

The complaint

Mr P's complaint is that Options UK Personal Pensions LLP (formerly Carey Pensions UK LLP) (Options) failed to carry out adequate due diligence on the proposed investment for his SIPP – Carbon Credits - to which he was introduced by a UK regulated financial adviser. He says the investment was unregulated, high risk, illiquid and has now failed.

He also says Options didn't carry out sufficient due diligence on his adviser and/or incorrect conclusions were drawn from the due diligence carried out. And he is seeking to be put back into the position he would have been in had the transfer not taken place.

Background

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 principal, establish, operate and wind-up a pension scheme, and make arrangements with a view to transactions in investments.

The Adviser ('Firm B')

Mr P says he received an introduction to a firm I'll refer to as Firm B who advised him on the transfer to the Options SIPP and to make the investments within the SIPP.

At the time Firm B was authorised by the Financial Services Authority (FSA) and would go on to be authorised by its successor the Financial Conduct Authority (FCA). Firm B ceased to be authorised in 2015.

ISP Group (ISP) – Carbon Credits

Based in Switzerland, ISP was the business which was to buy, register and hold the Carbon Credits for Mr P.

Options had a master account with ISP and an application was made to open a sub-account for Mr P's investment.

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 (tCO₂e) 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

Mr P says he received an unsolicited call offering him a pension review with an independent financial adviser. This resulted in a meeting with a regulated financial adviser from Firm B. Mr P says he was advised that his existing personal pensions weren't performing well, and he should transfer them to a SIPP and make an investment in a wind farm project. He was told he'd receive better returns on his pension as a result.

Mr P says he was subsequently called by Firm B urging him to complete documents in order to effect the transfer. Mr P was also provided with some information about Carbon Credits.

Mr P signed a Carey Pension Scheme Application Form on 15 June 2012. The form confirmed Mr P was applying for a 'single asset' SIPP and wanted to transfer a personal pension valued at £32,000 to the SIPP.

In terms of the investments to be held within the SIPP, the application form confirmed it to be Carbon Credits with the details to be provided.

The financial adviser agreement section of the form confirmed Firm B as the financial adviser and provided its authorisation number for the then regulator, the Financial Services Authority. Firm B was to receive £1,500 as an initial fee with no on-going fee to be paid from the SIPP. This section of the form has signatures alongside spaces for both member and financial adviser's details.

Ultimately two personal pensions, from the same provider, were transferred to Options in July and October 2012 with a combined transfer value of about £60,000.

Mr P signed 'Purchase Instruction for Carbon Credits' forms on 15 June 2012 and on 3 October 2012 both addressed to Options. In both cases the credits were to be bought, registered and held by ISP.

The first instruction said Mr P wanted to purchase credits in a hydroelectric power project in India. He intended to invest just under £30,000 and the purchase price of each 'unit' was £7.50.

The second instruction said that Mr P wanted to purchase 2,000 credits in a wind electricity generation project at £7.50 each unit for a total of about £15,000.

Pre-printed on both forms is the name of the 'introducing broker' – Firm T. Mr P says he spoke with a representative of Firm T about Carbon Credits and felt pressured by them to invest.

Options say Mr P also signed a "SIPP Member Instruction and Declaration Alternative Investment' for his Carbon Credit investments. I haven't seen a copy signed by Mr P but the declaration has been present in other similar cases seen by this service. The document has a section entitled 'Background' which says:

"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 were a buyer found.

Expert commentators suggest that the market in trading Carbon Credits may take some time to develop (assuming it does develop) – 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 Carbon Credits within your SIPP that this investment is potentially high risk, long term in nature and illiquid. Therefore we ask you to acknowledge the following:

I confirm that I have considered carefully the information provided by ISP who register and hold the Carbon Credit, and the (sic) have a good understanding of Carbon Credits, VERs and the VCS.”

Mr P would then have been asked to confirm a number of statements, including that:

- Options acted on an Execution Only Basis on his instruction
- Options hadn't provided any advice in respect of the SIPP or the investment
- The investment *'is an Unregulated "Alternative Investment" and as such is considered High Risk and Speculative and that it may prove difficult to value, sell/realise'*
- Mr P had taken his own financial, investment and tax advice
- He understood that investment values may fall as well as rise and that his entire investment may be lost
- He had not received any inducement for transacting the investment
- His normal day to day business was not of trading Carbon Credits
- He indemnified Options *'against any and all claims, demands, actions, suits, losses, costs, charges, expenses, damages, and liabilities whatsoever which Carey Pension Trustees UK Limited and/or Carey Pensions UK LLP may pay, sustain, suffer or incur in connection with any aspect of this investment'*.

