DRN-5193952

The complaint

Mr K complains that Options UK Personal Pensions LLP ('Options', trading as Carey Pensions UK LLP at the relevant time) failed to carry out sufficient due diligence before accepting his application for a Self-Invested Personal Pension ('SIPP') and his application to invest in a high-risk unregulated investment scheme. He says its failures caused him a financial loss which it should compensate him for.

Mr K is represented in this complaint by a professional representative, but for ease I'll refer only to Mr K.

What happened

I've outlined the key parties involved in Mr K's complaint below.

'Firm SP'

Firm SP was an appointed representative of two firms regulated by the Financial Services Authority ('FSA'), later becoming the Financial Conduct Authority ('FCA') - one firm from December 2004 to July 2005, and the other from June 2005 to June 2011. Historical checks on Firm SP's website (which is no longer active) show that in May 2013 it said *"The purpose of this website is to provide generic information about various sectors which may be of interest to investors.* [Firm SP] *does not provide investment advice. Those wishing to invest in any product should always seek professional advice prior to making any investment."* It doesn't appear that any information can be found on Companies House about Firm SP.

German Property Group companies

These companies were set up in Germany and were not regulated by the FCA.

AS German Property Group GmbH, formerly Dolphin Trust GmbH (which was also formerly Dolphin Capital GmbH) ('Dolphin GmbH') was seemingly set up in 2008 to acquire historic sites in Germany in need of restoration with tax concessions. The plan was that properties would be sold to German investors once development potential and planning permission was in place. And funding for development of projects was by way of loan notes issued to investors.

The properties were meant to be held by a Special Purpose Vehicle ('SPV') through Dolphin GmbH and Dolphin Capital 80. Project GmbH & Co KG ('DC80'), set up in 2011, was separately used for the purpose of accepting investor's monies and issuing the loan notes in respect of the properties.

The security was meant to be by way of first legal charge granted on the properties by Dolphin GmbH, whereby it was intended that the investor's funds would be paid (as set out below) to DC80 upon the transfer of the legal charge by Dolphin GmbH into the name of the Security Trustee (held in favour of the loan note holder). And the Security Trustee would then only release the security if loan note holders had been repaid.

The promotional material originally advertised that the investment funds would be paid by investors directly to a German law firm ('BK Law'), which would hold the funds in a secure account until the purchase of the property took place and the security documentation was issued, at which point the funds would be paid to DC80. However, this seemingly changed in or around August 2014 by which time BK Law no longer received any of the investment monies, albeit some of the documentation continued to reflect this process for a time.

The loan notes issued were usually for a period of between two to five years and widely promoted with fixed annual returns of 10 to 15%, paid six monthly or at the end of the term, with the return of the capital at the end of the term. And, in or around 2021, Dolphin GmbH and DC80 entered administration.

Options

Options is a SIPP provider and administrator. At the time of these events, Options was regulated by the FSA (later the FCA). 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.

On 25 February 2014, Options' Technical Review Committee met to consider the Dolphin investment. Minutes of the meeting record that Options considered the following Dolphin documentation:

- *"Investment summary;*
- *Invitation Documents (IM);*
- *Application Form;*
- *Best International Review Report;*
- *Internet Searches on all entities;*
- *World Checks;*
- *Companies House records;*
- *FCA Register;*
- *Legal Opinion on NMPI* [Non-Mainstream Pooled Investments] *status of investment;*
- *Loan Note Instrument, Security Trustee Agreement and Template Loan Note Certificate".*

The minutes also record that Options concluded, based on the above information, that there didn't appear to be a tax charge liability for the investment and *"it is therefore in order to proceed with investment."*, but that Options had some further requirements before proceeding, as I'll now explain.

On 7 March 2014 Options wrote to Dolphin GmbH to say that, following a request to allow the Dolphin investment into Options SIPPs, Options' Technical Review Committee had considered the information and documents Dolphin GmbH had provided. And Options' understanding of the Dolphin investment included that:

- *"Introducer fees are between 10% and 15% dependent on the term chosen."*
- *"There is no secondary market and Loan Notes are non-transferrable."*
- *"As the investment is unregulated no protection through FSCS* [Financial Services Compensation Scheme] *is offered."*

Options' letter went on to say,

> *"This investment is an Alternative Investment and such is considered high risk and/or speculative.*
>
> *As this investment is essentially a loan investment* [Options] *would not generally expect the loan amount to exceed more than 50% of the SIPP Members Funds, however, this is a matter for the client and their Adviser.*
>
> *Members must confirm they are "not connected" to the borrower.*
>
> *As this is an illiquid investment, we will require all members to confirm they will retain sufficient fees on their SIPP Bank Account to cover the term of the loan note.*
>
> *All members should take their own tax, investment and financial advice to determine whether this is a suitable investment for them and take into consideration the overall value of the SIPP funds, the percentage of the SIPP to be invested and ongoing charges."*

The letter said Options had concluded that there didn't appear to be a tax charge liability for the investment and so it appeared to be an acceptable investment into a member directed pension scheme. But to proceed, Options required Dolphin to sign a copy of the letter to confirm Options had correctly understood the investment, that Dolphin agreed to Options' requirements, and that Options' 'Limitation of Liability Wording' would be added to all contracts and agreements.

Options' letter added that to proceed with any investment, it also required:

- Each client to agree and complete Options' 'Member Instruction & Declaration' form in respect of this investment.
- Each client to agree and sign the 'Loan Note Offer' form as confirmation they'd read, agreed and understood the investment and wished to proceed.
- A completed and signed certificate of high net worth or sophisticated investor status if the investor was not receiving advice from an FCA regulated adviser.

Dolphin signed Options' letter on 10 March 2014.

Mr K's dealings with Firm SP, Options and Dolphin

Mr K had two existing pensions. Based on the evidence provided, I've not seen anything to suggest that either of these were anything other than defined contribution pensions. So this is the understanding I've proceeded on, and neither Mr K or Options has disputed this.

In January 2014, Mr K signed an Options SIPP 'Application for Direct Clients', which included the following information:

- A statement that said, *"**(SIPP to be established as execution-only)** Carey Pensions UK LLP and Carey Pension Trustees UK Ltd have not provided any advice and are not responsible for the suitability of appropriateness of your decision to establish a SIPP. This application should be used if you are a client establishing a SIPP without advice. You have made this decision independently and are aware of the implications of this decision"* (no emphasis added).

- Boxes were ticked as "*Yes*" to the following statements:

> “*I accept and acknowledge that Carey Pensions UK LLP and Cary Pensions Trustees Ltd have not provided any advice.”*
>
> and
>
> *“I have had the opportunity to read the Key Features/Terms & Conditions and acknowledge I have had the opportunity to ask any questions to confirm my understanding.”*

- The form asked Mr K to *“Please provide a short statement in your own words as to the reason for establishing the SIPP on an execution only basis”*. Mr K’s recorded response was, *“I want to be able to use my knowledge of certain products without the high costs of using a financial adviser. I understand how a SIPP works.”*

- A box was ticked to say that Mr K was applying for a *“Non-regulated Investment SIPP”* that *“Allows only unregulated investments that have been accepted by Carey Pensions UK. Please note that this SIPP option requires that you are a Certified Sophisticated Investor, or have appointed a regulated Professional Financial Adviser for advice on the investments.”*

- Mr K’s date of birth, which meant he was age 45 at the time of the application. It also recorded that Mr K was a self-employed joiner with a selected retirement age of 55.

- The ‘Transfers’ section set out the details of Mr K’s two pensions to be transferred, including that they had an approximate total value of £36,000. This section also asked Mr K to record details of any other pension he had, even if he wasn’t intending to transfer them to an Options SIPP. No other pensions were recorded.

- The ‘Investment’ section said, *“As you do not have a Professional Financial Adviser, your investment choices are your sole responsibility. You will instruct us and we will act on those instructions providing it is an acceptable investment in the Carey Pension Scheme. If you wish to appoint an Investment Manager to advise on your SIPP investment please complete the details below.”* No such details were recorded. However, this section did record that Mr K intended to invest £30,000 of his Options SIPP monies in “*Dolphin IG”*.

- The ‘Cancellation Rights’ section included a box ticked to say, *“I wish to waive my right to cancel my SIPP within 30 days of establishment. I understand this means that I will not be able to cancel my Carey Pension Scheme at a later date.”*

- The ‘Declaration’ section signed by Mr K said, amongst other things,

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

In January 2014, Mr K’s Options SIPP was established. Soon after, a total of over £38,000 was switched into it from his two existing pensions.

Based on Options' 7 March 2014 letter to Dolphin GmbH, Options would have required Mr K to sign a Dolphin 'Loan Note Offer' form as confirmation he'd read, agreed and understood the investment and wished to proceed, prior to investing in Dolphin loan notes. But despite my request, Options hasn't provided our Service with a signed copy of this.

