DRN-5375754

## The complaint

Mr J is unhappy that DP Pensions Limited ('DP') failed to exercise sufficient due diligence before accepting his pension switch to his self-invested personal pension ('SIPP') and permitting the Ethical Forestry investment within this, causing him a financial loss.

For simplicity, I will largely refer to Mr J throughout, even where the submissions I'm referring to were made by his representative.

## What happened

I've outlined what I think were some of the key parties involved in Mr J's complaint below.

Involved parties

*DP*

DP is a regulated pension provider and administrator. It's authorised to arrange deals in investments, deal in investments as principal, establish, operate or wind up a personal pension scheme and to make arrangements with a view to transactions in investments.

*Firm B*

At the time of the events complained of, Firm B was (and seemingly still is) an independent financial adviser authorised by the then regulator – the Financial Services Authority ('FSA'), which later became the Financial Conduct Authority ('FCA'), the latter of which I'll largely refer to throughout for ease.

*Ethical Forestry Limited ('Ethical Forestry')*

Ethical Forestry was a company based in Bournemouth which invested in an offshore investment scheme relating to plantations of what appears to be two types of hardwood tree crops, Formaleta, Acacia and Melina. The Ethical Forestry brochure said that the investment worked by planting trees for private investors and institutions on a "for profit" basis on plantations in Costa Rica. The trees would be grown and then harvested for their wood for sale to the timber trade.

This investment was advertised as one that would return a high yield to investors over time once the trees were grown and sold. Some of the benefits investors were informed about included that these trees can grow to impressive heights over a 12-year period and don't suffer from humidity and moisture changes compared to other trees in Costa Rica. These trees were, however, subject to other naturally occurring weather issues, disease, pests, political shifts in Costa Rica, as well as management and ownership issues.

In December 2015, Ethical Forestry went into liquidation. The liquidator's report, dated 24 January 2022 said, amongst other things, that many investors were led to believe they had ownership of trees and cropping rights in relation to the trees and were given GPS co-ordinates to these. However, it's clear these rights weren't given as these weren't capable of being granted under Costa Rican law.

The abrupt collapse of Ethical Forestry led to the Serious Fraud Office ('SFO') opening a criminal investigation into it. And the SFO later brought charges related to alleged fraud concerning the running of Ethical Forestry.

<u>The transaction</u>

While I've considered all the information provided, I've focused throughout on what I consider to be key to reaching my decision.

On 22 November 2010, an appointed representative of Firm B set out its recommendations for Mr J's pension monies. This said, in summary, that:

- Mr J was a director of a business in plumbing, who drew an income of around £20,500 per year.
- He had an outstanding mortgage on his property of around £50,000.
- He was 52, wanted to retire when he turned 60 and his high priority goal was to provide for his retirement.
- His attitude to risk was balanced.
- Alternative strategies had been explained in detail and Mr J had decided to invest in a mixture of protected funds, a portfolio of funds and structured products, which meant Firm B had recommended he establish a SIPP with DP.
- While it had discussed a number of suitable investment products and funds for investment within the SIPP, these usually have limited investment periods and the transfer may take some time, so Firm B would confirm its investment recommendation to Mr J once the transfer had taken place.

On 23 November 2010, DP received Mr J's completed SIPP application form, signed by him on 19 November 2011. This set out, amongst other things, that he was employed in plumbing, Firm B was his financial adviser and under the investment section it said this was to be arranged. The same day, DP confirmed to Mr J that his SIPP had been established.

Across December 2010 and January 2011, Mr J transferred in around £156,000 from existing pension schemes. And, on 19 January 2011, Firm B sent Mr J's completed Ethical Forestry application form and associated documents to DP. Mr J's completed Ethical Forestry tree purchase order form, signed by him on 17 January 2011 said, amongst other things, that Firm B was his adviser and that Mr J would be purchasing units costing £12,000. And, amongst other things, this said in small writing that Mr J understood the risks associated with the investment, including (but not exclusive to) those relating to currency risks, illiquidity and un-recoverable local taxation and that Mr J had carried out his own due diligence to his satisfaction.

On 20 January 2011, Ethical Forestry sent DP a receipt, noting the number of trees Mr J had purchased. And under '*What happens now*…' it said that Mr J's trees would be reserved and prepared for planting and that once these were six months old it would count out his allocation, assign the GPS co-ordinates to his property lease and issue this to him along with title documents.

On 28 January 2011, Firm B wrote to Mr J setting out its investment recommendations for the DP pension monies following the transfer to this, as DP was awaiting investment instructions. This said, in summary, that Mr J had a balanced attitude to risk and it recommended he invest in structured products, as well as a portfolio to diversify his investments and £12,000 into Ethical Forestry, which he went on to make as a result.

On 8 June 2011, Firm B sent Mr J a two page letter which said that following a recent file check its November 2010 and January 2011 reports may not have fully explained its reasons for recommending the selected investments within the SIPP, although this was discussed in great detail at the time. And Firm B set out some brief bullet pointed reasons as to why it had recommended the investments, including what it said was a small percentage of Mr J's fund into Ethical Forestry.

And, as set out above, Ethical Forestry went into liquidation in December 2015.

<u>Mr J's complaint</u>

On 11 September 2019, Mr J's representative made a data subject access request to DP, which it responded to on 1 October 2019. When doing so, DP said that if Mr J believed his pension had been mis-sold then he should contact Firm B to raise a complaint about the advice given.

In December 2020, Mr J complained to Firm B about the advice he'd received. But his complaint had been made too late to be considered. And, on 17 August 2021, Mr J complained to DP that it hadn't undertaken sufficient due diligence on Firm B and the business it was carrying out, and on the Ethical Forestry investment, before accepting his applications. Mr J said that he was a retail client, with a cautious attitude to risk and the investment was high risk.

In October 2021, DP sent Mr J its final response letter, which said that his complaint had been made too late to be considered. In summary, it said that:

- Mr J's complaint had been made more than six years after the events complained of, which took place in late 2010 and early 2011.
- The correspondence provided to Mr J about the status of the investment means he ought reasonably to have had cause for concern about his pension arrangement, and the Ethical Forestry investment held with this, more than three years before he made his complaint to it in August 2021.
- Given Mr J received at least five letters about this - three Firm B and two from it – he must have been aware something serious had gone wrong – the investment was in liquidation and the SFO were investigating. And, in addition, there was significant negative press surrounding the investment across 2016 and 2017.
- The moment that Mr J realised there was a problem was the point he ought to have been aware he had cause to complain about DP, given it was the regulated entity administering his SIPP. All of DP's literature indicates that it is FCA regulated and it is common knowledge that our Service is available in respect of complaints.

In November 2021, unhappy with this response, Mr J referred his complaint about DP to our Service. One of our Investigator's asked DP to provide a copy of the due diligence it had carried out at the time of the events complained of. And, in summary, DP said in response that as Mr J's complaint falls outside our remit, it had limited the information it had provided to consideration of our jurisdiction to consider the complaint.

As part of Mr J's submissions to our Service, he has said that:

- Mr J wasn't actively looking to change his pension to a new provider. At the time of he was distrustful of financial advisers have previously received some bad advice.

