DRN-5050334

The complaint

Mr B complains that in 2012, Options UK Personal Pensions LLP ('Options', Carey Pensions UK LLP at the relevant time) didn't carry out adequate due diligence when it accepted his Self-Invested Personal Pension ('SIPP') application with a view to invest in an unregulated investment. He says he has suffered a loss as a result of this.

Mr B wants to be put back into the position he would have been in had Options not accepted his SIPP application.

Mr B is represented by professional representatives, but I'll refer mainly to Mr B, even though submissions have been made on his behalf.

What happened

Involved parties

Given the various parties involved in Mr B's pension transfer and investment, I've set out a summary of each below.

Options UK Personal Pensions LLP ('Options')

Options is a SIPP provider and administrator. At the time of the events in this complaint, Options was regulated by the Financial Services Authority (FSA), which later became the Financial Conduct Authority (FCA). Previously named Carey Pensions UK, Options was authorised, in relation to SIPPs, to arrange (bring about) deals in investments, to deal in investments as principal, to establish, operate or wind up a pension scheme, and to make arrangements with a view to transactions in investments.

Henderson Carter Associates Limited ('Henderson')

At the time of the events in this complaint, Henderson was an advisory firm authorised and regulated by the regulator, the FSA, later the FCA. In February 2017, Henderson went into liquidation. In December 2018, the FCA started disciplinary action against the firm and its director which resulted in the prohibition of their carrying out any further regulated activities and fines for both the company and its director.

Sorensen Financial Services ('Sorensen')

Sorensen was an advisory firm regulated by the FSA and later FCA, and was authorised to give investment advice and pension transfer advice. In September 2017, Sorensen went into liquidation.

Mr B's dealings with Sorensen, Henderson, and Options

At the time of the SIPP application, Mr B was employed with a modest income. It's not clear how Mr B got in touch with the introducers, however from other similar cases, we know that Henderson and Sorensen contacted potential clients and offered them a free 'pension review'. If the clients agreed to transfer their existing pensions and open a SIPP, Henderson recommended carbon credits investments to them.

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 of one tonne of carbon dioxide. Buyers and sellers can use an exchange platform to trade, similar to a stock exchange. The quality of the credits is partly based on the validation process and sophistication of the fund or development company that acted as the sponsor to the carbon project.

Asked in a questionnaire by his previous representatives, Mr B stated in handwriting that he had no investment experience and had a "*very cautious*" investment risk profile. He said the risks were not highlighted by his independent financial adviser and he would not have made the investment had he been aware of those risks. He confirmed he had no other pension provision or retirement funds, aside from his transferred occupational pension and the subsequent SIPP, and that he planned to retire "*ASAP*".

On 26 July 2012, Sorensen produced a suitability report on the transfer of Mr B's pension in which it referred to previous advice from Henderson and clarified that the report was limited to advice on whether or not a transfer of Mr B's defined benefit (DB) scheme was suitable. Amongst other points it said:

> *"Following a discussion with your adviser at Henderson Carter Associates Ltd, you wish to explore the feasibility of transferring your* [DB pension] *referred to as "the scheme", into a pension arrangement that will allow you wide ranging investment options including carbon credits as this is one of your investment objects."*

It went on to say:

> "[…] *if you require specific investment options or input into the investment options then transferring the CETV* [cash equivalent transfer value] *to a personal pension arrangement is the only way this can be achieved. If it is your intention to invest some of your pension benefits into carbon credits a transfer is the only method of achieving this."*

And:

> *Part of the reason for the consideration of transferring the CETV from the scheme is to take advantage of the option to invest at least part of the CETV into Carbon credits.*
>
> *A SIPP is a specialist pension arrangement allowing a wide variety of investments and is therefore more expensive than standard personal pension plans.*
>
> […] *As previously explained our role is to provide a transfer analysis of the CETV from "the scheme" to a personal arrangement that will fulfil your objective to invest into Carbon credits. This requires us to comment on the required investment return from the transferred fund value to match the benefits from the "scheme".*
>
> *"The Critical Yield in this case of 14.2% would fall into the category of high. Typically investment returns from traditional investment funds should on average be expected to achieve 6% per annum, although this cannot be guaranteed.* ***Considering the required investment return from a personal arrangement with the associated risk, then comparing these to the guarantees afforded within 'the scheme', on these factors alone, the conclusion would be to remain in 'the scheme'.****"*
> [adviser's emphasis]

On 10 August 2012, Mr B completed a SIPP application form with Options, listing Sorensen as his financial adviser for the pension transfer with 3% initial fees, and Henderson as his investment manager with 1% ongoing advice fees per annum. A handwritten note confirmed Henderson was to be the firm for ongoing advice. The form stated that 100% of the fund was to be invested with this manager. It further detailed that the investment authorisation would be on an advisory level (as opposed to 'execution only' or 'discretionary'), i.e. that the investment manager provides advice on which the client may act.

At the end of the application form, Mr B signed a declaration which included, amongst other statements, the following:

- *"I agree to indemnify Carey Pensions UK LLP 'The Administrator' and Carey Pension Trustees UK Ltd 'The Trustee' against any claim in respect of any decision made by myself or my Financial Adviser/Investment Manager or any other professional adviser I choose to appoint from time to time; […]*
- *I understand that Carey Pensions UK LLP and Carey Pensions Trustees UK Ltd are not in any way able to provide me with any advice;*
- *I confirm that I am establishing the Carey Pension Scheme on an Execution only basis."*

On 3 September 2012 the SIPP was established.

On 8 October 2012, Options confirmed receipt of Mr B's pension funds from his DB scheme of around £159,700.

On 21 November 2012, a purchase agreement between Options and a provider of carbon credits was issued, this was also signed by Mr B. It agreed to buy 20,153 carbon credits for the overall price of around £130.994. The investment was made on 20 December 2012.

In or around September 2014, Mr B enquired about a transfer of his pension away from the SIPP. Options replied on 12 September 2014 that this would be possible, but that he would need to choose a provider that accepted an in-specie transfer, as it would be unlikely that he could sell the carbon credits for a cash transfer. From the evidence provided, it seems that no transfer went ahead after this.

On 4 September 2015, Options sent Mr B a cover letter with his annual SIPP valuation attached, stating the following:

> *"Please be aware that unfortunately we have valued your holding in* [provider] *Carbon credits at nil for the purposes of your Annual Valuation. This is because we have not been able to obtain a value for this holding. We have contacted a number of carbon credit brokers who have informed us that there is no price available as there is currently no market for carbon credits. We will continue to monitor the situation and will inform you if the condition of the carbon credit market changes."*

In September 2016, Mr B made a request to Options to access his pension benefits. On 21 October 2016, he received an Uncrystallised Funds Pension Lump Sum (UFPLS) of £20,764.56 (£15,328.15 net). I understand from the available evidence that this was the full remaining value of his SIPP, after his carbon credits investment was valued at £nil. Options also confirmed to him that after this his SIPP would be 'frozen', meaning that he would no longer receive updates or statements on it, but also not incur any SIPP fees.

In October and November 2018, Mr B had two successful claims with the Financial Services Compensation Scheme (FSCS) against the adviser firms. Each paid him the applicable maximum sum of £50,000 - one for his claim against Sorensen and one against Henderson - after both companies had gone into liquidation. However, the FSCS had calculated that his overall loss from the lost DB pension value and the failed investment exceeded the respective maximum compensation amount quite significantly, by around £113,000 on his claim about Sorensen, and £81,000 on his claim about Henderson.