The trustees of Mr P's SIPP confirmed they wanted to purchase units from ISP in a 'Buy Order' document that contained the following disclaimer:

'Verified Emission Reductions (VERs) are characterised by the fact that they are subject to fewer regulations, are less liquid, traded on an exchange subject to weak regulation, and are sometimes subject to short sales. The client understands and herewith confirms that VERs are a speculative investment. The client may lose all or substantially all of his investment. He confirms that he understands the speculative character of VERs and confirms that he can afford to be the risks of a speculative, illiquid investment such as a total loss.

Trading decisions in VERs are solely made by the client. The client understands that he buys directly from ISP Securities AG ("ISP"). ISP is not obliged to execute any buy order, ISP cannot guarantee the availability of a market in case of selling the VERs bought from ISP.

ISP cannot be held liable for any loss or gain that a client accrues. The client confirms that he does not buy VERs due to advertising by or initiated by ISP and that he has not relied on any tax, legal or investment advice by ISP.'

Mr P's Carbon Credit investments were bought on 17 July 2012 and 30 October 2012.

Mr P's SIPP then made an investment in gold bullion through Physical Gold Limited in November 2012. The total invested was slightly in excess of £11,000. Mr P had received advice from Firm B before making the investment.

Options has provided a "Physical Gold Member Declaration & Indemnity" document instructing Options to establish an account to enable him to buy gold bullion. We haven't been provided with the second page of the document and the first page is unsigned. This declaration included the following:

- Gold Bullion is considered an 'alternative investment' and may be considered high risk and/or speculative.
- Options act on an execution only basis and hadn't provided Mr P with any advice. Mr P had taken his own advice (including financial, tax and investment advice).
- Neither Mr P, nor any connected person, had received an inducement for this transaction.
- Mr P was not a gold trader personally and his SIPP would only purchase gold that met HMRC requirements.
- It was Mr P's responsibility to ensure the SIPP had sufficient funds to pay the storage costs of the gold bullion.
- Mr P (or his pension fund) would pay any tax charges deemed to apply by HMRC.
- Mr P indemnifies Options against *'any and all liability arising from this investment.'*

Mr P has provided 2013 correspondence from Firm T. In the email, Firm T asked him to send his share certificates in return for a deposit of £129,000 into his SIPP, £29,000 of which would be re-invested elsewhere. This never took place and would appear to have likely been an intended scam.

In June 2015, Options sent Mr P his annual valuation report. The covering letter informed him that:

'we have valued your holding in ISP-VER Carbon Credits at nil for the purposes of your Annual Valuation. This is because we have not been able to obtain a value for this holding. We have contacted a number of carbon credit brokers who have informed us that there is no price available as there is currently no market for carbon credits. We will continue to monitor the situation and will inform you if the condition of the carbon credit market changes.'

And that nil value would have been shown in his annual pension valuations thereafter.

Mr P withdrew a lump sum from his pension in February 2017 of about £7,500 which I understand is likely to have represented the remaining balance of his SIPP at the time – likely after his gold investment was realised. He says he used the money for home repair and to repay debt.

In January 2018, Mr P forwarded Firm T's email from 2013 to Options asking Options to look into the payment. Options initial response was that no such payment had been received. On 23 January 2018, Mr P emailed Options saying: *'Can you inform me what will become of the £29,000 I invested originally please it's a lot of money too (sic) lose!'*

Options replied in an email dated 24 January 2018. The email confirmed Mr P's carbon credits investments were valued at nil and that there was no current market for them. The email went on to say:

'I do see from your records however that you were advised to invest in Carbon Credits by a firm called [firm B]. Following a report published by the Financial Services Compensation Scheme (FSCS), we are aware that [firm B] have been declared in default.

If this is the case, you may be able to make a claim for compensation directly to the Financial Services Compensation Scheme (FSCS) in regards to the financial advice that you may have received from them.'

The email then provided details about the FSCS and how Mr P could contact them.

Mr P's claim to the FSCS

Mr P made a claim to the FSCS in respect of the advice he'd received from Firm B. The FSCS notified him that it would pay £50,000 in respect of this claim in October 2022.

The FSCS reassigned Mr P's rights to make a claim against Options in January 2023.

Mr P's complaint to Options

Mr P complained to Options in a letter dated 19 October 2020. That letter said:

- Mr P had received wholly unsuitable advice from an authorised firm, Firm B. He had made a claim to the FSCS about that advice.
- Mr P's Options SIPP application made it clear that his intention was to invest in Carbon Credits – a non-standard and unregulated investment.
- Options failed to carry out sufficient due diligence on Firm B or to reach the correct conclusions from the information it had obtained. Options ought to have identified that:
 - Firm B introduced a large number of clients who invested in a small number of unregulated investments.
 - There were clear concerns about whether Firm B was providing suitable advice to its clients
 - There was a clear and obvious risk of consumer detriment by continuing to accept referrals from Firm B. So, Options should not have accepted Mr P's SIPP application.
- Any reasonably adequate review would have demonstrated an investment in Carbon Credits as being highly speculative and manifestly unsuitable for any retail client. The reasons being:
 - The investment wasn't regulated so protection (by way of this service or the FSCS) wasn't available if the investment itself failed.
 - The investment didn't fall within the FCA's definition of a Standard Asset and therefore must be considered high risk and specialist.
 - The legal structure and title to the Carbon Credit was unclear which created uncertainty as to its legal status and Options' ability to hold title.
 - It ought to have been clear that the value of the investment, on purchase and

subsequently, would be difficult to assess. And there was no readily available market for the investment.