Firm B cold called him asking to discuss his pension arrangements. He was disappointed at the returns with his existing schemes and was reluctant to take an annuity upon retirement. And Firm B led him to expect yearly growth on top of his investments. He was aware funds could go down as well as up, but never envisaged a scenario where he could or would lose 100% of his investment.

- Being self-employed, his existing pensions were across five different personal pension plans that were split between two different providers.
- He first knew his Ethical Forestry investment was struggling when Firm B contacted him and said there was a possible risk it would go into liquidation.
- Mr J raised the issue with Firm B at the subsequent annual meeting with it. But Firm B's adviser's response was that he'd invested three times the amount Mr J had.
- He knew the SFO was involved but he wasn't aware this had any implications. And as he'd received encouraging updates concerning buyers for the investment, he'd been under the impression up until at least February 2018 that there was a still a realistic expectation that at least some of the funds would eventually be recovered via a sale of the timber.
- It was only when he was subsequently contacted by his now representative that he could see a way of pursuing the matter further. He wasn't previously aware there were any other options open to him – he thought that the FSCS was the only organisation he might be able to complain to, but he'd been told that it didn't cover the investment as it was based overseas.
- When asked what Mr J thought DP's role was at the time, Mr J said 'I trusted them to advise me appropriately and invest my pension funds in a way that suited my risk profile. Consequently I was happy to follow their recommendations.'.
- He didn't receive any kind of payment for moving his pension to DP and he hasn't received compensation for his losses from any other parties.

Our Investigator said that Mr J's complaint had been made in time for our Service to consider it. But DP didn't agree, also adding that in any event Firm B is responsible for his complaint. And that the FCA took regulatory action against Firm B in 2012 for a number of breaches, including failing to take reasonable care to ensure the suitability of its advice to clients.

As no agreement could be reached, Mr J's complaint was referred to me for a decision on whether or not we have the power to consider it.

I issued a jurisdiction decision which said that we can consider Mr J's complaint, as it had been made in time for us to do so. So I don't intend to revisit that here. I then asked DP to provide its business file in respect of the merits of Mr J's complaint. And I let DP know I'd be considering the matter and issuing a provisional decision on this, rather than passing the case back to an Investigator.

When providing its business file DP said, in summary, that:

- It first met with Firm B in May 2009 to understand more about its business and objectives. DP provided our Service with meeting notes, which it said were from the time and which explained that Firm B's business mainly came from existing clients, accountants and solicitors. It would be recommending around 10 transfers per month to customers, but it wouldn't be advising on transfers from defined benefit schemes, nor did it transact business with insistent clients. All clients were fully advised with positive recommendations. Firm B said the average SIPP size was around £150,000 where clients wanted to amalgamate their existing pensions. Firm B was looking for other SIPP providers to recommend. And it generally recommended a mix of insured managed funds, collective investment schemes and structured products to its customers.

- In June 2009, Firm B told DP that it was impressed with the Ethical Forestry investment and would be recommending this to some of its client where appropriate for a small part of their portfolio. And DP said that it would need to carry out due diligence into that investment first before accepting it into its SIPPs. Although I can't see that DP has provided us with a copy of the June 2009 meeting notes from the time – despite being asked to do so by the deadline to respond to my provisional decision.
- Firm B was a regulated adviser and gave its customers positive recommendations. DP didn't request copies of suitability reports and nor was there any obligation on it to do so at the time. This was referred to in the 2009 Thematic Review as one of the many examples of good practice but the FCA option not to include such a requitement in the 2013 Guidance, such that the FCA didn't think it appropriate to impost such a requirement on the industry.
- Firm B introduced 120 clients to DP in total between May 2009 and October 2014. This was just under 6% of DP's new business during that period. Mr J was the 70th introduction to it from Firm B and he was the 24th client to invest in Ethical Forestry with it. DP said that 39 – which was just under 33% - of the introductions it received from Firm B invested in Ethical Forestry with it. And that 38% of customers introduced by Firm B invested in non-mainstream investments as part of a diversified portfolio. DP also said that no other advisers introduced Ethical Forestry cases to it.
- There were no adverse trends to suggest anything amiss when considering Ethical Forestry applications.
- DP said that it received 488 investment applications during that period though, so the 39 Ethical Forestry applications made up less than 8% of those and a small proportion – at just under 1.5% – of the overall new investments it administered during that time. It also said Mr J's investment into Ethical Forestry only made up just under 8% of his transferred SIPP pension monies, with the remainder invested in other products which it assumes were recommended to balance the risk. And Mr J has made a positive return on the investments made overall.
- There's nothing to indicate that DP should have been concerned with the advice provided to Mr J – the overall portfolio recommended appears to have been wholly appropriate and didn't indicate significant risks were being taken with the overall pension fund.
- In addition to the face to face fact finding in May 2009 it carried out checks on the FCA register to ensure Firm B had appropriate permissions as well as obtaining copies of company accounts. While these are dated after it accepted Mr J's business from Firm B, it would have completed the checks prior to that and in 2009, but not retained copies.
- At the time DP didn't have any agreement in place with financial advisers, there was no requirement for it to do so and it only accepted business once satisfactory due diligence checks had been carried out.
- Due diligence was completed on the Ethical Forestry investment to determine whether it was genuine and capable of being held in a SIPP without adverse tax consequences. Due to the passage of time, it hasn't retained all copies of documents obtained at the time.
- Mr J was fully aware that DP was offered an execution only service and the suitability of the advice was a matter for Firm B. FCA guidance supports that DP, as a SIPP provider, isn't responsible for the advice given by an independent financial adviser.
- The Court of Appeal concluded that COBS 2.1.1R must be seen through the prism of the contract between SIPP provider and client and that the rule doesn't purport to expand those duties.
- Mr J's SIPP was opened in 2011, before the 2013 Guidance. However, prior to that, DP's managing director was part of the industry's FCA sub-committee group. And DP

had already implemented processes highlighted in 2009 for some time, such as trend spotting and identifying anomalous or more esoteric investments.
- The level of due diligence completed on both the introducer and investment was extensive and in line with the regulatory obligations in place in July 2009 upon its first acceptance of the Ethical Forestry investment into its SIPPs and upon accepting Mr J's SIPP application in November 2011.
- The fact the investment was manifestly high risk didn't make it unsuitable for a SIPP.
- It would be unfair if a SIPP provider is liable for the poor investment choice of a customer and where one investment in the portfolio has failed. Since the business is structured on the basis a SIPP provider doesn't provide advice, nor warn or advise customers as to the suitability of the underlying investment, and when its fees are charges are based on execution only services.
- It would be unfair if DP couldn't rely on express representations made by the customer when signing contractual documentation.

I issued a provisional decision letting the parties know that I think Mr J's complaint should be upheld.

