DRN-4167923

The complaint

Mr B complains that Curtis Banks Limited failed to carry out appropriate due diligence on an investment he intended to make before accepting it into his existing self-invested pension plan ('SIPP').

What happened

Mr B invested £60,000 in the Axiom Legal Financing Fund in April 2012 through his SIPP. The fund's aim was to provide short-term loans to UK regulated law firms to fund legal expenses and disbursements. The fund targeted a net return of 11% per year for investors.

The fund brochure explained the lending criteria as follows:

"Axiom provides finance for specific litigation cases and matters of a nonlitigious nature such as divorce, that have an expectation of completion in an average of 12 months. Axiom insures all cases against the law firm going into bankruptcy and litigation cases have insurance to repay the loan if the case loses. Axiom does not lend to "ambulance chasing" cases."

And in respect of security for the return of the loan the brochure stated:

"Funding in respect of each case is only made available to approved UK law firms, once insurance cover has been confirmed on each case by a UK regulated insurer.

Each loan will then be repaid at the conclusion of the case. The loan amount, including the insurance premiums, is recovered from the losing party of a litigation case, as provided by the Access to Justice Act. If a case loses, a claim is made on the loan's Legal Expenses (After The Event) insurance policy. A further policy (Indemnity Loan Guarantee Insurance) is also taken out on every case which provides additional protection against possible failure of a law firm."

Mr B has confirmed he did not receive advice on the investment but he was in touch with his long-term financial adviser ('Firm G') throughout. And the distributor of the fund, ('Firm M'), paid for the due diligence carried out by Curtis Banks before it accepted the investment into Mr B's SIPP.

Mr S was the Managing Director of the Axiom fund's Investment Manager. In August 2011 the Solicitors Regulation Authority ('SRA') decided to prosecute Mr S before the Solicitors Disciplinary Tribunal ('SDT') as a former Director of ATM Solicitors Ltd ('ATM'). However, the SRA didn't publish its decision to prosecute Mr S until July 2012.

Following several allegations made in the public domain during August and September 2012 concerning the credibility of the Axiom fund, in October 2012 the fund was suspended. Receivers were appointed in February 2013.

In July 2014 the SRA announced that Mr S had been struck off by the SDT. The SDT found that Mr S had been motivated by financial gain and the misconduct arose from the way he operated ATM. It determined Mr S's disregard for clients, preferring his own financial interests, was damaging to the reputation of the profession.

In May 2017 the Serious Fraud Office ('SFO') announced that it had opened a criminal investigation in 2014 into the collapse of the Axion fund. In 2020 the SFO charged Mr S, along with others, with carrying out a fraudulent scheme to divert money from the Axiom Legal Financing Fund for their own benefit. In 2022 Mr S was found guilty of fraud and was sentenced to 14 years in prison. His appeal was rejected.

In January 2018 Mr B complained to Curtis Banks about its failure to carry out proper due diligence on the Axiom fund before it accepted his instruction to invest in it. Mr B said the fund and Mr S were under investigation at the time of his proposed investment and a robust due diligence process ought to have uncovered this. He said if proper due diligence had been carried out he wouldn't have invested any of his money in the Axiom fund and wouldn't have suffered a loss.

Curtis Banks didn't uphold the complaint. While it noted the investment was high-risk, it said Mr B had signed a declaration to say he was an experienced investor so he would've understood the risks involved. Curtis Banks said it had performed appropriate due diligence on the investment at the time, explaining the allegations surrounding the Axiom fund and Mr S were not made public until October 2012, by which time Mr B had already made his investment. And although it hadn't made any enquiries with the SRA about Mr S in 2012, if it had, it said it wouldn't have found anything as nothing untoward was published about Mr S until after the investment was made.

Mr B remained unhappy and referred his complaint to our Service. He added that at the time of the investment Mr S was the Director of the Investment Manager and was also the owner of the company acting as Loan Manager. He said Mr S also had ties to three of the law firms comprising 75% of the panel of firms which received the finance the Axiom fund provided, with ATM receiving a substantial number of loans. Mr B said all of this should've been uncovered by Curtis Banks before it accepted the investment and as a result it should not have accepted the investment in the SIPP. Mr B said this would've convinced him that the investment in the Axiom fund was too risky and he wouldn't have proceeded with it.

Our Investigator upheld the complaint. He found that Mr S was integral to the investment scheme, and as such, Curtis Banks ought to have looked into his background further as part of reasonable due diligence on the investment. Had Curtis Banks done so, it would've found Mr S had already been sanctioned by the SDT in 2007 and 2009. In those cases the SDT had found that allegations of failing to act in the best interests of his clients, and acting for his clients in a situation where their interests conflicted with his own, had been substantiated. Given the control Mrs S had over the Axiom fund, in particular, that he would be responsible for screening the law firms requiring loans and for vetting each case, the Investigator thought this history should've raised concerns about the potential for consumer detriment.

