DRN-4893890

The complaint

Mr R complains that Options UK Personal Pensions LLP (formerly Carey Pensions, referred to as 'Options') didn't undertake sufficient due diligence on the Carbon Credits investment he made through his Options Self-Invested Personal Pension ('SIPP') and should not have permitted the investment to be made. Mr R says he's suffered a loss to his pension provision as a result.

In bringing this complaint, Mr R is represented by a professional third party, but for ease I shall refer to Mr R throughout.

What happened

The entities involved

Options

Options is a SIPP provider and administrator, regulated at the time of these events by the Financial Services Authority ('FSA'), now the Financial Conduct Authority ('FCA'). Its authorisations, in relation to SIPPs, were that it could arrange (bring about) deals in investments, deal in investments as principle, establish, operate and wind-up a pension scheme, and make arrangements with a view to transactions in investments.

Build your Wealth Ltd (Build your Wealth)

Build your Wealth was authorised by the FSA at the time Mr R's SIPP was established. It was incorporated in 2002 and dissolved in October 2015.

It appears it provided advice in relation to the transfer into the SIPP and the investment.

ISP Group Global Financial Services ('ISP')

ISP was established in 1993 and its website at the time described itself as *"a global financial firm specializing in private wealth management, institutional investments and investment banking services for private, institutional and corporate clients worldwide". At the time it was regulated by the Swiss Financial Market Supervisory Authority (FINMA) and the Israeli Securities Authority (ISA)*.

ISP sold the Carbon Credits investment that was to be held in Mr R's SIPP.

A Carbon Credit is a generic term for any tradable certificate or permit representing the right to emit one tonne of carbon dioxide or the mass of another greenhouse gas with a carbon dioxide (tC02e) equivalent to one tonne of carbon dioxide.

Buyers and sellers can use an exchange platform to trade, like a stock exchange for carbon credits. The quality of the credits is based in part on the validation process and sophistication of the fund or development company that acted as the sponsor to the carbon project.

What happened here

Mr R says that in early 2012, he first came across Build your Wealth when he was looking at what pension options were available to him. Mr R said most interactions took place over the phone but he did meet with a representative at Build your Wealth's offices as well.

The representative told Mr R that Carbon Credits investments would be the next big thing and recommended that Mr R transfer his existing personal pension to Options in order to facilitate an investment into Carbon Credits.

He says he was told the investment would be very safe and that it would generate better returns for his pension and so Mr R agreed to the transfer.

An application to open an Options SIPP was submitted to Options in or around May 2012, having been signed by Mr R on 25 April 2012.

A number of sections of the application form were pre completed and it confirmed, under the heading 'Investments', that Mr R wished to invest *"All of Fund, Less Fees"* in Carbon Credits. It also confirmed that Build your Wealth would be registered as Mr R's financial adviser and an initial fee of £1,500 would be paid to his adviser direct from Mr R's SIPP.

The SIPP declaration Mr R signed confirmed, amongst other things, that:

- He agreed to indemnify [Options] 'The Administrator' and [the Options trustees] against any claim in respect of any decision made by himself/or his financial adviser/Investment Manager or any other professional adviser he chose to appoint from time to time;
- He understood that [Options] and [Options' trustees] were not in any way able to provide him with any advice;
- He was establishing the [Options] Pension Scheme on an execution only basis.

Mr R's application was accepted by Options, and his SIPP was established. On 16 May 2012, the transfer of monies from his previous pension, worth approximately £44,000, was then completed.

Mr R signed a member instruction and declaration form for the Carbon Credits investment on 18 May 2012, instructing Options to purchase VER Carbon Credits through ISP for a consideration of £41,354. The document included a background statement, which said:

"The purpose of this introduction is to highlight some of the SIPP related risks involved with Carbon Credits in order that you are aware of these prior to purchase.

Whilst carbon credits generally have been around for some time, the market for trading them is still immature - this means there may not be a ready buyer of the Carbon Credits held within your SIPP and no guarantee that they could be sold at a profit were a buyer found.

Expert commentators suggest that the market in trading the Carbon Credits may take some time to develop (assuming it does develop) - three to five years is mentioned although again these cannot be guaranteed.

Consequently it should be appreciated by you as the scheme member instructing us to purchase Carbon Credits within your SIPP that this investment is potentially high risk, long term in nature and illiquid."

As such, it asked Mr R to acknowledge, amongst other things, that:

- He had a good understanding of carbon credits and VERs.
- Options was acting on an execution only basis and hadn't provided any advice.
- He was aware the investment was high risk and/or speculative, may be illiquid and/or difficult to value or sell and that he wished to proceed.
- He had taken his own advice, including but not limited to, financial, investment and tax advice regarding the Carbon Credits investment.
- He didn't hold Options responsible for any exchange rate or market rate fluctuations that might adversely affect the value of the investment.
- Should the investment be subject to a tax charge within the scheme this would be paid directly from his fund or by him.
- He indemnified Options against any and all liability arising from this investment.

On 18 May 2012, a purchase instruction was issued which confirmed Mr R's SIPP would buy 5,704 units from ISP for the total amount of £41,354. The instruction also confirmed the unit price as £7.25 (including an additional 0.05 transfer fee). The total sum of £41,354 was sent to ISP on 22 May 2012.

As per the contract notes I've seen, Mr R ultimately purchased a total of 5,666 units in two separate Carbon Credit projects for a total amount of £41,077.75 (which included commission payments to ISP). It's noted that there is a discrepancy of approximately £300 (and approximately 40 units) between what Mr R's SIPP sent to ISP and what was actually invested as per the contract notes. However, I've not been provided with any evidence as to the reason for this discrepancy.

