DRN-4750425

The complaint

Ms M has a self-invested personal pension (SIPP) with Options UK Personal Pensions LLP (formerly Carey Pensions UK LLP) ('Options'). Ms M transferred her existing personal pensions to the SIPP to invest in a property-based investment scheme in Cape Verde.

Ms M's complaint is that Options was negligent in accepting her application from an unregulated introducer to open the Options SIPP and make such an investment - which she says was high risk and speculative and unsuitable for her and her pension.

What happened

I will first set out my understanding of the various parties involved and their roles as well as the investment in this complaint.

Options

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

Ms M

Ms M is the complainant in this case, and she is represented by a firm of solicitors. Ms M applied for a SIPP with Options on 14 June 2011, her pension funds being invested into a property sold by Oasis Atlántico shortly after. Ms M first complained to Options about it in November 2021.

Cape Verde4 Life

Cape Verde4 Life was a UK based company. It was involved in overseas property-based investments. It was not regulated by the FCA and therefore not authorised to advise on investments covered by the Financial Services and Markets Act 2000 in the UK.

One of the directors was Mr C. Cape Verde4 Life was an introducer of business to Options and it introduced Ms M's application to open a SIPP to Options and arranged the subsequent investment. Cape Verde4 Life was at the time of Ms M's investment described as an authorised representative of Oasis Atlántico.

Oasis Atlántico

Oasis Atlántico Imobiliaria SARL ("Oasis") is a company incorporated under the laws of Cape Verde. It owned land in Cape Verde on which it was to build a tourism resort named Salinas Sea. The development was split into units (in effect hotel rooms).

<u>Investment structure</u>

As I understand it, there was more than one way to invest in the Salinas Sea project. A brochure was promoting investment via two special purpose vehicles (companies) which were intended to be set up on a basis that could be invested in within a UK SIPP. This form of investment involved buying shares in the companies which in turn invested in units in Salinas Sea. That investment type required a minimum investment of £10,000. The brochure said it was intended for authorised financial advisers and gave the impression it was an investment for high-net-worth clients and/or sophisticated investors.

Alternatively, it was possible for the investor to buy a unit or part of a unit through their SIPP, which was the case in Ms M's complaint. Buying a unit also involved entering into a Hotel Agreement under which the buyer/investor appointed the seller (Oasis) to operate the overall development (including the unit) as a hotel. When the unit was completed, Oasis was to let the buyer know it was available for inspection and then the contract was to be completed. The unit was to be part of the hotel and managed as a whole by the hotel manager, not by the individual investor. During the first three years the investor was to be paid an annual income of at least 5% of the price paid.

There was also provision for payment of income at the same level if the hotel was not completed and opened on time. There was a formula for calculating the rental income payable to the investor which involved pooling the rental income of all units, rather than based on the occupancy of the investor's individual unit.

Investors would receive income on this basis during the first three years if greater than 5% and calculated on the pooled basis after the first three years. An investor could sell their unit on the open market subject to the Hotel Agreement.

Ms M's investment

Ms M invested around £25,000 for 50% of a unit. She transferred three personal pensions into the SIPP and paid, in Euros, around €16,000 from these transfers to invest in the Salinas Sea property. The remaining ca. €9,000 was financed through a mortgage provided by Oasis, which was to be repaid out of the income generated by the unit.

Ms M's first instalment for the investment was paid in December 2011, followed by a second part payment in August 2012. The mortgage was provided upon scheduled completion when the remaining amount was due.

Ms M was required by Options to sign a document headed 'Salinas Sea – Alternative Investment Member Declaration & Indemnity'. The resort was completed later in 2013 and Ms M was first invited to inspect it in October 2013. The formalities for completing the purchase were to take place soon after, however by the time she raised some concerns in 2019, the purchase had not yet formally completed. It's unclear when this took place.

The relationship between Cape Verde4 Life and Options

As I understand it, Options relationship with Cape Verde4 Life began in April 2011. Cape Verde4 Life was an introducer of business to Options and Options has said it received 93 introductions between April 2011 and November 2013 when it ended its relationship with Cape Verde4 Life after deciding to stop accepting business from unregulated introducers. Options says it acted properly in accepting introductions from CapeVerde4 Life. It was not prohibited from accepting introductions from unregulated introducers. It says it undertook due diligence checks on Cape Verde4 Life on a number of occasions and had no reason to believe it should not accept introductions from that business at the time of Ms M's introduction.

Due diligence carried out by Options on Cape Verde4 Life

Options has provided the Financial Ombudsman Service with information about the due diligence it carried out on Cape Verde4 Life.

Options says:

- Cape Verde4 Life first proposed to become an introducer of SIPP business for Options in April 2011. It was an introducer from late April 2011 until November 2013 when Options made a business decision to no longer accept introductions from unregulated introducers.
- Cape Verde4 Life was working with an FCA regulated adviser, 1Stop Financial Services, who were at the time authorised to advise on pension transfers, "*if investors wished to take advice*".
- Options did not pay any commission to Cape Verde4 Life for introducing business to it. It did not see the details of any payments made to Cape Verde4 Life by the underlying provider, but Cape Verde4 Life did disclose on its "Introducer Profile" that it would receive approximately 8% commission.
- Options did not request copies of any suitability reports.
- Options did not consider the Salinas Seas investment to be a non-mainstream pooled investment. It says it was an investment "*into bricks and mortar property where they could be rented out with the rental returned to the pension scheme bank account."*

In addition to the above, I note Cape Verde4 Life completed a 'non-regulated introducer profile' with Options. It was sent to Cape Verde4 Life in March 2012 when Options said: *"As you, Cape Verde4 Life, introduce business to Carey Pensions then for compliance records and for the sake of good order we need to put in place Non Regulated Introducer Information and Terms of Business between our companies.*

I attach an Introducer Profile and Terms of Business and would be grateful if you could agree and complete these and return to me.

