DRN-4799752

Financial Ombudsman Service

The complaint

Mr K says that Intelligent Money Ltd ('IM') should not have accepted the instruction from his financial adviser to transfer his defined-benefit ('DB') occupational 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 K'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.

Greyfriars Asset Management LLP ('Greyfriars')

Greyfriars was a regulated Discretionary Fund Manager ('DFM'). The Financial Conduct Authority ('FCA') required Greyfriars to stop accepting any new funds into the Greyfriars Portfolio 6 offering in October 2016. The FCA Register records that Greyfriars' authorisation with the FCA was cancelled on 31 August 2023.

Greyfriars Portfolio 6 ('P6')

P6 was a portfolio offered by Greyfriars. Greyfriars said that P6 was a portfolio designed for investors wishing to gain exposure to investments that counter the risks associated with mainstream asset classes. And that the portfolio may wholly consist of non-pooled investments such as Exchange Traded Funds, simple deposits and asset backed securities, unregulated investments including direct investments into commercial property or unquoted corporate bonds.

Strand Capital Limited ('Strand')

Strand was a DFM which was incorporated in April 1999 and went into administration in May 2017. It was regulated by the FCA until 16 August 2023.

Gallium Fund Solutions Limited ('Gallium')

Gallium is a DFM which was incorporated in July 2008 and has been regulated by the FCA since 28 October 2008.

Active Wealth (UK) Limited ('Active Wealth')

Active Wealth was an Independent Financial Adviser (‘IFA’) firm that was incorporated in July 2014 and dissolved on 14 May 2019. Active Wealth was authorised by the FCA between 1 December 2014 and 14 May 2019. Mr R and Mr D were advisers at Active Wealth.

The FCA issued a Decision Notice against Mr R on 2 May 2023 and it’s recorded that Mr R has referred this to the upper Tribunal. It is noted, amongst other things in the Decision Notice and annexes that:

“The Authority’s rules prohibited Active Wealth and its advisers…from receiving commissions, remuneration or benefits of any kind apart from charging for advice provided.
…
The Authority’s prohibition on commission payments (COBS 6.1A.4R) was introduced to prevent advisers having a conflict of interest when recommending that customers invest their pensions in particular pension products. Such commissions create an incentive to recommend the product that would produce the highest payment for the adviser rather than the best outcome for the customer.
…
(Mr R) *dishonestly established, maintained and concealed a conflict of interest that was at the heart of Active Wealth’s business model so that he, and the other advisers, could receive prohibited commission payments…*
…
(Mr R) *dishonestly: (1) advised Active Wealth’s customers to invest in an investment portfolio created by Greyfriars Asset Management LLP (P6) consisting of mini-bonds knowing that it was not suitable for them; (2) falsified the P6 Application Forms in order to create the false impression that P6 was suitable for Active Wealth’s customers when it was not…*
…
Active Wealth was a small firm...Active Wealth’s primary business was the provision of pension and investment advice to retail customers.
…
On 25 May 2021, (Mr R) *was disqualified by the High Court from being a company director for 13 years following an investigation by the Insolvency Service that found that he failed to act in the best interests of Active Wealth’s customers in respect of advice he gave to transfer their pensions to SIPPs and invest in P6.*
…
The investments that Active Wealth recommended for customers’ SIPPs typically depended on the date of the recommendation: (1) from about March 2015 to September 2016, Active Wealth recommended that at least 288 customers invest in – among other things – a portfolio of high risk, illiquid investments called Portfolio Six or P6 that was managed by Greyfriars, a Discretionary Fund Manager (‘DFM’). The Authority required Greyfriars to cease accepting new funds into P6 in October 2016; (2) from no later than December 2016 to March 2017, Active Wealth recommended that about 100 customers invest through a second DFM. One of the investments that this DFM invested in were the sub-funds of an UCITS (Undertaking for Collective Investment in Transferable Securities) …and (3) from about April 2017 to November 2017, Active Wealth recommended approximately 290 customers to invest through a third DFM. That DFM invested customer funds in the UCITS sub-funds.
…
Active Wealth charged customers a flat advice fee, typically of about £1,500...Active Wealth typically shared 50% of that flat advice fee with the business that introduced the customer to Active Wealth…The advice fees were the main source of Active Wealth’s income.
…
However, in reality, Active Wealth’s advisers had a second source of remuneration which was in breach of the Authority’s rules, namely commission paid directly or indirectly from Active Wealth’s customers’ investments.

…
(Mr R) *set up the First Company…and a close relative set up the Second Company… the vast majority of their* (the Companies) *income derived from commission payments paid by issuers of investments into which Active Wealth's customers invested...*
…
The First Company received commission pursuant to marketing agreements…with the issuers of the investments. Of the agreements obtained by the Authority, the commission ranged between 7% and 17% of the sums invested… the First Company also received commission from firms that had their own marketing agreements with issuers for selling investments.
…
…bank statements for the period 12 March 2015 to 22 October 2018 show that the First Company received commission of £2.7 million…for investments that Active Wealth recommended that its customers invest in, including investments through P6 and one other investment.
…
…93.4% of the Second Company's receipts were commission payments: (1) £305,244 (17.6%) represented commission payments for investments in products available through P6...According to the agreements…commission (paid to the Second Company) *ranged between 4% and 17% of the total amount invested...*
…
These…payments represented a conflict of interest between the interests of (Mr R) *(and the other advisers) on the one hand and the customers' interests on the other hand.*
…
There was a significant risk of detriment to Active Wealth's customers because: (1) the commission provided a financial incentive for Active Wealth's advisers to provide unsuitable advice to customers to invest in the investments; (2) as a result of the false and misleading information provided by (Mr R) *to Greyfriars and the SIPP provider about Active Wealth's customers…*(Mr R) *exposed customers to a significant risk of loss from investments through P6 that he knew were highly likely not to have been suitable for them…*
…
Active Wealth's relationship with Greyfriars and P6.

The Greyfriars DFM service operated a range of investment portfolios aimed at financial advisers. One of these portfolios was P6, which was made up of minibonds including overseas investments in real estate, car parks, renewable energy and holiday resorts. The mini-bonds were not listed on a regulated market and promised returns of between 6% and 15% per annum. P6 investments were high risk and illiquid and were unlikely to be suitable for retail customers…
…
On 23 May 2015, Active Wealth entered into the Active Wealth P6 Agreement with Greyfriars. Under the agreement, Active Wealth was responsible for selecting and assessing the suitability of P6 when advising the customer to invest in the portfolio.

(Mr R) *was aware of the warnings contained in Greyfriars' documentation about the risks of investing in P6. In addition, the terms of the Active Wealth P6 Agreement signed by* (Mr R) *confirmed his understanding that "[P6] isn't as liquid as more conventional investments" and that customers could be "locked into a security for an indefinite period".*
…
(Mr R) *told the Authority that he believed that P6 was suitable for customers that were high net worth investors who owned more than one property...*
…
(Mr R's) *assertion that Active Wealth only advised customers who he defined as high net worth, or who owned more than one property, to invest in P6 was false. Rather, P6 was Active Wealth's default investment for its customers…*

…
Further, (Mr R) *admitted that the so-called high net worth customers included those that had "very cautious" or "cautious" attitudes to risk, being those that only wanted to take limited risks with their investments.* (Mr R's) *advice to invest in high-risk, illiquid investments was entirely unsuitable for customers who had "very cautious" or "cautious" attitudes to risk.* (Mr R) *told the Authority that either he or* (Mr D) *had a discussion with each of the customers and advised them that to achieve their targeted income they would have to accept greater risk. However, the evidence shows that it was not true that either* (Mr R) *or* (Mr D) *gave such advice or that the customers agreed to accept the greater risk.*

(Mr R) *knew that Greyfriars would not normally accept an investment into P6 where it represented more than 25% of a customer's "investable wealth". The Greyfriars P6 documentation stated that P6 was appropriate only for a "small proportion" of an investor's funds. However, Active Wealth advised customers to invest up to 62% of their "investable assets" in P6.*
…
…(Mr R) *knew that P6 was not a suitable investment for all of Active Wealth's retail customers but nonetheless allowed it to be Active Wealth's default recommendation and arranged for customers to invest a higher proportion of their SIPP funds than he knew was suitable. This gave rise to a significant risk that Active Wealth's customers would suffer loss that they could not financially bear.*
…
(Mr R)*, on behalf of Active Wealth, signed a declaration in the P6 Application Form that investments in unregulated investments to the proportions specified were suitable for the relevant customer's risk profile, circumstances, knowledge and experience.*

The Authority has reviewed the P6 Application Forms of 18 customers that invested in P6. In the application forms…Active Wealth specified that one of the reasons that the investment…would be suitable…was that they each had a "high" risk profile and capacity for loss. This contradicted Active Wealth's assessment of the attitude to risk and capacity for loss of seven customers because it assessed one customer as having a "very cautious" profile; three customers as having "cautious" profiles; and three customers as having "balanced" profiles.