- There was insufficient information about the provider of the Carbon Credits given the lack of trading record.
- And the investment returns proposed were higher than available under standard investments which ought to have raised concerns that they were unrealistically high.
- While Mr P did sign a disclaimer in respect of his investment it cannot have any legal effect. The SIPP transfer should not have happened and therefore Mr P would not have been asked to sign any disclaimer.
- Options failed to act in accordance with FCA Guidance.

Options responded to the complaint. Options' final response letter, dated 15 December 2020, said Mr P's complaint had been made too late and was time-barred. In summary Options said:

- Mr P's SIPP application form had been received, and his SIPP set up, on 20 June 2012. The pension transfers were received in July and October 2012 and the Carbon Credit investments made shortly after. A final investment in Physical Gold was made on 29 November 2012. All of these dates are more than six years before the letter of complaint.
- Mr P had been sent a notification that his Carbon Credits were valued at nil on 12 October 2015. This was reiterated in his annual valuation sent in June 2016 and thereafter. Mr P did not complain until October 2020 - more than three years later.
- As a result, Options concluded that Mr P's complaint had been made too late for referral to this Service.

The Investigator's conclusions and Options' response

Mr P's complaint was referred to this service on 1 June 2021. An investigator reviewed the complaint and concluded that it had been brought in time for our service to consider. He said:

- The 2015 statement would have prompted Mr P to complain about the advice he had received as it related to the performance of the investment
- He didn't think it would have prompted a complaint about SIPP due diligence conducted by Options

He went on to look into the merits of the complaint and concluded that it should be upheld. In summary, he said:

- He considered the regulator's Principles for Businesses were relevant to the complaint as were specific legal judgments. He also considered regulatory publications as evidence of what he considered to be good industry practice at the time
- He accepted that Options did not provide Mr P with advice. But in treating Mr P fairly and acting with due skill, care and diligence it ought to have thought carefully about accepting business from the Introducer and the Carbon Credit investment.
- He said that Options had carried out limited due diligence on the Carbon Credits Mr P's SIPP bought. In 2010, Options had obtained a third-party report on the investment which concluded that it could be included in a SIPP, was liquid and was unlikely to attract any pension scheme tax charges.

- The then regulator, the Financial Services Authority (FSA), had issued a consumer alert in relation to carbon credit trading in August 2011 – before Mr P’s application had been made.
- In both Options’ own research and the FSA publication, it was noted that there may be issues selling Carbon Credits. It wasn’t clear whether there was a market for the Carbon Credits Mr P bought.
- And given the regulator’s concerns, he thought it would have been reasonable for Options to question how the price of the Carbon Credits had been arrived at to satisfy itself that the pricing was fair.
- The investigator felt that while Options had undertaken some checks, the checks it made didn’t go far enough. And he set out some of the checks he thought Options should have made.
- The investigator said that had they carried out sufficient due diligence, Options would likely have discovered points of concern that could lead to consumer detriment. These included:
 - Whether the investments could be independently valued and what market existed for them
 - That Mr P was unlikely to benefit from regulatory protections in terms of the investments
 - The investments were esoteric and high-risk and might be difficult to sell.
- This should have led them to question Mr P and discovered he was investing almost all of his pension provision.

He concluded that Options should have refused to accept the SIPP application based on Mr P’s proposed investment. Options hadn’t provided any of the due diligence it carried out on Firm B. As Mr P had received advice from a regulated adviser he thought Options may not have had concerns about accepting their instruction but based on the information Options had (and should have obtained) about Carbon Credits they should not have accepted Mr P’s SIPP application.

He then set out how he thought Options should put things right for Mr P.

Options did not initially respond to the investigator despite requesting time to do so and the case was referred for an ombudsman’s decision. Mr P’s representative didn’t substantively reply to the investigator’s opinion either.

Options later sent a lengthy response setting out why it did not agree with the investigator’s assessment. Options remained of the view that Mr P’s complaint was not one our service could consider. It said:

- The complaint hadn’t been brought by an eligible complainant. Mr P had made a claim to the FSCS and his rights to pursue this complaint would have been assigned to the FSCS during the process. Without a re-assignment of those rights Mr P does not have standing to bring the complaint.
- Mr P’s complaint was made outside the six-year time limit which the investigator accepts. He also accepts Mr P would have had cause to complain about the investment performance of his carbon credits investment in 2015.
- And the investigator’s findings are that Options should have considered the possible returns from the Carbon Credits within its due diligence. Mr P therefore had enough information to bring the complaint when he was provided with the valuation report in

2015.