On 25 March 2014, Mr K signed an Options branded 'SIPP Member Instruction and Declaration Alternative Investment – Dolphin Capital GMBH' form. This included the following statements:

- *"Neither Carey Pensions UK LLP nor Carey Pension Trustees UK Ltd have provided any advice, whatsoever, in respect of the SIPP or this investment, including but not limited to financial, investment and tax advice."*
- *"I understand this investment is an Unregulated "Alternative Investment" and as such is considered High Risk and Speculative and that it may provide difficult to value, sell/realise."*
- *"I understand that as an Unregulated Investment the Financial Services Compensation Scheme will not apply."*
- *"I fully understand that the values of investments can fall as well as rise and that my entire investment may be lost."*
- *"I have had the opportunity to seek independent financial, investment, legal and tax advice regarding the investment and its value, taxes, costs and fees. Based on either this advice or my own advice I have decided to proceed with the investment."*
- *"I indemnify both Carey Pensions UK LLP and Carey Pension Trustees UK Ltd against: Any and all claims, demands, actions, suits, losses, costs, charges, damages, liabilities whatsoever which Carey Pensions Trustees UK Limited and/or Carey Pensions UK LLP may pay, sustain, suffer or incur in connection with any aspect of this investment."*

In April 2014, £30,000 of Mr K's Options SIPP monies were invested into a five-year Dolphin loan note. Based on Mr K's later SIPP statements and SIPP transaction lists, it doesn't appear that Mr K made any further investment in Dolphin.

In December 2016, Options emailed Mr K to explain that less interest would be paid on his SIPP cash balance, which was £16,386 at that time. Mr K forwarded this email to Firm SP to ask what his options were, and Firm SP replied that it would discuss this with him, amongst other things.

In January 2017, Firm SP emailed Mr K details of a new investment ('Investment H') it said he could use his Options SIPP cash balance to invest in. In March 2017, Firm SP asked Mr K for identification documents in order to complete his Investment H investment. Mr K replied to say he'd sent the requested documents. But based on Mr K's SIPP statements and SIPP transaction lists, it appears Mr K did not in fact make any investment in Investment H.

In February 2019, Mr K emailed Firm SP to ask if it had heard from Dolphin, as his investment was coming to the end of its five year term and he wanted to re-invest with Dolphin for a further five years to take him to his intended retirement age. Firm SP replied that Dolphin would be in touch with him to discuss his options.

In March 2019 Firm SP emailed a separate pension provider, and copied in Mr K, to say Mr K wanted to transfer his Options SIPP to it, and that he expected to transfer about £50,000 in cash given his Dolphin investment would mature shortly. However, it appears that this transfer never took place, possibly because Options emailed Mr K about his Dolphin investment in May 2019. This email said,

> *"We are aware that the terms of your investment with Dolphin Capital have either matured recently or are due to mature in the next few months,*
>
> *On speaking to Dolphin Trust to arrange repayment of the maturity funds into your pension scheme bank account, they have confirmed this week that the company currently does not have the liquidity to pay their investors at this time.*
>
> *They confirmed the Chief Executive Officer has in the last 2 weeks decided to sell properties to release funds to enable payments to investors. They have 2-3 properties on the market currently and have confirmed they already have some interest from various parties.*
>
> *They have stated they will keep us updated with the progress of the sales and that they will be sending out an investor update in the next couple of weeks. As soon as we receive further news, we will forward this on to you."*

Mr K emailed Firm SP to ask if this was anything to worry about, and it told him it didn't think so as things like this can happen in the property market.

On 28 October 2019, CFE (a company appointed to review Dolphin) issued an update to investors. Amongst other things, this update said:

> *"You have invested money in the investment model of the German Property Group (formerly Dolphin Trust) and have realised for some time now that there are disturbances in the return flow of your investments. This circumstance is unpleasant for you and understandably leads to uncertainty regarding your investment.*
>
> *Your investments in listed real estate with expansion/value creation potential justified themselves in a market environment "real estate investment" with market-proven increase in value in substance as well as yield. Special effects of this in Germany, beyond commercial predictability, include among others:*
> *overloading of the approval authorities, legal reorganisation of relevant property taxes for real estate, political decisions on ecologically sustainable renovations and new buildings pp* [sic].
>
> *The above-mentioned circumstances only provide an excerpt of the factors influencing project financing and its implementation."*

And

> *"In the interests of responsible corporate management and transparency towards all stakeholders, in particular investors and financial markets, the German Property Group, namely* [name of director of Dolphin]*, has commissioned our company with the neutral and independent preparation of continuation reports and rating analyses."*

On 12 December 2019 Dolphin wrote to investors. It said:

> *"We have appointed Consult Finance Estate (CFE), CFE are experts in helping companies reorganise their structure. We appointed CFE due to difficult market*

conditions we have faced, we feel we need to have the assistance of a specialised company to assist us in the restructuring process and to ensure all we do is fully validated for the interests of our investors.

The review can take up to 6 months to conclude, the reason for this timeframe is simply to allow a full and independent review of all the projects, the valuations, any delays currently in place and fully review the business structure. At the end of the process they will provide a detailed report that will be issued to all pension companies to review. During the review it is proposed that CFE will send an update every 4 weeks to clients to keep them updated.

There will be no payments made on maturities during the review period, the reason for this is to ensure all clients are treat [sic] *fairly and reasonably in receiving funds as advised by CFE."*

On 30 July 2020, Dolphin wrote to investors saying:

"The Core companies belonging to the German Property Group (formerly Dolphin Trust) have filed for bankruptcy with the Bremen Local Court (Insolvency Court). The Bremen Local Court has in turn appointed the experienced GÖRG insolvency expert Prof. Dr. Gerrit Hölzle to serve as preliminary insolvency administrator in the context of an insolvency for GPG.

The companies now under bankruptcy protection consist of financing and coordination hubs within the diverse and important German Property Group and include the eponymous German Property Group GmbH itself. The gradual filing of insolvency applications for all of the individual project development companies belonging to German Property Group will soon take place in an order agreed with the court for reasons of procedural efficiency.

The court have appointed GÖRG Partner Gerrit Hölzle: a German bankruptcy procedure ensures that the interests of the creditors are carefully protected from the bankruptcy application and that each creditor is treated equitably. Every effort is now being made to ensure that the German Property is dealt with fairly and efficiently for the benefit of its creditors. We are confident that the numerous stakeholders of The German Property Group, including affected municipalities throughout Germany, will also benefit from the structure and clarity provided by this insolvency proceeding."

The investment failed and it appears Mr K lost the monies he'd invested in Dolphin. As above, Dolphin filed for bankruptcy with the local court in Germany in 2020. The investment's failure has led to both civil and criminal proceedings against companies and individuals involved in the structure.

Mr K engaged his professional representative, and sent Options a letter of claim in August 2020. In summary this said, amongst other things, that:

- Mr K was advised by Firm SP to switch his existing pensions to a new SIPP with Options and invest his SIPP monies in Dolphin, as it told him this was an excellent investment opportunity, that it was safe and secure with the possibility of healthy returns.

- Options failed to carry out sufficient due diligence on introducer Firm SP before accepting Mr K's business from it. Had it done so, it ought to have known business introduced by Firm SP likely posed a high risk of consumer detriment, as it was acting as an introducer to an esoteric unregulated investment likely to be suitable only for a small proportion of a sophisticated investor's portfolio. And the business Firm SP was introducing involved some transfers from occupational and defined benefit schemes, and clients signing disclaimers acknowledging the investments were high risk.

- Options failed to carry out sufficient due diligence on the Dolphin investment prior to accepting it into its SIPPs. Options didn't carry out independent checks on its viability - and if had, it ought to have seen it had no real investor protection, no liquidity, couldn't be independently valued, was very high risk and effectively an unregulated collective investment scheme ('UCIS'), and that the Dolphin marketing material was misleading.

- Mr K hadn't been a sophisticated or high net worth investor – he was a retail investor who had not received advice from a regulated firm. And Options should have been mindful he was investing a significant part of his pension in Dolphin.

- So Options hadn't acted fairly or complied with its regulatory duties, specifically its responsibilities as set out in the Principles for Businesses at 2, 3 and 6 and COBS 2.1.1R. Had Options acted in accordance with its regulatory obligations and good industry practice at the relevant time, it should have refused to accept Mr K's introduction and investment, and therefore his existing pensions would have stayed where they were. Therefore, it should compensate him for his financial loss, including the Options SIPP management fees he'd paid, 8% interest per annum and his costs.

Mr K brought his complaint to our Service in November 2020, as Options hadn't yet responded to his letter of claim. Mr K thought Options should compensate him for his loss of investment and pension, taking into account its administration charges and what his pensions would have been worth had they stayed where they were and not been switched to Options in 2014. He told us he had no legal action pending against Options. And Mr K's submissions to us included that, at the time of the relevant events:

- He'd held an ISA with a separate firm and was considering his investment options. So his ISA firm recommended he speak with Firm SP in relation to his pension plans. As Firm SP had been recommended to him, he thought it would be trustworthy. He'd not been aware Firm SP was unregulated.

