J can be contingent on the assignment by him to Options of any rights of action he may have against other parties in relation to his transfer to the SIPP and the investment. The assignment should be given in terms that ensure any amount recovered by Options up to the balance due to Mr J is paid to him. Options should only benefit from the assignment once Mr J has been fully compensated for his loss (to be clear, this includes any loss that's in excess of our award limit). Options should cover the reasonable cost of drawing up, and Mr J's taking advice on and approving, any assignment required.

Award limit

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £160,000, plus any interest and/or costs/interest on costs that I think are appropriate. If I think that fair compensation is more than £160,000, I may recommend that the business pays the balance.

I don't know what award the above calculation might produce. So, while I acknowledge that the value of Mr J's original investment fell within our award limit, for completeness I have included information below about what ought to happen if fair compensation amounts to more than our award limit.

Decision and award: I uphold the complaint. I think that fair compensation should be calculated as set out above. My decision is that Options should pay Mr J the amount produced by that calculation – up to a maximum of £160,000. In addition to any losses subject to the award limit, Options should pay interest to Mr J if he's paid any fees or charges from funds outside of his pension arrangements, or if it takes more than 28 days from the date of Mr J's acceptance of this final decision to pay compensation, as set out above.

Recommendation: If the amount produced by the calculation of fair compensation is more than £160,000, I recommend that Options pays Mr J the balance.

This recommendation isn't part of my determination or award. Options doesn't have to do what I recommend. It's unlikely that Mr J can accept my decision and go to court to ask for the balance. Mr J may want to get independent legal advice before deciding whether to accept this decision.

My final decision

My final decision is that I uphold this complaint. To put things right Options UK Personal Pensions LLP must calculate and pay Mr J the award set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 17 April 2024.

Alex Salton
Ombudsman