- The test under the DISP rules is when the complainant become or ought reasonably to have become aware they had cause for complaint. The performance of the investment put Mr P on notice of potential issues relevant to the complaint and on a train of enquiry which would have led any reasonable person to consider their position regarding their SIPP provider.
- DISP 2.8.2 is silent on any requirement for a complainant to know who is responsible for their 'cause to complain'.

Options maintained that the complaint had been made out of time. However, it went on to respond to the investigator's position that the complaint should be upheld and said that:

- Options acts on an execution only basis and is member directed. It does not, and is not allowed to, provide advice.
- The investigator failed to say whether the due diligence duty he found existed was one recognised by law, and if so, the legal foundation of the duty. Options' view is that on the facts of Mr P's case such duties would not be recognised by the Courts
- The investigator is imposing obligations on Options that go beyond that which existed at the time, including a duty to reject a general category of investments because of its attributes where the regulator had not prohibited the acceptance of, and investment in, such investments.
- The investigator has considered FCA publications made *after* Mr P's SIPP application form (and investment instructions) were received. And the complaint was therefore being considered with the benefit of hindsight. The guidance did more than simply reflect what the industry was already doing and introduced new expectations.
- Regulatory publications cannot alter the meaning or scope of the obligations imposed by the Principles.
- The 2009 Thematic Review does not (nor does it claim to) provide guidance. Rather it does little more than highlight some examples of good practice. Many of these are directed at advisory firms not those providing execution-only services.
- Options' obligations to investigate or undertake due diligence on the SIPP investment were, in the High Court case of Adams, said to be '*framed by reference to the context of the contractual relationship between the parties.*' These obligations do not extend to Options assessing the underlying investment.
- The investigator was imposing on Options an obligation to undertake a qualitative assessment of the investment and an obligation to pass that assessment and findings to Mr P. That overreaches the actual legal obligations on Options at the time as found in the Adams case and beyond any published regulatory material.
- The conduct that the investigator expected of Options would have required them to provide advice to Mr P even if only at a high level. Options did not have permissions to do so.
- Options could not comment about the reasonableness of the price paid for Carbon Credits or the market for selling them without giving advice.
- There is no prohibition on accepting high-risk investments into a SIPP. A SIPP's purpose is to provide greater investment flexibility and control to members which is often used to gain access to higher-risk investments offering greater returns.
- The regulator did not prohibit investment in Carbon Credits or regulate their sale or marketing. Options would therefore have needed to reject 'blanket' the investment

'for no reason other than members might lose money if they invest it (sic). That is common to any investment.'

- Options updated its member declaration following its due diligence into Carbon Credits. It included that the investment was potentially high-risk, illiquid and that there may not be a ready buyer of the Carbon Credits.
- Mr P signed a member declaration which set out these warnings and elected to proceed with his investment. The wording of that declaration also took into account the FSA's consumer warning.
- Options did not cause Mr P's loss. *'It is very likely that they were extremely keen to proceed with the investment given their desire to make green investments and would have found a way to invest even if Options had not accepted their application.'*

It would be unfair for Options to be held fully liable for Mr P's losses because:

- The contract between them was effective to relieve Options of any liability it might otherwise bear
- Restitution under s27 of the Financial Services & Markets Act 2000 (FSMA) does not apply. The facts relied on in the Adams court case are absent on the facts of this case.
- Mr P must bear a measure of responsibility for his own actions
- The investment did not perform as well as hoped and that is where Mr P's losses flow from
- Mr P chose to invest in a product that Options had told him was high-risk
- There's no evidence to suggest that Mr P would not have gone ahead with the investment via another SIPP provider.

And notwithstanding this, Options made the following points relating to the method the investigator had used to resolve Mr P's complaint.

- The investigator had proposed the use of an index to determine the present value of Mr P's former pensions. That's inconsistent with other decisions issued by this service where the discount rates detailed in the FCA's guidance FG17/9 have been used.
- If the complaint is upheld and the investment cannot be bought by Options, the compensation should be adjusted. Mr P would have a windfall if he had both the compensation and the investment.
- The investigator recommended Options should pay Mr P £500 for his trouble and upset. Options say no evidence has been provided to support this.

Options requested an oral hearing in order to properly determine Mr P's complaint. Options said there were specific issues needing careful exploration.

- Whether this service has jurisdiction to consider Mr P's complaint.
- Mr P's understanding of the investment and of his and Options' respective roles.
- In Adams, the judge was only able to reach a conclusion about the claimant's level of understanding after hearing oral evidence. Mr P ought to have understood a simple statement set out in clear terms that the investment was high-risk.
- Mr P's motivation for entering into the transaction and what he would have done if he'd been given more information.

