DRN-3875137

The complaint

Mr A complains that BW SIPP LLP (BW) failed to undertake proper checks in relation to the investment he made. He also thinks BW failed to let him know about issues with the investment before it was valued at £0.

What happened

Mr A transferred his existing pension arrangement to a SIPP and subsequently invested in a carbon credits investment. Mr A has told us that he was introduced to the investment by someone representing Carbon Advice Group.

Mr A's SIPP application form listed the intended investment as Store First.

On 21 August 2011, Mr A signed a declaration stating:

> *"I would like to proceed with the Barnett Waddingham SIPP (BWSIPP) on an execution-only basis. I confirmed I have neither requested nor received any advice from Barnett Waddingham Investments LLP or any other financial adviser concerning the suitability of the BWSIPP. I also understand that Barnett Waddingham will assume that all further instructions concerning my SIPP are on an execution only basis unless I inform them otherwise."*

On the same date Mr A signed the transfer out paperwork from his existing SIPP with his ceding scheme.

On 1 November 2011, Mr A's ceding scheme confirmed the transfer of his pension monies to BW. The funds were received by BW on the same date.

BW refused to permit investment in Store First after undertaking due diligence in respect of the investment. Despite this, Mr A confirmed he still wished to go ahead with the SIPP. BW has told us that:

> *"We were made aware of Carbon Advice Group by* [Mr A's name] *directly when he requested his SIPP invest in carbon credits via the Carbon Advice Group. He is the only SIPP client we have who ever invested carbon credits."*

On 31 January 2012, BW wrote to Mr A in relation to the carbon credits investment, it said:

> *"I am writing regarding the proposed investment through Carbon Advice Group which we have referred to our external SIPP investment consultant. I am sure you are aware that trading carbon credits is a new market and you will be relying on the broker that you have selected. We have not been able to undertake due diligence on the broker and therefore you will need to satisfy yourself that you wish to proceed.*
>
> *Our external consultant, however, has suggested that we highlight the following point in the literature:*

"When an investment is made, funds are paid directly to Carbon Advice Group. It does not appear that any form of client or escrow account is being used. The carbon credits are not issued for 30 days after funds are received. Therefore, in the event of an administrator or liquidator being appointed during that 30 day period, your clients' funds would be at risk and not ring-fenced in any way."

Carbon schemes have also recently appeared on the Financial Services Authority website, and I suggest that you read the information at the following link (print-out attached for convenience):

www.fsa.gov.uk/Pages/consumerinformation/scamsandswindles/investment scams/carbon credit/index.shtml

If you wish to proceed with the investment having conducted your own research, we will require you to sign and return the attached Member Investment Declaration. I will then draw up the necessary documentation.

I look forward to hearing from you."

Mr A signed the Member Investment Declaration document on 2 February 2012:

Carbon Credit Investment

Background:

Following your instruction to us to purchase verified voluntary emission reduction carbon credits (VERs) the purpose of this document is to highlight some of the SIPP related risks involved in order that you are fully aware of these prior to purchase.

Whilst carbon credits generally have been around for some time, the market for trading VERs is still immature - this means there may not be a ready buyer of the VERs held within your SIPP and no guarantee that the VER could be sold at a profit were a buyer found.

Expert commentators suggest that the market in trading VERs may take some time to develop (assuming it does develop) - typically three to five years is mentioned although again these cannot be guaranteed. Consequently it should be appreciated by you as the scheme member instructing us to purchase VERs within your SIPP that this investment is potentially high risk, long term in nature and illiquid. Therefore we ask you to acknowledge the following:

Your acknowledgement as scheme member to us as the SIPP operator:

I confirm that I have considered carefully the information provided by the product provider and I have a good understanding of carbon credits and VERs; furthermore I wish to instruct you as the SIPP operator to make an investment in VERs on my behalf. I am fully aware that this is investment is High Risk and/or Speculative, may be illiquid and/or difficult to value or sell and confirm that I wish to proceed.

I acknowledge that I have been recommended to seek professional advice from a suitably qualified and authorised adviser however have chosen not to seek advice for this transaction.) I am fully aware that you are acting on my instructions on an Execution Only Basis as directed by me as scheme member and that you have not provided any advice whatsoever in respect of this investment or the SIPP.

Should any aspect of this investment be subject to a tax charge within the pension scheme any such charges will be paid directly from the fund or by me as the member of the Scheme.

I agree to provide you with any further information and/or documentation they may require prior to completing the purchase of this investment.