I have used a commencement date of 28 April 2011 for the Terms which is the date of your first case with us […]"

The profile document was signed by Cape Verde4 Life in September 2012. The form recorded a number of points in relation to Cape Verde4 Life including:

- It had been operating for five years, that its principal address was in the UK and that it had a branch in Cape Verde.
- It promoted Salinas Seas and intended to distribute future resorts from Oasis.
- The Salinas Sea investment was accepted by a number of other named SIPP operators.
- Cape Verde4 Life and/or its agents obtain clients from a "*UK distribution network*" (without further elaboration).
- The sales process adopted by Cape Verde4 Life and/or its agents was noted as "*Mainly pension review/non reg*" (without further elaboration).
- The average client was described as aged 45 plus, employed or self-employed with

an income of £20-50K. Typical commission structure was noted as "*master agent commission circa 8%"*

- Its objective for the coming 12 months was noted as "*sell out Salinas Seas/launch new Oasis resorts*".
- Training was provided by an IFA and a compliance partner on SIPPs, FSA and HMRC rules.
- The business produced by agents was monitored by Mr C reviewing all completed sales before submitting the application to the SIPP provider.
- Cape Verde4 Life worked with "*1SFS IFA*" and "*TFPP IFA*". I understand those firms to be 1Stop Financial Services and The Financial Planning Partnership.
- Cape Verde4 Life used a third-party compliance business to ensure no regulated activities were carried out by it.
- It had not been subject to any regulatory action or complaints.

Options entered into a terms of business agreement with Cape Verde4 Life in September 2012. It backdated that agreement to April 2011. In September 2013, Carey conducted a "World Check" search on Mr C. The check did not reveal anything adverse.

Due diligence carried out by Options on Salinas Seas

As I understand it, Options carried out checks on the Salinas Sea investment in 2010. It concluded it was eligible for investment in a pension scheme. It also decided as a result of that review that all investors in its SIPPs should complete its 'Alternative Member Declaration and Indemnity'. I will refer to that declaration again below.

I have seen a review of the Special Purpose Vehicle version of the investment carried out by a third party in April 2012 (i.e. after Ms M's application) which was provided to Options. It includes a suggestion that SIPP operators obtain an acknowledgement from scheme members of the high risk, illiquid nature of the investment. And "*where the member is not investing through an FSA authorised investor, the SIPP operator may wish to obtain a copy of the high net worth/sophisticated investor certificate."*

It is enough to say here that because of its checks upon the Salinas Sea investment, Options referred to the investment as an unregulated alternative investment considered high risk and speculative.

Ms M's dealings with Options and Cape Verde4 Life

Ms M applied to open a SIPP with Options in June 2011. As part of that application process, Ms M switched her existing personal pensions which had a combined estimated value of around £15,900.

The application form included a page for the details of the applicant's financial adviser. This page was not completed. Options says its records show Ms M used Cape Verde4 Life as her introducer and that she provided a letter of authority to that effect with her application. Options says that because CapeVerde4 Life is not a regulated adviser and acted only as an introducer, Ms M was classified as a direct client of Options.

Ms M said she was advised by Cape Verde4 Life to invest in Salinas Sea and to set up a SIPP with Carey and move her existing pensions to it. She said this 'pension review' took place following a cold call by a third party.

Ms M says she was given advice by Cape Verde4 Life verbally and we haven't been provided with documentation. Ms M's SIPP application form was accompanied by a letter addressed to Carey signed by Ms M which seems to have been prepared for her to sign. It says: "*I* [Ms M] *authorise and instruct Carey Pensions UK LLP as the Administrator of my Carey Pension Scheme and Carey Pension Trustees UK Ltd as the Trustee to provide Cape Verde4 Life, the authorized representative of Oasis Atlántico, with any information whatsoever they may require in relation to my scheme's purchase of an investment into the Salinas Sea investment."*

In June 2011 Ms M also signed a document headed: "SIPP Member Instruction and Declaration Alternative Investment – Salinas Sea". I will refer to this document as 'the declaration'. It recorded the investment type as "Aparthotel on Sal".

The declaration began: "*I* [Ms M] *being the member of the above scheme instruct Carey Pension Trustees UK Ltd to purchase a Hotel Room* ***with borrowing from the developer*** *with Salinas Sea on the island of in the Cape Verde Islands, managed on a "hotel room basis", through Oasis Atlántico,* […]*"* [original emphasis]

The declaration then included several confirmations such as:

- Ms M understood Options was acting on an 'execution only' basis and had not given any advice.
- *"I am fully aware that this is* [sic] *investment is High Risk and / or Speculative and confirm that I have taken appropriate advices* [sic]*, including financial, tax and investment advice."*
- She won't hold Options responsible for any exchange rate fluctuations.

The declaration also included an agreement by Ms M to indemnify Options against any claims in connection with the investment.

Ms M was not asked to state or otherwise indicate or provide evidence to show that she was a high-net-worth individual or sophisticated investor in the declaration, or in her SIPP application or otherwise. Instead, on her SIPP application the box for *"I am unlikely to fall within the 'high income individual' definition above"* was ticked.

Also in June 2011, Ms M was provided with a document from a UK law firm headed 'Report on Principal Terms of Documentation - Salinas Sea Cape Verde'. This showed Ms M was paying around £25,000 for a 25% share in a unit in the Salinas Sea development, set out in Euros, i.e. €26,250. Ms M was to pay around €13,000 when the contract was signed, around €4,000 on 30 October 2011, and ca. €9,000 upon completion of the sale. The last part was to be funded by a mortgage from Oasis.

It was expected construction would be completed by the end of October 2012. A Hotel Agreement was entered into at the same time relating to the management of the hotel room as part of the overall development.

Income from the unit was to be pooled with other units and it was guaranteed at a certain level for the first three years. The unit could be sold on the open market subject to the Hotel Agreement which had a 25-year term.

Later in October 2013, Oasis Atlántico announced the completion of the resort, and Ms M was invited to inspect her unit following which completion of the purchase was to take place. As per Options correspondence to her, Ms M's purchase of the Salinas Sea investment had

not yet completed in 2019 due to 'bureaucratic differences'. However, the mortgage provided by Oasis was used to fund the remaining amount before this.

By the time of her queries about the completion in 2019, it wasn't clear whether there was an outstanding mortgage balance or if she had received any rental income.

