DRN-4757060

The complaint

Mr H complains that Options UK Personal Pensions LLP (formerly Carey Pensions, referred to as 'Options') didn't undertake sufficient due diligence on the Carbon Credits investment he made through his Carey Self-Invested Personal Pension ('Carey SIPP') and should not have permitted the investment to be held. Mr H says he's suffered a loss to his pension provision as a result.

In bringing this complaint Mr H is represented by a professional third party, but for ease I shall refer to Mr H throughout.

What happened

The entities involved

Options

Options is a SIPP provider and administrator, regulated at the time of these events by the Financial Services Authority ('FSA'), now the Financial Conduct Authority ('FCA'). Its authorisations, in relation to SIPPs, were that it could arrange (bring about) deals in investments, deal in investments as principle, establish, operate and wind-up a pension scheme, and make arrangements with a view to transactions in investments.

Forensic Review Ltd ('Forensic')

Forensic was incorporated on 28 February 2012 and dissolved on 9 October 2012. It was not regulated by the FSA. Forensic appears to have introduced Mr H to Carbon Credits and directed him to Options in order for him to open a SIPP to hold the Carbon Credits investment.

Carbon Advice Group Limited ('CAG') – Carbon Credits

Incorporated in March 2007 and dissolved in October 2014, Carbon Advice Group Plc was the business that sold the Carbon Credits investment to be held in Mr H's SIPP.

A carbon credit is a generic term for any tradable certificate or permit representing the right to emit one tonne of carbon dioxide or the mass of another greenhouse gas with a carbon dioxide (tC02e) equivalent to one tonne of carbon dioxide.

Buyers and sellers can use an exchange platform to trade, like a stock exchange for carbon credits. The quality of the credits is based in part on the validation process and sophistication of the fund or development company that acted as the sponsor to the carbon project.

What happened here

Mr H says that in early 2012 he was 'cold-called' by Forensic and asked about his pension provision. He says a face-to-face meeting followed, and he was told about investing in

Carbon Credits using the funds from his existing pension provision, and was told by Forensic that he could open a SIPP with Carey in order to facilitate this.

An application to open a Carey SIPP was submitted in March 2012. The SIPP application form stated this form should only be used if Mr H was a client establishing a SIPP without advice.

In the application form it was noted that Mr H was employed, earning approximately £20,000 per year. He had a personal pension plan and a defined benefit ('DB') occupational pension scheme, and wished to transfer the values of these plans into the SIPP. Under the heading '*Investments'* it was indicated that he wished to invest £37,200 through CAG.

The SIPP declaration was signed and dated 5 April 2012. However, I think this is a mistake and the declaration was likely signed by Mr H on 5 March 2012 instead. I say this because other documents I've seen (that were likely submitted with the SIPP) were also signed by Mr H on 5 March 2012 and the SIPP application form was stamped as received by Carey Pensions on 13 March 2012.

The SIPP declaration Mr H signed confirmed, amongst other things, that:

- He agreed to indemnify Carey Pensions UK LLP 'The Administrator' and Carey Pension Trustees UK Ltd against any claim in respect of any decision made by himself/or his financial adviser/Investment Manager or any other professional adviser he chose to appoint from time to time;
- He understood that Carey Pensions UK LLP and Carey Pension Trustees UK Ltd were not in any way able to provide him with any advice;
- He was establishing the Carey Pension Scheme on an execution only basis.

Mr H signed a member declaration and indemnity form for the Carbon Credits investment on 5 March 2012, instructing Options to open an account with CAG to purchase and sell Carbon Credits for a consideration of £37,000. The document included a background statement, which said:

"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 in 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 the 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."

As such, it asked Mr H to acknowledge, amongst other things, that:

- He had a good understanding of carbon credits and VERs.
- He was fully aware the investment was high risk and/or speculative, may be illiquid

and/or difficult to value or sell and that he wished to proceed.
- Options had recommended he seek professional advice from a suitably qualified and authorised adviser but Mr H had chosen not to seek advice for this transaction.
- Options was acting on an execution only basis and hadn't provided any advice.
- He didn't hold Options responsible for any exchange rate or market rate fluctuations that might adversely affect the value of the investment.
- Should the investment be subject to a tax charge within the scheme this would be paid directly from his fund or by him.
- He indemnified Options against any and all liability arising from this investment.

The form was counter-signed by a 'Mr C' as 'witness'.

Mr H's application was accepted by Options, and the SIPP was established in March 2012.

In April 2012 a total of £38,628.27 was transferred into the SIPP from Mr H's existing pension provisions and on 23 April 2012, £34,800 was invested in Carbon Credits.

An Emissions Reduction Purchase Agreement ('ERPA') between CAG and Options was completed and signed on 30 April 2012. This stated:

"The Purchaser [Options] agrees to buy and the Seller [Carbon Advice Group plc] agrees to sell the following Contract Certified Emission Reductions ("CERs") according to the attached Terms and Conditions:

Quantity of CERs	*2900*
Price per tonne (£)	*£12.00*
Total consideration (£)	*£34,800*

On 2 May 2012 CAG wrote to Options confirming it had transferred the legal and beneficial title to the CERs to Options. It also provided the serial numbers and a link to the project.

Options wrote to Mr H on 23 September 2015 informing him (bold, its emphasis):

"To obtain an up-to-date market valuation of your Carbon Credits investment, we have contacted a number of Carbon Credit brokers, who have all confirmed that there are currently no prices available for carbon credits. As a result, we understand there is currently no market for selling Carbon Credits however if the position changes we will provide you with a further update as soon as we are able to do so.

As a market valuation for carbon credits is not currently available, we have regrettably had to value your Carbon Credits investment at Nil value. Until we are able to obtain an independent valuation of your Carbon Credits holdings we will continue to value your investment as Nil value which reflects the current market conditions."

And the SIPP valuation statement dated 18 March 2016 sent to Mr H by Options valued his total pension fund as £1,315.23, with the CAG investment valued at nil.

On 8 March 2018 Mr H complained to Options via his representative. In summary, he said that Options had, in accepting his business and subsequently facilitating the transfer of his personal and occupational pension schemes, showed no duty of care and did not treat him fairly. The complaint went on to say:

- The business was instigated by Mr H after he was approached by Forensic, which was a non-regulated introducer.