- Firm SP recommended switching his existing pensions into the SIPP and the subsequent investment into Dolphin - it told him they had to be switched to make the investment. He wasn't aware of anyone else involved in the application process.

- Prior to this, he'd not had any intention to switch his existing pensions. But after Firm SP's advice he thought it made sense to consolidate his pensions into one pot and get better returns via the Dolphin investment. Firm SP sold the investment to him as being low risk, safe and secure with the guarantee of good returns. He was told that the longer he invested, the higher the returns would be. Firm SP reassured him throughout the process and told him it had made a lot of money from the Dolphin investment. Mr K was not aware of how the investment worked other than what he was told.

- Firm SP told him to say he didn't have an independent financial adviser and to make it seem as though he was proceeding on his own accord. Mr K wasn't sure whether Firm SP had any contact with Options, but Firm SP was advising him in the background.

- He first became aware of the issues with Dolphin following an online search in which he noticed that there was a German Property Group committee reporting problems.

- He'd not made any complaints against any other parties and hasn't received compensation from any other source.

Options responded to Mr K's letter of claim in August 2022. In summary, it said:

- Options provided execution-only (i.e. non-advised) SIPP administration services, and this was explained in the documentation issued to Mr K and the paperwork he read, signed and agreed to.

- Options had no reason to think it shouldn't accept Mr K's SIPP business.

- Options had no relationship with Mr K prior to receiving his SIPP application. His SIPP application form made clear he came directly to Options without a financial adviser, as he wanted *"to be able to use my knowledge of certain products without the high costs of using a financial adviser. I understand how a SIPP works."* If Mr K believed he'd received any form of advice prior to or during the establishment of his SIPP and subsequent investment, he didn't make Options aware of this at any point. So Options couldn't reasonably have known that Mr K had, or believed he had, received advice.

- Options does not (and is not permitted to) to provide any advice to clients in relation to the suitability for them of the establishment of a SIPP, pension transfers or the underlying investments, or even their chosen financial adviser - to do so would put it in breach of its permissions. This was made clear to Mr K in the SIPP application form he signed. It's not for Options to look beyond his signature or decline his instruction on the assumption he didn't understand what he was signing, when there was no indication this was the case. Mr K shouldn't have signed the documents if he didn't understand or agree to them.

- Options issued Mr K with documents that highlighted many of the issues he now seeks to complain about. So it's not appropriate or fair for him to now complain.

- The documents Options provided Mr K with represented the full extent of information and warnings Options is permitted to provide. But their effectiveness is limited by members' openness and honesty. Options isn't responsible if Mr K chose not to heed its warnings.

- Options isn't responsible for the decisions Mr K made, the instructions he provided, or that his chosen investment hasn't performed in line with his expectations. Mr K contributed to his own potential losses (if there are any) by not being open and honest with Options. Options cannot be held accountable for something Mr K did without its knowledge and of his own free will.

- Options is not an investment manager and has no involvement in the operation of the underlying investments its members choose. It was Mr K's, or his appointed adviser's, responsibility to give Options investment instructions. And it was Mr K' s choice whether to take regulated financial advice before making decisions about his pension.

- Options is unable to comment on any interaction or discussion between Mr K and any third parties, as it was not party to these. Options' documentation recommended Mr K seek independent financial advice, and Mr K should have done this.

- Options followed its processes. It had strict procedures in place and was able to fully satisfy itself that Mr K understood the instructions he gave, had the opportunity to seek regulated advice, and had read and understood all the information and documentation Options provided.

- Options is acutely aware of the standards it must meet as part of the provision of its services as an execution-only SIPP provider. It has continually acted in accordance with its regulatory and statutory requirements, and improved its processes over the years in line with guidance from the regulator.

- Options acts as the administrator only of the SIPP. Options provided clear information and warnings in the application form and guided Mr K to seek regulated financial advice about the suitability of the decisions he was making. These included the warnings in the SIPP application form and the Alternative Investment - Member Declaration form he signed. The Member Declaration form was very clear regarding what the investment was and that it was high risk and speculative, so that Mr K could make an informed decision on whether to go ahead with his investment instruction.

- As an execution-only business, Options followed Mr K's investment instructions in line with its obligations under COBS 11.2.19.

- Mr K's SIPP application form said he wished to invest in Dolphin, so he'd clearly chosen this investment prior to establishing an Options SIPP.

- As Mr K's complaint is in relation to an execution-only SIPP, it should be heard by The Pensions Ombudsman ('TPO').

Our Investigator considered Mr K's complaint and thought it should be upheld. He noted that, while Options' had provided some documentary evidence, it hadn't responded to the specific questions he'd asked it about the due diligence it had carried out. He also noted Mr K said Firm SP had introduced him to the Options SIPP and the Dolphin investment and that there was evidence of interaction between Firm SP and Mr K. But he thought Options hadn't known of Firm SP's involvement and had considered Mr K a direct and unadvised client. So he didn't think it was fair to say Options had done something it shouldn't there.

However, our Investigator thought Options hadn't carried out sufficient due diligence on the Dolphin investment and should have refused to let it take place. He said Options should've been concerned that the Dolphin investment marketing material was misleading and at odds with Options' understanding of the investment. Further, he said Options hadn't followed its own requirements in accepting Mr K's application to invest in Dolphin, as he was a client who had not received FCA regulated advice and there was no evidence that he'd completed forms to say he was a sophisticated or a high net worth individual. Our Investigator thought it was fair and reasonable for Options to compensate Mr K for his financial loss and to pay him an additional £500 compensation for the distress and inconvenience it had caused him.

Mr K agreed with the Investigator's view and said he'd prefer to have compensation paid to him directly via his professional representative.

Despite being provided with the opportunity, it appears Options didn't provide any response to the Investigator's view.

As agreement couldn't be reached, this complaint was passed to me. I issued a provisional decision in which I explained why I thought Mr K's complaint should be upheld. In summary, I said Options hadn't carried out adequate due diligence on the Dolphin investment and that if it had, it should have refused to accept Mr K's SIPP business. And that Mr K wouldn't have established the SIPP, transferred monies in from existing pensions, or invested in Dolphin if it hadn't been for Options' failings. So I said Options should calculate Mr K's financial loss and compensate him for it, and also pay him a further £500 compensation for the distress it had caused him.

Mr K accepted the provisional decision.

Despite being provided with the opportunity, it appears Options didn't provide any response to the provisional decision.

As both parties have had the opportunity to provide any response they wanted to make to the provisional decision, I'm now in a position to make my final decision.

What I've decided – and why

Preliminary point – jurisdiction

For the avoidance of doubt, I am considering this preliminary point on the basis of the applicable rules and law and not on the basis of what is fair and reasonable in all the circumstances.

I can't see that Options has consented to us considering the complaint if it was made outside our time limits set out in the Dispute Resolution ('DISP') Rules – found in the Financial Conduct Authority's handbook – and DISP 2.8.2R in particular. Mr K's complaint was made more than six years after the events he complains of. But I haven't seen anything that makes me think Mr K knew, or ought to have known, that he had cause for complaint and that Options was or might be responsible for this more than three years before he complained to it. So I remain satisfied this complaint was referred within the time limits.

Preliminary point - should the complaint be referred to TPO?

I note Options says this complaint should be heard by TPO. Again, for the avoidance of doubt, I've considered this point on the basis of the applicable rules and law and not on the basis of what is fair and reasonable in all the circumstances.

Having done so, I remain satisfied that this complaint is one we can and should consider. We have a statutory duty to resolve complaints referred to us which are within our jurisdiction, subject to certain discretions which are set out in our rules. The rules set out in the FCA Handbook, at DISP 3.4.1R, say:

"The Ombudsman may refer a complaint to another complaints scheme where:

(1) he considers that it would be more suitable for the matter to be determined by that scheme; and

(2) the complainant consents to the referral."

I could now refer the complaint to TPO on the basis of DISP 3.4.1R if I take the view it's more suitable for TPO and if, in the light of that view, Mr K consents to a referral to TPO.

But I don't consider this is a complaint that would be more suitable for determination by TPO. This complaint requires consideration to be given to the rules and principles set down by the regulator. In my view, these are matters which the Financial Ombudsman Service is particularly well placed to deal with. I'm also satisfied we possess the necessary knowledge and expertise to fairly determine the complaint. Our investigation is also well advanced. So I don't think it would be more suitable for the subject matter of this complaint to be considered by TPO.

In reaching this conclusion I've considered the Memorandum of Understanding ('MoU') between the Financial Ombudsman Service and TPO. The MoU is a document about practical cooperation where there's remit overlap between the two organisations – however the MoU doesn't determine the jurisdiction of either organisation. Ultimately, DISP 3.4.1R says that I *may* refer the complaint to another complaints scheme, not that I *must*. So I have discretion to decide what I'll do in the circumstances. And, for the reasons I've given above, I've decided to exercise my discretion not to refer this complaint to TPO.