In October 2021 he received a reassignment of rights in respect of both claims from the FSCS to further pursue his complaint against Options.

Mr B's complaint

On 31 January 2019 Mr B complained, with the help of his former representatives, to Options. The main complaint points were:

- Options failed to conduct adequate due diligence on the underlying asset and allowed the client to invest into an unregulated, high-risk investment that wasn't suited to his risk-profile;
- Mr B was a not a sophisticated investor and had a low appetite for risk;
- the investments were selected on Mr B's behalf and recommendations made to him were unbalanced and misleading;
- Options failed to meet their obligation as an authorised body to record and review the type and size of the investments;
- Options did not request suitability reports.

Options issued its final response on 19 February 2019, saying that Mr B's complaint had been made too late under the applicable DISP rules as it was brought more than six years after the events complained about, and more than three years from when he was, or reasonably should have been, aware of a cause for complaint. It says this is because in September 2015 he was sent a valuation showing his carbon credit investment had been valued at £nil value, so from this point he would have been aware he'd suffered a loss.

Unhappy with that response, on 7 March 2019 Mr B's former representatives referred the complaint to our Service. One of our investigators assessed the complaint and thought it was brought in time and should be upheld, making a number of points, including:

- The complaint was made in time as the 2015 valuation didn't put Mr B on notice of a cause for complaint against Options.
- The FCA's Principles for Businesses, and in particular Principles 2, 3 and 6 are relevant.
- The regulator has issued a number of publications which discussed the Principles and gave examples of good industry practice in relation to SIPP operators.
- Options was not responsible for giving Mr B advice, nor was it responsible for checking any advice to him was suitable for his individual circumstances and requirements. But it had its own obligations to act in its clients' best interests.
- Options should have been concerned about the investment, given its limited understanding of the investment details and risks and permitting it despite concerns.
- In all the circumstances it was not fair and reasonable for Options to accept Mr B's SIPP application and investment.

Mr B's representatives didn't reply to this, but Options responded and made additional points:

- The investigator came to illogical conclusions when considering the time limits - given that Mr B was aware of the loss in value, he would have been put on notice for a cause for complaint in 2015.
- Only the 2009 Thematic Review was a relevant consideration, the other guidance and publications were published after the SIPP application was made.
- It wasn't official guidance, and even if it were, guidance isn't binding and is aimed at advisory firms, not SIPP providers.
- If Options had refused the opening of the SIPP, then another provider would have done so, therefore Options didn't cause any loss.
- Once the DB transfer request was made by Mr B, the loss of the DB pension benefits was assured and the guaranteed benefits lost, regardless of Options' conduct.

Options also requested a hearing to review the evidence and determine the right outcome, on time limits as well as the complaint merits.

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

My Provisional Decision

In advance of this decision, I issued a provisional decision to the parties in which I said that I thought Mr B's complaint should be upheld. Mr B's representatives accepted the provisional decision on his behalf with no further comments, Options didn't respond.

Preliminary point – Options' request for an oral hearing

Options says an oral hearing is necessary to explore issues such as Mr B's "*understanding of their investment and of their and Options' respective roles*", his "*motivation for entering into the transaction with Options and what they would have done if given more information", "about whether specific additional information would have deterred* [Mr B] *from taking the course of action which they ultimately took.",* and "*to understand the date on which they ought reasonably to be aware that a complaint could be made."*

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

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

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

The key question for me to consider when deciding if a hearing should be held is whether the complaint itself, and whether or not it falls within our jurisdiction, can be fairly determined without convening a hearing.

Our service does not operate in the same way as the Courts. Unlike a court, we have the power to carry out our own investigation. And the rules (DISP 3.5.8R) mean that, as the deciding ombudsman, I am able to decide the issues on which evidence is required and how that evidence should be presented. Oral cross-examination to further explore or test points is not something this service is required to do.

If I decide particular information is needed to decide a complaint fairly, in most circumstances we are able to request this information from either party to the complaint, or from a third party.

I have considered the request Options has made. However, I am satisfied that I am able to fairly determine this complaint without convening a hearing. In this case, I am satisfied I have sufficient information to determine both the jurisdiction and merits aspects of Mr B's complaint. So, I do not consider a hearing is required.

The key question for me to determine in this decision, firstly considering our jurisdiction, is whether Mr B knew, or should reasonably have known, that he had cause for complaint against Options, and when that was. And we have been able to test this to the extent we thought necessary by asking questions of Mr B in writing and considering the evidence available to us. The other key question to determine is whether Options should not have allowed Mr B's SIPP establishment and subsequent investment in carbon credits to go ahead, and whether Options has therefore caused him a loss for which it has to compensate him. We've also been able to investigate this as far as necessary, by reviewing the available evidence and considering the submissions made by the parties. So I don't consider an oral hearing to be necessary.

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

As I am satisfied it is not necessary for me to hold an oral hearing, I will now turn to considering Mr B's complaint.

What I've decided – and why

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

As the parties didn't make any further representations, I don't consider that I need to change the findings that I reached in my provisional decision. I have set these out below and adopt them as my findings in this final decision.

In my provisional decision I said:

"Time limits

Our investigator found that the complaint was in our jurisdiction, as it had been brought to us within three years of when Mr B was aware, or should reasonably have become aware, that he had cause to complain about Options.

DISP 2.8.2 sets out that:

> *"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:*
>
> *(1) more than six months after the date on which the respondent sent the complainant its final response, redress determination or summary resolution communication; or*
>
> *(2) more than:*
>
> > *(a) six years after the event complained of; or (if later)*
> >
> > *(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;*
>
> *unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;*
> *unless:*
>
> *(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2R or DISP 2.8.7R was as a result of exceptional circumstances; …*
>
> *(5) the respondent has consented to the Ombudsman considering the complaint where the time limits in DISP 2.8.2 R or DISP 2.8.7 R have expired"*

Options has not provided its consent to consider this complaint which it believes has been made outside of the relevant time limits.

In Mr B's case, having made his complaint in January 2019, the six-year period from when his SIPP was established, the pension transfer completed, and the investment made between August to December 2012 has expired. So I need to consider whether he brought his complaint within the three-year period.

In 2014, Mr B enquired about ways to transfer his pension away from the SIPP. The reasons for this are unclear. However, even if this may have been on the back of concerns about his investment, this doesn't amount to a complaint about or indicate any awareness that Options may have breached any obligation to him, particularly with regard to the due diligence it had undertaken. So, I've found that Mr B more likely than not didn't know he could complain to Options then. But whilst he had no *actual* knowledge, I must also consider what he *ought* reasonably to have known – his *constructive* knowledge.

I note that Options has said in its response to the complaint and to our investigator's view that it considers the knowledge or notice of a loss is enough in order to have awareness for the purposes of the relevant rule. So this would not need to include awareness of who might be responsible for this loss. But I don't agree.

The term 'complaint' is defined for the purposes of the DISP section in the FCA Handbook glossary as:

> *"any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a person about the provision of, or failure to provide, a financial service…which:*

(a) *Alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience; and*

(b) *Relates to an activity of that respondent, or any other respondent with whom that respondent has some connection in marketing or providing financial services or products …which comes under the jurisdiction of the Financial Ombudsman Service."*

The above definition of a complaint clearly provides that the expression of dissatisfaction must be in relation to a particular respondent who provided the financial services in question. It follows that awareness of a cause for complaint also needs to include the knowledge of who can be held responsible for the loss.

