DRN-3716940

Financial Ombudsman Service

The complaint

The estate of Mr A complains that, before it accepted Mr A's application to transfer his occupational defined benefit ('DB') pension scheme into a self-invested personal pension ('SIPP'), Options UK Personal Pensions LLP ('Options', formerly Carey Pensions) didn't carry out sufficient due diligence on the firm that introduced his business to Options, or on the investment his SIPP monies were used to make.

Mr A sadly passed away after bringing this complaint to our Service. His complaint has been continued by his wife Mrs A, who represents Mr A's estate and is herself represented here by a claims management company ('CMC'). Although it's important to remember that it is Mr A's estate bringing this complaint, for the most part I'll refer only to Mr A.

What happened

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

Options

Options is a SIPP provider and administrator. At the time of these events, Options was regulated by the Financial Services Authority ('FSA'), later becoming the Financial Conduct Authority ('FCA'). Options was authorised in relation to SIPPs, to arrange (bring about) deals in investments, to deal in investments as principal, to establish, operate or wind-up a pension scheme, and to make arrangements with a view to transactions in investments.

'Firm G' / Financial Provision Solutions Limited ('FPSL')

Firm G was an 'Introducer Appointed Representative' of FPSL from 24 February 2014 to 30 October 2015. An Introducer Appointed Representative can only introduce customers to another firm or members of the firm's group, and/or give out certain kinds of marketing material.

At the time of the events complained about, FPSL was an FCA regulated financial adviser. An introducer agreement was made between FPSL and Options. On 3 March 2014, an 'Introducer Profile – Regulated Financial Services Firm' document was signed, which set out the type of business FPSL would be introducing. On the same date, a Terms of Business was signed, which set out Options' terms of business and the conduct it expected of FPSL. A fee schedule intended for clients was also produced, titled, "*The Carey Pension Scheme SIPP Fee Schedule 2014 Financial Provision Solutions (for ex-Armed Forces)".*

Options has told us its agreement with FPSL ended when, in February 2017, FPSL ceased to be regulated by the FCA. In September 2019, FPSL went into Financial Services Compensation Scheme ('FSCS') default.

'Firm C'

Firm C is an investment manager based in the Isle of Man. It agreed to manage or provide oversight of investments taken out by Mr A after he had transferred his DB pension into his SIPP.

'Firm J'

Firm J is regulated in the UK by the FCA. It provided the investments into which Mr A's SIPP monies were invested.

Mr A's dealings with Firm G, FPSL and Options

Mr A had an armed forces occupational DB pension. Amongst other things, Mr A told us he'd noticed that an armed forces charity had said transferring out of the armed forces DB pension scheme was becoming commonplace, and so he enquired why. He was put in touch with Firm G, and Firm G put him in touch with FPSL.

It's not disputed that FPSL gave Mr A advice. Although I've not been provided with a copy of FPSL's advice in relation to Mr A, Options says its records show that FPSL produced a suitability report for him on 9 July 2014.

An Options branded SIPP application form was completed for Mr A in late 2014. This included the following information:

- A box stating *"I accept and acknowledge that Carey Pensions has not provided any advice"* was answered as "*Yes*".

- Mr A was applying for a 'Restricted Investment' SIPP, which allowed two regulated investments and excluded commercial property and unregulated investments.

- The 'Personal Details' section recorded, amongst other things, that Mr A was single at that time.

- The 'Transfers' section set out the details of Mr A's occupational DB scheme to be transferred, including that it had an approximate value of more than £81,000. A box which stated *"Have you taken advice on the transfer of this policy?"* was answered as *"Yes",* and Mr M of FPSL was recorded as the adviser who'd given that advice.

- The 'Transfers' section also stated *"For any Final Salary/Defined Benefit occupational scheme transfer you are required to seek appropriate advice from a regulated professional adviser and provide us with a copy of the TVAS* [transfer value analysis] *report and the advice. If the recommendation in the TVAS report and advice is not to transfer a Final Salary/Defined benefit scheme, then, Carey Pensions UK will not process the transfer request."*

- The 'Investments' section of the SIPP application form recorded that Firm C had been appointed as Mr A's Investment Manager and had 'discretionary' investment authorisation, meaning that it would manage Mr A's pension funds. This section also asked what the intended investment was, but no answer was recorded.

- The 'Professional Financial Adviser Agreement' section again recorded that Mr M of FPSL was Mr A's financial adviser. It also asked whether the financial adviser's fees would be paid from the SIPP, but no answer was recorded.

- The 'Declaration' section signed by Mr A said, amongst other things:

- *"I hereby consent to Carey Pensions UK LLP requesting the transfer of my policies listed in the application;"*
- "*I understand that it is my sole responsibility to make decisions relating to the purchase, retention or sale of any investment held within the Carey Pension Scheme"*.
- *"I agree to indemnify Carey Pensions UK LLP 'The Administrator' and Carey Pension Trustees UK Ltd against any claim in respect of any decision made by myself and/or my Professional Financial Adviser/Investment Manager or any other professional adviser I choose to appoint from time to time".*
- *"I understand that Carey Pensions UK LLP and Carey Pension Trustees UK Ltd are not in any way able to provide me with any advice."*

Mr A's new Options SIPP opened in December 2014. On 26 March 2015, about £83,559 was transferred into it from his DB pension scheme and a few days later FPSL's advice fee of about £3,993 was paid out of his SIPP. On 1 April, about £78,693 of Mr A's SIPP monies were paid to Firm J in order to purchase investments with Firm J – these included the KHG fund ('KHG') and the KMG fund ('KMG').

In December 2015, Options sent Mr A an annual valuation for his SIPP. This set out the value of his SIPP bank account (£510), his Firm J investment portfolio (£70,591), and the total of all his SIPP assets (£71,102). It also included a statement of transactions for his SIPP.

During 2018 Mr A was in contact with Options at various points, as follows.

He called Options on 8 January 2018, and Options' note of this call included that, *"Mr A called… He wanted an update of this scheme, he said he hasn't done anything with it in 3 years. I confirmed the current value as follows.*
SIPP Bank Account: £33.59
[Firm J]: £84,857.31

He mentioned that there wasn't a lot of difference from when the funds were invested 3 years ago. I confirmed that we were unable to comment on the performance of the investment as we are not financial advisers and only act on client instructions, which he agreed with and understood.

He mentioned that he may be moving abroad and possibly moving funds around but will let us know once he has made a decision."

Following a call from Mr A, Options emailed Mr A on 4 April 2018, saying, *"Your [sic] are invested into [Firm J] in various stocks, which is managed by [Firm C]. I have attached a current valuation from [Firm J], which has the stock name, code, and current value.*

As I confirmed the below stocks are currently suspended until notified:
[KHG]
[KMG]"

Mr A replied the same day with some questions. In summary, he said he understood from Options that these two funds were suspended and were probably the reason for the reduction in his current value. He asked when the suspensions would be lifted and whether the share value would reduce. He said he couldn't find KHG and KMG on the London Stock Exchange and asked for assistance in finding and viewing them. He also asked why there was an approximate difference of £6,000 between the current value showing on Firm J's platform and the valuation Options had attached to its email.

Options replied on 11 April 2018 with an update from Firm C on the KHG and KMG funds. The updates said KHG aimed to reopen for dealing across its liquid share-class in May 2018, and KMG was due to pay all redemptions in quarter two of 2018. Options also explained that the difference in valuations was because they were dated a week apart, and attached an up to date valuation from Firm J's platform which showed Mr A's holdings with Firm J was valued at a total of £82,519.

Based on the evidence provided so far, it appears Mr A sold some of his investments with Firm J (though not KHG or KMG) and transferred proceeds totalling £8,908 to another pension provider ('Provider O') in June and August 2018.

On 27 September 2018, Options emailed Mr A an update from Firm C on KHG and KMG. The update said KHG now had liquid shares which were open for dealing, and the illiquid shares were still being appraised and as and when any assets became liquid and redemption proceeds were received, these would be transferred to liquid shares. And that KMG was now fully liquid and it was indicated that pending redemptions would take place in October 2018. Options also attached the latest valuation statement from FPSL which set out that Mr A's holdings with Firm J was valued at a total of £79,476, and that this was made up of his fund values of £22,731 and cash of £56,744.

On 3 October 2018, Mr A emailed Options to confirm their recent conversation. He said he understood Options had asked Firm J to send it £50,000 cash so it could be transferred from Options to Provider O. And that Options had asked that as each fund was unsuspended, monies be released until all monies had been transferred to Options totalling over £32,000, so it could then also be transferred out from Options.

Soon after, Options told Mr A it had received the £50,000 and transferred it (minus Options' fee) to Provider O.

It appears Mr A had a conversation with Options around 22 March 2019. On that date, Options sent him a follow up email and attached a valuation obtained from Firm J that day, in which Options had highlighted the suspended funds for him to see – it highlighted KHG but not KMG.

Mr A replied that same day to say, *"This is [sic] £15,000 drop since 22 December is this correct? Also I requested the transfer of all my funds once suspensions were lifted. I asked that as each suspension is lifted it is then taken out of fund and placed in my account, this was done when the first suspension was lifted but clearly not the others resulting in what at first glance looks like a £15,000 loss. Please contact me on Monday 25 March to clarify the situation. If my explanation above is correct I will be seeking to recover this loss."*

Mr A and Options had a telephone call on 29 March 2019. Options followed it up that day with an email explaining that the total value of his SIPP was £30,623, and this included around £13,142 cash in his SIPP bank account, £8,252 cash with Firm J and a suspended amount of £9,228. Options said it could send further monies to Provider O for a fee, otherwise it could wait until all funds were unsuspended. Options added that market fluctuations accounted for a difference of £2,000 Mr A had noticed.
On 18 April 2019, Mr A asked Options to transfer the £13,142 cash in his SIPP bank account to Provider O and to provide details of: what monies it had recently received from Firm J; the cash/other funds held with Firm J; and, the suspended funds. In reply, Options provided a fund and value breakdown from Firm J, and said it had asked Firm J to send all available cash so this could be transferred to Provider O.