The Authority considers that Active Wealth and (Mr R) *knowingly and falsely represented on the P6 Application Forms, and to the Authority in interview, that some customers had a "high" risk tolerance and capacity for loss.*

(Examples were given of some customers about whom the FCA considered Mr R/Active Wealth had knowingly provided false and misleading information in the P6 Application Forms, including about their attitude to risk, capacity for loss, about being high net worth and the percentage of their investable assets being invested in P6.)
…
(Mr R) *dishonestly arranged for Active Wealth's customers to invest in P6 in the knowledge it was not suitable for them. He…misled them about the suitability of P6 and its liquidity and falsified the P6 Application Forms in order to create the false impression that P6 was suitable for Active Wealth's customers when it was not. P6 was a high-risk illiquid investment and (*Mr R) *knew this. Notwithstanding this knowledge,* (Mr R) *told Active Wealth's customers and the Authority that it was a suitable investment for Active Wealth's customers, when there was clear evidence to the contrary.*
…
(Mr R) *derived direct financial benefit from the advice fees generated from customers who: switched or transferred out of their existing pension arrangements to SIPPs investing in P6 as a result of Active Wealth's unsuitable advice to invest in P6 and/or invested in P6 as a result of* (Mr R's) *false and misleading statements in the P6 Application Forms.*

…
(Mr R) *accepts that the commission payments ought to have been disclosed to Active Wealth's customers.*
…
*Active Wealth advised at least 658 customers during the Relevant Period (*between 12 March 2015 and 5 February 2018)*. Of those, 580 customers (just over 88%) invested in investments for which commission payments were made. It is highly improbable – particularly for pension investments or pension holders with a low risk profile – that such a high proportion of customers would have been advised to invest in such a narrow range of investments – or investments of these kinds – were it not for the fact that* (Mr R) *and/or other Active Wealth advisers would earn commission if they did so.*
…
…(The FCA) *rejects* (Mr R's) *contention that P6 was not the default investment for Active Wealth customers. Of the 315 Active Wealth clients in the period up to and including September 2016, 255 customers (just over 80%) invested monies in P6.*
…
The high-risk nature of P6 was summarised in statements within the P6 documentation and would also have been apparent to any competent financial adviser…the high risk nature of P6 was clear from when the first investments were made by Active Wealth customers.

Contrary to what was stated in some of the P6 documentation, P6 was not comprised of up to 40% in equities, up to 40% in fixed interest securities and up to 20% in property with the balance in cash...(Mr R) *was aware of this at the time that he was recommending that Active Wealth customers invest in P6.*
…
Greyfriars sent monthly emails to Active Wealth setting out the bonds in which P6 customers were invested. This information made it clear that they were investments in mini-bonds…
…
(Mr R) *does not deny that he stated on P6 Application Forms that Active Wealth customers, who he had assessed as having "very cautious", "cautious" and "balanced" risk profiles, had a high-risk profile and capacity for loss.*
…
It appears to the Authority that the SIPP provider was not given the customer questionnaires which contradicted the information in the P6 Application forms…therefore, the SIPP provider cannot have known that they were not accurate."

The FCA also issued a Final Notice against Mr D of Active Wealth on 28 September 2023. It was noted amongst other things, in the Final Notice that:

"…when advising customers to transfer or switch their pensions to SIPPs and invest part of their SIPP funds in high risk, illiquid investments, (Mr D) *recklessly closed his eyes to the obvious risks that they were not suitable to recommend. This put customers at serious risk of receiving unsuitable advice...*
…
During his time at Active Wealth, (Mr D) *received total income from Active Wealth of £94,773. In addition,* (Mr D) *received total payments of £123,326 from the First Company and £83,023 from the Second Company.*
…
During his time at Active Wealth, (Mr D) *advised about 65 customers to switch or transfer their existing pension arrangements to SIPPs and subsequently advised them to invest part of their SIPP funds in P6…*(Mr D) *failed to provide proper advice to these customers.*
…
(Mr D) *knew that the underlying products in P6 were unregulated investments, including overseas property investments, and that those products relied on alternative funding because they could not receive funding from mainstream banks.* (Mr D) *knew that the*

underlying products carried a higher risk that customers might lose some or all of their pension funds and were not protected by the FSCS.

Notwithstanding (Mr D's) *awareness of the significant risks of these underlying products, he usually recommended that customers, including those that he assessed as having a cautious attitude to risk or who were not sophisticated investors, invest in P6. He told the Authority that he did so because it was Active Wealth's "preferred" investment and that it was "part of Active Wealth's investment process" to recommend P6…*
…
(Mr D) *recklessly ignored the obvious risk that P6 was unsuitable for his clients, and proceeded to recommend it."*

What happened here

Mr K has said at his place of work there was concern about the funding position of the DB scheme. As he was personally worried out the future of the scheme, he sought advice from Active Wealth, who had been recommended by colleagues.

Mr K said that he met with Mr R of Active Wealth, who told him it was a "no brainer" to transfer out of the DB scheme. Mr K said Mr R told him speed was of the essence as many of his colleagues were transferring out and the DB scheme trustees could stop paying transfer values at any point. Mr K says he was due to meet Mr R again to complete the transfer paperwork but Mr R didn't turn up, so he signed the relevant documents and sent them to Mr R. Mr K said he wasn't experienced in investments or pensions and he wasn't told how valuable his benefits were – he feels Active Wealth misled him in this regard. Mr K also said he asked for low risk investments but he didn't receive any advice documents or know what he was investing in.

Active Wealth wrote to IM on 14 February 2017, referring to the SIPP application it had submitted for Mr K via the Strand platform. It enclosed transfer forms for Mr K's DB scheme and identification documents, as well as Mr R's G60 pensions certificate from the Chartered Insurance Institute dated 26 January 2001.

A Financial Advice Certification record was completed by Mr R on 8 February 2017 confirming that Active Wealth had provided Mr K with financial advice specific to his DB scheme and that Mr R had the required permissions to give the advice.

The SIPP was opened on 26 February 2017. And on 27 and 28 February 2017 £870.53 and £64.44 were received into the SIPP, seemingly from two separate pension providers. The total sum was invested in Strand on 1 March 2017.

On 24 March 2017 £152,212 – representing the value of Mr K's DB scheme benefits – was received into the SIPP.

An application form for a Gallium Fund Solutions account was submitted on 30 May 2017. However, it appears this also acted as an application form for the IM SIPP as it contained declarations specific to the SIPP. The application form noted Mr K had appointed a DFM to choose his investments, but he'd chosen a specific model portfolio – the Ultra Conservative portfolio. The application form contained an appendix which said Mr K's attitude to risk was 'very low risk'.

A declaration at the end of the Gallium / SIPP application form was ticked. 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 and held the SIPP Operator and Plan Trustee jointly indemnified against any claim in respect of such decisions.