As our investigator said in his findings, I too think that the September 2015 correspondence informing Mr B of a £nil valuation wouldn't have put him on notice that he may have cause for complaint *against Options*. The complaint that Mr B has brought is that Options didn't carry out sufficient due diligence on the introducers and the investment.

In its letter of complaint, Mr B's former representatives set out the responsibilities that it considered Options to have had when conducting due diligence prior to accepting a new client or making an investment on behalf of their pension. These are things that Mr B didn't know, and I consider ought not reasonably to have known, or have been prompted to find out, at the time Options corresponded with him in September 2015.

I also don't consider that the correspondence would have done any more than inform him that he may have suffered, or might in the future suffer, a loss. The letter is light on detail about what may happen to the value of Mr B's investment going forward. And it's very clear that it's just a current estimate, as Options was not able to obtain a value. When Mr B enquired about the transfer of his SIPP or, later in 2016, about taking benefits, none of the correspondence with Options at the time pointed out that Options may have done anything wrong in accepting these investments into his SIPP. So it's clear that Mr B was not aware of Options' obligations to him, as I would have expected of any reasonable retail investor in those circumstances.

I appreciate that, as an 'execution only' SIPP provider, Options wasn't in a position to provide advice, but there's no indication in any of the correspondence whether the loss may be temporary or permanent. Reference is made to current market conditions, saying "[…] *as there is currently no market for carbon credits. We will continue to monitor the situation and will inform you if the condition of the carbon credit market changes.*" Any reasonable consumer may have assumed these would change in time, perhaps seeing their investment regain some or all of its value. So there was no real sense of urgency given by the letter that the reader may need to take any action. And a reasonable consumer might first consider responsibility for any loss to lie with those who'd advised them to invest in carbon credits, which here was the introducer. Options doesn't suggest anywhere in the correspondence that it may bear any responsibility.

I also don't consider that the estimate of a loss in this correspondence would, or indeed reasonably should, have highlighted to Mr B that Options may have been responsible for any wider loss that he had suffered from the original transfer.

The value of investments can of course go up and down, and most investors know that over the long term – particularly in the case of pensions – value lost can be recovered over time. So I don't consider that Mr B was on notice back in 2015 that he needed to look into this further, nor would I have expected any reasonable retail investor to consider that Options might have been responsible to them for this loss in value.

So, I haven't found that Mr B was, or reasonably should have been, aware of any wider SIPP due diligence obligations that Options may have had, or any loss that had arisen from those, at the time the value of his investments was estimated to be £nil in September 2015 when he received the valuation.

It's also worth noting that the information available to consumers about a SIPP provider's obligations to them back in 2015 was not only limited, but also disputed by some in the industry. Whilst the regulators, the FSA and subsequently the FCA, had issued various publications detailing what they considered to be a SIPP provider's obligations, the judicial review decision in *Berkeley Burke SIPP Administration Limited v Financial Ombudsman Service* [2018] EWHC 2878 (admin) didn't come out until October 2018. And it was after then that I consider an ordinary retail consumer – knowing that there was a problem with their pension and that they have, or may suffer a loss – may have more easily learnt of a SIPP provider's obligations to them by conducting some research.

Only once Mr B had been in touch with his former representatives, he was informed of such duties. And he made his complaint to Options in January 2019. That was within three years of when he knew, and ought reasonably to have known, he could complain to Options about his losses."

So, although six years from when the transfer and the investment were made have expired, Mr B has brought his complaint within three years from when he ought reasonably to have known something was wrong, he'd suffered a loss and could complain to Options about it. So, I've decided that we can consider the merits of Mr B's complaint.

Merits

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

"When considering what is fair and reasonable, I am 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.

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

<u>The Principles</u>

In my view, the FCA's Principles for Businesses are of particular relevance to my decision. The Principles for Businesses, which are set out in the FCA's handbook "*are a general statement of the fundamental obligations of firms under the regulatory system*" (PRIN 1.1.2G). 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 considers section 228 of the Financial Services and Markets Act 2000 ('FSMA') and the approach an Ombudsman is to take when deciding a complaint. The judgment of Jacobs J in BBSAL upheld the lawfulness of the approach taken by the Ombudsman in that complaint, which I have described above, and included the Principles and good industry practice at the relevant time as relevant considerations that were required to be taken into account.

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.

<u>The ‘Adams’ court cases and COBS 2.1.1R</u>

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 on Mr B’s case. 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 on Mr B’s case.

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

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 Mr B’s 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 B’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.

In Mr B’s complaint, amongst other things, I’m considering whether Options ought to have identified that the DB pension transfer and the intended carbon credits investment involved a significant risk of consumer detriment and, if so, whether it ought to have declined to accept applications to establish a SIPP with the intention of investing in carbon credits before it received Mr B's application. The same applied to Options deciding whether to accept introductions from Sorensen and Henderson.

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. In doing that, I am required to take into account relevant considerations which include: law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. This is a clear and relevant point of difference between this complaint and the judgments in both Adams cases – those regarded a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

I have proceeded on the understanding Options was not obliged – and not able – to give advice to Mr B on the suitability of its SIPP or the carbon credits investment for him personally. But I am satisfied Options' obligations included deciding whether to accept introductions of business from particular firms and applications for SIPPs intended to be solely invested in non-mainstream, high-risk investments.

<u>Regulatory publications</u>

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

- The 2009 and 2012 thematic review reports.
- The October 2013 finalised SIPP operator guidance.
- The July 2014 "Dear CEO" letter.

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 the SIPPs that are unsuitable or detrimental to clients.*

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

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

- *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."*

<u>The later publications</u>

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)

Although I’ve referred to selected parts of the publications, to illustrate their relevance, I have considered them in their entirety. 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 for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect the publications, which set out the 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.

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

The remainder of the publications also provide a reminder that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and to produce the outcomes envisaged by the Principles. In that respect, these publications also go some way to indicate what I consider amounts to good industry practice at the relevant time. I 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* Mr B’s SIPP application and investment in carbon credits were made. But like the Ombudsman in the BBSAL case, I do not think the fact that some of the publications (except for the 2009 Thematic Review Report) post-date the events that took place in relation to Mr B's complaint, means that the examples of good practice they provide were not good practice at the time of the relevant events. Although the later publications were published after the events subject to this complaint, the Principles that underpin them existed throughout, as did the obligation to act in accordance with the Principles.

It is also clear from the text of the 2009 and 2012 Thematic Review Reports (and the "Dear CEO" letter in 2014) that the regulator expected SIPP operators to have incorporated the recommended good practices into the conduct of their business already. So, whilst the 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 Options' point that the judge in Adams didn't consider the 2012 Thematic Review report, the 2013 SIPP Operator Guidance and 2014 "Dear CEO" letter to be of relevance to his consideration of Mr Adams' claim. But it doesn't follow that those publications are irrelevant to my consideration of what's fair and reasonable in the circumstances of this complaint. I'm required to take into account good industry practice at the relevant time. And, as mentioned, the publications indicate what I consider to amount to good industry practice at the relevant time.

That doesn't mean that in determining what is fair and reasonable, I will only consider Options' actions with these documents in mind. The reports, "Dear CEO" letter, and guidance gave non-exhaustive examples of good practice. They did not say the suggestions given were the limit of what a SIPP operator should do. As the annex to the "Dear CEO" letter notes, what should be done to meet regulatory obligations will depend on the circumstances.