At around this time, Mr A and Mrs A were re-married, after their previous marriage was dissolved some years earlier.

Mr A engaged his CMC. He submitted a claim to the FSCS regarding FPSL. And in August 2020, the FSCS calculated Mr A's total loss was over £134,000 and paid him £85,000 in compensation, its maximum amount at that time. The FSCS later provided Mr A with a reassignment of rights to enable him to pursue a complaint against Options.

On 24 March 2021, Mr A complained to Options. In summary, he thought Options was also responsible for his financial loss in addition to FPSL as it hadn't carried out sufficient due diligence on FPSL and its business model, or on the investment with Firm J, before accepting his SPP and investment applications. Mr A thought Options should put him back into the financial position he'd be in but for its failings, and also compensate him for the distress its failings had caused him.

Options issued its final response to Mr A's complaint in May 2021, which didn't uphold it.

Unhappy with this, Mr A referred his complaint to the Financial Ombudsman Service the same month. Amongst other things, Mr A told us that at the time of the events:

- When he'd made an online enquiry to an armed forces charity about an unrelated matter, he'd noticed it said transferring out of the armed forces DB pension scheme was becoming commonplace. So he enquired why, as the scheme members had always been advised never to do this. He had no intention of transferring his pension out of the scheme and was looking forward to retiring early under it. The charity put him in touch with Firm G, and Firm G put him in touch with FPSL to advise him on why transferring out was becoming commonplace.

- FPSL told him the armed forces DB scheme was changing and he wouldn't be able to receive his pension until age 65, and that he had until April 2015 to transfer out of the scheme, as after that date he wouldn't have access to his pension at all until aged 65. Because he wished to retire early, this left him with no option but to transfer out.

- All conversations and correspondence took place by mail or telephone, except for a ten minute face to face meeting whilst he was at work to sign the required documents.

- Nothing had attracted him to either the introducer or the investment, he merely trusted the people providing the advice.

- As the introducer was working for an armed forces charity, he presumed everything was above board, that he could trust the advice provided and that his money would be in good hands.

- His understanding of the investment was that his money would be placed into funds with low to medium risks and that it would not result in significant loss - that whilst it wouldn't grow in millions, it would grow to be at a reasonable growth by aged 60. He did not expect to start losing money almost immediately and to receive news that funds had been suspended with no access for very long periods of time. At the time of transferring out of his DB scheme, he had no idea of how the SIPP scheme worked. And although he still didn't fully understand, this remained so until he started seeing the value of his pension going down and he learned a little more.

- At the time, he thought Options' role was to invest his money in different funds and manage his money.

- He didn't receive any payment when moving his DB pension.

- Until his CMC investigated, he was unaware there was a further claim against Options in relation to these matters. Prior to this, he'd just thought Options' administration and communication was poor.

- He moved funds from his Options SIPP to Provider O in October 2018, but it took a further year to disinvest funds and he still held suspended funds in his Options SIPP.

<u>Submissions from Options</u>

Options has made a number of points in its final response to Mr A's complaint, and in the submissions it has made to our Service in this and other separate complaints brought to our Service about Options featuring FPSL as the regulated advising introducer. For simplicity, I've brought these points together here. Amongst other things, they include that:

- Mr A's CMC has taken a 'one size fits all' approach and not considered the individual circumstances of this case. And has incorrectly directed this complaint to Options. This complaint should be directed to any or all of: Firm J; the liquidators of FPSL; the wealth management firm Mr A instructed in April 2019

- Fundamentally, as an execution-only (i.e. non-advised) provider, Options would have been in breach of COBS 11.2.19 had it not followed Mr A's instruction to invest.

- Options made clear to Mr A that it provided execution-only services. Mr A had signed to confirm that: he'd taken, or had the opportunity to take, advice regarding the suitability of the SIPP and the underlying investment; he was instructing Options to establish a SIPP, transfer his pension and make the investment; and, that he understood the risks associated with his choices, and Options was not responsible for any of those decisions because it acted on an execution-only basis.

- The documentation Options provided to Mr A recommended he take independent financial advice, and made clear that Options considered he was an advised client who'd used an FCA regulated adviser to advise on the transaction he was instructing Options to make. Mr A had also signed to confirm that he'd received advice from FPSL but had not received any advice from Options.

- Options can't comment on any interactions the client had with third parties, as Options wasn't party to those interactions.

- Our Service is determined to conclude Options should be liable for Mr A losses, to such an extent that we disregard any evidence which doesn't support that conclusion. And we had not asked Mr A sufficient questions, including about his understanding of the investment and his relationship with Options. Options must be give the opportunity see the questions put to Mr A and his answers, so that it may comment on them.

- Our Service must take into account the legal and contractual context of the relationship Options has with its members, including Mr A, being one of a self-invested personal pension scheme in which Options acts on a strictly execution only/non-advised basis and is member- directed throughout. Options acts only as the administrator of Mr A's SIPP. Options is not permitted to provide any advice or comment in relation to the establishment of a SIPP, the underlying investment(s), performance or transfers of any previously held arrangements into the SIPP. Nor is it permitted to assess suitability for a client's individual circumstances. Or to advise or

comment on the suitability of the introducer a client has chosen to use. Our Service should not reach a finding that imparts on Options a legal duty which does not exist.

- Our Service failed to take account of relevant law and regulations as required by section 228(2) of FSMA and DISP 3.6.4R, or explain why we had departed from the relevant law. In particular, we didn't state whether the due diligence duty we found to exist is one recognised by law (rather than some broader professional standards) and, if so, the legal foundation of the duty. The duties suggested would not be recognised in a Court and legal liability would not be established.

- Even if the 2009 Thematic Review Report had been statutory guidance (which it wasn't), the breach of such statutory guidance wouldn't give rise to a claim for damages under FSMA S.138D.

- Regulatory publications cannot found a claim for compensation in themselves and do not assist in construction of the Principles.

- It was Mr A's choice to use FPSL, and he engaged FPSL before contacting Options. And he'd had a 30 day 'Right to Change Your Mind' period in which he could have cancelled his instructions to transfer his DB pension to his new Options SIPP.

- FPSL was regulated. It provided full advice on the transfer of the client's pension, the establishment of the SIPP, the investment and the investment manager. And this was made clear in the SIPP application the client completed and signed. Options ensured Mr A had appointed FPSL and confirmed it had provided financial advice for the transactions he was making and that FPSL held the correct permissions for the advice they provided to Mr A.

- This complaint should be directed to FPSL, because it was the regulated party that had provided advice. And the FSCS agreed FPSL was the liable party, given it had compensated the client in relation to FPSL.

- Options carried out due diligence on FPSL on a number of occasions, and before accepting business from it. It carried out internet searches, FCA register checks and World Check searches. In addition, an Introducer Profile was completed and a Terms of Business was signed. Options understood that FPSL's client profile would vary depending on the source of the enquiry received but it expected many to be ex-armed forces personnel with deferred pension benefits with an average value of around £35,000, that FPSL would advise on both DB and defined contribution transfers, including advising on the ongoing investment strategy which would be through FCA regulated investment managers. And at the time Mr A was introduced, Options found no reason to reject FPSL introductions.

- After its initial agreement with FPSL, Options did not have any further discussions with FPSL about the client process or the business it was referring.

- Options did not request copies of any suitability reports/pension transfer reports provided to the clients.

- FPSL were regulated by the FCA and Options was entitled to accept its introductions and/or take at face value that it was behaving as a reasonably prudent regulated firm would, and providing appropriate advice. It wasn't Options' responsibility to monitor

an FCA regulated entity introducing or advising clients, when that entity was permitted to do so. For our Service to suggest it was is to impose material obligations and requirements on Options which go far beyond the duties it owed at the relevant time, and even now.

- Given the proper scope of Options' regulatory duties, as established in *Adams*, there can be no breach of those duties on Options' part as a result of its decision to accept customers introduced by FPSL, a regulated entity. In the light of their conclusions on the scope of Options' duties, the judge in *Adams* rejected the proposition that Options owed duties of the kinds now being relied upon by reference to any legally actionable COBS rules.

- FPSL introduced 38 clients to Options, and Mr A was the 25th of these. 75% of the 38 introductions involved the transfer of an occupational DB pension scheme.

- Options had no control over the information FPSL provided to the client.

- Our Service contended that FPSL was targeting customers who held armed forces pensions but hasn't provided any evidence to support this.

- Our Service assumed Mr A received advice (or other regulated activity) from Firm G and that commissions payments were likely made. But no evidence has been provided to support that. And Options holds no records to suggest Firm G introduced and/or advised Mr A.

- Options had no relationship with Firm G and was not aware it was involved in Mr A's transaction - none of the paperwork he or FPSL provided to Options mentioned Firm G. So it's not fair or reasonable to suggest Options was aware of Firm G's involvement where the client and FPSL didn't inform Options about Firm G. Options didn't carry out due diligence on Firm G or have Terms of Business with it, as it didn't know about it. FPSL likely had Terms of Business with Firm G, if indeed Firm G was involved at all. Mr A received regulated advice after any involvement by Firm G, so Firm G did not cause Mr A to transfer his DB pension into a SIPP. So FPSL should be held responsible for any potential losses the client claims to have suffered as a result of Firm G's involvement.

- In any event, the regulatory regime has never prohibited SIPP providers from accepting introductions from unregulated firms. Indeed, at the time the FSA thought Options' approach to accepting such business was acceptable. This was made clear in the *Adams* first instance judgment, and wasn't called into question by the appeal judgment.

- Mr A's entry into the Options' SIPP and onward investment cannot have been either caused by, or 'in consequence of any action' of Firm G, as required by section 27 of the FSMA.

- Our Service hadn't evidenced that there was a risk Mr A would be exposed to some purported harm arising from FPSL purportedly targeting certain customers or paying commissions.

- Options UK undertook due diligence on Firm J and Firm C, which were regulated at the time for the services they were providing to Mr A.

- Options had no reason to question or reject Mr A's SIPP application or investments because he was making investments in a regulated portfolio, managed by a regulated investment manager after receiving regulated advice from FPSL.

