DRN-5033911

The complaint

Mr F and Ms F – husband and daughter of the late Mrs F, complain that Options UK Personal Pensions LLP ("Options"), formerly Carey Pensions UK LLP ("Carey") didn't undertake sufficient due diligence on the Carbon Credits investment the late Mrs F made through her Options self-invested personal pension ("SIPP"), or on the unregulated firm who introduced her application to it.

Mr F and Ms F are the beneficiaries of the late Mrs F's SIPP.

What happened – the parties

I will first set out my understanding of the various parties involved, their roles, and a brief overview of the investment in this complaint.

Options

Options is a SIPP provider and administrator, regulated by the Financial Conduct Authority ("FCA"). Options is authorised, in relation to SIPPs, to arrange (bring about) deals in investments, deal in investments as principal, establish, operate or wind up a pension scheme and make arrangements with a view to transactions in investments. Carey was not, and Options is not, authorised to advise on investments.

Whilst Mrs F's dealings were with Carey, I'll refer to Options throughout this decision for simplicity.

ISP Group Global Financial Services ("ISP")

ISP is a firm based in Switzerland which, at the time of the events in this complaint, I understand was regulated by the Swiss Financial Market Supervisory Authority (FINMA) and the Israeli Securities Authority (ISA).

ISP provided an investment platform where Carbon Credits could be held and potentially traded. Mrs F purchased Carbon Credits from ISP using funds from her SIPP.

Carbon Credits

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

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

Mrs F purchased approximately 4,000 Carbon Credit units in a wind power project based in India.

Rockstar Investments HK ("RI")

As I understand it, RI was a firm based in Hong Kong. It was not authorised by the FCA, or its predecessor, the Financial Services Authority ("FSA"). Options says RI introduced Mrs F's SIPP application to it.

Reignite Now ("RN")

RN wasn't authorised by the FCA or FSA. I understand RN had some involvement in marketing the Carbon Credits investment to Mrs F.

Options' due diligence on the introducers and investment

Options didn't respond to requests from this service to provide details of the due diligence it carried out on Mrs F's Carbon Credits investment, or on the firms that were involved in introducing her application to it.

However, as I understand it, Options did carry out some checks on Mrs F's Carbon Credits investment to the extent it considered it to be an alternative investment, requiring Mrs F to sign its alternative investment member declaration form for investments into Carbon Credits. I will refer to this declaration in more detail below.

It is also my understanding, from what Options has told us, that it carried out some checks on RI, which included completing an introducer profile and introducer agreement.

What happened – the late Mrs F's dealings with Options

Mr F and Ms F told us that the late Mrs F received advice from RI to transfer her existing personal pensions to a SIPP with Options and to purchase Carbon Credits. Mrs F signed a letter of authority, which authorised Options to share information with RI.

Mrs F signed Options' SIPP application form, which confirmed she was employed, earning an annual income of approximately £12,000 and that she planned to retire at age 65. The form noted Mrs F's intention to transfer her existing pension schemes to the SIPP and to invest 100% of her pension fund with ISP. The form asked if advice had been taken on transferring the existing schemes. No answer was provided. A box was selected to waive Mrs F's cancellation rights.

The final page of the application form – headed "*12. Declaration*" included, amongst other statements, the following:

> *"I agree to indemnify* [Options] *… against any claim in respect of any decision made by myself and/or my Financial Adviser/Investment Manager or any other professional adviser I choose to appoint from time to time …*
>
> *"I understand that* [Options] *… are not in anyway* [sic] *able to provide me with any advice".*

Mrs F signed Options' alternative investment member declaration and indemnity form on 16 October 2012. The investment name was recorded as "*ISP – VER CARBON CREDITS"* and the investment type was recorded as "*VER CARBON CREDITS"*.

The member declaration included a background statement, which said:

> "*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…"

The form proceeded to ask Mrs F to confirm her understanding that:

- Options was acting on an execution only basis and hadn't provided Mrs F with any advice.
- The investment was an unregulated "*Alternative Investment"* and was therefore considered high risk and speculative, which may prove difficult to sell.
- She had taken her own advice including financial, investment, and tax advice regarding the investment.
- The entire amount invested may be lost.

The declaration also included an agreement by Mrs F to indemnify Options against any claims etc in connection with the investment.

Mrs F was not asked to state or otherwise indicate or provide evidence to show that she was a high-net-worth individual or sophisticated investor in the declaration, or in her SIPP application, or otherwise.

A purchase instruction for the Carbon Credits investment was completed and signed by Mrs F on 1 November 2012. This confirmed her instruction to purchase approximately 4,000 credits for a unit price of £7.45 per credit, amounting to a total investment of approximately £30,000. This form recorded RN as the introducing broker, although it's clear from other documentation, including emails between RI and Options, that RI remained very much involved in Mrs F's application.

Mrs F's application was accepted by Options and her SIPP was established on 8 November 2012. A short time later, Mrs F's existing personal pension schemes were transferred into her SIPP amounting to a combined transfer value of approximately £34,000.

Funds from Mrs F's SIPP were invested into Carbon Credits on 23 November 2012. A document dated 29 November 2012 on ISP headed paper confirmed the details of the investment, including a commission payment to ISP of approximately £200.

In October 2015, Options wrote to Mrs F to explain it was unable to obtain an up-to-date market valuation for her Carbon Credits investment and that there was currently no market for selling Carbon Credits. In light of this, Options explained it had valued the Carbon Credits at £nil within Mrs F's SIPP.