So, I still don't consider that it would be more suitable for this complaint to be determined by TPO, and I've decided not to exercise my discretion to refer it.

Therefore, I've gone on to consider the merits of Mr K's complaint.

<u>The merits</u>

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

Relevant considerations

I've carefully taken account of the relevant considerations to decide what's fair and reasonable in the circumstances of this complaint.

Before I set out the reasoning for my decision, it's important for me to say that in considering what is fair and reasonable in all the circumstances of this complaint, I have taken into account relevant law and regulations; regulators rules; guidance and standards; codes of practice; and where appropriate, what I consider to have been good industry practice at the relevant time.

In my view, the FCA's Principles for Businesses are of particular relevance. The Principles for Businesses, which are set out in the FCA's Handbook "*are a general statement of the fundamental obligations of firms under the regulatory system"* (PRIN 1.1.2G – at the relevant date). Principles 2, 3 and 6 provide:

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

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

> *"The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The Specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirements 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'd 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 ought to have refused to accept the investment. The Ombudsman found Berkeley Burke had therefore not complied with its regulatory obligations and hadn't 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 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've 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's 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 that I must take into account when deciding this complaint.

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

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 K'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 the FSMA ('the COBS claim'). HHJ Dight rejected this claim and found that Options SIPP had complied with the best interests rule on the facts of Mr Adams' case.

The Court of Appeal rejected Mr Adams' appeal against HHJ Dight's dismissal of the COBS claim, on the basis that Mr Adams was seeking to advance a case that was radically different to that found in his initial pleadings. The Court found that this part of Mr Adams' appeal didn't so much represent a challenge to the grounds on which HHJ Dight had dismissed the COBS claim, but rather was an attempt to put forward an entirely new case.

I note that in *Adams v Options SIPP*, HHJ Dight found that the factual context of a case would inform the extent of the duty imposed by COBS 2.1.1R. HHJ Dight said at paragraph 148:

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

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

In Mr K's complaint, amongst other things, I'm considering whether Options ought to have identified that accepting the Dolphin investment into its SIPPs involved a significant risk of consumer detriment and, if so, whether it ought to have declined to accept the Dolphin investment in its SIPPs *before* it accepted Mr K's SIPP application.

The facts of Mr Adams' and Mr K's cases are also different. I make that point to highlight that there are factual differences between *Adams v Options SIPP* and Mr K's case. And I need to construe the duties Options owed to Mr K under COBS 2.1.1R in light of the specific facts of Mr K's case.

So I've considered COBS 2.1.1R – alongside the remainder of the relevant considerations, and within the factual context of Mr K's case, including Options' role in the transaction.

However, it's important to emphasise that I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And, in doing that, I'm required to take into account relevant considerations which include: law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. This is a clear and relevant point of difference between this complaint and the judgments in

Adams v Options SIPP. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

I also want to emphasise that I don't say Options was under any obligation to advise Mr K on the SIPP and/or the underlying investment. Refusing to accept an application isn't the same thing as advising Mr K on the merits of the SIPP and/or the underlying investment. But I am satisfied Options' obligations included deciding whether to accept an introduction from a firm and whether to accept particular investments into its SIPP. And I don't accept that it couldn't make such an assessment without straying into giving the member advice.

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

Options may argue that a contravention of the Principles cannot in itself give rise to any cause of action at law. However, I am dealing with a complaint, not a cause of action, and what I am seeking to identify here is what is relevant to my consideration of what is fair and reasonable in the circumstances of this case. And I'm satisfied that the FCA's Principles are a relevant consideration that I must take into account when deciding this complaint.

The regulatory publications

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

- The 2009 and 2012 Thematic Review Reports.
- The October 2013 finalised SIPP operator guidance.
- The July 2014 *"Dear CEO"* letter.

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

The 2009 Thematic Review Report

The 2009 Report included the following statement:

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

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

…

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

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

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

- *Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm's clients, and that they do not appear on the FSA website listing warning notices.*

- *Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.*

- *Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified.*

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

- *Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely.*

- *Routinely identifying instances of execution-only clients who have signed disclaimers taking responsibility for their investment decisions, and gathering and analysing data regarding the aggregate volume of such business.*

- *Identifying instances of clients waiving their cancellation rights, and the reasons for this."*

The later publications

In the October 2013 finalised SIPP operator guidance, the FCA stated:

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

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

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

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

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

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

- *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*

- *Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.*

- *Being able to identify irregular investments, often indicated by unusually small or large transactions; or higher risk investments such as unquoted shares which may be illiquid. This would enable the firm to seek appropriate clarification, for example from the prospective member or their adviser, if it has any concerns.*

- *Identifying instances when prospective members waive their cancellation rights and the reasons for this.*

Although the members' advisers are responsible for the SIPP investment advice given, as a SIPP operator the firm has a responsibility for the quality of the SIPP business it administers. Examples of good practice we have identified include:

- *conducting independent verification checks on members to ensure the information they are being supplied with, or that they are providing the firm with, is authentic and meets the firm's procedures and are not being used to launder money*

- *having clear terms of business agreements in place which govern relationships and clarify responsibilities for relationships with other professional bodies such as solicitors and accountants, and*

- *using non-regulated introducer checklists which demonstrate the SIPP operators have considered the additional risks involved in accepting business from nonregulated introducers*

In relation to due diligence, the October 2013 finalised SIPP operator guidance said:

"Due diligence

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

- *ensuring that all investments permitted by the scheme are permitted by HMRC, or where a tax charge is incurred, that charge is identifiable, HMRC is informed and the tax charge paid*

- *periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme*

- *having checks which may include, but are not limited to:*

    - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*
    - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*

- *ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified*

- *good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and*

- *ensuring these benchmarks clearly identify those instances that would lead a firm to decline the proposed business, or to undertake further investigations such as instances of potential pension liberation, investments that may breach HMRC tax-relievable investments and non-standard investments that have not been approved by the firm"*

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

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

- correctly establishing and understanding the nature of an investment

- ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation

- ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable)

- ensuring that an investment can be independently valued, both at point of purchase and subsequently, and

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

I acknowledge that the 2009 and 2012 Thematic Review Reports and the *"Dear CEO"* letter aren't formal guidance (whereas the 2013 finalised guidance is). However, the fact that the reports and *"Dear CEO"* letter didn't constitute formal guidance doesn't mean 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 regulators' expectations of what SIPP operators should be doing also go some way to indicate what I consider amounts to good industry practice, and I'm therefore satisfied it's appropriate to take them into account.

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

At its introduction the 2009 Thematic Review Report says:

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

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

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

Options may argue 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'm therefore satisfied it's appropriate to take them into account too. And I note that (except for the *"Dear CEO"* letter) these publications were issued prior to the events Mr K complains of.

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

I note the judge in the *Adams* case didn't consider the 2012 Thematic Review Report, 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 amounts to good industry practice at the relevant time.

That doesn't mean that in considering what's fair and reasonable, I'll only consider Options' actions with these documents in mind. The reports, *"Dear CEO"* letter and guidance gave non-exhaustive examples of good practice. They didn't 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 K. It's accepted Options wasn't required to give advice to Mr K, 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 they're evidence of what I consider to have been good industry practice at the relevant time, which would bring about the outcomes envisaged by the Principles. I note the FCA's Enforcement Guide says publications of this type *"illustrate ways (but not the only ways) in which a person can comply with the relevant rules".* And so it's fair and reasonable for me to take them into account when deciding this complaint.

I find that the 2009 Report together with the Principles provide a very clear indication of what Options could and should have done to comply with its regulatory obligations that existed at the relevant time before accepting Mr K's applications.

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 K's application to establish a SIPP and make the underlying investment in Dolphin, Options complied with its regulatory obligations: to act with due skill, care and diligence; to take reasonable care to organise and control its affairs responsibly and effectively; to pay due regard to the interests of its customers and treat them fairly; and to act honestly, fairly and professionally. In doing that, I'm looking to the Principles and the publications listed above to provide an indication of what Options should have done to comply with its regulatory obligations and duties.

Taking account of the factual context of this case, it's my view that in order for Options to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), amongst other things it should have undertaken sufficient due diligence into the Dolphin investment *before* deciding to accept Mr K's applications.

What I'll be looking at here is whether Options took reasonable care, acted with due diligence and treated Mr K fairly, in accordance with his best interests. And what I think is fair and reasonable in light of that. And I think the key issue in Mr K's complaint is whether it was fair and reasonable for Options to have accepted his SIPP application in the first place. So, I need to consider whether Options carried out appropriate due diligence checks on the Dolphin investment before deciding to accept Mr K's SIPP application.