In April 2015, it seems Mr R applied to transfer his pension to another provider and Options was notified of this on 5 August 2015. In reply, on 25 August 2015, Options wrote to Mr R informing him (bold, its emphasis):

"To obtain an up-to-date market valuation of your Carbon Credits investment, we have contacted a number of Carbon Credit brokers, who have all confirmed that there are currently no prices available for Carbon Credits. As a result, we understand there is currently no market for selling Carbon Credits however if the position changes we will provide you with a further update as soon as we are able to do so.

As a market valuation for carbon credits is not currently available, we have regrettably had to value your Carbon Credits investment at Nil value. Until we are able to obtain an independent valuation of your Carbon Credits holdings we will continue to value your investment as Nil value, which reflects the current market conditions." [Options' emphasis]

Options further confirmed: *"The cash value of your SIPP is currently £21.49 and we would require [new pension provider] to confirm that they will accept your Carbon Credit investment as an in-specie transfer before we can proceed."*

As I understand it, Mr R didn't proceed with the transfer and remained with Options.
On 10 August 2020, Mr R complained to Options via his representative. In summary, he said that Options had, in accepting his SIPP application and subsequently facilitating the transfer of his personal pension scheme, failed to provide him with a duty of care and didn't treat him fairly. The complaint went on to say:

- Options failed to identify that the investments proposed to be made in Mr R's SIPP were unsuitable for him.

- Options failed to conduct adequate due diligence on the Carbon Credits investment. Had it done so, it would have identified that the investment was unregulated by any UK financial authorities, that it was high risk and speculative and that it had no realistic open market value.
- As such the investment was wholly inappropriate and unsuitable for a retail client such as Mr R was at the time of the transaction.
- The investment has failed and has no value and Mr R has lost the entirety of his pension.
- Options breached its duties owed to its client under the rules and regulations set out by the FSA/FCA.
- Had it acted in accordance with its duties, it should never have allowed the transfer to take place in which case Mr R would never have followed through with the subsequent investment.
- Options should redress his loss so that he was in as close a position as possible to that which he would have been in but for Options' errors.

Around the same time, in September 2020, Mr R also made a claim to the Financial Services Compensation Scheme (FSCS) to complain about the poor advice he received from Build your Wealth (which by now had been dissolved).

On 5 October 2020, Options sent Mr R its final response to his complaint, which it said was made late. In summary, it said Mr R's SIPP was opened in May 2012 and the subsequent investment into Carbon Credits was completed in the same month. Mr R complained to Options in 2020 and so it was made over six years after those events.

In August 2015, Mr R was issued a letter which advised him that his Carbon Credit investment had been valued at nil. Options says this letter reasonably ought to have made Mr R aware he had cause to complain. As he did not make his complaint before August 2018 (within three years of August 2015), the complaint has been made late and Options does not give its consent for or service to consider it.

Mr R did not agree with Options' rejection of his complaint, so he referred his complaint to the Financial Ombudsman Service where it was looked at by our investigator.

After considering the information provided by each side, the investigator thought Mr R's complaint wasn't made late and could be considered by our service.

In summary, whilst they thought that the August 2015 letter would have caused Mr R concern, they didn't think the letter made (or ought to have made) Mr R reasonably aware that Options could be responsible for Mr R's loss and that he could complain to it about this. At that time, a reasonable retail investor in Mr R's position, didn't have an understanding of SIPP providers' obligations to their clients and so our investigator didn't think it was fair to say the August 2015 letter was enough to make Mr R aware of his cause for complaint to Options. So, they concluded the complaint was made in time and could be considered by our service.

Options didn't agree with the investigator's view. In summary it said:

- It remained of the view that the complaint had been made late.
- The August 2015 letter ought reasonably to have made Mr R aware that he had cause to complain.
- The investigator's reasoning that Mr R wasn't aware Options could be at fault for his loss is flawed, and is based on an incorrect interpretation of the requirements set out in the relevant rules.

- The investigator failed to explain when Mr R would have developed an understanding of Options' obligations to him and why he instructed a claims management company to make a complaint when he did.
- It noted that Mr R had made a claim to the FSCS about the advice he received from his financial adviser at the time but that it's not been made clear when this claim was made.
- It also requested an Oral hearing in order to properly determine whether the complaint should be time-barred.

As no agreement could be reached, the matter was passed to me for decision.

My Provisional Decision

In advance of this decision, I issued a provisional decision to the parties in which I said that I thought Mr R's complaint was within our jurisdiction and that it should be upheld. Mr R confirmed his acceptance of my provisional decision, but Options didn't reply.

What I've decided – and why

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

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

In my provisional decision I said:

> *"I've considered all of the points made by the parties. But I haven't responded specifically to all of them below; I have concentrated on what I consider to be the main issues in order that I may determine this complaint. And in doing this I've included some of the arguments, and my responses to them, that Options has raised in other similar Carbon Credit investment complaints considered by this Service.*
>
> *Having considered everything carefully, I've provisionally come to a similar conclusion to the investigator, but for different reasons, that this complaint hasn't been made late and so is one we can look at. I have also considered the merits of this complaint and provisionally decided to uphold it. I'll explain why below and I'm issuing this provisional decision to allow the parties the opportunity to respond.*
>
> *Preliminary point – Options' request for an oral hearing*
>
> *Options says an oral hearing is necessary to explore issues such as when Mr R had, or ought reasonably to have had, knowledge that he had cause to complain.*
>
> *The Ombudsman Service provides a scheme under which certain disputes may be resolved quickly and with minimum formality (s.225 FSMA). DISP 3.5.5R of the FCA Dispute Resolution rules provides the following:*
>
> > *"If the Ombudsman considers that the complaint can be fairly determined without convening a hearing, he will determine the complaint. If not, he will invite the parties to take part in a hearing. A hearing may be held by any means which the Ombudsman considers appropriate in the circumstances,*

including by telephone. No hearing will be held after the Ombudsman has determined the complaint".