Mrs F sadly passed away in late 2016 and Options arranged the distribution of death benefits from her SIPP. Options initially intended to pay death benefits to Mr F and Ms F in equal shares in line with Mrs F's expression of wish nomination, but Mr F later instructed Options to pay the entirety of the death benefits to Ms F. I understand approximately £1,400 was paid to Ms F in July 2018.

As the Carbon Credits investment was illiquid, Options arranged to assign it to Ms F. As a result of some administrative challenges, I understand Options ultimately arranged to set up a bare trust holding the asset for the benefit of Ms F, in order to complete the distribution of benefits and close the SIPP within the prescribed two-year window to avoid a tax liability.

Mr F and Ms F's complaint

Mr F and Ms F as beneficiaries of the late Mrs F's SIPP, complained to Options in March 2018. In summary, the letter of complaint said Options had failed to meet its obligations to carry out due diligence on the introducer or investment. Amongst other points, the letter said:

- Mrs F was advised by an unregulated introducer to invest in an unsuitable unregulated investment.
- Mrs F was not an experienced investor and wasn't willing to take risks with her investments.
- The risks had not been disclosed to Mrs F.
- Options failed to identify the involvement of an unregulated introducer.
- Options failed to meet its obligation to identify anomalous investments.

Options responded to the complaint with its final response in May 2018 rejecting the complaint. In summary, it said:

- Mrs F was classified as a direct client of Options.
- Options provided execution only SIPP administration services, which was explained to Mrs F within the documentation she received when the SIPP was established.
- Options was not permitted to provide advice to Mrs F, or comment on the suitability of a SIPP, the underlying investment, or introducer.
- Options followed its processes and acted properly in accepting the introduction from RI. Options is permitted to accept introductions from unregulated introducers and had no reason to believe it shouldn't accept introductions from RI.
- Mrs F signed Options' member declaration to confirm she understood the risks associated with her investment choice, which Options had no responsibility for.
- Options took action to ensure the investment was suitable to be held in a SIPP.
- Mrs F didn't indicate in any of the documentation she completed that she had received advice from RI. Options cannot be held responsible for Mrs F's decision to sign documentation she knew to be inaccurate or failed to understand.

- Mrs F was given numerous risk warnings.
- The performance of the investment was out of Options' control.

Unhappy with Options' response, Mr F and Ms F referred the complaint to the Financial Ombudsman Service. It was noted that of approximately £34,000 transferred to the SIPP, around £30,000 had been invested into Carbon Credits, with the value of the investment written down to £nil in 2015, leaving Mrs F without a pension for her retirement, or support for her family when she passed away.

Our Investigator's view

One of our Investigators considered the complaint. They thought the complaint should be upheld. They thought Options had failed to carry out sufficient due diligence on the Carbon Credits investment to meet its regulatory obligations, and Options ought to have found out more about Mrs F's circumstances. Had it done so, our Investigator thought Options ought to have refused to accept Mrs F's application, and the investment and subsequent loss would not have come about. So, it was fair and reasonable for Options to compensate for the losses that had been caused. The Investigator thought it was unnecessary to go on to consider the due diligence carried out by Options on the introducer.

Our Investigator then set out how this redress calculation should be carried out, and said they thought Options should pay an additional £500 compensation.

Neither party provided any additional comments or evidence in response to the Investigator's view. As no agreement could be reached, the complaint was passed to an Ombudsman to decide.

The provisional decision

An Ombudsman colleague issued a provisional decision on this complaint, inviting the parties to respond with any final comments and to provide any further evidence before a final decision was reached. That colleague has now left the Financial Ombudsman Service and the complaint has been passed to me to make a final decision.

Options didn't respond to the provisional decision. Mr F and Ms F accepted the decision and confirmed they had nothing further to add.

Having reviewed the case afresh and noting that neither party made any further submissions in response to the provisional decision, I have decided I agree with, and have not been persuaded to depart from, my colleague's provisional findings. I've therefore repeated those findings below, as my final decision and have not included any further detail of them in this background summary.

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.

Where the evidence is incomplete, inconclusive, or contradictory, I've reached my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence, what I've seen on similar cases and the wider surrounding circumstances. In reaching my decision I've carefully reviewed all points raised by Mr F, Ms F and Options, but will limit my reasoning to what I consider to be the key issues.

As noted above, we haven't received any further submissions from either party in response to the provisional decision, and I agree with my Ombudsman colleague's findings, as set out in that decision. So, I have repeated those findings below, with a few minor changes, as my final decision.

Relevant considerations

I'm required to determine this complaint by reference to what I consider to be fair and reasonable in all the circumstances of the case. When considering what is fair and reasonable, I'm required to take into account: relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time.

In light of Mr F and Ms F's complaint, what I'll be looking at here is whether Options took reasonable care, acted with due diligence and treated the late Mrs F fairly, in accordance with her best interests, and what I think is fair and reasonable in light of that. And I think the key issues in Mr F and Ms F'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 the late Mrs F's SIPP application in the first place.

Mr F and Ms F have said, as part of the complaint, that Options knew that the late Mrs F had been advised and introduced to it by a firm (RI) which was not authorised or regulated by the FCA, and Options failed to carry out sufficient due diligence on it.

I have considered this argument, and Options' position that it acted appropriately in accepting the introduction from the unregulated introducer, and that it had treated Mrs F as a direct client. But ultimately, I haven't reached any findings on this point, as I consider this unnecessary. As I go on to explain below, I don't think that Mrs F's application to open a SIPP for investment in Carbon Credits ought to have been accepted by Options at all.

