DRN-4763188

The complaint

Mr H says that Intelligent Money Ltd ('IM') should not have accepted the instruction from his financial adviser to transfer his defined-benefit ('DB') pension to a Self-Invested Personal Pension ('SIPP'). He also says that IM failed to carry out sufficient due diligence on the investments he went on to make, which has caused a loss to his pension.

What happened

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

Involved parties

IM

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

Grosvenor Butterworth (Financial Services) Ltd ('GBFS')

GBFS was an independent financial adviser. It was authorised and regulated by the FCA at the relevant time until 12 October 2018. GBFS had permission to advise on pensions and investments. GBFS appointed a voluntary liquidator in January 2018 and its company status is currently showing as 'Liquidation'.

Strand Capital Limited ('Strand')

Strand was a discretionary fund manager ('DFM'). It held monies and investments in its safe custody. Strand was authorised and regulated by the FCA at the relevant time and went into special administration on 17 May 2017. It was regulated by the FCA until 16 August 2023.

Optima Worldwide Group PLC

Optima was the parent company of, and fully owned, Strand Capital Limited.

What happened here

Mr H has said he was "cold-called" GBFS in 2016 and offered a pension review. He says he didn't really have any objectives at the time and didn't understand much about his pension arrangements. Mr H recalls that GBFS told him by transferring and investing his 'frozen' pension, he would receive greater returns.

GBFS issued a 'Summary of Recommendations' report on 18 April 2016, in which it recommended Mr H should transfer his DB scheme, which had a transfer value of £97,896.16, to an IM SIPP and invest his funds with Strand. It said Strand would invest and manage his funds in line with his 'low-medium' attitude to risk.

Mr H accepted the advice and completed an application form for the SIPP on 22 April 2016. It was instructed that 100% of Mr H's funds should be invested with Strand, which was the selected DFM. And GBFS's details were given in the Financial Adviser Details section. A declaration at the end of the SIPP application form was signed by Mr H. The declaration stated, amongst other things, that:

- The applicant understood they should read and understand the Terms and Conditions of the IM SIPP before signing.
- The applicant would be bound by the trust deed and SIPP rules.
- The applicant agreed that he, and his financial adviser if he sought advice, were solely responsible for all the decisions relating to the purchase, retention and sale of the investments within the SIPP and held the SIPP Operator and Plan Trustee jointly indemnified against any claim in respect of such decisions.

Mr H also completed a Strand account opening form on 22 April 2016. By signing the declaration, he confirmed:

- He had not, and would not, receive advice as to the suitability of the investments for his circumstances from Strand; and
- He had read and agreed to Strand's dealing terms and the account Terms and Conditions.

On the same day Mr H also signed 'An agreement with Strand Capital Limited for the provision of Discretionary Management Services'.

GBFS sent IM a copy of the SIPP application form, Strand account opening form and Strand DFM agreement on 26 April 2016 and the SIPP was opened on 27 April 2016.

On 9 August 2016, £101,361.02 was received into the SIPP and £101,247.02 was invested in Strand on 10 August 2016.

Strand went into special administration in May 2017 and Mr H received correspondence about this from the administrators in late 2017.

As I understand it, after becoming aware the Strand investment in his SIPP had got into difficulties Mr H contacted the Financial Services Compensation Scheme ('FSCS'), via his representative, to make a claim against GBFS for the unsuitable advice he received to transfer out of his DB scheme and invest via Strand.

Mr H received information from the special administrators of Strand that he held the following units as of May 2018:

- 5alpha Adventurous UCITS – 289.042
- 5alpha Conservative UCITS – 452.606
- Optima Worldwide Group PLC 8.0% (Series D) – 19,400

The FSCS wrote to Mr H on 30 September 2019 and agreed that Mr H had a valid claim against GBFS. The FSCS had calculated Mr H's loss to be £90,918.29 but it would pay him the maximum compensation of £50,000.

The FSCS subsequently gave Mr H a reassignment of rights to enable him to pursue a complaint against IM.

In February 2020, Mr H divested the liquid funds remaining in his IM SIPP, and transferred £76,745.68 to a SIPP with another provider.

Mr H's representative complained to IM on his behalf in June 2020; it said IM had helped facilitate the transfer of a DB pension to an unsuitable SIPP. And this had led to an investment strategy that wasn't suitable for Mr H. It said IM had failed to carry out the required due diligence on Strand and it should have declined to allow the investments to be held in the SIPP.

IM rejected the complaint, saying the crux of Mr H's complaint was that he was placed into investments which were not suitable for him. It said it was for GBFS to provide suitable advice and IM is not authorised to provide advice. IM said it carries out due diligence on all firms that it works with. And it obtained an agreement between IM and Strand. This agreement explained that Strand understood that IM only allowed FCA regulated standard assets into its SIPP. It added that it did not have any reason to believe in 2016 that Strand would enter administration in 2017.

Mr H's representative subsequently referred the complaint to the Financial Ombudsman Service. It said Mr H recalled that GBFS told him by transferring and investing his 'frozen' pension, he would receive greater returns and he wasn't made aware of the risks the investments posed. The representative confirmed Mr H had since transferred the pension funds invested with 5alpha into a new SIPP. As such, the only remaining investment held within the IM SIPP is Mr H's OWG investment. It added that although the investment was valued at nil, IM had refused to allow Mr H to close his SIPP account. IM insisted that Mr H is required to leave his SIPP open, and funds have been retained by IM in order to cover their fees. The representative believes IM is further exploiting Mr H and his losses in order to further its own financial gain.

Our Investigator asked IM to provide its file and asked questions about the due diligence checks it had carried out on GBFS and Strand so that they could consider the complaint further.

IM provided the following information about the due diligence checks it had carried out on GBFS:

- GBFS signed an introducer terms of business agreement with IM in February 2017. This remained in place until 12 October 2018, after which GBFS was no longer authorised. IM has since, in response to my provisional decision, provided a copy of an Introducer Terms of Business Agreement that GBFS signed on 18 December 2015.
- Before accepting GBFS as an introducer, IM checked that it was authorised by the FCA, that the firm had the required permissions and asked for a copy of the adviser's G60 certificate which demonstrated he could advise on DB pension transfers.
- It carried out spot checks on GBFS thereafter to ensure it was still authorised and had the required permissions.
- IM understood that GBFS would meet clients face to face to allow the advisers to obtain permission from their clients before the adviser either submitted the online application on the client's behalf or the client signed the paper form. IM's online declaration states that the adviser must have the client's permission before signing the electronic declaration.
- It didn't have any further discussions with GBFS about its client process or the business it was referring.
- It didn't pay any adviser fees to GBFS through Mr H's SIPP.

- It didn't request any suitability reports. But it said Mr H's ceding scheme approved any transfers from his DB scheme over to IM. It said the ceding scheme has its own checks too and there was no business introduced to IM that was rejected by the ceding scheme.
- GBFS introduced 71 clients and Mr H's application was number 38 – however, IM has also told us that another customer who has referred a complaint to the Financial Ombudsman Service was also application number 38, despite the application having been submitted earlier than Mr H's.
- Around 13% of applications involved transfers from DB pension schemes.
- It did not allow non-standard investments – Mr H's investments were classified as standard assets at all times.
- The introductions from GBFS accounted for around 1.8% of business during that period.

IM provided a copy of the IM Introducer Terms of Business Agreement, which was signed by a Director of GBFS on 27 February 2017. Amongst other things, it was stated in this agreement that:

"IM is under no obligation to accept any client as a client of IM. If any client is refused as a client of IM, IM is under no obligation to provide a reason for this refusal to the Introducer…

…The Introducer agrees to use its reasonable endeavours to provide IM with all necessary documentation in relation to the client's application for a Scheme and to provide reasonable co-operation with IM in the provision of any additional information necessary in respect of the investment.

The Introducer agrees to, where necessary, provide reasonable co-operation to IM in its reasonable endeavours to adhere all relevant legal and regulatory rules and guidance.

…IM undertakes not to promote or market any other product or services to the client other than those set out below and will not engage in the provision of investment advice (as defined in FSMA and relevant secondary legislation) to clients of the Introducer…

…The Introducer agrees that it is responsible for any advice including but not limited to advice as to the suitability or appropriateness of the Services of IM for the client. IM shall not be responsible for any advice or recommendation given by the Introducer in relation to underlying investments."

IM gave the following information about the due diligence checks it had carried out on Strand:

- The investments Strand made were not classed as non-standard.
- There is no investment product literature because the investments were made through a regulated third party platform/DFM who agreed to be bound by IM's terms to only invest in standard assets.
- It asked Strand to complete an 'Asset Holder Terms of Business' agreement, which was signed in February 2017.
- Any further information about the investments should be sought from Strand. It didn't carry out an independent review of the investment platform.
- Strand investments were all quoted on a recognised exchange or by a regulated fund manager.

IM provided a copy of the 'Asset Holder Terms of Business' agreement signed by Strand on 27 February 2017 (around six months after Mr H's funds were invested with Strand). It's noted, amongst other things, in this agreement that:

"IM is the Scheme Operator of the pension Scheme.

Intelligent Money Trustees Ltd as the Scheme Trustee is the sole Trustee and legal owner of all assets held by the pension Scheme, holding assets in Trust for its members.

The Scheme Trustee of the pension Scheme is for the purposes of the Agreement at all times the Client of the Asset Holder…

…the Scheme Trustee is to be treated as a Retail Client, unless otherwise agreed.

The Scheme Operator and Trustee give authority for the risk strategy/investment profile to be agreed between the pension Scheme member, the pension Scheme Member's appointed Financial Adviser and the Asset Holder. Authority is also given to the pension Scheme Member and/or the pension Scheme Member's appointed Financial Adviser to give investment instructions directly to the Asset Holder...

…Where the Asset Holder is providing the pension Scheme with 'either' execution only or advisory Accounts, the Asset Holder will be responsible for carrying out any appropriateness test on the pension Scheme Member, as required under MiFID where an investment in a complex investment product is taking place. In the event that the duty has been undertaken by an IFA who is non MiFID, the Asset Holder will obtain a Suitability Declaration.