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

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

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

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

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

<u>The 2013 alert</u>

The regulator also issued an alert in January 2013 about advisers giving advice to consumers on SIPPs without consideration of the underlying investment to be held in the SIPP. The alert ("*Advising on pension transfers with a view to investing pension monies into unregulated products through a SIPP*") set out that this type of restricted advice didn't meet regulatory requirements. It said:

> *"It has been brought to the FSA's attention that some financial advisers are giving advice to customers on pension transfers or pension switches without assessing the advantages and disadvantages of investments proposed to be held within the new pension. In particular, we have seen financial advisers moving customers' retirement savings to self-invested personal pensions (SIPPs) that invest wholly or primarily in high risk, often highly illiquid unregulated investments (some which may be in Unregulated Collective Investment Schemes).* […]
>
> *The cases we have seen tend to operate under a similar advice model. An introducer will pass customer details to an unregulated firm, which markets an unregulated investment (eg an overseas property development). When the customer expresses an interest in the unregulated investment, the customer is introduced to a regulated financial adviser to provide advice on the unregulated investment. The financial adviser does not give advice on the unregulated investments and says it is only providing advice on a SIPP capable of holding the unregulated investment …*
>
> *Financial advisers using this advice model are under the mistaken impression that this process means they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect.*
>
> *The FSA's view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes …"*

The alert came after the events in this complaint – but, again, it didn't set new standards. It highlighted that advisers using the restricted advice model discussed in the alert generally weren't meeting existing regulatory requirements and set out the regulator's concerns about industry practices at the time. It's also clear that in this case Mr B dealt with two regulated adviser firms, and I haven't seen what exact advice Mr B received on the intended investment from Henderson. However, the main point of the above extract is that consideration has to be given to not just the vehicle or wrapper in the abstract, but the suitability of the overall proposition.

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

As mentioned above, the questions I need to consider include whether Options ought to, acting fairly and reasonably to meet its regulatory obligations and good industry practice, have identified that consumers introduced by Sorensen and Henderson with a view to investing in carbon credits were being put at significant risk of detriment. And, if so, whether Options should not therefore have accepted Mr B's application for the Options SIPP and the pension transfer from his DB scheme in the first place.

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

Options has previously made submissions about its contracts with clients such as Mr B and I've carefully considered everything Options has said about this.

I acknowledge that Options says that, at the time of the transaction, there was nothing in the DISP rules preventing SIPP providers accepting business from execution-only customers or high-risk business.

For clarity, my decision is made on the understanding that Options acted purely as a SIPP operator. I don't say Options should (or could) have given advice to Mr B or otherwise have ensured the suitability of the SIPP or the intended Carbon credits investment for him. I accept that Options made it clear to Mr B that it wasn't giving, nor was it able to give, advice and that it played an 'execution only' role in his SIPP investments.

I've not overlooked or discounted the basis on which Options was appointed. And my decision on what's fair and reasonable in the circumstances of Mr B's case is made with all of this in mind. So, I've proceeded on the understanding that Options wasn't obliged – and wasn't able – to give advice to Mr B on the suitability of the SIPP or the carbon credits investment.

While the 2009 Thematic Review Report made clear that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as independent financial advisers (IFA), it also made 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*."

And the 2009 Thematic Review Report went on to give the following as examples of measures that SIPP operators could consider, taken from examples of good practice that the regulator had observed and suggestions it had made to firms:

> "*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."

So, even if the investments weren't recorded on the application form, Options knew or should have known the investments that were typically being made by Sorensen/Henderson-introduced clients. This was also likely the case, given the number of clients that were introduced by them with a view to invest in carbon credits.

In this case, the DB pension transfer suitability report, issued before the application was made and a copy of which Options required as part of its business acceptance agreement with Sorensen and Henderson (see below), also clearly stated the investment into carbon credits as the main objective.

When asked *"From the total number of clients introduced to you by the introducer* [Sorensen]*, what % of the applications were to be invested in non-mainstream investments?"* Options answered "*100%*", further underlining its knowledge of the investment intentions in DB transfers advised by Sorensen, with Henderson's involvement, to its SIPP. The application form also showed that Mr B intended to invest 100% of his funds with the named investment manager from Henderson.

So I'm satisfied Options was aware, or should reasonably have been aware, from the outset that the purpose of setting up the SIPP was to invest into carbon credits, or at the very least into high-risk, non-mainstream investments.

<u>Options' due diligence on introducing advisers Sorensen and Henderson</u>

Options had a duty to conduct due diligence and give thought to whether to accept introductions from Sorensen and Henderson. It hasn't provided us with its full file for this complaint, however from other similar cases we're aware of the underlying agreements and relationship Options had with Sorensen and Henderson.

The Business Acceptance Agreement and 'Roles and Responsibilities' document

Options had a business acceptance agreement with Sorensen and Henderson working together as introducers. The agreement reads as follows:

"*Sorensen and HC IFA* [Henderson] *Business Acceptance Criteria 2012*

Following the recent applications received from Sorensen Financial Services on behalf of the clients of HC IFA, and discussions with [the firm directors and an adviser] *regarding the establishment of SIPPs for these clients into the Carey Pension Scheme, it was agreed that we would detail our Business Acceptance Policy for such schemes, to ensure there is no confusion in the parameters in place, and to ensure schemes can be established as efficiently as possible, for the benefit of the clients overall Retirement plan.*

HC IFA is the adviser to the client.

HC IFA is not qualified to provide occupational transfer advice and they outsource this to Sorensen Financial Advisers, who have the requisite qualifications and permissions to advise on occupational Transfers.

There will be a mix of clients with Occupational DB and DC schemes. Sorensen will carry out the TVAS and Provide a TVAS report and the suitability and advice letter for the client.

Sorensen will charge an initial fee for this work activity and advice.

Carey Pensions UK will accept Occupational Money Purchase (DC) arrangements.

In the case of Occupational Final Salary (DB) schemes then the following will apply:-

Where the advice in NOT to proceed then Carey Pensions UK will not accept the occupational transfer into the Carey Pension Scheme [my emphasis].

Where the advice is that it is acceptable to proceed Carey Pensions UK will accept the occupational transfer, but will require a copy of the TVAS report and the advice letter for their file.

Carey Pensions UK requires a minimum transfer value of £25,000 into their SIPP.

Following the transfer advice, the IFA HC take over responsibility for the client and the appropriateness or otherwise of the asset selection, in relation the [sic] *risk profile of the client."*

This shows the roles of the firms working together, rather than as individual entities, and having a shared business goal of introducing clients to Options' SIPPs with the intention to invest funds on Henderson's advice.

Attached to the respective introducer profiles of both firms (further discussed below) was a document setting out the roles and responsibilities of the two firms and of Options in the business relationship.