Mr J let us know he accepted my provisional decision with no further comments to add. And, in response, a representative of DP's added, in summary, that:

- With the exception of the 2009 Thematic Review, none of the other FCA reviews, guidance or Dear CEO letter had been published at the time of the events complained of and have no bearing here. Statements in later guidance – which gave examples of good practice and weren't rules – and reviews aren't mentioned in earlier guidance that was in force at the time. It isn't reasonable to hold DP to a standard based on publications that didn't exist at the time on the basis these represented a reminder of the contemporary position. So DP is being held to a higher standard than was in place at the time.
- Sections of the decision are templated, despite factual differences to other final decisions regarding SIPP providers.
- We've relied on particular case law to the detriment of other case law, the latter of which includes guidance on the duties owed by an execution only SIPP provider.
- We've given no reason to support that DP shouldn't have accepted Mr J's SIPP application in the first place.
- Firm B was a regulated adviser and DP took comfort from this. DP wasn't responsible for assessing suitability of the advice nor the quality of the investment. And there were no red flags in the transactions.
- DP had no reason to think Ethical Forestry was anything but a genuine investment. And we've failed to point to anything about the investment that was available in 2011 that wasn't already known to Mr J or that DP should have been aware of.
- Some of the things we've said DP should have identified as a risk, such as rights to the trees not being capable of being granted under Costa Rican law, are unreasonable to expect of DP and wholly disproportionate for the low fee charged for the SIPP.
- Our Service has referred to Ethical Forestry's marketing having included references to it being low risk. But DP accepts Ethical Forestry was a high risk investment. It was never of the opinion that this was low risk.
- Only a small proportion of Mr J's SIPP was invested in Ethical Forestry. And DP's decision to accept the risk surrounding that investment has to be understood within the wider context of the entire SIPP portfolio. The application for Ethical Forestry wasn't approved on its own or in isolation by DPP, but whilst approving Mr J's applications for other capital protected investments, of which 60% of his SIPP pension monies had capital guarantees. And DP assumed Firm B had recommended

these as a diversified approach to balance the risk of investing in Ethical Forestry.

- The overall gain on Mr J's DP SIPP pension monies was just under 20%, even when taking into account the Ethical Forestry investment. And the current approach essentially asks DP to underwrite the loss for one small element of the SIPP portfolio, which isn't fair or reasonable.
- While 38% of customers introduced to it by DP invested in Ethical Forestry, this was part of a diversified portfolio. This shows the majority of clients introduced to it by Firm B didn't invest in non-mainstream investments and that Ethical Forestry was only offered by Firm B to a small number of customers for whom it was appropriate and of which they accepted the risk.
- It isn't a SIPP provider's responsibility to protect the customer against an investment decision that with the benefit hindsight proves to be ill advised. There was no requirement at the time on DP to obtain copies of suitability reports, for example. And the action taken by the FCA in respect of Firm B post dates the events complained of, so it would be unfair to expect DP to have assessed the suitability of the advice provided by Firm B on the assumption that this might have been deficient.
- When DP received Mr J's SIPP application form no intended investment information was provided. But this wasn't uncommon, Mr J was the 70th client introduced to DP and so it was already aware of the type of portfolio's that Firm B was recommending to clients, some of which included a small percentage into Ethical Forestry.
- Mr J was unhappy with the returns on his pensions before switching to DP, so it's reasonable to assume he would have always moved these to a new provider and invested in Ethical Forestry, even if DP had refused his applications, given his clear intention to seek higher returns.
- Should the complaint be upheld, the redress should be in respect of the investment in Ethical Forestry only, rather than based on the transfer value of the SIPP.

**What I've decided – and why**

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

Having done so, I remain of the view that Mr J's complaint should be upheld, for largely the same reasons as those set out in my provisional decision, which I've largely repeated below.

When deciding what's fair and reasonable in all the circumstances of this complaint, I need to take account of relevant law and regulations, regulator's rules, guidance and standards, codes of practice and, where appropriate, what I think was good industry practice at the relevant time.

While I've considered the entirety of the detailed submissions the parties have provided, my decision focuses on what I consider to be the central issues. The purpose of my decision isn't to comment on every point or question made, rather it's to set out my decision and reasons for reaching it.

**Relevant considerations**

I think the FCA's Principles for Businesses – which are set out in the FCA's Handbook – are of particular relevance. These "*are a general statement of the fundamental obligations of firms under the regulatory system*" (PRIN 1.1.2G – at the relevant date). And 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 had upheld a consumer's complaint against it. The Ombudsman considered the FCA Principles and good industry practice at the relevant time. He concluded that it was fair and reasonable for Berkeley Burke to have undertaken due diligence in respect of the investment before allowing it into the SIPP wrapper, and that if it had done so, it would have refused to accept the investment. The Ombudsman found Berkeley Burke had therefore not complied with its regulatory obligations and 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 s.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 decision 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 judgments when making this decision on Mr J's case.

I note that the Principles for Businesses didn't form part of Mr Adams' pleadings in his initial case against Carey 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 judgment said 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 both judgments when making this decision on Mr J'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 owed him a duty to comply with COBS 2.1.1R, a breach of which, he argued, was actionable pursuant to section 138(D) of FSMA ('the COBS claim'). HHJ Dight rejected this claim and found that Options 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 he 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 there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams (summarised in paragraph 120 of the Court of Appeal judgment) and the issues in Mr J's complaint. 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 Carey SIPP agreed to accept the investment into its SIPP.

In Mr J's complaint, amongst other things, I'm considering whether DP ought to have identified that the business introduced by Firm B and the Ethical Forestry investment involved a significant risk of consumer detriment. And, if so, whether it ought to have declined to accept Mr J's introduction from Firm B and/or his investment application.

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

So, 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 J's case.

However, it's important to emphasise that I must determine this complaint by reference to what I think is 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; regulator's rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. There is a clear and relevant point of difference between this complaint and the judgments in *Adams v Options SIPP*. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

I also want to emphasise that I don't say that DP was under any obligation to advise Mr J on the SIPP and/or the underlying investments. Refusing to accept an application isn't the same thing as advising Mr J on the merits of the SIPP and/or the underlying investments. But I am satisfied DP's obligations included deciding whether to accept particular investments into its SIPP and/or whether to accept introductions from particular businesses.

**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.

<u>*The 2009 Thematic Review Report*</u>

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.)

Although I've referred to selected parts of the publications to illustrate the relevance, I've considered these in their entirety.

I acknowledge that the 2009 and 2012 reports and the "*Dear CEO*" letter aren't formal guidance (whereas the 2013 finalised guidance is). However, the fact that the reports and "*Dear CEO*" letter didn't constitute formal guidance doesn't mean the importance of these should be underestimated. These provide a reminder that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it's treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications which set out the regulators' expectations of what SIPP operators should be doing also go some way to indicate what I consider amounts to good industry practice, and I'm therefore satisfied it's appropriate to take these into account.

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

At its introduction the 2009 Thematic Review Report says:

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

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

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

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

I'm also satisfied that DP, at the time of the events under consideration here, thought the 2009 review was relevant. DP acknowledged in its submissions that the review is relevant to how it conducts its business and highlights some areas of good practice.

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

I've carefully considered what DP has said about publications being published after Mr J's SIPP was set up. But, like the ombudsman in the BBSAL case, I don't think the fact the publications post-date the events that took place in relation to Mr J's complaint mean that the examples of good practice they provide weren't good practice at the time of the relevant events. Although the publications were published after the events subject to this complaint, the Principles that underpin them existed throughout, as did the obligation to act in accordance with the Principles.