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

The key question for me to consider when deciding whether a hearing should be held is whether or not "the complaint and its jurisdiction, can be fairly determined without convening a hearing".

We do not operate in the same way as the Courts. Unlike a Court, we have the power to carry out our own investigation. And the rules (DISP 3.5.8R) mean I, as the Ombudsman determining this complaint, am able to decide the issues on which evidence is required and how that evidence should be presented. I am not restricted to oral cross-examination to further explore or test points.

If I decide particular information is required to decide a complaint fairly, in most circumstances we are able to request this information from either party to the complaint, or even from a third party. In this case, we have undertaken an investigation and asked for the evidence that we needed to complete that. Options has had the opportunity to consider, and comment, on our investigator's opinion in which their findings were summarised. And it will have the same opportunity again once it receives this provisional decision.

I have carefully considered the submissions Options has made. And I am satisfied that I am able to fairly determine this complaint without convening a hearing. In this case, I am satisfied I have sufficient information to make a fair and reasonable decision. So, I don't consider a hearing – or any further investigation by other means – is required.

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

As I'm satisfied it isn't necessary for me to hold an oral hearing, I'll now turn to considering whether Mr R's complaint falls within our service's jurisdiction.

Our Jurisdiction

I've considered all the available evidence and arguments to decide whether Mr R's complaint is within the jurisdiction of the Financial Ombudsman Service.

Before we can consider something, we need to check, by reference to the Financial Conduct Authority's (FCA) DISP Rules and the legislation from which those rules are derived, whether the complaint is one we have the power to look at and whether it's a complaint we should consider.

DISP Rule 2.8.2 R includes rules about general time limits. It says:

> *"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service …*
>
> > *(2) more than:*
> >
> > > *(a) six years after the event complained of; or (if later)*
> > >
> > > *(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;*
> >
> > *unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;*
>
> *unless:*
>
> > *(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R … was as a result of exceptional circumstances; or…*
> >
> > *(5) the respondent has consented to the Ombudsman considering the complaint where the time limits … have expired …"*

Mr R's complaint relates to events in 2012 when his Options SIPP was opened and his investment was made in Carbon Credits. Mr R first made a complaint to Options in 2020, and so he complained over six years from the events in 2012.

I must therefore consider if Mr R complained within three years of the date on which he became aware (or ought reasonably to have become aware) that he had cause for complaint. Specifically, cause to make this complaint about Options.

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

> *"any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a person about the provision of, or failure to provide, a financial service…which:*
>
> *(a) Alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience; and*

(b) *Relates to an activity of that respondent, or any other respondent with whom that respondent has some connection in marketing or providing financial services or products …which comes under the jurisdiction of the Financial Ombudsman Service."*

Accordingly, the material points required for Mr R to have awareness of his cause for complaint about Options include:

- *Awareness of a problem*
- *Awareness that the problem has or may cause him material loss; and*
- *Awareness that the problem was or may have been caused by an act or omission of Options*

Options contends that the August 2015 letter ought to have made Mr R aware of his cause to complain to Options, as it made Mr R "formally aware of the severe decline in his investment value..."

Mr R has told us that he responded to an advert from his representatives in June 2020 and that he was subsequently informed he may have grounds to make a complaint against Options. Up to that point, he says he was unaware of the duty of care Options owed him and of the due diligence that should have been conducted before it proceeded with his transfer.

Having reviewed all available evidence, I think it reasonable that the August 2015 letter ought to have caused Mr R considerable worry, considering his investment had dropped so significantly and was now being valued at nil.

However, I'm not satisfied that Mr R ought to have reasonably been aware he may have cause to complain to Options when he received that letter in August 2015.

I say this because I've not seen anything that would indicate to Mr R that Options may be responsible for the loss and that he could complain to Options about this. He's far more likely to have equated the issue with the advice he received from his financial adviser, rather than with Options.
At the time, I consider that consumers and normal retail investors, such as Mr R, generally didn't have a good understanding of the rules and guidance which applied to SIPP providers, or the responsibilities SIPP providers have towards their clients.

It was only when the unsuccessful judicial review challenge in the R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service [2018] EWHC 287 ("BBSAL") judgment was published in late 2018, that there was increased publicity around SIPP providers' duties. It was then where it became clearer that a SIPP provider could be responsible for the losses a consumer suffered in some circumstances.

So, allowing for some time for Mr R to notice the change in the landscape following the BBSAL judgment and to work out what this meant for him and his SIPP, I think Mr R could reasonably have become aware of Options' role and its potential failures after the start of 2019. And that of course also pre-supposes that he was still looking to determine responsibility for his loss, which had first occurred 3 years prior to this.

It's from this point on that I would have expected Mr R to be able to question the potential issues with the investment and, through some research, whether on his own or with the help of a claims management company (CMC) or solicitor, to understand that his loss may have been caused by an act or omission of Options.