- Forensic was not authorised to conduct investment business and was a non-regulated introducer to Options.
- Forensic pre-populated the SIPP application form, including the investment choice, “Carbon Advice Group”, and the amount “£37,200”.
- Forensic was acting without authorisation so there was a breach of s.27 Financial Services and Markets Act (FSMA) 2000.
- Options was aware Mr H was about to transfer the value of a Final Salary pension scheme. It was unsatisfactory that Options permitted investment into an alternative investment without Mr H taking advice.
- It suggests that Options accepted direct applications/introductions from Forensic in volume, and a pattern must have emerged.
- Mr H was coached, step by step through the process by a Mr C from Forensic and Mr H thought he was receiving regulated advice.
- Execution-only final salary transfers were unusual, and in the absence of regulated advice Options owed Mr H a heightened duty of care.
- It was not feasible or believable that Mr H would choose to transfer his pension funds into Carbon Credits without taking regulated advice, so it was not acceptable for Options to use the “execution only” route to absolve itself of responsibility.
- Mr H now believes the whole process was “reverse engineered”. He trusted the third parties and what he was being advised, and went along with it.
- Options had not acted in accordance with the Principles for Businesses set out in the FCA’s handbook, in particular Principles 2,3 and 6.
- Options should not have classified the application as execution only, and when it did it ought to have sought evidence as to why Mr H did not take advice.
- Had Options insisted Mr H took regulated advice, and/or explained the potential issues with dealing with a non-regulated introducer, Mr H would not have proceeded with the application.
- In conclusion Mr H thought that Options should not have accepted his business, either from a non-regulated entity, or as a direct client, so it should never have got to the point of him signing a member declaration, or indemnities. Had Options acted fairly and in his best interests the investment would never have occurred. Mr H said that Options should redress his loss so that he was in as close a position as possible to that which he would have been in but for Option’s errors.

On 4 May 2018 Options sent Mr H its final response to his complaint, which it did not uphold. In summary, it said:

- Options provided execution only SIPP administration services, as explained in the SIPP application form, the Member Declaration Form, its Terms and Conditions and SIPP Key Features document, all of which had been reviewed by Mr H when he applied for the SIPP.
- Mr H completed a direct client application form, indicating he had not received any advice and wished to be classed as a direct client.
- Options is not permitted to provide advice or comment on the suitability of a SIPP or the underlying investment for the member, nor any introducer had one been chosen.
- Mr H had not been introduced by Forensic. Options were never made aware of the involvement of any introducer. As Mr H chose not to inform Options of his relationship with Forensic, Options cannot be held responsible for information that was omitted from the application form and not disclosed to it.
- Options cannot, and is not obligated, to go beyond the paperwork Mr H signed, and Options acted in good faith and proceeded with Mr H’s unambiguous instructions.
- Options did not breach s21 FSMA because it did not accept Mr H’s introduction from Forensic.

- Options was unable to complete due diligence on a firm (Forensic) that it had never been made aware of.

Options then went on to provide several direct quotes from the application form that Mr H had signed, and stated that Mr H had indicated he wished to invest in CAG, and this choice was made before he'd had any contact with Options.

In relation to the Investment Member Declaration, it summarised the relevant points of the form and said:

- Mr H had signed this on 5 March 2012, and his signature had been witnessed by Mr C, but it said it had had no indication that Mr C had any relationship/connection with Mr H other than witnessing his signature.
- Mr H had again elected not to take any advice, contrary to that which he was now asserting.
- It had laid out an in depth summary of all the potential risks for Mr H's chosen investment, acting in its capacity as administrators, to ensure Mr H was fully aware of those risks.
- It was entitled to, and it is reasonable for Options to accept at face value, Mr H's signature confirming his understanding of the various documents referred to. If Mr H did not agree to or understand the documents, and if he had received financial advice as he now states, he should not have signed the documents.
- Options had complied with Principle 6 on the basis that it provided Mr H with clear and accurate information and acted in accordance with his written instructions.
- Options had treated Mr H fairly, and in particular had:
  - Ensured the investment was suitable to be held in a SIPP;
  - Provided Mr H with numerous risk warnings about the investment;
  - Recommended that Mr H seek independent financial advice; and
  - Took steps to ensure Mr H understood he was entering into the investment on an execution only basis.
- Had Mr H told Options that he had a relationship with Forensic, Options would have completed due diligence on this introducer and would have been able to tell Mr H that the firm was unregulated.
- Mr H continued to interact with Options without explaining his relationship with Forensic. As such, he has contributed to his own potential losses.
- The documents Options required Mr H to sign were designed to provide him with the necessary information, including the risks associated with the investment, and so that he understood the nature of his relationship with Options and that a third-party adviser should be instructed if he wished.
- The Member Declaration was for Mr H to provide Options with his investment instructions. And for him to read and confirm his understanding that he was investing in Carbon Credits, that he understood all of the documentation involved, and that he understood the investment was high risk and speculative.

Mr H did not agree with this outcome so on 15 May 2018 he referred his complaint to the Financial Ombudsman Service.

After considering the information provided by each side, the Investigator thought Mr H's complaint ought to be upheld. He thought Options had not carried out sufficient due diligence on the Carbon Credits investment to meet its regulatory obligations, and Options ought to have found out more about Mr H's circumstances. Had it done so our Investigator thought Options ought to have refused to accept Mr H's application, and the investment and subsequent loss would not have come about. So, in accepting the Carbon Credits investment to be held in its SIPP when it ought not to have done so, it was fair and reasonable for Options to compensate Mr H for his loss.

Our Investigator then set out how this redress calculation should be carried out, and said he thought Options should pay Mr H an additional £500 for the distress and inconvenience he'd been caused.

Options did not agree with the Investigator's view. It said the Investigator had not adopted a fair procedure, not taken proper account of the mandatory relevant considerations, and had not reached a fair and reasonable outcome. In summary it said:

- The Investigator failed to take into account relevant law and regulations as required.
- The Investigator failed to show whether the due diligence duties he said Options had were recognised by law, and failed to clarify the standard against which Options' actions were being assessed.
- The obligations the Investigator was seeking to place on Options went far beyond those which it owed at the relevant time, including a duty to reject a general category of investment due to its attributes, when the Regulator had not prohibited the acceptance of, or investment in, such an investment.
- Only the Regulators' reports published prior to Mr H's application were relevant.
- The Regulator's 2009 thematic review, and the other publications referred to by the Investigator, cannot found a claim for compensation in themselves and do not assist in the construction of the Principles.
- The 2009 review did not provide 'guidance' and was not statutory guidance in any case, and it was neither fair nor reasonable to determine Mr H's complaint by reference to the regulator's publications.
- The criticisms of Options' due diligence on the Carbon Credits investment are unfounded, and failed to take into account the very limited nature of Options' legal obligations in respect of the investment due diligence.
- Following the Investigator's imposed obligations would have found Options making a recommendation to Mr H not to proceed, which would have significantly overarched its legal obligations at the time. In addition it would have required Options to provide advice to Mr H, which it did not have the necessary regulatory permissions to do.
- Options would have been unable to comment on the price Mr H was paying for the Carbon Credits, nor the market for selling them without giving advice, which it was unable to do.
- The Investigator, in saying Options ought to have questioned Mr H on how much of his pension fund he was proposing to invest, was imposing on it a requirement to assess the suitability of the investment for Mr H.
- It is clear that the Investigator has taken issue with the Carbon Credit investment purely on the basis that it was high-risk. There was no prohibition on the acceptance of high-risk investments into a SIPP, and the purpose of a SIPP is to allow investors greater investment control and flexibility.
- The Member Declaration Options required prospective investors to sign was clear as to the nature and risks associated with Carbon Credits, and the wording used reflected the Regulator's earlier consumer warning.
- It was not fair and reasonable to find that Options needed to go further than the warnings it gave, especially since the Regulator had not deemed it necessary to prohibit the investment in Carbon Credits, nor regulate their sale or marketing.
- The Investigator only left it an option of a blanket rejection of the investment for no reason other than the member might lose money, which is common to any investment.
- Options had no awareness of any involvement of Forensic in the process, and Options had no relationship or prior dealings with Forensic.