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

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

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

I'm deciding what's fair and reasonable in the circumstances of this complaint – and for all the reasons I've set out above I'm satisfied that the Principles and the publications listed above are relevant considerations to that decision.

And taking account of the factual context of this case, I think that for DP to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), amongst other things it should have undertaken sufficient due diligence into Firm B and the business it (Firm B) was introducing and on the Ethical Forestry investment, both initially and on an ongoing basis.

In deciding what's fair and reasonable in the circumstances, it's appropriate to take an inquisitorial approach. And, ultimately, what I'll be looking at here is whether DP took reasonable care, acted with due diligence, and treated Mr J fairly, in accordance with his best interests. And what I think's fair and reasonable in light of that. I consider the key issue in Mr J's complaint is whether it was fair and reasonable for DP to have accepted his SIPP and Ethical Forestry applications in the first place. So, I need to determine whether DP carried out appropriate due diligence checks on Firm B and the investment before deciding to accept Mr J's applications.

As noted above, DP says it did carry out due diligence on Firm B and Ethical Forestry before accepting business from it and permitting the investment within its SIPPs. And from what I've seen I accept that it undertook some checks. However, the question I need to consider is whether DP ought to, acting fairly and reasonably to meet its regulatory obligations and good industry practice, have identified that consumers introduced by Firm B and/or investing in Ethical Forestry were being put at significant risk of detriment. And, if so, whether DP should therefore not have accepted Mr J's applications.

**The contract between DP and Mr J**

As set out above, my decision is made on the understanding that DP acted purely as a SIPP operator. I don't say DP should (or could) have given advice to Mr J or otherwise have ensured the suitability of the SIPP or Ethical Forestry investment for him. I accept that DP made it clear to Mr J that it wasn't giving, nor was it able to give, advice and that it played an execution-only role in his SIPP investments. And that forms Mr J signed confirmed, amongst other things, that losses arising as a result of DP acting on his instructions were his responsibility.

I've not overlooked or discounted the basis on which DP was appointed. And my decision on what's fair and reasonable in the circumstances of Mr J's case is made with all of this in mind. So, I've proceeded on the understanding that DP wasn't obliged – and wasn't able – to give advice to Mr J on the suitability of the SIPP or Ethical Forestry investment. But I remain satisfied that, to meet its regulatory obligations when conducting its operation of SIPPs business, DP had to decide whether to accept introductions of business and/or investments with the Principles in mind. And I don't agree that it couldn't have rejected introductions or applications without contravening its regulatory permissions by giving investment advice.

**What did DP's obligations mean in practice?**

The business DP was conducting was its operation of SIPPs. The regulatory publications provided some examples of good industry practice observed by the FCA during its work with SIPP operators, including being satisfied that it should accept applications from a particular introducer, and being satisfied that a particular investment is an appropriate one to accept. So I'm satisfied that, to meet its regulatory obligations and good industry practice, when conducting its business, DP was required to consider whether to accept or reject particular referrals of business and particular applications for investment in its SIPPs.

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. And its obligations and duties in this respect weren't prescriptive and depended on the nature of the circumstances, information and events on an ongoing basis.

I am satisfied that, to meet its regulatory obligations, when conducting its business, DP 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, DP should have carried out due diligence which was consistent with good industry practice and its regulatory obligations at the time. And in my opinion, DP should have used the knowledge it gained from this to decide whether to accept or reject business or a particular investment.

**DP's due diligence on Firm B**

As I've said, DP had a duty to conduct due diligence and give thought as to whether to accept business from third parties arranging or advising on investments. That's consistent with the Principles and the regulators' publications as set out earlier in this decision.

And this is also seemingly consistent with DP's own understanding of its obligations at the relevant time, given it has said that before accepting Firm B's business DP verified that it was and remained authorised by the FCA, that it had the requisite permissions and DP said that it met with Firm B in May and June 2009 to understand its business model, for example.

From the information that has been provided, I'm satisfied DP did take some steps toward meeting its regulatory obligations and good industry practice. However, for the reasons given below, I don't think the steps we've seen evidence of went far enough, or were sufficient, to meet DP's regulatory obligations and good industry practice. I think that if DP had undertaken sufficient due diligence, then it ought to have identified potential risks of consumer detriment associated with the business being introduced to it by Firm B, and prior to its receipt of Mr J's business.

As set out above, DP's due diligence obligations were ongoing and an example of good practice identified in the FCA's 2009 Thematic Review Report was:

> *"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."*

Given all that I've said above, I don't think simply keeping records without scrutinising the information would be consistent with good industry practice and DP's regulatory obligations. As highlighted in the 2009 review, the reason why the records are important is so that potentially unsuitable SIPPs can be identified.

It's clear DP had access to information about the number and nature of introductions that Firm B made to it, as it's been able to provide details about this when requested.

DP told our Service, amongst other things, that it received its first introduction from Firm B in mid-2009. It said that Firm B introduced 120 customers to it, of which 38% invested in non-standard investments and that just under 33% of these invested in Ethical Forestry. DP also told us that Mr J was the 70th customer introduced to it by Firm B and that he was the 24th client introduced by it that invested in Ethical Forestry. And that no other advisers, other than Firm B, introduced Ethical Forestry cases to DP.

So, looking at the business DP received from Firm B, by the time it received Mr J's application DP had already received a number of introductions from Firm B. Around a third of these customers had already invested in Ethical Forestry with it and Firm B was the only adviser whose customers were investing in Ethical Forestry through their DP SIPP.

I've taken into account that DP has said that just less than two thirds of the clients Firm B introduced to it invested in standard investments only. And that Mr J only invested a small proportion of his SIPP pension monies into Ethical Forestry, at just over 7%, and that this was part of an otherwise diversified portfolio of SIPP investments. But it's fair to say that such investments are highly unlikely to be suitable for the vast majority of retail clients. They will generally only be suitable for a small proportion of the population – i.e. sophisticated and/or high net worth investors – and, even then, only in respect of a small proportion of their pension. So, when bearing this in mind, I think DP should've been concerned that such a volume of introductions, where a respectively high proportion of customers were investing in high-risk esoteric investments, such as Ethical Forestry, and where Firm B this was the only adviser introducing such business to DP, was highly unusual.

In summary, I think DP either was aware, or ought reasonably to have been aware, that the type of business Firm B was introducing was high risk and therefore carried a potential risk of significant consumer detriment.

In addition, I note that Firm B was fined in 2012, for reasons which included giving unsuitable advice to invest in UCIS (of which I understand Ethical Forestry to be) and structured products between January 2009 and February 2012 ('the relevant period'). The FCA said, amongst other things, that from the sample reviewed none of Firm B's recommendations given to make such investments were suitable in light of the customers attitude to risk. The FCA found that although Firm B categorised structured products and UCIS as high risk, it had recommended these to customers with moderate attitudes to risk. It said that several customers had low incomes, no other significant assets other than their home and limited capacity for loss. The FCA also said that Firm B's suitability letters provided little analysis of why the products were suitable for the client. And that customers investing in UCIS and structured products were at significant risk of losing some or all of their money.

While I recognise the FCA fine itself post-dates the events complained of here, DP accepted business from Firm B during almost the entirety of 'the relevant period' that it was fined for and the events complained of in Mr J's particular case also took place during that period. So I think this helps build a picture of the type of business Firm B was involved in at that time.