IM has provided us with a copy of the IM SIPP Terms and Conditions and these stated, amongst other things, that:

- The Terms and Conditions set out the contract between the member and IM and should be read in conjunction with the Key Features of the IM SIPP.
- IM undertook to operate the SIPP in accordance with the SIPP Rules and the Terms and Conditions Agreement.
- The Provider (IM), Operator (IM) and the Trustee (IM or Intelligent Money Trustees Limited) didn't offer and weren't authorised to give advice on transfers.
- The Operator didn't check transfers for suitability.
- It was investors' responsibility to decide whether the IM SIPP was suitable.
- Details of transactions undertaken by Investment Managers on an investor's behalf would only be available from the Investment Managers. The Investment Manager must provide valuations at least monthly to the Operator.
- Neither the Provider, Trustee nor the Operator provided financial advice or accepted any liability for the performance or choice of investments.
- The Operator will not be liable for any loss arising from investor's investment instructions.
- Neither the Trustee, nor the Operator accepted liability for any loss occasioned by any Investment Manager or other person or body which is responsible for any fund management or ancillary connected service.
- The FCA publishes a list of Standard Assets for SIPPs. IM strictly prohibits the investment of any SIPP funds into any asset that doesn't meet the FCA's definition of a Standard Asset.
- A Standard Asset must be capable of being accurately and fairly valued on an ongoing basis and readily realised within 30 days, whenever required. Any investment that doesn't meet the definition of a Standard Asset, as detailed in the document, is classed as a Non-Standard Asset.
- IM strictly prohibits the holding of Non-Standard Assets within IM SIPPs and investors aren't permitted to make any instruction to any party to hold Non-Standard Assets within the SIPP.
- IM instructed investors' Financial Advisers/Discretionary Fund Managers to also agree not to hold any Non-Standard Assets within investors' plans.
- Investors acknowledged, agreed and undertook that Intelligent Money, Intelligent Money Trustees, Intelligent Money Group and their individual Directors and employees have no liability should an investor, their financial adviser or their Discretionary Fund Manager (where relevant) breach the plan rule and access Non-Standard Assets.
- Investors acknowledged and agreed that IM's rule to strictly prohibit the holding of Non-Standard Assets within the SIPP satisfies and discharges IM's duty of care to investors in relation to Non-Standard Assets within their SIPP. And investors agreed to waive any rights to make any claim against these IM entities should the investor, their Financial Adviser or their DFM breach IM's rule on Non-Standard Assets and to keep IM fully indemnified against any claim in relation to Non-Standard Assets.
- The terms are effective as of 1 January 2015.

The IM SIPP Key Features document stated, amongst other things, that:

- Investors, or their Financial Adviser, nominate an Investment Manager to administer, arrange and take investment decisions on the investments held in the IM SIPP.
- IM doesn't accept any liability for any loss as a result of any action by an Investment Manager, IFA or any other person or body responsible for any investment management or associated ancillary services related to investors' IM SIPPs.

The Gallium application form didn't contain the details of any financial adviser, but in the declarations section a box next to the following statement was ticked:

"If you are submitting this application on behalf of a client, please tick to confirm that you have the express authority of the client to do so."

The total amount received from Mr K's former DB scheme was subsequently invested in Gallium on 31 May 2017.

Active Wealth went into liquidation in 2018 and was dissolved in 2019.

As I understand it, after becoming aware the Strand investment in his SIPP had got into difficulties, Mr K contacted the Financial Services Compensation Scheme ('FSCS') to make claims against Strand and Active Wealth.

The FSCS agreed Mr K had a valid claim against Strand and made a payment of £933.69 into his IM SIPP in May 2018. The FSCS subsequently gave Mr K a reassignment of rights in which, amongst other things, the FSCS explained it was transferring back to Mr K any legal rights it held against IM.

The FSCS wrote to Mr K on 14 January 2020 and agreed that Mr K had a valid claim against Active Wealth. The FSCS had calculated Mr K's loss to be £86,521.42 but it would pay him the maximum compensation of £50,000. The FSCS subsequently gave Mr K a reassignment of rights in which, amongst other things, the FSCS explained it was transferring back to Mr K any legal rights it held against IM.

Mr K's representative complained to IM on his behalf in July 2022. It said that IM was required to carry out checks on advisers introducing business to it and it had failed to carry out sufficient checks on Active Wealth. Had it done so, the representative said it would've found that Active Wealth was routinely giving unsuitable advice to consumers, like Mr K, to transfer out of valuable DB schemes and make investments through DFMs, such as Strand, in non-standard assets. It said it ought to have been clear to IM, by the time it received Mr K's SIPP application, that customers introduced by Active Wealth were at risk of detriment.

IM didn't agree it had done anything wrong by accepting the SIPP application. IM said that Active Wealth had the required permissions to advise on DB pension schemes and it had a copy of Mr R's G60 certificate on file demonstrating this. It said it was an adviser-led SIPP provider and any concerns with the suitability of the advice Mr K received should be directed to Active Wealth.

Unhappy with IM's response, Mr K referred his complaint about IM to the Financial Ombudsman Service in September 2022.

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

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

- Active Wealth signed an introducer agreement with IM in February 2015. This remained in place until the FCA placed restrictions on Active Wealth in November 2017.
- Before accepting Active Wealth 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 Mr R's G60 certificate which demonstrated he could advise on DB pension transfers.
- It carried out spot checks on Active Wealth thereafter to ensure it was still authorised and had the required permissions.
- IM understood that Active Wealth would meet clients face to face to sign application forms – at that point IM only accepted wet signatures.
- It didn't request any suitability reports.
- Active Wealth introduced 375 clients, but it hasn't told us how many applications it received before it received Mr K's application.
- Around 51% of applications involved transfers from DB pension schemes.
- It did not allow non-standard investments – Mr K's investments were classified as standard assets at the time.
- The introductions from Active Wealth accounted for around 4% of business during that period.

IM provided a copy of the IM Terms of Business Agreement, which was signed by Mr R of Active Wealth on 13 February 2015. Amongst other things, it was stated in this agreement that:

"IM is under no obligation to accept any Client as a client of Intelligent Money Ltd. 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 provide Intelligent Money Ltd with all necessary documentation in relation to the client's application for a Scheme and to co-operate with Intelligent Money Ltd in the provision of any additional information as necessary.

The Introducer agrees to co-operate with Intelligent Money in its reasonable endeavours to adhere to the guidance previously provided by the FSA in respect of SIPP & PP operators…

…[IM] *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 Scheme 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 the investments:

- The investments were made through regulated third party platforms/DFMs (Strand and Gallium) who agreed to be bound by IM's terms to only invest in standard assets.
- It provided a copy of the Asset Holder Terms of Business ('AHTB') agreement signed by Gallium on 29 March 2017.

- It also provided an AHTB signed by Vega Algorithms Ltd on 5 April 2017. Vega Algorithms was an appointed representative of Gallium and appeared to be involved with the investment of Mr K's funds.
- It carried out due diligence checks on Gallium and in September 2017 it obtained information from Gallium about its structure and investment strategy.
    - This included the Gallium Fund Solutions Limited Assurance Report on Internal Controls for the Year Ended 5 April 2016 and a Due diligence pack dated '2017'.
- Any further information about the investments should be sought from Strand and Gallium.
- Gallium invested Mr K's pension monies in the Newscape funds which were traded on a recognised exchange and were therefore Standard Assets.

IM provided a copy of the AHTB agreement between IM and Gallium. This was signed by both parties in March 2017 (so just prior to IM accepting Mr K's business from Active Wealth). 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 [sic] FCA authorised, or if there is any breach of the conditions set out in this Agreement."

"4. Permitted Investments

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."

The AHTB agreement included Permitted Investment Guidance 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"

Although IM didn't provide a copy of the AHTB agreement for Strand in the file it sent for Mr K, I've seen a copy of the AHTB agreement that Strand signed on 27 February 2017 in a file that IM sent for another complaint being considered by this Service.

After considering all of the information provided, our Investigator upheld the complaint. He thought IM ought to have refused to accept Mr K's SIPP application from Active Wealth. This was because the Investigator thought if IM had carried out sufficient due diligence checks on Active Wealth, including asking reasonable questions about its business model, it would've found significant risks associated with the introductions from it. The majority of the monies being transferred to IM were derived from DB schemes and the Regulator had made it clear transferring out of a DB scheme won't usually be suitable. So, there was a clear risk of consumer detriment from the pattern and volume of business being introduced. The Investigator thought Mr K would not have proceeded to transfer his DB pension if IM had refused his application and explained why. So, he recommended that IM should compensate Mr K on the basis that he'd remained in his DB scheme.