- The Investigator's suggestion than Options ought to have done more to check if any third party was involved was absurd and demonstrative of the unfair approach being taken.
- Options did not cause Mr H's loss. It was likely Mr H was extremely keen to proceed with the investment and would have found a way even if Options had not accepted his application. It was illogical and flawed to say no other SIPP operator would have accepted the Carbon Credit investment, which was a perfectly legitimate investment, of which the sale of, or investment in, had not been regulated.
- The contract between Options and Mr H was effective to relieve Options of any liability it might otherwise bear.
- It is fair and reasonable for Mr H to bear a measure of responsibility for his own actions. Mr H's loss flows simply from the fact that his selected investment did not perform as he'd hoped, and one that Options had told him was high-risk.

With regard to the redress calculation suggested by the Investigator, Options thought:

- Mr H's request to the administrators of his DB pension to transfer his benefits was made around 24 March 2012. Once this transfer was complete the loss of his DB benefits was assured from that point. Even if Options had asked him if he had wanted to proceed with the investment, his DB benefits had already been lost regardless of his decision. So Mr H is responsible for the loss of these benefits.
- Any compensation awarded to Mr H should be reduced to reflect his own responsibility for his decisions.
- There was inconsistency with our Service's approach to using benchmarks and discount rates when considering investment growth.
- Options agreed that Mr H ought to assist Options in taking ownership of the investment. But if this did not happen and Mr H retained ownership, the Investigator thought there should be no adjustment to the compensation award to reflect this. This was not fair or reasonable, and if retained and no compensation adjustment was made, would give Mr H a windfall.
- In relation to the proposed £500 award, the Investigator had provided no evidence to support that Mr H had suffered any degree of upset.

Options also requested that an Ombudsman holds an oral hearing in order to properly determine Mr H's complaint.

As no agreement could be reached the matter was passed to me for a decision.

I issued a provisional decision on 27 March 2024. I said that Options had failed to carry out adequate due diligence on the Carbon Credits investment. And I thought if Options had done so, it should've refused to permit the investment to be held in its SIPPs. And it was fair and reasonable to conclude that if Options had refused to permit the Carbon Credits investment in its SIPPs then Mr H would've retained his existing pensions and wouldn't have transferred them to a SIPP or subsequently made the investment that he did. So I recommended that Options should put Mr H back in the position he would have been in if he hadn't transferred his pensions to the Carey SIPP. I also recommended that it pay him £500 for the distress and inconvenience caused by the total loss of his pension.

Mr H accepted my provisional decision. Options did not respond to my provisional decision by the deadline I gave. So, I'm now proceeding with my final decision.

What I've decided – and why

Preliminary point – Options' request for an oral hearing

Although Options hasn't responded to my provisional decision, I've reconsidered its request for a hearing. Options say that an oral hearing is necessary to explore Mr H's understanding and approach to this investment, and his and Options' respective roles.

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

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

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

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

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

If I decide particular information is required to decide a complaint fairly, in most circumstances we are able to request this information from either party to the complaint, or even from a third party. In this case, we have undertaken an investigation and asked for the evidence that we needed to complete that. Options has had the opportunity to consider, and comment, on our Investigator's opinion in which their findings were summarised, as well as my provisional decision.

I have carefully considered the submissions Options has made. And I am satisfied that I am able to fairly determine this complaint without convening a hearing. In this case, I am satisfied I have sufficient information to make a fair and reasonable decision. So, I don't consider a hearing – or any further investigation by other means – is required.

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

As I'm satisfied it isn't necessary for me to hold an oral hearing, I'll now turn to considering the merits of Mr H's complaint.

<u>Merits of the complaint</u>

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

Given that Mr H accepted my provisional decision and Options didn't provide a response, I see no reason to depart from my provisional findings. As such, I've decided to uphold Mr H's complaint and I've largely repeated my findings, as per my provisional decision, below.

When considering what's 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.

In light of Mr H's complaint, what I'll be looking at here is whether Options took reasonable care, acted with due diligence and treated Mr H fairly, in accordance with his best interests, and what I think's fair and reasonable in light of that. And I think the key issues in Mr H's complaint are whether Options carried out sufficient due diligence on the Carbon Credits investment, and whether it was fair and reasonable for Options to have accepted Mr H's SIPP application in the first place.

Mr H has said, as part of his complaint, that Options knew that he had been advised and introduced to it by a firm (Forensic) which was not authorised or regulated by the FCA, and Options had failed to carry out sufficient due diligence on Forensic.

I have considered this argument, and Options' position that it had no knowledge of any involvement by any third party, and it had always treated Mr H as a direct client. But ultimately I haven't reached any findings on this point as I consider this unnecessary. As I go on to explain below, I don't think that Mr H's application to open a SIPP for investment in Carbon Credits ought to have been accepted by Options at all.

<u>Relevant considerations</u>

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

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 provide:

"Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.

Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.

Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly."

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

"The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The Specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of

them to the particular requirement they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules."

And at paragraph 77 of BBA Ouseley J said:

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

In *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878) (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 BBA including paragraph 162 set out above, said (at paragraph 104 of BBSAL):

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

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

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

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

I note that the Principles for Businesses did not form part of Mr Adams' pleadings in his initial case against Options SIPP. And HHJ Dight did not consider the application of the Principles to SIPP operators in his judgment. The Court of Appeal also gave no consideration to the application of the Principles to SIPP operators. So neither of the judgments say anything about how the Principles apply to an Ombudsman's consideration of a complaint. But to be clear, I do not say this means *Adams* is not a relevant consideration *at all.* As noted above, I have taken account of both judgments when making this decision on Mr H'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 the High Court judgement HHJ Dight found that the factual context of a case would inform the extent of the duty imposed by COBS 2.1.1R. HHJ Dight said at paragraph 148:

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

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

The facts of this case are also different, and I need to construe the duties Options owed to Mr H under COBS 2.1.1R in light of the specific facts of Mr H's case.

To confirm, I have considered COBS 2.1.1R - alongside the remainder of the relevant considerations, and within the factual context of Mr H's case, including Options' 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.

I also want to emphasise that I don't say that Options was under any obligation to advise Mr H on the SIPP and/or the underlying investments under the circumstances. Deciding to not accept an application because it was being set up to invest in a product that Options considered unsuitable for its SIPP, isn't the same thing as advising Mr H on the merits of the SIPP and/or the underlying investments.

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

<u>The regulatory publications</u>

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

- The 2009 and 2012 Thematic Review reports.
- The October 2013 Finalised SIPP Operator Guidance.
- The July 2014 "*Dear CEO*" letter.