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

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), it should have undertaken sufficient due diligence checks to consider whether to accept or reject particular applications for investments, in this case Dolphin, with its regulatory obligations in mind. I'm mindful of Options' 7 March 2014 letter to Dolphin, and the Options' requirements that it set out – including that each client must sign a Member Declaration form and a Loan Note Offer form, and that non-advised investors must also complete and sign a certificate of high net worth or sophisticated investor status. It's clear these were to help enable Options to decide whether or not to permit the investment in question, so I think that Options understood this obligation that it had to undertake checks to consider whether to accept or reject particular investments.

What ultimately happened to the Dolphin investment scheme is well established, if poorly documented, and has been the subject of court action. What I'm looking at here is what Options knew or ought to have known about the Dolphin investment around the time it received Mr K's SIPP and investment application, and what conclusions it ought to have drawn from this at that time.

The contract between Options and Mr K

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 K or otherwise have ensured the suitability of the SIPP or the Dolphin investment for him. I accept that Options made it clear to Mr K that it wasn't giving, nor was it able to give, advice and that it played an execution-only role in his SIPP investments. And that forms it appears Mr K signed confirmed, amongst other things, that losses arising as a result of Options acting on his instructions were his responsibility.

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 K'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 K on the suitability of the SIPP or Dolphin investment.

What did Options' obligations mean in practice?

In this case, the business Options was conducting was its operation of SIPPs. And I'm satisfied that, to meet its regulatory obligations, when conducting its operation of SIPPs business, Options had to decide whether to accept or reject particular investments and/or referrals of business with the Principles in mind. To be clear, I don't agree that it couldn't have rejected applications without contravening its regulatory permissions by giving investment advice.

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

I am satisfied that, to meet its regulatory obligations, when conducting its business, Options was required to consider whether to accept or reject particular business, with the Principles in mind.

All in all I am satisfied that, in order to meet the appropriate standards of good industry practice and the obligations set by the regulator's rules and regulations, Options should have carried out due diligence which was consistent with good industry practice and its regulatory obligations at the time. And in my opinion, Options should have used the knowledge it gained from this to decide whether to accept or reject business or a particular investment.

The due diligence carried out by Options on Firm SP

In this case, the business Options was conducting was its operation of SIPPs. I'm satisfied that meeting its regulatory obligations when conducting this business would include deciding whether to accept or reject particular referrals of business. The regulators' reports and guidance provided some examples of good practice observed by the FSA and FCA during its work with SIPP operators. This included being satisfied that a particular introducer is appropriate to deal with. That involves conducting checks – due diligence – on introducers to make informed decisions about accepting business. This obligation was a continuing one.

I note Mr K says Firm SP introduced him to both Options and the Dolphin investment. I also note Options says Mr K's SIPP application made clear he was a direct client without an adviser. So there is a dispute over how Mr K's SIPP business was introduced to Options.

But I don't think I need to make a finding on that matter. Because regardless, having reached the conclusions I'll set out below, the due diligence Options may or may not have carried out on Firm SP it isn't the basis on which I'm upholding Mr K's complaint or something I've relied on in reaching my conclusions. As I'll explain, I think Options failed to carry out sufficient due diligence on the Dolphin investment and to follow its own processes, and that Options didn't reach the right conclusions based on the information available to it.

So I don't think it's necessary for me to also consider Options' due diligence on Firm SP. I'm satisfied that Options wasn't treating Mr K fairly or reasonably when it accepted his SIPP application in order to invest in Dolphin, so I don't need to consider the due diligence it may have carried out on Firm SP and whether this was sufficient to meet its regulatory obligations. And I make no findings about this issue.

Mr K's particular applications

For the reasons I'll set out below, Options shouldn't have accepted Mr K's application to invest in Dolphin. And even if I thought otherwise I'd still consider it fair and reasonable to uphold Mr K's complaint on the basis that Options didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr K fairly, by accepting his particular applications in the circumstances, for the reasons given below.

As set out above, the FCA guidance says that:

‘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.’

Options 7 March 2014 letter to Dolphin makes clear that to proceed with any investment, Options also required:

- Each client to agree and complete Options’ ‘Member Instruction & Declaration’ form for the Dolphin investment.
- Each client to agree and sign the ‘Loan Note Offer’ form as confirmation they’d read, agreed and understood the Dolphin investment and wished to proceed.
- A completed and signed certificate of high net worth or sophisticated investor status if the investor was not receiving advice from an FCA regulated adviser.

So I think it’s clear that the above were Options’ benchmarks. And that it wouldn’t permit the investments within its SIPPs unless certain circumstances, such as those detailed above, were present as a minimum standard for it to be able to do so.

As I say, I’ve not been provided with a copy of any Loan Note Offer that Mr K signed. In addition, I’ve not seen anything to suggest that Mr K signed a certificate of high net worth or sophisticated investor status. It’s clear that Options accepted Mr K as a direct client who had not received advice from an FCA regulated adviser. So Options' own requirements meant that without these, it shouldn’t have allowed his Dolphin investment to be made.

And in any case, I’ve considered what Options would have known about Mr K and his circumstances at that time. The SIPP application that he signed in January 2014 recorded that he was a self-employed joiner, and it did not record his income or any other assets apart from the two pensions worth approximately £36,000 that he intended to switch to Options. I acknowledge that his SIPP application also recorded that the reason he was establishing the SIPP on an execution only basis was because *“I want to be able to use my knowledge of certain products without the high costs of using a financial adviser. I understand how a SIPP works.”*. But I don’t think there is anything in Mr K’s SIPP application form, or in the other evidence I’ve seen, that means Options could reasonably have concluded that Mr K was a high net worth individual.

It seems Options may have taken comfort that Mr K might be considered a sophisticated investor. However, COBS 4.12.9G set out that ‘A retail client who meets the criteria for a certified high net worth investor but not for a certified sophisticated investor may be unable to properly understand and evaluate the risks of the non-mainstream pooled investment in question.’.

From what I can see Mr K wasn’t a certified sophisticated investor under COBS 4.12.7R. He hadn’t been assessed by a regulated firm as ‘sufficiently knowledgeable to understand the risks associated with engaging in investment activity in non-mainstream pooled investments’.

Options might say that Mr K held himself out as a self-certified sophisticated investor. And I recognise that as someone who was self-employed, Mr K may have run his own business. But I can't see anything to suggest he met the self-certified sophisticated investor criteria in COBS 4.12.8R.

Options could have seen from Mr K's SIPP application that he intended to retire within ten years of his 2014 application. And that despite being asked to, Mr K hadn't recorded that he held any other pensions other than the two he intended to switch to Options. It seems unlikely to me in the particular circumstances that Mr K would knowingly put almost his entire SIPP monies at such a high risk that close to his intended retirement age.

Having considered the available information, I don't think Mr K understood or had the knowledge to be able to assess the risks involved. Options' understanding was that Mr K hadn't had any regulated advice. And it seems Mr K had a limited knowledge and experience of these types of investments and/or investments generally. The Dolphin investment was in loan notes, and was a high risk and complex investment only suitable for certain types of investor.

Options' due diligence on the Dolphin investment

I think Options' obligations certainly went beyond checking that the Dolphin investment existed and would not result in tax charges and I think it understood this at the time. I say this because Options has provided us with copies of some of the information the evidence shows it considered before accepting the Dolphin investment within its SIPPs.

The evidence shows that prior to permitting the Dolphin investment into its SIPPs and before accepting Mr K's application to invest in this in 2014, Options reviewed, amongst other things, the following, which was seemingly provided to it by Dolphin as part of a due diligence pack:

- *"Investment summary;*
- *Invitation Documents (IM);*
- *Application Form;*
- *Best International Review Report;*
- *Internet Searches on all entities;*
- *World Checks;*
- *Companies House records;*
- *FCA Register;*
- *Legal Opinion on NMPI* [Non-Mainstream Pooled Investments] *status of investment;*
- *Loan Note Instrument, Security Trustee Agreement and Template Loan Note Certificate".*

Options has also provided us with some evidence of the due diligence checks it undertook into Dolphin which included, for example, obtaining:

- Investment brochures and completed project brochures. Including, for example, pictures and a summary listing completed projects.
- Legal opinion and advice obtained by Dolphin on the investment. For example, in respect of financial promotions, FSMA and compliance issues.
- Dolphin's 'Clarity on Marketing Rules & Practices' document, dated September 2012.
- Copies of accounts and annual returns in respect of involved parties.

Despite my request in the provisional decision, Options hasn't told us how many of its customers went on to invest in Dolphin, over what timescales it accepted this investment into its SIPPs and what proportion was on an execution-only basis. But on 10 March 2014, Dolphin signed its confirmation of Options' understanding of the investment and requirements to proceed with the investment. So it seems likely Options began accepting applications for the Dolphin investment from then. However, I note Options received Mr K's SIPP application and established his SIPP before this, in January 2014. And Mr K's SIPP application made clear that he intended to invest his SIPP monies in Dolphin. So Options accepted his SIPP application before it had even considered whether the Dolphin investment was one that was suitable to accept into its SIPPs.