I also understand and agree that, in the event of my death, if you are unable to sell the asset within HMRC timescales that it will be transferred to my beneficiaries through my estate (where possible) and accordingly may be subject to any Inheritance Tax.

I indemnify you against any and all liability arising from this investment."

Sadly, Mr A's investment subsequently failed. Mr A later raised a complaint about BW.

Background to the complaint

BW issued its final response letter on 4 June 2020, it didn't uphold Mr A's complaint. Briefly it said:

- It revalued the investment down to nil based on information received from Beaufort Securities (custodian of the asset). This was reflected in the October 2017 annual statement.

- Earlier that year Mr A had exchanged emails with BW having received an email from Beaufort Securities stating that there was no secondary market for carbon credits and that it was valuing them at nil.

- It did explain that it was reducing the value of his investment.

- BW's investment committee considered Mr A's request to invest in carbon credits.

- At the time of investment BW:

    - Disclosed to Mr A that it had been unable to undertake due diligence in relation to Carbon Advice Group PLC.
    - Recommended Mr A seek financial advice.
    - Highlighted to Mr A the key risks of investing in Carbon Credits.
    - Signposted Mr A to information about carbon credits on the regulator's website.

- In turn Mr A:

    - Confirmed he had a good understanding of Carbon Credits.
    - Confirmed he wanted his instruction to be accepted on an execution-only basis.
    - Indemnified BW against any and all liability arising from this investment.

- It made Mr A fully aware of the basis on which BW's investment committee allowed his investment in carbon credits to proceed.

Unhappy with its response, Mr A referred his complaint to this service.

During our investigation, BW provided us with the following timeline of events:

- 05/10/2011 – the SIPP was established on an execution-only basis.

- 01/11/2011 – £129,649.77 (£83,692.94 non protected rights and £45,956.83 protected rights) was received from Mr A's previous pension. As it was a SIPP to SIPP transfer, BW says it wasn't required to investigate the funding of the ceding scheme.

- 31/01/2012 – BW wrote to Mr A regarding his proposed investment in Carbon Credits traded via Carbon Advice Group, with warnings that it was unable to carry out due diligence and enclosing a Member Investment Declaration to be signed in order to proceed, along with the FSA (Financial Services Authority) warning on investment scams dated at 1 August 2011.

- 10/02/2012 – £99,999.87 was invested in MW Wind Electricity Generation Farm at Radhapuram with £26,844.18 remaining in cash in the SIPP.

- 31/03/2017 – Carbon Advice Group was dissolved, Beaufort Securities became custodian of the asset.

- 12/06/2017 – Beaufort Securities confirmed there was no market for the asset and valued it at nil.

- 23/02/2018 – Beaufort Securities confirmed that an agreement with the FCA (Financial Conduct Authority) prevented it from opening any new accounts in order to transfer the asset to Mr A personally, removing it from the SIPP.

- April 2020 – Complaint raised by Mr A and responded to by BW.

- July 2020 – Mr A elected to take his remaining cash holdings, paid from the SIPP on 20 July 2021.

BW has told us that the SIPP currently remains dormant, pending resolution of the asset holding with no administration fees due.

One of our investigators reviewed Mr A's complaint and concluded that it should be upheld. BW disagreed. Briefly, it said:

- It wasn't the case that it didn't undertake any due diligence, it employed an independent third party to undertake due diligence, which represented good practice.
- The compensation set out by the investigator was based on the pension monies transferred into the SIPP coming from defined benefit occupational pension scheme, which was not the case. The funds were in fact transferred from another SIPP.

Following on from the information provided by the business, the investigator revised the recommended redress in accordance with the fact that the ceding scheme was a defined contribution personal pension plan.

During the course of our investigation, Mr A has detailed his circumstances and the impact this situation had on him, amongst other things, he's told us that:

- He is in financial difficulty, is unable to work for medical reasons and has had no income since 2020.
- Not being able to access his pension has made things more difficult financially and has had a negative impact on his mental health.
- His partner and daughter also have ongoing medical issues.

Because agreement couldn't be reached, the case was escalated to me for review. I issued my provisional decision explaining why I thought Mr A's complaint should be upheld and told both parties I would consider anything further they wanted to add. Mr A accepted my decision and made no further comments. BW also accepted my decision although it did disagree with my findings. My findings remain as set out in my provisional decision; I've reiterated these below. I've amended the redress methodology slightly as the section contained a minor error in my provisional decision.