I've considered the relevance of these publications. And I've set out material parts of the publications here, although I've considered them in their entirety.

The 2009 Thematic Review Report

The 2009 report included the following statement:

"*We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses ('a firm must pay due regard to the interests of its clients and treat them fairly') insofar as they are obliged to ensure the fair treatment of their customers. COBS 3.2.3(2) states that a member of a pension scheme is a 'client' for COBS purposes, and 'Customer' in terms of Principle 6 includes clients.*
It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six TCF consumer outcomes.
…
We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the members to confirm the position, or by contacting the firm giving advice and asking for clarification. Moreover, while they are not responsible for the advice, there is a reputational risk to SIPP operators that facilitate SIPPs that are unsuitable or detrimental to clients.

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

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

- *Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm's clients, and that they do not appear on the FSA website listing warning notices.*
- *Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.*
- *Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified.*
- *Being able to identify anomalous investments, e.g. unusually small or large transactions or more 'esoteric' investments such as unquoted shares, together with the intermediary that introduced the business. This would enable the firm to seek appropriate clarification, e.g. from the client or their adviser, if it is concerned about the suitability of what was recommended.*
- *Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely.*
- *Routinely identifying instances of execution-only clients who have signed disclaimers taking responsibility for their investment decisions, and gathering and analysing data regarding the aggregate volume of such business.*
- *Identifying instances of clients waiving their cancellation rights, and the reasons for this".*

The later publications

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

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

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

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

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

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

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

- *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*
- *Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.*
- *Being able to identify irregular investments, often indicated by unusually small or large transactions; or higher risk investments such as unquoted shares which may be illiquid. This would enable the firm to seek appropriate clarification, for example from the prospective member or their adviser, if it has any concerns.*
- *Identifying instances when prospective members waive their cancellation rights and the reasons for this.*

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

Examples of good practice we have identified include:

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

In relation to due diligence, the October 2013 Finalised SIPP Operator Guidance said:

*"**Due diligence***

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

- *ensuring that all investments permitted by the scheme are permitted by HMRC, or where a tax charge is incurred, that charge is identifiable, HMRC is informed and the tax charge paid*
- *periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme*
- *having checks which may include, but are not limited to:*
  - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*
  - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*

- *ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified*
- *good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and*
- *ensuring these benchmarks clearly identify those instances that would lead a firm to decline the proposed business, or to undertake further investigations such as instances of potential pension liberation, investments that may breach HMRC tax-relievable investments and non-standard investments that have not been approved by the firm"*

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

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

- correctly establishing and understanding the nature of an investment
- ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation
- ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable)
- ensuring that an investment can be independently valued, both at point of purchase and subsequently, and
- 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 aren't formal guidance (whereas the 2013 Finalised Guidance is). However, the fact that the reports and "*Dear CEO*" letter didn't constitute formal guidance doesn't mean the importance of these should be underestimated. These provide a reminder that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it's treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications which set out the regulators' expectations of what SIPP operators should be doing also go some way to indicate what I consider amounts to good industry practice, and I'm therefore satisfied it's appropriate to take these into account.

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

At its introduction the 2009 Thematic Review Report says:

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

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

So, I'm satisfied that the 2009 Report is a reminder that the Principles apply and it gives an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. The Report set out the regulator's expectations of what SIPP operators should be doing and therefore indicates what I consider amounts to good industry practice at the relevant time. So I remain satisfied it's relevant and therefore appropriate to take it into account.

In Options' submissions on other cases with our Service involving SIPP due diligence, including when making its points about regulatory publications, it has referenced the *R. (on the application of Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service* [2017] EWHC 352 (Admin) case. While the judge in that case made some observations about the application of our statutory remit, that remit remains unchanged. And, as noted above, in considering what's fair and reasonable in all the circumstances of a case, I'm required to take into account (where appropriate) what I consider to have been good industry practice at the relevant time.

I think the Report is also directed at firms like Options acting purely as SIPP operators, rather than just those providing advisory services. The Report says that "*We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses*…" And it's noted prior to the good practice examples quoted above that "*We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs*."

The remainder of the publications also provide a *reminder* that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and to produce the outcomes envisaged by the Principles. In that respect, these publications also go some way to indicate what I consider amounts to good industry practice at the relevant time. I'm therefore satisfied it's appropriate to take them into account too.

I appreciate that some of the publications I've listed above were published after Mr H's SIPP application and investment in Carbon Credits. But like the Ombudsman in the *BBSAL* case, I do not think the fact that the later publications (i.e. those other than the 2009 Thematic Review Report), post-date the events that took place in relation to Mr H's complaint, mean that the examples of good practice they provide were not good practice at the time of the relevant events. Although the later publications were published after the events subject to this complaint, the Principles that underpin them existed throughout, as did the obligation to act in accordance with the Principles.

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

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

That doesn't mean that in considering what is fair and reasonable, I will only consider Options' actions with these documents in mind. The reports, Dear CEO letter and guidance gave non-exhaustive examples of good 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.

To be clear, I don't say the Principles or the publications obliged Options to ensure the transactions were suitable for Mr H. It's accepted Options wasn't required to give advice to Mr H, and couldn't give advice. And I accept the publications don't alter the meaning of, or the scope of, the Principles. But as I've said above these are evidence of what I consider to have been good industry practice at the relevant time, which would bring about the outcomes envisaged by the Principles. And, as per the FCA's Enforcement Guide, publications of this type "*illustrate ways (but not the only ways) in which a person can comply with the relevant rules*". So it's fair and reasonable for me to take them into account when deciding this complaint.

I'd also add that, even if I agreed with Options that any publications or guidance that post-dated the events subject of this complaint don't help to clarify the type of good industry practice that existed at the relevant time (which I don't), that doesn't alter my view on what I consider to have been good industry practice at the time. That's because I find that the 2009 Report together with the Principles provide a very clear indication of what Options could and should have done to comply with its regulatory obligations that existed at the relevant time before accepting Mr H's SIPP application.

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

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

Submissions have been made about breaches of the Principles not giving rise to any cause of action at law, and breaches of guidance not giving rise to a claim for damages under FSMA. I've carefully considered these but, to be clear, it's not my role to determine whether something that's taken place gives rise to a right to take legal action. I'm deciding what's fair and reasonable in the circumstances of this complaint – and for all the reasons I've set out above I'm satisfied that the Principles and the publications listed above are relevant considerations to that decision.

And, taking account of the factual context of this case, it's my view that in order for Options to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), amongst other things it should have undertaken sufficient due diligence checks on the Carbon Credits investment *before* accepting Mr H's application to open a SIPP and invest in Carbon Credits.

And the questions I need to consider include whether Options ought to, acting fairly and reasonably to meet its regulatory obligations and good industry practice, have identified that consumers investing in Carbon Credits were being put at significant risk of detriment. And, if so, whether Options should not therefore have accepted Mr H's applications.