- Questions need to be asked about whether specific additional information would have deterred Mr P from taking this course of action.
- Whether, in the event an award is made, the award should be reduced to reflect Mr P's involvement in the loss, his risk appetite and investment preferences, the extent to which he would have suffered a loss regardless of any steps Options took and the performance of the investment.

No further submissions were provided by either party.

The complaint was passed to me for my decision. I issued a provisional decision to both parties setting out why I intended to uphold Mr P's complaint and how I thought Options should settle it.

Options did not respond to the provisional decision. Mr P confirmed he had no further comment to make.

What I've decided – and why

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

As neither party made further representations, I'm proceeding with my final decision.

Options' request for an oral hearing

Options didn't respond to my provisional decision in which I set out my answer to Options' request for an oral hearing. So my response hasn't changed. Options say that an oral hearing is necessary to explore Mr P'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 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 Investigators' opinions in which their findings were summarised.

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 P 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 whether Mr P's complaint is one this service is able to consider.

Our jurisdiction to consider Mr P's complaint

I've considered what both parties have said on this issue and having done so have reached the same conclusion as our investigator but for different reasons. I think this is a complaint that we can consider.

Our rules say we can only consider complaints referred to us, unless exceptional circumstances apply, within six years of the event being complained about. Or, if this gives the consumer more time, within three years of them becoming aware (or when they ought reasonably to have become aware) of cause for complaint. The complaint must also be referred to this service within six months of the respondent's final response letter.

Mr P's complaint is about the due diligence Options carried out on both the introducer to his SIPP and the investments subsequently purchased within it. Mr P's SIPP was opened in 2012 and all the investments were bought in that same year. Mr P's complaint to Options was made in 2020, more than six years later.

But Mr P's complaint would still be in time for this service to consider if it had been made within the three-year time limit. Evidence provided to us suggests that Mr P only became aware that there may have been a problem with his pension in January 2018 and at that point his initial concern related to the follow-on transactions proposed by Firm T in 2013, not to the specific concerns he's since raised about Options' acceptance, in 2012, of his SIPP and its investments and the due diligence it undertook.

However, based on the documentation provided, I think Mr P ought to have realised there may be a problem earlier. Options wrote to Mr P in 2015 to let him know that his Carbon Credit investments, which made up the largest part of his pension, were worthless. But that doesn't mean Mr P will have known, or ought reasonably to have known, that he had cause for complaint against Options.

I think a reasonable person, in 2015, might first have looked to the advice they'd received to take out the SIPP and the underlying investments which had apparently resulted in

significant financial losses. And Mr P did go on to make a claim to the FSCS about the advice he'd received, from Firm B, as Options had indicated he could do in 2018.

I am mindful though that, as a layman, in 2015 or indeed in January 2018, Mr P is unlikely to have realised that Options might have been responsible for his losses or that they owed to him the responsibilities he's complaining about now. This was before the decision in *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878 ('BBSAL').

At the end of 2018 however, the BBSAL case was decided and the position regarding SIPP operators' responsibilities was clarified. Following that decision, there was publicity surrounding the Court's findings that SIPP operators, in certain circumstances, may be liable for past failures to act in the best interests of their customers when conducting due diligence on pension transfers and investments.

And given the Carbon Credits value hadn't recovered at all in the meantime and Mr P had withdrawn the remaining value from his pension, I think, acting reasonably, Mr P would, either by his own research or through engaging a professional representative, have been able to learn the possibility of pursuing a due diligence complaint against Options.

His complaint was made to Options in October 2020, within three years of the start of 2019, when Mr P could reasonably have learnt from the publicity surrounding BBSAL that he may have cause for complaint against it. And as such, the complaint was made in time for our service to consider.

Finally, and for completeness, Mr P referred his complaint to the Financial Ombudsman Service on 1 June 2021 within six months of Options' final response letter dated 15 December 2020. So, I've decided that it was brought in time.

Merits of the complaint

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

While I've considered all the points made by the parties, I have not responded to them all below, as that's not necessary for me to reach a decision on this complaint. But I have concentrated on what I consider to be the main issues.

When considering what's fair and reasonable in the circumstances, I need to take account of relevant law and regulations, Regulators' rules, guidance and standards, codes of practice and, where appropriate, what I consider to have been good industry practice at the relevant time.

In Mr P's complaint, what I'll be looking at is whether Options took reasonable care, acted with due diligence and treated Mr P 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 P'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 P's SIPP application in the first place based on his intention to invest in Carbon Credits.

Mr P has said, as part of his complaint, that Options knew that he had been advised and introduced to it by a regulated firm and Options had failed to carry out sufficient due diligence on that Introducer.

I have considered this argument, and the evidence presented. In this case Mr P received advice from Firm B but says that it was Firm T (an unregulated business) who persuaded him to invest in Carbon Credits. And while Firm B is noted as Mr P's financial adviser on his SIPP application form, it is Firm T who is named as the broker for Mr P's Carbon Credit investments. Options had that information in 2012 before the Carbon Credits investments went ahead and could have sought clarification at the time.