- Mr A's SIPP application form said he'd appointed Firm C as discretionary investment manager to manage his pension funds via Firm J, so he'd chosen this investment prior to establishing his SIPP with Options and was placing investments decisions in Firm C's hands.

- Options did not carry out due diligence into the underlying funds held in the SIPP. Mr A invested in a standard regulated investment portfolio provided by a regulated financial provider and managed by a regulated investment manager, so Options didn't consider this to be an 'alternative' or 'high risk' investment. And it was for Firm C to select appropriate underlying investments in line with the client's risk appetite. So Options wouldn't necessarily know at any one time what underlying funds the client was invested in, as it may constantly change.

- Options has no control over the investment, its performance or any decision in relation to it. Any complaint regarding the investment should be directed to Firm C as the regulated firm that managed the investment.

- It was reasonable for Options to rely on Mr A's signed declaration that he understood the various documents - he shouldn't have signed them if he'd not agreed with them or understood them, and the transactions wouldn't have proceeded without Mr A signing these documents. The documents were clear and highlighted many of the issues Mr A now complains of.

- Options is acutely aware of the standards it must meet as a SIPP provider. It had met them and had acted appropriately at all times as the client's SIPP provider. And it had administered the SIPP in line with its terms and conditions.

- Mr A transferred the majority of his investment out of Firm J and into Provider O and has suffered no actual loss.

- Mr A was determined to proceed, and it was wrong to suggest that another SIPP provider couldn't legitimately have accepted the client's investment instruction. So the outcome would be the same as it was.

- Our Service said Options shouldn't have accepted Mr A's business in the first place so is liable for all of his loss. But the contract between Mr A and Options relieved Options of any liability it might otherwise bear - concluding otherwise would render void and unenforceable a validly concluded contract. No other legally recognised duty (e.g. in tort or under COBS 2.1.1R) would justify the conclusion our Service reached. And restitution under section 27 of the FSMA would not be available in this case, not least because the case-specific factors relied upon by the Court of Appeal in Adams for refusing section 28 relief are absent in this case.

- Once Mr A made his transfer request, the loss of his DB benefits was assured from that point, even if Options had asked him if he wanted to proceed. So Mr A must bear the loss of these benefits, as his decision couldn't have been prevented even if Options had acted as our Service suggested it should.

- Further, absent any involvement from Options, Mr A would likely have transferred out of his DB pension to a pension which provided benefits that could be inherited by his dependents, since his SIPP application nominated three beneficiaries.

- Mr A's alleged loss is within the realms of possible performance of an investment. The mere underperformance of an investment does not create a wrong or a liability.

- If any compensation is awarded, Mr A must bear some responsibility for his decisions, in particular in the light of the application form he signed which set out Options' responsibilities to him. So any compensation awarded should be reduced to reflect that responsibility, and also reduced to reflect the compensation Mr A received from the FSCS.

- Further, Mr A transferred £77,708 out of his Options SIPP to Provider O. This amount, and the full growth on it since this transfer, must be offset by any compensation awarded.

- Our Service should provide Options with a copy of Mr A's FSCS reassignment of rights and query why he received £85,000 FSCS compensation in circumstances where he transferred £77,708 to Provider O.

- Mr A has recovered any loss he believed he'd suffered. He received £85,000 FSCS compensation plus the £77,708 he transferred out of Options to Provider O in 2019. So he's received £162,707 against an original transfer amount of £83,559.

- Allowing Mr A to retain the investment(s), whether within the SIPP or otherwise, in circumstances where the compensation awarded to him has been calculated upon the assumption that it would be returned to Options (or have a nil value), would give Mr A a windfall so is not fair and reasonable. If Mr A is unable to return the investment(s) to Options, the compensation should be recalculated to reflect this (as in *Adams* a presumptive value was ascribed to the storage pods).

- If our Service's current conclusions stand, Options would be penalised for failing to act in a way which was inconsistent with the contractual and regulatory scheme.

- And there is also a real unfairness if the SIPP provider is liable for the poor investment choices of consumers, since its business is structured on the provision of execution-only services and its fees reflect that. Further, where a consumer chooses an execution only service, it would be unfair if the SIPP provider couldn't rely on express representations the consumer made when signing contractual documentation, such as those made by Mr A.

- An oral hearing should be held to properly determine this complaint. The issues it should address included the extent of Mr A's communications with Firm G, the extent to which he relied on FPSL's advice, his understanding of the investment and the parties roles, and his motivations for entering the transactions. It's procedurally unfair and inappropriate that a fact sensitive matter such as this should be decided wholly on the papers.

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

One of our Investigator’s considered Mr A’s complaint and upheld it. He wasn’t persuaded Options had conducted adequate due diligence on FPSL and its business model. He thought Options ought to have been concerned that FPSL was apparently targeting clients with armed forces DB pensions. And that it ought to have been concerned that the involvement of Firm G risked consumer detriment. Overall, he thought Options shouldn’t have accepted any business from FPSL. He said Options should put things right by carrying out a redress calculation for Mr A and also paying him £500 compensation for the distress and inconvenience its failings caused him.

Mr A had further contact with our Service, but didn’t provide any further comments or evidence in response to the Investigator’s view.

Options disagreed with the Investigator’s view and provided some further comments, which have been included in the submissions from Options that I’ve already set out.

As agreement couldn’t be reached, this complaint was referred for an Ombudsman’s decision.

Sadly, Mr A passed away. Mrs A, representing Mr A’s estate, continued with this complaint with representation from the same CMC.

This complaint came to me. At my request, Options provided some further comments and evidence, which have been included in the submissions from Options that I’ve already set out.

I issued a provisional decision in which I said that, as preliminary matters, I had decided not to exercise my discretion to refer this complaint to TPO, that I did not think an oral hearing was required, and that I thought this complaint had been brought within the relevant time limits. I then concluded this complaint should be upheld. In summary, I said Options ought to have had significant concerns about the introductions it was receiving from FPSL and shouldn’t have accepted Mr A’s business from it. And if it had rejected Mr A’s business, he wouldn’t have established an Options SIPP, transferred his DB scheme monies into it or invested with Firm J. I said it was fair and reasonable for Options to compensate Mr A’s estate and any pension beneficiaries for the loss they’ve suffered.

Mr A’s estate told us it accepted the provisional decision and had nothing further to add.

Options told us it would respond in due course. But despite being provided with the opportunity to do so, Options ultimately didn’t provide our Service with any further comments or evidence to consider in response to the provisional decision.

I’m now in a position to make my decision.

What I've decided – and why

I'd like to start by saying how sorry I was to learn of Mr A's passing, and to offer my sincerest condolences to Mrs A and the rest of Mr A's family.

Preliminary point - should the complaint be referred to TPO?

I note Options' argument that this complaint should be heard by TPO rather than the Financial Ombudsman Service. For the avoidance of doubt, I've considered this point on the basis of the applicable rules and law and not on the basis of what is fair and reasonable in all the circumstances.

I've carefully considered Options' submissions on this point, and I'm satisfied that this complaint is one we can and should consider. We have a statutory duty to resolve complaints referred to us which are within our jurisdiction, subject to certain discretions which are set out in our rules. The rules set out in the FCA Handbook, at DISP 3.4.1R, say:

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

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

(2) the complainant consents to the referral."

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

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

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

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

Preliminary point - Options' request for an oral hearing

I note Options says an oral hearing is necessary to explore issues included the extent of Mr A's communications with Firm G, the extent to which he relied on FPSL's advice, his understanding of the investment and the parties roles, and his motivations for entering the transactions. Options also says it's procedurally unfair and inappropriate that a fact sensitive matter such as this should be decided wholly on the papers. And that our Service had not asked Mr A sufficient questions, and that Options must be given the opportunity see the

questions put to Mr A and his answers, so that it may comment on them.

I'm mindful that Mr A has passed away. But for completeness, I've considered Options request for an oral hearing. And I don't think a hearing is necessary here in any case. For the avoidance of doubt, I've considered this point on the basis of the applicable rules and law and not on the basis of what is fair and reasonable in all the circumstances.

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

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

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

The key question for me to consider when deciding whether a hearing should be held is whether or not "*the complaint can be fairly determined without convening a hearing*".
We do not operate in the same way as the Courts. Unlike a Court, we have the power to carry out our own investigation. And the rules (DISP 3.5.8R) mean I, as the Ombudsman determining this complaint, am able to decide the issues on which evidence is required and how that evidence should be presented. I am not restricted to oral cross-examination to further explore or test points.

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

I have considered the submissions Options has made. However, I remain satisfied that I am able to fairly determine this complaint without convening a hearing. In this case, I am satisfied I have sufficient information to firstly determine whether this complaint has been brought in time, and to then make a fair and reasonable decision. So, I do not consider a hearing is required.

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

Preliminary point - time limits

I've thought again about whether this is a complaint our Service can consider. For the avoidance of doubt, I've considered this point on the basis of the applicable rules and law and not on the basis of what is fair and reasonable in all the circumstances.

Our ability to consider complaints is set out in Chapter 2 (DISP 2) of the FCA's Handbook of Rules and Guidance. DISP 2.8.2R says:

The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service…

> *(2) more than:*
>
> > *(a) six years after the event complained of; or (if later)*
> >
> > *(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;*
> >
> > *unless the complainant referred the complaint to the respondent or the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;*
> >
> > *unless:*
>
> *(3) in the view of the Ombudsman, the failure to comply with the time limits…was as a result of exceptional circumstances.*

Mr A's complaint against Options was that it hadn't carried out sufficient due diligence on FPSL and its business model, or on the investment with Firm J, before accepting his SIPP and investment applications. Options accepted Mr A's SIPP application in December 2014, his DB pension was transferred into his SIPP on 26 March 2015, and his SIPP monies were sent to Firm J for investment in April 2015. Mr A complained to Options on 24 March 2021. So the complaint points in relation to the DB transfer and Firm J investment have been brought in time under the six-year part of the rule.

However, Options accepted Mr A's SIPP application more than six years before Mr A complained to Options. So, the complaint point in relation to this event has been brought outside the six-year part of the rule. Therefore, I must consider whether this complaint point has been brought within the three-year part of the rule. And under the three-year part of the rule, I need to consider not only when Mr A did become aware he had cause for complaint, but also when he ought reasonably to have become aware he had cause for complaint.