That's because I'm satisfied the transfer of Mrs F's existing pensions to a SIPP was arranged for the purpose of investing in Carbon Credits. I say this because documentation provided at the time of Mrs F's SIPP application stated that she intended to invest in Carbon Credits. So, from the outset of Mrs F's relationship with Options, it was aware that it was her intention to invest her pension funds in Carbon Credits.

Accordingly, I don't think it's necessary to consider what due diligence checks Options ought to have carried out on RI, and what it ought to have determined from those checks had it carried them out in detail. That's because I think Options failed to comply with its regulatory obligations and good industry practice at the relevant time when it accepted Mrs F's application to invest in Carbon Credits through her SIPP. And I'm satisfied it ought to have declined to accept Mrs F's application to make the investment in the first place.

Based on what I've seen, Mrs F's application to take out the SIPP was to make the Carbon Credits investment. And, for reasons I'll come on to below, if that investment and instruction had been declined, it's my view that her application to open the SIPP and move her existing pensions to it wouldn't have gone ahead. Her SIPP therefore wouldn't have been opened and her pensions would have stayed where they were.

So, I've not gone on to consider the due diligence Options may have carried out on RI and whether this was sufficient to meet its regulatory obligations, in any more detail.

I'll start by setting out what I have identified as the relevant considerations to deciding what is fair and reasonable in this complaint.

The Principles for Businesses ("the Principles")

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

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

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

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

The Adams court cases and COBS 2.1.1R

On 18 May 2020, the High Court handed down its judgment in the case of *Adams v Options SIPP* [2020] EWHC 1229 (Ch). Mr Adams subsequently appealed the decision of the High Court and, on 1 April 2021, the Court of Appeal handed down its judgment in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474. I've taken account of both these judgments and the judgment in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 1188 when making this decision. I note the Supreme Court refused Options permission to appeal the Court of Appeal judgment.

I've considered whether *Adams* means that the Principles should not be taken into account in deciding this case. I note that the Principles for Businesses didn't form part of Mr Adams' pleadings in his initial case against Options SIPP. And HHJ Dight didn't 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 don't say this means *Adams* isn't a relevant consideration at all. As noted above, I've taken account of the *Adams* judgments when making this decision.

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.

Although the Court of Appeal ultimately overturned HHJ Dight's judgment, it rejected that part of Mr Adams' appeal that related to HHJ Dight's dismissal of the COBS claim on the basis that Mr Adams was seeking to advance a case that was radically different to that found in his initial pleadings. The Court found that this part of Mr Adams' appeal 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 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 para 148:

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

The facts in this case are different from those in Adams. There are also differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Mr F and Ms F's complaint. The breaches were summarised in paragraph 120 of the Court of Appeal judgment. In particular, HHJ Dight considered the contractual relationship between the parties in the context of Mr Adams' pleaded breaches of COBS 2.1.1R that happened *after* the contract was entered into. And he wasn't asked to consider the question of due diligence before Options agreed to accept the investment into its SIPP.

In Mr F and Ms F's complaint, amongst other things, I am considering whether Options ought to have identified that the investment in Carbon Credits involved a significant risk of consumer detriment and, if so, whether it ought to have declined to accept such investments within its members' SIPPs prior to receiving Mrs F's application. I also want to emphasise that I don't say that Options was under any obligation to advise Mrs F 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 Mrs F on the merits of the SIPP and/or the underlying investments.

As already mentioned, 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; regulator's rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. This is a clear and relevant point of difference between this complaint and the judgments in both Adams cases. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

Overall, I'm 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 this case.

Regulatory publications

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

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

I've considered the relevance of these publications. And whilst I've only set out material parts of the publications below, I have 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 customers and treat them fairly') insofar as they are obliged to ensure the fair treatment of their customers. COBS 3.2.3(2) states that a member of a pension scheme is a 'client' for COBS purposes, and 'Customer' in terms of Principle 6 includes clients.

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

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

> *"This guide, originally published in September 2009, has been updated to give firms further guidance to help meet the regulatory requirements. These are not new or amended requirements, but a reminder of regulatory responsibilities that became a requirement in April 2007.*
>
> *All firms, regardless of whether they do or do not provide advice must meet Principle 6 and treat customers fairly. COBS 3.2.3(2) is clear that a member of a pension scheme is a "client" for SIPP operators and so is a customer under Principle 6. It is a SIPP operator's responsibility to assess its business with reference to our six TCF consumer outcomes: …"*

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.
- Ensuring that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc).

I acknowledge that the 2009 and 2012 reports and the "Dear CEO" letter are not formal "guidance" (whereas the 2013 finalised guidance is). However, the fact that the reports and "Dear CEO" letter did not constitute formal guidance does not mean their importance should be underestimated. They provide a reminder that the Principles apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications, which set out the regulator's expectations of what SIPP operators should be doing, also goes some way to indicate what I consider amounts to good industry practice and I am, therefore, satisfied it is appropriate to take them into account.

It is 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'm satisfied it's relevant and therefore appropriate to take it into account.

In Options' submissions on other cases with our Service involving SIPP provider 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 2009 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 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 therefore remain satisfied it's appropriate to take them into account too.

I appreciate that some of the publications I've listed above were published after Mrs F's SIPP application and investment in Carbon Credits. But like the Ombudsman in the BBSAL case, I do not think the fact that some of the publications post-date the events that took place in relation to this 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 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 regulator's comments suggest some industry participants' understanding of how the good practice standards shaped what was expected of SIPP operators changed over time, it is clear the standards themselves had not changed.