However, I haven't reached any findings on this issue as I consider it unnecessary to decide the complaint. As I go on to explain below, I don't think that Mr P's application to open a SIPP for investment in Carbon Credits ought to have been accepted by Options at all. And that's because the type of investment he was due to make should have given Options cause for concern in the first place.

Relevant considerations

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 P'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 P'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 P'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 P under COBS 2.1.1R in light of the specific facts of Mr P'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 P'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 P 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 P 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 P's case.

The regulatory publications

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

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

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

The 2009 Thematic Review Report

The 2009 report included the following statement:

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

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

...

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

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

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

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

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 P'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 P'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 P. It’s accepted Options wasn’t required to give advice to Mr P, 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 P’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 P’s SIPP application with the intention of making an investment in Carbon Credits, 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 P'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 P's application.

The contract between Options and Mr P

Options has said that it provides execution only (i.e. non-advised) SIPP administration services. It said this was clearly set out to Mr P in its product documentation. To be clear, I don't say Options should (or could) have given advice to Mr P or otherwise have ensured the suitability of the investment for him. I accept that Options made it clear to Mr P 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 P 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 P'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 P 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.

What did Options' obligations mean in practice?

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 Regulators' 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 P'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.

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

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 Regulators' publications as set out earlier in this decision. It's also consistent with HMRC rules that govern what investments can be held in a SIPP.

I also think Options understood this to some extent, as Options told us it carried out an internal investment review and due diligence on Carbon Credits and concluded it was a suitable investment to be held within a UK pension scheme. However, in Mr P's case 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 (sic) 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 Financial Services Authority - the FSA, (the then Regulator) 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 P 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 P 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 SIPP^s *at all*, bearing in mind what it should have ascertained about the investment if it had carried out appropriate due diligence checks.

It's also 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.

Overall, I'm not satisfied that Options undertook sufficient due diligence on the Carbon Credits investment before it decided to accept it into its SIPP. So my provisional finding is that Options didn't meet its regulatory obligations and didn't act fairly and reasonably in its dealings with Mr P, by not performing sufficient due diligence checks on the Carbon Credits investment before deciding to accept it into Mr P's SIPP.

In August 2011, i.e. before Mr P made his investment, and likely after Options had approved the Carbon Credits investment as an appropriate investment for its SIPP^s, the FSA 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 (OTC) 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.

Options may say that Mr P had sought advice from a suitably qualified and authorised adviser. 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. 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 SIPP^s. 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 at which these were sold to Mr P. I also note that despite Mr P subscribing for Carbon Credits in two different projects at separate times the cost of each unit was the same. These were things Options could have and should have investigated further.

Assuming that Mr P would hold valid units or credits, there doesn't appear to be any measure of the quality of the credits in question. In other words, were the units or credits being 'generated' valid?

Whilst the buy orders issued by ISP stated the units as VCS, I haven't seen any independent verification that the units met the Verified Carbon Standard ('VCS') standard. So, at the time, there was a risk this validation wouldn't be achieved.

I also haven't seen evidence of a registration of the projects with the United Nations Framework Convention on Climate Change ('UNFCCC') at the times Mr P invested. The lack of that registration could suggest that the relevant standard hasn't been met.

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

And, as I've said above, 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 P to sign.

So, at the time of Mr P's investment there was little confirmation that Mr P'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 P 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.

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.

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 P'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 P'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.

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

It could be that the investment Mr P made was, and is, legitimate. And I 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. So, although they technically worked as claimed, the reality was very different.

The FSA warning was published before Mr P'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 P might have struggled to realise the investment should've caused it significant concern – especially considering that the majority of Mr P's funds in the SIPP were invested in Carbon Credits.

At the point Mr P's investments were 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 P's pension savings because he may have had other arrangements elsewhere. But it was an indicator of the kind of risk to which Mr P 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 P 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 P. I accept Options had no obligation to give advice to Mr P, 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 P'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 P 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 P'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 P fairly, by accepting the Carbon Credits investment in his SIPP.

Did Options act fairly and reasonably in proceeding with Mr P's instructions?

The indemnity

In my view, for the reasons given, Options should've refused to allow Mr P'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 P 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 P 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 P 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 P'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 P compensation in the circumstances?

The involvement of other parties

In this decision I'm considering Mr P's complaint about Options. However, I accept that it's likely other parties were involved in the transaction complained about.

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 P fairly, and the starting point, therefore, is that it would be fair to require Options to pay Mr P 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 P 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 P'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 P 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 P.

Mr P taking responsibility for his own investment decisions

Options has said that Mr P 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 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 P's actions mean he should bear the loss arising as a result of Options' failings.

Mr P 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 P's investment in Carbon Credits wouldn't have been made in the first place.