The Investigator thought that if Curtis Banks had acted in Mr B's best interests, in line with its responsibilities under the relevant regulations, it should not have allowed the investment into Mr B's SIPP. And he wasn't persuaded Mr B would've otherwise gone on to invest as he did because he was considering other investments in unregulated schemes at the time and had decided not to proceed due to the risks highlighted to him. As such, he thought Curtis Banks should compensate Mr B for his loss.

Curtis Banks said at the time of the investment Mr S remained regulated by the SRA so in its view he must have remained competent and able to carry on practising as a solicitor. It said the Investigator seemed to be suggesting that it should not allow any investments with regulated businesses or individuals that have previously had rulings made against them, even if those rulings did not lead to regulated authority being removed. Curtis Banks said this could not be the case as it would make it impossible to allow investments with the likes of large, global regulated institutions that have had sanctions placed against them but remain regulated.

Curtis Banks maintained that at the time of the investment, the Axiom fund was performing well and based on the information available to it at the time, there were no grounds to decline the investment as it met the regulator's and Curtis Banks' acceptable criteria.

As Curtis Banks didn't accept the Investigator's view, the complaint was referred to me to make a final decision.

On 4 May 2023 I issued a provisional decision upholding Mr B's complaint. In summary, I said I didn't think that Curtis Banks had acted with due skill, care and diligence, treated its customer fairly, or acted in his best interests by accepting Mr B's application to invest in the Axiom legal financing fund. Overall, I didn't think Curtis Banks had met its regulatory obligations, and as a result it allowed Mr B to be put at significant risk of detriment. I said that if Curtis Banks had refused to accept the Axiom investment into Mr B's SIPP he would have decided against making this investment and he would've invested differently.

I thought Curtis Banks was directly responsible for Mr B's loss and I recommended it should compensate him for this by comparing the value of his investment with a benchmark and paying him the difference. I also recommended that Curtis Banks should pay Mr B £500 for the distress and inconvenience caused by the unsuitable advice.

Mr B asked some questions about how HMRC would view a compensation payment into his pension. After explaining that this would be treated in the same way as any other contribution, Mr B confirmed that any compensation due could not be paid into his pension because his yearly allowance was only £3,600. Mr B ultimately accepted my provisional decision and also confirmed that he would be a basic-rate tax payer in retirement.

Although Curtis Banks confirmed that it had received my provisional decision, it didn't provide any comments in response.

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.

As Mr B accepted my provisional decision and Curtis Banks didn't respond, I see no reason to depart from my findings as per my provisional decision, which are repeated below.

I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. This includes the Principles for Business ('PRIN') and the Conduct of Business Sourcebook ('COBS'). And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of Curtis Bank's actions here.

The Principles

In my view, the Financial Conduct Authority's ('FCA') Principles for Businesses are of particular relevance to my decision.

The Principles for Businesses, which are set out in the FCA's handbook, "*are a general statement of the fundamental obligations of firms under the regulatory system"* (PRIN 1.1.2G). And I consider that Principles 2, 3 and 6 are relevant to my consideration of this complaint. They 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 requirement they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules."*

And at paragraph 77 of BBA Ouseley J said:

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

In (*R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878) ("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 had not treated its client fairly.

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

> *"These passages explain the overarching nature of the Principles. As the FCA correctly submitted in their written argument, the role of the Principles is not merely to cater for new or unforeseen circumstances. The judgment in BBA shows that they are, and indeed were always intended to be, of general application. The aim of the Principles- based regulation described by Ouseley J. was precisely not to attempt to formulate a code covering all possible circumstances, but instead to impose general duties such as those set out in Principles 2 and 6."*

The BBSAL judgment also considers section 228 of Financial Services & Markets Act 2000 ("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.

I've also considered the High Court decision in *Adams v Options SIPP*. In that case, Mr Adams had made an investment into storage pods through his SIPP. Since that decision the Court of Appeal has handed down its judgment following its consideration of Mr Adams' appeal. I've taken both judgments into account when making this decision.

I note that the Principles for Businesses did not form part of Mr Adam's pleadings in his initial case against Options SIPP. And, HHJ Dight did not consider the application of the Principles to SIPP operators in his judgment in the High Court. The Court of Appeal also did not consider to the application of the Principles to SIPP operators. So, neither of these judgments provide any assistance with the application of the Principles for Businesses, and in particular, they say nothing about how the Principles apply to an Ombudsman's consideration of a complaint.

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. I am therefore satisfied that the FCA's Principles are a relevant consideration that I must take into account when deciding this complaint.

<u>*COBS 2.1.1R*</u>

The rule says:

> "*A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*"

I acknowledge that COBS 2.1.1R 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 Adam's appeal was an attempt to put forward an entirely new case rather a challenge to the grounds on which HHJ Dight had dismissed the COBS claim.

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

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

So I have considered COBS 2.1.1R - alongside the remainder of the relevant considerations, and within the factual context of Mr B's case, including Curtis Banks' role in the transaction. However, I think it is important to emphasise that I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And, in doing that, I am required to take into account relevant considerations which include: law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. This is a clear and relevant point of difference between this complaint and the judgments in *Adams v Options SIPP*. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

<u>The regulatory publications</u>

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

- The regulator's 2009 and 2012 thematic review reports.
- The regulator's October 2013 Finalised SIPP Operator Guidance.
- The regulator's July 2014 "Dear CEO" letter.