*Investments will be made in accordance with the HMRC legislation governing pension Schemes and the Scheme Operators List of Permitted Investments (*Permitted Investments is defined as *"the investments/assets IM permit to be held by any Asset Holder within our Schemes. These are restricted and we direct you to Section 4 and the PERMITTED INVESTMENTS GUIDANCE at the end of this Agreement.). The Scheme Operator may update this document from time to time and the most recent version can be obtained from them…*

…All asset valuations, cash movements, stock and balance, aggregate stock and contract notes will be provided by email to the Scheme Operator by CSV file if required...

The Asset Holder agrees to provide online access to view client's accounts to the Scheme Operator and to the pension Scheme member (or their nominated IFA).

All valuations, transaction statements, Tax Vouchers and consolidated Tax Certificates should be sent to the Scheme Operator or online access provided as applicable…

…The Scheme Operator reserves the right to terminate this Agreement with immediate effect if the Asset Holder ceases to be to be FCA authorised, or if there is any breach of the conditions set out in this Agreement."

In Section 4, 'Permitted Investments' it stated:

"The Asset Holder acknowledges and accepts that IM does NOT permit (and indeed STRICTLY PROHIBITS) any Non-Standard and/or illiquid assets (as defined and amended from time to time by the FCA) to be held within its schemes.

In signing this agreement, the Asset Holder agrees not to invest, direct, facilitate or otherwise enable the investment of any Scheme assets into such Non-Standard and/or *illiquid assets. This applies directly or indirectly (via any third party to this agreement retained of instructed by the Asset Holder)."*

The agreement included a Permitted Investment Guidance document which listed the permitted investments and further stated:

"INTELLIGENT MONEY EXPRESSLY PROHIBITS ANY OF THE FOLLOWING TRANSACTIONS IN RESPECT OF OUR SCHEMES:

Any and all investments not listed in the Permitted Investments list above including, but not limited to:

Stocks and Shares and other Transferrable Securities not listed or traded on a recognised exchange in accordance with the section on Stocks and Shares and other Transferrable Securities in the Permitted Investments above
Any other investments that are classed as Non-Standard by the FCA
Warrants
Futures
Options
Contracts for Differences
Other derivative instruments of any nature
Geared or leveraged transactions
Other transactions which could result in a loss greater than the original amount invested
Purchase of shares that would give the member a controlling interest in a company
Unregulated Collective Investment Schemes (UCIS)
Overseas Property
Residential Property"

After considering all of the information provided, our Investigator upheld the complaint. She noted IM had entered into an introducer agreement with GBFS a significant period of time *after* it accepted Mr H's application for the SIPP. She thought this showed IM hadn't carried out any checks on GBFS before accepting Mr H's application, so it didn't have any idea about the nature of GBFS's business practices, putting Mr H at risk of detriment. She noted that the agreement with Strand also post-dated Mr H's investments, which meant IM could not be certain Mr H's funds would only be invested in standard assets. The Investigator thought this was evidenced by the fact Mr H invested in the OWG Bond, which wasn't an investment that would be permitted on its own permitted investment list. Again, she thought the lack of checks at the relevant time put Mr H at risk of detriment.

The Investigator noted that Strand was wholly owned by OWG. And the fact that Strand was investing client funds into its parent company should have been flagged as a clear conflict of interest and raised suspicion to the possibility that it was not putting its clients' best interests first. Furthermore, she said as the (unlisted) OWG bond was not on the standard asset list and the documents for it clearly warned of the lack of secondary market, it was the Investigator's view is that IM ought to have denied the requested investment into Strand. Overall, the Investigator believed that if IM had followed its regulatory obligations and carried out sufficient due diligence it is likely that it would not have accepted Strand as a suitable DFM and, acting fairly and reasonably towards its clients, declined to permit it to invest members' monies within its SIPPs. The Investigator recommended that IM should compensate Mr H for his loss arising from the pension transfer and investment and pay him £500 for the trouble and upset caused.

IM responded saying it didn't agree and would be providing more information. It asked for an extension, which was provided, but as no further response was received from IM the complaint was referred to me to make a final decision.

I asked IM for further information about the customers introduced by GBFS that invested in Strand. IM responded saying that the first customer introduced by GBFS was on 13 January 2016 and 69 of the 71 customers introduced by GBFS invested through Strand, with the remainder leaving their funds in cash.

I issued a provisional decision on 4 March 2024, explaining why I intended to uphold the complaint. In summary, I said that IM should have decided not to accept any business from GBFS before it received Mr H's application from GBFS. I also said that IM should've declined to permit customers to invest via Strand. I was satisfied that if IM had refused to accept Mr H's applications, he would not have invested his pension monies through IM and would've retained his existing pension arrangements. So, I recommended that IM should put Mr H back into the position he would've been in if IM had refused to accept his SIPP application from GBFS. I also recommended IM should pay Mr H £300 for the distress and inconvenience caused by its actions.

IM didn't accept the provisional decision and made the following points:

- GBFS and Strand were FCA authorised and regulated firms when IM accepted applications and investments into its SIPPs.
- The introductions IM received from GBFS were not significant in volume, accounting for only 1.8% of introductions during that period.
- It is not accepted that it is highly unusual for most of a regulated firm's introductions to a SIPP to involve pension transfers given GBFS's status as a pension transfer specialist.
- It isn't surprising that DB pension transfers increased from April 2015 given the introduction of the Pension Schemes Act 2015 which gave consumers freedom to access pension benefits earlier than in the past.
- IM carried out checks on GBFS and entered into an Introducer Terms of Business Agreement with GBFS in December 2015, before Mr H's SIPP application was received, contrary to what I had said in my provisional decision. IM provided a copy of this agreement.
- The investments were, at the time IM accepted them into its SIPP, listed on recognised stock exchanges and complied with the FCA's definition of 'standard asset' and as such, were permitted investments.
- Mr H's Strand investments were not all in fixed income securities. Mr H was invested in the 5alpha conservative and adventurous funds, which were listed on the Irish Stock Exchange. As such, they were permitted investments.
- Mr H's OWG Bond investment was listed on the Nasdaq First North Bond Market, Copenhagen from 12 September 2016.
- As the investments were standard assets, no enhanced due diligence was required.
- The due diligence standard required by the Ombudsman is disproportionate and bears no relation to IM's contractual requirements. The fees IM charged for its administration services reflects the limited nature of its obligations.
- Many SIPP providers accepted non-standard assets into their SIPPs so it is unreasonable to assume that Mr H would not have effected the transfers of his pension and made the investments if IM had declined his applications.
- The decision to 'saddle' IM with all of Mr H's loss is 'perverse' given the involvement of other firms in the chain of events. It is unfair not to take account of the potential contribution of other parties to Mr H's loss.

Mr H accepted my provisional decision but made some comments on IM's response to the provisional decision.

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.

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

I've also taken account of IM's response to my provisional decision. Having done so, I'm still upholding the complaint.

When considering what's fair and reasonable in the circumstances, I need to take account of relevant 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.

In deciding what's fair and reasonable in the circumstances, it's appropriate to take an inquisitorial approach. And, ultimately, what I'll be looking at here is whether IM took reasonable care, acted with due diligence and treated Mr H fairly, in accordance with his best interests. And what I think is fair and reasonable in light of that. And I think that a key issue in Mr H's complaint is whether it was fair and reasonable for IM to have accepted Mr H's SIPP business in the first place.

I also have to consider whether it was fair and reasonable for IM to have accepted Mr H's application to invest with Strand. So, I need to consider whether IM carried out appropriate due diligence checks on GBFS and Strand before deciding to accept Mr H's applications.

<u>Relevant considerations</u>

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

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).

PRIN 1.1.9G at the relevant date stated that:

"Some of the other rules and guidance in the Handbook deal with the bearing of the Principles upon particular circumstances. However, since the Principles are also designed as a general statement of regulatory requirements applicable in new or unforeseen situations, and in situations in which there is no need for guidance, the appropriate regulator's other rules and guidance should not be viewed as exhausting the implications of the Principles themselves."

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 161:

"The Principles are the overarching framework for regulation, for good reason. The FSA has clearly not promulgated, and has chosen not to promulgate, a detailed all-embracing comprehensive code of regulations to be interpreted as covering all possible circumstances…The overarching framework would always be in place to be the fundamental provision which would always govern the actions of firms, as well as to cover all those circumstances not provided for or adequately provided for by specific rules."

At paragraph 162 Ouseley J said:

"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."

At paragraph 77 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."

And at paragraph 184 Ouseley J said:

"The width of the Ombudsman's duty to decide what is fair and reasonable, and the width of the materials he is entitled to call to mind for that purpose, prevents any argument being applied to him that he cannot decide to award compensation where there has been no breach of a specific rule, and the Principles are all that is relied on."

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 *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."

And at paragraph 107:

"The passages in the judgment of Ouseley J. discussed above were essentially directed at the question of whether the FSA could use the Principles to augment the rules. The answer to that question was that it could and there is no suggestion that the concept of augmentation was to be limited in the manner for which BBSAL contended. However, it is also important that the present case concerns the decision of an Ombudsman, rather than the FSA. In that connection, it is clear from the judgment of Ouseley J. that the Ombudsman can permissibly take an even broader approach than the regulator."

And then, after citing more passages from the *BBA* case, Jacobs J at paragraph 109 stated:

"I consider that these passages, too, are fatal to BBSAL's attempts to put limits on the extent to which the Ombudsman was entitled to use the Principles in order to augment existing rules or duties. The Ombudsman has the widest discretion to decide what was fair and reasonable, and to apply the Principles in the context of the particular facts before him."

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

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

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

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

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

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

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

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

I note that there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Mr H'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 store pods investment into its SIPP.