And Mr R did just that. He was prompted to contact his CMC by an advert and he asked them to look into it for him, as he was understandably still concerned about the loss of his pension. After some investigations, Mr R referred his complaint to Options in October 2020. As such, the complaint was referred within three years of January 2019, and so I consider it was referred within the relevant time limits.

It's therefore my provisional jurisdiction decision that the complaint has been made in time and I will now turn to its merits.

Merits of the complaint

Mr R has said, as part of his complaint, that Options knew that he had been advised and introduced to it by Build your Wealth, and Options had failed to carry out sufficient due diligence on the introducer.

I have considered this argument, but ultimately, I haven't reached any findings on this point as I consider this unnecessary to reach a decision on Mr R's complaint. As I go on to explain below, I don't think that Mr R's application to open a SIPP for investment in Carbon Credits ought to have been accepted by Options at all.

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

With that in mind I'll start by setting out what I have identified as the relevant considerations to deciding what is fair and reasonable in this case.

Relevant considerations

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

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

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

And at paragraph 77 of BBA Ouseley J said:

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

In BBSAL, Berkeley Burke brought a judicial review claim challenging the decision of an Ombudsman who had upheld a consumer's complaint against it. The Ombudsman considered the FCA Principles and good industry practice at the relevant time. He concluded that it was fair and reasonable for Berkeley Burke to have undertaken due diligence in respect of the investment before allowing it into the SIPP wrapper, and that if it had done so, it would have refused to accept the investment. The Ombudsman found Berkeley Burke had therefore not complied with its regulatory obligations and had not treated its client fairly.

Jacobs J, having set out some paragraphs of BBA including paragraph 162 set out above, said (at paragraph 104 of BBSAL):

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

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

As outlined above, Ouseley J in the BBA case held that it would be a breach of statutory duty if I were to reach a view on a complaint without taking the Principles into account in deciding what is fair and reasonable in all the circumstances of a case. And Jacobs J adopted a similar approach to the application of the Principles in BBSAL. I am 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 have taken account of both these judgments when making this decision on Mr R's case.

I note that the Principles for Businesses did not form part of Mr Adams' pleadings in his initial case against Options SIPP. And HHJ Dight did not 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 do not say this means Adams is not a relevant consideration at all. As noted above, I have taken account of both judgments when making this decision on Mr R'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 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 did not so much represent a challenge to the grounds on which HHJ Dight had dismissed the COBS claim, but rather was an attempt to put forward an entirely new case.

I note that in the High Court judgement 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."

In my view there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Mr R's complaint. The breaches alleged by Mr Adams were summarised in paragraph 120 of the Court of Appeal judgment. In particular, as HHJ Dight noted, he was not asked to consider the question of due diligence before Options SIPP agreed to accept the store pods investment into its SIPP.

The facts of this case are also different, and I need to construe the duties Options owed to Mr R under COBS 2.1.1R in light of the specific facts of Mr R's case.

To confirm, I have considered COBS 2.1.1R - alongside the remainder of the relevant considerations, and within the factual context of Mr R's case, including Options' role in the transaction.

However, I think it is 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 am required to take into account relevant considerations which include:

- *law and regulations,*

- *Regulators' rules, guidance and standards,*
- *codes of practice,*
- *and, where appropriate, what I consider to have been good industry practice at the relevant time.*

This is a clear and relevant point of difference between this complaint and the judgments in Adams v Options SIPP. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

I also want to emphasise that I don't say that Options was under any obligation to advise Mr R on the SIPP and/or the underlying investments under the circumstances. Deciding to not accept an application because it was being set up to invest in a product that Options considered unsuitable for its SIPP, isn't the same thing as advising Mr R on the merits of the SIPP and/or the underlying investments.

Overall, I am 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 R'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

In the October 2013 Finalised SIPP Operator Guidance, the FCA stated:

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

All firms, regardless of whether they do or do not provide advice must meet Principle 6 and treat customers fairly. COBS 3.2.3(2) is clear that a member of a pension scheme is a 'client' for SIPP operators and so is a customer under Principle 6. It is a

SIPP operator's responsibility to assess its business with reference to our six TCF consumer outcomes."

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

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

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

- *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for unauthorised business warnings.*
- *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*
- *Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.*
- *Being able to identify irregular investments, often indicated by unusually small or large transactions; or higher risk investments such as unquoted shares which may be illiquid. This would enable the firm to seek appropriate clarification, for example from the prospective member or their adviser, if it has any concerns.*
- *Identifying instances when prospective members waive their cancellation rights and the reasons for this.*

Although the members' advisers are responsible for the SIPP investment advice given, as a SIPP operator the firm has a responsibility for the quality of the SIPP business it administers.

Examples of good practice we have identified include:

- *conducting independent verification checks on members to ensure the information they are being supplied with, or that they are providing the firm with, is authentic and meets the firm's procedures and are not being used to launder money*
- *having clear terms of business agreements in place which govern relationships and clarify responsibilities for relationships with other professional bodies such as solicitors and accountants, and*
- *using non-regulated introducer checklists which demonstrate the SIPP operators have considered the additional risks involved in accepting business from 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.

The "Dear CEO" letter also sets out how a SIPP operator might meet its obligations in relation to investment due diligence. It says those obligations could be met by:

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

I acknowledge that the 2009 and 2012 reports and the "Dear CEO" letter aren't formal guidance (whereas the 2013 Finalised Guidance is). However, the fact that the reports and "Dear CEO" letter didn't constitute formal guidance doesn't mean the

importance of these should be underestimated. These provide a reminder that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it's treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications which set out the regulators' expectations of what SIPP operators should be doing also go some way to indicate what I consider amounts to good industry practice, and I'm therefore satisfied it's appropriate to take these into account.