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

The September 2009 Thematic Review Report

The 2009 report included the following statement:

> *"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses ('a firm must pay due regard to the interests of its customers and treat them fairly') insofar as they are obliged to ensure the fair treatment of their customers. COBS 3.2.3(2) states that a member of a pension scheme is a 'client' for COBS purposes, and 'Customer' in terms of Principle 6 includes clients. It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six [treating customers fairly ('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:
[…]

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

…"

The October 2012 Thematic Review Report

The 2012 report included the following in relation to non-standard investments:

"Principle 2 of the Principles for Business, states a 'a firm must conduct its business with dues skill, care and diligence'.

Some SIPP operators were unable to demonstrate that they are conducting adequate due diligence on the investments held by members or the introducers who use their schemes, to identify potential risks to their members or to the firm itself. In some firms this was made worse by over-reliance on third parties to conduct due diligence on behalf of the operator. In some cases this resulted in taxable investments being inadvertently held, and monies in potentially fraudulent investments."

The 2013 Finalised Guidance

In the October 2013 Finalised SIPP Operator Guidance, the FCA states:

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

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

With regard to relationships between advisers/introducers and SIPP operators the FCA said:

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

- *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for un-authorised business warnings."*

In respect of due diligence, the October 2013 Finalised SIPP Operator Guidance said:

> *"Due diligence*
>
> *Principle 2 of the FCA's Principles for Businesses requires all firms to conduct their business with due skill, care and diligence. All firms should ensure that they conduct and retain appropriate and sufficient due diligence (for example, checking and monitoring introducers as well as assessing that investments are appropriate for personal pension schemes) to help them justify their business decisions. In doing this SIPP operators should consider:*
>
> - *ensuring that all investments permitted by the scheme are permitted by HMRC, or where a tax charge is incurred, that charge is identifiable, HMRC is informed and the tax charge paid*
> - *periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme*
> - *having checks which may include, but are not limited to:*
>   - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*
>   - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*
> - *ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified*
> - *good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and*
> - *ensuring these benchmarks clearly identify those instances that would lead a firm to decline the proposed business, or to undertake further investigations such as instances of potential pension liberation, investments that may breach HMRC tax-relievable investments and non-standard investments that have not been approved by the firm."*
>
> *Due diligence in respect of Unregulated Collective Investment Schemes (UCIS)*

UCIS are complex, opaque, illiquid and risky, and tend to invest in high risk ventures such as films, green energy initiatives and overseas property funds. They may not be covered by FOS or FSCS protections.

We have stated previously that UCIS are high risk, speculative investments which are unlikely to be suitable for the vast majority of retail customers…

…If firms are involved with UCIS they should ensure that they:

- *have enhanced procedures for dealing with UCIS*
- *have KPI's and benchmarks linked to the sale of UCIS to monitor the business they are conducting*
- *ensure that any third-party due diligence that they use or rely on has been independently produced and verified, or*
- *undertake appropriate due diligence on each UCIS scheme - this due diligence, together with all research should be kept under regular review."*

The 2014 Dear CEO letter

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

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

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

I acknowledge that the 2009 and 2012 reports and the *"Dear CEO"* letter are not 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 indicate 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 regulator's expectations of what SIPP operators should already be doing, also represent what I consider amounts to good industry practice at the time. So, I am satisfied it is appropriate to take them into account.

Like the Ombudsman in the Berkeley Burke case, I don't think the fact that the 2012 thematic review, and the "Dear CEO" letter post-dates the original investment in this case means the examples of good industry practice they provide were not good practice at the time of the events. Although they were published after the original investment in April 2012, the Principles that underpin them existed throughout, as did the obligation to act in accordance with those Principles.

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

It is important to bear in mind that the reports, Dear CEO letter and guidance gave non-exhaustive examples of good industry practice. They did not say the suggestions given were the limit of what a SIPP operator should do. As the annex to the *"Dear CEO"* letter notes, what should be done to meet regulatory obligations will depend on the circumstances.

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

Overall, in determining this complaint I need to consider whether Curtis Banks complied with its regulatory obligations as set out by the Principles to act with due skill, care and diligence, to take reasonable care to organise its business affairs responsibly and effectively, to pay due regards to the interests of its customers (in this case Mr B), to treat them fairly, and to act honestly, fairly and professionally. And, in doing that, I'm looking to the Principles and the publications listed above to provide an indication of what Curtis Banks could have done to comply with its regulatory obligations and duties.

How Mr B came to invest in the Axiom legal financing fund

Mr B provided our Service with a timeline setting out the series of events that led to his investment in the Axiom fund.

Based on copies of emails I've seen, as well as Mr B's recollections, it appears that from early 2011 Mr B was looking to invest in alternative investment schemes through a SIPP. Mr B says he discussed this with his adviser at Firm G, although this was as a friend, rather than in his capacity of a financial adviser. Mr B says he was considering investments in several schemes throughout 2011, including investments in property funds, ethical forestry and a jewellery business. During that time Mr B decided to open a SIPP with Curtis Banks, to allow for the eventual investment and to trade in equities. The account was opened in August 2011.