The term 'complaint' is defined for the purposes of DISP in the FCA handbook as:

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

> *a) Alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience; and*
> *b) Relates to an activity of that respondent, or any other respondent with whom that respondent has some connection in marketing or providing financial services or products …which comes under the jurisdiction of the Financial Ombudsman Service."*

And *respondent* means a regulated firm covered by the jurisdiction of the Financial Ombudsman Service.

So, the material points required for Mr A to have awareness of a cause for complaint include:

- awareness of a problem;
- awareness that the problem had or may have caused him material loss; and
- awareness that the problem was or may have been caused by an act or omission of Options (the respondent in this complaint).

The SIPP annual valuation Options sent Mr A in December 2015 showed that his Firm J investments in total were valued at about £7,500 (about 10%) less than he'd invested in them. And the email Options sent Mr A in April 2018 made clear that two of the funds he was invested in, KHG and KMG, had been suspended. And I note that Mr A told our Service he did not expect to start losing money almost immediately and to receive news that funds had been suspended with no access for very long periods of time.

So, I accept that Mr A was, or ought reasonably to have been, aware from December 2015 that there was a problem with his SIPP investment which had or may have caused him a financial loss.

But I'm not persuaded Mr A ought reasonably to have linked any act or omission of Options to this problem at those times. I note that Mr A told us that at the time of the events, he thought Options' role was to invest his money in different funds and manage his money. And broadly speaking, that's part of what Options did – it accepted his investment instructions and administered the SIPP his investments were held in. To my mind, there is nothing in Mr A's testimony to our Service to suggest he thought from the start that Options' role went beyond this.

And I'm not satisfied there was anything in the December 2015 SIPP annual valuation or the communications Mr A had with Options at various points in 2018 that ought reasonably to have made him aware that the problem with his SIPP investments was or may have been caused by an act or omission of Options. I'm mindful that Mr A transferred his DB scheme benefits and made his investments after FPSL had provided him with advice. So I think it's reasonable to conclude that Mr A's first thoughts would have been that FPSL were responsible for the problem with his SIPP investments.

That said, I think that in March 2019 Mr A came to think there was a *different* problem with his SIPP that may have caused him a financial loss, and that this problem may have been caused by an act or omission of Options. I say this because on 22 March 2019, after Options had sent him an updated valuation, Mr A emailed Options to say, *"This is [sic] £15,000 drop since 22 December is this correct? Also I requested the transfer of all my funds once suspensions were lifted. I asked that as each suspension is lifted it is then taken out of fund and placed in my account, this was done when the first suspension was lifted but clearly not the others resulting in what at first glance looks like a £15,000 loss. Please contact me on Monday 25 March to clarify the situation. If my explanation above is correct I will be seeking to recover this loss."*

So at this point, Mr A thought Options might have caused him a £15,000 financial loss by not transferring monies as soon as the later suspensions were lifted. I understand Mr A went on to engage his CMC and I think it's more likely than not that at some point afterwards, his CMC mentioned to Mr A the possibility that the transfer of his DB scheme in the first place could have caused him a financial loss, and that both FPSL (as his adviser) and Options (as his SIPP provider) could have a responsibility for that particular problem. And this is supported by Mr A's testimony that until his CMC investigated, he was unaware there was a further claim against Options in relation to these matters and prior to this, he'd just thought Options' administration and communication was poor.

I've not been provided with any evidence to suggest that Mr A had any information prior to this that ought reasonably to have made him aware he had cause for complaint about the due diligence Options carried out when it accepted his SIPP application and his investment applications in 2012.

So in the circumstances of this particular complaint, even if the earliest point at which Mr A became aware he had a cause for complaint against Options was in March 2019, I do not consider that he ought reasonably to have been aware any earlier that there was a problem with his SIPP that had caused him a loss for which Options might also bear a responsibility. Mr A complained to Options within three years of this, in March 2021. Therefore, I remain of the view that this complaint about Options has been brought in time under the three-year part of the rules and so is a complaint our Service can consider.

Given this, I've gone on to consider the merits of this complaint.

The merits

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

Relevant considerations

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

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

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

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

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

> *"The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The Specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirements they cover. The general notion that the*

specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules."

And at paragraph 77 of BBA Ouseley J said:

"Indeed, it is my view that it would be a breach of statutory duty for the Ombudsman to reach a view on a case without taking the Principles into account in deciding what would be fair and reasonable and what redress to afford. Even if no Principles had been produced by the FSA, the FOS would find it hard to fulfil its particular statutory duty without having regard to the sort of high level Principles which find expression in the Principles, whoever formulated them. They are of the essence of what is fair and reasonable, subject to the argument about their relationship to specific rules."

In *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878) ('BBSAL'), Berkeley Burke brought a judicial review claim challenging the decision of an Ombudsman who'd upheld a consumer's complaint against it. The Ombudsman considered the FCA Principles and good industry practice at the relevant time. He concluded that it was fair and reasonable for Berkeley Burke to have undertaken due diligence in respect of the investment before allowing it into the SIPP wrapper, and that if it had done so, it 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 *BBSA*L):

"These passages explain the overarching nature of the Principles. As the FCA correctly submitted in their written argument, the role of the Principles is not merely to cater for new or unforeseen circumstances. The judgment in BBA shows that they are, and indeed were always intended to be, of general application. The aim of the Principles-based regulation described by Ouseley J. was precisely not to attempt to formulate a code covering all possible circumstances, but instead to impose general duties such as those set out in Principles 2 and 6."

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

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

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

I've considered whether *Adams* means that the Principles should not be taken into account in deciding this case. I note that the Principles for Businesses didn't form part of Mr Adams' pleadings in his initial case against Options SIPP. And, HHJ Dight didn't consider the application of the Principles to SIPP operators in his judgment. The Court of Appeal also gave no consideration to the application of the Principles to SIPP operators. So, neither of the judgments say anything about how the Principles apply to an Ombudsman's consideration of a complaint. But, to be clear, I don't say this means *Adams* isn't a relevant consideration at all. As noted above, I've taken account of the *Adams* judgments when making this decision on the estate of Mr A's case.

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

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

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

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

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

In the estate of Mr A's complaint, amongst other things, I'm considering whether Options ought to have identified that accepting introductions from FPSL involved a significant risk of consumer detriment and, if so, whether it ought to have declined to accept introductions from FPSL *before* it received Mr A's application.

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

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

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

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

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

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

The regulatory publications

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

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

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

The 2009 Thematic Review Report

The 2009 Report included the following statement:

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

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

…

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

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

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

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

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

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

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

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

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

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

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

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

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

At its introduction the 2009 Thematic Review Report says:

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

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

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

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

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

It's also clear from the text of the 2009 and 2012 Thematic Review Reports (and the *"Dear CEO"* letter in 2014) that the regulator expected SIPP operators to have incorporated the

recommended good practices into the conduct of their business already. So, whilst the regulators' comments suggest some industry participants' understanding of how the good practice standards shaped what was expected of SIPP operators changed over time, it's clear the standards themselves hadn't changed.

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

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

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

> *"It has been brought to the FSA's attention that some financial advisers are giving advice to customers on pension transfers or pension switches without assessing the advantages and disadvantages of investments proposed to be held within the new pension. In particular, we have seen financial advisers moving customers' retirement savings to self-invested personal pensions (SIPPs) that invest wholly or primarily in high risk, often highly illiquid unregulated investments (some which may be in Unregulated Collective Investment Schemes).*
> *…*
> *Financial advisers using this advice model are under the mistaken impression that this process means they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect.*
>
> *The FSA's view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes."*

The alert was issued prior to the events complained of here. And again, it didn't set new standards. It highlighted that advisers using the restricted advice model discussed in the alert generally weren't meeting *existing* regulatory requirements and set out the regulator's concerns about industry practices at the time.

To be clear, I don't say the Principles or the publications obliged Options to ensure the transactions were suitable for Mr A. It's accepted Options wasn't required to give advice to Mr A, and couldn't give advice. And I accept the publications don't alter the meaning of, or the scope of, the Principles. But as I've said above they're evidence of what I consider to have been good industry practice at the relevant time, which would bring about the

outcomes envisaged by the Principles. I note the FCA's Enforcement Guide says publications of this type *"illustrate ways (but not the only ways) in which a person can comply with the relevant rules".* And so it's fair and reasonable for me to take them into account when deciding this complaint.

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

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

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

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

The contract between Options and Mr A

Options argues that I am retrospectively imposing new duties of due diligence on it and that these duties are inconsistent with the contract Mr A entered. Options also argues that it had very limited obligations to undertake due diligence on FPSL or the underlying investment(s). And that the contract between Mr A and Options relieved Options of any liability it might otherwise bear, and concluding otherwise would render void and unenforceable a validly concluded contract.

I've carefully considered these arguments. For clarity, my decision is made on the understanding that Options acted purely as a SIPP operator. I don't say Options should (or could) have given advice to Mr A or otherwise have ensured the suitability of the SIPP or the investments for him. I accept that Options made it clear to Mr A that it wasn't giving, nor was it able to give, advice and that it played an execution-only role in his SIPP investment. And that forms it appears Mr A signed confirmed, amongst other things, that Options was not responsible for the decisions to make the transactions because it acted on an execution-only basis.

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

What did Options’ obligations mean in practice?

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

Options says it carried out checks on FPSL by carrying out internet, World Check and FCA register searches. In addition, an Introducer Profile was completed and a Terms of Business was signed. So Options did take some steps towards meeting its regulatory obligations and good industry practice.

However, I don’t think those steps that we’ve seen evidence of went far enough, or were sufficient, to meet Options’ regulatory obligations and good industry practice. As set out earlier, to comply with the Principles, Options needed to conduct its business with due skill, care and diligence; organise and control its affairs responsibly and effectively; and pay due regard to the interests of its clients (including Mr A) and treat them fairly. 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.