Ms M's complaint

In November 2021, Ms M complained to Options and stated that the pension was mis-sold, "[p]*articularly in light of the case of Adams vs Carey* [see below]". Options did not uphold Ms M's complaint. It made a number of points including:

- It did not give any advice and there is no record that Ms M received any advice;
- it acted properly and in accordance with Ms M's best interests in accepting and acting on her instructions;
- it provides an 'execution only' SIPP and is not responsible for the performance of Ms M's investment or for its suitability;
- it gave appropriate warnings that the investment was considered 'high risk';
- it has not breached any rules or formal guidance.

Ms M then referred her complaint to the Financial Ombudsman Service with the assistance of a firm of solicitors. One of our investigators considered the complaint.

The investigator thought the complaint should be upheld. He made a number of points including:

- The Principles for Businesses, and in particular Principles 2, 3 and 6 are relevant.
- The regulator has issued a number of publications which discussed the Principles and gave examples of good industry practice in relation to SIPP operators.
- Options was not responsible for giving Ms M advice, nor was it responsible for checking any advice to her was suitable for her individual circumstances and requirements. But it had its own obligations to act in its clients' best interests.
- Options understanding of Cape Verde4 Life's business model should have given it cause for concern and it ought to have made enquiries about the involvement of regulated advisers.
- Options should have been concerned about a lack of regulated advice in the circumstances. It would have been reasonable for Options to question Ms M if she had received any advice on the transfer and investment and who that advice had come from, rather than relying on a declaration that no advice had been received.
- Cape Verde4 Life being an unregulated introducer and promoting a high-risk investment should have alerted Options to the risk of consumer detriment.
- In all the circumstances it was not fair and reasonable for Options to accept Ms M's SIPP application. Options says it had to carry out Ms M's instructions. However, it shouldn't have accepted her application from Cape Verde4 Life in the first place. As such, Options should never have been in the position of having to decide whether or not to accept any investment instruction given by Ms M.

The investigator then set out how he thought Options should put things right.
Options did not respond to the assessment.

My Provisional Decision

In advance of this decision, I issued a provisional decision to the parties in which I said that I thought Ms M's complaint should be upheld. Ms M accepted that decision, but Options didn't respond.

What I've decided – and why

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

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

In my provisional decision I said:

"I'll first say, for completeness, that I'm satisfied the complaint has been made in time as per the rules in the Dispute Resolution: Complaints Sourcebook within the FCA Handbook ("DISP"). Although it's clear that Ms M made her complaint more than six years after the events she's complaining about, I haven't seen anything that makes me think she knew, or ought reasonably to have known, of her cause for complaint against Options more than three years before she referred her complaint to Options in November 2021.

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

The Principles

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

"Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.

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

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

> *"The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The Specific rules do not supplant them and cannot be used to contradict them. They are*

but specific applications of them to the particular requirement they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules."

And at paragraph 77 of BBA Ouseley J said:

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

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

The ombudsman found Berkeley Burke had therefore not complied with its regulatory obligations and had not treated its client fairly. Jacobs J, having set out some paragraphs of BBA including paragraph 162 set out above, said (at paragraph 104 of BBSAL):

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

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

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

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

I confirm I have taken account of the judgment of the High Court in the case of Adams v Options SIPP [2020] EWHC 1229 (Ch) and the Court of Appeal judgment in Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 474. I note the Supreme Court refused Options permission to appeal the Court of Appeal judgment.

I've considered whether these judgments mean that the Principles should not be taken into account in deciding this case - and I am of the view they do not. In the High Court case, HHJ Dight did not consider the application of the Principles and they did not form part of the pleadings submitted by Mr Adams. One of the main reasons why HHJ Dight found that the judgment of Jacobs J in BBSAL was not of direct relevance to the case before him was because *"the specific regulatory provisions which the learned judge in Berkeley Burke was asked to consider are not those which have formed the basis of the claimant's case before me."*

Likewise, the Principles were not considered by the Court of Appeal. So, the Adams judgments say nothing about the application of the FCA's Principles to the ombudsman's consideration of a complaint.

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 some of the Principles and that this rule was considered by HHJ Dight in the High Court case. Mr Adams pleaded that Options SIPP owed him a duty to comply with COBS 2.1.1R, a breach of which, he argued, was actionable pursuant to section 138(D) of FSMA ("the COBS claim"). HHJ Dight rejected this claim and found that Options SIPP had complied with the best interests rule on the facts of Mr Adams' case.

Although the Court of Appeal ultimately overturned HHJ Dight's judgment, it rejected that part of Mr Adams' appeal that related to HHJ Dight's dismissal of the COBS claim on the basis that Mr Adams was trying to advance a case that was radically different to that found in his initial pleadings. The Court found that this part of Mr Adams' appeal did not so much represent a challenge to the grounds on which HHJ Dight had dismissed the COBS claim, but rather was an attempt to put forward an entirely new case.

I note that HHJ Dight found that the factual context of a case would inform the extent of the duty imposed by COBS 2.1.1R. HHJ Dight said at para 148:

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

The facts in Ms M's case are different from those in Adams. There are also differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Ms M's complaint. The breaches were summarised in paragraph 120 of the Court of Appeal judgment. In particular, HHJ Dight considered the contractual relationship between the parties in the context of Mr Adams' pleaded breaches of COBS 2.1.1R that happened after the contract was entered into. In Ms M's complaint, I am considering whether Options ought to have identified that the introductions from Cape Verde4 Life and/or the investment in Salinas Seas involved a risk of consumer detriment and, if so, whether it ought to have ceased accepting such introductions and/or making such investments prior to entering into a contract with Ms M.
As already mentioned, I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And, in doing that, I am required to take into account relevant considerations which include: law and regulations; regulator's rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. This is a clear and relevant point of difference between this complaint and the judgments in both Adams cases -

that was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

I have proceeded on the understanding Options was not obliged – and not able – to give advice to Ms M on the suitability of its SIPP or the Salinas Sea investment for her personally. But I am satisfied Options' obligations included deciding whether to accept certain investments into its SIPPs and/or whether to accept introductions of business from particular firms.