**What should DP reasonably have done?**

In light of this, DP could simply have concluded that, given the potential risks of consumer detriment – which I think were clear and obvious at the time – it shouldn't have continued accepting applications from Firm B and before it received Mr J's applications. That would have been a fair and reasonable step to take, in the circumstances.

Alternatively, DP could have taken fair and reasonable steps to try to address the potential risks of consumer detriment in the first instance by, for example, conducting further independent verification checks to enhance its understanding of the introductions it was receiving from Firm B and on the content of the information provided to it to check for authenticity.

DP might say that it didn't have to obtain this information from Firm B. But I think this was a fair and reasonable step to take, in the circumstances, to meet its regulatory obligations and good industry practice.

*Requesting information directly from Firm B*

As part of its due diligence on Firm B, I think it's fair and reasonable to expect DP, in line with its regulatory obligations, to have made some specific enquiries and obtained information about Firm B's business model.

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

The October 2013 finalised SIPP guidance gave an example of good practice as:

> '*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.*'

I recognise that DP met with Firm B in May 2009 before first accepting its business to understand more about its business and objectives. And that the meeting notes reflect that DP was told that Firm B would generally recommend a mix of structured products and trustee investment plans to customers. However, DP has said that shortly after, during a further June 2009 meeting with Firm B, the latter said it would now be recommending the

Ethical Forestry investment to some of its client where appropriate for a small part of their portfolio.

I can't see that DP made any further enquiries with Firm B though to check with it things like the amount of business it expected to introduce to it in respect of the Ethical Forestry investment that Firm B said it would now be recommending, the type of clients it would now be recommending this particular investment to, how and why retail clients were interested in making esoteric investments such as this and what material was being provided to clients by it about this, for example.

If DP had done this, then I think it would likely have become aware of the above information and the resulting significant potential risk of consumer detriment either from those continued initial discussions with Firm B or more detailed discussions this ought to have led. And, in the alternative, if Firm B had been unwilling to answer such questions if put to it by DP, I think DP should simply then have declined to accept introductions from Firm B.

DP might say that it didn't have to obtain this information from Firm B. But I think this was a fair and reasonable step to take, in the circumstances, to meet its regulatory obligations and good industry practice.

And, in that case, I think DP should have concluded, and before it accepted Mr J's business from Firm B, that it shouldn't accept or continue to accept introductions from it.

*Making independent checks*

In light of what I've said above, I think it would also have been fair and reasonable for DP, to meet its regulatory obligations and good industry practice, to have taken independent steps to enhance its understanding of the introductions it was receiving from Firm B.

The 2009 Thematic Review Report said that:

> "…*we would expect* [SIPP operators] *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*.".

And an example of good practice given was:

> *"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.".*

So I think it would've been fair and reasonable for DP to, for example, request copies of suitability reports and speak to some applicants directly and/or contact Firm B for clarification.

To be clear, I accept DP couldn't give advice. But it had to take reasonable steps to meet its regulatory obligations. And in my view such steps included addressing a potential risk of consumer detriment by obtaining copies of suitability reports and speaking to applicants and/or contacting Firm B for clarification, as this could have provided DP with further insight into Firm B's business model and an understanding of its clients. I think these were fair and reasonable steps to take in reaction to the risks of consumer detriment I've mentioned.

If DP had undertaken the type of due diligence I've mentioned above, then I think it ought reasonably to have identified, and before it accepted Mr J's application, that Firm B's business carried a significant risk of consumer detriment, there were anomalous features and Firm B had a disregard for its consumers' best interests. Retail consumers, like Mr J, were transferring pension monies to DP to invest in higher-risk esoteric investments, like Ethical Forestry, when it's fair to say that such investments are highly unlikely to be suitable for the vast majority of retail clients in any proportion. And I think DP either was aware, or ought reasonably to have been aware, that the type of business Firm B was introducing was high risk and therefore carried a potential risk of consumer detriment.

In Mr J's particular case, for example, he was a retail rather than high-risk investor, his suitability report reflects that he had a relatively low income, no other significant assets other than his home, his retirement horizon was less than 10 years and he was noted as a balanced risk investor.

It follows from the above that there was a significant risk of customer detriment. In that case, I think DP should have concluded, and before it accepted Mr J's business from Firm B, that it shouldn't accept introductions from it. DP therefore didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr J fairly by accepting his applications from Firm B. To my mind, DP didn't meet its obligations or good industry practice at the relevant time, and allowed Mr J to be put at significant risk of detriment as a result.

As I've said, DP shouldn't have accepted Mr J's introduction from Firm B in first place. I think it is fair and reasonable to uphold this complaint on that basis alone. Even if I thought differently, I've also considered the due diligence that DP carried out on the Ethical Forestry investment and I've decided to uphold Mr J's complaint, for the reasons given below. When doing so, I have taken the same approach to considering this as I did to considering the due diligence undertaken on Firm B.

**DP's due diligence on the Ethical Forestry investment**

DP has said that it completed due diligence on the underlying investment to determine whether this was genuine and capable of being held within a SIPP without any adverse tax consequences. And that, in order to do so, and prior to first permitting the Ethical Forestry investment into its SIPPs in July 2009 (and before accepting Mr J's later applications to invest in this), it considered the following – where DP has said it no longer has a copy of the documents from the time, it said it was providing subsequent copies of these in the same form:

- Investment brochure – the version DP provided dates from 2014.
- Investment winter newsletter – dated 2015.
- A two-page investment factsheet – undated.
- Example purchase order form.
- Example owners pack and proof of title documents.
- A one-page Investment security printout from Ethical Forestry's website.
- External compliance checklist on the investment provided by Enhance Support Solutions – dated 7 November 2010.
- A letter between the FCA and Ethical Forestry dated April 2008, which indicated how the asset must be managed so as not to breach relevant sections of FSMA.

It seems DP went on to conclude that, based on the information provided, Ethical Forestry appeared to be an acceptable investment.

Having carefully considered all the information that's been made available to us to date to evidence the checks DP carried out on the Ethical Forestry investment, I'm satisfied this likely did allow it to broadly understand the nature of the investment. But I don't think DP's actions went far enough.

For the reasons set out above, I think DP's obligations certainly went beyond checking that the Ethical Forestry investment existed and would not result in tax charges. And, as I explain in more detail below, I'm not satisfied that DP undertook sufficient due diligence on the Ethical Forestry investment before it decided to accept this into its SIPPs in July 2009. I think some of the information should have given DP real cause for concern about the risk of consumer detriment associated with this.

As such, in my view, DP didn't comply with its regulatory obligations and good practice, and it didn't act fairly and reasonably in its dealings with Mr J, by not undertaking sufficient due diligence on the Ethical Forestry investment before it accepted his applications to invest in this.

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

*If DP had completed sufficient due diligence, what ought it reasonably to have concluded?*

The third-party report on Ethical Forestry provided to DP by Enhance was dated November 2010, which was after DP had already permitted the investment into its SIPPs in July 2009. And the report included the following points:

- The report was only undertaken to identify whether the investment is likely to be acceptable within a SIPP based on HMRC rules.
- There is no established market for buying and selling this investment. The investment can be assigned or sold to another investor subject to a buyer being found, or the trees can be harvested and the proceeds taken. The harvest proceeds in the early years will likely be less due to the immaturity of the trees.
- The investment should be viewed as illiquid.
- The investment is unregulated so no investor protection applies.