I've carefully considered what Options has said about Mr P being made aware that the investment was high-risk. But I'm not satisfied that Mr P understood the risks of the Carbon Credits investment.

But even if Mr P *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.

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 P for the loss he's suffered. I don't think it would be fair to say in the circumstances that Mr P should suffer the loss because he ultimately instructed the transaction.

Had Options declined to accept Mr P's investment in Carbon Credits, would the transaction complained about still have gone ahead elsewhere?

Options has said that if it had refused to permit the investment in Carbon Credits, the investment would still have proceeded with a different SIPP provider. But I don't think it's fair and reasonable to say that Options shouldn't compensate Mr P 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 P'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."

But, in this case, I'm not satisfied that Mr P 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 any cash incentive.

There is nothing to show Mr P genuinely understood the risks involved and I've not seen any evidence he was paid a cash incentive. Mr P cannot be said to have been incentivised to enter into the transaction. He says he was just advised of better returns and he transferred his entire pension provision into the SIPP.

On balance, I'm satisfied that Mr P, 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 P's application to invest in Carbon Credits, the transactions this complaint concerns wouldn't still have gone ahead.

And to be clear, I accept in this case Mr P was, later in 2012, advised to invest in gold bullion and went on to do so within his Options SIPP. Mr P hasn't specifically complained about this investment and I make no finding on the suitability or otherwise of this investment for Mr P and his SIPP. It is sufficient to say that had Options declined to accept Mr P's SIPP application the gold bullion investment (along with the Carbon Credits) would not have gone ahead.

So, overall, I do think it's fair and reasonable to direct Options to pay Mr P compensation in the circumstances. While I accept that other parties might have some responsibility for initiating the course of action that's led to Mr P'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 P'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 P. 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 P for the full amount of his loss. But for Options' failings, I'm satisfied that the transactions 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 P'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 P 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 P to the full extent of the financial losses he's suffered due to its failings, and notwithstanding any failings by another third party.

In conclusion

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 P'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 P'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 P 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

I consider that Options failed to comply with its own regulatory obligations and didn't put a stop to the transactions that are the subject of this complaint. My aim in awarding fair compensation is to put Mr P back into the position he would likely have been in had it not been for Options' failings.

Had Options not accepted Mr P's application, I think his pensions would have remained with his previous providers and he wouldn't have opened the Options SIPP or invested in Carbon Credits and gold bullion. However, I cannot be certain that values will be obtainable for what the previous policies would have been worth.

I acknowledge that Mr P withdrew the remaining value of his SIPP in 2017. It is not clear whether Mr P retains a SIPP with Options as a result of his Carbon Credits holdings. If Mr P has been able to close his SIPP with Options, then the provisions I've set out below relating to acquiring illiquid investments and waiving SIPP fees may no longer be relevant.

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

However, I do think it's fair and reasonable for some allowance to be made for the sum(s) Mr P actually received from the FSCS and has had the use of for a period of the time covered by the calculation.

If Options wishes to make such an allowance, it must first calculate the proportion of the total FSCS payment Mr P received that it's fair and reasonable to apportion to each individual transfer into the SIPP – this *must* be proportionate to the value of the actual sums transferred in. The total FSCS payment allowed for *must* be no more than the total FSCS payment made to Mr P or for his benefit. Having done this, Options can then make the allowance by following the steps set out in the sections below.

What must Options do?

In summary, Options should:

- Obtain the actual transfer value of Mr P's Options pension (if it remains open) including any outstanding charges as of the date of my final decision.
- If the Options SIPP remains open, pay a commercial value to buy any illiquid investments (or treat them as having a zero value).
- Undertake a loss calculation and pay any redress owing in line with the steps set out below. This payment should take account of any available tax relief and the effect of charges. Options should add interest to this payment if it is not made within 28 days of the acceptance of my final decision.
- If the Options SIPP needs to be kept open only because of illiquid investment/s and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.
- If Mr P has paid any fees or charges to Options from funds outside of his pension arrangements, Options should also refund these to him. Interest at a rate of 8% simple per year from the date of payment to the date of refund should be added to this.
- Pay Mr P £500 to compensate him for the distress and inconvenience he's been caused by Options' failings.

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

Treatment of any illiquid assets held within the SIPP

I think it would be best if any illiquid assets held could be removed from the SIPP. Mr P would then be able to close the SIPP, if he wishes. That would then allow him to stop paying the fees for the SIPP. The valuation of any illiquid investment may prove difficult, as there is no market for it. For calculating compensation, Options should establish an amount it's willing to accept for the investment/s as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investment/s.

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

If Options is unable, or if there are any difficulties in buying Mr P's illiquid investment, it should give the holding a nil value for the purposes of calculating compensation. In this instance Options may ask Mr P to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the relevant holding. That undertaking should allow for the effect of any tax and charges on the amount Mr P may receive from the investment and any eventual sums he would be able to access from the SIPP. Options will

have to meet the cost of drawing up any such undertaking and the reasonable cost of Mr P taking advice in relation to it. The undertaking should also only take effect once Mr P has been compensated in full, to include receipt of any loss that may be above our award limit.