Regulatory publications

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

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

The 2009 report included the following statement:

> *"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses ('a firm must pay due regard to the interests of its customers and treat them fairly') insofar as they are obliged to ensure the fair treatment of their customers. COBS 3.2.3(2) states that a member of a pension scheme is a 'client' for COBS purposes, and 'Customer' in terms of Principle 6 includes clients.*
>
> *It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six TCF consumer outcomes. We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the member to confirm the position, or by contacting the firm giving advice and asking for clarification. Moreover, while they are not responsible for the advice, there is a reputational risk to SIPP operators that facilitate the SIPPs that are unsuitable or detrimental to clients.*
>
> *Of particular concern were firms whose systems and controls were weak and inadequate to the extent that they had not identified obvious potential instances of poor advice and/or potential financial crime. Depending on the facts and circumstances of individual cases, we may take enforcement action against SIPP operators who do not safeguard their clients' interests in this respect, with reference to Principle 3 of the Principles for Business ('a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems').*
>
> *The following are examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms:*

- *Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm's clients, and that they do not appear on the FSA website listing warning notices.*
- *Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.*
- *Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified.*
- *Being able to identify anomalous investments, e.g. unusually small or large transactions or more 'esoteric' investments such as unquoted shares, together with the intermediary that introduced the business. This would enable the firm to seek appropriate clarification, e.g. from the client or their adviser, if it is concerned about the suitability of what was recommended.*
- *Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely.*
- *Routinely identifying instances of execution-only clients who have signed disclaimers taking responsibility for their investment decisions, and gathering and analysing data regarding the aggregate volume of such business.*
- *Identifying instances of clients waiving their cancellation rights, and the reasons for this."*

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

It is relevant that when deciding what amounted to have been 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.

Like the ombudsman in the BBSAL case, I do not think the fact the publications, (other than the 2009 Thematic Review Report), post-date the events that took place in relation to Ms M's complaint, mean that the examples of good practice they provide were not good practice at the time of the relevant events. Although the later publications were published after the events subject to this complaint, the Principles that underpin them existed throughout, as did the obligation to act in accordance with the Principles.

It is also clear from the text of the 2009 and 2012 reports (and the "Dear CEO" letter in 2014) that the regulator expected SIPP operators to have incorporated the recommended good

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

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

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

To be clear, I do not say the Principles or the publications obliged Options to ensure the pension was suitable for Ms M. It is accepted Options was not required to give advice to Ms M, and it could not give advice. And I accept the publications do not alter the meaning of, or the scope of, the Principles. But they are evidence of what I consider to have been good industry practice at the relevant time, which would bring about the outcomes envisaged by the Principles.

What did Options' obligations mean in practice?

In this case, the business Options was conducting was its operation of SIPPs. I am 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 regulatory publications provided some examples of good industry practice observed by the FSA and FCA during their work with SIPP operators including being satisfied that a particular introducer is appropriate to deal with.

It is clear from Options' non-regulated introducer profile in this case that by early 2012, if not before, it understood and accepted that as a non-advisory SIPP operator its obligations meant it had a responsibility to carry out due diligence on Cape Verde4 Life and that it could and should decide not to do business with an introducer if it thought that was appropriate. Indeed it had done some due diligence for this introducer and investment in 2010.

I am satisfied that, in order to meet the appropriate standards of good industry practice and the obligations set by the regulator's rules and regulations, Options should have carried out due diligence on Cape Verde4 Life. And in my opinion, Options should have used the knowledge it gained from its due diligence process to decide whether to accept or reject a referral of business.

The due diligence carried out by Options on the investment

Because of what I say below about the introducer, I do not need to refer to the due diligence carried out by Options of the Salinas Sea investment in detail.

Options has told us that the Salinas Sea investment was not considered a non-mainstream pooled investment. It said it was a 'bricks and mortar' property to be rented out with the rental income paid to the SIPP.

This is an oversimplification. Ms M was not making a straightforward purchase of, say, a holiday apartment or home that she could occupy or rent out as she saw fit and freely sell on the open property market. She was buying a half share in a hotel room in a development that was not yet complete, where the property would form part of a hotel. Ms M is in principle free to sell the investment if she wants to, but she must sell subject to the hotel agreement and the ability to sell, in practice, depends on there being a market for part shares in hotel room investments.

These points were - or were largely - understood by Options at the time of Ms M's investment when it categorised the investment as an unregulated alternative investment that was high risk and speculative which might be difficult to sell/realise. And this understanding of the investment formed part of the context in which, or was a relevant factor in, the checks made by Options on Cape Verde4 Life since it planned to introduce clients for the purpose of investing in Salinas Sea.

The due diligence carried out by Options on the introducer

Options was permitted to accept business from unregulated introducers. It was not therefore at fault simply because it accepted business introduced from Cape Verde4 Life.

I note that Options' non-regulated introducer profile form which it completed with Cape Verde4 Life began with the following words: *"As an FSA regulated pensions company, we are required to carry out due diligence as best practice on unregulated introducer firms looking to introduce clients to us, to gain some insight into the business they carry on."*

So there is no dispute that Options took steps to make checks on Cape Verde4 Life and understand its business model. It seems to have sent the form to Cape Verde4 Life to complete in March 2012. The completed form was signed in September 2012.

Although Options asked Cape Verde4 Life to complete the non-regulated introducer profile in 2012, it should have completed a due diligence assessment on Cape Verde before it first agreed to accept any business from Cape Verde4 Life in 2011.

I also consider that good industry practice was to carry out further checks on introducers from time to time and not just on a one-off basis. So even if a reasonable initial assessment had been made to accept business in 2011, that decision could be reversed if Options thought it appropriate to do so. I note that Options indeed decided to reverse its decision to accept business from Cape Verde4 Life (and all other unregulated introducers) in November 2013.

In this case, Options gathered information to carry out a due diligence assessment in 2012 using the unregulated introducer profile form referred to above. The due diligence assessment used a form headed 'UK introducer assessment proforma'. The version of this form I have seen is not dated but I note the regulator is referred to on the form as FCA rather than FSA. The FSA was replaced by the FCA in April 2013 so the form, and therefore the due diligence assessment, would seem to have been completed after April 2013.
The due diligence assessment proforma seems to have been completed by Options using the information from the unregulated introducer profile which was signed in September 2012. This was after Ms M's application had been accepted. But I believe this same analysis should have been carried out in 2011, before agreeing to accept business from Cape Verde4 Life.