To correctly understand the nature of the investment and consistent with its regulatory obligations though, DP should have also had regard to, and given careful consideration to, how Ethical Forestry was marketed to investors when undertaking due diligence into the proposed investment. And this includes conducting some further basic independent searches. I note that DP has provided a copy of the Ethical Forestry marketing material it says that it reviewed versions of as part of its due diligence at the time. But this isn't dated from the time it permitted the investment within its SIPPs. And, in any event, for the reasons given below, I think it's fair to say that the information provided about the Ethical Forestry investment was at best unclear and that a number of the statements made in promotional material were misleading.

The marketing material I've seen says Acacia is "a safe and secure investment". The brochures for the Melina and/or Acacia tree crops say the investment is "secure, dependable and stable" and that it is "Low risk – No peaks or troughs, just steady and stable increases".

And, in October 2008 as well as February and September 2009 for example, statements on Ethical Forestry's website read:

"*If you are looking for **certified, high return investments, low risk**, ethical investment which is both profitable and carbon friendly, our Tropical Hardwood Investments demand your serious consideration*" (my emphasis).

In October 2010:

"*Our forestry investments are suited for pensions because:*

- ***Timber investments Out-Perform** - As an asset class timber has consistently out-performed most stocks and commodities for the last 100 years, including oil, gas and gold.*
- ***Are low risk** - No peaks or troughs, just steady and stable increases.*
- ***Are Very Stable** - Timber prices are extremely stable and not correlated to the stock market.*
- ***Offer Higher returns** - Historically, timber investments offer higher returns than traditional investment"* (no emphasis added).

And in November 2010:

"*Ethical Forestry's investments offer **steady, stable increases** with **predictably high** returns, and as they are not correlated to the stock market, they do not suffer from unpredictable peaks and troughs*." (my emphasis).

In my view, DP should have been concerned that neither the marketing material nor the website reflected the risks. It was an unregulated high-risk investment. The Ethical Forestry investment was certainly not "low risk" and "secure" on any reasonable analysis. Despite this, the investment appears to have been marketed as such to pension investors.

DP should also have been concerned about how the projected returns were set out in the marketing material.

In August 2009, Ethical Forestry's website said that the projected returns for a £12,000 investment over 12 years in Formaleta would be in excess of £84,000. And an Acacia brochure (dated 2010) said, for example, that the projected returns for an £18,000 investment over 10 years would be £93,642 and for an accumulating investment over 22 years the projected return was £732,297. Another undated version of the Acacia brochure that I've seen said this would be "ideal for SIPPs pensions and personal investment portfolios" and that conservative figures were used in its projections.

The website also said in respect of Melina that "A typical investment of £18,000 invested over 10 years is projected to return £93,642. By comparison, a high-return account at 6% compound interest per annum would yield just £32,235 over 10 years".

I don't think that this marketing material contained any evidential basis for what appears to be wholly unrealistic "conservative" returns for investors – up to around 4,000% growth for an accumulating investment in the tree crops. Reference is made to historic figures from the Costa Rica National Forestry Office. But no detail is provided for investors to verify these figures. And, in any case, neither the website nor brochures say that past performance is no indicator of what might happen in the future, give alternative projections in different market conditions or highlight the risk factors associated with unregulated investments such as this.

A due diligence brochure I've seen doesn't seem to contain any disclaimer which explained that Ethical Forestry wasn't regulated by the FCA, that investment values may rise or fall, there were no performance guarantees and customers might not get back the full amount paid, for example. I've seen a 42 page Melina due diligence brochure which I note did contain some of this type of information. But I'm not sure whether investors would've seen this lengthy document. And none of the due diligence brochures I've seen explained that customers would not have recourse to the FSCS or our Service. And I think that a warning ought to have been given in all the marketing materials and on the website.

For the reasons I've given, I think the investment promotional material at the time was unclear and misleading. So, DP 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 Ethical Forestry without appreciating the risks involved. I think that these concerns alone ought to have led DP to conclude that it shouldn't permit this investment within its SIPPs, and at the very least this ought to have led DP to understand the importance of undertaking comprehensive independent due diligence.

Looking at all of the above, there were significant warning signs and risks associated with the Ethical Forestry investment, namely:

- There was no investor protection associated with this investment. It was illiquid, subject to currency fluctuations and there may be no market for it. There were also other risks involved such as disease or fire that could've destroyed the trees allocated to investors.
- It was being specifically 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.
- Ethical Forestry had no proven track record for investors and so DP couldn't be certain that the investment wasn't impaired or operated as claimed.
- The very high projected returns set out should have been questioned. I don't expect DP to have been able to say the investment would have been successful. But such high projected returns without any apparent basis should have given DP cause to question its credibility.
- The marketing material was, at best, unclear as to the risks associated with the investment. So, DP should have been concerned that consumers may have been misled or did not properly understand the investment they intended to make.
- As set out by the liquidator, investors were led to believe they had ownership of trees and cropping rights in relation to the trees and were given GPS co-ordinates to these, when these rights weren't given as these weren't capable of being granted under Costa Rican law.

All in all I am satisfied that DP ought to have had significant concerns about the Ethical Forestry investment from the beginning. Had DP 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 Ethical Forestry investment into its SIPPs and that this wasn't acceptable for its SIPPs.

As such, and based on the available evidence, I don't think DP 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 Ethical Forestry investment before it did so. I don't think DP met its regulatory obligations and, in accepting Mr J's application to invest in Ethical Forestry, it allowed his funds to be put at significant risk.

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 DP wasn't expected to, nor was it able to, give advice on the suitability of the SIPP and/or the investment. To be clear, I'm not making a finding that DP should have assessed this for Mr J. 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 DP shouldn't have allowed the Ethical Forestry investment into its SIPPs because it was high risk. Instead, my fair and reasonable decision is that there were things DP knew or ought to have known about the Ethical Forestry investment and how it was being marketed, for example, which ought to have led DP to conclude it wouldn't be consistent with its regulatory obligations or good practice to allow it into its SIPPs. And that DP failed to act with due skill, organise and control its affairs responsibly, or treat Mr J fairly by accepting this into his SIPP.

To be clear, I don't say DP should have identified all issues which later came to light. I only say that, based on the information that was available at the relevant time had it undertaken sufficient due diligence, DP should have identified that there was a significant risk of consumer detriment if it permitted the investment within its SIPPs. And it's my fair and reasonable opinion that appropriate checks would have revealed issues which were, in and of themselves, sufficient basis for DP to have declined to accept the Ethical Forestry investment in its SIPPs before Mr J applied to invest in this with it. And it's the failure of DP's due diligence that's resulted in Mr J being treated unfairly and unreasonably.

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

**Did DP act fairly and reasonably in proceeding with Mr J's instructions?**

I recognise might have Mr J signed forms confirming he understood that DP wouldn't accept any liability for issues that might arise in respect of the investment and that it seems he declared that he'd received details of the risk factors and terms and conditions for the investment and wished to proceed with this.