I note that HHJ Dight in the Adams case didn't consider the 2012 thematic review, 2013 SIPP operator guidance and 2014 "Dear CEO" letter to be of relevance to his consideration of Mr Adams' claim. But it does not follow that those publications are irrelevant to my consideration of what is fair and reasonable in the circumstances of this complaint. I am required to take into account good industry practice at the relevant time. And, as mentioned, the publications indicate what I consider amounts to good industry practice at the relevant

time.

That doesn't mean that, in considering what is fair and reasonable, I will only consider Options' actions with these documents in mind. The reports, Dear CEO letter and guidance gave non-exhaustive examples of good industry practice. They 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 do not say the Principles or the publications obliged Options to ensure the transactions were suitable for Mrs F. It is accepted Options was not required to give advice to Mrs F, and could not give advice. And I accept the publications do not alter the meaning of, or the scope of, the Principles. But, as I've said above, they're 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 so, it's fair and reasonable for me to take them into account when deciding this complaint. 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 Mrs F's 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 Mrs F's application to establish a SIPP and to invest 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 have done to comply with its regulatory obligations and duties.

Submissions have been made on similar cases 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 am dealing with a complaint, not a cause of action, and what I am seeking to identify here is what is relevant to my consideration of what is fair and reasonable in the circumstances of this case. And I'm satisfied that the FCA's Principles are a relevant consideration that I must take into account when deciding this complaint.

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 into the Carbon Credits investment before deciding to accept Mrs F's application to open a SIPP and invest in Carbon Credits.

I've looked at whether Options took reasonable care, acted with due diligence and treated Mrs F fairly, in accordance with her best interests. And what I think is fair and reasonable in light of that. I think the key issue is whether it was fair and reasonable for Options to have accepted Mrs F's SIPP application in the first place. So, I need to consider whether Options carried out appropriate due diligence checks before deciding to accept Mrs F's application.

I've considered 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 Mrs F's application.

The contract between Options and Mrs F

Options has said that it provides execution only (i.e. non-advised) SIPP administration services. It said this was clearly set out to Mrs F in its product documentation. To be clear, I don't say Options should (or could) have given advice to Mrs F, or otherwise have ensured the suitability of the investment for her. I accept that Options made it clear to Mrs F that it wasn't giving, nor was it able to give, advice and that it played an execution-only role in her SIPP investments. And that the forms Mrs F signed confirmed, amongst other things, that losses arising as a result of Options acting on her instructions were her 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 this complaint 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 Mrs F on the suitability of the investment in Carbon Credits that she made. But I don't agree that Options 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 the operation of its SIPPs business, Options had to decide whether to accept or reject particular investments with the Principles in mind.

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

I think that it's fair and reasonable to expect Options to have looked carefully at the Carbon Credits investment *before* accepting Mrs F'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 Regulator's publications as set out earlier in this decision. It's also consistent with HMRC rules that govern what investments can be held in a SIPP.

Whilst limited information has been provided, I think Options did understand its obligation to carry out due diligence on the Carbon Credits investment to some extent as it required Mrs F to agree to and sign its alternative investment member declaration. So, it's clear Options considered the Carbon Credits investment to be an unregulated, non-standard investment that was high-risk and speculative. I also understand Options updated its member declaration to include the following wording specific to investments in Carbon Credits:

> "*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 …"*

I understand that Options, on similar cases involving Carbon Credits, has said this additional wording included in its member declaration reflected the contents of the FSA consumer warning, which I assume to mean the warning the FSA issued in August 2011 about individuals investing in Carbon Credits. I understand 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. I understand Options has further added on other cases we've seen, that if the warnings it included in the member declaration were not sufficient to convey to Mrs F 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 were here in line with the Principles and good industry practice. Whilst it was an appropriate step for Options to take to ensure Mrs F was aware of the risks of the investment she intended to make, Options was still obliged to consider whether the investment was an appropriate investment to be held in its SIPPs *at all*, bearing in mind what it should have ascertained about the investment if it had carried out appropriate due diligence checks.

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 members' SIPPs. So, my finding is that Options didn't meet its regulatory obligations and didn't act fairly and reasonably in its dealings with Mrs F, by not performing sufficient due diligence checks on the Carbon Credits investment before deciding to accept Mrs F's SIPP application.

As briefly noted above, in August 2011, i.e., before Mrs F made her investment, and likely after Options had first approved the Carbon Credits investment as an appropriate investment for its SIPPs, the FSA issued a consumer warning about the risks of investing in Carbon Credit schemes.

Within this alert, 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 Credits trading market. It said:

> *"It is not often made clear to investors that this involves trading on over-the-counter markets which require experience and skill. You may lose money or not be able to sell at all…*
>
> *Beware that VERs certificates are often labelled as 'certified', but this certification is voluntary involving a wide range of bodies and different quality standards that are not recognised by any UK financial compensation scheme …*
>
> *… Just because the salesperson mentions the Kyoto Protocol or 'government-backed' plans does not tell you anything about the type of carbon credit you are investing in."*

I think it's fair to say 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 argue that the declaration and indemnity Mrs F signed shows that it did in fact recommend that Mrs F seek advice from a suitably qualified and authorised adviser, but that Mrs F had chosen not to. And given the Regulator's warning, I think requiring investors to take regulated financial advice would've gone some way towards meeting the requirements under the Principles and to protect consumers from detriment. As the evidence indicated Mrs F hadn't taken regulated advice when it received her application, I think this alone ought to have led to Options to refuse to accept her intended investment in Carbon Credits. But I think Options also ought to have had other serious concerns about the information it gathered, had it completed sufficient due diligence process checks. And had it done so, I think it would have drawn different conclusions about the appropriateness of the Carbon Credits investment to be held in its SIPPs. I think the information Options would have obtained – had it carried out sufficient checks – ought to have given it real cause for concern regarding the risk of serious consumer detriment associated with the investment.