And I think that Options understood this at the time too, as it did more than just check the FCA entries for FPSL to ensure it was regulated to give advice. It also entered into a Terms of Business agreement with FPSL. And it’s apparent that Options had access to some information about the type and volume of introductions it was receiving from FPSL, as it’s been able to provide us with information about this when requested.

For clarity, I don’t think simply keeping records about the number and nature of introductions that FPSL made without scrutinising that information would have been consistent with good industry practice and Options’ regulatory obligations. As highlighted in the 2009 Thematic Review Report, the reason why the records are important is so that potentially unsuitable SIPPs can be identified.

So, and well before the time of Mr A’s application in late 2014, I think that Options ought to have understood that its obligations meant that it had a responsibility to carry out appropriate checks on FPSL to ensure the quality of the business FPSL was introducing.

What due diligence did Options carry out on FPSL?

Options says it carried out checks on FPSL on a number of occasions.

It says it checked FPSL’s entry on the FCA register. However, the only detailed or documentary evidence Options has provided to support this is a copy of an FCA search for FPSL dated 9 May 2016, which is more than two years after Options entered into its agreement with FPSL.

Options also says it carried out internet searches. Again, the only detailed or documentary evidence Options has provided to support this is a copy of a Companies House search for FPSL dated 9 May 2016, more than two years after Options entered into its agreement with FPSL.

Options also says it searched World Check (a risk intelligence tool which allows subscribers to conduct background checks on businesses and searches for individuals). But, Options hasn't provided any detailed or documentary evidence to support that it carried out this search, or to show what business(es) and/or individual(s) it searched for and what information was returned.

In March 2014 FPSL completed an 'Introducer Profile – Regulated Financial Services Firm' document. Options has provided a copy of this, and I can see it asks a number of questions. I've set out what I think are the relevant questions it asked, along with FPSL's responses in bold:

- *"What type of clients you advise and may introduce to Carey Pensions"*
  "Individuals"

- *"Please indicate the type of pension product you advise on"*
  "SIPP; SSAS; Workplace Pensions."

- *"Please indicate your average client profile and transfer value"*
  "Will vary depending on source of enquiry, but many clients will be ex armed forces moving their **[armed forces occupational DB scheme]** ***benefits – average £35000".***

- *"Do you advise on occupational pension transfers?"*
  "Yes"

- *"If applicable, when advising on the establishment of a pension, do you also advise on the underlying investments?"*
  "Yes"

- *"Please indicate the type of investments you are looking to utilize [sic]"*
  From a list of options, only ***"FCA regulated DFM"*** was chosen in response.

- *"Please can you outline how you monitor the quality and suitability of the advice you provide"*
  "We have set up a process for dealing with enquiries that will be followed. Also, the process will be checked by our compliance providers and the FCA will be invited in to check the process".

At the same time, Terms of Business were agreed between Options and FPSL and I've been provided with a copy of these. They say FPSL's responsibilities included:

- *"To evaluate your client's financial circumstances and based on this assess their suitability for what, if any, of the Carey Pension range is appropriate;"*

- *"To document your recommendation together with suitable alternatives that could have been appropriate and why rejected in favour of the recommended product;"*

- *"Where a transfer is recommended, all options considered and the advice provided to the client in line with regulatory requirements;"*

- *“To provide the necessary documentation to your client about our product you are recommending – this will include, where appropriate, Key Features, personal illustration, Schedule of Fees, Terms and Conditions and product brochures;”*

- *“Where required, to provide any additional information we require about your client to enable us to join your client to our Scheme;”*

- *“Where requested, to inform us whether advice has been given and if requested, provide clarification on the advice provided;”*

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

- *“To ensure you have the correct FCA authorisations to provide the investment advice;”*

Was this sufficient due diligence in the circumstances?

Given the circumstances involved here, I don’t think the above alone was reasonable or sufficient to meet Options’ regulatory obligations and good industry practice. Crucially, I don’t think Options took appropriate steps or drew reasonable conclusions from the information that was available to it before accepting Mr A’s application.

I think Options was aware of, or should have identified potential risks of, consumer detriment associated with business introduced by FPSL, including the following, before it accepted Mr A’s application:

- The nature of the business being introduced. FPSL appeared to be targeting particular clients who were members of a DB scheme – it said many clients would be ex-armed forces transferring their armed forces occupational pension benefits.

- How FPSL was able to meet its regulatory standards, particularly given that it was a small independent financial adviser (‘IFA’) firm.

- The risk of a business that wasn’t authorised by the FCA to give pension transfer or investment advice being involved in the transfer and investment process.

Options knew all of this, or else ought to have known it from the information available, but it didn’t then make further appropriate checks of FPSL’s business model, either at the start of its relationship or on an ongoing basis.

I think Options should have taken steps to address these risks (or, given these risks, have simply declined to deal further with FPSL). Such steps should have involved getting a full understanding of FPSL’s business model – through requesting information from FPSL and through independent checks. Such understanding would have revealed there *was* a significant risk of consumer detriment associated with introductions of business from FPSL.

In the alternative, FPSL may not have been willing to provide the required information, or fully answer the questions about its business model. In either event Options should have concluded it shouldn’t accept introductions from FPSL.

I’ve set out below some more detail on the potential risks of consumer detriment I think Options either knew about or ought to have known about *before* it accepted Mr A’s SIPP

application. These points overlap, to a degree, and should have been considered by Options cumulatively.

The nature of the business introduced by FPSL

The Introducer Profile makes clear FPSL was targeting clients who were members of armed forces DB schemes, as it said "…*many clients will be ex armed forces moving their* [DB scheme] *benefits…"*

I think Options was aware of this targeting, to the extent that an Options branded fee schedule was produced which was seemingly tailored to this group of FPSL-introduced clients. As this was titled,

> *"The Carey Pension Scheme SIPP Fee Schedule 2014*
>
> *Financial Provision Solutions (for ex-Armed Forces)"*

In addition, Options says 38 clients were introduced by FPSL and the vast majority (75%) of these involved the transfer of an occupational DB pension scheme. Options also says Mr A was the 25th of the introductions it received from FPSL.

As set out above, the 2009 Thematic Review Report deals specifically with the relationships between SIPP operators and introducers or "*intermediaries*". And it gives non-exhaustive examples of good practice. In my view, to meet these standards, and its regulatory obligations, set by the Principles, Options ought to have identified a significant risk of consumer detriment arising from business introduced to Options by a firm which appeared to be specialising in pension transfers from one occupational DB pension scheme. And so Options ought to have ensured it thought very carefully about accepting applications from FPSL and, therefore, Mr A.

I think Options should have been concerned, and before it received Mr A's SIPP application, about the volume of introductions it was receiving from FPSL involving the transfer of occupational pensions with defined benefits, as was the case with Mr A. At the relevant date COBS 19.1.6G stated:

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

While I acknowledge this aims to define the expectation of a regulated financial adviser when determining the suitability of a pension transfer, it emphasises the regulator's concern about the potential detriment such a transaction could expose a consumer to. Given the nature of its business and regulatory status, I'd expect Options to have been familiar with the guidance contained in the COBS – even if it didn't apply directly to it. Mr A's pension transfer involved defined benefits, and Options has told us that the majority of the other applications introduced by FPSL did so too. This was a further clear and obvious potential risk of consumer detriment.

Options says it had no control over the information FPSL provided to Mr A. And that it can't comment on any interactions Mr A had with FPSL or other third parties, as Options wasn't party to those interactions.

But a DB transfer is a complex transaction. It also involves many risks, and potentially the loss of significant guaranteed benefits. For this reason, advice on such transactions is tightly regulated in the UK and there are standards of good practice that those giving the advice are expected to follow. This means several steps need to be taken as part of the advice process and documentation such as fact-finds, suitability reports, TVAS reports, and illustrations, all of which generally feature in the advice process. The purpose is to ensure any advice given takes into account all relevant factors, is suitable, and the recipient of the advice is in a fully informed position, where they understand the benefits they are giving up and the risks associated with the transfer.

I think Options, acting fairly and reasonably, should have satisfied itself that a similar process was being followed here by FPSL. I say this because FPSL's starting point appears to have been that the consumers it dealt with would be transferring out of the DB scheme (i.e. it seems to have taken the view a transfer was suitable for all), since the Introducer Profile said many of its clients would be ex-armed forces transferring their occupational armed forces pension benefits. So it was documented that there was a presumption that the transfers would be going ahead. There was a clear risk of consumer detriment if consumers were not in a fully informed position and therefore not able to understand the risks associated with such a transfer.

Options says FPSL was regulated and provided full advice on the transfer of the client's pension, the establishment of the SIPP, the investment and the investment manager. That Options ensured Mr A had appointed FPSL, and confirmed FPSL had provided financial advice for the transactions he was making and that it held the correct permissions for the advice they provided to Mr A. Options also says it was entitled to accept FPSL's introductions and/or take at face value that it was behaving as a reasonably prudent regulated firm would, and providing appropriate advice - it wasn't Options' responsibility to monitor an FCA regulated entity introducing or advising clients, when that entity was permitted to do so

I acknowledge that FPSL was regulated. And I acknowledge that Options' Introducer Profile asked FPSL to outline how it monitored the quality and suitability of the advice it provided, and FPSL answered that it had set up a process for dealing with enquiries and that the process would be checked by its compliance providers and the FCA would be invited to check the process.

But I've not seen that Options asked any further questions about any of this or asked for any documentary evidence of the process or checks that FPSL said would be carried out. And I note Options told us that, after its initial agreement with FPSL, it didn't have any further discussions with FPSL about the client process or the business it was referring. And Options has also told us it didn't ask FPSL for copies of the advice it was providing to the clients it was introducing to Options – even though the Terms of Business Options had agreed with FPSL entitled it to do so, and the 'Transfers' section of the SIPP application form said Options required a copy of the advice. So Options didn't follow its own process here.

Options may argue that these types of pension transfers were one of FPSL's specialisms, and that FPSL's introductions represented only a small percentage of total introductions for Options at that time. But I think it's highly unusual for most or all of a regulated advice firms' introductions to a SIPP provider to involve DB pension transfers so as to invest with the same firm and managed by the same investment manager. This FPSL-introduced business may have only represented a small percentage of Options' overall business but I think it's fair to say that most advice firms, particularly small firms like FPSL, don't transact this kind of business in these volumes.