Amongst other things, the document said that Henderson/Sorensen are each responsible for the following:

- Under the "Providing Advice" section:
  - *"To evaluate your client's financial circumstances and based on this assess their suitability for what, if any, of the* [Options] *Pension range is appropriate;"*
  - *"To document your recommendation together with suitable alternatives that could have been appropriate and why rejected in favour of the recommended product;"*
  - *"Where a transfer is recommended, all options considered and the advice provided to the client in line with regulatory requirements;"*
- Under the "Scheme Investments" section:
  - *"Where your client seeks advice, to provide fully documented advice to your client on the suitability of the Scheme investments, taking account of their financial objectives and attitude to investment risk;"*

As noted above, Options said in their Business Acceptance Agreement that they would not accept transfers into its SIPP where Sorensen hadn't recommended the transfer from a DB scheme. It goes on to say: *"Where the advice is that it is acceptable to proceed Carey Pensions UK will accept the occupational transfer, but will require a copy of the TVAS report and the advice letter for their file."*

The suitability report on the DB transfer from Sorensen said the following:

> *"The Critical Yield in this case of 14.2% would fall into the category of high. Typically investment returns from traditional investment funds should on average be expected to achieve 6% per annum, although this cannot be guaranteed.* ***Considering the required investment return from a personal arrangement with the associated risk, then comparing these to the guarantees afforded within 'the scheme', on these factors alone, the conclusion would be to remain in 'the scheme'.****"* [adviser's emphasis]
>
> *The decision to transfer should only be taken if there is sufficient belief that the investments ultimately selected can achieve the level of returns required. It is important that you discuss the investment of the funds if a transfer proceeds with your adviser to satisfy yourself that the potential rewards are consistent with the risks and loss of guarantees."*

It's not further clarified what Options' phrase "*acceptable to proceed*" from the Business Acceptance Agreement entails, however from the above it's difficult to interpret the report as a recommendation to transfer away from the DB scheme, which had valuable guarantees such as a guaranteed minimum pension (GMP). The entire report has the premise of an investment into carbon credits as its main objective, rather than securing a safe pension for Mr B. But the last paragraph cited above shows that the adviser from Sorensen distances himself from any advice on the investment and makes it clear that the report only provides restricted transfer advice, even though the outcome of the recommendation relies purely on the success of the underlying investment.

There is no clear recommendation to transfer in the report and the very high Critical Yield shows how unlikely it is to reach the same or even better benefits than those of the DB scheme. On that basis alone, the advice is not to proceed with a transfer. The report even goes on to say that the conclusion would be to remain in the scheme, were it not for "*sufficient belief that the investments ultimately selected can achieve the level of returns required.*", being fully aware that carbon credits are an unregulated, high-risk investment.

The report also assumed Mr B's normal retirement age would be set to 75 and recommends this is done for tax reasons. It does confirm he *can* retire earlier, but then goes on to say, "*If you decide to take benefits earlier than the normal retirement age of the scheme it will make it much more difficult to achieve the required critical yield."* Mr B confirmed this pension was his only provision for retirement, so he would have had to agree to work until 75, if he followed the report's, and Henderson's, recommendations. But when he answered his former representatives' questions in January 2019, aged in his late 50s, he said he wanted to retire "*ASAP*". Unless his circumstances changed significantly, this would indicate he wasn't fully aware of the SIPP's set late retirement age, or he didn't understand this when he agreed to Sorensen's and Henderson's recommendations a few years earlier.

So even though the report avoids an obvious recommendation for or against the transfer, it's clear that but for the objective of investing in carbon credits, the advice would be to stay in the DB scheme.

Despite this and seemingly in breach of its own Business Acceptance Agreement, as well as Sorensen not fulfilling its responsibilities under the 'Roles and Responsibilities' document, Options accepted Mr B's SIPP application and the transfer of his DB pension.

I appreciate that Options has also previously argued the requirement to take advice on occupational pension transfers under s48 of the Pension Schemes Act 2015 wasn't in place yet when the application was made in 2012. However, under its own Business Acceptance Agreement Options required proof of advice on transferring a DB scheme and this would have been in line with due diligence requirements to ensure only those clients whose pensions and circumstances were deemed suitable for a DB transfer could open a SIPP with Options. In this case, Options accepted the application, despite the lack of a positive recommendation to transfer Mr B's DB scheme.

At the relevant date COBS 19.1.6G stated:

> *"When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme whether to transfer or opt-out, a firm should start by assuming that a transfer or opt-out will not be suitable. A firm should only then consider a transfer or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer or opt-out is in the client's best interests".*

While I acknowledge this aims to define the expectation of a regulated financial adviser when determining the suitability of a pension transfer, it emphasises the regulator's concern about the potential detriment such a transaction could expose a consumer to. Given the nature of its business and regulatory status, I'd expect Options to have been familiar with the guidance contained in COBS – even if it didn't apply directly to it. This was a further clear and obvious potential risk of consumer detriment.

Options' due diligence on Sorensen

Options have provided us with a copy of Sorensen's introducer profile, a document on 'Carey Pensions UK' headed paper, signed on 24 July 2012. On it, Options (previously Carey) states it has a duty to carry out due diligence to comply with FSA requirements and therefore requests information on independent adviser firms.

One of the questions is: "*Has the Firm or any of its advisers been subject to any FSA supervisory visits, thematic reviews or any other regulatory action in the last two years?"* and "*If yes, what was the outcome?".* To which Sorensen replied: "*TCF visit*" and "*not disclosed*".

This means that Sorensen had a supervisory visit from the regulator at the time, the FSA, which would have happened after an initial assessment during which the FSA found concerns about the firm's 'treating customers fairly' (TCF) practices, i.e. not complying with a principle the FSA put in place to ensure customers receive fair treatment from advisers. Sorensen then doesn't provide information about the outcome of this visit on the introducer profile, but only confirms that the firm isn't "*subject to any on-going FSA review, action or censure*". However, this may still mean that the outcome was not in favour of the firm, or had not yet been disclosed to it.

The entire section on questions of how many complaints the firm had in the last two years, how many were upheld and what the total compensation paid was, is answered in unclear handwriting with what could either be interpreted as "N/D", likely standing for 'not disclosed' as in the section above, or as "N/A", indicating that the director filling out the introducer profile deemed the questions as not applicable.

The whole of the next section about how many pensions were established in the last 12 months, how many SIPP/SSAS, how many personal or occupational pension transfers, how many transfers overall and average value are also all marked with "N/A" (or "N/D").

The profile goes on to ask: "*Are any Pension schemes established on an Execution Only basis?"* which is answered with "*Yes*" and the following question "*If yes what typically would* *be the reason for this?"* is also answered with "N/D" / "N/A". The same for the question on what percentage of the firm's overall business is related to pensions.

In the section 'general information', Sorensen answered the question "*What is a typical client for the firm*[?]" with "*One who pays*". And the question "*What are the Key Features you are looking for from your Pensions Administration Provider[?]"* with "*Not to ask too many questions and do what we ask of them*".

It's fair to say that this is a rather contemptuous response, displaying Sorensen's stance to consumer protection and due diligence by SIPP providers such as Options. Its focus seems to lie on having customers who pay its fees and commissions, rather than ensuring the advice on pension products is appropriate for each customer they have, with an orientation on profit rather than integrity. Going on to say it prefers providers who 'don't ask too many questions' shows a quite blunt and dismissive approach to regulatory duties and co-operation between regulated entities in the process of advising on pension transfers.

I think such statements on an introducer profile, which has the whole purpose of getting to know the introducer firm and its conduct and values, should have raised concerns with Options. The profile is clearly pointing to the risk of consumer detriment with a firm that prioritises 'clients that pay', and openly disregarding scrutiny from providers who 'shouldn't ask too many questions' and do what it asks them to.

It's also notable that most sections relevant to a firm that provides pension transfer advice is marked as 'not applicable' (or 'not disclosed'), withholding crucial information about the firm's record on things such as complaint data as well as pension types advised on. Options also seem to have done no further research on the FSA's action on Sorensen's 'treating customers fairly' record and I haven't been provided with any evidence about whether any more information was provided about the outcome of the FSA's visit. This indicates that information about such a visit and the introducer profile generally was seen as a formality, rather than something Options would have investigated further before accepting introductions from the firm.