<u>The contract between Options and Mr H</u>

Options has said that it provides execution only (i.e. non-advised) SIPP administration services. It said this was clearly set out to Mr H in its product documentation. To be clear, I don't say Options should (or could) have given advice to Mr H or otherwise have ensured the suitability of the investment for him. I accept that Options made it clear to Mr H that it wasn't giving, nor was it able to give, advice and that it played an execution-only role in his SIPP investments. And that forms Mr H signed confirmed, amongst other things, that losses arising as a result of Options acting on his instructions were his responsibility.

So, I've not overlooked or discounted the basis on which Options was appointed. And my decision on what's fair and reasonable in the circumstances of Mr H's case is made with all of this in mind. I've proceeded on the understanding that Options wasn't obliged – and wasn't able – to give advice to Mr H on the suitability of the investment in Carbon Credits that he made. But I don't agree that it couldn't have rejected applications without contravening its regulatory permissions by giving investment advice.

<u>What did Options' obligations mean in practice?</u>

The Regulators' reports and guidance provided some examples of good practice observed by the FSA and FCA during its work with SIPP operators. This included being satisfied that a particular investment is appropriate to accept. That involves conducting checks – due diligence – on investments to make informed decisions about accepting business. This obligation was a continuing one.

In this case, the business Options was conducting was its operation of SIPPs. It's my view that in order for Options to have met its regulatory obligations, (under the Principles and COBS 2.1.1R), when conducting its operation of SIPPs business, Options had to decide whether to accept or reject particular investments with the Principles in mind.

Taking account of the Regulator's guidance and what I consider to have been good practice at the time, It's my view that Options was obliged to carry out due diligence on the Carbon Credits investment – due diligence that went further than simply checking that the investment was permitted to be held in the SIPP under HMRC rules. I say that after taking into account the regulatory publications I've referenced earlier in this decision, amongst other matters, in considering whether Options acted fairly and reasonably in this case.

I think that it's fair and reasonable to expect Options to have looked carefully at the Carbon Credits investment *before* accepting Mr H's application for a SIPP to hold the Carbon Credits investment. To be clear, for Options to accept the Carbon Credits investment without carrying out a level of due diligence that was consistent with its regulatory obligations, while asking its customer to accept warnings absolving it of the consequences, wouldn't in my view be fair and reasonable or sufficient. And if Options didn't look at an investment in detail, and if such a detailed look would have revealed that the investment might not be secure, might be fraudulent, or that the investment couldn't be independently valued, or that it was impaired, it wouldn't in my view be fair or reasonable to say Options had exercised due skill, care and diligence – or treated its customer fairly – by accepting such an investment.

<u>The due diligence carried out by Options on the Carbon Credits investment – and what it should have concluded</u>

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

I also think Options understood this to some extent, as Options told us it carried out an internal investment review and due diligence on the Carbon Credits investment and concluded it was a suitable investment to be held within a UK pension scheme. However, it didn't provide evidence of the investment review or due diligence checks it carried out. But in response to the Investigator's view, Options explained that following its due diligence into Carbon Credits, Options updated its member declaration to include the following wording (emphasis added by Options):

"The purpose of this introduction is to highlight some of the SIPP related risks involved with Carbon Credits in order that you are aware of these prior to purchase.

Whilst Carbon Credits generally have been around for some time, ***the market for trading them is still immature – this means there may not be a ready buyer of the Carbon Credits held within your SIPP and no guarantee they could be sold at a profit where a buyer found.***

Expert commentators suggest that the market in trading Carbon Credits may take some time to develop ***(assuming it does develop)*** *– typically three to five years is mentioned although these cannot be guaranteed.*

Consequently it should be appreciated by you as the scheme member instructing us to buy Carbon Credits that ***this investment is potentially high risk, long term in nature and illiquid****."*

Options said this reflected the contents of the FSA consumer warning, which I assume to mean the warning the FSA issued in August 2011 about individuals investing in carbon credits. Options said the FSA noted in the warning that not all carbon credits investments are scams and it clearly appreciated that in some circumstances it would be appropriate to invest in them. Options further added that if the warnings it included in the member declaration were not sufficient to convey to Mr H that the investment was high risk, it asked what wording would have been sufficient to convey that it was high risk.

But I think this somewhat misses the point of what Options' obligations here were in line with the Principles and good industry practice. While ensuring Mr H was aware of the risks of the investment he intended to make was appropriate, Options was still obliged to consider whether the investment was an appropriate investment to be held in its SIPPs *at all*, bearing in mind what it should have ascertained about the investment if it had carried out appropriate due diligence checks.

As I've said above, Options didn't provide evidence of the investment review or due diligence checks it carried out in its file for this complaint. But I've seen evidence of the due diligence checks Options completed on the Carbon Credits investment in another complaint being considered by us where the consumer went on to invest in Carbon Credits. So, I've considered this evidence.

In that complaint file, the evidence provided shows that Options:

- Carried out checks through 'World Check' in respect of CAG and its Directors.
- Searched Companies House records for CAG and its Directors.
- Reviewed the investment brochure produced by CAG, project brochures and CAG's

website.

- Reviewed sample applications and investment agreements.
- Reviewed the Technical Infrastructure Overview document.
- Reviewed an investment overview produced by 'Enhance'.
- Held an Investment Committee Meeting in August 2011 to consider whether to permit Carbon Credits investments, which included reviewing the above materials.

The committee concluded that there did not appear to be a tax charge liability for the investment, so it was to be permitted to be held in its SIPPs. However, the committee required the following in order to proceed:

- Alternative Investment Member Declaration and Indemnity for each client that wished to transact in the investment.
- Alternative Investment Adviser Notification Letter signed by each Adviser.
- Alternative Investment Provider Notification Letter signed by CAG.
- Carey Pension Trustees UK Ltd Limitation of Liability wording added to all contracts and assignment documents.

So, while Options did undertake some due diligence checks before permitting the investment to be held in its SIPPs, I think it needed to do more to satisfy its obligations under the Principles. And it's important to note that Options' obligations under the principles were continuous, i.e. it wasn't sufficient to carry out checks once and allow the investment to proceed, it had to be alive to developments, including any updates or commentary from the Regulator, and carry out ongoing checks to limit the risk of consumer detriment.

In August 2011, i.e. before Mr H made his investment, and likely after Options had approved the Carbon Credits investment as an appropriate investment for its SIPPs, the FSA (the then Regulator) issued a consumer warning about the risks of investing in carbon credit schemes. This is the warning Options was likely referring to in response to the Investigator's view.

As Options said, although the FSA stressed not all carbon credit schemes are scams, it strongly recommended consumers sought advice from an FSA-authorised financial adviser before getting involved in the carbon credit trading market. It said:

"It is not often made clear to investors that this involves trading on over-the-counter markets which require experience and skill. You may lose money or not be able to sell at all…

Beware that VERs certificates are often labelled as 'certified', but this certification is voluntary involving a wide range of bodies and different quality standards that are not recognised by any UK financial compensation scheme…"

"…Just because the salesperson mentions the Kyoto Protocol or 'government-backed' plans does not tell you anything about the type of carbon credit you are investing in."