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.

The parties to this complaint have provided detailed submissions to support their position and I am grateful to them for taking the time to do so. I've considered these submissions in their entirety. However, I trust that they will not take the fact that my decision focuses on what I consider to be the central issues as a discourtesy. The purpose of this decision is not to address every point raised in detail, but to set out my findings, on what I consider to be the main points, and reasons for reaching them.

Where the evidence is incomplete, inconclusive, or contradictory (as some of it is here), I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances.

It's my role to fairly and reasonably decide if the business has done anything wrong in respect of the individual circumstances of the complaint made and – if I find that the business has done something wrong – award compensation for any material loss or distress and inconvenience suffered by the complainant as a result of this.

Relevant considerations

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

When considering what is fair and reasonable in the circumstances, I need to take account of relevant law and regulations, regulator's rules, guidance and standards, codes of practice and, where appropriate, what I consider to have been good industry practice at the relevant time. This goes wider than the rules and guidance that come under the remit of the Financial Conduct Authority (FCA). Ultimately, I'm required to make a decision that I consider to be fair and reasonable in all the circumstances of the case.

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). Principles 2, 3 and 6 are of particular relevance here, in my view.

Ouseley J in *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin) 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 *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878). I am therefore satisfied that the Principles are a relevant consideration that I must take into account when deciding this complaint.

The Berkeley Burke judgment also considers section 228 of FSMA and the approach an ombudsman is to take when deciding a complaint. The judgment of Jacobs J 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.

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 when making this decision on Mr A's case.

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

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

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

I also want to emphasise here that I do not say that BW was under any obligation to advise Mr A on the SIPP and/or the underlying investments. Refusing to accept an application or not permitting an investment isn't the same thing as advising Mr A on the merits of investing in Carbon Credits and/or transferring to the SIPP.

The regulatory publications

The FCA (and its predecessor, the FSA) has issued a number of publications which remind 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.

These reports 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 is appropriate to take them into account.

In determining this complaint, I need to consider whether, in accepting Mr A's SIPP application, BW complied with its regulatory obligations as set out by the Principles to act with due skill, care and diligence, to take reasonable care to organise its business affairs responsibly and effectively, to pay due regard to the interests of its customers, to treat them fairly, and to act honestly, fairly and professionally. And, in doing that, I'm looking to the rules and the publications listed above to provide an indication of what BW could have done to comply with its regulatory obligations and duties.

Taking account of the factual context of this case, it is my view that in order for BW to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), it should have undertaken sufficient due diligence checks to consider whether to accept or reject particular applications for investments, with its regulatory obligations in mind.

I also want to reemphasise here that I do not say that BW was under any obligation to advise Mr A on the SIPP and/or the underlying investment in Carbon Credits. Refusing to accept an application or permit an investment is not the same thing as advising Mr A on the merits of investing and/or switching to the SIPP.

The due diligence carried out by BW on the Carbon Credits investment – and what it should have done

Taking everything into account, I'm satisfied that it should – as a minimum – have:

- *Identified the Carbon Credits investment as a high-risk, speculative and non-standard investment, so it should've carried out thorough due diligence on it.*
- *Examined where Mr A's money would be invested – in other words, what type of Carbon Credit he was investing in.*
- *Considered whether the investment was suitable for a personal pension scheme.*
- *Made sure the investment was genuine – in other words, not a scam or linked to fraudulent activity.*
- *Made sure the investment worked as claimed.*
- *Ensured that the investment could be independently valued, both at the point of purchase and subsequently.*
- *Ensured Mr A's SIPP wouldn't become a vehicle for a high-risk and speculative investment.*

The FSA (the then regulator) had identified *that "trading on these markets requires skill and experience"*. These investments were unlikely to be suitable for the majority of retail investors. And they were only generally likely to be suitable for a small element of the investment portfolio of a sophisticated investor.

There is no price transparency – there is no independent source regarding the price being set, and nothing to confirm at what price the credits were acquired. So, there was no way to

establish how the price was being arrived at. So, there could've been a very significant difference between the price the units were acquired at and the price these were sold to Mr A at. This is something BW could have and should have investigated.

Assuming that Mr A would hold valid units or credits, there doesn't appear to be any measure of the quality of the credits in question. In other words, were the units or credits being 'generated' valid? I haven't seen any independent verification that the units met the Verified Carbon Standard (VCS) standard. So, at the time, there was a risk this validation wouldn't be achieved. I haven't seen evidence of a registration of the project with the United Nations Framework Convention on Climate Change (UNFCCC) at the time Mr A invested. The lack of that registration could suggest that the relevant standard hadn't been met.