Firm G made Curtis Banks aware of Mr B's intention to invest in a property fund and in November 2011, Curtis Banks explained that the fund fell into what it called the "esoteric" category, meaning it would need to carry out due diligence before it could accept the investment. However, Mr B said he decided not to proceed with this fund due to the risks that had been highlighted to him. So, between November 2011 and March 2012 Mr B says he discussed further possible investment opportunities with his friend at Firm G. And in March 2012, the investment in the Axiom fund was introduced to Mr B. Mr B said he received the fund fact sheet on 9 March 2012 through Firm G. He said he decided to move forwards with this investment because he thought the fact it involved another regulated industry (regulated firms of solicitors) provided him with more protection.

On 20 March 2012 Firm M, the fund distributor, contacted Curtis Banks and explained it had been contacted by Firm G about Mr B's wish to invest £60,000 into the Axiom fund. It provided Curtis Banks with the fund brochure, fact sheet and subscription form. Curtis Banks responded the same day explaining that as the investment was a unregulated collective investment scheme ('UCIS'), it would need to consider Mr B's individual circumstances and carry out due diligence on the investment. Firm M responded immediately explaining it would pay for the due diligence. It said Firm G had told it that Mr B wanted to proceed and would provide whatever information was necessary.

Curtis Banks reviewed the information that had been provided, made some other checks (which I will return to below) and approved the investment on 24 April 2012.

Mr B's relationship with Curtis Banks

Curtis Banks says it is an execution only SIPP administrator, which means that it only acts on the instruction of the investor or any third party professional who has authority to make an instruction on their behalf. Curtis Banks says it does not provide advice or recommend investments to its clients.

Although it appears that Firm G and Firm M were involved in introducing the Axiom investment to Mr B, Mr B has been clear with our Service that he did not take any advice in relation to the investment, either through Firm G, or Curtis Banks. And he says that any discussions he had with the adviser at Firm G were done so in their capacity as friends. Mr B says it was his decision alone to proceed with the investment, however, he did so on the basis that Curtis Banks had carried out appropriate due diligence and approved the investment to be held in the SIPP.

I accept that Curtis Banks didn't provide any advice here, and so it didn't have an obligation to consider the suitability of the investment for Mr B. It was however required, in its role as an execution only SIPP provider, to consider whether the investment in the Axiom legal financing fund was an appropriate investment to make within its SIPP. And overall, I think Curtis Bank's duty as a SIPP operator was to treat Mr B fairly and to act in his best interests. And taking account of the regulator's guidance and what I consider to have been good practice at the time, I think it needed to carry out due diligence to at least ensure:

- that it understood how the investment would operate;
- that the proposed underlying investment for the SIPP was a genuine asset and was not part of a fraud or a scam or pensions liberation;
- that those who held significant positions of control and influence were fit and proper;
- that any third-party due diligence that they used or relied on had been independently produced and verified.

It isn't in dispute that Curtis Banks understood it needed to carry out due diligence on the Axiom investment. That's because it explicitly told Firm M that as the investment was a UCIS, it would need to carry out due diligence before accepting it into the SIPP.

So, I've considered the due diligence Curtis Banks carried out here and whether it met its obligations to Mr B in line with the Principles I've referred to above and COBS.

What due diligence checks did Curtis Banks carry out on the Axiom investment?

It isn't clear from the information received from Curtis Banks how it carried out its due diligence. By this I mean that I haven't seen a copy of any information request it made to those involved with Axiom. I have, however, seen the bundle of documents that it says it considered before approving the investment, which for completeness I've listed below:

- An offering memorandum for the investment;
- A supplemental memorandum for the investment;

- A brochure for the Axiom Legal Financing Fund;
- A fact-sheet regarding the investment, produced by Axiom;
- A due diligence questionnaire completed by Axiom;
- A subscription agreement for the investment;
- An email in Swedish that appears to confirm the Investment Manager had won an award from a Nordic financial media company;
- A statement of overall assets and declaration, completed by Mr B;
- A valuation report of Mr B's SIPP as of 19 April 2012;
- A 'UCIS approval process' sign-off form, completed by Curtis Banks; and
- A series of emails between Curtis Banks' employees, Firm G and Firm M, setting out what information Curtis Banks required from Mr B to allow the investment to go ahead.

This is a significant amount of information, and it would've given Curtis Banks a fairly good understanding of how the fund operated and how it would generate returns. But it seems to me that Curtis Banks relied heavily on information produced by those running the Axiom fund itself. Of particular concern is the due diligence questionnaire that was produced by Axiom and apart from the Swedish article (which I consider to be of limited value), I haven't seen any evidence to demonstrate that Curtis Banks looked beyond this or sought to investigate the parties involved with the investment any further. And I think this would obviously fall foul of the regulator's expectations (and would also be contrary to good practice) that any due diligence carried out by a third party should be independently verified.