Whilst Options have argued that Sorensen was a regulated firm and they relied on the regulator's selection and scrutiny, it's clear from the introducer profile that Sorensen had an approach that didn't align with consumer protection standards at the time introductions started. Options also had its own process in place to request such a profile in addition to its own research on the FSA database, indicating that it didn't usually solely rely on a firm's regulation. However, when provided with statements like those on the profile and a lack of detail provided by Sorensen's director, it still chose to accept the SIPP application – despite having been informed of FSA concerns about Sorensen's 'treating customers fairly' record and not knowing the outcome of the visit.

100% of applications from Sorensen were to be invested in non-mainstream investments, which shows that Options had an awareness of the business model of the firm – together with Henderson – that had the aim of investing former occupational pension schemes into high-risk, non-mainstream investments, with the potential of clients losing most or all of their pension provisions.

So even though a due diligence process seems to have been in place, Options disregarded information from this process about Sorensen that should have raised concerns of serious consumer detriment.

Options' due diligence on Henderson

As noted above, the ‘roles and responsibilities’ document set out that Henderson was responsible for the following:

- Under the “Providing Advice” section:

    - *“To evaluate your client’s financial circumstances and based on this assess their suitability for what, if any, of the* [Options] *Pension range is appropriate;”*
    - *“To document your recommendation together with suitable alternatives that could have been appropriate and why rejected in favour of the recommended product;”*

- Under the “Scheme Investments” section:

    - *“Where your client seeks advice, to provide fully documented advice to your client on the suitability of the Scheme investments, taking account of their financial objectives and attitude to investment risk;”*

We haven’t been provided with any evidence of the advice Henderson gave to Mr B, so it’s not possible to comment on what exact advice Mr B received from Henderson on the investment into carbon credits. However, from the pension transfer suitability report provided by Sorensen, it’s clear that Henderson did give advice to Mr B on this, as the report has an investment into carbon credits as a starting point and objective for the pension transfer. This paired with the Business Acceptance Agreement shows that Henderson was involved in the role of introducing Mr B to Options and had an influence on his decisions from the outset.

To the question *“From the total number of clients introduced to you by the introducer* [Henderson]*, what % of the applications were to be invested in non-mainstream investments?”,* Options responded “*33%”.* This shows that a large part of Henderson’s introductions was aimed at investing clients’ pensions into high-risk, non-mainstream investments.

Whilst Options previously argued that Henderson was FSA-regulated at the time and provided evidence of its checks on the FSA database and a World Check which didn’t produce any adverse results, this doesn’t mean that Options had no responsibility to also check the intended business and conduct of the firm, proposed in the quoted Business Acceptance Agreement.

I also can’t see that Options requested any evidence of Henderson fulfilling its duties under the above ‘Roles and Responsibilities’ agreement, such as clearly documenting advice and looking into alternatives. And I think it’s fair to say that the recommended high-risk investments are highly unlikely to be suitable for the vast majority of retail clients. They will generally only be suitable for a small proportion of people investing for their pension. And I think Options either was aware, or ought reasonably to have been aware, that the type of business Henderson was introducing was high-risk and therefore carried a potential risk of consumer detriment.

From the information that Options has provided about its relationship with Henderson, I’m satisfied Options did take some steps towards meeting its regulatory obligations and good industry practice. However, I don’t think those steps we’ve seen evidence of went far enough or were sufficient to meet Options’ regulatory obligations and standards of good industry practice.

I think Options was aware of, or should have identified potential risks of, consumer detriment associated with business introduced by Henderson (together with Sorensen).

The SIPP business introduced by the two firms appears to have been high-risk business, including many defined benefit scheme transfers where monies ended up being invested in unregulated and esoteric investments post-transfer.

<u>What fair and reasonable steps should Options have taken, in the circumstances?</u>

Options could simply have concluded that given the potential risks of consumer detriment – which I think were clear and obvious at the time – it should not accept applications from Sorensen and/or Henderson under their business agreement. That would have been a fair and reasonable step to take, in the circumstances.

Alternatively, Options could have taken fair and reasonable steps to address the potential risks of consumer detriment.

As set out above, the 2009 Thematic Review Report explained that the regulator would expect SIPP operators to have procedures and controls, and for management information to be gathered and analysed, to enable the identification of, amongst other things, "*consumer detriment such as unsuitable SIPPs*". Further, that this could then be addressed in an appropriate way "[…] *for example by contacting the members to confirm the position, or by contacting the firm giving advice and asking for clarification.*"

From the application form that showed Mr B's income and circumstances, it would have been clear that he was neither a sophisticated nor a high-net-worth investor. I think it's likely Options would have become aware that Mr B didn't understand the investment and risk factors. As he told his former representatives, he considered himself to be a *"very cautious"* investor and he had no investment experience at the time. He also confirmed that the investment was selected on his behalf, not by him. So, if it had asked Mr B how and why he was interested in transferring out of his existing pension and making this high-risk non-standard investment, I think Options would have become aware that he was not an experienced investor and had no intention to transfer but for the known promises of high returns from Henderson, and Options would or should have declined to proceed.

I accept Options couldn't give advice, but it had to take reasonable steps to meet its regulatory obligations. And in my view, such steps included addressing a potential risk of consumer detriment by speaking to applicants, as this could have provided Options with further insight into Henderson and Sorensen's business model. This would have been a fair and reasonable step to take in reaction to the clear and obvious risks of consumer detriment I've mentioned.

Options should also have taken further steps to query Sorensen's responses on the introducer profile, given its obvious disregard for consumer protection and Options' requirement for due diligence, as well as the undisclosed outcome of the 'treating customers fairly' action by the FSA. It also should have followed its own Business Acceptance Agreement and checked whether Mr B had actually received a recommendation to transfer. From the transfer suitability report it would have been clear that but for the objective of making a high-risk investment into carbon credits, a transfer with a very high critical yield that solely relied on returns much higher than the industry average would not have been acceptable.

Again, I'm not saying that Options was supposed to – or able to – give advice to Mr B. But the accumulation of evidence of the motivation for the two businesses to enable the carbon credit investments jointly with restricted advice from each firm, and the lack of experience and risk awareness of Mr B, should have alerted Options to the serious risk of detriment to his pension provisions.

Had it taken these fair and reasonable steps, what should Options have concluded?

If Options had undertaken these steps, I think it ought to have identified, amongst others, the following risks before it accepted Mr B's application and investment instructions:

- Mr B had not received a positive recommendation to transfer his DB pension scheme, the suitability report was only based on the objective of investing in carbon credits.
- Carbon credits were a high risk, non-standard and unregulated investment and the Options SIPP was being established in order to effect these, despite Mr B being neither a sophisticated, nor a high-net-worth, nor an experienced investor with a capacity for loss.
- Sorensen's introducer profile had shown responses that lacked integrity and reassurance of consumer protection and 'treating customers fairly' measures.

Each of these in isolation is significant, but cumulatively I think they demonstrate that there was a significant risk of consumer detriment associated with the introductions Options received from Sorensen and Henderson. I think that Options ought to have had real concerns that the firms together weren't acting in customers' best interests and weren't meeting their regulatory obligations.

Options didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr B fairly by accepting his application from Sorensen/Henderson. To my mind, Options didn't meet its regulatory obligations or good industry practice at the relevant time and allowed Mr B to be put at significant risk of detriment as a result. Options should have decided, before it accepted Mr B's business from Sorensen and Henderson, that it shouldn't accept introductions from either firm. I therefore conclude that it's fair and reasonable in the circumstances to say that Options shouldn't have accepted Mr B's SIPP application from Sorensen/Henderson at all.