For the reasons given above, I think DP should have refused Mr J's application from Firm B and/or refused to permit the Ethical Forestry investment within its SIPPs though. So things shouldn't have progressed beyond that – the opportunity to execute investment instructions or proceed in reliance on an indemnity shouldn't have arisen at all in Mr J's case.

**Indemnities**

In my view it's fair and reasonable to say that just having Mr J sign indemnity declarations wasn't an effective way for DP to meet its regulatory obligations to treat him fairly, given the concerns DP ought to have had about his introduction and the intended investments. DP knew that Mr J had signed forms intended to indemnify it against losses that arose from acting on his instructions. And, in my opinion, relying on such indemnities when DP knew, or ought to have known, Mr J's dealings with Firm B and the Ethical Forestry investment were putting him at significant risk wasn't the fair and reasonable thing to do.

In the circumstances I think very little comfort could have been taken from declarations stating that Mr J understood the investment risks. Having identified the risks I've mentioned above, it's my view that the fair and reasonable thing to do would have been to refuse to accept Mr J's applications.

The Principles exist to ensure regulated firms treat their clients fairly. And I don't think the paperwork Mr J signed meant that DP could ignore its duty to treat him fairly. I'm satisfied that indemnities contained within the contractual documents don't absolve DP of its regulatory obligations to treat customers fairly when deciding whether to accept or reject business.

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

**COBS 11.2.19R**

DP has said that it's an execution only SIPP provider. As I've said though, it wasn't fair and reasonable for DP to have accepted Mr J's applications in the first place.

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

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

**Is it fair to ask DP to compensate Mr J in the circumstances?**

*Would Mr J's application have gone ahead elsewhere if DP had declined it?*

I've considered whether, in the circumstances, Mr J would have gone ahead with the switch and the later Ethical Forestry investments if DP had refused his applications. In *Adams v Options SIPP*, the judge found that Mr Adams would've proceeded with the transaction regardless. HHJ Dight says (at paragraph 32):

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

I recognise Mr J may have signed a declaration confirming he understood and accepted the level of risk and wished to proceed. But Mr J was a retail customer, who doesn't appear to work in finance or pensions. And, in any event, I'm not satisfied that Mr J was determined to move forward with the transactions in order to take advantage of a cash incentive. I've not seen any evidence to show Mr J was paid a cash incentive.

It therefore cannot be said Mr J was incentivised to enter into the transaction. And, on balance, I'm satisfied that Mr J, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for himself. So, in my opinion, this case is very different from that of Mr Adams.

And had DP, as a regulated firm, explained to Mr J even in general terms why it would not accept his applications or that it was terminating the transaction, I think Mr J is likely to have lost trust in Firm B – particularly given in this case Mr J has had he was wary of financial advisers due to a previous negative experience. And without the above firm(s) involvement I don't think Mr J would have otherwise had any interest in switching to a DP SIPP and making high risk non-standard investments, including Ethical Forestry. So I find it very unlikely that Mr J would later still have sought to invest in this elsewhere.

And, in any case, I don't think it's fair and reasonable to say that DP shouldn't compensate Mr J for his loss based on speculation that another SIPP operator would've made the same mistakes as I've found DP did. I think it's fair instead to assume that another SIPP provider would've complied with its regulatory obligations and acted according to good industry practice, and therefore wouldn't have accepted business from Firm B, nor permitted investment into Ethical Forestry in its SIPPs, and prior to Mr J's applications.

So, on balance, I think it's fair and reasonable to direct DP to pay Mr J compensation in the circumstances. I'm satisfied that Mr J would not have continued with the DP SIPP and the Ethical Forestry investment, had it not been for DP's failings. And, whilst I accept other parties might have some responsibility for initiating the course of action that led to Mr J's loss, I consider that DP failed to comply with its own obligations and didn't put a stop to the transactions proceeding by declining to accept Mr J's applications when it had the opportunity to do so.

*The involvement of other parties*

I accept that other regulated parties were involved in the transactions complained about, such as Firm B and I've carefully considered DP's points in respect of this. In this decision I'm considering Mr J's complaint about DP though. DP had its own distinct set of obligations when considering whether to accept Mr J's application for a SIPP. And, as I explain below, I'm satisfied that it's fair to require it to compensate Mr J for the full measure of his loss.

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).

I want to make clear that I've taken everything DP has said into consideration. And it's my view that it's appropriate in the circumstances for DP to compensate Mr J to the full extent of the financial losses he's suffered due to DP's 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 DP's liable to pay to Mr J. DP accepted Mr J's business. And, but for DP's failings, I'm satisfied that Mr J's pension monies likely wouldn't have been switched to an DP SIPP and then invested in Ethical Forestry via Firm B.

I am not asking DP 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 should not impact on Mr J's right to fair compensation from DP for the full amount of his loss. The key point here is that but for DP's failings, Mr J wouldn't have suffered the loss he's suffered. As such, I'm of the opinion that it's appropriate and fair in the circumstances for DP to compensate Mr J to the full extent of the financial losses he has suffered due to its failings, and notwithstanding any failings by other firms involved in the transactions.

I note that DP has said, for example, that Firm B is primarily responsible for any loss suffered. And I've set out below that DP could have the option to take an assignment from Mr J before compensation is paid. And that compensation could be made contingent upon Mr J's acceptance of this term of settlement.

As set out above, I'm satisfied that DP should've put a stop to the transactions and that the switch to the DP SIPP and the investment into Ethical Forestry likely wouldn't have gone ahead if it'd treated Mr J fairly and reasonably. I've carefully considered causation, contributory negligence, and apportionment of damages. But in the circumstances here and for the reasons I've given, I'm still satisfied it's fair and reasonable for DP to compensate Mr J for his full loss.

*Mr J taking responsibility for his own investment decisions*

Section 5(2)(d) of the FSMA (now section 1C) requires the FCA, in securing an appropriate degree of protection for consumers, to have regard to, amongst other things, the general principle that consumers should take responsibility for their own investment decisions. Having considered this I'm satisfied that it wouldn't be fair or reasonable to say Mr J's actions mean he should bear the loss arising as a result of DP's failings.

For the reasons given above, I think that if DP had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted Mr J's introduction from Firm B nor permitted his later investment application. That should have been the end of the matter – if that had happened, I'm satisfied the arrangement for Mr J wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

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

Mr J used the services of regulated firms and providers, trusting these to act in his best interests. So, I don't think it would be fair to say in the circumstances that Mr J should suffer the loss because he ultimately instructed the transactions to be effected. Overall, I'm satisfied that in the circumstances, for all the reasons given, it's fair to say DP should compensate Mr J for the loss he's suffered.

**What would have otherwise happened?**

My aim is to return Mr J as closely as possible to the position he would now be in but for what I consider to be DP's due diligence failings.

While I've taken into account that Mr J has said he was 'cold called' and wasn't otherwise interested in changing his pension at the time, a telephone note of Firm B's made at the time said that he wanted a pension review, he was wary but wanted help and advice. And Mr J has said that he was disappointed with returns from his existing schemes, he was reluctant to take an annuity and that his pensions were spread across five plans, albeit with two providers.