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

At its introduction, the 2009 Thematic Review Report says:

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

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

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

In Options' submissions on other cases with our Service involving SIPP due diligence, including when making its points about regulatory publications, it has referenced the R. (on the application of Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service [2017] EWHC 352 (Admin) case. While the judge in that case made some observations about the application of our statutory remit, that remit remains unchanged. And, as noted above, in considering what's fair and reasonable in all the circumstances of a case, I'm required to take into account (where appropriate) what I consider to have been good industry practice at the relevant time.

I think the 2009 Report is also directed at firms like Options acting purely as SIPP operators, rather than just those providing advisory services. The Report says that "We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses…" And it's noted prior to the good practice examples quoted above that "We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs."

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.

I appreciate that some of the publications I've listed above were published after Mr R's SIPP application and investment in Carbon Credits. But like the Ombudsman in the BBSAL case, I do not think the fact that the later publications (i.e. those other than the 2009 Thematic Review Report), post-date the events that took place in relation to Mr R's complaint, mean that the examples of good practice they provide were not good practice at the time of the relevant events. Although the later publications were published after the events subject to this complaint, the Principles that underpin them existed throughout, as did the obligation to act in accordance with the Principles.

It is also clear from the text of the 2009 and 2012 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 is clear the standards themselves had not changed.

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

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

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

I'd also add that, even if I accepted that any publications or guidance that post-dated the events subject of this complaint don't help to clarify the type of good industry practice that existed at the relevant time (which I don't), that doesn't alter my view on what I consider to have been good industry practice at the time. That's because I find that the 2009 Report together with the Principles provide a very clear indication of

what Options could and should have done to comply with its regulatory obligations that existed at the relevant time before accepting Mr R's SIPP application and the Carbon Credits investment.

It's important to keep in mind the judge in Adams v Options didn't consider the regulatory publications in the context of considering what's fair and reasonable in all the circumstances, bearing in mind various matters including the Principles (as part of the Regulator's rules) or good industry practice.

And in determining this complaint, I need to consider whether, in accepting Mr R's SIPP application with the intention of making an investment in Carbon Credits, Options complied with its regulatory obligations: to act with due skill, care and diligence; to take reasonable care to organise and control its affairs responsibly and effectively; to pay due regard to the interests of its customers and treat them fairly; and to act honestly, fairly and professionally. In doing that, I'm looking to the Principles and the publications listed above to provide an indication of what Options should've done to comply with its regulatory obligations and duties.

Taking account of the factual context of this case, it's my view that in order for Options to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), amongst other things it should have undertaken sufficient due diligence checks on the Carbon Credits investment before accepting Mr R's application to open a SIPP and invest in Carbon Credits.

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

<u>The contract between Options and Mr R</u>

To be clear, I don't say Options should (or could) have given advice to Mr R or otherwise have ensured the suitability of the investment for him. I accept that Options made it clear to Mr R 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 the forms signed by Mr R confirmed, amongst other things, that losses arising as a result of Options acting on his instructions were his responsibility.

So, I've not overlooked or discounted the basis on which Options was appointed. And my decision on what's fair and reasonable in the circumstances of Mr R's case is made with all of this in mind. I've proceeded on the understanding that Options wasn't obliged – and wasn't able – to give advice to Mr R on the suitability of the investment in Carbon Credits that he made. But I don't agree that it couldn't have rejected applications without contravening its regulatory permissions by giving investment advice.

<u>What did Options' obligations mean in practice?</u>

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 investment is appropriate to accept. That involves conducting checks – due diligence – on investments to make informed decisions about accepting business. This obligation was a continuing one.

In this case, the business Options was conducting was its operation of SIPPs. It's my view that in order for Options to have met its regulatory obligations, (under the Principles and COBS 2.1.1R), when conducting its operation of SIPPs business, Options had to decide whether to accept or reject particular investments with the Principles in mind.

Taking account of the Regulator's guidance and what I consider to have been good practice at the time, it's my view that Options was obliged to carry out due diligence on the Carbon Credits investment – due diligence that went further than simply checking that the investment was permitted to be held in the SIPP under HMRC rules. I say that after taking into account the regulatory publications I've referenced earlier in this decision, amongst other matters, in considering whether Options acted fairly and reasonably in this case.

I think that it's fair and reasonable to expect Options to have looked carefully at the Carbon Credits investment before accepting Mr R's application for a SIPP to hold the Carbon Credits investment. To be clear, for Options to accept the Carbon Credits investment without carrying out a level of due diligence that was consistent with its regulatory obligations, while asking its customer to accept warnings absolving it of the consequences, wouldn't in my view be fair and reasonable or sufficient. And if Options didn't look at an investment in detail, and if such a detailed look would have revealed that the investment might not be secure, might be fraudulent, or that the investment couldn't be independently valued, or that it was impaired, it wouldn't in my view be fair or reasonable to say Options had exercised due skill, care and diligence – or treated its customer fairly – by accepting such an investment.

The due diligence carried out by Options on the Carbon Credits investment – and what it should have concluded

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

I also think Options understood this to some extent, as Options has told us on other similar complaints where the consumer invested into Carbon Credits, that it carried out due diligence on the Carbon Credits investment and concluded it was suitable to be held within a UK pension scheme.