I've reviewed the 'UCIS approval process' document. The document states that the purpose of the process is to assess whether the proposed investment is appropriate for acceptance as an asset of the Curtis Banks SIPP. So, it would appear to be an important part of the due diligence process. However, this strikes me as being a very 'light touch' approach. For example, Curtis Banks said it hadn't obtained any further details on the investment (e.g. through Companies House) because it was a non-UK registered company. However, that didn't prevent it from carrying out internet searches or searches in relation to the individuals involved in the investment scheme. Furthermore, the section named 'scope for financial crime' states:

"Difficult to judge as fund is registered overseas. Fund overview has been provided due diligence and fact sheet on fund has been provided and reviewed so no particular issues foreseen."

It is difficult to see how this conclusion has been reached, particularly as it seems to be based purely upon information provided by the fund and no independent research has been carried out. In addition, a section named 'any other issues' states:

"Loans are secured against insurance policy on losing party and additional indemnity guarantee. Difficult to judge the strength of the security so should consider loans as high risk for purposes of investment approval."

So, it's clear that there were already concerns about the risks proposed by the scheme, particularly because those risks were difficult to judge.

I'm also mindful that the form noted the investment was only available to 'experienced/qualified' investors. Curtis Banks noted that Mr B had completed an 'investor declaration' and that it should consider asking for evidence. But having seen the declaration, it simply asked Mr B to tick a box to indicate what class of investor he felt he could be classified as. The options were:

- An experienced investor;
- A high net worth individual;
- A sophisticated investor.

Mr B ticked the box to say he was an experienced investor. But the form gave no indication or guidelines as to what an experienced investor was and how that related to the proposed investment. It appears Curtis Banks followed this up with Firm G, asking for evidence of Mr B's experience. However, Curtis Banks accepted Firm G's short response that Mr B had a self-trade account with Curtis Banks and approved the investment shortly thereafter.

I do recognise that Curtis Banks flagged an issue with the bank account that Mr B was supposed to send the funds to for investment. It noted that the account was not held in the name of the investment scheme and was located overseas. However, it appears this sticking point was overcome after it sought further clarification.

Overall, while I think the due diligence carried out by Curtis Banks was extremely limited, it seems there were still some concerns highlighted. And I think it ought to have done much more to satisfy itself in the circumstances that the investment was appropriate to be held in the SIPP.

What due diligence should Curtis Banks have carried out on the investment scheme?

The due diligence questionnaire sets out the various parties involved with the running of the scheme, but of particular focus is the Investment Manager. The questionnaire explains:

"The Investment Manager is responsible for screening the law firms requiring loans and for vetting each case and ensuring all the cases are insured before instructing the Loan Manager, to make payments. They have no access to investor's money in the Fund."

It further explained that Mr S, as managing director, would primarily be involved with the day-to-day investment decisions of the fund. So, I think it's clear that Mr S was a person of significant control at the heart of the investment scheme. The decisions as to which firms of solicitors would receive loans would be made by him. And the fund only made money if those firms of solicitors repaid the loans or their insurance covered their costs. So, to my mind there were several key routes of enquiry when carrying out due diligence on the scheme which Curtis Banks ought to have followed.

Firstly, given how integral Mr S' role was to the success of the fund, I think Curtis Banks ought reasonably to have looked into Mr S's background to ensure that he was fit and proper, which would've included carrying out checks through the SRA and Companies House. It also should've looked into the various businesses named in the Axiom fund brochure, in particular the Loan Manager, which was responsible for making payments. Lastly, I think it ought to have looked into which firms of solicitors had previously or routinely received loans from the fund.

Curtis Banks was asked what information it sought about Mr S through the SRA. It said it didn't see any reason to look into Mr S' background, but even if it had done so, it wouldn't have found any adverse information about him or the fund. It maintained there wasn't anything untoward about Mr S or the fund in the public realm until October 2012.

Mr B says that information was publicly available by April 2012 that Mr S was under investigation by the SRA again. This was in connection with ATM, which was a frequent recipient of loans from the Axiom fund, and ultimately the investigation led to him being struck off.

As I've said above, I think Curtis Banks should have, as part of reasonable due diligence into the investment, checked Mr S' background through the SRA. The SRA has a search function whereby you can search individuals by name or SRA number. Mr S has previously been sanctioned by the SDT, in 2007 and 2009. Had Curtis Banks searched for Mr S' record in this way, it doesn't appear it would've returned the SDT decisions from 2007 and 2009. That's because I've used an archived version of the SRA's search function which shows that in 2012, when a search was completed it would've had an 'Important Notes' section which said the following:

- *Not all regulatory decisions are published – read more about our publication policy.*
- *We began publishing decisions in early 2008.*
- *Decisions remain on the site for three years.*
- *For the most up-to-date and complete picture of an individual's regulatory record, please contact us.*
- *Read more about how we regulate.*

So, had Curtis Banks carried out a search in April 2012, the 2007 decision was unlikely to have been published and the 2009 decision would most likely have already been removed from the website (having been issued more than three years before).