From what we've seen, the due diligence Options carried out on the carbon credits investment was limited. However, its due diligence on the investment that was made is secondary to the point that I consider it fair and reasonable to uphold Mr B's complaint on the basis of what I've already set out above – that Options shouldn't have accepted Mr B's introduction from Sorensen and Henderson and the SIPP application in the first place.

Was it fair and reasonable in all the circumstances for Options to proceed with Mr B's application?

For the reasons given above, I think Options shouldn't have accepted Mr B's business from Sorensen/Henderson. So, things shouldn't have got beyond that, because Options didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr B fairly by accepting his business from the introducers. I consider that Options didn't meet its regulatory obligations or good industry practice at the relevant times and allowed Mr B to be put at significant risk of detriment as a result.

Further, in my view it's fair and reasonable to say that just asking Mr B to sign declarations wasn't an effective way for Options to meet its regulatory obligations to treat him fairly, given the concerns Options ought to have had about the business being introduced by Sorensen and Henderson. In my opinion, relying on the contents of such forms when Options knew, or ought to have known, that the type of business it was receiving from Sorensen/Henderson would put investors at significant risk, wasn't the fair and reasonable thing to do. Having identified the risks I've mentioned above, and being aware of the purpose of the SIPP and the DB pension transfer, I think the fair and reasonable thing for Options to do would have been to decline to accept Mr B's business from the introducers.

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

So, I'm satisfied that Mr B's Options SIPP shouldn't have been established and his DB pension shouldn't have been transferred.

<u>Is it fair to ask Options to pay Mr B compensation in the circumstances?</u>

The involvement of other parties

In this decision I'm considering Mr B's complaint about Options. But I accept other parties were involved in the transactions complained about, Sorensen and Henderson.

Mr B pursued an FSCS claim against both Sorensen and Henderson. The FSCS upheld Mr B's claims against both firms and paid him its compensation limit at the time of £50,000 per claim. But his losses exceeded the limit, as mentioned above. Following this, the FSCS provided Mr B with a reassignment of rights.

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). 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 its regulatory obligations, good industry practice and to treat Mr B fairly.

The starting point, therefore, is that it would be fair to require Options to pay Mr B compensation for the loss he's suffered as a result of its failings. I've carefully considered if there's any reason why it wouldn't be fair to ask Options to compensate Mr B for his loss.

I accept that other parties, such as Henderson and Sorensen, might have some responsibility for initiating the course of action that led to Mr B's loss. However, I'm satisfied that it's the case that if Options had complied with its own distinct regulatory obligations as a SIPP operator, the arrangement for Mr B wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

I want to make clear that I've taken everything Options has said into consideration. And it's my view that it's appropriate and fair in the circumstances for Options to compensate Mr B to the full extent of the financial losses he's suffered due to Options' failings. And, having carefully considered everything, I don't think that it would be appropriate or fair in the circumstances to reduce the compensation amount that Options is liable to pay to Mr B.

Mr B taking responsibility for his own investment decisions

In reaching my conclusions in this case I've thought about section 1C of FSMA. 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. With Options' arguments in mind, I've extended this to include the decision to transfer a pension with the purpose of investing it.

I've considered this point carefully and I'm satisfied that it wouldn't be fair or reasonable to

say Mr B's actions mean he should bear the loss arising as a result of Options' failings.
In my view, if Options had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted Mr B's business from Sorensen/Henderson. That should have been the end of the matter – if this had happened, I'm satisfied the arrangement for Mr B wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

As I've made clear, Options needed to carry out appropriate initial and ongoing due diligence on Sorensen/Henderson and their joint business model and reach the right conclusions. I think it failed to do this. Relying on the fact that both firms were regulated at the time doesn't absolve Options from its duty to ensure the firms' integrity, that 'treating customers fairly' measures are in place, and that its own requirements for business acceptance are fulfilled.

Being regulated firms, I'm satisfied that Mr B trusted Sorensen and Henderson to act in his best interests – and the FSCS has upheld his claims against then. But Mr B also then used the services of a regulated personal pension provider, Options. And as explained above, if Options had acted in accordance with its regulatory obligations and good industry practice, I'm satisfied the arrangement for Mr B wouldn't have come about in the first place.

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

<u>Had Options declined Mr B's business from Sorensen/Henderson, would the transactions complained about still have been effected elsewhere?</u>

Options argues it did not cause Mr B's loss because he would have found a way to invest in carbon credits even if Options had not accepted Sorensen/Henderson's introduction. It says that if it had refused to process Mr B's application for any reason, Mr B would've likely made the same investment via a different SIPP provider.

However, Options has provided no evidence to support an argument that Mr B wanted to open a SIPP and invest his SIPP monies into carbon credits no matter what. I've thought carefully about what Mr B would likely have done if Options had told him that it was rejecting his business.

From what Mr B has said, I think that his decision to transfer his DB pension scheme to the SIPP was highly influenced by Henderson's advice to invest into carbon credits and his pension monies were transferred to Options principally in order to make this investment. That's supported by the transfer advice letter Sorensen prepared for Mr B and provided to Options. As mentioned above, that letter contained the following wording:

> *"Following a discussion with your adviser at Henderson Carter Associates Ltd, you wish to explore the feasibility of transferring your* [DB pension] *referred to as "the scheme", into a pension arrangement that will allow you wide ranging investment options including carbon credits as this is one of your investment objects.*
>
> *Please note that this report is based on the information provided by Henderson Carter Associates Ltd and the Trustees of "the scheme".*
>
> […] *If it is your intention to invest some of your pension benefits into carbon credits a transfer is the only method of achieving this."*

So it’s clear the whole transfer was done on the premise to invest in carbon credits. And I don’t think it’s fair and reasonable to say that Options shouldn’t compensate Mr B for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I’ve found Options did. I think it’s fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn’t have accepted Mr B’s business from Sorensen/Henderson in order to invest in carbon credits.

In the circumstances, I’m satisfied it’s fair and reasonable to conclude that if Options had refused to accept Mr B’s application from Sorensen/Henderson, the transactions would not have gone ahead, and Mr B would have retained his monies in his DB scheme.

Had Options explained to Mr B why it refused to accept his application, I think it very unlikely Mr B would have tried to find another SIPP operator on his own terms to accept the business. He wasn’t an experienced investor, nor a high-net-worth individual with a large capacity for loss. He confirmed he had no other pension provisions and relied on the transferred (and later invested) funds for his retirement.

Options also made the argument that the moment Mr B requested his transfer out of the DB scheme, the guarantees of the scheme were lost, regardless of whether or not Options had accepted the application or allowed the investment. So it said it didn’t cause the loss of the DB scheme benefits. However, I’m not persuaded that Mr B, an individual with no investment experience, proceeded to transfer a DB pension, which he’d built up over many years, in the knowledge that the proposed investments he was making were high-risk. He confirmed that he had not been made aware of the risks by his financial adviser, considered himself to be a “*very cautious*” investor, and would not have gone ahead with the investment had he known about the risks.

Having carefully considered all of the circumstances, I’m satisfied it’s fair and reasonable to conclude that if Options had refused to accept Mr B’s SIPP application from Sorensen/Henderson, the transactions this complaint concerns would not have gone ahead.

<u>In conclusion</u>

I’ve looked at whether Options took reasonable care, acted with due diligence and treated Mr B fairly, in accordance with his best interests. And what I think is fair and reasonable in light of that.

Taking everything into consideration, I think that in the circumstances of this case it’s fair and reasonable for me to conclude that Options should have decided not to accept business from Henderson/Sorensen before it had received Mr B’s application from Sorensen. I conclude that if Options hadn’t accepted Mr B’s introduction from Sorensen and/or Henderson, Mr B wouldn’t have established an Options SIPP, transferred his DB Scheme monies into it or eventually invested in a high-risk investment.