And in Mr H's complaint, amongst other things, I'm considering whether IM ought to have identified that the introductions from GBFS involved a significant risk of consumer detriment and, if so, whether it ought to have ceased accepting introductions from GBFS *before* entering into a contract with Mr H. And I'm also considering whether IM ought to have identified that investments made through Strand involved a significant risk of consumer detriment and, if so, whether it ought to have declined to accept further applications to invest in Strand *before* it received Mr H's application.

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

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

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 IM was under any obligation to advise Mr H on the SIPP and/or the underlying investments. Refusing to accept an application isn't the same thing as advising Mr H on the merits of the SIPP and/or the underlying investments.

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

<u>The regulatory publications</u>

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

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

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

The 2009 Thematic Review Report

The 2009 Report included the following statement:

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

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

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

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

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

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

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

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

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

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

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

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

The later publications

The introduction to the 2012 Thematic Review Report explains that it was undertaken to investigate concerns that the regulator had about poor firm conduct and the potential for significant consumer detriment, and to determine the extent to which SIPP operators had adapted processes and procedures to reduce risks following the 2009 Report. The Regulator stated in the introduction that the findings of the review confirmed its concerns. The 2012 Report states that all SIPP operators should review their business in light of the contents of the report.

Findings from the review included:

- Inadequate risk identification processes and risk mitigation planning underpinned by poor quality management information ('MI').
- An increase in the number of non-standard investments held by some SIPP operators, with often poor monitoring of this.
- A lack of evidence of adequate due diligence being undertaken for introducers and investments.

The Report stated that:

"In our 2009 report we identified that there was a relatively widespread misunderstanding among SIPP operators that they bear little or no responsibility for the quality of the SIPP business that they administer, as this is the responsibility of clients and client's advisers…

As we stated in 2009, we are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Business: a firm must pay due regard to the interests of its customers and treat them fairly', in so far as they are obliged to ensure the fair treatment of their members."

And, under the heading *"Non-standard investments, due diligence and financial crime"* the Report stated that:

"Some SIPP operators were unable to demonstrate that they are conducting adequate due diligence on the investments held by their members or the introducers who use their schemes, to identify potential risks to their members or to the firms itself."

The review set out the regulator's expectation that SIPP operators review their business, paying particular attention to, amongst other things:

- Whether their risk identification and risk mitigation planning was sufficiently robust to ensure that the firm has safeguarded its customer's interests.
- The level of non-standard investments held within their schemes.

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

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

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

Under the heading *"Management Information (MI)"* the finalised SIPP operator guidance stated that:

"Principle 6 of the FCA's Principles for Businesses requires all firms to pay due regard to the interest of its customers and treat them fairly. SIPP operators are not responsible for the SIPP advice given by third parties such as financial advisers. We would expect SIPP operators to have procedures and controls in place that enable them to gather and analyse MI that will enable them to identify possible instances of financial crime and consumer detriment."

The guidance goes on to give examples of MI firms should consider which includes:

- Collection of MI to identify trends in the business submitted by introducers.
- The ability to identify the number of investments, the nature of those investments, the amount of funds under management, spread of introducers and the percentage of higher risk or non-standard investments.

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

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

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

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

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

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

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

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

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

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

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

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

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

"Due diligence

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

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

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

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

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

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

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

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

The July 2014 *"Dear CEO"* letter provides a further reminder that the Principles apply and an indication of the FCA's expectations about the kinds of practical steps a SIPP operator might reasonably take to achieve the outcomes envisaged by the Principles. In the letter the FCA said that in a Thematic Review it had recently conducted it had focused on the due diligence procedures SIPP operators used to assess non-standard investments, and how well firms were adhering to the relevant prudential rules.

The letter went on to say that during the Review it found a significant number of SIPP operators were still failing to manage the risks and ensure customers were protected appropriately. The FCA encouraged SIPP operators to review the key findings in its Thematic Review, which were summarised in an annex to the letter, and asked them to take action to ensure their businesses were able to demonstrate an appropriate degree of protection for consumers' pension savings.

The annex to the *"Dear CEO"* letter states, amongst other things, that the Thematic Review identified significant failings in due diligence procedures to assess non-standard investments and that:

"Principle 2 of the FCA's Principles for Business requires all firms to conduct their business with due skill, care, and diligence. SIPP operators should ensure that they conduct and retain appropriate and sufficient due diligence, for example, assessing that assets allowed into a scheme are appropriate for a pension scheme. Our thematic review found that most

SIPP operators failed to undertake adequate due diligence on high risk, speculative and non-standard investments…"

The annex also sets out how a SIPP operator might meet its obligations in relation to investment due diligence. Such obligations could be met by:

- *correctly establishing and understanding the nature of an investment*
- *ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation*
- *ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable)*
- *ensuring that an investment can be independently valued, both at point of purchase and subsequently, and*
- *ensuring that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc.)*

Further, the annex states that:

"We found that, typically, firms had difficulty completing due diligence for non-standard overseas investment schemes where firms did not have access to local qualified legal professionals or accountants. Also, since the last review of SIPP operators, we noted an increase in the number of opaque investment structures, such as special purpose vehicles and limited companies, created to pool investment monies and finance other businesses. Firms had difficulty establishing where money was being sent, and whether underlying investment propositions were genuine.

We also found that many SIPP operators accepted investments into their schemes without adequate consideration of how investments could be valued or realised.

Finally, we found many firms continuing to rely on marketing and promotional material produced by investment providers as part of due diligence processes, despite previous guidance highlighting the need for independent assessment of investments."

The annex refers to the proposed definition of Non-Standard Assets as set out in the FCA's Consultation Paper - CP12/33. The proposed definition was by way of a list of Standard Assets with all assets not on the list being categorised as Non-Standard Assets.

The Standard Assets list included Corporate Bonds but also included the following criteria for Standard Assets:

"Standard assets must be capable of being accurately and fairly valued on an ongoing basis, readily realised whenever required (up to a maximum of 30 days), and for an amount that can be reconciled with the previous valuation."

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, I'm of the view that 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's treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications which set out the regulators' expectations of what SIPP operators should be doing also go some way to indicate what I consider amounts to good industry practice, and I'm therefore satisfied it's appropriate to take 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.

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.

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

The publications make frequent reference to introducers but not execution only stockbrokers or discretionary investment managers. However, given the non-exhaustive nature of the guidance and its purpose to make clear to non-advisory SIPP operators that they have a responsibility for the quality of the SIPP business they administer, I'm satisfied that the points made could be borne in mind in relation to other businesses SIPP operators deal with such as execution only stockbrokers and discretionary investment managers.

In this regard I note that on 18 April 2013, so well before Mr H' SIPP application was accepted by IM, the FCA published a Final Notice relating to Mr W who had been a Director of a SIPP operator called Montpelier Pension Administration Services ('MPAS').

The FSA conducted a supervisory visit of MPAS in October 2010 as part of the SIPP Thematic Review. A number of findings were made against Mr W arising out of that visit including, amongst other things, that he'd failed to exercise due skill, care, and diligence in managing the business of MPAS in breach of Principle 6. The findings of fault included findings relating to:

- Due diligence and monitoring of introducers.
- Due diligence of new assets to be accepted into MPAS' schemes.
- Due diligence and monitoring of discretionary fund managers.

It was noted, amongst other things, in the Final Notice that:

"4.29. MPAS' due diligence on the Introducers from whom it accepted new business consisted only of a search on the Financial Services Register each time an application for new business was received to ensure that the introducing firm was still authorised. MPAS did not carry out any other monitoring, such as identifying and analysing referral trends, which would have enabled it to be satisfied that Introducers were recommending SIPP investments only where it was suitable to members and only where the investment type was suitable to MPAS...

4.31. After the Authority had communicated its concerns to MPAS in January 2011 regarding the firm's lack of due diligence and monitoring of Introducers, Compliance conducted an audit which identified a trend of exclusively high-risk business being referred by certain Introducers, indicating that those Introducers were not referring investors to MPAS according to suitability alone, and importing significant risk to members and MPAS alike. Compliance identified two Introducers as having habitually referred an unacceptably high volume of high-risk investments, or as having advised clients who were not sophisticated investors to place the entirety of their SIPP funds into high-risk investments…

4.37. MPAS did not have adequate systems and controls in place to monitor and administer SIPP assets on an ongoing basis. (Mr W) *did not ensure that there was an appropriate system in place by which MPAS could identify the exact assets held for individual members, nor was there a system in place by which MPAS could instantaneously ascertain the current value of those assets (for example through real-time price feeds). Instead, MPAS relied on obtaining delayed valuations upon request to the relevant investment platforms.* (Mr W) *did not make reasonable effort during the Relevant Period to identify and implement a method by which MPAS could regularly and closely monitor the value of assets held for individual members…*

4.39. MPAS did not routinely gather management information and was thereby unable to identify areas of risk to both itself and to members. Regular collation and analysis of management information should have enabled the Board to have a clear understanding of vital aspects of the business, such as the effectiveness of its compliance procedures, its adherence to service standards and trends indicating risk in the types of business being referred and accepted…

5.4. (Mr W) *failed to exercise due skill, care and diligence by giving insufficient consideration to compliance and to the safety of members' investments, including failing to understand the* *consequences and risks of accepting a high volume of illiquid non-standard investments into the MPAS schemes. By failing to ensure MPAS could identify such issues,* (Mr W) *caused scheme members to be exposed to additional risks such as formulaic selling by introducers, unsuitable recommendations for illiquid or volatile investments, or the potential imposition of a range of tax charges…*

5.18. (Mr W) *did not take steps to ensure that MPAS made adequate use of management information so as to enable it to identify areas of risk to both members and to MPAS' itself.* (Mr W) *should have ensured that Compliance and the Board in particular had ready access to management information reports at its quarterly meetings in order to allow it to govern the firm effectively. MPAS did not utilise management information to identify and mitigate areas of risk, with the effect that it only acted upon key areas of risk (such as certain Introducers recommending unacceptably high volumes of risky investments to some members) after they were highlighted by the Authority following its supervisory visit in October 2010…*