I haven't seen that it was demonstrated that there was any ready market for Mr A's units. It wasn't demonstrated how Mr A would find businesses to buy his small allocation of Carbon Credit units.

At the time there was little confirmation that Mr A's SIPP was acquiring anything of any realisable value, whether the units existed or, if they did, whether they were being sold at inflated prices.

BW may consider that carrying out the kind of assessment that would be required to establish and interrogate such factors as I've discussed and carry out appropriate due diligence, imposes on it requirements over and above its responsibilities as a SIPP provider. But I'm satisfied these are the kind of things BW needed to do when accepting Mr A's proposed investment to meet its regulatory obligations and good practice. And, I don't think that this amounts to a conclusion that BW should've assessed the suitability of the Carbon Credits investment for Mr A's individual circumstances.

BW does appear to have understood the importance of due diligence, it refused to permit Mr A's initial application to invest in Store First because of due diligence concerns. And, I accept BW did do some due diligence in relation to Carbon Credits, this doesn't seem to have extended beyond looking at marketing brochures (I also note some material provided didn't relate to the project Mr A's Carbon Credits supposedly related to) and a report prepared for BW by a third party, albeit it has only provided us with excerpts from that report. The due diligence therefore didn't cover all – or even a significant number of – the points I've set out above. So, based on the evidence I've seen, I'm satisfied that BW didn't carry out due diligence at the time to satisfy its reasonable responsibilities as a SIPP provider.

If BW had completed sufficient due diligence on Mr A's Carbon Credits investment, what should it reasonably have concluded?

It could be that the investment was/is legitimate. I also accept that technically there was a market for Carbon Credits. But it's now been highlighted that it often wasn't possible to sell them even though there was a market for them. And in particular, there are reports that voluntary Carbon Credits aren't actively traded and that buyers don't buy from private individuals. So, although they technically worked as claimed, the reality was very different.

The FSA warning was published before Mr A's SIPP was set up – indeed this appears to have been highlighted in the third-party report commissioned by BW and included in the declarations Mr A was asked to sign – and this made it clear that there may be issues with selling Carbon Credits. I'm satisfied this is something BW should've not only identified as part of its due diligence but considered a significant factor in deciding whether to permit the investment. Also, the fact Mr A might then have struggled to realise the investment should've caused it significant concern – especially considering that the vast majority of the money

transferred (about £130,000) to the SIPP by Mr A was invested in Carbon Credits. It isn't clear how Mr A would be able to take benefits from his pension if the investment was difficult to value or realise.

It could be argued that not being able to independently value an investment wouldn't be indicative of its performance or legitimacy. But the investment was predicated on the Carbon Credits being sold for more than what was paid for them. And so, I think there should've been concerns if it wasn't possible to independently value them. And if an independent valuation had been possible, it's now been highlighted that voluntary Carbon Credits were sold at "significantly inflated prices" so it seems likely this would then have been identified. Which would effectively render the investment fundamentally unviable.

BW should also have been aware that Mr A was unlikely to benefit, in terms of the investment itself, from any regulatory protections (the investment being unregulated) such as access to the Financial Services Compensation Scheme or this service.

In the circumstances, I'm satisfied there were a number of concerns BW should've identified. It should've known there was a significant risk of consumer detriment, and it shouldn't have added the Carbon Credits to the list of permitted investments for Mr A's SIPP (as I understand it Mr A is the only consumer who invested in Carbon Credits via a BW SIPP and was the first to do so, it's specifically in connection with Mr A's request to invest in Carbon Credits that BW looked into the investment). When doing so, I think it didn't act with due skill, care and diligence or treat Mr A fairly.

I note that BW highlighted to Mr A that it had been unable to undertake due diligence in respect of Carbon Advice Group. I think that BW should have recognised that this significantly increased the risk in allowing this investment and that in simply putting Mr A on notice of the fact that it hadn't been able to undertake due diligence BW wasn't doing enough. Especially considering that one of the risks flagged was:

> *"When an investment is made, funds are paid directly to Carbon Advice Group. It does not appear that any form of client or escrow account is being used. The carbon credits are not issued for 30 days after funds are received. Therefore, in the event of an administrator or liquidator being appointed during that 30 day period, your clients' funds would be at risk and not ring-fenced in any way."*

Having concluded that BW shouldn't have allowed the Carbon Credits investment in any event, I've not gone on to consider what BW could've discovered about Carbon Advice Group or what conclusions it should've drawn from this.