I think it's also rather telling that when accepting Mrs F's SIPP Application for investment in Carbon Credits, it was a requirement that she kept enough money in her SIPP cash account to cover at least five years of Options' SIPP fees. This to me indicates that Options was aware the Carbon Credits investment wasn't readily realisable, in full or part, and as such it was looking to protect itself in the near to mid-term, by ensuring that its fees for holding this illiquid investment would be paid. Given that realisation, I think this should have brought firmly into question whether or not this was an appropriate investment, in which an ordinary retail customer, such as Mrs F, should invest the vast majority of their pension provision.

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

- Identified the Carbon Credits investment as a high-risk, speculative and non-standard investment and carried out due diligence on it.

- Correctly established and understood the nature of the investment.

- Considered whether the investment was an appropriate investment to make available via its SIPPs.

- Made sure the investment was genuine and not a scam, or linked to fraudulent activity.

- Made sure the investment worked as claimed.

- Ensured that the investment could be independently valued, both at the point of purchase and subsequently.

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

Whilst I haven't seen any evidence to confirm Options carried out checks prior to accepting Mrs F's application to determine the validity of the underlying project the Carbon Credits originated from – it does appear the project had been independently verified as meeting the Verified Carbon Standard ("VCS") at the relevant time. So, I'm satisfied the units were likely valid.

However, while Options could have been satisfied the credits Mrs F was purchasing were valid, I haven't seen that it was demonstrated that there was any ready market for the units. I haven't seen any evidence to show it was demonstrated how Mrs F would find a buyer for her small allocation of Carbon Credit units. As set out above, Options' member declaration said:

> *"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."*

I therefore think Options appreciated prior to accepting Mrs F's SIPP application 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.

So, at the time of Mrs F's application, there was little confirmation that Mrs F's SIPP would be acquiring anything of any realisable value or whether there was a market for the credits, and Options had no indication of whether the credits were being sold at inflated prices.

I don't think simply noting these risks and making investors, such as Mrs F, aware of these issues within its member declaration 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 its members' pensions.

Options may consider that carrying out the kind of assessment that would be required to establish and interrogate such factors as I've discussed and carry out appropriate due diligence, imposes on it requirements over and above its responsibilities as a SIPP provider. But I'm satisfied these are the kind of things Options needed to do when deciding whether to accept Mrs F's application 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 Mrs F's individual circumstances.

So, based on the evidence I've seen, I don't consider Options carried out sufficient due diligence at the time to satisfy its reasonable responsibilities as a SIPP provider.

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

Given what I've seen surrounding the VCS registration of the underlying project that generated the Carbon Credits in this case, I'm satisfied the Carbon Credits Mrs F was intending to purchase were likely legitimate. And this reflects the FSA's warning that not all Carbon Credit investments are scams. I also accept that technically there was a market for Carbon Credits. But it's been highlighted that it often wasn't possible to sell Carbon Credits even though there was a market for them. So, although they might have worked as claimed in theory, the reality was very different.

The FSA warning was published before Mrs F'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 or ought to have been aware of at the time, and it should have considered this as a significant factor in deciding whether to permit the investment. The fact Mrs F might have struggled to realise the investment should've caused Options significant concern – especially considering that Mrs F was intending for the vast majority of her pension savings to be invested in Carbon Credits. It wasn't clear how Mrs F would be able to take benefits from her pension if the investment was difficult to value or realise.

At the point of receiving Mrs F's application, Options would've been aware that she was intending to invest almost all of her transferred pension arrangements in an unregulated, esoteric and high-risk investment which would likely be difficult to sell. I acknowledge that Options wouldn't have been aware whether the amount to be invested in Carbon Credits represented the entirety of Mrs F's pension savings because she may have had other benefits elsewhere, the evidence I've seen indicates Mrs F may have had another policy that wasn't ultimately transferred to the SIPP. But it was an indicator of the kind of risk to which Mrs F 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 necessarily be indicative of its future performance or legitimacy. But I think the investment was very likely 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 have 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 members' SIPPs. When doing so, I think it didn't act with due skill, care and diligence or treat Mrs F 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 Mrs F's individual circumstances. I accept

Options had no obligation to give advice to Mrs F, or to ensure otherwise the suitability of an investment for her.

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 this ought to have led it to conclude it shouldn't accept the Carbon Credit investment into its SIPPs before it accepted Mrs F's SIPP application. 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 resulted in Mrs F being treated unfairly and unreasonably.

I'm of the opinion that, Options didn't meet its regulatory obligations or the standards of good practice at the time, and it allowed Mrs F'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 Mrs F fairly, by accepting her application to invest in Carbon Credits.

Did Options act fairly and reasonably in proceeding with Mrs F's instructions?

COBS 11.2.19R

I note that Options has stated that it acted on an execution only basis and as such it was obliged under COBS 11.2.19R to execute Mrs F's investment instructions, effectively arguing that once the SIPP was established, it was required to execute the specific instructions of its client. Before I comment on this point, I think it's important for me to reiterate that in my view, it was not fair and reasonable for Options to have accepted Mrs F's SIPP application in the first place. So, the opportunity to execute her investment instruction, or to proceed in reliance on an indemnity, should not have arisen at all.

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

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

With the above in mind, I don't think Options' understanding surrounding this point is relevant to its obligations under the Principles to decide whether or not to accept an application to open a SIPP in the first place, or whether to execute an investment instruction.