For the reasons I’ve set out, I also think it’s fair and reasonable to direct Options to compensate Mr B for the loss he’s suffered as a result of Options accepting his business from Sorensen/Henderson. I say this having given careful consideration to the *Adams v Options* 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.

While I accept that other parties might have some responsibility for initiating the course of action that’s led to Mr B’s loss, I consider that Options failed to comply with its own regulatory obligations and didn’t put a stop to the transactions proceeding by declining to accept Mr B's applications when it had the opportunity to do so. And I'm satisfied that Mr B wouldn't have established the Options SIPP, transferred monies in from his DB scheme, or invested in a non-mainstream investment hadn't it been for Options' failings.

In my view, in considering what is fair compensation in this case, it's reasonable to make an award against Options that requires it to compensate Mr B for the full measure of his loss. The compensation he's already received from the FSCS is taken into account below."

Putting things right

My aim is to return Mr B to the position he'd now be in but for what I consider to be Options' failure to carry out adequate due diligence checks before accepting Mr B's business from Sorensen/Henderson.

I'm asking Options to calculate fair compensation by comparing the current position to the position Mr B would be in if he'd not transferred from his DB scheme. In summary, Options should:

1. Calculate and pay compensation for the loss Mr B's pension provisions have suffered as a result of Options accepting his application.

2. If the SIPP needs to be kept open only because of the illiquid investment and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.

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

4. Pay Mr B £500 for the distress and inconvenience he's suffered.

I shall explain how I direct Options to carry out these steps in further detail below.

<u>Calculate and pay compensation for the loss Mr B's pension provisions have suffered as a result of Options accepting his application</u>

A fair and reasonable outcome would be for Options to put Mr B, as far as possible, into the position he'd now be in if it hadn't accepted his SIPP application. As explained above, had this occurred, I consider it's more likely than not Mr B would have remained in his DB scheme.

The actual value of any current SIPP investment should be assumed to be nil for the purposes of the redress calculation. To be clear, this would include it being given a nil value for the purposes of ascertaining the current value of Mr B's SIPP.

I think this is fair because it's unlikely the carbon credits investment will have any significant realisable value in the future as I understand there is no available market and Options decided to 'freeze' the SIPP due to it's £nil value. Options has argued in other, similar, cases that if the investment remains in Mr B's SIPP or otherwise with Mr B with no adjustment in the redress, this would give Mr B an unfair windfall. Though I think it's unlikely, it is possible that the carbon credits investment may have some realisable value in the future. So, in this instance, for any investments assumed to be nil value, Options may ask Mr B to provide an undertaking to account to it for a sum equivalent to the net amount of any payment the SIPP may receive from those investment(s) in the future. That undertaking should allow for the effect of any tax and charges on the amount Mr B may receive from the investment(s) and any eventual sums he would be able to access. Options should meet any costs in drawing up the undertaking and the reasonable costs of Mr B taking advice in relation to it. Options should only benefit from the undertaking once Mr B has been fully compensated for his loss (to be clear, this includes any loss that's in excess of our award limit).

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

I can see that Mr B took a UFPLS from his SIPP in October 2016. This should be taken into account as a withdrawal under the FCA redress guidance mentioned below.

Even though he took these payments around the age of 55, they seem to have been one-off withdrawals likely of what was left in the SIPP after the carbon credits were given a £nil value. Given the DB scheme's guarantees, I think it's reasonable to assume that had Mr B kept his DB pension, he would have retired at the scheme's normal retirement age. In my provisional decision I invited his representatives to clarify the circumstances of the withdrawals and whether Mr B took any other benefits from age 55. But as I didn't hear back from them on this, I think compensation should be based on the scheme's normal retirement age as per the usual assumptions in the FCA's guidance.

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

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

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

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

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

As such, for the purposes of the calculation that's being carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4, if it wishes, Options may notionally, for the periods from the point of their payment through until the valuation date (as per the DISP App 4 definition of that term), allow for the payments Mr B received from the FSCS following the claims about Henderson and Sorensen, as an income withdrawal payment.

Where such an allowance is made then Options must also, at the end of the calculation, allow for a notional addition to the overall calculated loss that's equivalent to the payments Mr B received from the FSCS following the claims about Henderson and Sorensen. The effect of this notional addition will be to increase the overall loss calculated using the most recent financial assumptions in line with PS22/13 and DISP App 4, by a sum that's equivalent to the payments Mr B received from the FSCS.

Redress paid to Mr B as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, Options may make a notional deduction to cash lump sum payments to take account of tax that Mr B would otherwise pay on income from his pension. Mr B's representatives didn't state that he was another rate taxpayer in response to my provisional decision, so it's reasonable to assume that Mr B is likely to be a basic rate taxpayer at his selected retirement age, so the reduction would equal 20%. However, if Mr B would have been able to take a further tax-free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

<u>SIPP fees</u>

It wouldn't be fair for Mr B to have to continue to pay annual SIPP fees to keep the SIPP open, if it can't be closed after compensation has been paid due to the illiquid investment. I appreciate that Options have informed Mr B that the SIPP is 'frozen' and no fees are being charged. But if this should change and the SIPP needs to be kept open only because of the illiquid investment and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.

<u>Fees and charges paid outside the SIPP</u>

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

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

<u>Pay Mr B £500 for the distress he's suffered</u>

In addition to the financial loss that Mr B has suffered as a result of the problems with his pension, I think it's fair and reasonable to say that the loss of a significant portion, if not all, of his DB pension provision has caused Mr B distress. This has also now been going on for several years. So, I think that it's fair for Options to compensate him for this as well. I'm satisfied that £500 is an appropriate sum of compensation for this.

Award limit

Where I uphold a complaint, I can award fair compensation of up to £150,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £150,000, I may recommend that the business pays the balance.

Until the calculations are carried out, I don't know how much the compensation will be, but £150,000 is the maximum sum that I'm able to award in Mr B's complaint. So, I also make a recommendation below in the event that the compensation is to exceed this sum, although I can't require that Options pays this.

If Options believes other parties to be wholly or partly responsible for the loss, it is free to pursue those other parties. So, if Mr B's 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 Mr B may be contingent on the assignment by him to Options of any rights of action he may have against other parties in relation to his transfer to the SIPP and the investments if Options is to request this. Options should cover the reasonable cost of drawing up, and Mr B'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 B's rights should allow him to retain all rights to the difference between £150,000 and the full loss as calculated above.

Determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. I require that Options UK Personal Pensions LLP pay the amount produced by that calculation up to the maximum of £150,000 (including distress and/or inconvenience but excluding costs) plus any interest set out above.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend Options UK Personal Pensions LLP pay Mr B the balance plus any interest on the balance and costs as set out above.

The recommendation isn't part of my determination or award. Options UK Personal Pensions LLP doesn't have to do what I recommend. It's unlikely that Mr B could accept a final decision and go to court to ask for the balance. Mr B may want to get independent legal advice before deciding whether to accept this final decision.

My jurisdiction decision

It's my decision that Mr B's complaint against Options UK Personal Pensions LLP has been brought in time and that it may be considered by the Financial Ombudsman Service.

My final decision

It's my decision that I uphold Mr B's complaint. I require that Options UK Personal Pensions LLP calculate and pay the award, and take the actions, as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 28 October 2024.

Lea Hurlin

Ombudsman