To be clear, I reiterate, I'm not making a finding that BW should've assessed the suitability of the Carbon Credits investment for Mr A. I accept BW had no obligation to give advice to Mr A, or to ensure otherwise the suitability of an investment for him.

At the point Mr A's investment was arranged BW would've been aware that he was investing the vast majority of his pension fund in an unregulated, esoteric and high-risk investment which might be difficult to sell. I acknowledge that BW wouldn't be aware whether that was the entirety of his pension savings because he may have had other benefits elsewhere. But it was an indicator of the kind of risk to which Mr A was being exposed. These were 'red flags', so to speak, which should've caused BW significant concern as to whether or not to allow Mr A to hold that investment in his SIPP.

I'm satisfied BW could've identified the concerns I've mentioned, and ought to have drawn the conclusions I've set out, based on what was known at the time. I think it did identify some of these as BW set them out in the declaration it asked Mr A to sign.

BW ought to have identified significant concerns in relation to the investment, and it ought to have led it to conclude it shouldn't accept the Carbon Credit investment. It ought to have realised there was a high risk of detriment to Mr A.

In conclusion

After considering these points, I don't regard it as fair and reasonable to conclude that BW acted with due skill, care and diligence, or treated Mr A fairly by accepting the investment in Carbon Credits or accepting the application for the SIPP. BW didn't meet its regulatory obligations or the standards of good practice at the time, and it allowed Mr A's pension fund to be put at significant risk as a result.

Did BW act fairly and reasonably in proceeding with Mr A's instructions?

In my view, for the reasons given, BW should've refused to allow Mr A's investment in Carbon Credits. So, things shouldn't have progressed beyond that. Had BW acted in accordance with its regulatory obligations and best practice, it is fair and reasonable in my view to conclude that it shouldn't have permitted the investment.

My remit is, of course, to make a decision on what I think is fair and reasonable in all the circumstances. And my view is that it's fair and reasonable to say that just asking Mr A to sign 'risk' or 'indemnity' declarations wasn't an effective way for BW to meet its regulatory obligations to treat him fairly, given the concerns BW ought to have had about the investment.

Having identified a risk, it's my view that the fair and reasonable thing to do would be to refuse to accept the investment in Carbon Credits – not put in place a process asking Mr A to sign declarations in an attempt to absolve itself of responsibility. I don't think the declarations Mr A signed meant that BW could ignore its duty to treat him fairly.

I think BW refusing to accept this business would've likely meant that Mr A would've acted very differently. This refusal would've tended to highlight the concerns – albeit not necessarily the details of those concerns – with making such an investment.

In any event, I don't believe it would be reasonable to assume that another SIPP operator would've allowed the investment, had BW not permitted it. I don't think it's fair and reasonable to say that BW shouldn't compensate Mr A for his loss on the basis of speculation that another SIPP operator would've made the same mistakes as I've found BW did. I think it's fair instead to assume that another SIPP provider would've complied with its regulatory obligations and good industry practice, and therefore wouldn't have allowed the investment.

It's possible that it could be argued that other parties have contributed to Mr A's losses and so it's not fair to hold BW fully responsible. However, I've concluded Mr A wouldn't have invested but for BW's failure to carry out sufficient due diligence. So, in these circumstances, I'm satisfied it's fair to hold it responsible for the whole of the loss suffered. I'm not asking it to account for losses that go beyond the consequences of its failings.

As set out above, I'm satisfied that BW should've put a stop to the transaction and that the investment wouldn't have gone ahead if it had treated Mr A fairly and reasonably. I've carefully considered causation, contributory negligence, apportionment of damages and DISP 3.6.4. But in the circumstances here, I'm still satisfied it's fair for BW to compensate Mr A for his full loss. In addition to the financial losses Mr A has suffered I think the loss of his pension, which had been of a significant value, will have caused him a lot of worry and

distress and I think that BW should compensate him for this as well. In accordance with his submissions, Mr A has suffered financial and medical difficulties over the last few years and his not being able to access his pension has made an already difficult situation much harder.

Putting things right

I consider that BW 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 A back into the position he would likely have been in had it not been for BW's failings. Had BW acted appropriately, I think it's *most likely* that Mr A wouldn't have invested in Carbon Credits.