The indemnity

In my view, for the reasons given, Options should've refused to allow Mrs F's proposed

investment in Carbon Credits into its members' SIPPs generally, and it should've rejected Mrs F's 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 Mrs F sign declarations or indemnities, wasn't an effective way for Options to meet its regulatory obligations to treat her fairly, given the concerns Options ought to have had about the investments.

Options knew that Mrs F had signed forms intended, amongst other things, to indemnify it against losses that arose from acting on her 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 into its SIPPs at all.

The Principles exist to ensure regulated firms treat their clients fairly. And I don't think the paperwork Mrs F signed meant that Options could ignore its duty to treat her 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 Mrs F'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 compensation in the circumstances?

The involvement of other parties

In this decision I'm considering Mr F and Ms F's complaint about Options. However, I accept that it's likely other parties were involved in the transaction complained about, possibly RI, RN and ISP.

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 Mrs F fairly, and the starting point, therefore, is that it would be fair to require Options to pay compensation for the loss caused as a result of its failings.

But I've carefully considered if there's any reason why it wouldn't be fair to ask Options to award compensation for the 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 losses in the SIPP, 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 could have been avoided.

So, it is my view that it's appropriate and fair in the circumstances for Options to pay compensation to the full extent of the financial losses due to its 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.

Mrs F's responsibility for her own investment decisions

Options may argue that Mrs F had responsibility for her 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 Mrs F's actions mean her beneficiaries should bear the loss arising as a result of Options' failings.

Mrs F 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 Mrs F's investment in Carbon Credits wouldn't have been made in the first place.

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

But even if Mrs F *had* received a full 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 her SIPP at all. So, the loss could have been avoided in any event.

Overall, I'm satisfied that in the circumstances, for all the reasons given, it's fair and reasonable to say Options should pay compensation to account for the loss as a result of its failings. I don't think it would be fair to say in the circumstances that Options shouldn't compensate the loss because Mrs F ultimately instructed the transaction to be effected.

Had Options declined to accept Mrs F's investment in Carbon Credits, would the transaction complained about still have been effected elsewhere?

I've also considered a point I'm aware Options has raised in similar cases, that if it had refused to permit the investment in Carbon Credits, the investment would still have been effected with a different SIPP provider. But I don't think it's fair and reasonable to say that Options shouldn't pay compensation for the 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 Mrs F's application to open a SIPP to hold Carbon Credits.

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

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

I'm not aware that Mrs F received an incentive payment for proceeding with the Carbon Credits investment in this case, but I'm aware that some investors in similar cases involving Carbon Credits did receive such payments. As Mrs F passed away some time ago, I think it could be challenging to try to obtain that information, Mr F and Ms F have confirmed they cannot recall a payment being made to Mrs F at the relevant time. In any case, I've thought carefully about whether the lure of a hypothetical incentive payment would have meant Mrs F would have proceeded with the investment in any event.

Having done so, I'm not satisfied that Mrs F proceeded knowing that the investment she was making was high risk, and that she was determined to move forward with the transaction in order to take advantage of a cash incentive in the knowledge that she could potentially lose the entire investment.

There is nothing to show Mrs F genuinely understood the risks involved. I've seen no evidence to indicate Mrs F had any relevant investment experience and she transferred a considerable proportion of her pension provision into the SIPP.

And, on balance, I don't consider that any payment offered upon completion of the investment purchase meant Mrs F would have proceeded regardless. I haven't seen any evidence to suggest receiving such a payment was essential for Mrs F at the time. So, I think therefore, it cannot be said she was so intent on entering the transaction no matter what, that she would have done so in the knowledge that her entire pension fund was at risk.

On balance, I'm satisfied that Mrs F, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for herself. 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 told Mrs F it was rejecting her application to invest in Carbon Credits and why, the transaction this complaint concerns would not still have gone ahead.

So, overall, I think it's fair and reasonable to direct Options to pay compensation in the circumstances. While I accept that other third parties might have some responsibility for initiating the course of action that led to the 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 Mrs F'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. 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 for the full measure of the 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 F and Ms F's right to fair compensation from Options for the full amount of the loss.

The key point here is that but for Options' failings, I'm satisfied Mrs F wouldn't have suffered the loss of the vast majority of her retirement savings when her Carbon Credits investment was valued at £nil. And, as such, I'm of the opinion that it's appropriate and fair in the circumstances for Options to pay compensation to the full extent of the financial loss 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 Mrs F'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 Mrs F'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 pay compensation for the full losses caused. 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.

I've decided to uphold this complaint on the basis that Options should have refused to accept Mrs F's SIPP application to be used to hold the investment in Carbon Credits. I therefore don't consider it necessary to consider whether or not Options should have accepted introductions from RI. I make no finding about the due diligence Options carried out on RI.

However, to be clear, even if I thought Options had undertaken adequate due diligence on the introducer and had acted appropriately in accepting the business from the introducer (which, as I've just explained, I've not considered), I'd still reach the finding that it is fair and reasonable to uphold Mr F and Ms F's complaint on the basis of what I've already set out – i.e., that Options should not have accepted Mrs F's SIPP application to hold the investment in Carbon Credits.

Fair compensation

I consider that Options failed to comply with its regulatory obligations and good industry practice and did not reject Mrs F's application to open a SIPP in order to invest in Carbon Credits. Had Options acted appropriately, I think it's more likely than not that Mrs F would have remained a member of the existing personal pension schemes she transferred into her Options SIPP.