IM didn't accept the Investigator's view and responded as follows:

- The transfer discharge documents sent to Mr K's employer showed advice had been given, by an authorised and appropriately qualified adviser and that Mr K had countersigned these.
- Mr K accepted the advice and transferred £152,212.81 to a SIPP on 24 March 2017. He transferred £148,795.73 out of the IM SIPP on 31 January 2020. As Mr K received an FSCS payment of £50,000 IM is struggling at this stage to see where Mr K's loss is.
- The Investigator had failed to take account of the context in which the advice was given. It took place at a time when there was a huge media backdrop of DB schemes failing and many trade unions were actively encouraging members to leave employer-controlled schemes and take personal control of their own arrangements.
- The volume and type of business introduced by Active Wealth is irrelevant. Mr R was a pension transfer specialist and as such, it was no surprise that the majority of his submitted business was DB pension transfers.
- Active Wealth was FCA authorised. The FCA, with all its resource, regulatory and oversight powers, and with its supervisory and disciplinary responsibilities, still saw fit to award this IFA with Authorised Status, despite having some misgivings (unbeknownst to the industry). If the FCA felt there was just the slightest concern, surely, it would have put in place a temporary injunction to business while it investigated further. Any concerns were obviously not significant otherwise action would have been taken. It is completely unreasonable to suggest that IM should have come to any differing conclusion.

IM said it intended to make further representations and asked for sight of Mr K's FSCS decision letter and reassignment of rights. This was provided by the Investigator.

IM responded and asked for the Investigator's response to the points it initially made before referring the matter to the Ombudsman. IM added that it was concerned the Financial Ombudsman Service appeared to completely disregard COBS 2.4.4 - 2.4.6 which enables a firm to rely on steps taken by other FCA regulated entities. IM reiterated that it was not authorised to give financial advice and had never sought to attain those permissions. It said that to override and dismiss the advice given by an FCA authorised financial adviser, would have required it to 're-perform' the advice process, but without permissions to do so, this is simply not possible.

The Investigator didn't change his view on the matter so the complaint was referred to me for a decision. IM didn't make any further comments.

I issued a provisional decision on 17 April 2024, explaining why I intended to uphold the complaint. In summary, I said that IM should have decided not to accept any business from Active Wealth before it received Mr K's SIPP application from Active Wealth. And I was satisfied that if IM had refused to accept Mr K's application, 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 K back into the position he would've been in if IM had refused to accept his SIPP application from Active Wealth. I also recommended IM should pay Mr K £500 for the distress and inconvenience caused by its actions.

Mr K accepted my provisional decision.

IM acknowledged my provisional decision and said there was a lot of detail devoted to the Greyfriars P6 investment, which Mr K did not invest his pension funds in. It added that the Strand and Gallium investments were standard assets. IM said it intended to respond, and was given extra time to do so, but no response was received by the deadline set.

Although IM didn't provide a substantive response to my provisional decision, I've taken account of information IM has provided in response to a provisional decision I issued on a similar complaint. In that case, IM didn't accept the provisional decision and made the following points:

- Active Wealth, Greyfriars, Strand and Gallium were all FCA authorised and regulated firms when IM accepted applications and investments into its SIPPs.
- IM entered into an agreement with Active Wealth and conducted proportionate due diligence on it.
- The introductions IM received from Active Wealth were not significant in volume – it represented only 5.9% of total 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/switches so as to invest in the same high-risk portfolio.
- 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.
- 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.
- As the investments were standard assets, no enhanced due diligence was required.
- The Gallium 5alpha conservative fund was listed on the Irish Stock Exchange; as such, it was a permitted investment.
- 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 customers would not have effected the transfers of their pensions and made the investments if IM had declined the applications.
- The decision to 'saddle' IM with all of the customers' losses 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 their losses.

I've also taken account of IM's response to another Ombudsman's decision where Active Wealth was the introducer to the IM SIPP. In that complaint, the customer went on to invest through Greyfriars in P6. The Ombudsman upheld the complaint, saying that IM should have decided not to accept business from Active Wealth, not to permit its SIPP members to invest with Greyfriars and not to accept P6 in its SIPPs before it received the complainant's business from Active Wealth. IM made detailed submissions on a number of points in response to the Ombudsman's provisional decision. And it has also made points in response to other provisional decisions issued involving similar issues. Given the overlap in the points IM made in those complaints and the issues I'm considering in this complaint, I've carefully considered everything IM said and I've referred to a number of its submissions in its responses to the decisions later on in this 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.

Having done so, I've decided to uphold it.

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.

The parties to this complaint have provided detailed submissions to support their position and I'm grateful to them for doing so. I've considered these submissions in their entirety. However, I trust that they won't take the fact that my decision focuses on what I consider to be the central issues as a discourtesy. To be clear, the purpose of this decision isn't to comment on every individual point or question the parties have made, rather it's to set out my findings and reasons for reaching them.

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 K fairly, in accordance with his best interests. And what I think is fair and reasonable in light of that. And I think the key issue in Mr K's complaint is whether it was fair and reasonable for IM to have accepted Mr K's SIPP business in the first place. So, I need to consider whether IM carried out appropriate due diligence checks on Active Wealth, and the selected investment managers before deciding to accept Mr K's applications.

Relevant considerations

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 K'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 K's case.

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

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

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

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

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

And in Mr K's complaint, amongst other things, I'm considering whether IM ought to have identified that the introductions from Active Wealth involved a significant risk of consumer detriment and, if so, whether it ought to have ceased accepting introductions from Active Wealth *before* it accepted Mr K's application.

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

So I've considered COBS 2.1.1R – alongside the remainder of the relevant considerations, and within the factual context of Mr K's case, including 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 K on the SIPP and/or the underlying investments. Refusing to accept an application isn't the same thing as advising Mr K 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 K's case.

The regulatory publications

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

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

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

The 2009 Thematic Review Report

The 2009 Report included the following statement:

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

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

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

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

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

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

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

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

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

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

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

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

The later publications

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 worthyetc.)*

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."

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

I acknowledge that the 2009 and 2012 Thematic Review Reports and the *"Dear CEO"* letter aren't formal guidance (whereas the 2013 finalised guidance is). However, 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 also satisfied that IM, at the time of the events under consideration here, thought the regulatory publications were relevant. In the Business Agreement it entered into with Active Wealth IM referenced, in general terms, at least some of the publications *"The Introducer agrees to co-operate with Intelligent Money in its reasonable endeavours to adhere to the guidance previously provided by the FSA in respect of SIPP & PP operators."* Further, IM says it did carry out some due diligence on Active Wealth and the DFMs. So, it clearly thought it was good practice to do this, at the very least.

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 K's 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 K. It is accepted IM wasn't required to give advice to Mr K, and couldn't give advice. And I accept the publications don't alter the meaning of, or the scope of, the Principles. But, as I've said above, they're evidence of what I consider to have been good industry practice at the relevant time, which would bring about the outcomes envisaged by the Principles. 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 Active Wealth/the business Active Wealth was introducing and undertaken sufficient due diligence into the DFMs *before* deciding to accept Mr K's applications.

Ultimately, what I'll be looking at is whether IM took reasonable care, acted with due diligence and treated Mr K fairly, in accordance with his best interests. And what I think is fair and reasonable in light of that. And I think the key issue in Mr K's complaint is whether it was fair and reasonable for IM to have accepted Mr K's applications in the first place. So, I need to consider whether IM carried out appropriate due diligence checks before deciding to accept Mr K'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 Active Wealth were being put at significant risk of detriment. And, if so, whether IM should therefore not have accepted Mr K's applications for the IM SIPP and/or the investments.

The contract between IM and Mr K

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 K or otherwise have ensured the suitability of the SIPP or the investments for him. I accept that IM made it clear to Mr K that it wasn't giving, nor was it able to give, advice and that it played an execution-only role in his SIPP

investments. And that forms Mr K 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 K'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 K on the suitability of the SIPP, using the chosen investment managers 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 K) and treat them fairly. Its obligations and duties in this respect weren't prescriptive and depended on the nature of the circumstances, information and events on an ongoing basis.

And I think that IM understood this to some degree at the time too, as it did more than just check the FCA entries for Active Wealth and the DFMs to ensure they were regulated – it also entered into agreements with those parties and sought additional information.

So, and well before the time of Mr K'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 Active Wealth 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. 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.

Further, I think IM should have carried out appropriate due diligence on the DFMs. 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 the DFMs as investment manager.