5.19. As both managing director and MPAS' liaison with Introducers, (Mr W) *failed to take reasonable steps to ensure that MPAS conducted adequate due diligence and continued monitoring on those firms.* (Mr W) *concentrated his efforts on fostering business opportunities for Introducers without taking reasonable steps to ensure that those Introducers were advising scheme members in relation to suitable SIPP investments only, in satisfaction of MPAS' regulatory obligation as a SIPP operator to ensure that its members were being properly advised…*

5.21. Accurate identification and monitoring of SIPP assets should have been of particular concern to (Mr W) *during the Relevant Period given the large proportion of non-standard, investments under MPAS' administration. However,* (Mr W) *failed to take reasonable steps to ensure that MPAS was able to identify and monitor assets accurately on behalf of members. He did not ensure that MPAS had access to regular and accurate asset information, which would have been easily obtainable via software providing regular and live price feeds.* (Mr W) *thereby failed to ensure that MPAS was able to satisfy its basic obligation to SIPP members to maintain proper control over the assets it held for their benefit…"*

Specifically, on the discretionary fund managers point, the FCA said:

"4.38 A proportion of the assets administered by MPAS were managed by discretionary fund managers during the Relevant Period, and MPAS typically entered into agreements with those discretionary fund managers upon recommendation by MPAS' Introducers. However, no due diligence was undertaken in relation to the recommended fund managers, nor was any ongoing monitoring undertaken to ensure that those with responsibility for management of members' assets were doing so properly…"

And:

"5.6. Additionally, (Mr W) *did not understand the significance of certain systems and controls, including the use of management information to identify and mitigate areas of risk in the business, and due diligence and continued monitoring of Introducers and discretionary fund managers and the SIPP assets, which would have reduced the risk of members being unsuitably advised or their assets unsafely managed."*

And:

"5.22. (Mr W) *failed to ensure that any controls were in place in relation to discretionary fund managers, in the form of agreements setting out the terms on which SIPP assets were to be managed. By failing in this regard,* (Mr W) *exposed members to the risk that their assets*

would be mismanaged without detection by MPAS, and especially given that no other procedures were in place for continuous monitoring of discretionary fund managers.

5.23. The Authority therefore considers that in having failed to take reasonable steps to ensure that systems and controls were in place in key areas of MPAS' business, in breach of Statement of Principle 7, (Mr W) *has demonstrated a serious lack of competence and capability as a significant influence function holder."*

To be clear, I don't say that the Final Notice mentioned above was regulatory guidance that I'm required to take into account. But I'm satisfied the above does help to demonstrate that the obligations on SIPP operators, as discussed in the guidance and other publications referred to above, wouldn't necessarily be satisfied *only* by carrying out due diligence on introducers and investments.

I also don't say the Principles or the publications obliged IM to ensure the transactions were suitable for Mr H. It is accepted IM wasn't required to give advice to Mr H, 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. 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.

I'm making a decision on what's fair and reasonable in the circumstances of this complaint – and for all the reasons I've set out above I'm satisfied that the Principles and the publications listed above are relevant considerations to that decision. And taking account of the factual context of this case, it's my view that in order for IM to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), amongst other things it should have undertaken sufficient due diligence into GBFS/the business GBFS was introducing and undertaken sufficient due diligence into Strand and the investments it made *before* deciding to accept Mr H's applications.

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

And the questions I need to consider are whether IM ought to, acting fairly and reasonably to meet its regulatory obligations and good industry practice, have identified that consumers introduced by GBFS and/or investing with Strand were being put at significant risk of detriment. And, if so, whether IM should therefore not have accepted Mr H's applications for the IM SIPP and/or the investments.

The contract between IM and Mr H

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

I've not overlooked or discounted the basis on which IM was appointed. And my decision on what's fair and reasonable in the circumstances of Mr H's case is made with all of this in mind. So, I've proceeded on the understanding that IM wasn't obliged – and wasn't able – to give advice to Mr H on the suitability of the SIPP, using Strand as an investment manager or the subsequent investments.

What did IM's obligations mean in practice?

In this case, the business IM was conducting was its operation of SIPPs. And I'm satisfied that, to meet its regulatory obligations, when conducting its operation of SIPPs business, IM had to decide whether to accept or reject particular investments and/or referrals of business with the Principles in mind.

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

As set out above, to comply with the Principles, IM 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 H) 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.

It seems that IM understood this to some extent at the time; in response to my provisional decision, IM provided evidence demonstrating that it entered into an agreement with GBFS in December 2015 – before Mr H's application was submitted. It also carried out some checks on GBFS to ensure it was regulated and held the correct permissions. But it didn't enter into an agreement with Strand until after Mr H's SIPP application had been accepted and his investments had been made. So, it appears that the extent of the due diligence carried out by IM on Strand at the time customers applied to invest through Strand was checking the FCA entries to ensure it was regulated.

But as I've set out above, the Regulator had put out a significant amount of guidance pertaining to SIPP Operator obligations before Mr H's introduction in April 2016. So, and well before the time of Mr H's application, I think that IM ought to have understood that its obligations meant that it had a responsibility to carry out appropriate checks on GBFS to ensure the quality of the business it was introducing.

And I think IM also ought to have understood that its obligations meant that it had a responsibility to carry out appropriate due diligence on investments to be held/being held in its SIPPs, meaning it should have carried out appropriate due diligence on Strand. So, I'm satisfied that, to meet its regulatory obligations when conducting its business, IM was also required to consider whether to accept or reject a particular investment with the Principles in mind. And in my opinion, IM should have used the knowledge it gained from its due diligence to decide whether to accept or reject any application that involved a request to involve Strand as the investment manager.

I've taken account of IM's comments about the limited fees it charged customers like Mr H for administering their SIPPs. But it is not the fee as such that defines the roles and responsibilities of the parties; it is the agreement between the parties and the rules (including the Principles) that IM is subject to when providing that agreed service. And IM still needed to carry out appropriate initial and ongoing due diligence and reach the right conclusions.

<u>IM's due diligence on GBFS</u>

IM has explained to us that it wouldn't have accepted SIPP business unless the business had been recommended by an FCA authorised and regulated financial adviser.

And I'm satisfied IM carried out some checks before it accepted business from GBFS, amongst other things, I'm satisfied this included:

- Checking that GBFS was regulated and authorised by the FCA to give financial advice.
- Obtaining a copy of a GBFS adviser's G60 Certificate.
- Entering into an Introducer Terms of Business Agreement with GBFS on 18 December 2015.

From the information that has been provided, it appears that IM 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 IM's regulatory obligations and good industry practice.

I think IM was aware of, or should have identified potential risks of, consumer detriment associated with business introduced by GBFS *before* it accepted Mr H's application.

As I explain below, based on the available evidence and what IM has told us, I'm satisfied that the vast majority (if not all) of the SIPP business introduced to IM by GBFS prior to it receiving Mr H's application was business where consumers would be investing with Strand. So, I think IM needed to also carry out due diligence on Strand and understand the nature of the investments that it would make for clients to ensure there was no risk of consumer detriment. I think such steps should have included getting a fuller understanding of the business that GBFS was introducing through asking questions and through independent checks.

Further, I'm satisfied such steps would have confirmed there was a significant risk of consumer detriment associated with introductions of business from GBFS. And I think IM should have concluded it shouldn't continue accepting introductions from GBFS and *before* it accepted Mr H's SIPP application.

So, based on the evidence provided to us to date, I'm of the view IM failed to conduct sufficient due diligence on GBFS *before* accepting Mr H's business from it, or draw fair and reasonable conclusions from what it did know, or ought to have known, about the business it was receiving from GBFS. And that IM ought reasonably to have concluded it should not continue to accept business from GBFS, and have ended its relationship with it, *before* it received Mr H's application. I've set out some more detail about this below, the points I make below overlap, to a degree, and should have been considered by IM cumulatively.

Volume of business and the type of investments being made by GBFS-introduced consumers

We asked IM about the number of introductions it received from GBFS, the number of the introductions it received from GBFS where applicants invested in Strand investments and what number Mr H was amongst the introductions IM received from GBFS. IM has confirmed to us that:

- It received 71 introductions from GBFS and the first introduction was on 13 January 2016.
- Mr H was the 38th client introduced to it.
- GBFS's introductions accounted for 1.8% of its new business during the period which it had an agreement with it.
- 13% of the applications involved transfers from DB schemes.
- 69 of the customers introduced went on to invest through Strand, with the remainder staying in cash.
- It was unable to confirm how members' pension monies had been invested through Strand.
- IM did not allow non-standard assets so none of the clients' funds were invested in assets classified as non-standard when the clients opened their SIPPs.

There appears to be some inconsistency here. As I've said above, IM has told us another customer who has complained to us about the investments placed through Strand in their IM SIPP was the 38th introduction from GBFS, even though that customer was introduced before Mr H by a few weeks. As IM hasn't clarified this point in its response to my provisional decision, I'm proceeding on the basis that Mr H's introduction was *around* the 38th IM received from GBFS.

An example of good practice identified in the FSA's 2009 Thematic Review Report was:

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

I think IM either had, or ought to have had, access to information about the number and type of introductions that GBFS made. I say that because IM has, when asked by us, been able to provide us with information about the volume and type of business that GBFS was introducing to it.

I don't think simply keeping records about the number and nature of introductions that GBFS made without scrutinising that information would have been consistent with good industry practice and IM's 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.

As I've mentioned above, IM has said 71 members were introduced by GBFS and 69 – i.e. 97% – of these invested with Strand. But IM can't provide any information about how Strand invested their customers' funds.

A joint administrators' report into Strand dated 6 July 2017 says, amongst other things, that:

"Until May 2016 the only investments arranged by the Company (Strand) were in OWG bonds."

I have attached a link to this report here:

https://www.evelyn.com/media/ttugri3w/joint-special-administrators-proposal.pdf

And it appears that some of Mr H's pension monies were used to purchase 19,400 units of the OWG 8.0% bond (Series D).