I think Mrs F would have remained with her previous providers, however I cannot be certain that a value will be obtainable for what the previous policies would have been worth at the time death benefits would likely have been distributed. I also think it's unlikely, given the time that's passed, that Options will be able to ascertain details from Mrs F's previous pension providers to determine how death benefits would have been paid out to her beneficiaries had she remained invested in those schemes until her death, including details as to whether there were any restrictions on how death benefits could be paid and the likely timescales for distributing death benefits. This service took reasonable steps to accurately establish how death benefits would have been paid had the plans remained with the previous pension providers however this information wasn't readily available.

With the above in mind, I am satisfied what I have set out below, based on the information that's been made available, is fair and reasonable.

Mrs F passed away in November 2016 and I understand Options received notification of her death on 1 December 2016 and completed distribution of the available benefits from her SIPP including the Carbon Credits investment, almost two years later, in November 2018. I've therefore considered what this means for how compensation should fairly be awarded. Mrs F's husband and daughter (Mr F and Ms F) were named beneficiaries on the expression of wish section of her SIPP application to receive death benefits in equal shares. However,

as I've set out above, I don't think Mrs F's SIPP ought to have been established in the first place.

I haven't seen evidence to confirm whether Mrs F had completed expression of wish forms for her existing pension schemes, or whether any restrictions applied, but ultimately, it would have been for the trustees of each policy to determine how death benefits should be paid out. Mr F has confirmed that he instructed Options to pay 100% of the death benefits to Ms F according to the late Mrs F's wishes. He's confirmed he would have made the same instruction to Mrs F's previous providers had she kept her existing pensions. Having carefully considered the circumstances of this case and in the absence of any evidence from the previous providers as to how they would have distributed death benefits had Mrs F not switched her plans to the SIPP, I think it would be fair and reasonable to determine its more likely than not the trustees of the previous providers would have acted in accordance with the request to pay death benefits to Ms F only. I therefore require Options to pay compensation to Ms F.

I've also considered the time it took Options to distribute the death benefits and whether this would have differed had the late Mrs F remained with her previous providers. Based on the evidence I've seen, it's my view that there were delays during the processing of the death benefits by Options that likely would not have occurred had Mrs F remained with her existing schemes. I've taken this finding into account in how I've decided Options should calculate redress.

What I've set out below is also based on my understanding, which both parties have had an opportunity to correct, that:

- Mrs F's Options SIPP has been closed.
- The Carbon Credits investment is being held in a bare trust for the benefit of Ms F, with Options acting as trustee.
- Mrs F's existing pension schemes did not contain any guaranteed benefits that were lost upon transfer to the Options SIPP.
- Mrs F may have received an incentive payment when the investment into Carbon Credits was made.
- Mrs F did not receive compensation from any other parties such as the Financial Services Compensation Scheme in connection with the transactions complained about.

Putting things right

My aim in awarding fair compensation is to determine the position Mr F and Ms F would have been in, had it not been for Options' failings. I consider that Options failed to comply with its own regulatory obligations and didn't put a stop to the transactions set out above. Had Options acted appropriately I think it's more likely than not that Mrs F would have remained a member of the existing pension schemes she transferred into her Options SIPP, until she passed away in 2016.

Considering the above, I require Options to do the following:

- Obtain the notional death benefits values of Mrs F's previous pension plans as at the date specified below.

- Obtain the actual death benefits value of Mrs F's SIPP, including any outstanding charges as at the date specified below.

- Pay an amount to Ms F, as beneficiary of Mrs F's pension, to reflect the difference in the calculated notional death benefits values of her previous pension plans and the actual death benefits value of her SIPP at the date specified below, plus interest.

- Pay £300 to Mr F and Ms F split between them in equal shares to acknowledge the distress and inconvenience caused to them by its failings.

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

Calculate the losses encountered as a result of making the transfer and investment

Options should first contact the providers of the existing personal pension schemes which were transferred into Mrs F's SIPP and ask them to provide notional death benefits values for the policies as at the date I think it's likely death benefits would've been distributed had the policies remained with them.

I am unable to say precisely how long it would have taken for Mrs F's beneficiary to receive the benefits from her existing personal pensions following her death, but it is reasonable to take into account some time for the trustees of the policies to have been notified of the plan holder's death, and for them to make a determination as to how to distribute the death benefits. I've not seen anything which would suggest this would have been in any way complex or time-consuming, as there would likely not have been any issues involving the presence of an illiquid asset within the pensions, had Mrs F not transferred. So, I'm satisfied it is fair and reasonable in the circumstances to say Mrs F's beneficiary would probably have received the death benefits as a lump sum within 28 days of notification of Mrs F's death, which took place on 1 December 2016.

It's also not clear whether funds would have remained invested between notification of death and payment of death benefits. Based on the limited evidence available, I think it's reasonable in the circumstances for Options to calculate the notional values on the basis that the funds would have remained invested until distribution.

Therefore, Options should obtain notional death benefits values for Mrs F's existing policies as at the date of 29 December 2016 (i.e., the date of notification of death plus 28 days).

For the purposes of the notional calculation, the provider should be told to assume no monies would've been transferred away from the plans, and the monies in the policies would've remained invested in an identical manner to that which existed prior to the actual transfer.

Any contributions or withdrawals Mrs F 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've enjoyed is allowed for. To be clear this doesn't include SIPP charges or fees paid to third parties like an adviser. But it does include any pension commencement lump sums or pension income Mrs F actually took after her pension monies were transferred to Options.