And whilst, in Mr R's complaint, it hasn't yet provided evidence of the due diligence checks it carried out, it has explained on other similar complaints, that following its due diligence into Carbon Credits, Options updated its member declaration to include the following wording (emphasis added by Options):

"The purpose of this introduction is to highlight some of the SIPP related risks involved with Carbon Credits in order that you are aware of these prior to purchase.

Whilst Carbon Credits generally have been around for some time, ***the market for trading them is still immature – this means there may not be a ready buyer of the Carbon Credits held within your SIPP and no guarantee they could be sold at a profit were a buyer found.***

*Expert commentators suggest that the market in trading Carbon Credits may take some time to develop **(assuming it does develop)** – typically three to five years is mentioned although these cannot be guaranteed.*

*Consequently it should be appreciated by you as the scheme member instructing us to buy Carbon Credits that **this investment is potentially high risk, long term in nature and illiquid**."*

Options said this reflected the contents of the FSA (the then Regulator) consumer warning, which I assume to mean the warning the FSA issued in August 2011 about individuals investing in Carbon Credits (which I refer to below). Options said the FSA noted in the warning that not all Carbon Credits investments are scams and it clearly appreciated that in some circumstances it would be appropriate to invest in them. Options further added that if the warnings it included in the member declaration were not sufficient to convey to Mr R that the investment was high risk, it asked what wording would have been sufficient to convey that it was high risk.

But I think this somewhat misses the point of what Options' obligations here were in line with the Principles and good industry practice. While ensuring Mr R was aware of the risks of the investment he intended to make was appropriate, Options was still obliged to consider whether the investment was an appropriate investment to be held in its SIPPs at all, bearing in mind what it should have ascertained about the investment if it had carried out appropriate due diligence checks.

It's also important to note that Options' obligations under the Principles were continuous, i.e. it wasn't sufficient to carry out checks once and allow the investment to proceed, it had to be alive to developments, including any updates or commentary from the Regulator, and carry out ongoing checks to limit the risk of consumer detriment.

Overall, I'm not satisfied that Options undertook sufficient due diligence on the Carbon Credits investment before it decided to accept it into its SIPP. So, my provisional finding is that Options didn't meet its regulatory obligations and didn't act fairly and reasonably in its dealings with Mr R, by not performing sufficient due diligence checks on the Carbon Credits investment before deciding to accept it into Mr R's SIPP.

In August 2011, i.e. before Mr R made his investment, and likely after Options had approved the Carbon Credits investment as an appropriate investment for its SIPPs, the FSA issued a consumer warning about the risks of investing in Carbon Credit schemes.

Options has said on another similar complaint that although the FSA stressed not all Carbon Credit schemes are scams, it strongly recommended consumers sought advice from an FSA-authorised financial adviser before getting involved in the carbon credit trading market. It said:

"It is not often made clear to investors that this involves trading on over-the-counter markets which require experience and skill. You may lose money or not be able to sell at all…

Beware that VERs certificates are often labelled as 'certified', but this certification is voluntary involving a wide range of bodies and different quality standards that are not recognised by any UK financial compensation scheme…"

"…Just because the salesperson mentions the Kyoto Protocol or 'government-backed' plans does not tell you anything about the type of carbon credit you are investing in."

These investments were unlikely to be suitable for the majority of retail investors. And they were only generally likely to be suitable for a small element of the investment portfolio of a sophisticated investor.

Taking everything into account, I'm satisfied that Options should – as a minimum – have:

- *Identified the Carbon Credits investment as a high-risk, speculative and non-standard investment and carried out due diligence on it.*
- *Correctly established and understood the nature of the investment.*
- *Considered whether the investment was an appropriate investment to make available via its SIPPs.*
- *Made sure the investment was genuine and not a scam, or linked to fraudulent activity.*
- *Made sure the investment worked as claimed.*
- *Ensured that the investment could be independently valued, both at the point of purchase and subsequently.*

A key issue with carbon credits in general is there is no price transparency – there is no independent source regarding the price being set, and nothing to confirm at what price the credits should be acquired. So, there was no way to establish how the purchase price was being arrived at. As such, there could've been a very significant difference between the price the units were acquired at and the price at which these were sold to Mr R. This is something Options could have, and should have, investigated further.

Assuming that Mr R would hold valid units or credits, there doesn't appear to be any measure of the quality of the credits in question. In other words, were the units or credits being 'generated' valid? I haven't seen any independent verification that the units met the Verified Carbon Standard ('VCS') standard. So, at the time, there was a risk this validation wouldn't be achieved.

I also haven't seen evidence of a registration of the project with the United Nations Framework Convention on Climate Change ('UNFCCC') at the time Mr R invested. The lack of that registration could suggest that the relevant standard hadn't been met.

Furthermore, I haven't seen that it was demonstrated there was any ready market for Mr R's units. It wasn't demonstrated how Mr R would find businesses to buy his small allocation of Carbon Credit units.

And, as I've said above, I think Options also appreciated that there might not be a market for the Carbon Credits and that there was no guarantee that the credits could be sold at a profit. This is because it included these warnings in the indemnity it asked Mr R to sign.

So, at the time of Mr R's investment there was little confirmation that Mr R's SIPP was acquiring anything of any realisable value, whether the credits were being sold at inflated prices and whether there was a market for them.

And I don't think simply noting and making Mr R aware of these issues was consistent with the Principles and good practice. I think Options needed to weigh up these concerns and features and consider whether it was an appropriate investment to be held in customers' pensions.