So, based on the evidence available to me, I think it's more likely than not Strand was investing 100% of client funds in OWG bonds (Corporate Bonds) between the date of GBFS's first introduction in January 2016 and May 2016. And given Mr H's funds were invested in the OWG series D bond around August 2016, it's evident that Strand continued to invest a proportion of clients' funds in OWG thereafter.

As I explain elsewhere in this decision, if IM had undertaken adequate initial and ongoing due diligence into Strand it ought to have identified, and prior to accepting Mr H's business, that Strand was investing clients' pension monies in speculative high risk and potentially highly illiquid Corporate Bonds.

So, I think IM either was aware, or ought reasonably to have been aware before it received Mr H's SIPP application, that a significant proportion of the business GBFS was introducing was high risk, with consumers' pension monies ending up invested in high risk Corporate Bonds, and that this business carried a potential risk of consumer detriment.

I think it's highly unusual for most of a regulated advice firms' introductions to a SIPP provider to involve pension transfers/switches so as to invest largely, or wholly, in a single high risk, potentially illiquid Corporate Bond. I think it's fair to say that most advice firms certainly don't transact this kind of business in significant volumes.

IM disputes this, saying it is common for IFAs to specialise in certain areas. It also adds that transferring pension funds from DB schemes was not of itself a 'red flag', particularly in the context of the Pensions Schemes Act 2015, which granted new freedom to those who wished to access their pension funds and led to an increase in DB transfers.

But I still think it's fair to say that such a pattern was unusual. The investments are highly unlikely to be suitable for the vast majority of retail clients. They will generally only be suitable for a small proportion of the population – sophisticated and/or high net worth investors. So, while IM says the volume of business that GBFS introduced overall wasn't significant, I think the number of pension transfers and switches being effected through GBFS in order to invest in the same particular high-risk Corporate Bonds ought to have been a cause for concern. Particularly in the absence of any information from GBFS about the type of customers it dealt with, which could explain the pattern of high-risk business it was introducing. And, as discussed below, IM also ought to have had concerns about the close relationship between Stand and OWG and whether Strand was acting in its mutual customers' best interests in the circumstances.

Having regard to the pattern of high risk business I think it's more likely than not that IM received from GBFS prior to Mr H's business being accepted; I think that IM should have been concerned that the quality of introductions, relating mainly to consumers investing through Strand in the same Corporate Bond (a higher-risk esoteric investment), was unusual – particularly from a small IFA business. And it should have considered how a small IFA business introducing this amount of higher-risk business was able to meet regulatory standards. I think this was a further clear and obvious potential risk of consumer detriment.

IM has said from the outset that it did not allow Introducers to arrange investments in Non-Standard Assets and that it was satisfied the Strand investments qualified as Standard

Assets. However, I note that the Introducer Terms of Business Agreement GBFS signed with IM in December 2015 did not carry any restrictions on the types of investments the Introducer could arrange to be held in IM SIPPs. But the Agreement GBFS signed in February 2017 stated the following:

'14. Non-Standard Investments:

a) *The introducer acknowledges and accepts that IM does NOT permit any Non-Standard assets (as defined and amended from time to time by the FCA), including any assets that do not have 30-day liquidity, to be held in its Schemes.*
b) *In signing this agreement, the Introducer agrees not to invest, direct, facilitate, or otherwise enable the investment of any Scheme assets into such Non-Standard and/or illiquid assets. This applies directly or indirectly via any third party stockbroker, Discretionary Fund Manager, Platform, etc.'*

So, despite what IM has said in response to the Investigator's view and my provisional decision, it's possible that at the time GBFS first started introducing customers to IM, IM did not exclude any particular types of investment to be held in its SIPPs. But I don't think that this matters either way. Ultimately, IM was still required to consider whether the investments being introduced were appropriate to be held in its SIPPs, bearing in mind its regulatory obligations as an execution only SIPP operator and good industry practice. And had IM carried out the checks it ought to have done on the types of investments GBFS would make for its clients before accepting Mr H's application, it would've found that GBFS facilitated the investment of client monies into assets via Strand that carried a high risk of consumer detriment. And this ought to have been another clear sign that accepting business from GBFS could place customers at risk.

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

IM could simply have concluded that, given the potential risks of consumer detriment from the pattern of business being introduced to it by GBFS – which I think should have been clear and obvious at the time – it should not continue to accept applications from GBFS. That would have been a fair and reasonable step to take, in the circumstances. Alternatively, IM could have taken fair and reasonable steps to address the potential risks of consumer detriment, such as those I've set out below.

Requesting information directly from GBFS

Given the potential risk of consumer detriment, I think that IM ought to have found out more about how GBFS was operating before it received Mr H's application. And, mindful of the type of introductions I think that it's more likely than not that IM was receiving from GBFS from the outset, I think it's fair and reasonable to expect IM, in line with its regulatory obligations, to have made some specific enquiries and carried out independent checks.

As set out above, the 2009 Thematic Review Report explained that the Regulator would expect SIPP operators to have procedures and controls, and for management information to be gathered and analysed, 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, also 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 IM, and long before it received Mr H's SIPP application, should have checked with GBFS and asked about things like: how it came into contact with potential clients, what agreements it had in place with its clients, what agreements it had in place with Strand, how and why such a significant proportion of the retail clients it was introducing were interested in investing specifically in one particular type of Corporate Bond, and what material was being provided to clients by it and what it was telling its clients about Strand.

I think it's more likely than not that if IM had checked with GBFS and asked the *type* of questions I've mentioned above that GBFS would have provided a response. In the alternative, if GBFS had been unwilling to answer such questions if they'd been put to it by IM, I think IM should simply then have declined to accept introductions from GBFS.

IM might say that it didn't have to obtain this information from GBFS. But I think this was a fair and reasonable step to take, in the circumstances, to meet its regulatory obligations as an execution only SIPP operator and good industry practice.

Making independent checks

The 2009 Thematic Review Report said that:

""…we would expect (SIPP operators) *to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way,* ***for example by contacting the members to confirm the position*** (my emphasis in bold)*, or by contacting the firm giving advice and asking for clarification."*

Given the potential risks of consumer detriment from the pattern of business being introduced to it by GBFS – which I think should have been clear and obvious at the time – I think it would have been fair and reasonable for IM, 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 GBFS. And, given the unusual pattern of business it was receiving from GBFS, I think it would have been fair and reasonable for IM to speak to some applicants, like Mr H, directly.

And I think it's more likely than not that if IM had done this, IM would have been told by some applicants that they had been told by GBFS they could get a better return by transferring to IM and investing through Strand and that they hadn't been made aware of the risks.

Furthermore, had it requested sight of any suitability reports, I think IM would've likely found that GBFS did not have a good understanding of how Strand invested clients' funds. I've seen a copy of the suitability report issued by GBFS to Mr H, which set out Strand's objective as follows:

"We take a global multi-asset approach to portfolio construction. Our preferred choice of building blocks is Exchange Traded Funds (ETFs)

We choose ETFs because we find them to be the most efficient and elegant solution for achieving highly liquid, tradable, and diversified positions. Like any other share, they can be bought and sold on the London Stock Exchange (LSE)."

But as per the joint administrators' report into Strand dated 6 July 2017, until May 2016 the only investments Strand arranged were in OWG bonds, and it continued to invest a significant proportion of client funds in OWG bonds thereafter. So, it would appear that GBFS had very little understanding of the investment strategy Strand would employ for its customers, which again ought to have been noted as posing a significant risk of consumer detriment.

I appreciate that IM might say that it couldn't comment on advice without potentially being in breach of its permissions. Again, I confirm that I accept IM couldn't give advice. But it had to take reasonable steps to meet its regulatory obligations. And in my view such steps should have included addressing a potential risk of consumer detriment by speaking to applicants, and/or requesting sight of suitability reports, as these steps could have provided IM with further insight into GBFS's business model and what it was telling consumers. This would've gone some way to address the clear and obvious risks of consumer detriment from GBFS-introduced business that I've mentioned above.

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

As mentioned above, premised on the pattern of GBFS-introduced business alone I think IM could simply have concluded that, given the clear and obvious potential risks of consumer detriment, it should not continue to accept business from GBFS. I think that would have been a fair and reasonable conclusion for IM to have reached. But I also think it's more likely than not that if IM had undertaken *independent* checks into the business it was receiving from GBFS that such checks would only have served to further reinforce the clear and obvious potential risks of consumer detriment associated with introductions from GBFS. If IM had undertaken adequate independent checks I think it's more likely than not that it would have identified, that:

- GBFS was explaining to some consumers that they could get a better return by transferring to IM and investing through Strand and that they were not being made aware of the risks involved.
- GBFS did not have a good understanding of how Strand would go on to invest their clients' funds.
- GBFS ultimately facilitated the investment of client monies in high-risk, Corporate Bonds which involved a real risk of becoming illiquid.

I accept that GBFS might not have given a full and honest response to questions IM asked. Which I think only serves to highlight the importance of undertaking adequate ongoing due diligence, including independent checks, when receiving such an unusual pattern of predominantly high risk business from a single introducer.

Any of these points would have been significant in isolation and should have further demonstrated that there was a significant risk of consumer detriment associated with introductions from GBFS. I think any of the three points ought to have been a clear red flag to IM, especially when considered alongside the pattern of business it was receiving from GBFS.

I think IM ought to have viewed the pattern of business as a serious cause for concern which raised serious questions about the motivation and competency of GBFS. And if IM had undertaken adequate initial and ongoing due diligence into GBFS and the business being received from it, I think IM should have concluded, and *before* it accepted Mr H's business from GBFS, that it shouldn't continue to accept introductions from GBFS. I therefore conclude that it's fair and reasonable in the circumstances to say that IM shouldn't have accepted Mr H's application from GBFS.

In my view, IM didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr H fairly by accepting his application from GBFS. To my mind, IM didn't meet its obligations or good industry practice at the relevant time, and allowed Mr H to be put at significant risk of detriment as a result.