Given all this, I'm satisfied Options couldn't be certain whether the advice FPSL was offering to the clients it was introducing to Options met the regulatory requirements, or that FPSL's advice and business model was in fact operating in line with Options' assumptions. I think Options should have been concerned about how FPSL was able to meet its regulatory standards, particularly given that FPSL was a small IFA firm. I think this was a clear and obvious potential risk of consumer detriment. Especially since Mr A was transferring more than £80,000 out of his DB pension scheme - a move which was highly unlikely to be suitable for the vast majority of retail clients, as indicated by COBS 19.1.6G.

I do not say Options should have checked the advice that was given – but it should have taken steps to ascertain if a reasonable process was in place and consumers were taking these steps on an informed basis. And I think if it had undertaken such steps and carried out even a cursory investigation of the individuals being introduced to it, then it would have become aware no reasonable process was in place and consumers were not fully informed of the risks, which I'll come to.

The risk of an unregulated business being involved

Options argues there was nothing in the DISP rules preventing SIPP providers from accepting business from unregulated introducers. But as I'll explain, while I think it's likely Firm G was involved from the start here and that Options was, or ought to have been, aware of this, the due diligence Options may or may not have carried out on Firm G isn't the basis on which I'm upholding Mr A's complaint, or something I've relied on in reaching my conclusions.

Options also argues that it had no relationship with Firm G and was not aware it was involved in the client's transaction – that none of the paperwork the client or FPSL provided to Options mentioned Firm G, and that Options holds no records to suggest Firm G introduced and/or advised Mr A. So it says it's not fair or reasonable to suggest Options was aware of Firm G's involvement where the client and FPSL did not inform Options about Firm G.

Options also says it didn't carry out due diligence on Firm G or have Terms of Business with it, as it didn't know about it. That Mr A's entry into the Options' SIPP and onward investment cannot have been either caused by, or 'in consequence of any action' of Firm G, as required by section 27 of the FSMA. And that FPSL likely had Terms of Business with Firm G, if indeed Firm G was involved at all. So in Options' view, FPSL should be held responsible for any potential losses the client claims to have suffered as a result of Firm G's involvement.

Having carefully considered the available evidence, including the SIPP application forms I've seen in this and other complaints brought to us against Options where FPSL was the introducing adviser, I think it's more likely than not that most, if not all, FPSL-introduced Options consumers were doing the same thing. By which I mean that application forms to establish an Options SIPP were being submitted for FPSL-introduced Options consumers recording that advice had been given by FPSL on the DB transfer, that pension monies were then being transferred into the newly established Options SIPPs for those consumers, and, subsequently, the consumers SIPP monies were being invested with Firm J and managed by Firm C.

To be clear, I don't think it's credible that most, or all, of these FPSL-introduced consumers were independently determining to transfer their DB pensions and to invest their pension monies with Firm J and to be managed by Firm C without any input from another party. Given what Options ought reasonably to have identified about the business it was receiving from FPSL had it undertaken adequate due diligence, I think this should have been a

significant cause for concern for Options and caused it to consider the business it was receiving from FPSL very carefully.

Mr A provided our Service with a copy of a Firm G branded fact find titled 'Pension Review Questionnaire – Armed Forces Veterans', which captured information about his current circumstances and objectives. The 'Declaration' section of this fact find says,

> *"The information contained within this document is accurate to the best of my knowledge (member and partner) and that I consent to my information being provided to third parties for purposes relating to my pension only *".*
>
> The indicated footnote read,
> *"* We engage with fully regulated and qualified third parties in order to create an accurate suitability report that is bespoke to your circumstances. We require your consent to disclose the information you provide to those third parties."*

If Options had made appropriate enquiries with FPSL, Options ought to have been alive to the risk that an unregulated third party might have been involved in promoting the transfer and investments to investors, like Mr A, before passing them on to FPSL for regulated advice.

What fair and reasonable steps should Options have taken in the circumstances?

Options could simply have concluded that, given the potential risks of consumer detriment – which I think were clear and obvious at the time – it should not accept applications from FPSL. That would have been a fair and reasonable step to take in the circumstances. Alternatively, Options could have taken fair and reasonable steps to address the potential risks of consumer detriment. I've set these out below.

<u>Requesting information directly from FPSL</u>

Options says it was Mr A's choice to use FPSL, and he engaged FPSL before contacting Options. And that Options had no control over the information FPSL provided to Mr A.

But given the significant potential risk of consumer detriment I think that, as part of its due diligence on FPSL, Options ought to have found out more about how FPSL was operating long before it received Mr A's application. And mindful of the type of introductions it was receiving from FPSL from the outset, I think it's fair and reasonable to expect Options, in line with its regulatory obligations, to have made some specific enquiries and obtained information about FPSL's business model.

As set out earlier, the 2009 Thematic Review Report explained that the regulator would expect SIPP operators to have procedures and controls, and for management information to be gathered and analysed, 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 operator 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."*

And I think that Options, before accepting further applications from FPSL, should have checked with FPSL about things like:

- how it came into contact with potential clients,
- what agreements it had in place with its clients,
- whether all of the clients it was introducing were being offered advice,
- what its arrangements with any unregulated businesses were,
- how and why retail clients were interested in making these investments,
- whether it was aware of anyone else providing information to clients,
- how it was able to meet with or speak with all its clients, and
- what material was being provided to clients by it.

I think it's more likely than not that *if* Options had asked FPSL for this type of information that FPSL would have provided the information sought. And that, amongst other things, Options would have then have been told that clients were being cold-called and told about transferring their DB pensions before being given regulated advice by FPSL in relation to that – as I've seen in other complaints brought to our Service against Options featuring FPSL as the advising introducer. And that Firm G, an unregulated firm, had introduced at least some clients to FPSL in the first place – that Firm G was gathering client details and then passing them to FPSL for regulated advice in relation to transferring their DB pensions.

But if Options had been unable to obtain the information sought from FPSL, then I think it's fair and reasonable to say that Options should have then concluded that it was unsafe to proceed with accepting business from FPSL in those circumstances. In my opinion, it wasn't reasonable, and it wasn't in-line with Options' regulatory obligations, for it to proceed with accepting business from FPSL if the position wasn't clear.

<u>Making independent checks</u>

I think, in light of what I've said above, it would also have been fair and reasonable for Options, 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 FPSL. For example, it could have asked for copies of correspondence relating to the advice.

The 2009 Thematic Review Report said that (with my emphasis):

> *"…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****."*

So I think it would have been fair and reasonable for Options to speak to some applicants, like Mr A, directly.

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

And, on balance, I think it's more likely than not that if Options *had* contacted Mr A to 'confirm the position', Mr A would have told Options that Firm G had passed him to FPSL, he

had no idea how the SIPP scheme worked, and that all conversations and correspondence (so including those with both Firm G and FPSL) had taken place by mail or telephone, except for a ten minute face to face meeting to sign the required documents.

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

If Options had undertaken these steps I think it ought to have identified, amongst others, the following risks before it received Mr A's application:

- The SIPP business introduced by FPSL appeared to target particular DB scheme transfers.
- The risk that FPSL was not meeting its regulatory standards, particularly given that it was a small IFA firm.
- The risk of an unregulated business being involved in the transfer and investment process.
- A third party, like introducer Firm G, might have 'sold' to consumers the idea of transferring occupational DB scheme pensions before the involvement of any regulated parties.
- These features I've mentioned above carried a significant risk of consumer detriment.

Each of these in isolation was significant, but cumulatively I think they demonstrate that there *was* a significant risk of consumer detriment associated with introductions from FPSL. I think that Options ought to have had real concerns that FPSL wasn't acting in customers' best interests and wasn't meeting its regulatory obligations.

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

Due diligence on the underlying investments

Options had a duty to conduct due diligence and give thought to whether an investment itself is acceptable for inclusion into a SIPP. That's consistent with the Principles and the regulators' publications as set out earlier in this decision. It's also consistent with HMRC rules that govern what investments can be held in a SIPP.

I accept that the Firm J investment, managed by Firm C, doesn't appear to be fraudulent or a scam. But this doesn't mean that Options did all the checks it needed to do. Indeed, in its submissions in another, similar, complaint featuring the same firms here, Options says it did not carry out due diligence into the underlying funds held in the SIPP.

However, given what I've said about Options' due diligence on FPSL and my conclusion that it failed to comply with its regulatory obligations and good industry practice at the relevant time, I don't think it's necessary for me to also consider Options' due diligence on the investment. I'm satisfied that Options wasn't treating Mr A fairly or reasonably when it accepted his application from FPSL, so I've not gone on to consider the due diligence it may

have carried out on the investment and whether this was sufficient to meet its regulatory obligations. And I make no findings about this issue.

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

For the reasons previously given above, I think Options should have refused to accept Mr A's application from FPSL. So things shouldn't have got beyond that.

In its submissions to our Service, Options has referred to forms that clients like Mr A signed and suggests these indemnify Options. For completeness, in my view it's fair and reasonable to say that just having Mr A sign 'indemnity' declarations wasn't an effective way for Options to meet its regulatory obligations to treat him fairly, given the concerns Options ought to have had about his introduction.

Options knew that Mr A 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 Options knew, or ought to have known, Mr A's dealings with FPSL were putting him at significant risk wasn't the fair and reasonable thing to do. 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 A's application.

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

COBS 11.2.19R

Options says that, as an execution-only (i.e. non-advised) provider, it would have been in breach of COBS 11.2.19 had it not followed Mr A's instruction to invest. And that it made clear to Mr A that it provided execution-only services.

However, in the circumstances it's my view that the crux of the issue in this complaint is whether Options should have accepted the SIPP application from FPSL and established Mr A's SIPP in the first place.

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."

So I don't think that Options' argument on this point is relevant to its obligations under the Principles to decide whether to accept Mr A's application to open a SIPP in the first place.