Calculate the loss Mr P has suffered as a result of making the transfer in relation to monies originating from defined contribution schemes

Options should first contact the provider of the plans which were transferred into the SIPP and ask it to provide a notional value for the policies 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 plans, and the monies would have remained invested in an identical manner to that which existed prior to the actual transfer.

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, this was called 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.

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

Any withdrawal out of the SIPP should be deducted at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. 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 it wishes, Options *may* make an allowance in the form of a notional withdrawal (deduction) equivalent to that proportion of the payment(s) Mr P received from the FSCS following the claim about Firm B, that it's fair and reasonable to apportion to monies transferred in from the defined contribution schemes in accordance with what's stated earlier in this decision, and on the date the payment(s) was actually paid to Mr P or to third parties for his benefit. Where such a deduction is made there must also be a corresponding notional contribution (addition), at the date of my final decision equivalent to the total relevant notional withdrawal(s) accounted for in this part of the calculation.

To do this, Options should ask the operator of Mr P's previous defined contribution pension plans to allow for the relevant notional withdrawal(s) in the manner specified above. Options must also then allow for a corresponding notional contribution (addition) as at the date of my final decision, equivalent to the accumulated FSCS payment(s) notionally deducted by the operators of Mr P's previous defined contribution pension plans.

Where there are any difficulties in obtaining notional valuations from the previous operators, Options can instead allow for both the notional withdrawal(s) and contribution(s) in the notional calculation it performs, provided it does so in accordance with the approach set out above.

Mr P's loss, if any, is the total notional value of the previous plans' transfer values (or, if required, as established in line with the index set out above) less the current value of his SIPP (also as at the date of my final decision).

Compensation should be paid as calculated above promptly. If Options does not pay the compensation within 28 days of being notified of Mr P's acceptance of my final decision,

Options is to pay 8% simple interest per year on the compensation from the date of my final decision until the date of payment.

Pay an amount into Mr P's pension so that the transfer value is increased by the loss calculated above

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

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr P as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mr P won't be able to reclaim any of the reduction after compensation is paid.

Under current legislation, Mr P will be entitled to a tax-free lump sum of 25% of the value of his pension with the remainder being taxed as income. This means of any loss calculated, 25% would be tax-free and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So, making a notional reduction of 15% overall from the loss adequately reflects this.

Options should also provide details of all of its calculations to Mr P in a form that should be understandable to him.

SIPP fees

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

Fees and charges paid outside the SIPP

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

I will also add here that income tax may be payable on any interest paid pursuant to this award. If Options deducts income tax from the interest, it should tell Mr P how much has been taken off. Options should give Mr P a tax deduction certificate for any interest if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

Pay Mr P £500 for the distress and inconvenience caused by Options' failure to act fairly and reasonably

Mr P transferred his existing pension(s) to a SIPP and has suffered the loss of use of the majority of those funds since. Mr P has demonstrated that he has experienced serious financial difficulty in recent years, so I think it's fair to say the loss of use of his pension fund would have caused Mr P distress and inconvenience particularly at a time he may have been thinking about the possibility of retirement.

I consider that a payment of £500 is appropriate to compensate for that upset.

Assignment of rights

If Options believes other parties to be wholly or partly responsible for the loss, it is free to pursue those other parties. So, if Mr P's loss does not exceed £160,000, or if Options accepts my recommendation below that it should pay the full loss as calculated above, the compensation payable to Mr P may be contingent on the assignment by him to Options of any rights of action he may have against other parties in relation to his transfer to the SIPP and the investment if Options is to request this. Options should cover the reasonable cost of drawing up, and Mr P's taking advice on and approving, any assignment required.

If the loss exceeds £160,000 and Options does not accept my recommendation to pay the full amount, any assignment of Mr P's rights should allow him to retain all rights to the difference between £160,000 and the full loss as calculated above.

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

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

Determination and money award: I uphold this complaint. I think that fair compensation should be calculated as shown above. It's my final decision that I require Options UK Personal Pensions LLP to pay Mr P the amount produced by that calculation – up to a maximum of £160,000 (including the £500 to compensate for the distress and inconvenience Options' actions caused) plus any interest and costs.

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

My recommendation is not binding on Options. Options doesn't have to do what I recommend. It's unlikely that Mr P can accept my final decision and go to court to ask for the balance after the award has been paid. Mr P may want to consider getting independent legal advice before deciding whether to accept this final decision.

My jurisdiction decision

My decision is that Mr P's complaint has been made in time and is one this service can consider.

My final decision

My final decision is that I uphold this complaint. I require that Options UK Personal Pensions LLP must calculate and pay the award, and take the actions, set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 29 August 2024.

Claire Poyntz
Ombudsman