I've considered IM's comments about the level of fees it charged customers like Mr K for administering their SIPPs. However, IM still needed to carry out appropriate initial and ongoing due diligence and reach the right conclusions.

IM's due diligence on Active Wealth

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 IM appears to have carried out some checks before it accepted business from Active Wealth, amongst other things, I'm satisfied this included:

- Checking that Active Wealth was regulated and authorised by the FCA to give financial advice.
- Obtaining a copy of an Active Wealth adviser's G60 Certificate.
- Entering into a Business Agreement with Active Wealth.

From the information that has been provided, I'm satisfied 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 Active Wealth *before* it accepted Mr K's application.

As I explain below, based on the available evidence, I think it's more likely than not that the majority of the SIPP business introduced to IM by Active Wealth prior to it receiving Mr K's application was business where consumers would be investing with Greyfriars post-transfer to invest in P6. In other words, it was mostly high risk business where consumer's monies were ending up invested in unregulated and esoteric investments post-transfer. And I think IM should have taken steps to address this potential risk; such steps should have included getting a fuller understanding of the business that Active Wealth 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 Active Wealth. And I think IM should have concluded it shouldn't continue accepting introductions from Active Wealth and *before* it accepted Mr K's SIPP application.

So, based on the evidence provided, I'm of the view IM failed to conduct sufficient due diligence on Active Wealth *before* accepting Mr K'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 Active Wealth. And that IM ought reasonably to have concluded it should not continue to accept business from Active Wealth, and have ended its relationship with it, *before* it received Mr K'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 Active Wealth-introduced consumers

We asked IM about the number of introductions it received from Active Wealth, the percentage of introductions it received from Active Wealth where applicants invested in non-mainstream investments and what number Mr K was amongst the introductions IM received from Active Wealth. IM has confirmed to us that:

- It received 375 introductions from Active Wealth but it didn't say how many applications were received before Mr K's.
- Active Wealth's introductions accounted for 3.95% of its new business during the period which it had an agreement with it.
- 51.46% of the applications involved transfers from DB schemes.
- 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.

In another case I've seen involving an Active Wealth-introduced customer who transferred existing pensions to an IM SIPP, IM told us that customer was the 235th client introduced to it by Active Wealth and that introduction was made in June 2016. As Mr K's introduction to IM was made in February 2017, I've assumed Mr K was between the 236th and 375th client introduced to IM.

On a different case I've seen, not involving Mr K, IM confirmed to us that:

- 41.05% of the 375 introductions from Active Wealth involved consumers who invested with Greyfriars. And P6 was the only investment consumers introduced by Active Wealth made through Greyfriars.
- The date of the first application for a consumer introduced by Active Wealth who invested with Greyfriars was 16 June 2014.

On that case we explained we wanted more information about where consumers introduced by Active Wealth had invested, including those who hadn't invested with Greyfriars. In response IM provided us with the following breakdown:

"The percentages that you asked for are as follow:

Greyfriars - 49%
Strand Capital - 20%
Gallium - 17%
Property Purchase - 0.26%
Prudential - 0.26%
Stocktrade - 0.26%
No Investment Made - 13%"

But, in response to the Ombudsman's provisional decision that I have referred to above, IM said:

- It received a total of 375 introductions from Active Wealth.
- 49% of Active Wealth-introduced consumers invested with Greyfriars, all of these consumers invested in P6.
- The first SIPP application IM accepted for an Active Wealth-introduced consumer who invested with Greyfriars was dated 18 March 2015.
- 76% of the overall introductions IM received from Active Wealth before it accepted that complainant's application in August 2015 involved consumers who invested with

Greyfriars (this figure doesn't include any consumers where IM hadn't received initial investment instructions by the date it accepted that SIPP application).

And in response to another provisional decision recently issued involving similar issues, IM has confirmed that the introductions it received from Active Wealth represented 5.9% of the total introductions it received during the corresponding period.

While there is some inconsistency between these bullet points, I appreciate the information contained within the latter bullet points follows on from an in-depth analysis IM undertook into the business introduced by Active Wealth. So, I'm satisfied that the information IM has provided about this in response to the other Ombudsman's provisional decision contains the correct figures.

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 Active Wealth 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 Active Wealth was introducing to it.

I don't think simply keeping records about the number and nature of introductions that Active Wealth 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 375 members were introduced by IM and 49% of these invested with Greyfriars (so, a little over 180) and that the only investment made with Greyfriars was P6. IM has also said that 51.46% of the introductions it received from Active Wealth involved consumers who effected transfers in from DB schemes. IM has also told us that the first SIPP application IM accepted for an Active Wealth-introduced consumer who invested with Greyfriars was dated 18 March 2015.

As I've mentioned above, the FCA required Greyfriars to stop accepting any new funds into P6 in October 2016. And it seems more likely than not that all, or the least the overwhelming majority, of the 180+ Active Wealth-introduced consumers who invested in Greyfriars will have been introduced to IM by October 2016 at the very latest.

From the FCA's Decision Notice for Mr R it appears that:

- Active Wealth advised at least 658 customers between 12 March 2015 and 5 February 2018.
- Of the 315 Active Wealth clients in the period up to and including September 2016, 255 customers (just over 80%) invested monies in P6.
- From about March 2015 to September 2016, Active Wealth recommended that at least 288 customers invest in, amongst other things, P6 with Greyfriars.
- From no later than December 2016 to March 2017, Active Wealth recommended that about 100 customers invest their monies through a second DFM.
- From about April 2017 to November 2017, Active Wealth recommended approximately 290 customers to invest their monies through a third DFM.

And from what IM has said, we know that of the consumers introduced by Active Wealth:

- 49% invested with Greyfriars.
- 20% invested with Strand Capital.
- 17% invested with Gallium.

As I understand it, Mr K's application for a SIPP was received by IM in February 2017. And, having regard to the evidence that's currently available to me I think it's more likely than not that most of the introductions IM received from Active Wealth *before* it accepted Mr K's business was in respect of consumers who invested in P6 through Greyfriars.

So, I think it's more likely than not that IM had received a number of introductions from Active Wealth, where consumers had invested in P6, before it received Mr K's introduction.

The type of investment most Active Wealth-introduced consumers were making before IM accepted Mr K's SIPP application

As I've mentioned above I'm satisfied most IM members introduced by Active Wealth *before* IM accepted Mr K's business were having their monies invested by Greyfriars into P6.

With regards to P6; I'm satisfied that Greyfriars was investing P6 investors' monies in speculative, high-risk and potentially highly illiquid unlisted Corporate Bonds. We've obtained example/draft copies of the invitation documents for a sample of the types of Corporate Bonds that P6 customers' monies were invested into before Mr K's monies were transferred into the IM SIPP. And we've previously provided IM with a copy of these documents on another complaint, this included the invitation documents for the following investments:

- Olmsted Properties V Bond
- Uavend Bond
- Enviroparks IV Bond
- Eco Parks Bond
- Resort Group V Bond

I think these were typical of the sort of Corporate Bonds that Greyfriars had been investing Active Wealth-introduced consumers' monies into in P6 for some time. That this was the case also doesn't appear to be inconsistent with a transactional analysis IM has provided of disinvestments its members effected from P6 investments from October 2015 until November 2017, in which it includes some members who invested in P6 before Mr K's SIPP application. The P6 disinvestments that were effected in the full transactional analysis through until November 2017 appear to relate primarily, if not exclusively, to various Olmsted, Uavend, Enviroparks, Eco Parks, Coefficient Care and Oasis Atlantico Corporate Bonds.

The following was explained in the promotional invitation documents for the five Corporate Bonds referenced in the bullet points above (some of the points below were referred to in all of the invitation documents, others just in the majority):

- Investments in the Corporate Bonds was speculative.
- The Issuers' ability to meet their payment obligations to the holders of the Corporate Bonds would be wholly linked to, contingent on, highly sensitive to and dependent on the performance of Loan Note Instruments. If the Operating Company didn't perform as expected then it could default on the payment of interest or capital repayment pursuant to the Loan Note Instrument. This in turn could result in the Issuer

defaulting on the payment of interest or principal of the Corporate Bonds on the due dates.
- Whilst transferrable, there was no secondary market for the Corporate Bonds on which the Corporate Bonds could be bought and sold.
- Outside of the redemption dates, requests to redeem would be at the absolute discretion of the Directors.
- There are significant risks associated with investing in the Corporate Bonds. And where the risks specified in the prospectuses materialised, investors could lose part or all of their investment.
- *"Potential investors should…be aware that an investment in the Company involves a high degree of risk."*
- Sums equivalent to those being raised from the Corporate Bonds for the specified purpose wasn't available to the Operating Companies from banks at an acceptable cost.
- The security offered for the bonds wasn't a guarantee from a third-party or financial institution. If the Company and/or Operating Company, and/or any other members of the Group/associated firms that had granted security, were wound-up or liquidated and their assets/security were worth less than the value of the outstanding Corporate Bonds, Bondholders would not get back all, or possibly any, of the monies invested.