So, while, for the reasons given, I'm satisfied that Mr J wouldn't have otherwise transferred to a DP SIPP and then invested in high risk non-standard investments like Ethical Forestry, based on the available information, it seems likely that Mr J might still have looked to move his existing pensions elsewhere and to amalgamate these.

I can't state definitively which provider would have been used, or into what holdings, and in what proportions the monies would have otherwise been invested though. So, having carefully considered this, and given the lack of certainty on this point (including about the specific provider, holdings, and the specific proportions, monies would have been invested in post-transfer had transfers elsewhere still been effected), for the purposes of quantifying redress in this case I think the fair and reasonable approach is to assume that the pension monies in question would have achieved a return equivalent to the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return index). I'm satisfied that's a fair and reasonable proxy for the type of return that could have been achieved over the period in question.

**Putting things right**

In summary, on a fair and reasonable basis, DP should:

1. Calculate a notional value, as at the date of this decision, of the monies that were transferred into the DP SIPP if they'd not been transferred into this.

2. Obtain the actual current value of Mr J's DP SIPP, as at the date of this decision, less any outstanding charges.

3. Deduct the sum arrived at in step 2) from the sum arrived at in step 1).

4. Pay a commercial value to buy any illiquid investments (or treat them as having a zero value).

5. Pay an amount into Mr J's DP SIPP, so that the transfer value of this is increased by an amount equal to the loss calculated in step 3). This payment should take account of any available tax relief and the effect of charges. The payment should also take account of interest as set out below.

6. Pay Mr J £250 for the distress and inconvenience the problems with his pension have caused him.

I've explained how DP should carry out the calculation, set out in steps 1 - 6 above, in further detail below:

1. Calculate a current notional value, as at the date of this decision, of the monies that were transferred into the DP SIPP if they'd not been transferred into it.

   To do this, DP should calculate what the monies transferred into the SIPP would now be worth had they instead achieved a return equivalent to that of the FTSE UK Private Investors Income Total Return Index from the date they were first switched into the DP SIPP through until the date of my final decision. I'm satisfied that's a reasonable proxy for the type of return that could have been achieved over the period in question.

   DP must also make a notional allowance in this calculation for any additional sums Mr J has contributed to or withdrawn from, this SIPP since outset. To be clear this doesn't include SIPP charges or fees paid to third parties like an adviser.

Any notional contributions or notional withdrawals to be allowed for in the calculation should be deemed to have occurred on the date on which monies were actually credited to, or withdrawn from, the DP SIPP by Mr J.

2. Obtain the actual current value of Mr J's DP SIPP, as at the date of this decision, less any outstanding charges.

   This should be the current value as at the date of my final decision.

3. Deduct the sum arrived at in step 2) from the sum arrived at in step 1).

   The total sum calculated in step 1) minus the sum arrived at in step 2), is the loss to Mr J's pension provision.

4. Pay a commercial value to buy Mr J's share in any investments that cannot currently be redeemed.

   I'm satisfied that Mr J's DP SIPP only still exists because of the illiquid investments that are held within it. And that but for these investments Mr J's monies could have been transferred away from DP. In order for the SIPP to be closed and further SIPP fees to be prevented, any remaining investments need to be removed from the SIPP.

   To do this DP should reach an amount it's willing to accept as a commercial value for the investments, and pay this sum into the SIPP and take ownership of the relevant investments.

   If DP is unwilling or unable to purchase the investments, then the actual value of any investments it doesn't purchase should be assumed to be nil for the purposes of the redress calculation. To be clear, this would include their being given a nil value for the purposes of ascertaining the current value of Mr J's SIPP in step 2).

   If DP doesn't purchase the investments, it may ask Mr J to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from these investments. That undertaking should allow for the effect of any tax and charges on the amount Mr J may receive from the investments, and any eventual sums he would be able to access from the SIPP. DP will need to meet any costs in drawing up the undertaking.

5. Pay an amount into Mr J's DP SIPP, so that the transfer value of this is increased by an amount equal to the loss calculated in step 3). This payment should take account of any available tax relief and the effect of charges. The payment should also take account of interest as set out below.

   The amount paid should allow for the effect of charges and any available tax relief. Compensation shouldn't be paid into a pension plan if it would conflict with any existing protections or allowances.

   If DP is unable to pay the compensation into Mr J's SIPP, or if doing so would give rise to protection or allowance issues, it should instead pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore, the compensation should be reduced to notionally allow for any income tax that would otherwise have been paid.

   The notional allowance should be calculated using Mr J's actual or expected marginal rate of tax in retirement at his selected retirement age.

It's reasonable to assume that Mr J is likely to be a basic rate taxpayer at his selected retirement age, so the reduction would equal 20%. However, if Mr J would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

Neither DP nor Mr J have disputed that this is a reasonable assumption, despite being given the opportunity to do so in response to my provisional decision and being made aware that it won't be possible for us to amend this assumption once any final decision has been issued on the complaint.

6. Pay Mr J £250 for the distress and inconvenience the problems with his pension have caused him.

   In addition to the financial loss that Mr J has suffered as a result of the problems with his pension, I think that the loss suffered to Mr J's pension provision has likely caused him some distress. Mr J lost a significant proportion of his DP SIPP pension monies, Mr J is in his late 50's at the time and I think this is likely to have caused him some worry. I think that it's fair for DP to compensate him for this as well and that this is a fair and reasonable amount in the circumstances.

DP must also provide the details of its redress calculation to Mr J in a clear, simple format.

*Assignment of rights*

If DP believes other parties to be wholly or partly responsible for the loss, it is free to pursue those other parties. So, if Mr J's loss does not exceed £160,000 (which is the maximum sum I'm able to award in a case such as this), or if DP accepts my recommendation below that it should pay the full loss as calculated above, then the compensation payable to Mr J by DP may be contingent on the assignment by him to DP of any rights of action he may have against other parties, and to any future payment Mr J might receive from such parties, in relation to his transfer to the DP SIPP and the investments if DP is to request this. DP should cover the reasonable cost of drawing up, and Mr J's taking advice on and approving, any assignment required.

*SIPP fees*

If the investment/s can't be removed from the SIPP, and because of this it can't be closed once compensation has been paid, then it wouldn't be fair for Mr J to have to pay annual SIPP fees to keep the SIPP open. So, if the SIPP needs to be kept open only because of the illiquid investments and is used only or substantially to hold those assets, 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 J or into his SIPP within 28 days of the date DP receives notification of Mr J's acceptance of my final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation isn't paid within 28 days.

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

## My final decision

For the reasons given, it’s my final decision that Mr J’s complaint should be upheld and that DP Pensions Limited 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 require DP Pensions Limited to pay Mr J the compensation amount as set out in the steps above, up to a maximum of £160,000 (including distress and/or inconvenience but excluding costs) plus any interest set out above.

**Recommendation:** If the compensation amount exceeds £160,000, I also recommend that DP Pensions Limited pays Mr J the balance.

My recommendation would not be binding. Further, it’s unlikely that Mr J can accept my final decision when issued and go to court to ask for the balance. Mr J may want to consider getting independent legal advice before deciding whether to accept the final decision.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr J to accept or reject my decision before 16 April 2025.

Holly Jackson
**Ombudsman**