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.

I think this was something Options recognised, given it approved the investment to be held in its SIPPs with caveats. Following the Investment Committee meeting, Options wrote to CAG on 1 August 2011, stating that it had approved the investment to be held in its SIPPs but had some additional requirements, which included members taking their own tax, investment and financial advice to determine whether it was a suitable investment for them. And that it suggested no more 50% of members' funds should be invested in this asset given the potential liquidity issues.

In that complaint, the consumer signed an indemnity on 3 March 2012 that reflected these points, including that he had taken appropriate advice and that it had been suggested that he invest under 50% of his fund because of the potential liquidity issues. However, the indemnity Options required Mr H to sign deviated from those requirements, despite it having been signed on 5 March 2012, only two days after the consumer who'd been asked to sign a significantly different indemnity.

Options may say that the indemnity Mr H signed shows that it did in fact recommend that Mr H seek advice from a suitably qualified and authorised adviser, but that Mr H had chosen not to. But this is a different requirement to the requirement the Investment Committee decided on, which was that when investing in Carbon Credits, investors should take their own financial advice to determine whether the investment was suitable for them. And given the Regulator's warning, I think requiring investors to take regulated financial advice would've gone some way to meeting the requirements under the Principles and to protect consumers from detriment. As it is evident Mr H hadn't taken advice, this alone ought to have led to Options refusing to permit Mr H's investment in Carbon Credits. But I think Options ought to have had other serious concerns about some of the information it gathered during the due diligence process and drawn different conclusions about the appropriateness of the investment to be held in its SIPPs. Furthermore, other information I think it should have obtained, ought to have given Options real cause for concern about the risk of consumer detriment associated with this.

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

- Identified the Carbon Credits investment as a high-risk, speculative and non-standard investment and carried out due diligence on it.
- Correctly established and understood the nature of the investment.
- Considered whether the investment was an appropriate investment to make available via its SIPPs.
- Made sure the investment was genuine and 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.

A key issue with carbon credits in general is there is no price transparency – there is no independent source regarding the price being set, and nothing to confirm at what price the credits should be acquired. So, there was no way to establish how the purchase price was being arrived at. As such, there could've been a very significant difference between the price the units were acquired at and the price these were sold to Mr H at. This is something Options could have and should have investigated further.

Also, assuming that Mr H would hold valid units or credits, there doesn't appear to be any measure of the quality of the credits in question. There is reference in the CAG investment brochure to the Carbon Credits it offered having the Verified Carbon Standard ('VCS') accreditation. But the brochure described the Carbon Credits available through the voluntary carbon market as Voluntary Emission Reductions ('VERs'). And the other information Options appears to have reviewed was specific to VERs. Indeed, the indemnity Mr H signed also referred to him purchasing VERs.

However, the agreement Mr H actually completed was for CERs. The ERPA showed Mr H had purchased 2,900 CERs with a unit price of £12 per tonne. So, the information Options had reviewed prior to agreeing to permit the Carbon Credits investments didn't correlate to the investment Mr H went on to make. And this purchase agreement didn't state the project or the standard of the units he was investing in.

I appreciate that the transfer certificate for the CERs sent to Options included the serial numbers for the credits purchased and a web link to the project the credits originated from on the United Nations Framework Convention on Climate Change ('UNFCCC') website. I've been able to access this website using the internet archive 'Wayback Machine' and a snapshot from 26 December 2009 shows that Mr H's carbon credits were derived from a wind power project in India. And, it does appear the credits were registered with the UNFCCC and as such, were valid.

However, while Options could've been satisfied the credits Mr H was purchasing were valid, I haven't seen that it was demonstrated there was any ready market for Mr H's units. It wasn't demonstrated how Mr H would find businesses to buy his small allocation of Carbon Credit units. And I note the Terms and Conditions attached to the ERPA stated:

"There may be a big difference between the buying price and the selling price of Carbon Credits. If you have to sell them immediately, you may get back much less than you paid for them. You may have difficulty in selling Carbon Credits at the price you wish to achieve and, in some circumstances; it may be difficult to sell them at any price. It can be difficult to assess what would be a proper market price for these investments. You should not invest in Carbon Credits unless you have thought carefully about whether you can afford to do so and have taken appropriate advice."

And I think Options also appreciated that there might not be a market for the Carbon Credits and that there was no guarantee that the credits could be sold at a profit. This is because it included these warnings in the indemnity it asked Mr H to sign (although the indemnity referred to VERs not CERs). The immaturity of the market was also something the Investment Committee noted to be a risk, and as it wanted the indemnity to reflect its suggestion to limit the exposure to the Carbon Credits investment in its SIPPs to less than 50%. However, it's clear that in Mr H's case, this suggestion was not included in the indemnity, and as such, he invested almost the entirety of the pension monies transferred to Options in the Carbon Credits investment.

So, at the time of Mr H's investment there was little confirmation that Mr H's SIPP was acquiring anything of any realisable value, whether the credits were being sold at inflated prices and whether there was a market for them.

And I don't think simply noting and making Mr H aware of these issues was consistent with the Principles and good practice. I think Options needed to weigh up these concerns and features and consider whether it was an appropriate investment to be held in customers' pensions.

Options 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 Options needed to do when accepting Mr H's proposed investment to meet its regulatory obligations and good practice. And, I don't think that this amounts to a conclusion that Options should've assessed the suitability of the Carbon Credits investment for Mr H's individual circumstances.

So, based on the evidence I've seen, I'm satisfied that Options didn't carry out sufficient due diligence at the time to satisfy its reasonable responsibilities as a SIPP provider.

<u>If Options had completed sufficient due diligence on Mr H's Carbon Credits investment, what should it reasonably have concluded?</u>

I think the Carbon Credits Mr H was intending to purchase were likely legitimate, given what I've seen on the UNFCCC website. And this reflects the FSA's warning that not all carbon credit investments are scams. I also accept that technically there was a market for carbon credits. But it's been highlighted that it often wasn't possible to sell carbon credits even though there was a market for them. And even the ERPA terms acknowledged it might not be possible to sell the credits at all. So, although they technically worked as claimed, the reality was very different.

The FSA warning was published before Mr H's SIPP was set up and this made it clear that there may be issues with selling carbon credits. I'm satisfied this is something Options was aware of at the time and it should've considered this as a significant factor in deciding whether to permit the investment. The fact Mr H might have struggled to realise the investment should've caused it significant concern – especially considering that almost the entirety of Mr H's funds in the SIPP were invested in Carbon Credits. It also isn't clear how Mr H would be able to take benefits from his pension if the investment was difficult to value or realise.

At the point Mr H's investment was arranged, Options would've been aware that he was investing almost all of his pension fund in an unregulated, esoteric and high-risk investment which would likely be difficult to sell. I acknowledge that Options wouldn't be aware whether the amounts being invested in Carbon Credits was the entirety of Mr H's pension savings because he may have had other benefits elsewhere. But it was an indicator of the kind of risk to which Mr H was being exposed. These were 'red flags', so to speak, which should've caused Options significant concern as to whether or not the investment was appropriate to be held in members' SIPPs.