And I think, if it had undertaken adequate due diligence into the P6 investment *before* it received Mr K's SIPP application, IM ought reasonably to have identified that:

- Greyfriars was predominantly investing P6 investors' monies in speculative, high-risk and potentially highly illiquid unlisted Corporate Bonds.
- In paperwork Active Wealth-introduced consumers were signing to invest in P6, it was explained that Greyfriars' parent company would *endeavour* to provide liquidity, but there was no guarantee it would be able to.
- In marketing material from Greyfriars' website from the relevant period (copies of which have previously been provided to IM on another complaint that has been the subject of an Ombudsman's final decision), Greyfriars was presenting P6 as an investment that was low risk, would provide high levels of income, was secure and offered a high level of liquidity with P6 being tradable monthly. This was despite the fact that the underlying unlisted Corporate Bond investments which were being made with P6 investors' monies were noted as being high risk in all of the invitation documents I've seen, all of which also highlighted the potential for partial or complete loss of sums invested. It ought to have been clear and obvious that the unlisted Corporate Bond investments were also potentially highly illiquid.
- Consumers may have been misled and could easily have been given the impression, from statements akin to those that Greyfriars was making on its website, that they were assured of high returns with little or no risk and would easily be able to sell their investment when they wished to. Such an impression was clearly misleading.

So, I think IM either was aware, or ought reasonably to have been aware that *most* of the business Active Wealth had introduced to it prior to it receiving Mr K's application was high risk, with most consumers' pension monies ending up invested in high risk unlisted Corporate Bonds via P6, and that this business and the manner in which it was being marketed carried a significant risk of consumer detriment.

What should IM have concluded about the business introduced by Active Wealth?

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 in the same high risk portfolio which was investing largely, or wholly, in high risk, potentially illiquid unlisted Corporate

Bonds. 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. So, while IM says the volume of business that Active Wealth introduced overall wasn't significant, I think the volume of pension transfers being effected through Active Wealth in order to invest in the same particular high-risk portfolio ought to have been a cause for concern.

Having regard to the volume of high-risk business I think it's more likely than not that IM received from Active Wealth prior to Mr K's business being accepted; I think that IM should have been concerned that the volume of introductions, relating mainly to consumers investing in the same Greyfriars portfolio (and with their monies then being invested in higher-risk esoteric investments), was unusual – particularly from a small IFA business. And it should have considered how a small IFA business introducing this volume of higher-risk business was able to meet regulatory standards. I think this was a further clear and obvious potential risk of consumer detriment.

While I've carefully considered what IM has said about this point, I still think this concern ought to have been even greater in light of the volume of cases involving DB transfers IM says it received from Active Wealth. At the date Active Wealth first became an introducer of IM, COBS 19.1.6G stated:

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

COBS 19.1.6G was then amended slightly prior to IM accepting Mr K's business:

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

While I acknowledge COBS 19.1.6G aimed to define the expectation of a regulated financial adviser when determining the suitability of a pension transfer, it emphasises the Regulator's concern about the potential detriment such a transaction could expose a consumer to. Given the nature of its business and regulatory status, I'd expect IM to have been familiar with the guidance contained in the COBS – even if it didn't apply directly to it.

This was a further clear and obvious potential risk of consumer detriment that ought to have been considered alongside the other factors I've mentioned above.

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

IM could simply have concluded that, given the potential risks of consumer detriment from the pattern of business being introduced to it by Active Wealth – which I think should have been clear and obvious at the time – it should not continue to accept applications from Active Wealth. 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 Active Wealth

Given the potential risk of consumer detriment, I think that IM ought to have found out more about how Active Wealth was operating before it received Mr K's application. And, mindful of the type of introductions I think that it's more likely than not that IM was receiving from Active Wealth 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 K's SIPP application, should have checked with Active Wealth 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 the DFMs that Active Wealth-introduced consumers were investing with, how and why such a significant proportion of the retail clients it was introducing were interested in investing specifically in P6, how a firm of its size was able to meet with or speak with all its clients given the volume of business being introduced, what material was being provided to clients by it and what it was telling its clients about P6.

I think it's more likely than not that if IM had checked with Active Wealth and asked the *type* of questions I've mentioned above that Active Wealth would have provided a response. In the alternative, if Active Wealth 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 Active Wealth.

IM might say that it didn't have to obtain this information from Active Wealth. But I think this was a fair and reasonable step to take, in the circumstances, to meet its regulatory obligations 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 Active Wealth – 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 Active Wealth. And, given the unusual pattern of business it was receiving from Active Wealth, I think it would have been fair and reasonable for IM to speak to some applicants 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 Active Wealth they could get a better return by transferring to IM and investing in P6 and that this would involve no, or little risk. I also think it's more likely than not it would have become clear to IM that there was a risk that the consumer-specific paperwork being submitted by Active Wealth to IM, in respect of the P6 applications, might not have provided an accurate summary of at least some of those consumers' circumstances and/or assets and/or experience and/or risk profile. I think that's consistent with what we've seen in some other cases with us involving IM and Active Wealth-introduced consumers who invested in P6. And I also think it's consistent with what the FCA says it found when it took a closer look at Active Wealth's business in the Notices for Mr R and Mr D that I've referred to earlier in this decision.

I appreciate that IM says 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 included addressing a potential risk of consumer detriment by speaking to applicants as this could have provided IM with further insight into Active Wealth's business model and what it was telling consumers. This was a fair and reasonable step to take in reaction to the clear and obvious risks of consumer detriment from Active Wealth-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 Active Wealth-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 Active Wealth. 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 Active Wealth that such checks would only have served to further reinforce the clear and obvious potential risks of consumer detriment associated with introductions from Active Wealth. If IM had undertaken adequate independent checks I think it's more likely than not that it would have identified, amongst others, the following risks and before it received Mr K's application:

- Active Wealth was explaining to some consumers that they could get a better return by transferring to IM and investing in P6 and that this would involve no, or little risk. And, to be clear, I don't think this would have accorded with what Active Wealth would have said it was telling consumers if asked by IM. Mindful of what's stated in the FCA Notices referenced earlier in this decision, I accept that Active Wealth 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.
- Consumer-specific paperwork being submitted by Active Wealth to IM in respect of the P6 applications might not have provided an accurate summary of some consumers' circumstances and/or assets and/or experience and/or risk profile.

Either 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 Active Wealth. I think either ought to have been a clear red flag to IM, especially when considered alongside the pattern of business it was receiving from Active Wealth.

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

In my view, IM didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr K fairly by accepting his application from Active Wealth. To my mind, IM didn't meet its obligations or good industry practice at the relevant time, and allowed Mr K 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 Active Wealth and/or those working for it. And I'm not saying that IM should have been aware of, or identified, everything that was mentioned about Active Wealth and/or those working for it in the FCA Notices. 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 Active Wealth-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 Active Wealth before IM had accepted Mr K's business. Further, that it's the failure of IM's due diligence that's resulted in Mr K being treated unfairly and unreasonably.

IM says it was able to assume Active Wealth would comply with its regulatory obligations and that it was able to rely on written statements from Active Wealth as per COBS 2.4. But, as I've explained above, I'm satisfied that IM didn't comply with its regulatory obligations, good industry practice or treat Mr K fairly by failing to undertake adequate due diligence on Active Wealth. And I'm satisfied that had it undertaken adequate due diligence IM ought reasonably to have been aware of facts that should have caused it to decline to accept business from Active Wealth *before* it accepted Mr K's application. In other words, I'm satisfied that if IM had undertaken adequate due diligence on Active Wealth it ought to have been privy to information which didn't reconcile with what IM says Active Wealth represented to it. And, in failing to take this step, I think it's fair and reasonable to conclude that IM didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr K fairly.