Having carefully considered all of the information that's been made available to us to date, I don't think Options' actions went far enough. As I explain in more detail below, I'm not currently satisfied that Options undertook sufficient due diligence on the Dolphin investment before it decided to accept this into its SIPPs. As such, in my view, Options didn't comply with its regulatory obligations and good practice, and it didn't act fairly and reasonably in its dealings with Mr K, by not undertaking sufficient due diligence on the Dolphin investment before it accepted his SIPP applications which I think was clearly made with the intention of investing in Dolphin.

Further, based on what it knew or ought to have known had it undertaken sufficient due diligence, I think Options failed to draw a reasonable conclusion on accepting the Dolphin investment into its SIPPs.

If Options had completed sufficient due diligence, what ought it reasonably to have discovered?

<u>Dolphin's marketing material</u>

I recognise Dolphin seems to have provided Options with a copy of its 'Clarity on Marketing Rules & Practices' document, which said, amongst other things, that introducers should 'tell and not to sell' and that they should direct investors to regulated advisers if needed. And that Dolphin provided letters from a firm regulated in the UK which said, for example, that they were happy from a promotions perspective having reviewed the investment due diligence documents.

However, importantly, and consistent with its regulatory obligations, I think that Options should have had regard to, and given careful consideration to, Dolphin's marketing material itself when undertaking due diligence into the proposed Dolphin investment. And that includes conducting some further basic independent searches.

Had it done so, I think that Options should have been concerned that the marketing material did not clearly reflect the risks. For the reasons given below, I think it's fair to say that the information provided about the Dolphin investment was at best unclear and that a number of the statements made in promotional material were misleading.

Dolphin's 16-page brochure – that Options has provided us with – entitled 'Investment Opportunity UK Brochure' contained what I think are prominent statements. For example, under a 'Key Features' heading, it said that it offered a *"**Fixed** 12% return per annum"* and that it was a *"**Low Risk** Investment"* (my emphasis).

Page four of the document set out more details of the 'key features' as follows:

- *"FIXED RETURN OF 12% per annum on capital invested"* (no emphasis added).
- Another UK SIPP provider had already approved the investment, *"thoroughly assessed it and described it as a **Low Risk** investment opportunity*" (my emphasis).
- *"A **simple** and totally transparent process"* (my emphasis).

- A UK based law firm had assessed that the investment as compliant with UK company, regulatory and pension legislation.
- It said in bold type that an exclusive agreement had been reached with Four Gates, a major German Fund Provider, who had agreed to purchase at least €100m worth of property from Dolphin, per annum, over the next five years.
- Investment funds are sent directly to the German law firm, who hold the funds in a secure account until the purchase of the property takes place and security documentation is issued.
- That *"UK Investors are **investing into the Dolphin structure, which simply uses German Listed Buildings as the underlying asset class. UK Investors do not have to consider the usual risks, legal responsibilities or on-going costs that are often associated with buying or owning property abroad**."* (no emphasis added).

So the marketing material made available to investors referred to the investment as 'low risk' on different occasions, drawing attention to this on the first page of the brochure and throughout. It made the investment out to be less risky than investors purchasing their own property abroad. And I think it's interesting that the Dolphin investment was marketed here as a simple and transparent process, when it took legal opinion to explain the investment process and structure, as well as opinion from another regulated party. So I don't think that the Dolphin investment was by any means simple, and it's accepted that it was in fact a high-risk non-standard investment.

I recognise that page three of the UK Brochure referenced the need for potential investors to read the Memorandum of Information document. While Options doesn't appear to have provided this document in relation to Mr K's complaint, our Service has been provided with a copy of this document dating from September 2014 in relation to a separate complaint featuring the Dolphin investment. This says, amongst other things, that:

- The investment wasn't regulated by the FCA and that there was no recourse to our Service and the FSCS.
- Although this is a short-term secured investment, there can be no guarantee the specified (or any) return will be achieved.
- An investment in Loan Notes involves a high degree of risk, along with providing examples of risks such as German property prices falling. And it said that investors could lose their return, or all or part of their investment.

And I recognise that the UK Brochure itself said under 'Risk Factors' that the investment is for those who accept they have the ability to absorb the associated risks. And that investors should be aware they will be required to bear the financial risks of the investment, which they should understand and satisfy themselves that this is suitable for them. It also detailed some of the risks, such as a major fall in property prices and said that past performance isn't necessarily a reliable indication of future performance.

However, the UK Brochure immediately tempered this by saying directly underneath that Dolphin minimises the risks through in-depth due diligence. As I've said, by that point, Dolphin had also already highlighted to customers in different places that the investment was low risk and simple. And while it said that a UK law firm had assessed the investment to be compliant with UK regulation and legislation, there was no reference in the brochure itself to the fact the investment wasn't actually regulated by the FCA and that there was no recourse to our Service and the FSCS.

I don't seem to have been provided with any evidence of the agreement Dolphin said that it had with Four Gates in the UK Brochure and how this was progressing. Instead the

Information Memorandum said on page 11 that Dolphin had no prior arrangements in place with any potential property acquirer. And while the Information Memorandum said there were no guaranteed returns, and I recognise fixed and guaranteed returns aren't necessarily the same thing, I think the promotional material failed to qualify the fixed return the investment was clearly and consistently marketed as providing. Such that it is fair to say there was a risk that investors would have understood the fixed returns to be guaranteed. And, as I'll come on to later, Dolphin's financial accounts weren't full and approved in order to support the secure position being promoted.

So, I think the information given in the Information Memorandum was at odds with what other marketing materials stated about the investment being low risk with fixed returns. And I'm not persuaded that customers would've understood that this investment was high risk with no guarantees or financial regulation and protection. I think this ought to have raised significant concerns with Options about the way the investment was being marketed. And, that is was highly likely that investors could be investing in Dolphin without appreciating the risks involved.

In addition, I've seen copies of two letters that were seemingly the cover letters to the Dolphin due diligence pack that was sent to potential investors, both dated from mid to late 2012. While I note that the letter dated September 2012 said, amongst other things, that the value of investments can go up or down, that investors might not get back what they put in and past performance isn't a guarantee of future performance, it had already set out that all investors have been paid the promised fixed returns and had their capital refunded in full. And the second letter provided no risk warnings but said at the bottom that 'Our focus is to provide **a reliable, low risk** investment opportunity…We offer a **Fixed** Return of 12% per annum' (my emphasis).

I think it's worth clarifying here that I'm aware Dolphin did go on to pay some returns seemingly in the way it had marketed to investors, including to Mr K. But this is with the benefit of hindsight when, as set out above, I'm considering what Options knew or ought reasonably to have known had it undertaken sufficient due diligence prior to Mr K's 2014 application and permitting the investment into its SIPPs. And, while Options recognised that Dolphin was an alternative investment and was high risk and/or speculative, it should have been concerned that the marketing material was at odds with its understanding and didn't clearly highlight the risks associated with unregulated investments such as this. The investment was certainly not low risk and simple on any reasonable analysis, even though it appears to have been marketed as such to pension investors.

For the reasons I've given, the promotional material was unclear, contradictory in places and misleading in others. So, Options should have had significant concerns about how the investment was being promoted and the information being provided to investors about the investment. There was a significant risk of consumer detriment, as there was a real risk that investors could be investing in Dolphin without appreciating the risks involved particularly if they hadn't taken financial advice before investing. I think that these concerns alone ought to have led Options to conclude that it shouldn't permit this investment within its SIPPs, and at the very least this ought to have led Options to understand the importance of undertaking comprehensive independent due diligence.

<u>Dolphin's accounts</u>

I recognise that Options did obtain some accounts in relation to Dolphin. So it clearly understood this to be important in meeting its obligations when deciding whether to permit the investment within its SIPPs. And I can see that Options has provided us with copies of a 'Report on the Overall Picture Conveyed by the Financial Statements as of 31 December

2010' and a 'Report on the Compilation of the Financial Statements as of 31 December 2011' in respect of these accounts.

However, I don't think Options' actions went far enough. Options doesn't appear to have been provided with or sought any financial statements in relation to Dolphin for the more than two years before permitting the investment into its SIPPs from early 2014, or after.

- Dolphin's accounts:

    - Dolphin Capital GmbH annual financial statement for the period from January to December 2012, including details for 2011, wasn't ascertained until more than a year later, on 3 March 2014.
    - Dolphin Capital GmbH credit reports contained financial information for the period January to December 2011 and 2012 respectively, including details for 2009, 2010 and 2011, but with 2013 marked as 'unknown'.
    - Dolphin Trust GmbH annual financial statement for the period January to December 2014, including details for 2013, wasn't created until nearly two years later, in September 2016.

So, in summary, while Options may have obtained or been provided with some accounts, it didn't obtain the most recently filed at the time of Mr K's 2014 investment. And in any case, it isn't enough for it to have just obtained these. Had Options obtained and reviewed these accounts then, looking at the information, I think it ought reasonably to have become aware that there were significant delays and gaps in full and proper annual financial accounts being produced.