The 2013 introducer assessment proforma

Options has said it chose to stop accepting business from Cape Verde4 Life as a result of a business decision to stop accepting introductions from unregulated introducers. It must follow that the decision was not made as a result of the assessment made, based on the proforma. I conclude from this that Options either decided to continue to accept business based on that assessment or it failed to complete its due diligence assessment and so just continued to accept business from Cape Verde4 Life by default until it made its business decision relating to all unregulated introducers.

Whatever the reason, I have considered the contents of the proforma and whether it was reasonable to continue to accept business from Cape Verde4 Life in the light of the assessment it should reasonably have made based on that proforma.

The introducer assessment proforma form uses a 'red, amber, green' system for grading the information provided by a potential (or in the case of Cape Verde4 Life, an actual) introducer. Green equates to what Options called low risk, amber to medium risk, and red to high risk. The form has three sections:

- company personnel and advice
- client profile
- investment

At the end of the form it says:

"Accept:	*Low risk* *All green*
Queries to raise:	*Medium Risk* *Mixture of Green and Amber* - *Raise with TRC before proceeding*
Decline:	*High Risk* *All Red Or* *Mixture of red and Amber* - *Issue standard letter/email and decline."*

So by the time Options was using this form it was satisfied that in its role as a non-advisory SIPP operator it could make checks on an introducer and choose not to accept business from the introducer if it thought that was the appropriate thing to do.

The form has around 20 cells that can be completed in a column headed "*Results from Introducer Enquiry".* On the completed form I have seen one is rated red, one shows in amber, and two more have 'amber' written in them by hand. Three are green. The rest have not been completed – some have information written in them with no colour code applied, most are left blank.

In the client profile section three cells have not been graded. The cells related to the following:

- "Detail whether clients are UK or non-UK residents. The following alternative answers were given:
    - Green/Low Risk: *Non-UK Residents*

      UK Residents and Company has relevant permissions

    - Amber/medium risk: *UK residents through another entity (Need to carry out DD on this other entity)*
    - Red/High Risk: *UK Residents but there is no evidence of any entity having relevant permissions.*
- Detail average value of typical clients [sic] pension: the following alternative answers were given:
    - Green/low risk: *£25K & above to regulated investments*
    - Amber/medium risk: *£25K & above to mix of regulated and non-regulated* investments
    - Red/High Risk: *£25K & above to non-regulated investments*

      Less than £25K to full SIPP/ non-regulated investment SIPP
- Detail client profile as described by company. The following alternative answers were given:
    - Green/low risk: *Fully advised*
    - Amber/medium risk: *Execution only – high net worth/sophisticated*
    - Red/high risk: *Execution only client, Not high net worth [or] Sophisticated investor"*

The answer to the first question should have been amber since Cape Verde4 Life was dealing with UK clients, but apparently involving a UK IFA. According to the proforma this meant Options should also have carried out "*DD*" – due diligence – on the IFA(s). I note that reference has been made to working with 1 Stop Financial Services and The Financial Planning Partnership. I do not know if Options carried out due diligence on these firms.

I note that in 2014 two partners in 1 Stop Financial Services were subject to disciplinary sanction by the FCA. The regulator had taken action in relation to that firm's business model between October 2010 and November 2012. The two partners were fined and banned from performing any significant influence function in relation to any regulated activity. According to the FCA, 1 Stop Financial Services had advised customers to switch their pensions to SIPPs which enabled them to invest in unregulated and often high-risk products regardless of whether those products were suitable for the customers.

1 Stop Financial Services business model involved receiving introductions from unregulated introducers who typically promoted investments such as overseas property investments. 1 Stop Financial Services would then give advice on the suitability of switching an existing pension to a SIPP to make that investment. It did not give advice on the suitability of the investment.

I do not say that Options ought to have been aware of action taken by the regulator against the 1 Stop Financial Services partners before that action was published. But I do consider that Option could and should have found out about 1 Stop Financial Services' business model.

In relation to that business model, on 18 January 2013 the FSA issued an alert which included the following:

> *"Advising on pension transfers with a view to investing pension monies into unregulated products through a SIPP*

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 of which may be Unregulated Collective Investment Schemes). Examples of the unregulated investments are diamonds, overseas property developments, storepods, forestry and film schemes, among other non-mainstream propositions.

The cases we have seen tend to operate under a similar advice model. An introducer will pass customer details to an unregulated firm, which markets an unregulated investment (eg an overseas property development). When the customer expresses an interest in the unregulated investment, the customer is introduced to a regulated financial adviser to provide advice on the unregulated investment. The financial adviser does not give advice on the unregulated investments and says it is only providing advice on a SIPP capable of holding the unregulated investment…

The FSA is investigating a number of firms and has secured a variation of their Part IV permission so that they are unable to continue operating in that way. The FSA is also considering taking enforcement action against these firms.

We have seen cases where, as a result of these advisory strategies involving unauthorised firms, customers have transferred out of more traditional pension schemes and invested their retirement savings wholly in unregulated assets via SIPPs, taking very high and often entirely unsuitable levels of risk despite receiving advice on the pension transfer from regulated firms.

… 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 investment held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as a SIPP and other wrappers), consideration of the suitability of the overall proposition, that is the wrapper and the expected underlying investments in unregulated schemes…

For example, where a financial adviser recommends a SIPP knowing that the customer will transfer out of a current pension arrangement to release funds to invest in an overseas property investment under a SIPP, then the suitability of the overseas property investment must form part of the advice about whether the customer should transfer into the SIPP…"

Ms M's SIPP application was dated 14 June 2011. It seems to have been received by Options on 30 June 2011. So this was before the above alert had been issued by the regulator. But as I have said, Options should have been aware of 1 Stop Financial Services' business model and the implications it had for its SIPP members. It meant their members were apparently choosing to invest in unregulated high risk speculative investments with the very considerable risk of suffering significant detriment, without the benefit of regulated financial advice in relation to that investment.

Clearly Options could not have known before Ms M's application that the owners of 1 Stop Financial Services would, in 2014, be fined and banned for their work in relation to SIPPs.