If Options has evidence that Mrs F received an 'incentive payment' in relation to the Carbon

Credits investment, it should take such payment into account when completing its calculations. From the evidence that's been presented, I haven't seen anything to indicate Mrs F did receive a payment, but I'm unable to discount the possibility that there was one. Should Options have evidence that Mrs F received a payment, this can be accounted for in the calculation by way of treating it as an income withdrawal payment paid on the date the incentive payment was received (if applicable). This is money Mrs F would not have received if she hadn't transferred her existing pensions to Options.

If there are any difficulties in obtaining notional valuations from the previous providers, 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.

Interest

Any compensation resulting from this loss calculation must be paid within 28 days of the date Options receives notification of Mr F and Ms F's acceptance of this, my final decision. The calculation should be carried out as at the date of 29 December 2016. But because this compensation is to redress monies which Mrs F's beneficiary ought to have received at an earlier date, which she has not had use of, additional interest should be added.

So, interest must be added to the compensation amount at the rate of 8% per year simple from 29 December 2016 to the date of settlement.

Income tax on interest

If Options considers that it's required by HM Revenue & Customs ("HMRC") to deduct income tax from any interest paid, it should tell the beneficiaries how much it's taken off. It should also give the beneficiaries a tax deduction certificate if requested, so they can reclaim the tax from HMRC if appropriate.

Pay an amount to Ms F if the calculation above demonstrates a loss

If the calculation above identifies a loss, a payment should be made as a lump sum to Ms F to redress this loss. HMRC tax rules mean that death benefits taken by a beneficiary from a personal pension, where the plan holder died before reaching the age of 75, are free of any tax liability as long as the benefits are distributed within two years of the notification of death. I see no reason why the beneficiary of Mrs F's pension, would not have taken the benefits within two years of the notification of her death, had Mrs F kept her existing personal pensions, so there would have been no tax liability incurred. So, it is my determination that there be no notional deduction to reflect tax on this compensation.

Notional deduction to the compensation

It's my understanding Options paid the death benefits from Mrs F's SIPP to Ms F in 2018. To account for the amount that Ms F has already had the benefit of, Options should notionally reduce the compensation calculated above by 8% (simple interest) on the amount of death benefits Ms F received, from the date it was paid to Ms F, to the date of settlement.

It's my view that reducing Ms F's share of the compensation by this method is a fair way to ensure she is not overcompensated.

Treatment of the illiquid asset (Carbon Credits)

I understand Options set up a bare trust to hold the Carbon Credits investment for the benefit of Ms F in order for the SIPP to be closed. I think it's unlikely the Carbon Credits investment will have any realisable value in the future, but I'm unable to discount the possibility that Ms F could potentially benefit from the investment should it become possible to sell it at some point in the future.

If the total calculated redress in this complaint is less than £150,000, Options may choose to ask Ms F to provide an undertaking to account to it for the net amount of any payment she may receive from the Carbon Credits investment. That undertaking should allow for the effect of any tax and charges on the amount she may receive from the investment. Options will have to meet the cost of drawing up any such undertaking.

If the total calculated redress in this complaint is greater than £150,000 and Options doesn't pay the recommended amount (set out below), Ms F should retain the rights to any future return from the investment until such time as any future benefit that she receives from the investment together with the combined compensation paid by Options (excluding any interest) equates to the total calculated redress amount in this complaint. Options may ask Ms F to provide an undertaking to account to it for the net amount of any further payment she may receive from the investment thereafter. That undertaking should allow for the effect of any tax and charges on the amount Ms F may receive from the investment from that point. As above, Options will need to meet any costs in drawing up the undertaking.

Distress & inconvenience

I think both Mr F and Ms F will have been caused considerable distress and inconvenience. Options' due diligence failings have had an impact on the death benefits available to them during what I imagine was an extremely difficult time.

I consider that a payment of £300 is appropriate to compensate for that, which Options should pay in equal proportions to Mr F and Ms F.

Assignment

If Options believes other parties to be wholly or partly responsible for the loss, it is free to pursue those other parties. So, if the loss does not exceed £150,000, or if Options accepts my recommendation below that it should pay the full loss as calculated above, the compensation payable to Ms F can be contingent on the assignment by Mr F and Ms F to Options of any rights of action they may have against other parties in relation to Mrs F's pension switch to the SIPP and the Carbon Credits investment if Options is to request this. Options should cover the reasonable cost of drawing up, and Mr F and Ms F's taking advice on and approving, any assignment required.

If the loss exceeds £150,000 and Options does not accept my recommendation to pay the full amount, any assignment of Mr F and Ms F's rights should allow them to retain all rights to the difference between £150,000 and the full loss as calculated above.

Determination and money award: my decision is that I require that Options pay Mr F and Ms F compensation as set out above, up to a maximum of £150,000 plus any interest payable.

Until the calculations are carried out, I don't know how much the compensation will be, and it may be nowhere near £150,000, which is the maximum sum that I'm able to award in Mr F and Ms F's complaint. But I'll also make a recommendation below in the event the compensation is to exceed this sum, although I can't require that Options pays this.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I also recommend that Options pays Ms F the balance.

If Mr F and Ms F accept this decision, the money award and the requirements of the decision will be binding on Options. My recommendation won't be binding on Options.

Further, it's unlikely that Mr F and Ms F will be able to accept my determination and go to court to ask for the balance of the compensation after the money award has been paid. Mr F and Ms F may want to consider getting independent legal advice before deciding whether to accept this, my final decision.

My final decision

For the reasons given, my decision is that I uphold this complaint. To put things right I require that Options UK Personal Pensions LLP must calculate and pay the award as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F and Ms F to accept or reject my decision before 18 October 2024.

Beth Wilcox
Ombudsman