I think that the lack of full and proper annual financial accounts that Options ought reasonably to have identified in light of the above is supported by the insolvency administrator's expert assessment in respect of DC80, which set out in respect of the group of companies accounts, amongst other things, that:

> *"150. The tests for a commingling of assets in the relationship between the insolvency debtor [DC80] and its limited partner, AS German Property Group GmbH, are met.*
>
> *151. There are no properly prepared, approved and published annual financial statements for the insolvency debtor. Documents were only able to be identified at all for the years 2011, 2012, 2014, 2015 and 2018; these suggest that annual financial statements should have been prepared. However…these documents do not comply with commercial law regulations…*
>
> *…*
>
> *153. With regard to proper accounting in accordance with § 238 HGB [HGB seemingly being Germany's commercial code and accounting standards for how companies must prepare and report financial statements], it is not readily possible for an expert third party to obtain an overview of the business transactions and the situation of the business.*
>
> *…*
>
> *161. The breach of the obligation to keep accounts in the qualified case of the absence of proper and comprehensible accounts as a whole is demonstrable in the present case…"*

I think this supports that if Options had attempted to independently check the published company accounts in light of the concerns it ought to have had from the information available to it, this likely would not have come to anything as our understanding is that full and proper company accounts hadn't been published for some years, which in itself is unusual under the circumstances. So, Options would likely have had to ask Dolphin for those accounts. And had it done so, given what I've explained above, I think it's likely that either Options would have been provided documents similar to those reviewed by the insolvency practitioner, which would have shown incomplete and inadequate bookkeeping, or Dolphin may have declined to provide the requested information. And, in either event, this ought to have been of significant concern to Options.

Investment due diligence summary

Looking at all of the above, I still think there were significant warning signs and risks associated with the Dolphin investment, namely:

- There was no investor protection associated with this investment – investors didn't have recourse to our Service or the FSCS.
- It was illiquid – there was no exit strategy, the customer couldn't sell their interest in the investment and realising it was project dependent.
- It was being targeted for investment by pension investors, it was a speculative overseas based investment with inherent high risks that made it very obviously unsuitable for all but a small category of investors and even then, only a small part of such an investor's portfolio.
- The high projected and fixed returns set out should have been questioned. I don't expect Options to have been able to say the investment would have been successful. But such high projected returns without any apparent basis should have given Options cause to question its credibility.
- The lack of properly prepared and approved annual financial statements should have been questioned.
- The marketing material either didn't contain, or was unclear, as to the risks associated with the investment. And it was at odds with Options' own understanding of the Dolphin investment – that it was an alternative investment that was high risk and/or speculative. So, Options should have been concerned that consumers may have been misled or did not properly understand the investment they intended to make.
- It misled investors in relation to the security of their investment.
- While the loan notes were seemingly governed by UK law, the properties these were in respect of were based overseas and would be subject to the domestic laws and regulations that apply in respect of the sale and purchase of these. That created additional risk.

In my opinion it's still fair and reasonable to say that Options ought to have concluded there was an obvious risk of consumer detriment here. All in all, I remain satisfied that Options ought to have had significant concerns about the Dolphin investment from the beginning. And I still think such concerns ought to have been a red flag for Options when it was considering whether to accept this investment into its SIPPs. Such concerns emphasise the importance of sufficient due diligence being undertaken before investments are accepted and before SIPP investors monies are invested.

Had Options done what I think it should have, and drawn reasonable conclusions from what it knew or ought to have known, I think that it ought to have concluded there was a significant risk of consumer detriment if it accepted the Dolphin investment into its SIPPs and that this investment wasn't acceptable for its SIPPs.

As such, and based on the available evidence, I don't think Options undertook appropriate steps or drew reasonable conclusions from the information that I'm satisfied would have been available to it, had it undertaken adequate due diligence into the Dolphin investment, before it accepted the investment in its SIPPs. I don't think Options met its regulatory obligations and, in accepting Mr K's application to invest in Dolphin, it allowed his funds to be put at significant risk.

To be clear, I'm not saying Options should have identified all the issues the insolvency administrator has set out or to have foreseen the issues which later came to light with Dolphin. I'm only saying that, based on the information available to Options at the relevant time, it should have drawn a similar overall conclusion – that there was a significant risk that potential investors were being misled. I'm satisfied, on a fair and reasonable basis, that a significant risk of consumer detriment ought to have been apparent from the information available to it at the time. And I do think that appropriate checks would have revealed issues which were, in and of themselves, sufficient basis for Options to have declined to accept the Dolphin investment in its SIPPs before Mr K invested in it. And it's the failure of Options' due diligence that's resulted in Mr K being treated unfairly and unreasonably.

There's a difference between accepting or rejecting a particular investment for a SIPP and advising on its suitability for the individual investor. As I've said, I accept Options wasn't expected to, nor was it able to, give advice to Mr K advice on the suitability of the SIPP and/or the investment for him personally. To be clear, I'm not making a finding that Options should have assessed this for Mr K. I accept it had no obligation to give him advice, or to otherwise ensure the suitability of an investment for him.

And I'm also not saying that Options shouldn't have allowed the Dolphin investment into its SIPPs because it was high risk. Instead, my fair and reasonable decision is that there were things Options knew or ought to have known about the Dolphin investment and how it was being marketed, which ought to have led Options to conclude it wouldn't be consistent with its regulatory obligations or good practice to allow it into its SIPPs. And that Options failed to act with due skill, organise and control its affairs responsibly, or treat Mr K fairly by accepting this into his SIPP.

I still think the fair and reasonable conclusion based on the evidence available is that Options shouldn't have accepted Mr K's application to invest in Dolphin. I think it ought to have concluded that it would not be consistent with its obligations to do so. To my mind, Options didn't meet its regulatory obligations or good industry practice at the relevant time, and allowed Mr K to be put at significant risk of detriment as a result.

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

Options may argue that it had to act in accordance with Mr K's instructions - that it was obliged to proceed in accordance with COBS 11.2.19R as this obliged it to execute the specific investment instructions of its client once the SIPP had been established.

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

> *'The heading to COBS 11.2.1R shows that it is concerned with the manner in which orders are to be executed: i.e. on terms most favourable to the client. This is consistent with the heading to COBS 11.2 as a whole, namely: "Best execution". The text of COBS 11.2.1R is to the same effect. The expression "when executing orders"*

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

I therefore don't think that such an argument Options may make on this point is relevant to its obligations under the Principles to decide whether or not to accept an application to open a SIPP or to execute the instruction to make the Dolphin investment i.e. to proceed with the application.

The indemnities

The declarations Mr K signed sought to confirm that he was aware the investment was high risk, had taken his own advice, was responsible for his own investment decisions, and would not hold Options responsible for any liability resulting from the investment.

The FSA's 2009 report said that SIPP operators should, as an example of good practice, be:

"Routinely identifying instances of execution-only clients who have signed disclaimers taking responsibility for investment decisions and gathering and analysing data regarding the aggregate volume of such business."

With this in mind, I think Options ought to have been cautious about accepting Mr K's applications even though he had signed indemnities. There was no evidence of any other regulated party (other than Options) being involved in this transaction. In these circumstances I think very little comfort could have been taken from declarations stating that Mr K was responsible for his own investment decisions and understood the investment risks, while waving his cancellation rights.

Options had to act in a way that was consistent with the regulatory obligations that I've set out in this decision. In my view, Options was not treating Mr K fairly by asking him to sign indemnities absolving it of all responsibility, and relying on such indemnities, when it ought to have known that Mr K was being put at significant risk.

I'm satisfied that Options ought to have decided that it wouldn't permit Dolphin in its SIPPs at all. Given this, this transaction shouldn't have progressed to the point of Mr K signing disclaimers and declarations. Therefore, Mr K's Options SIPP shouldn't have been established and the opportunity to execute investment instructions or proceed in reliance on an indemnity shouldn't have arisen at all.

Is it fair to ask Options to compensate Mr K?

In deciding whether Options is responsible for any losses that Mr K has suffered in respect of the transaction he complains about here, I need to consider what would have happened if Options had done what it should have done – in other words, had it not accepted or proceeded with Mr K's applications.

When considering this I have taken into account the Court of Appeal's supplementary judgment in Adams ([2021] EWCA Civ 1188), insofar as that judgment deals with restitution/compensation.

I am required to make the decision I consider to be fair and reasonable in all the circumstances of the case and I do not consider the fact that Mr K signed indemnities means that he shouldn't be compensated if it is fair and reasonable to do so.

Had Options acted fairly and reasonably it should have concluded that it should not accept Mr K's SIPP application – in which he clearly stated that he intended to invest the majority of his SIPP monies in Dolphin. That should have been the end of the matter – Options should have told Mr K that it could not accept his business. And I am satisfied, if that had happened, the arrangement for Mr K would not have come about in the first place, and the loss he suffered could have been avoided.