But what it could and should have known was that Cape Verde4 Life said the IFA it was involved with was giving no advice on the suitability of the unregulated investment for its clients. This meant that the involvement of a regulated IFA should not have provided the comfort to Options that it might otherwise have done. Options potential new clients from Cape Verde4 Life were not getting advice from an authorised and regulated financial adviser on the suitability of investing potentially all of their pension in an unregulated investment, which Options considered to be high risk and speculative. So it knew or should have known that the business model Cape Verde4 Life was involved in lacked the safeguard of effective independent regulated advice. The involvement of the IFA with its business model ought to have been a red flag item that should have given Options concerns.

I also note that 1 Stop Financial Services voluntarily varied its permissions with the regulator so that with effect from 10 November 2012 it was no longer permitted to carry on any regulated activities. Accordingly, this information was not available (since it had not yet taken place) when Options first agreed to accept business from Cape Verde4 Life or if had carried out an assessment in September 2012 when the introducer profile was signed. But 1 Stop Financial Services had been operating its business model since before Cape Verde4 Life first became an introducer and that business model had therefore been discoverable if Options had carried out checks on that firm in 2011.

The other IFA firm Cape Verde4 Life said it worked with was The Financial Planning Partnership. As I understand it, The Financial Planning Partnership was a trading name used by another business that I'll call Business F. According to the FCA register, Business F was using the trading name The Financial Planning Partnership from 2009.

It seems that The Financial Planning Partnership/Business F also operated a business model with an unregulated introducer of the type highlighted by the FSA in its alert. So again, if Options had made checks on that firm before it stopped trading, it is likely it would also have given cause for concern rather than comfort.

The above points relating to the two IFA firms Cape Verde4 Life said it worked with also mean that the following question in the company personnel and advice section of the proforma that were rated amber should have been reconsidered:

- *"Does the company hold FCA or Equivalent permissions for investment advice?*
    - *No but this is provided by FCA regulated professional - Need to complete further DD in respect of this adviser"*

Returning to the proforma assessment, Cape Verde4 Life was only introducing clients to invest in unregulated investments and their clients were not high net worth or sophisticated investors so the next two questions should have been rated as red.

In the investment section of the proforma there is an amber and a green cell. The rest are not completed. The answers to the questions which have not been completed should have been graded as red:

- "*Are investments generally used regulated or unregulated – all unregulated*" (red answer)
- "*Which countries are investments generally based in – Other overseas*" [i.e. not UK or EEA] (red answer)
- "*Does company promote unregulated investments, state which investments are promoted. – Yes*" [Salinas Sea] (red answer)
- "*Detail investment type most often used – Non EEA Commercial Property, Non-*

Regulated Investments, Unquoted Shares, Loans." (red answer)

Having considered the proforma, it is my view that in 2012/2013 Options carried out an incomplete assessment. Had it completed its assessment, based on its own process, it would have come out with a result showing considerably more red than the incomplete assessment it did carry out.

I think based on its own processes Options should have concluded that as the form showed, or should have shown, mostly red and amber assessments it should have declined to do further business with Cape Verde4 Life.

What Options ought to have decided

As shown above, Options gathered information on which it could and should reasonably have made an assessment in 2012 and should have come to the conclusion not to accept introductions from Cape Verde4 Life. This should have happened even before it received Ms M's application in June 2011.

Options should have carried out its proforma based assessment, or a similar assessment, before it first agreed to accept introductions from Cape Verde4 Life. If it had done so, it would have rejected Cape Verde4 Life's request to act as an introducer. Alternatively, if it carried out such an exercise within a short time of allowing introductions without first carrying out the assessment in full, it should have decided not to continue to accept business from Cape Verde4 Life.

In either event I think that if Options had acted reasonably, in a way that was consistent with its role as a non-advisory SIPP operator, and in a way that was consistent with its obligations in that role under the Principles and with good industry practice, it would not have accepted business from Cape Verde4 Life by the time of Ms M's application - and it would not have accepted her application.

Options had carried out due diligence checks in relation to Cape Verde4 Life and the Salinas Sea investment which meant it knew that Cape Verde4 Life:

- was involved in promoting the Salinas Sea investment.
- became an introducer to Options in order to introduce clients to invest in Salinas Sea within their pensions while Options considered Salinas Sea an unregulated high risk and speculative alternative investment.
- was not authorised to give regulated investment advice.
- apparently worked with regulated IFAs in some circumstances but not in all cases and that it would make direct introductions to Options on the basis that the client was acting on an 'execution only' basis.
- had mostly clients that could not reasonably be classified as high net worth or as sophisticated investors.
- was receiving commission of around 8%.

In addition to these points, Options knew or should reasonably have known the investment was likely to be highly illiquid. It knew or should have known the investment was likely to be difficult to value and that it might well be hard to sell when the member wanted to take benefits from their pension.

Options knew or should have known that it's unlikely an ordinary retail investor client, such as Ms M, would choose to transfer their personal pension to a SIPP without advice. And

Options knew or should have known that it did not have a good understanding of the way Cape Verde4 Life operated, in particular how it found its clients. For example, on the introducer profile Cape Verde4 Life said it obtained its clients from a "*UK Distributions Network*" without any recorded explanation of what that meant in practice. And the sales process was described as "*mainly pension review/non reg*", again without any recorded explanation of what that meant.

Options also knew that investing in an unregulated alternative investment that is high risk and speculative is unsuitable for most retail investors and that it is only likely to be suitable for high-net-worth or sophisticated investors on the basis that such an investment makes up only a small proportion of their portfolio.

When Options agreed to accept business from Cape Verde4 Life, it did not impose conditions on it such as, for example, only accepting such business where regulated advice had been given and/or only business involving high net worth or sophisticated investors, and/or only allowing a limited proportion of the SIPP fund to be invested in Salinas Sea.

Taking all these points into account, Options knew or should have known when agreeing to accept introductions from Cape Verde4 Life there was a real risk of customer detriment. Options response to this was to require potential clients to sign the declaration I referred to above. I don't think that was a fair and reasonable approach bearing in mind the Principles for Businesses and good industry practice. Instead, the fair and reasonable approach would have been to decline business from Cape Verde4 Life - as Options' own process on its own proforma assessment form provided for, or as any reasonable similar assessment would have provided for.