I take the view that Mr A would have invested differently. It's not possible to say *precisely* what he would have done differently. But I'm satisfied that what I've set out below is fair and reasonable given Mr A's circumstances and objectives when he invested.

What must BW do?

To compensate Mr A fairly, BW must:

- Compare the performance of Mr A's investment with that of the benchmark shown below. If the actual value is greater than the fair value, no compensation is payable.

- If the fair value is greater than the actual value, there is a loss and compensation is payable.

- BW should add interest as set out below.

- BW should pay into Mr A's pension plan to increase its value by the total amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

- If BW is unable to pay the total amount into Mr A's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore, the total amount should be reduced to *notionally* allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mr A won't be able to reclaim any of the reduction after compensation is paid.

- The *notional* allowance should be calculated using Mr A's actual or expected marginal rate of tax at his selected retirement age.

- It's reasonable to assume that Mr A is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr A would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

- Pay to Mr A £1,000 for the distress and inconvenience caused by the loss of the majority of this pension.

Income tax may be payable on any interest paid. If BW deducts income tax from the interest it should tell Mr A how much has been taken off. BW should give Mr A a tax

deduction certificate in respect of interest if Mr A asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Carbon Credits	Still exists but illiquid	FTSE UK Private Investors Income Total Return Index	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)

Actual value

This means the actual amount payable from the investment at the end date.

It may be difficult to find the *actual value* of the portfolio. This is complicated where an asset is illiquid (meaning it could not be readily sold on the open market) as in this case. BW should establish an amount it's willing to accept for the investment/s as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investment/s.

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

If BW is unable to purchase illiquid assets, their value should be assumed to be nil for the purpose of calculating the *actual value*. BW may require that Mr A provides an undertaking to pay BW any amount he may receive from the illiquid assets in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. BW will need to meet any costs in drawing up the undertaking.

Fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

Any additional sum paid into the investment should be added to the *fair value* calculation from the point in time when it was actually paid in.

Any withdrawal from the SIPP should be deducted from the fair value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if BW totals all those payments and deducts that figure at the end to determine the fair value instead of deducting periodically.

SIPP fees

If the investments can't be removed from the SIPP, and because of this it can't be closed after compensation has been paid, then it wouldn't be fair for Mr A to have to pay annual SIPP fees to keep the SIPP open albeit, as I understand it from BW's submissions, the SIPP is being treated as dormant and no fees are due. But, for the sake of completeness, if the SIPP needs to be kept open only because of the illiquid investment/s and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.

Why is this remedy suitable?

I've decided on this method of compensation because:

- I can't say definitively into what holdings, and in what proportions, Mr A's monies would have been invested had BW not permitted the Carbon Credits investment. However, overall, I consider the measure below is a fair and reasonable proxy for the return Mr A's monies might have experienced over the period in question if they'd not been invested in the Carbon Credits holding.

- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds.

- I'm satisfied that the mix and diversification provided by using a benchmark of the FTSE UK Private Investors Income total return index would be a fair measure for comparison for what Mr A's monies might have been worth if they hadn't been invested in the Carbon Credits holding.

My final decision

For the reasons set out above, I uphold Mr A's complaint. BW SIPP LLP must pay Mr A compensation as set out above.

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £160,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £160,000, I may recommend the business to pay the balance.

BW SIPP LLP should provide details of its calculation to Mr A in a clear, simple format.

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

Recommendation: If the amount produced by the calculation of fair compensation exceeds £160,000, I recommend that BW SIPP LLP pays Mr A the balance plus any interest on the amount as set out above.

This recommendation is not part of my determination or award. It does not bind BW SIPP LLP. It is unlikely that Mr A can accept my decision and go to court to ask for the balance. Mr A may want to consider getting independent legal advice before deciding whether to accept this decision.

If BW SIPP LLP does not pay the recommended amount, then any investments currently

illiquid should be retained by Mr A. This is until any future benefit that he may receive from the investments together with the compensation paid by BW SIPP LLP (excluding any interest) equates to the full fair compensation as set out above.

BW SIPP LLP may request an undertaking from Mr A that either he repays to BW SIPP LLP any amount Mr A may receive from the investments thereafter or if possible, transfers the investments to BW SIPP LLP at that point.

Mr A should be aware that any such amount would be paid into his pension plan so he may have to realise other assets in order to meet the undertaking.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 25 January 2023.

Nicola Curnow
Ombudsman