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 often sold at "significantly inflated prices" so it seems likely this would then have been identified. This would effectively render the investment fundamentally unviable.

Options should also have been aware that investors would be 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 the Financial Ombudsman Service.

In the circumstances, I'm satisfied there were a number of concerns Options should've identified. It should've known there was a significant risk of consumer detriment, and it shouldn't have permitted the investment to be held in its SIPP. When doing so, I think it didn't act with due skill, care and diligence or treat Mr H fairly.

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

I'm satisfied Options 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. Options 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 into its SIPPs before it accepted Mr H's application to invest in Carbon Credits. It ought to have identified that there was a high risk of consumer detriment here. And it's the failure of Options' due diligence that's resulted in Mr H being treated unfairly and unreasonably.

In my opinion Options didn't meet its regulatory obligations or the standards of good practice at the time, and it allowed Mr H's pension fund to be put at significant risk as a result. So, I think it's fair and reasonable to conclude that Options didn't act with due skill, care and diligence, and it didn't treat Mr H fairly, by accepting the Carbon Credits investment in his SIPP.

<u>Did Options act fairly and reasonably in proceeding with Mr H's instructions?</u>

COBS 11.2.19R

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

Options' argument about having to execute the transaction as a result of COBS 11.2.19R was considered and rejected by the judge in *BBSAL*. In that case Jacobs J said:

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

I therefore don't think that Options' argument on this point is relevant to its obligations under the Principles to decide whether or not to execute the instruction to make the Carbon Credits investment i.e. to proceed with the applications.

The indemnity

In my view, for the reasons given, Options should've refused to allow Mr H's investment in Carbon Credits and his application to open the SIPP on the basis of that proposed investment. So, things shouldn't have progressed beyond that. Had Options 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.

Further, in my view it's fair and reasonable to say that just having Mr H sign declarations or indemnities, wasn't an effective way for Options to meet its regulatory obligations to treat him fairly, given the concerns Options ought to have had about the investments.

Options knew that Mr H had signed forms intended, amongst other things, to indemnify it against losses that arose from acting on his instructions. And, in my opinion, relying on the contents of such forms when Options knew, or ought to have known, allowing the Carbon Credits investment to be held within its SIPPs would put investors at significant risk wasn't the fair and reasonable thing to do. The fair and reasonable thing to do would have been to refuse to accept the investments in its SIPPs at all.

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

Ultimately I'm satisfied that Mr H's investment in Carbon Credits shouldn't have been permitted and so the opportunity to proceed in reliance on an indemnity shouldn't have arisen at all.

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

The involvement of other parties

In this decision I'm considering Mr H's complaint about Options. However, I accept that it's likely other parties were involved in the transaction complained about, possibly Forensic and/or CAG.

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

As I set out above, in my opinion it's fair and reasonable in the circumstances of this case to hold Options accountable for its own failure to comply with the regulatory obligations, good industry practice and to treat Mr H fairly, and the starting point, therefore, is that it would be fair to require Options to pay Mr H compensation for the loss he's suffered as a result of Options' failings.

But I've carefully considered if there's any reason why it wouldn't be fair to ask Options to compensate Mr H for his loss, including whether it would be fair to hold another party liable in full or in part. Whilst I accept that it may be the case that another party might have some responsibility for initiating the course of action that led to Mr H's loss, I'm satisfied that it's also the case that if Options had complied with its own distinct regulatory obligations as a SIPP operator, the investment in Carbon Credits wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

So it is my view that it's appropriate and fair in the circumstances for Options to compensate Mr H to the full extent of the financial losses he's suffered due to Options' failings. And, taking into account the combination of factors I've set out above, I'm not persuaded that it would be appropriate or fair in the circumstances to reduce the compensation amount that Options is liable to pay to Mr H.

Mr H taking responsibility for his own investment decisions

Options has said that Mr H ought to bear some responsibility for his own actions and the losses that followed. And in *Adams*, the judge held that in construing the SIPP operator's regulatory obligations, regard should be had to section 5(2)(d) of the FSMA (now section 1C). This section requires the FCA, in securing an appropriate degree of protection for consumers, to have regard to, amongst other things, the general principle that consumers should take responsibility for their own investment decisions.

I've considered this point carefully. But having done so I am satisfied that it wouldn't be fair or reasonable to say Mr H's actions mean he should bear the loss arising as a result of Options' failings.

Mr H used the services of a regulated personal pension provider in Options. And, in my view, if Options had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted Carbon Credits investments into its SIPPs at all. That should have been the end of the matter – if that had happened, I'm satisfied Mr H's investment in Carbon Credits wouldn't have been made in the first place.

I've carefully considered what Options has said about Mr H being made aware that the investment was high risk. But I'm not satisfied that Mr H understood the risks of the Carbon Credits investment. Indeed, in his submission to our Service, Mr H said he was just promised excellent returns and a safe investment.

But even if Mr H *had* received an explanation of the risks involved with the investment, for the reasons I've already given, I'm satisfied that if Options had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted the investment into his SIPP. So, the loss he's suffered could have been avoided in any event.

Options has said that it should not be held responsible for the loss of the protected benefits associated with Mr H's DB pension, because the loss of these was assured once the transfer into his SIPP was complete. Options has said that even if it had asked Mr H whether he was sure he wished to proceed with the investment, these benefits would have already been lost. I have considered this point carefully, but I don't agree with Options here. I'll explain.

Mr H's SIPP was opened on around 14 March 2012. He submitted his request to the administrators of his DB pension scheme to transfer the benefits to his SIPP on 24 March 2012. But as I've said above, in my view, if Options had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted Mr H's application to open a SIPP *at all*. That should have been the end of the matter. If that had happened, I'm satisfied Mr H would not have requested the transfer of the value of his DB pension, and the arrangement for Mr H wouldn't have come about in the first place, so his protected benefits would not have been lost.

So, overall, I'm satisfied that in the circumstances, for all the reasons given, it's fair and reasonable to say Options should compensate Mr H for the loss he's suffered. I don't think it would be fair to say in the circumstances that Mr H should suffer the loss because he ultimately instructed the transaction to be effected.

Had Options declined to accept Mr H’s investment in Carbon Credits, would the transaction complained about still have been effected elsewhere?

Options has said that if it had refused to permit the investment in Carbon Credits, the investment would still have been effected with a different SIPP provider. But I don’t think it’s fair and reasonable to say that Options shouldn’t compensate Mr H for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I’ve found Options did. I think it’s fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn’t have accepted Mr H’s application to hold Carbon Credits in its SIPP.

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

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

I have considered this point carefully, as Mr H has told us he was paid a sum of £2,500 in what he told was ‘commission’ once the Carbon Credits were bought. But, in this case, I’m not satisfied that Mr H proceeded knowing that the investment he was making was high risk, and that he was determined to move forward with the transaction in order to take advantage of the cash incentive.