Was it fair and reasonable to proceed with Ms M's instructions?

For the reasons given, Options should have refused to accept Ms M's application. So, things should not have got beyond that.

However, Ms M was also asked to sign the member's declarations (one in June 2011 and one in December 2011, likely corresponding to the two investment parts). The declarations give warnings about the high-risk speculative nature of the Salinas Sea investment. And they included a statement that Ms M wouldn't hold Options responsible for any losses resulting from the investment. However, I don't think these documents demonstrate Options acted fairly and reasonably in proceeding with Ms M's instructions.

The declarations Ms M signed stated: *"I am fully aware that this is* [sic] *investment is High Risk and / or Speculative and confirm that I have taken appropriate advices* [sic]*, including financial, tax and investment advice."*

So the member's declaration is in clear conflict with the remaining paperwork such as the SIPP application form in which Ms M is classed as a direct client not having received advice. As a minimum, these contradictions should have alerted Options to the possibility that Ms M may very well have been given advice – and therefore further steps to clarify this were required. I can see that Options changed the format and wording of its member's declaration later that year, possibly to rectify this conflicting statement. But I think this just lends to the assertion that Options' attention to detail was lacking with regard to what was happening between its clients and Cape Verde4 Life. And had Ms M been fully aware that she had *not* received advice, she may have also pointed out this discrepancy at the time, instead of signing all the documents.

Asking Ms M to sign the declaration and indemnity absolving Options of all its responsibilities when it ought to have known that Ms M's dealings with Cape Verde4 Life were putting her at

significant risk of detriment was not the fair and reasonable thing to do. And it was not an effective way for Options to meet its regulatory obligations in the circumstances. It was not fair and reasonable to proceed on that basis.

Further, I do not consider it fair and reasonable for Options to avoid responsibility now on the basis of the indemnity Ms M signed. Had Options acted appropriately in the circumstances, then Ms M should not have been able to proceed with her application. And, as mentioned, she should not have got to the stage of signing the declaration.

Is it fair to require Options to compensate Ms M?

Even though Options have argued this previously, I have seen no evidence to show Ms M would have proceeded even if Options had rejected her application. Ms M was contacted by Cape Verde4 Life, she was not actively looking for such investments. There is nothing to indicate Ms M was highly motivated to make the investment or that she was being paid any kind of incentive payment to do so. I have not seen anything that makes me think Ms M would have sought out another SIPP provider if Options had declined the application, or terminated the application, and explained why.

In any event, I think any SIPP provider acting fairly and reasonably should have reached the conclusion it should not deal with Cape Verde4 Life. I do not think it would be fair to say Ms M should not be compensated based on speculation that another SIPP operator might have made the same mistakes as Options did.

I think it's fair and reasonable instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted the application, or would have terminated the transaction before completion." I'm upholding Ms M's complaint on the basis that Options shouldn't have accepted her introduction from Cape Verde4 Life. It's not therefore necessary for me to consider whether Cape Verde4 Life carried out any regulated activities in breach of the general prohibition that Options ought to have been aware of. Or whether or not Options should've allowed the Salinas Sea investment into Ms M's SIPP. I make no findings about the appropriateness of the investments for the Options SIPP which Ms M opened.

Fair compensation

I consider that Options failed to comply with its regulatory obligations and good industry practice and that it should have rejected Ms M's application to open a SIPP in order to invest in Salinas Sea. My aim in awarding fair compensation is to put Ms M back into the position she would likely have been in had it not been for Options' failings. Had Options acted appropriately, I think it's *more likely than not* that Ms M would have remained a member of the pensions she transferred into the SIPP.

I think Ms M would have remained with her previous providers, however I cannot be certain that a value will be obtainable for what the previous policies would have been worth. I am satisfied what I have set out below is fair and reasonable, taking this into account and given what I understand of Ms M's circumstances and objectives when she invested.

I accept that Ms M has been caused distress and inconvenience in relation to her SIPP and the Salinas Sea investment generally and I note that she consulted a firm of solicitors and made a complaint some years ago now. Knowing that her pension savings are in an illiquid investment will have caused considerable distress.

Putting things right

My aim is to return Ms M to the position she would now be in but for what I consider to be Options' failure to carry out adequate due diligence checks before accepting her SIPP application. I appreciate that the investment is still active and she may receive rental income on it if the mortgage on the unit has now been paid off. But given its illiquid nature, it's very unlikely the benefits Ms M will get from the SIPP are equivalent to what she would have got from her previously existing pensions.

In light of the above, I require that Options calculate fair compensation by comparing the current position to the position Ms M would be in if she had not transferred from her existing pensions.

In summary, Options should:

- Calculate the notional transfer value of Ms M's previous pension plans as of the date of the acceptance of this final decision.
- Obtain the actual transfer value of Ms M's SIPP, including any outstanding charges as of the date of the acceptance of this final decision.
- Pay a commercial value to buy any illiquid investments (or treat them as having a zero value) and take on any liabilities linked to the SIPP.
- Pay an amount into Ms M's SIPP so as to increase the transfer value to equal the notional value established. This payment should take account of any available tax relief and the effect of charges. Options should add interest to this payment if it is not made within 28 days of the acceptance of this final decision.
- If the SIPP needs to be kept open only because of the illiquid investment/s and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.
- If Ms M has paid any fees or charges from funds outside of her pension arrangements, Options should also refund these to Ms M. Interest at a rate of 8% simple per year from the date of payment to the date of refund should be added to this.
- Pay to Ms M £500 to compensate her for the distress and inconvenience she's been caused by Options' failings.

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

<u>Treatment of any illiquid assets held in the SIPP</u>

As stated above and outlined in the investigator's assessment of this complaint, the aim in putting things rights is to put Ms M into the position she would likely have been in had it not been for Options' failings. Had Options acted appropriately, I think it's *more likely than not* that Ms M would not have invested in Salinas Sea and would not have entered into any loan arrangement to finance part of the purchase of the investment.