I'm also satisfied that the SDT's decision to prosecute Mr S would not have been disclosed via the search function. I say this because while it is evident the SRA decided to refer Mr S to the SDT in August 2011, I'm aware that the procedure at the time required the SRA's legal department to prepare a statement under Rule 5 of the SRA's Disciplinary Proceedings Rules detailing the specific allegations. This had to be reviewed by the SDT, and they would have to certify that there was a case to answer. The SDT didn't certify that Mr S had a case to answer until July 2012, when it published the decision to prosecute. So, this would not have been present on Mr S' record had a search been carried out in April 2012.

Although Curtis Banks didn't make any enquiries through the SRA, I think it should have started by using the search function and when that didn't return anything, it ought to have made a specific request to the SRA about Mr S' full regulatory record. I say this because the search function encouraged any person making an enquiry to do so, making it clear that they would not be party to full or historic records using the search function alone. Again, given the importance of Mr S' role in the investment scheme, I think making that enquiry would've been reasonable in the circumstances as not doing so would've risked missing important and relevant information about his past conduct.

I still don't think Curtis Banks would've been told about the referral to the tribunal in August 2011 because that decision hadn't been approved and certified yet. However, I'm satisfied the previous regulatory history would have been disclosed, which would've revealed the sanctions delivered by the SDT in 2007 and 2009. So, I've considered the decisions delivered by the SDT in 2007 and 2009 and whether the information contained within them ought to have given Curtis Banks grounds for refusing the investment.

<u>Findings of the SDT in the matter of [Mr S] and The Solicitors Act 1974 5 July 2007</u>

Here the SDT considered allegations against Mr S that he was guilty of conduct unbefitting a solicitor. This was in relation to schemes that, similar to the Axiom fund, also involved the funding of legal claims through loans and insurance. In my view the most relevant allegations, insofar as they related to Mr S' integrity, were that he:

- Failed to act in the best interests of his clients contrary to the Solicitors Practice Rules 1990;

- Acted for clients in a situation where their interests conflicted with his own.

The SDT was satisfied that those allegations were substantiated. The SDT found that Mr S was not sufficiently independent to act in the best interests of his clients because he owned other businesses that gained financially from referrals when he represented his clients in claims. The SDT believed Mr S' conduct had not been of the standard expected of solicitors, noting that clients had to be confident that their interests were paramount and were not in conflict with their solicitor's own interests. The SDT levied a significant fine against Mr S for this conduct.

Findings of the SDT in the matter of [Mr S] and The Solicitors Act 1974 25 February 2009

In this tribunal the SDT was asked to consider an allegation that Mr S had failed to pay counsels' fees when they became due. However, Mr S' failure to pay those fees was directly connected to the issues considered by the SDT in 2007. The SDT found the allegation had been substantiated and imposed a further smaller fine. However, the SDT noted:

"[Mr S]'s downfall had been that he had entered into a scheme for the funding of cases which had proved not to work. The Tribunal noted the earlier findings of the Tribunal and recognised that the allegation substantiated against [Mr S] on this occasion was all part of the same debacle and recognised that the earlier allegations and this allegation should not be viewed cumulatively."

I think that the findings of each of the tribunals are highly relevant to the due diligence process as they call into question Mr S' integrity and honesty. The fact that the SDT found Mr S had failed to act in the best interests in his clients or appropriately manage conflict of interests, in a scheme that had similar hallmarks to the investment scheme he was now operating, ought to have given Curtis Banks significant cause for concern. And it also would've revealed further dishonesty on Mr S' part. I say this because the Compliance section of the due diligence questionnaire asks:

"Is there any material, criminal, civil or administrative proceedings pending or threatened against the firm or any of its principals, or have there been any such matters?"

This was answered, *"no"* but as above, Mr S had been sanctioned by the SDT in 2007 and 2009. So, this was clearly incorrect and had Curtis Banks carried out the enquiries with the SRA as above, it would have known that to be the case.

Curtis Banks says that even if it had been aware of the SDT's decisions in 2007 and 2009, as Mr S hadn't been struck off and was still permitted to act as a solicitor, it doesn't think this information would've had an impact on its decision to accept the investment. It says many large global financial institutions have been sanctioned by regulatory authorities in the past but that doesn't stop it from accepting business from them.

I've considered this point but I don't think these are comparable positions. Mr S was an individual of significant control within an off-shore investment scheme, and Curtis Banks had already highlighted problems with being able to vet the scheme assets. And as I will go on to explain, Mr S' role and influence extended beyond the Investment Manager. The fact the SDT decisions highlight a history of unethical behaviour, in situations where he stood to gain financially, was in my view a very relevant consideration to the investment proceeding. So, I don't think this can reasonably be compared with fines or sanctions levied against large institutions regulated in the UK.

I'm also mindful that in the 2013 Finalised Guidance the FCA said it would be good practice for SIPP providers to ensure that advisers/introducers have a clear disciplinary history. While

Mr S was not an introducer or adviser here, I think the principle can reasonably be applied to significant persons of control within an investment scheme, considering their overall importance to the success of the investment. I accept the guidance doesn't say that such individuals having been disciplined in the past should result in the investment being declined. But I think it is an important point that should be taken into account when the purpose of making the checks, in accordance with Principles 2,3 and 6, is kept in mind.