To be clear, I'm not saying here that IM should have been aware of, or identified, everything that has subsequently come to light about Strand. I only say that, based on the information I think would have been available to IM at the relevant time had it undertaken adequate due diligence, it ought to have been apparent that there was a significant risk of consumer detriment associated with GBFS-introduced business. And that it's more likely than not that the *type* of independent checks it would have been fair and reasonable for IM to undertake in the circumstances would have revealed issues which were, in and of themselves, sufficient basis for IM to have declined to continue to accept introductions from GBFS before IM had accepted Mr H's business. Further, that it's the failure of IM's due diligence that's resulted in Mr H being treated unfairly and unreasonably.

For the reasons given above, IM shouldn't have accepted Mr H's business from GBFS.

<u>IM's due diligence on Strand</u>

I'm satisfied that, in order to meet its regulatory obligations and good industry practice, IM should have carried out sufficient due diligence on Strand (and the investments it routinely made). And in my opinion, IM should have used the knowledge it gained from that due diligence to decide whether to accept or reject any application that involved a request to involve Strand as investment manager.

Regarding the due diligence it undertook on Strand, IM has said at various points that:

- It carries out due diligence on all firms that it works with. And it won't accept business that isn't placed with an FCA authorised and regulated investment manager in Standard Assets.
- It entered into an agreement with Strand at the outset of its relationship, although it hasn't shown Strand entered into a Terms of Business Agreement until 27 February 2017.
- Strand agreed to IM's terms – it understood and agreed that investments were to be made in accordance with HMRC legislation governing pension schemes and in accordance with IM's list of Permitted Investments.
- As Strand had agreed to IM's terms, IM believed that clients' pension monies wouldn't have any exposure to non-standard investments.

Based on the information that's been made available to us, I'm not satisfied that IM undertook sufficient due diligence on Strand before allowing its SIPP investors to invest through it. And based on the evidence we've been provided, my view is that IM didn't meet its regulatory obligations and didn't act fairly and reasonably in its dealings with Mr H by not performing sufficient due diligence on Strand before allowing Mr H to invest monies in his SIPP with Strand.

<u>What should IM have done?</u>

Taking into account all the available evidence and the relevant considerations I've referenced above, and what's fair and reasonable in the circumstances of this case – in relation to Strand (and the instructions IM was receiving for members' monies to be invested with Strand) – my view is that IM should have:

- Carried out adequate due diligence on Strand before any of its members' monies were invested with Strand.
- Had regard to information available about Strand in the public domain at the time and to Strand's marketing material.
- Taken adequate steps to understand Strand's business model/business objectives, the type of clients it dealt with and the levels of business it conducted.
- Taken adequate steps to understand the type of investments Strand would be investing members' monies in and what Strand's typical portfolios/investments might look like.
- Satisfied itself that Strand was an appropriate firm to deal with.
- Taken steps to ensure that Strand understood that any investments effected would have to accord with IM's operative permitted investments list.
- Had a terms of business agreement in place governing its relationship with Strand and clarified respective responsibilities from the outset. And had measures in place so as to enable IM to assure the effectiveness of that agreement on an ongoing basis.
- IM's representative has told us there was an agreement in effect with Strand. But IM hasn't demonstrated the steps it took to assure the effectiveness of any such agreement on an ongoing basis.
- Gathered and analysed information about the business it was receiving, and the investments being made with SIPP monies, enabling it to identify possible instances of consumer detriment.

IM might say that it wasn't aware of where monies it transferred to Strand were being invested. And, in any event, it says Strand entered into an agreement with it which set out the investments that it would permit. But IM entered into the agreement with Strand long after the start of IM's business relationship with Strand. So, in reality, it had no reason to believe Strand would not invest any proportion of client funds in non-standard assets from the outset of its relationship and during the time Mr H's SIPP business was placed with it.

But even if IM could evidence that Strand had entered into an agreement with it at the outset of its relationship, I don't think entering into such an agreement evidences that IM did all that was expected of it in terms of undertaking adequate due diligence into Strand on both an initial and an ongoing basis. As mentioned previously, I also think that IM should have had some way of assuring the effectiveness of any agreement it entered into with Strand on an ongoing basis.

As required by the Principles, SIPP providers should take reasonable care to organise and control their affairs responsibly and effectively, with adequate risk management systems. The Regulator has previously highlighted, in publications referred to earlier in this decision, its concerns about providers that had systems and controls in place that were weak and inadequate to the extent that they had not identified obvious potential instances of poor advice and/or potential financial crime.

So as to treat its members fairly and reasonably while complying with its regulatory obligations, I think IM should have been:

- Routinely recording and reviewing the type and size of investments being made in its SIPPs, including where DFMs were placing investments on behalf of investors.
- Ensuring it had a clear set of procedures in place to help it deal with appropriately and/or control its exposure to investments that it hadn't retained control over.
- Had systems and controls in place so as to enable it to promptly identify where members' monies were being invested in non-standard assets, or investments which

weren't on IM's operative permitted investment list – including where such investment(s) had been effected on members' behalf by a DFM.
- Where appropriate sought clarification from the member or their adviser/DFM, if it had concerns about any investments that were being made.

As the regulator explained in its 2012 Thematic Review Report, it expected:

"…SIPP operators to review the systems and controls in place to allow them to comply with relevant FSA requirements, including Principle 3. All SIPP operators should ensure the systems and controls they operate are sufficiently robust to identify risks to the scheme and its members and, where identified, take appropriate action to mitigate those risks."

The regulator continued to note in its 2012 Thematic Review Report that:

"Approximately 70% of the SIPP operators in our general review reported that they held non-standard investments; however, over a quarter of the firms sampled were unable to identify the percentage of non-standard investments held due to poor quality MI.

Although the level and types of investments some customers are looking to hold within their SIPP has diversified rapidly over the last 24 months, firms' processes are not keeping pace.

Principle 2 of the Principles for Business, states 'a firm must conduct its business with due skill, care and diligence'.

Some SIPP operators were unable to demonstrate that they are conducting adequate due diligence on the investments held by their members or the introducers who use their schemes, to identify potential risks to their members or to the firms itself. In some firms this was made worse by an over-reliance on third parties to conduct due diligence on behalf of the operator. In some cases this has resulted in taxable investments being inadvertently held, and monies invested in potentially fraudulent investments.

During our review we also found that, although firms hold sufficient capital to meet the minimum regulatory requirements, they do not appear to have sufficient funds set aside to mitigate, for example, the liquidity risk posed by the type of investments held by their members if those investments prove to be the subject of any HMRC tax charges. Although the administrator typically has the right to reclaim charges from members, if the assets are illiquid or insufficient it is possible the SIPP operator may be unable to meet these liabilities as they fall due, threatening the ongoing viability of the firm.

Principle 4 of the Principles for Business, which applies to all SIPP operators, states 'a firm must maintain adequate financial resources'.

All SIPP operators should review the types and levels of investments their members hold and consider if the capital set aside is sufficient to meet their liabilities as they fall due and ensure they continue to meet Principle 4 at all times."

I think that so as to treat its members fairly and reasonably, and so as to comply with its regulatory obligations, IM should have had systems and controls in place (including, where appropriate, agreements with DFMs) that enabled it to remain sighted on the type and size of investments being made in its SIPPs.

From the evidence I've seen, I'm not satisfied IM had systems and controls in place to enable it to remain sighted on the type and size of investments Strand was making with IM's members' SIPP monies. Based on the evidence available to me, I think IM failed to put effective systems and controls in place with Strand, that it failed to undertake adequate initial and ongoing due diligence on Strand and on the investments Strand was placing on IM's members' behalf.

As I've noted above, the joint administrators' report into Strand dated 6 July 2017 said that until May 2016, the only investments arranged by Strand were in OWG bonds.

I think that if IM had undertaken adequate initial due diligence into Strand, including steps to understand what Strand's typical portfolios/investments for SIPP investors might look like, it's most likely that IM would have identified this. And IM appears to have been unsighted on the fact that significant sums of its members' monies were being invested in Strand's parent company and in an investment that appeared to be outside of IM's own permitted investments list.

<u>If IM had completed sufficient due diligence, what ought it reasonably to have concluded?</u>

The Optima Worldwide Bond (OWG)

I have seen a copy of a document entitled "OWG Company Description – In Relation To The Trading Of The Company's "C" Corporate Bond On NASDAQ First North, Copenhagen" dated 26 September 2016.

I have also seen a copy of a document entitled "In Relation To The Admission To Trading Of The Company's Series "D" Corporate Bond On Nasdaq First North, Copenhagen" dated 31 August 2016.

As I've said above, Mr H's monies appear to have been invested in the Series D Bond. However, for completeness, I've included information relating to both the C and D Bonds here.

I appreciate these documents were published after Mr H initially invested monies in the OWG bond with Strand and that, as such, the documents weren't available to IM prior to all of the events complained about. However, it doesn't appear IM sought any information from Strand about the assets it invested client monies in. The extent of IM's due diligence, which took place after a significant number of customers had already invested through Strand (including Mr H), amounted to asking it to sign its Asset Holder Terms of Business Agreement, in which Strand agreed it would not invest client funds in non-standard assets.

But as I've said, in order to comply with the regulatory Principles and I think IM ought to have asked for the type of information these documents contained. And I think that it's most likely some of the material information mentioned in the documents would have been readily discoverable by IM prior to Mr H's monies being invested into the OWG bond, had sufficient due diligence been undertaken. This would include, amongst other things; information about the structure of the investment bonds, the interest payable and whether they were listed.

The C Bond

The September 2016 document explained that Optima Worldwide Group PLC was the parent company of, and fully owned, Strand Capital. The document explains that Optima Worldwide Group PLC was dependent upon its subsidiary companies and investee companies performing in order for it to be able to fund the interest repayments during the Bond's fixed term and repay the capital amount on redemption. The company's principal operating subsidiaries were Brandon Hill Capital and Strand Capital.