There is nothing to show Mr H genuinely understood the risks involved. He says he was just advised of excellent returns and promised a good investment, and he transferred his entire pension provision into the SIPP.

And I can’t see that the ‘commission’ offered on completion of the investment purchase meant Mr H would have proceeded regardless. I say this as I can’t see the payment he received was considered to be essential by Mr H at the time. Mr H has explained that he used the money to pay bills, and it went towards the general upkeep of the house, new clothes for his children and nothing extravagant. So I think therefore, it cannot be said he was *incentivised* to enter into the transaction in this way.

On balance, I’m satisfied that Mr H, unlike Mr Adams, wasn’t eager to complete the transaction for reasons other than securing the best pension for himself. So, in my opinion, this case is very different from that of Mr Adams. And having carefully considered all of the circumstances, I’m satisfied it’s fair and reasonable to conclude that if Options had refused to accept Mr H’s application to invest in Carbon Credits, the transaction this complaint concerns wouldn’t still have gone ahead.

So, overall, I do think it’s fair and reasonable to direct Options to pay Mr H compensation in the circumstances. While I accept that Forensic and/or CAG might have some responsibility for initiating the course of action that’s led to Mr H’s loss, I consider that Options failed to comply with its own regulatory obligations when it didn’t put a stop to the transactions proceeding. It ought to have declined Mr H’s application to open a SIPP to invest in Carbon Credits when it had the opportunity to do so.

In making these findings, I’ve taken into account the potential contribution made by other parties to the losses suffered by Mr H. In my view, in considering what fair compensation looks like in this case, it’s reasonable to make an award against Options that requires it to compensate Mr H for the full measure of his loss, whilst taking into account the payment Mr H received for completing the investment. But for Options’ failings, I’m satisfied that the transaction this complaint concerns wouldn’t have occurred in the first place.

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

The key point here is that but for Options' failings, Mr H wouldn't have suffered the loss he's suffered. And, as such, I'm of the opinion that it's appropriate and fair in the circumstances for Options to compensate Mr H to the full extent of the financial losses he's suffered due to its failings, and notwithstanding any failings by another third party.

<u>In conclusion</u>

Taking all of the above into consideration, I think that in the circumstances of this case it's fair and reasonable for me to conclude that Options shouldn't have accepted Mr H's application to open a SIPP to be used to hold the investment in Carbon Credits.

I don't think Options met its regulatory obligations or the standards of good practice at the time, and it allowed Mr H's pension fund to be put at significant risk as a result.

So, for the reasons I've set out, I think it's fair for Options to compensate Mr H for the full losses he's suffered. I say this having given careful consideration to the *Adams* judgments but also bearing in mind that my role is to reach a decision that's fair and reasonable in the circumstances of the case having taken account of *all* relevant considerations.

Putting things right

My aim in awarding fair compensation is to put Mr H back into the position he would likely have been in had it not been for Options' failings. Had Options acted appropriately, I think it's *more likely than not* that Mr H would have remained a member of his existing pension schemes that he transferred into the SIPP.

Mr H's personal circumstances mean that I do not consider it likely that he would have remained working beyond the age of 55. I say this after considering the significant personal and health problems he has experienced since 2013. Mr H has been unable to work since 2014 due to family commitments and since 2016 he has been deemed unfit to work due to health problems. His income since 2014 has been limited to tax credits and child benefits, and since 2016 has received a Personal Independence Payment ('PIP').

Because of this I think it more likely that not that had Mr H retained his personal pension plan I think it is likely he would have taken the benefits from this at the earliest time possible, which would have been from his 55th birthday. I also consider it highly likely that he would also have applied to take the benefits from his DB pension scheme early to supplement his income from his 55th birthday. This is earlier than his normal retirement date, so the redress calculation set out below should take this into account.

Mr H transferred monies from two different pension schemes into the SIPP, including monies from both defined contribution ('DC') and DB schemes. To put things right Options will need to undertake different types of loss calculations, one in relation to the monies that originated from the DB scheme and another in relation to monies that originated from the DC scheme. Options has told us that Mr H's SIPP was closed in June 2019, with a nil value.

In light of the above, Options should:

- Consider the value of Mr H's SIPP to be £nil for the purpose of this calculation.
- Undertake loss calculations as set out below in respect of each of the schemes from which monies were transferred into the SIPP and pay any redress owing in line with the steps set out below.
- If Mr H has paid any fees or charges from funds outside of his pension arrangements, Options should also refund these to Mr H. Interest at a rate of 8% simple per year from date of payment to date of refund should be added to this.
- Pay to Mr H £500 to compensate him for the distress and inconvenience he has been caused.

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

Calculate the loss Mr H has suffered as a result of making the transfer in relation to monies originating from his DB scheme

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

For clarity, I consider it likely that Mr H would have taken early retirement from age 55. So, compensation should be based on him taking benefits at this age.

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

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

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

Redress paid to Mr H as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4, Options may make a notional deduction to cash lump sum payments to take account of tax that consumers would otherwise pay on income from their pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to

Mr H’s likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

Calculate the loss Mr H has suffered as a result of making the transfer in relation to monies originating from his DC scheme

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

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

Any withdrawal out of the SIPP should be deducted at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. This should include the £2,500 Mr H received as a result of the investment. The same applies for any contributions made, these should be added to the notional calculation from the date they were actually paid, so any growth they would have enjoyed is allowed for.

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

The notional value of Mr H’s existing plan if monies hadn’t been transferred (established in line with the above) is Mr H’s loss, as the Options SIPP was valued at zero and closed.

Pay an amount to Mr H (if possible into a pension plan) equal to the loss calculated above in relation to monies originating from his DC scheme

If the redress calculation demonstrates a loss, the compensation should if possible be paid into a pension plan, if Mr H still has one open. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn’t be paid into a pension plan if it would conflict with any existing protection or allowance.

If a payment into a pension isn’t possible, or has protection or allowance implications, it should be paid directly to Mr H as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. As I’ve explained above, making a notional deduction of 15% overall from the loss adequately reflects this.

Distress & inconvenience

I think the loss of the pension provision that is the subject of this complaint caused Mr H significant distress. Mr H has brought up his children alone and has suffered significant health problems during the events about which this complaint concerns, and has been caused a great deal of worry by seeing his entire pension provision lost. So, I think Options should pay Mr H £500 to compensate him for this.

My final decision

Where I uphold a complaint, I can make an award requiring a financial business to pay compensation of up to £150,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £150,000, I may recommend that Intelligent Money Ltd pays the balance.

Determination and award: For the reasons set out above, I'm upholding the complaint.

My final decision is that Options UK Personal Pensions LLP must calculate and pay Mr H the compensation amount produced by the calculation, as set out in the steps above, up to the maximum of £150,000.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that Options UK Personal Pensions LLP pay Mr H the balance.

My recommendation would not be binding. Further, it's unlikely that Mr H could accept a final decision and go to court to ask for the balance. Mr H may want to get independent legal advice before deciding whether to accept any final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 21 May 2024.

Hannah Wise
Ombudsman