For the reasons given above, IM shouldn't have accepted Mr K's business from Active Wealth. And even if I thought IM had undertaken adequate due diligence on the DFMs that invested Mr K's funds, I'd still consider it fair and reasonable to uphold Mr K's complaint on

the basis that IM didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr K fairly, by accepting his business from Active Wealth. To my mind, IM didn't meet its regulatory obligations or good industry practice at the relevant times, and allowed Mr K to be put at significant risk of detriment as a result.

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

In light of my conclusions about IM's regulatory obligations to carry out sufficient due diligence on Active Wealth and given my finding that in the circumstances of this complaint IM failed to comply with these obligations, I've not gone on to consider IM's obligations under the Principles in respect of carrying out sufficient due diligence on Strand and Gallium. And I make no findings on this issue. As I will go on to explain, it's my view that had IM complied with its regulatory obligations and good industry practice and carried out sufficient due diligence checks on Active Wealth, then Mr K wouldn't have transferred away from his DB scheme or switched his other pensions to the SIPP. So, his funds would not have been invested through either Strand or Gallium.

<u>Was it fair and reasonable in all the circumstances for IM to proceed with Mr K's application?</u>

For the reasons given above, I don't think IM should have accepted Mr K's SIPP application from Active Wealth as it ought to have refused to accept introductions from Active Wealth by the time it received Mr K'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 K 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 Active Wealth.

IM knew that Mr K 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 Active Wealth 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 K's application would have been to decline to accept Mr K's business from Active Wealth.

The Principles exist to ensure regulated firms treat their clients fairly. And I don't think the paperwork Mr K 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 K's IM SIPP shouldn't have been established. And that the opportunity for IM to execute instructions to invest Mr K's monies with Strand or Gallium, 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 K's business from Active Wealth and carry out the investment instructions.

<u>Is it fair to ask IM to pay Mr K compensation in the circumstances?</u>

The involvement of other parties

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

I also accept that Mr K pursued a complaint against Strand and Active Wealth with the FSCS. The FSCS upheld Mr K's complaint about Active Wealth, it calculated Mr K's losses to be in excess of £50,000 and paid him some compensation. It also made a payment to Mr K in respect of his claim against Strand. Following these claims the FSCS provided Mr K with a reassignment of rights.

IM says that it should not be liable for the full extent of Mr K'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 K fairly.

The starting point, therefore, is that it would be fair to require IM to pay Mr K compensation for the loss he's suffered as a result of its failings. I've carefully considered if there's any reason why it wouldn't be fair to ask IM to compensate Mr K for his loss.

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

I want to make clear that I've taken everything each party has said into consideration. And it's my view that it's appropriate and fair in the circumstances for IM to compensate Mr K 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 K.

I'm not making a finding that IM should have assessed the suitability of the SIPP or investments for Mr K. I accept that IM wasn't obligated to give advice to Mr K, 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.

In response to the Investigator's view IM said it couldn't see that Mr K had suffered a loss, given he transferred a total of around £153,000, transferred out around £149,000 and received a further £50,000 from the FSCS. But the FSCS estimated Mr K's loss to be around £86,500 when it carried out the calculation in January 2020. This was attributable to the hypothetical value of the DB scheme benefits Mr K had lost, which is the correct basis for the calculation, not the loss experienced on the transfer value Mr K received. And ultimately, Mr K alleges that IM has caused him a loss here and I think Mr K is entitled to pursue a complaint against IM on this basis.

Mr K 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 K'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 K's business from Active Wealth *at all*. That should have been the end of the matter – if that had happened, I'm satisfied the arrangement for Mr K wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

As I've made clear, IM needed to carry out appropriate initial and ongoing due diligence on Active Wealth and reach the right conclusions. I think it failed to do this. And just having Mr K 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. In my view, if IM had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted Mr K's business from Active Wealth.

Active Wealth was a regulated firm with the necessary permissions to advise Mr K on his pension provisions. Strand and Gallium were also regulated firms with the necessary permissions to invest Mr K's monies and Mr K also used the services of a regulated personal pension provider in IM. I'm satisfied that in his dealings with these parties, Mr K 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 K for the loss he's suffered. I don't think it would be fair to say in the circumstances that Mr K should suffer the loss because he ultimately instructed the transactions be effected.

<u>Had IM declined Mr K's business from Active Wealth, would the transactions complained about still have been effected elsewhere?</u>

As I've explained above, had it undertaken adequate due diligence IM ought reasonably to have been aware of facts that should have caused it to decline to accept business from Active Wealth *before* it accepted Mr K's application. And IM didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr K fairly, by accepting his business from Active Wealth.

IM might say that if it hadn't accepted Mr K's application from Active Wealth, that the transfers of Mr K's pensions and investments would still have been effected with a different SIPP provider. But I don't think it's fair and reasonable to say that IM shouldn't compensate Mr K for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found IM did by accepting the introduction from Active Wealth. 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 K's business from Active Wealth.

In the circumstances, I'm satisfied it's fair and reasonable to conclude that if, and *before* it received Mr K's application, IM had declined to accept business from Active Wealth, Mr K'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 K. Mr K was not provided with an incentive and he says he wasn't told anything about the investments that he went on to make. Mr K says he was simply told by Active Wealth it was a 'no brainer' to transfer his pensions to a SIPP. Mr K said he asked for low risk investments but he didn't know what he was investing in. And, based on the evidence I've seen to date, I'm not satisfied that Mr K understood the risks involved in the transactions.

On balance, I'm satisfied that Mr K, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for himself. So, 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 K's application from Active Wealth, the transactions this complaint concerns wouldn't still have gone ahead.

<u>Summary</u>

Overall, I think it's fair and reasonable to direct IM to pay Mr K 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 K's 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 K's application when it had the opportunity to do so.

In making these findings, I've taken into account the potential contribution made by other parties to the losses suffered by Mr K. 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 K for the full measure of his loss. IM accepted Mr K's business from Active Wealth and, but for IM's failings, I'm satisfied that Mr K'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 K'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 K 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 K 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.

<u>What would have happened if Mr K's pension monies hadn't been transferred to IM?</u>

I've thought carefully about what might have happened if IM refused to accept Mr K's business from Active Wealth. As I've mentioned above, I'm satisfied that IM should have decided not to accept business from Active Wealth *before* it received Mr K's business from Active Wealth. I also think it's fair and reasonable to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted Mr K's business from Active Wealth either.

IM said the Investigator hadn't taken account of the context in which the advice was given. IM said the advice was given to Mr K at a time when there was a huge media backdrop of DB schemes failing and many trade unions were actively encouraging members to leave employer-controlled schemes and take personal control of their own arrangements. The

implication of what IM is saying here is that it believes Mr K would've transferred out of his DB scheme regardless.

Mr K told us that at the time of his transfer, there was concern among his employer's workforce about the future of the DB scheme. He said in recent years, while the value of assets had increased, the value of the schemes' liabilities to meet members' benefits had increased by a greater amount. The overall effect had been an increase in the funding shortfall of the schemes. Mr K says he wasn't aware of the finer details, but from his perspective, he was worried about the long-term prospects of the pension scheme. As he didn't know what to do, he sought advice and Active Wealth was recommended to him by colleagues. Mr K says he had very little experience of financial matters and so he relied entirely on the advice he was given by Active Wealth. Mr K says he asked for low-risk investments.

In light of Mr K's testimony, I'm satisfied that Mr K wanted pensions advice at the time (as opposed to him having been 'cold-called' by Active Wealth). So, I've carefully considered what Mr K would most likely have been advised to do if IM had declined to accept his business from Active Wealth and Mr K had then sought advice from a different adviser.

I accept Mr K had some concerns about the funding position of the DB scheme. But given Mr K says he asked for low-risk investments and Active Wealth invested the entirety of his funds in Gallium's 'Conservative' fund, I don't think he was prepared to take much risk with this pension. I'm also not persuaded that he wanted to transfer out of the DB scheme regardless of the advice he received, I think Mr K was simply looking for advice on what was in his best interests.