I'm satisfied that Mr A's SIPP shouldn't have been established and the opportunity to execute investment instructions or proceed in reliance on an indemnity shouldn't have arisen at all. And I'm firmly of the view that it wasn't fair and reasonable in all the circumstances for Options to proceed with Mr A's application.

Is it fair to ask Options to pay compensation in the circumstances?

<u>The involvement of other parties</u>

In this decision I'm considering the estate of Mr A's complaint about Options. However, I accept that other parties were involved in the transactions complained about, including FPSL.

Mr A pursued an FSCS claim against FPSL. The FSCS upheld Mr A's claim, calculated his losses to be in excess of £85,000 and paid him its limit of £85,000 compensation. Following this the FSCS provided Mr A with a reassignment of rights.

Options contends that FPSL is really responsible for Mr A's losses. And that FPSL, as the principal business, would be the respondent for complaints about the activities Firm G undertook as its appointed representative. Options also says the FSCS agreed FPSL was the liable party, given it had compensated the client in relation to FPSL. But the Financial Ombudsman Service won't look at complaints against FPSL as it's been dissolved and no longer exists as a regulated business.

The DISP rules set out that when an Ombudsman's determination includes a money award, then that money award may be such amount as the Ombudsman considers to be fair compensation for financial loss, whether or not a court would award compensation (DISP 3.7.2R).

As I set out above, in my opinion it's fair and reasonable in the circumstances of this case to hold Options accountable for its own failure to comply with the relevant regulatory obligations, good industry practice, and to treat Mr A fairly.

The starting point therefore, is that it would be fair to require Options to pay compensation for the loss Mr A's estate and ultimately any pension beneficiaries have suffered as a result of its failings. I've carefully considered if there's any reason why it wouldn't be fair to ask Options to compensate Mr A's estate and any pension beneficiaries for their loss, including whether it would be fair to hold another party liable in full or in part.

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

I want to make clear that I've carefully taken everything Options has said into consideration. And it's my view that it's appropriate and fair in the circumstances for Options to compensate Mr A's estate and ultimately any pension beneficiaries to the full extent of the financial losses they've suffered. This is due to Options' failings, and that these failings have caused these losses. And, taking into account the combination of factors I've set out above, I'm not persuaded that it would be appropriate or fair in the circumstances to reduce the compensation amount that Options is liable to pay to Mr A's estate and any pension beneficiaries.

To be clear, I'm not making a finding that Options should've assessed the suitability of the SIPP or the investment for Mr A. I accept that Options wasn't obligated, and indeed was not authorised to give advice to Mr A, or otherwise to ensure the suitability of the pension wrapper or investments for him. Rather, I'm looking at Options' separate role and responsibilities – and for the reasons I've explained, I think it failed in meeting those responsibilities.

Mr A taking responsibility for his own investment decisions

I've carefully considered Options' suggestion that consumers should take responsibility for their own investment decisions.

In reaching my conclusions in this case I've thought about section 5(2)(d) of the FSMA (now section 1C). This section requires the FCA, in securing an appropriate degree of protection for consumers, to have regard to, amongst other things, the general principle that consumers should take responsibility for their own investment decisions.

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

In my view, if Options had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted Mr A's application from FPSL to open a SIPP *at all*. That should have been the end of the matter – if that had happened, I'm satisfied the arrangement for Mr A wouldn't have come about in the first place, and the loss suffered could have been avoided.

As I've made clear, Options needed to carry out appropriate initial and ongoing due diligence on FPSL, and reach the right conclusions. I think it failed to do this. And just having Mr A sign forms that contained declarations wasn't an effective way of Options meeting its obligations, or of escaping liability where it failed to meet its obligations.

And I wouldn't consider it fair or reasonable for Options to have concluded that Mr A had received an explanation of the risks involved from FPSL, given what Options knew, or ought to have known, about FPSL's business model by the time it received Mr A's application.

I don't think it would be fair to say in the circumstances that Mr A's estate and any pension beneficiaries should suffer the loss because Mr A ultimately instructed the transactions be effected. I say this because FPSL was a regulated firm with the necessary permissions to advise on the transactions this complaint concerns. I'm satisfied that in his dealings with it, Mr A trusted FPSL to act in his best interests. Mr A also then used the services of Options - a regulated personal pension provider.

So overall, I'm satisfied that in the circumstances, for all the reasons given, it's fair to say Options should compensate Mr A's estate and any pension beneficiaries for the loss they've suffered.

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

Mr A told us he'd made an online enquiry to an armed forces charity about an unrelated matter and noticed it said transferring out of the armed forces DB pension scheme was becoming commonplace, so he enquired why and was put in touch with Firm G who then passed him to FPSL.

So I accept that at the beginning of the events here, Mr A made an enquiry about his pension. And I accept that he had a wish to retire early, and before age 65. However, it doesn't automatically follow that Mr A wanted to open a SIPP, transfer his DB scheme benefits into an Options SIPP and invest his SIPP monies with Firm J no matter what. And I note that Mr A also told us he'd not started with any intention of transferring his DB scheme benefits.

In any case, I've thought carefully about what Mr A would likely have done if Options had told him it was rejecting his business from FPSL and why.

Options argues that Mr A would likely have proceeded with the transfer and investments regardless of the actions it took. It says Mr A would likely have transferred out of his DB pension to a pension which provided benefits that could be inherited by his dependents, since his SIPP application nominated three beneficiaries. And that other SIPP providers were accepting such investments at the time, and another SIPP operator would've accepted Mr A's application had Options declined it.

The 'Nomination of Beneficiaries' section of Mr A's SIPP application form did nominate three beneficiaries – Mrs A (noted as his *"ex wife"* at that time), and Mr A's two children. But this section was a standard part of the SIPP application form, so Mr A may simply have filled it out because it was there – it does not automatically follow that Mr A wanted to transfer his DB pension benefits to a SIPP in order to provide death benefits for these beneficiaries no matter what. Further, I've not been provided with a copy of the advice FPSL gave Mr A, and based on the evidence provided I'm not persuaded that Mr A would've considered the different death benefits available through a transfer to a SIPP justified the likely decrease of retirement benefits for Mr A.

Based on Mr A's testimony to our Service, it seems likely FPSL's advice may have involved Mr A expressing a wish to retire early. And based on Options' processing Mr A's transfer request in light of its application form stating that for DB schemes, if the advice was not to transfer then it wouldn't process the transfer request, I think FPSL's advice included that Mr A should transfer his DB scheme benefits to a SIPP.

But ultimately, the FSCS concluded that the advice FPSL gave to Mr A was unsuitable. And based on the evidence provided, I'm not persuaded that Mr A had at that time a pressing need to retire early or that he understood the risks involved in the transactions.

So I think that even if Mr A had sought advice from a different adviser, it's more likely than not that the advice would have been not to transfer his DB pension or establish a SIPP, bearing in mind the regulator's view that a transfer out of a DB pension won't usually be suitable. And I think it's more likely than not that Mr A would have acted in accordance with that advice. Alternatively, if Options hadn't accepted his business from FPSL, Mr A might

have simply decided not to seek pensions advice elsewhere from a different adviser and still then retained his existing DB pension.

And I don't think it's fair and reasonable to say that Options shouldn't compensate Mr A for his loss on the basis of speculation that another SIPP operator would've made the same mistakes that I've found Options did. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted Mr A's application from FPSL.

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

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

But, in this case, I'm not satisfied that Mr A proceeded knowing that the investment he was making was high risk and speculative, and that he was determined to move forward with the transactions in order to take advantage of a cash incentive.

It appears Mr A understood that his pension monies were being moved into a safe investment to achieve reasonable growth for his pension and an early retirement. I've also not seen any evidence to show Mr A was paid a cash incentive. It therefore cannot be said he was incentivised to enter into the transaction. And, on balance, I'm satisfied that Mr A, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for himself. So, in my opinion, this case is very different from that of Mr Adams. And having carefully considered all of the circumstances, I'm satisfied it's fair and reasonable to conclude that if Options had refused to accept Mr A's application from FPSL, the transactions this complaint concerns would not have still gone ahead.

Options says Mr A had a 30 day 'Right to Change Your Mind' period in which he could have cancelled his instructions to transfer his DB pension to his new Options SIPP. But that once the client made his transfer request, the loss of his DB benefits was assured from that point, even if Options had asked him if he wanted to proceed. So it says the client must bear the loss of these benefits, as his decision couldn't have been prevented even if Options had acted as our Service suggested it should.

But I don't agree. Mr A's SIPP application included a number of statements in the 'Declarations' section that he signed, including, *"I hereby consent to Carey Pensions UK LLP requesting the transfer of my policies listed in the application;"* – the policy listed in the SIPP application form was Mr A's armed forces DB pension, which wasn't transferred until March 2015. So on balance, I'm satisfied that when Options received Mr A's SIPP application form in late 2014, his DB pension benefits were still within his DB scheme and would only be transferred once Options set up his new SIPP.

<u>The 2018 switch to a pension with Provider O and the 2019 appointment of a wealth manager</u>

I'm mindful that it appears Mr A opened a new pension with Provider O in 2018, and that he transferred his Options SIPP monies into it at various points in 2018 and 2019. And Options says Mr A appointed a new wealth manager in 2019, though I've not been provided with any evidence to support this.

So Options may argue it shouldn't be held responsible for any losses to Mr A's pension which happened after Provider O and a new wealth manager were involved. I've thought about this carefully and I think it's fair and reasonable in the circumstances of this complaint to hold Options fully responsible for all of the losses Mr A might have incurred.

DISP App 4.4.2 R (and I refer to DISP App 4 again later) uses the current value of the defined contribution ('DC') pension arrangement as the comparator (adjusted only for benefits already paid to the consumer and SERPS adjustments where applicable).

So the rule does not limit the losses to the point where the pension is moved elsewhere. However, I've thought about whether it's fair to limit the loss up to the point Mr A moved his pension funds to Provider O. But I don't think it is. In this decision, I've considered whether Options complied with its regulatory obligations and good industry practice. And if it had, Mr A would more likely than not have remained in his DB scheme and his benefits would not have been exposed to any investment risk at all.