It also explained that the company's core investment strategy was to invest in companies with the potential to generate profit and capital growth. Investee companies would return payments to the investing company by dividend, management charges or loan interest and these funds would be paid to the company to meet bond interest payments. Generally, the company wouldn't invest in new start-up businesses with fewer than two years of full accounts unless there's adequate security available. The company would seek to identify any factors which might be detrimental to the business and there had to be an exit route in place for any investee company.

In order to service the interest payments on the bonds, the company's target was to source investment and loan opportunities that could deliver a cash flow income by the investee company of at least 12% a year on all capital employed over the term of the bond. Failure to meet this benchmark could compromise the ability of the company to pay the half yearly interest payments.

It was explained that the company was applying for the OWG bond to be listed on the appropriate exchange. And its confirmed that previous series issues A&B were unlisted and that series C was previously listed on the GXG Markets until that market closed on 18 August 2015.

It also explained that the company anticipated the first day of trading in its series "C" Bonds to be 26 September 2016.

The D Bond

The August 2016 document explained that a little over £5,300,000 series D Bonds had been issued and were outstanding. It was explained that the series D Bonds were 8% Convertible Bonds in Optima Worldwide Group PLC. The Bonds were convertible into ordinary shares in the company at the time of conversion and at a discount of 25% to market price. If not converted the principal amount outstanding on the bond was repayable on 30 September 2021.

Optima Worldwide Group PLC was the parent company of, and fully owned, Strand Capital. The document explains that the Bond was unsecured and that Optima Worldwide Group PLC was dependent upon its subsidiary companies and investee companies performing in order for it to be able to fund the interest repayments during the Bond's fixed term and repay the capital amount on redemption. The company's principal operating subsidiaries were Brandon Hill Capital and Strand Capital.

It also explained that the company's core investment strategy was to invest in companies with the potential to generate profit and capital growth. Investee companies would return payments to the investing company by dividend, management charges or loan interest and these funds would be paid to the company to meet bond interest payments. Generally, the company wouldn't invest in new start-up businesses with fewer than two years of full accounts unless there's adequate security available. The company would seek to identify any factors which might be detrimental to the business and the Board had to be convinced that there was an exit route in place for any investee company.

In order to service the interest payments on the bonds, the company's target was to source investment and loan opportunities that could deliver a cash flow income by the investee company of at least 12% a year on all capital employed over the term of the bond. Failure to meet this benchmark could compromise the ability of the company to pay the half yearly interest payments.

It was explained that the company was applying for the OWG bond to be listed on the appropriate exchange. And it's confirmed that previous series issues A&B were unlisted and that series C was previously listed on the GXG Markets until that market closed on

18 August 2015. There's no mention of series D having been previously listed. But it was explained that the company was seeking a public market for its bonds and its expected first day of trading for series D on Nasdaq First North, Copenhagen was 12 September 2016.

IM says that the Series D Bond qualified as a permitted investment under its Terms of Business Agreement because it was a transferable security that was listed on Nasdaq First North, Copenhagen from 12 September 2016. As this was a recognised overseas investment exchange, it was permitted under its terms.

The precise timing of Mr H's OWG Series D Bond investment isn't clear as the only information available to me is the date on which Mr H's funds were sent to Strand, which was on 10 August 2016. But assuming the investment in the Series D Bond happened shortly after the funds were sent to Strand, it appears Mr H's investment in the OWG Series D Bond could've been made in August 2016, *before* it was listed on Nasdaq First North, Copenhagen. So, it's possible IM permitted an investment that wasn't allowed as per its own permitted investment list at the time because it was unlisted. But ultimately I think this is a moot point because in my view, IM should've refused to permit its customers or potential customers, including Mr H, to invest via Strand *before* it received Mr H's application, at which point, neither the Series C Bond, nor the Series D Bond were listed on a recognised overseas investment exchange. This is confirmed in the document entitled "In Relation To The Admission To Trading Of The Company's Series "D" Corporate Bond On Nasdaq First North, Copenhagen" dated 31 August 2016.

As such, if IM had undertaken adequate ongoing due diligence into Strand before allowing its members' monies to be invested with it, including steps to understand what Strand's typical portfolios/investments might look like, I think it's most likely that IM would have identified that the types of investment that might be placed via Strand on IM's members' behalf included investments that weren't on IM's permitted investment list. Further, that almost all of the clients introduced by GBFS were ending up with monies invested, through Strand, in one particular holding that wasn't on IM's permitted investment list and was issued by Strand's own parent company.

Based on the evidence I've seen to date I don't think IM undertook adequate due diligence into Strand before allowing any of its members' monies to be invested with Strand.

I've thought about whether it would've been reasonable for IM to accept the Strand OWG Bond investments as permitted investments, on the basis that they would soon be listed on a recognised overseas investment exchange. But I think that even if the investments could've met the criteria to be considered as permitted investments under IM's Terms of Business, I still think the investments contained features which carried a high risk of consumer detriment, such that IM should've refused to do business with Strand.

As I've said above, the investment in OWG Bonds amounted to a direct investment in Strand's parent company. This was a clear conflict of interest, and I think IM should've had genuine concern over whether Strand could act independently in customers' best interests, given the discretionary mandate it had to invest customers' funds. And, as per the Special Administrator's statement of proposals report dated July 2017, the only investment Strand made on behalf of customers until May 2016 was in OWG Bonds. So, I think this concern would've been validated, had IM made any enquiries with Strand at the beginning of its relationship about the types of investments it would typically make for clients.

Furthermore, I think the additional risks the bond investments posed also increased the risk of consumer detriment. According to the Company Statement in Relation to the Admission to Trading Of The Company's Series "D" Corporate Bond On Nasdaq First North, Copenhagen, OWG explained the risks, which included the following:

- Investee Companies may become illiquid and therefore may be unable to meet all or some of the agreed interest and capital repayments, or agreed dividend payments.
- The anticipated exit strategy in relation to Investee Companies may fail to materialise and recovery of all or some of the capital invested may not be achieved.
- The management teams of Investee Companies may change and the businesses may fail to achieve the financial performance expected at the time the investment was made.
- The Issuer's Shares and Bonds are not a suitable investment for all investors.
- Each potential investor should assess the appropriateness of an investment in the Company's Shares or Bonds and, specifically, should:
    - Have sufficient financial resources and liquidity in order to be able to bear all the risks of his investment.
    - Acknowledge that they may not be able to sell their Shares or Bonds for a long time or at all.
- The Bonds may have no established trading market when issued, and one may never develop. If a market does develop, it may not be very liquid. Therefore investors may not be able to sell their bonds easily or at prices that will provide them with a yield comparable to similar investments that have a developed secondary market. Investors should therefore regard their investment in the bonds to be of an illiquid nature and close ended prior to the redemption date.

So, I think it's clear that even if IM considered the Strand OWG Bonds to meet the criteria of permitted investments under its Terms of Business, the investments Strand made had other concerning features such as an inherent conflict of interest and illiquidity issues. There was also Strand's concerning practice of investing all of the customers funds in the single investment for most of the time. All of these issues added up to a high risk of consumer detriment.

As such, by the time it received Mr H's application, I don't think that IM should have been allowing Strand to invest members' monies within its SIPPs. If acting fairly and reasonably towards its clients, IM should have stopped doing business with Strand due to the risk of consumer detriment resulting from Strand investing IM's members' monies in investments that were outside of IM's permitted investment list and due to their other concerning features. As such, I think IM acted inappropriately in permitting Mr H's monies to be invested with Strand. Had it not done so, I'm satisfied that monies in Mr H's SIPP wouldn't then have ended up being invested in the OWG bond or 5alpha funds.

And, even if I thought IM had undertaken adequate due diligence on GBFS (which, as I explain elsewhere in this decision, I don't), I'd still consider it fair and reasonable to uphold Mr H's complaint solely on the basis that IM didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr H fairly, by allowing Strand the opportunity to invest his money. To my mind, IM didn't meet its regulatory obligations or good industry practice at the relevant times, and allowed Mr H to be put at significant risk of detriment as a result.

That's because, for the reasons I've set out at length above, IM didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr H fairly by accepting his business from GBFS. Separately, IM also didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat its customers fairly, by permitting customers introduced by GBFS to invest with Strand. And because IM didn't meet its regulatory obligations or good industry practice at the relevant times, I think it allowed Mr H to be put at significant risk of detriment as a result.

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

For the reasons given above, I don't think IM should have accepted Mr H's business from GBFS and I also think it shouldn't have been allowing its members to invest their SIPP monies with Strand by the time it received Mr H's application. So things shouldn't have got beyond that.

Further, in my view it's fair and reasonable to say that just having Mr H sign declarations, wasn't an effective way for IM to meet its regulatory obligations to treat him fairly, given the concerns IM ought to have had about the business being introduced by GBFS and about Strand.

IM knew that Mr H had signed forms intended to acknowledge, amongst other things, his awareness of some of the risks involved with investing and to indemnify IM against losses that arose from acting on his instructions. And, in my opinion, relying on the contents of such forms when IM knew, or ought to have known, that the type of business it was receiving from GBFS, and investing with Strand, would put investors at significant risk of detriment, 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 for IM to do by the time it received Mr H's application would have been to decline to accept Mr H's business from GBFS.

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

So, I'm satisfied that Mr H's IM SIPP shouldn't have been established. And that the opportunity for IM to execute instructions to invest Mr H's monies with Strand, or proceed in reliance on an indemnity and/or risk disclaimers, shouldn't have arisen at all. I'm firmly of the view that it wasn't fair and reasonable in all the circumstances for IM to accept Mr H's business from GBFS and carry out the investment instructions.

Is it fair to ask IM to pay Mr H compensation in the circumstances?

The involvement of other parties

In this decision I'm considering Mr H's complaint about IM. However, I accept that other parties were involved in the transactions complained about – including GBFS and Strand.