A search of Mr S on Companies House would've also been very revealing. However, it appears Curtis Banks failed to do any checks in this regard.

In the same Compliance section in the due diligence questionnaire it asked:

"Do any of the firm's principals have any other business involvement?
- *If yes, describe and quantify how much of their professional time is dedicated to each?"*

The answer given was that Mr S spent all of his time working for the Investment Manager. And I think the implication there was that he didn't have any other business involvement.

However, at the time of the investment, Mr S was a director of no less than five other companies, including the company named in the brochure as the fund's Strategic Adviser, although the due diligence questionnaire refers to this as the former Investment Manager. And I've also established through my own research that a court judgment was delivered by the High Court of Justice of the Isle of Man on 12 May 2022 concerning monies held in an account owned by the Loan Manager of the Axiom fund. Here, the court established that the Loan Manager was in fact owned by Mr S and that it was through the Loan Manager's accounts that investors funds were directed to Mr S' own accounts.

Clearly Curtis Banks would not have found out by the fraud perpetrated by Mr S had it looked into the ownership of the Loan Manager in 2012. And it's evident the court judgment I've referred to above was delivered a decade after this. However, I'm satisfied that Curtis Banks could've discovered Mr S' ownership of the company acting as Loan Manager had it made appropriate enquiries in 2012. I say this because the due diligence questionnaire confirmed that the company acting as Loan Manager was regulated by the Isle of Man Financial Services Commission. So if Curtis Banks had checked this register, I'm satisfied it would have discovered Mr S' ties to that company.

All of this means that not only did Mr S have many other undisclosed business interests, but Mr S was also effectively responsible for choosing the firms who would receive loans from the Axiom fund, as well as being responsible for paying the loans to firms and collecting repayments. In my view this fact, coupled with what Curtis Banks ought to have uncovered about Mr S' history of failing to act in his clients best interests and failing to manage conflict of interests, should've led Curtis Banks to conclude there was a real risk of consumer detriment arising from the management of the investment scheme.

Lastly, I think that as part of reasonable due diligence into the Axiom investment, Curtis Banks ought to have made enquiries into the firms that benefitted from the loans provided by the fund, much like it would've looked into the assets of any other standard investment fund.

Following the conclusion of Mr S' trial at the Crown Court in 2022 the SFO reported that:

"Whilst investors were told their loans would be provided to a panel of high quality law firms to fund legal cases with a high likelihood of success, the majority of the funds (amounting to

£40 million) were paid to just three law firms – ATM, Ashton Fox and Bracewell's – all of which [Mr S] either owned or held undisclosed interest in."[1]

Reporting in the Law Society Gazette during Mr S' trial also noted:

"Prosecutors say the fund – which was set up to lend money to firms pursuing no-win no-fee claims, mainly in relation to unenforceable consumer credit agreement cases – made loans only to… ATM Solicitors in 2009, the year when it commenced trading."[2]

So, had Curtis Banks asked about the firms that had received loans from the Axiom fund it would've found that in the last 12 months Mr S had resigned as a Director of two firms that had received the majority of the loans the fund had provided since its inception (ATM and Ashton Fox). This ought to have been very concerning and highlighted an even higher risk of consumer detriment given how the Director of the Investment Manager stood to gain from the loan monies, as well as being responsible for collecting repayments. There was a clear and obvious conflict of interest here that Mr S had failed to disclose.

It's possible that if Curtis Banks asked about the firms which had received loans from the Axiom fund in the past, the Investment Manager would've refused to provide this information. But if it had it done so, I think that would've been grounds alone to refuse to permit the investment in the SIPP. Given Mr S' undisclosed business interests and history of failing to act in his clients' best interests, I think it would've been an important to establish that there was no risk of any other conflict of interests. And failing to provide this information ought to have been a serious concern.

Overall, if Curtis Banks had been acting in its clients' best interests and had acted with due care, skill and diligence before accepting the investment in the Axiom legal financing fund, I think it would've most likely discovered the following facts:

- Mr S had been sanctioned by the SDT for failing to act in his clients best interests and manage conflicts of interest;
- Mr S had undisclosed business interests;
- Mr S owned the company acting as Loan Manager for the Investment Manager; and
- Mr S had been a Director of two firms of solicitors that had received the majority of loans from the Axiom fund.

Mr S had failed to disclose these facts in the due diligence questionnaire, demonstrating a willingness to hide material facts from prospective investors. It also demonstrates that Mr S had clear conflicts of interest such that there was a real risk of consumer detriment if they proceeded with the investment. If Curtis Banks had been in possession of these facts, and considered these alongside the concerns it had already highlighted about the risks posed by the fund, I think it could've only determined that the Axiom investment was not a suitable investment to be held in the SIPP. As such, I think it should have refused to permit Mr B's investment in it.