My understanding is that Oasis offered financing for up to 35% of the purchase price (under the terms of the investment the interest on the lending is set at Euribor 6 (six) month rate plus 5.8%), which would be repaid by way of the rental payments from the investment. If Ms M has an outstanding balance, then Options must settle this with Oasis. How it goes about doing this is a matter for Options and Oasis, but the outcome of this must be that this isn't an ongoing concern for Ms M and that there is no risk of her having to pay anything in connection with this. To be clear, this should be the result whether or not the asset is removed from the SIPP (as per the below).

I think any illiquid assets held should be removed from the SIPP. Ms M would then be able to close the SIPP, if she wishes. That would then allow her to stop paying the fees for the SIPP. The valuation of the illiquid investment may prove difficult, as there is no market for it. For calculating compensation, Options should establish an amount it's willing to accept for the investment as a commercial value. Given that both the investment provider and the underlying investment are ongoing concerns, I expect this to be achievable. It should then pay the sum agreed plus any costs and take ownership of the investment - and ensure that in doing so it takes on or otherwise removes all liability Ms M may have for any financing taken out to part fund the purchase of the investment/s.

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

If Options is unable, or if there are any difficulties in buying Ms M's illiquid investment, it should give the holding a nil value for the purposes of calculating compensation. In this instance Options must still take on or otherwise remove all liability Ms M may have for any financing taken out to part fund the purchase of the investment/s. If the total calculated redress in this complaint is less than £170,000, Options may ask Ms M to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the relevant holding. That undertaking should allow for the effect of any tax and charges on the amount Ms M may receive from the investment and any eventual sums she would be able to access from the SIPP. Options will have to meet the cost of drawing up any such undertaking and the reasonable costs of Ms M taking advice in relation to it.

If the total calculated redress in this complaint is greater than £170,000 and Options doesn't pay the recommended amount (set out below), Ms M should retain the rights to any future return from the investment until such time as any future benefit that she receives from the investment(s) together with the compensation paid by Options (excluding any interest) equates to the total calculated redress amount in this complaint. Options may ask Ms M to provide an undertaking to account to it for the net amount of any further payment the SIPP may receive from these investments thereafter. That undertaking should allow for the effect of any tax and charges on the amount Ms M may receive from the investment from that point, and any eventual sums she would be able to access from the SIPP. As above, Options will need to meet any costs in drawing up the undertaking and the reasonable costs of her taking advice in relation to it.

If the total calculated redress in this complaint is greater than £170,000, Options must in the first instance take on or otherwise remove all liability Ms M may have for any financing taken out to part fund the purchase of the investment so as to ensure that Ms M is left unencumbered by this.

<u>Calculate the loss Ms M has suffered as a result of making the transfer from her personal pensions</u>

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

Any contributions or withdrawals Ms M has made will need to be taken into account whether the notional values are established by the ceding provider or calculated as set out below.

Any withdrawal out of the SIPP should be deducted at the point it was actually paid so it

ceases to accrue any return in the calculation from that point on. The same applies for any contributions made - these should be added to the notional calculation from the date they were actually paid, so any growth they would have enjoyed is allowed for.

If there are any difficulties in obtaining a notional valuation from the previous providers, then Options should instead arrive at a notional valuation by assuming the monies would have enjoyed a return in line with the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, this was called the FTSE WMA Stock Market Income Total Return Index). That is a reasonable proxy for the type of return that could have been achieved over the period in question.

The notional value of Ms M's existing plans if monies hadn't been transferred (established in line with the above) less the proportion of current value of the SIPP being used for this aspect of the calculation (as at date of calculation) is Ms M's loss.

Compensation should be paid as calculated above promptly. If Options does not pay the compensation within 28 days of being notified of Ms M's acceptance of this final decision, Options is to pay 8% simple interest per year on the compensation from the date of this final decision until the date of payment.

I will also add here that income tax may be payable on any interest paid pursuant to this award. If Options deducts income tax from the interest, it should tell Ms M how much has been taken off. Options should give Ms M a tax deduction certificate for any interest if Ms M asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

In my provisional decision, I asked the parties whether or not there were any guaranteed benefits applicable to Ms M's previous pensions. Neither party informed me of any, so I have proceeded on the basis that there were none.

Pay an amount into Ms M's SIPP so that the transfer value is increased by the loss calculated above

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

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Ms M as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to her likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

SIPP fees

If the illiquid investment(s) can't be removed from the SIPP or if Options does not take ownership of the investment(s), and they continue to be held in Ms M's SIPP, there will be ongoing fees in relation to the administration of that SIPP. Ms M would not be responsible for those fees if Options had not accepted the transfer of her pensions into the SIPP. So, I think it is fair and reasonable for Options to waive any SIPP fees until such a time as Ms M can dispose of the investment(s) and close the SIPP.

Fees and charges paid outside the SIPP

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

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

Distress and inconvenience

Ms M transferred her personal pensions to a SIPP and had to suffer the loss of those pensions, as well as having uncertainty about her retirement options with an illiquid asset in her SIPP. I think it's fair to say this would have caused Ms M considerable distress and inconvenience. So, I consider that a payment of £500 is appropriate to compensate for that upset. Ms M will clearly have been worried that her retirement provision will have been reduced and this concern has now gone on for a number of years.

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £170,000, plus any interest and/or costs/interest on costs that I think are appropriate. If I think that fair compensation is more than £170,000, I may recommend that the business pays the balance.

I do not know what award the above calculation might produce. So, whilst I acknowledge that the value of Ms M's original investment was within our award limit, for completeness I have included information below about what ought to happen if fair compensation amounts to more than our award limit.

Determination and money award: It's my final decision that I require Options to pay Ms M compensation as set out above, up to a maximum of £170,000 plus any interest and costs payable.
As I've said above, until the calculations are carried out, I don't know how much the compensation will be, and it may be nowhere near £170,000, which is the maximum sum that I'm able to award in Ms M's complaint. But I'll also make a recommendation below in the event that the compensation is to exceed this sum, although I can't require that Options pays this.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £170,000, I also recommend that Options pays Ms M the balance.

If Ms M accepts my final decision, the money award and the requirements of the decision will be binding on Options. My recommendation won't be binding on Options.

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

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms M to accept or reject my decision before 16 May 2024.

Lea Hurlin
Ombudsman