I also accept that Mr H pursued a complaint against GBFS with the FSCS. The FSCS upheld Mr H's complaint, it calculated Mr H's losses to be in excess of £50,000 and paid him some compensation. Following this the FSCS provided Mr H with a reassignment of rights.

IM says that it should not be liable for the full extent of Mr H's loss because of the involvement of these other businesses and to make no allowance for this in the redress is neither fair nor reasonable.

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

In my opinion it's fair and reasonable in the circumstances of this case to hold IM accountable for its own failure to comply with its regulatory obligations, good industry practice and to treat Mr H fairly. The starting point, therefore, is that it would be fair to require IM to pay Mr H compensation for the loss he's suffered as a result of its failings.

I've carefully considered if there's any reason why it wouldn't be fair to ask IM to compensate Mr H for his loss.

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

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

I'm not making a finding that IM should have assessed the suitability of the SIPP or investments for Mr H. I accept that IM wasn't obligated to give advice to Mr H, or otherwise to ensure the suitability of the pension wrapper, investment manager or investments for him. Rather, I'm looking at IM's separate role and responsibilities – and for the reasons I've explained, I think it failed in meeting those responsibilities.

Mr H taking responsibility for his 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 H's actions mean he should bear the loss arising as a result of IM's failings.

In my view, if IM had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted Mr H's business from GBFS *at all*. That should have been the end of the matter – if those things had happened, I'm satisfied the arrangement for Mr H wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

As I've made clear, IM needed to carry out appropriate initial and ongoing due diligence on GBFS and Strand and reach reasonable conclusions. I think it failed to do this. And just having Mr H sign forms containing declarations wasn't an effective way of IM meeting its obligations, or of escaping liability where it failed to meet its obligations.

GBFS was a regulated firm with the necessary permissions to advise Mr H on his pension provisions. Strand was also a regulated firm with the necessary permissions to invest Mr H's monies and Mr H also then used the services of a regulated personal pension provider in IM. I'm satisfied that in his dealings with these parties, Mr H trusted each of them to act in his best interests.

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

Had IM declined Mr H’s business from GBFS, would the transactions complained about still have been effected elsewhere?

From the evidence provided to me, I think it’s more likely than not that Mr H’s pension monies were transferred to IM specifically so as to invest via Strand. A Strand account was applied for on the same day as the SIPP, and the entirety of the funds transferred into the SIPP were sent to Strand to be invested.

IM maintains that if it hadn’t accepted Mr H’s application from GBFS and/or permitted members to invest with Strand in its SIPPs, that the transfers of Mr H’s pension and investments would still have been effected with a different SIPP provider. That’s because it says other SIPP operators accepted non-standard investments into its SIPPs at the time.

But I’ve upheld this complaint on the grounds that IM should’ve refused to accept Mr H’s application from GBFS, and the application to invest via Strand, on the grounds that GBFS was introducing business which carried an increased risk of consumer detriment. This was because of the inherent conflict of interest and liquidity risk attached to the OWG Bonds and because they were investments that were not permitted under IM’s terms when they were unlisted (as they were for some of the time IM was accepting business from GBFS involving Stand). So, whether or not the investments would be classed as Standard Assets, does not, in my view, make a difference here. It is the combination of features of the investments Strand made for customers that clearly produce a high risk of consumer detriment, which ought to have led IM to refuse to do business with Strand. So, had IM carried out appropriate due diligence checks it would’ve come to the conclusion that it shouldn’t accept any business from GBFS or permitted investments to be made via Strand.

I also don’t think it’s fair and reasonable to say that IM shouldn’t compensate Mr H for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I’ve found IM 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 H’s business from GBFS for the reasons I’ve set out above.

In the circumstances, I’m satisfied it’s fair and reasonable to conclude that if, and *before* it received Mr H’s application, IM had declined to accept business from GBFS and/or hadn’t continued to permit its members to invest with Strand, Mr H’s monies wouldn’t still have been transferred into the IM SIPP.

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, I don’t think these circumstances apply to Mr H. Mr H was not provided with an incentive and he didn’t know anything about the investments that he went on to make. Mr H had been cold-called by GBFS and otherwise had no reason to review his pension – he was a long way from retirement and didn’t have any objectives that he wished to explore at the time. Mr H says he was simply told by GBFS he could get better returns. And, based on the evidence I’ve seen to date, I’m not satisfied that Mr H understood the risks involved in the transactions.

On balance, I’m satisfied that Mr H, 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 IM had refused to accept Mr H's application from GBFS and/or hadn't continued to permit its members to invest with Strand the transactions this complaint concerns wouldn't still have gone ahead. That's because Mr H didn't seek out advice about his pension, he was cold-called by GBFS and wasn't otherwise interested in making changes to his pensions. But even if Mr H did seek out advice from another adviser I think it's unlikely that another adviser would've recommended that he transfer out of his DB scheme. That's in view of the Regulator's starting position that transferring out of a DB scheme won't usually be suitable. So, on balance, I think Mr H would've remained in his DB scheme if IM had refused to accept his SIPP application.

<u>Summary</u>

Overall, I think it's fair and reasonable to direct IM to pay Mr H compensation in the circumstances. While I accept that other parties might have some responsibility for initiating the course of action that's led to Mr H' loss, I consider that IM failed to comply with its own regulatory obligations and didn't put a stop to the transactions proceeding by declining to accept Mr H's application when it had the opportunity to do so. I say this having given careful consideration to the *Adams v Options* judgments but also bearing in mind that my role is to reach a decision that's fair and reasonable in the circumstances of the case having taken account of all relevant considerations.

In making these findings, I've taken into account the potential contribution made by other parties to the losses suffered by Mr H. In my view, in considering what fair compensation looks like in this case, it's reasonable to make an award against IM that requires it to compensate Mr H for the full measure of his loss. IM accepted Mr H's business from GBFS and continued to permit its members to invest with Strand and, but for IM's failings, I'm satisfied that Mr H's pension monies wouldn't have been transferred to IM at all.

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

Putting things right

My aim is to return Mr H to the position he would now be in but for what I consider to be IM's failure to carry out adequate due diligence checks before accepting Mr H's SIPP application.

As I've already mentioned above:

- I don't think it's fair and reasonable to say that IM shouldn't compensate Mr H for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found it did. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted Mr H's application from GBFS.
- If IM had declined to accept Mr H's business from GBFS and Mr H had then sought advice from a different adviser, I think it's unlikely that another adviser, acting reasonably, would have advised Mr H to transfer away from his DB pension.

- Alternatively, if IM had declined to accept Mr H's business from GBFS, Mr H might have simply decided not to seek pensions advice elsewhere from a different adviser and still then retained his existing scheme.

Fair compensation

A fair and reasonable outcome would be for IM to put Mr H, as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr H would most likely have remained in his DB occupational pension scheme but for IM's failings.

IM must therefore 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.

For clarity, Mr H has not yet retired, and he has no plans to do so at present. So, compensation should be based on the scheme's normal retirement age, as per the usual assumptions in the FCA's guidance.

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

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

- calculate and offer Mr H redress as a cash lump sum payment,
- explain to Mr H 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 his personal pension
- offer to calculate how much of any redress Mr H receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr H accepts IM's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr H for the calculation, even if he ultimately decides not to have any of his redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr H's end of year tax position.

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

As such, for the purposes of the calculation that's being carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4, if it wishes, IM 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 Mr H received from the FSCS following the claim about GBFS, as an income withdrawal payment. Where such an allowance is made then IM must also, at the end of the calculation, allow for a notional addition to the overall calculated loss that's equivalent to the payment Mr H received from the FSCS following the claim about GBFS. 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 Mr H received from the FSCS.

Redress paid to Mr H as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4, IM may make a notional deduction to cash lump sum payments to take account of tax that Mr H would otherwise pay on income from his pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr H's likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

Illiquid Investments

My aim is to return Mr H to the position he would've been in but for the actions of IM. This is complicated where investments are illiquid (meaning they cannot be readily sold on the open market) as their value can't be determined, which appears to be the case here.

In order for the SIPP to be closed and further SIPP fees to be prevented, the illiquid investment needs to be removed from the SIPP. To do this IM should reach an amount it's willing to accept as a commercial value for any investment that cannot currently be redeemed, and pay this sum into the SIPP and take ownership of the relevant investment.

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

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

SIPP fees

If there remain illiquid investments that can't be removed from the SIPP, and it hence cannot be closed after compensation has been paid, then it wouldn't be fair for Mr H to have to continue to pay IM annual SIPP fees to keep the SIPP open. As such, if the IM SIPP needs to be kept open only because of an illiquid investment, and is used only or substantially to hold the illiquid investment, then any future IM annual SIPP fees must be waived by IM until the SIPP can be closed.

Compensation for distress and inconvenience

In addition to the financial loss that Mr H has suffered as a result of the problems with his pension, I think that the loss suffered to Mr H's pension provisions has caused Mr H distress. And I think that it's fair for IM to compensate him for this as well. So, IM should pay Mr H £300 for the distress and inconvenience its actions caused him. I think this is a reasonable sum given that IM's actions did not lead to a total loss to Mr H's pension, but will still have caused him to worry about the impact of the loss on his future retirement.

My final decision

Where I uphold a complaint, I can make an award requiring a financial business to pay compensation of up to £160,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £160,000, I may recommend that Intelligent Money Ltd pays the balance.

<u>Determination and award:</u> For the reasons set out above, I'm upholding the complaint. My final decision is that Intelligent Money Ltd must calculate and pay Mr H the compensation amount produced by the calculation, as set out in the steps above, up to the maximum of £160,000.

<u>Recommendation:</u> If the amount produced by the calculation of fair compensation exceeds £160,000, I recommend that Intelligent Money Ltd pay Mr H the balance.

My recommendation would not be binding. Further, it's unlikely that Mr H could accept a final decision and go to court to ask for the balance. Mr H may want to get independent legal advice before deciding whether to accept any final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 23 May 2024.
Hannah Wise
Ombudsman