Options may consider that carrying out the kind of assessment that would be required to establish and interrogate such factors as I've discussed and carry out appropriate due diligence, imposes on it requirements over and above its responsibilities as a SIPP provider. But I'm satisfied these are the kind of things Options needed to do when accepting Mr R's proposed investment to meet its regulatory obligations and good practice. And, I don't think that this amounts to a conclusion that Options should've assessed the suitability of the Carbon Credits investment for Mr R's individual circumstances.

So, based on the evidence I've seen, I'm satisfied that Options didn't carry out sufficient due diligence at the time to satisfy its reasonable responsibilities as a SIPP provider.

<u>If Options had completed sufficient due diligence on Mr R's Carbon Credits investment, what should it reasonably have concluded?</u>

It could be that the investment Mr R made was/is legitimate. I also accept that technically there was a market for carbon credits. But it's been highlighted that it often wasn't possible to sell them even though there was a market for them. So, although they technically worked as claimed, the reality appears to have been very different.

The FSA warning was published before Mr R's SIPP was set up and this made it clear that there may be issues with selling carbon credits. I'm satisfied this is something Options was aware of at the time and it should've considered this as a significant factor in deciding whether to permit the investment. The fact Mr R might have struggled to realise the investment should've caused it significant concern – especially considering that almost the entirety of Mr R's funds in the SIPP were invested in Carbon Credits. It also isn't clear how Mr R would be able to take benefits from his pension if the investment was difficult to value or realise.

At the point Mr R's investment was arranged, Options would've been aware that he was investing almost all of his pension fund in an unregulated, esoteric and high-risk investment which would likely be difficult to sell. I acknowledge that Options wouldn't be aware whether the amounts being invested in Carbon Credits was the entirety of Mr R's pension savings because he may have had other benefits elsewhere. But it was an indicator of the kind of risk to which Mr R was being exposed. These were 'red flags', so to speak, which should've caused Options significant concern as to whether or not the investment was appropriate to be held in members' SIPPs.

It could be argued that not being able to independently value an investment wouldn't be indicative of its performance or legitimacy. But the investment was predicated on the Carbon Credits being sold for more than what was paid for them. And so, I think there should've been concerns if it wasn't possible to independently value them. And if an independent valuation had been possible, it's now been highlighted that voluntary carbon credits were often sold at "significantly inflated prices" so it seems likely this would then have been identified. This would effectively render the investment fundamentally unviable.

Options should also have been aware that investors would be unlikely to benefit, in terms of the investment itself, from any regulatory protections (the investment being unregulated) such as access to the Financial Services Compensation Scheme or the Financial Ombudsman Service.

In the circumstances, I'm satisfied there were a number of concerns Options should've identified. It should've known there was a significant risk of consumer detriment, and it shouldn't have permitted the investment to be held in its SIPP. When doing so, I think it didn't act with due skill, care and diligence or treat Mr R fairly.

To be clear, I reiterate, I'm not making a finding that Options should've assessed the suitability of the Carbon Credits investment for Mr R. I accept Options had no obligation to give advice to Mr R, or to ensure otherwise the suitability of an investment for him.

I'm satisfied Options could've identified the concerns I've mentioned, and ought to have drawn the conclusions I've set out, based on what was known at the time. Options ought to have identified significant concerns in relation to the investment, and it ought to have led it to conclude it shouldn't accept the Carbon Credit Investment into its SIPPs before it accepted Mr R's application to invest in Carbon Credits. It ought to have identified that there was a high risk of consumer detriment here. And it's the failure of Options' due diligence that's resulted in Mr R being treated unfairly and unreasonably.

In my opinion Options didn't meet its regulatory obligations or the standards of good practice at the time, and it allowed Mr R's pension fund to be put at significant risk as a result. So, I think it's fair and reasonable to conclude that Options didn't act with due skill, care and diligence, and it didn't treat Mr R fairly, by accepting the Carbon Credits investment in his SIPP.

<u>Did Options act fairly and reasonably in proceeding with Mr R's instructions?</u>

COBS 11.2.19R

I note that Options has made the point on other similar complaints that COBS 11.2.19R obliged it to execute investment instructions. It effectively says that once the SIPP has been established, it is required to execute the specific instructions of its client.

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

'The heading to COBS 11.2.1R shows that it is concerned with the manner in which orders are to be executed: i.e. on terms most favourable to the client. This is consistent with the heading to COBS 11.2 as a whole, namely: "Best execution". The text of COBS 11.2.1R is to the same effect. The expression "when executing orders" indicates that it is looking at the moment when the firm comes to execute the order, and the way in which the firm must then conduct itself. It is concerned with the "mechanics" of execution; a conclusion reached, albeit in a different context, in Bailey & Anr v Barclays Bank [2014] EWHC 2882 (QB), paras [34] – [35]. It is not addressing an anterior question, namely whether a particular order should be executed at all. I agree with the FCA's submission that COBS 11.2 is a section of the Handbook concerned with the method of execution of client orders,

and is designed to achieve a high quality of execution. It presupposes that there is an order being executed, and refers to the factors that must be taken into account when deciding how best to execute the order. It has nothing to do with the question of whether or not the order should be accepted in the first place.'

I therefore don't think that Options' argument on this point is relevant to its obligations under the Principles to decide whether or not to execute the instruction to make the Carbon Credits investment i.e. to proceed with the applications.