I think it's very unlikely that suitable advice from a different advisory business would have resulted in Mr K transferring his pension monies to IM. I think it's unlikely that another adviser, acting reasonably, would have advised Mr K to transfer away from his DB scheme. I say this given Mr K's inexperience with investing, his capacity for loss and his low attitude to risk. And also bearing in mind the Regulator's starting assumption that transferring out of a DB pension will not be suitable. So, in the circumstances, I'm satisfied it's fair and reasonable to conclude that if IM had declined to accept Mr K's application from Active Wealth, Mr K would have retained his DB pension.

I note Mr K transferred a small sum from two separate personal pensions to IM. But I think the transfer of those plans was only effected because Active Wealth recommended Mr K transfer out of his DB scheme. So, I don't think Mr K would've transferred these pensions if he had remained in his DB scheme.

<u>In conclusion</u>

Taking all of the above into consideration, I think that in the circumstances of this case it's fair and reasonable for me to conclude that IM should have decided not to accept business from Active Wealth *before* it received Mr K's business from Active Wealth. And I also think it's fair and reasonable for me to conclude that if IM hadn't accepted Mr K's introduction from Active Wealth, that Mr K wouldn't have established and transferred monies into an IM SIPP or made the investments he did with the transferred funds.

For the reasons I've set out, I also think it's fair and reasonable to direct IM to compensate Mr K for the loss he's suffered to his pensions as a result of IM accepting his business from Active Wealth.

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.

Putting things right

My aim is to return Mr K 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 K'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 K 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 K's application from Active Wealth.
- If IM had declined to accept Mr K's business from Active Wealth and Mr K had then sought advice from a different adviser, I think it's unlikely that another adviser, acting reasonably, would have advised Mr K to transfer away from his DB pension. I also don't think he would've transferred his personal pensions.

<u>Fair compensation</u>

A fair and reasonable outcome would be for IM to put Mr K, as far as possible, into the position he would now be in but for its failings.

Mr K transferred monies from three different pension schemes into the SIPP, including monies from two personal pensions and a DB scheme. To put things right IM will need to undertake different types of loss calculations, one in relation to the monies that originated from his DB scheme and another in relation to monies that originated from his personal pension schemes. As part of doing this IM will need to calculate the portion of Mr K's current SIPP value that's attributable to each of the respective transfers/switches and apply them to the relevant calculations.

As I understand it, the balance of Mr K's IM SIPP was transferred to a new provider on 31 January 2020. And this balance included a sum of £933.69 that Mr K received from the FSCS in 2018 in relation to a claim he made about his Strand investment. The SIPP was subsequently closed.

In light of the above, IM should:

- Undertake loss calculations as set out below in respect of each of the schemes from which monies were transferred into the SIPP and pay any redress owing in line with the steps set out below.
- Pay to Mr K £500 to compensate him for the distress and inconvenience he's been caused.

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

I acknowledge that Mr K 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 K'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 assignment if required.

So, I think it's fair and reasonable to make no *permanent* deduction in the redress calculation for the compensation Mr K received from the FSCS. And it will be for Mr K 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 K actually received from the FSCS and has had the use of for a period of the time covered by the calculation.

If IM wishes to make such an allowance, it must first calculate the proportion of the total FSCS payment Mr K received that it's fair and reasonable to apportion to each individual transfer into the SIPP – this must be proportionate to the value of the actual sums transferred in. The total FSCS payment allowed for must be no more than the total FSCS payment Mr K actually received. Having done this, IM can then make the allowance by following the steps set out in the sections below.

Calculate the loss Mr K has suffered as a result of making the transfer in relation to monies originating from his DB scheme

I consider Mr K 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, 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 K'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 K redress as a cash lump sum payment,
- explain to Mr K 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 K receives could be augmented rather than receiving it all as a cash lump sum,
- if Mr K accepts IM's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr K 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 K's end of year tax position.

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 that proportion of the payment Mr K received from the FSCS following the claim about Active Wealth, that it's fair and reasonable to apportion to monies transferred in from the DB scheme and in accordance with what's stated earlier in this provisional decision, as an income withdrawal payment.

Where such an allowance is made then IM must also, at the end of the calculation, allow for a corresponding notional addition to the overall calculated loss that's equivalent to the relevant notional income withdrawal payments allowed for. 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 proportion of the payment Mr K received from the FSCS accounted for in this part of the calculation.

Redress paid to Mr K 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 K 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 K'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.

Calculate the loss Mr K has suffered as a result of making the transfer in relation to monies originating from personal pension schemes

IM should first contact the providers of the personal pension plans that were transferred into the IM SIPP and ask them to provide a notional values for the policies as at the date the monies were transferred away from the IM SIPP on 31 January 2020. For the purposes of the notional calculation the providers should be told to assume no monies would have been transferred away from the plans, and the monies in the policy would have remained invested in an identical manner to that which existed prior to the actual transfer.

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

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

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

The notional value of Mr K's existing pension plans if the monies hadn't been transferred (established in line with the above) less the proportion of the current value of the SIPP being used for this aspect of the calculation (by which I mean that portion which is attributable to monies transferred in from the personal pension plans) as at 31 January 2020 is Mr K's loss.

Any calculated loss as at 31 January 2020 must be brought up to date. To do this, IM must calculate what the current value of the loss figure would be if it had enjoyed a return

equivalent to the FTSE UK Private Investors Income Total Return Index from 31 January 2020 through until the date of my final decision.

If it wishes, IM may make an allowance in the form of a notional withdrawal (deduction) equivalent to that proportion of the payments Mr K received from the FSCS following the claim about Active Wealth, that it's fair and reasonable to apportion to monies transferred in from the defined contribution schemes in accordance with what's stated earlier in this decision, and on the date the payment was actually paid to Mr K. Where such a deduction is made there must also be a corresponding notional contribution (addition) at the date of my final decision equivalent to the total relevant notional withdrawals accounted for in this part of the calculation.

To do this, IM should ask the operators of Mr K's previous defined contribution pension plans to allow for the relevant notional withdrawals in the manner specified above. IM must also then allow for a corresponding notional contribution (addition) as at the date of my final decision, equivalent to the accumulated FSCS payments notionally deducted by the operators of Mr K's previous defined contribution pension plans.

Where there are any difficulties in obtaining notional valuations from the previous operators, IM can instead allow for both the notional withdrawals and contributions in the notional calculation it performs, provided it does so in accordance with the approach set out above.

<u>Pay an amount into Mr K's pension so that the value is increased by the loss calculated above in relation to monies originating from his personal pension schemes</u>

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

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr K as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr K'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.

<u>Illiquid investments</u>

My aim is to return Mr K 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. IM has told me that Mr K's Strand account was closed and his remaining funds were transferred away to a new provider on 31 January 2020. So, the IM SIPP was closed.

<u>Interest</u>

The compensation resulting from the loss assessment calculation relating to Mr K's personal pensions must be paid to Mr K or into his SIPP within 90 days of the date IM receives notification of Mr K's acceptance of my final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation isn't paid within 90 days.

Compensation for distress and inconvenience

In addition to the financial loss that Mr K has suffered as a result of the problems with his pension, I think that the loss suffered has caused Mr K distress. Mr K has told us that the issues with his pension have contributed to his poor health and I don't doubt that the ongoing uncertainty has had an impact on his retirement plans. So, I think that it's fair for IM to compensate Mr K for this as well.

I've considered the particular circumstances of Mr K's case and overall, I think IM should pay Mr K £500 for the distress and inconvenience its actions caused him. I think this is a fair amount, taking account of the impact on Mr K's health and the fact he's lost the guarantees associated with his DB pension.

My final decision

Where I uphold a complaint, I can make an award requiring a financial business to pay compensation of up to £170,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £170,000, I may recommend that Intelligent Money Ltd pays the balance.

Determination and award: For the reasons set out above, I'm upholding the complaint.

My final decision is that Intelligent Money Ltd must calculate and pay Mr K the compensation amount produced by the calculation, as set out in the steps above, up to the maximum of £170,000.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £170,000, I recommend that Intelligent Money Ltd pay Mr K the balance.

My recommendation would not be binding. Further, it's unlikely that Mr K could accept a final decision and go to court to ask for the balance. Mr K 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 K to accept or reject my decision before 12 June 2024.

Hannah Wise
Ombudsman