By moving to a personal pension arrangement it was reasonably foreseeable that Mr A might in future change pension provider, adviser/wealth manager, and/or investments – Options couldn't reasonably expect that he would remain in the same SIPP and investments until retirement and that he would never change adviser. But it is a result of Options' failure to comply with its regulatory obligations and good industry practice that Mr A's pension fund became subject to investment risk and/or losses.

In any event, I'm deciding the complaint against Options and I think without its failure of due diligence Mr A would have remained in his DB scheme. So, in the circumstances of this complaint I consider it's fair and reasonable to hold Options fully responsible for all of the losses Mr A might have incurred.

In conclusion

So, overall, I do think it's fair and reasonable to direct Options to pay the estate of Mr A and any pension beneficiaries compensation in the circumstances. While I accept that other firms might have some responsibility for initiating the course of action that's led to the losses, I consider that Options failed to comply with its own regulatory obligations and didn't, when it had the opportunity to do so, put a stop to the transactions proceeding by declining Mr A's application from FPSL. And I'm satisfied that Mr A wouldn't have established the SIPP, transferred monies in from his existing DB pension, or invested with Firm J if it hadn't been for Options' failings.

Options didn't have to carry out an assessment of Mr A's needs and circumstances in order to meet its regulatory requirements, but it did have to treat Mr A fairly under the Principles. I'm satisfied that in the circumstances, and for all the reasons given, it's fair and reasonable to conclude that Options should compensate Mr A for the loss he's suffered.

In making these findings, I've taken into account the potential contribution made by other parties to the losses suffered here. In my view, in considering what fair compensation looks like in this case, it's reasonable to make an award against Options that requires it to compensate Mr A's estate and any pension beneficiaries for the full measure of their loss. FPSL was reliant on Options to facilitate access to Mr A's pension. But for Options' failings, Mr A's pension transfer wouldn't have occurred in the first place.

As such, I'm not asking Options to account for loss that goes beyond the consequences of its failings. I'm satisfied those failings have caused the full extent of the loss in question. That other parties might also be responsible for that same loss is a distinct matter, which I'm not able to determine. However, that fact shouldn't impact on the rights of Mr A's estate and any pension beneficiaries to fair compensation from Options for the full amount of their loss.

Taking all of the above into consideration, I think that in the circumstances of this case it's fair and reasonable for me to conclude that Options shouldn't have accepted Mr A's SIPP application. For the reasons I've set out, I also think it's fair to ask Options to compensate Mr A's estate and any pension beneficiaries for the loss they've suffered.

I say this having given careful consideration to the *Adams v Options* judgment, but also whilst bearing in mind that my role is to reach a decision that's fair and reasonable in the circumstances of the case, having taken account of all relevant considerations.

Putting things right

My aim is to return Mr A's estate and ultimately any pension beneficiaries to the position they would now be in but for what I consider to be Options' failure to carry out adequate due diligence checks before accepting Mr A's SIPP application. Had Options acted appropriately, I think it's *more likely than not* that Mr A would have remained a member of the DB pension scheme that he transferred into the SIPP.

In light of the above, Options should calculate fair compensation by comparing the current position to the position Mr A's estate (and hence the pension beneficiaries – including Mrs A as spouse) would be in if Mr A had not transferred from his existing DB pension.

In summary, Options should:

1. Calculate the loss Mr A's estate (and any pension beneficiaries) have suffered as a result of Mr A making the transfer.

2. Take ownership of any remaining investments that cannot be surrendered if possible.

3. Pay compensation for the loss to Mr A's pension. If that is not possible, pay compensation for the loss to Mr A's estate direct. In either case the payment should take into account the necessary adjustments set out below.

I explain how Options should carry out these steps in further detail below.

1. *Calculate the loss Mr A's estate (and any pension beneficiaries) have suffered as a result of Mr A making the transfer.*

   Given that Mr A has sadly passed away, consideration needs to be given to the specific circumstances of this case and a comparison done between any death benefits Mrs A and/or the pension beneficiaries could receive from Mr A's personal pension against any death benefit or spousal/dependent's pension the estate and/or Mrs A/the beneficiaries would have received if Mr A had remained in his DB pension scheme.

Options has made various arguments to the effect that there is no financial loss here and that Mr A may have already been fully compensated for his financial loss by the FSCS.

But to properly determine the financial loss here, Options must undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in policy statement PS22/13 and set out in the regulator's handbook in DISP App 4:
https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter.

As I've already explained, I'm not persuaded Mr A had a pressing need to retire early at the time of the events complained of, and I think he would have remained in his DB scheme. However, Mr A sadly passed away in 2023 and I understand he would likely have been unwell for a time beforehand. That said, Mr A told us in mid-2022 that he'd not made any pension withdrawals, and I've seen nothing to make me think he accessed his pension benefits after this. So I'm not persuaded Mr A's health meant he would have accessed his pension before his DB scheme's normal retirement age. Therefore on balance, I think compensation should be based on Mr A's date of death as it preceded his DB scheme's normal retirement age, as per the usual assumptions in the FCA's guidance.

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

2. *Take ownership of any investments held within the SIPP which cannot be surrendered*

I note Options says Mr A transferred the *majority* of his investment out of Firm J and into Provider O. And I note Mr A told us he still held suspended funds in his Options SIPP. Further, I've not been provided with any evidence that the Options SIPP has been closed. So my understanding is that the Options SIPP is still open and that part of Mr A's investment is still with Firm J (possibly in suspended fund(s)). And neither Options or Mr A's estate have disputed my understanding.

I'm not sure what, if any, future value these investments might have and as Mr A wouldn't have purchased these investments but for Options' failings, I still think it's appropriate for Options to take ownership of these investments if they still exist and are held on behalf of Mr A.

In order for the SIPP to be closed and further SIPP fees to be prevented, any remaining investment(s) need(s) to be removed from the SIPP. To do this, Options should calculate an amount it is willing to accept as a commercial value for any investments that cannot be surrendered and pay that sum into the SIPP and take ownership of the relevant investments. This amount should be taken into account for the loss calculation.

Options says that allowing the retention of the investment(s), whether within the SIPP or otherwise, in circumstances where the compensation awarded has been calculated upon the assumption that it would be returned to Options (or have a nil value), would give Mr A's estate a windfall so is not fair and reasonable.

If Options is unwilling or unable to purchase the investment(s), the value of them should be assumed to be nil for the purposes of the loss calculation. Provided Mr A's estate and the beneficiaries are compensated in full, Options may ask Mrs A to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the investment(s). That undertaking should allow for the effect of any tax and charges on the amount Mr A's estate and any beneficiaries may receive from the investment(s) and any eventual sums they would be able to access. Options should meet any costs in drawing up the undertaking and any reasonable costs for advice required by Mrs A to approve it.

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

3. *Pay compensation into the SIPP or to Mr A's estate (and any pension beneficiaries) for any loss suffered calculated in (1)*

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

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

I note Options says Mr A transferred £77,708 out of his Options SIPP to Provider O, and so this amount, and the full growth on it since this transfer, must be offset by any compensation awarded. However, it is my understanding that the calculations within DISP App 4 will already take this into account.

Options says our Service should provide it with a copy of Mr A's FSCS reassignment of rights and query why he received £85,000 FSCS compensation in circumstances where he transferred £77,708 to Provider O. In my view, it's not necessary for our Service to make such an enquiry with the FSCS, although Options is free to make this enquiry itself if it wants to and we provided Options with a copy of Mr A's FSCS reassignment of rights alongside the provisional decision.

Options also says any compensation awarded should be reduced to reflect the compensation Mr A received from the FSCS. I acknowledge that Mr A received a sum of compensation from the FSCS, and that he had the use of the monies received from the FSCS. The terms of Mr A's reassignment of rights required him to return compensation paid by the FSCS in the event this complaint is successful, and I understand that the FSCS will ordinarily enforce the terms of the assignment if required. So, I think it's fair and reasonable to make no *permanent* deduction in the redress calculation for the compensation Mr A received from the FSCS. And it will be for Mr A's estate to make the arrangements to make any repayments it needs to make to the FSCS. However, I do think it's fair and reasonable for some allowance to be made for the sum(s) Mr A actually received from the FSCS and had the use of for a period of the time covered by the calculation.

As such, for the purposes of the calculation that's being carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4, if it wishes, Options *may* notionally, for the period from the point of their payment through until the valuation date (as per the DISP App 4 definition of that term), allow for the payment(s) Mr A received from the FSCS following the claim about FPSL, as an income withdrawal payment. Where such an allowance is made then Options must also, at the end of the calculation, allow for a notional addition to the overall calculated loss that's equivalent to the payment(s) Mr A received from the FSCS following the claim about FPSL. The effect of this notional addition will be to increase the overall loss calculated using the most recent financial assumptions in line with PS22/13 and DISP App 4, by a sum that's equivalent to the payment(s) Mr A received from the FSCS.

Options may not be able to pay the compensation into the SIPP. If so, compensation for the loss should be paid to Mrs A direct on behalf of the estate and any beneficiaries. Redress paid directly to Mr A's estate as a cash lump sum in respect of a future loss includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4.3.31G(3), Options may make a notional deduction to allow for income tax that would otherwise have been paid. The notional deduction should be calculated using the appropriate marginal rate of tax in retirement. By way of example, if Mrs A is the beneficiary and is likely to be a basic rate taxpayer in retirement, her likely income tax rate in retirement is presumed to be 20%. In line with DISP App 4.3.31G(1) this notional reduction may not be applied to any element of lost tax-free cash.

My final decision

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

Where I uphold a complaint, I can award fair compensation of up to £160,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £160,000, I may recommend that the business pays the balance.

Determination and Award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My decision is that Options UK Personal Pensions LLP should pay the amount produced by that calculation up to the maximum of £160,000 (including distress and/or inconvenience but excluding costs) plus any interest set out above.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £160,000, I recommend that Options UK Personal Pensions LLP pay Mr A's estate the balance plus any interest on the balance as set out above.

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

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mr A to accept or reject my decision before 2 October 2024.

Ailsa Wiltshire
Ombudsman