With this in mind, I don't think that Curtis Banks acted with due skill, care and diligence, treated its customer fairly, or acted in his best interests by accepting Mr B's application to invest in the Axiom legal financing fund. So, I don't think Curtis Banks met its regulatory obligations, and as a result it allowed Mr B to be put at significant risk of detriment.

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[1] https://www.sfo.gov.uk/2022/08/11/serious-fraud-office-secures-conviction-in-100-million-no-win-no-fee-fraud/

[2] https://www.lawgazette.co.uk/news/axiom-fund-set-up-to-fill-legal-aid-black-hole-court-hears/5112764.article

For the sake of clarity, I'm not making a finding that Curtis Banks should have assessed the suitability of the investment for Mr B. I accept Curtis Banks had no obligation to give advice to him or to otherwise ensure the suitability of the investment for him. However, I think it fell short in its regulatory responsibilities to Mr B and it should not have allowed the investment in the SIPP.

What would Mr B have done if Curtis Banks had refused the investment?

As I've set out above, Mr B had been considering what investment to make over the previous 12 months before investing in Axiom. Several different investments had been under consideration during this time and had been discounted by Mr B due to the risks highlighted to him. So, I think it's clear that Mr B was not determined to invest in any particular investment come what may; it appears he was alive to the risks posed by alternative investments and wanted to mitigate any possible losses.

On balance, I think Mr B would've taken on board any concerns that were raised about the risks posed by any particular investment. And had Curtis Banks informed Mr B that having carried out due diligence on the Axiom investment scheme, it had concerns about the potential for consumer detriment and did not think it was an appropriate investment to be held in the SIPP, I think Mr B would've been influenced by this. So, overall I think he would have decided against making the investment. As such, I think Curtis Banks is directly responsible for Mr B's loss here as I think he would've invested differently if Curtis Banks had prevented him from investing in Axiom through his SIPP.

Curtis Banks may argue that Mr B would have gone on to invest in Axiom through another SIPP provider if it had refused to allow the investment. But I'm not persuaded that's the case, given Mr B had declined to invest in other schemes previously when risks had been highlighted to him. And in any event, I do not think it's fair and reasonable to say that Curtis Banks should not be responsible for its errors because another SIPP operator may have made the same mistakes. I think it's fair instead to assume that another SIPP provider wouldn't have processed the transaction if it had carried out sufficient due diligence in accordance with its own regulatory responsibilities and good industry practice.

Taking all of the above into consideration – individually and cumulatively – I think in the circumstances of this case it is fair and reasonable to conclude that Curtis Banks should not have accepted the Axiom investment into its SIPP wrapper. If it had undertaken sufficient due diligence before doing so, it would have identified that the investment was not safe to include in its SIPPs, because there were serious conflicts of interest attached to the key individual involved in running the scheme, such that there was a real risk of consumer detriment.

Given these failings, I think it is fair and reasonable in the circumstances for Curtis Banks to be fully accountable for the losses Mr B has suffered.

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

Putting things right

Fair compensation

My aim is that Mr B should be put as closely as possible into the position he would probably now be in if he had been given suitable advice.

I think Mr B would have invested differently. It's not possible to say *precisely* what he would have done, but I'm satisfied that what I've set out below is fair and reasonable given Mr B's circumstances and objectives when he invested.

What must Curtis Banks do?

To compensate Mr B fairly, Curtis Banks must:

- Compare the performance of Mr B'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.

- Curtis Banks should also add any interest set out below to the compensation payable.

- If there is a loss, Curtis Banks should pay into Mr B's pension plan to increase its value by the 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 – as Mr B has indicated would be the case here.

- As Curtis Banks is unable to pay the compensation into Mr B'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 compensation 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 B won't be able to reclaim any of the reduction after compensation is paid.

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

- Mr B has confirmed he will be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr B 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 Mr B £500 for the distress caused by Curtis Banks' failings. It's clear that the total loss of the investment has had a real impact on his retirement planning because Mr B intended to retire at age 60 but has had to defer this. He's also had to adjust his plans to repay his mortgage as he doesn't have sufficient funds to do so. So, I think the distress caused by Curtis Banks' failings is significant here.

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

Investment name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Axiom Legal Financing Fund	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 investment. This is complicated where an investment is illiquid (meaning it could not be readily sold on the open market) as in this case. Curtis Banks should take ownership of the illiquid investment by paying a commercial value acceptable to the pension provider. The amount Curtis Banks pays should be included in the actual value before compensation is calculated.

If Curtis Banks is unable to purchase the investment the *actual value* should be assumed to be nil for the purpose of calculation. Curtis Banks may require that Mr B provides an undertaking to pay Curtis Banks any amount he may receive from the investment in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan.

Curtis Banks 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.

Why is this remedy suitable?

I've chosen this method of compensation because:

- Mr B wanted Capital growth and was willing to accept some investment risk.

- 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. It's a fair measure for someone who was prepared to take some risk to get a higher return.

- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr B's circumstances and risk attitude.

My final decision

For the reasons I've given, I uphold the complaint.

My decision is that Curtis Banks Limited should pay the amount calculated as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 4 July 2023.

Hannah Wise
Ombudsman