Options may argue that Mr K would have proceeded with the switches and invested in Dolphin regardless of its involvement, perhaps through another SIPP provider, and it may say other SIPP providers were accepting such investments at the time. But I'm not persuaded by this.

I don't think there is any persuasive evidence Mr K would have tried to find another SIPP operator to accept the business and gone ahead with the switch if Options had refused his application. I acknowledge Mr K says he'd been considering his investment options when he spoke to the firm managing his ISA at the start of events here, so I accept Mr K was interested in his options. But I'm not persuaded he would have knowingly exposed most of his existing pension monies to such a high risk, particularly given they appeared to be his only pension provision (apart from his state pension) and that he only had ten years until he intended to retire.

So I'm satisfied that Mr K would not have continued with the Options SIPP and the Dolphin investment had it not been for Options' failings. And, whilst I accept other parties may be responsible for initiating the course of action that led to Mr K's loss, I consider that Options failed unreasonably to put a stop to that course of action when it had the opportunity and obligation to do so.

I don't think it's fair and reasonable to say that Options shouldn't compensate Mr K for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I think it 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 permitted the Dolphin investment into its SIPPs, or accepted Mr K's applications.

I have considered paragraph 154 of the Adams v Options High Court judgment, which says:

> *"The investment here was acknowledged by the claimant to be high risk and/or speculative. He accepted responsibility for evaluating that risk and for deciding to proceed in knowledge of the risk. A duty to act honestly, fairly and professionally in the best interests of the client, who is to take responsibility for his own decisions, cannot be construed in my judgment as meaning that the terms of the contract should be overlooked, that the client is not to be treated as able to reach and take responsibility for his own decisions and that his instructions are not to be followed."*

For all the reasons I've set out, I'm satisfied that it would not be fair to say Mr K's actions mean he should bear the loss arising as a result of Options' failings. I do not say Options should not have accepted the application because the investment was high risk.

I acknowledge Mr K was warned of the high risk and declared he understood that warning. But, I'm satisfied that Mr K, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for himself.

So I am satisfied in the circumstances, for all the reasons given, that it is fair and reasonable to conclude that Options should compensate Mr K for the loss he has suffered. I am not asking Options to account for loss that goes beyond the consequences of its failings. I am satisfied those failings have caused the full extent of the loss in question. That other parties might also be responsible for that same loss is a distinct matter. And that fact should not impact on Mr K's right to fair compensation from Options for the full amount of his loss.

In the circumstances, I'm satisfied it's fair and reasonable to conclude that if Options had refused to accept Mr K's applications, the transactions wouldn't still have gone ahead.

Mr K taking responsibility for his own investment decisions

I've considered this point carefully and I'm satisfied that it wouldn't be fair or reasonable to say Mr K's actions mean he should bear the loss arising as a result of Options' failings.

For the reasons given above, I think that if Options had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted the Dolphin investment into its SIPPs at all. That should have been the end of the matter. If that had happened, I'm satisfied the arrangement for Mr K wouldn't have come about in the first place, and the loss he's suffered could have been avoided - since the purpose of the SIPP switches was to enable Mr K's investment in Dolphin.

As I've made clear, Options needed to carry out appropriate due diligence on the Dolphin investment and reach the right conclusions. I think it failed to do this. And having Mr K sign forms containing declarations and indemnities wasn't an effective way of Options meeting its obligations, or of escaping liability where it failed to meet these.

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

The involvement of other parties

In this decision I'm considering Mr K's complaint about Options. But I accept other parties were involved in the transactions complained about – however our Service can't consider a complaint about Firm SJ as it's not a regulated firm, and doesn't appear to be currently trading.

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 K fairly.

The starting point therefore, is that it would be fair to require Options to pay Mr K 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 K for his loss.

I accept that other parties might have some responsibility for initiating the course of action that led to Mr K's loss. However, I'm satisfied that it's also the case that if Options had complied with its own distinct regulatory obligations as a SIPP operator, the arrangement for Mr K 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 I've carefully considered causation, contributory negligence, and apportionment of damages. And it's my view that it's appropriate and fair in the circumstances for Options to compensate Mr K 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 K.

Putting things right

I consider that Options failed to carry out adequate due diligence and comply with its own regulatory obligations and good industry practice, and didn't put a stop to the transactions that are the subject of this complaint. My aim in awarding fair compensation is to put Mr K back into the position he would likely have been in had it not been for Options' failings. Had Options acted appropriately, I think it's *most likely* that Mr K wouldn't have invested in Dolphin and therefore wouldn't have switched from his existing pensions, since he switched them in order to invest in Dolphin. So, I think it's *most likely* that Mr K would've remained a member of the pensions he switched into the Options SIPP.

What must Options do?

In light of the above, Options should:

- Obtain the notional transfer value of Mr K's previous pension plans.
- Obtain the actual transfer value of Mr K's SIPP, including any outstanding charges.
- Pay a commercial value to buy any illiquid investments (or treat them as having a zero value).
- Pay an amount into Mr K's SIPP so as to increase the transfer value to equal the notional value established. This payment should take account of any available tax relief and the effect of charges.
- If the SIPP needs to be kept open only because of the illiquid investment/s and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.
- If Mr K has paid any fees or charges from funds outside of his pension arrangements, Options should also refund these to Mr K. Interest at a rate of 8% simple per year from date of payment to date of refund should be added to this.
- Pay to Mr K an amount of £500 to compensate him for the distress and inconvenience he's been caused.

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

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

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

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

Calculate the loss Mr K has suffered as a result of making the transfer

Options should first contact the providers of the plan which were transferred into the Options SIPP and ask them to provide a notional value for the policies as at the date of calculation. For the purposes of the notional calculation the providers should be told to assume no monies would've been transferred away from the plans, and the monies in the policies would've remained invested in an identical manner to that which existed prior to the actual transfer.

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

Any withdrawal out of the SIPP should be deducted at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. The same applies for any contributions made, these should be added to the notional calculation from the date they were actually paid, so any growth they would've enjoyed is allowed for.

If there are any difficulties in obtaining a notional valuation from the previous providers, then Options should instead arrive at a notional valuation by assuming the monies would have enjoyed a return in line with the FTSE UK Private Investors Income Total Return Index. I'm satisfied that it is a reasonable proxy for the type of return that could have been achieved over the period in question.

The notional value of Mr K's existing plans if monies hadn't been transferred (established in line with the above) less the current value of the SIPP (as at date of calculation) is Mr K's loss.

Pay an amount into Mr K's SIPP so that the transfer value is increased by the loss calculated above.

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

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr K as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%, and neither party has disagreed with this. So, making a notional deduction of 15% overall from the loss adequately reflects this.

I note Mr K would prefer to have compensation paid to him directly via his professional representative. But as I say, my aim in awarding fair compensation is to put Mr K back into the position he would likely have been in had it not been for Options' failings. And this means Options paying redress into Mr K's pension if possible.

SIPP fees

If the investments can't be removed from the SIPP, and because of this it can't be closed after compensation has been paid, then it wouldn't be fair for Mr K to have to continue to pay annual SIPP fees to keep the SIPP open. So, if the SIPP needs to be kept open only because of the illiquid investment/s and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.

Interest

The compensation resulting from this loss assessment must be paid to Mr K or into his SIPP within 28 days of the date Options receives notification of his acceptance of my opinion. The calculation should be carried out as at the date of my opinion. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my opinion to the date of settlement if the compensation is not paid within 28 days.

Costs

Mr K has said Options should compensate him for his financial loss, including the Options SIPP management fees he'd paid, 8% interest per annum and his *"costs".*

Mr K hasn't specified or quantified what costs he's referring to here. Given he is represented by a professional representative, I've assumed Mr K is referring to his legal costs. Mr K has not disputed this assumption.

But I'm not asking Options to compensate Mr K for his legal costs here. I think it was Mr K's choice to engage a professional representative – I'm not persuaded Mr K had no alternative but to use a professional representative, and he could instead have himself contacted both Options and our Service at no cost. So I don't think it would be fair to ask Options to compensate Mr K for his choice to use a representative to bring his complaint.

Distress & inconvenience

In addition to the financial loss that Mr K 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 of his pension provision has caused Mr K distress and inconvenience. So I think it's fair for Options to compensate Mr K for this, and I still think £500 is fair and reasonable amount in the particular circumstances of this complaint.

My final decision

For the reasons given, it's my decision that Mr K's complaint should be upheld and that Options UK Personal Pensions LLP must pay fair redress as set out above.

Where I uphold a complaint, I can award fair compensation of up to £160,000, 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 £160,000, I may recommend that the business pays the balance.

Determination and Award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My decision is that Options UK Personal Pensions LLP should pay the amount produced by that calculation up to the maximum of £160,000 (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 £160,000, I recommend Options UK Personal Pensions LLP pay Mr K the balance plus any interest on the balance 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 K could accept a final decision and go to court to ask for the balance and Mr K may want to get independent legal advice before deciding whether to accept a final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 3 January 2025.

Ailsa Wiltshire
Ombudsman