The indemnity

In my view, for the reasons given, Options should've refused to allow Mr R's investment in Carbon Credits and his application to open the SIPP on the basis of that proposed investment. So, things shouldn't have progressed beyond that. Had Options acted in accordance with its regulatory obligations and best practice, it is fair and reasonable in my view to conclude that it shouldn't have permitted the investment.

Further, in my view it's fair and reasonable to say that just having Mr R sign declarations or indemnities, wasn't an effective way for Options to meet its regulatory obligations to treat him fairly, given the concerns Options ought to have had about the investments.

Options knew that the forms Mr R signed, intended, amongst other things, to indemnify it against losses that arose from acting on his instructions. And, in my opinion, relying on the contents of such forms when Options knew, or ought to have known, allowing the Carbon Credits investment to be held within its SIPPs would put investors at significant risk wasn't the fair and reasonable thing to do. The fair and reasonable thing to do would have been to refuse to accept the investments in its SIPPs at all.

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

Ultimately I'm satisfied that Mr R's investment in Carbon Credits shouldn't have been permitted and so the opportunity to proceed in reliance on an indemnity shouldn't have arisen at all.

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

The involvement of other parties

In this decision I'm considering Mr R's complaint about Options. However, I accept that it's likely other parties were involved in the transaction complained about, including Build your Wealth, which has since ceased trading and against whom Mr R has made a successful FSCS claim.

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

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

But I've carefully considered if there's any reason why it wouldn't be fair to ask Options to compensate Mr R for his loss, including whether it would be fair to hold another party liable in full or in part. Whilst I accept that it may be the case that another party might have some responsibility for initiating the course of action that led to Mr R's loss, I'm satisfied that it's also the case that if Options had complied with its own distinct regulatory obligations as a SIPP operator, the investment in Carbon Credits wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

So it is my view that it's appropriate and fair in the circumstances for Options to compensate Mr R to the full extent of the financial losses he's suffered due to Options' failings. And, taking into account the combination of factors I've set out above, I'm not persuaded that it would be appropriate or fair in the circumstances to reduce the compensation amount that Options is liable to pay to Mr R. I have, however, taken into account in the redress provided for below, the FSCS compensation for the Build your Wealth advice received by Mr R, to ensure that he isn't doubly compensated.

Mr R taking responsibility for his own investment decisions

Options has said in other similar complaints that Mr R ought to bear some responsibility for his own actions and the losses that followed. And in Adams, the judge held that in construing the SIPP operator's regulatory obligations, regard should be had to 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. But having done so I am satisfied that it wouldn't be fair or reasonable to say Mr R's actions mean he should bear the loss arising as a result of Options' failings.

Mr R used the services of a regulated personal pension provider in Options. And, in my view, if Options had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted Carbon Credits investments into its SIPPs at all. That should have been the end of the matter – if that had happened, I'm satisfied Mr R's investment in Carbon Credits wouldn't have been made in the first place.

I've carefully considered what Options has said about Mr R being made aware that the investment was high risk. But I'm not satisfied that Mr R understood the risks of the Carbon Credits investment. Indeed, in his submission to our Service, Mr R said he was just promised excellent returns and a safe investment.

But even if Mr R had received an explanation of the risks involved with the investment, for the reasons I've already given, I'm satisfied that if Options had acted in accordance with its regulatory obligations and good industry practice it shouldn't

have accepted the investment into his SIPP. So, the loss he's suffered could have been avoided in any event.

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

Had Options declined to accept Mr R's investment in Carbon Credits, would the transaction complained about still have been effected elsewhere?

Options has said on other similar complaints that if it had refused to permit the investment in Carbon Credits, the investment would still have been effected with a different SIPP provider. But I don't think it's fair and reasonable to say that Options shouldn't compensate Mr R for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found Options did. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted Mr R's application to hold Carbon Credits in its 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."

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

There is nothing to show Mr R genuinely understood the risks involved, and I've not seen any evidence to show Mr R was paid a cash incentive. Mr R has also confirmed that he was paid no such incentive. It therefore cannot be said he was incentivised to enter into the transaction in this way. He says he was just advised of better returns and promised a profitable investment and he transferred his entire pension provision into the Options SIPP.

On balance, I'm satisfied that Mr R, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for himself. So, in my opinion, this case is very different from that of Mr Adams. And having carefully considered all of the circumstances, I'm satisfied it's fair and reasonable to conclude that if Options had refused to accept Mr R's application to invest in Carbon Credits, the transaction this complaint concerns wouldn't still have gone ahead.

So, overall, I do think it's fair and reasonable to direct Options to pay Mr R compensation in the circumstances. While I accept that other might have some responsibility for initiating the course of action that's led to Mr R's loss, I consider that Options failed to comply with its own regulatory obligations when it didn't put a stop to the transactions proceeding. It ought to have declined Mr R's application to open a SIPP to invest in Carbon Credits 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 R. In my view, in considering what fair compensation looks like in this case, it's reasonable to make an award against Options that requires it to compensate Mr R for the full measure of his loss. But for

Options' failings, I'm satisfied that the transaction this complaint concerns wouldn't have occurred in the first place.

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

The key point here is that but for Options' failings, Mr R wouldn't have suffered the loss he's suffered. And, as such, I'm of the opinion that it's appropriate and fair in the circumstances for Options to compensate Mr R to the full extent of the financial losses he's suffered due to its failings, and notwithstanding any failings by another third party.

In conclusion

Taking all of the above into consideration, I think that in the circumstances of this case it's fair and reasonable for me to conclude that Options shouldn't have accepted Mr R's application to open a SIPP to be used to hold the investment in Carbon Credits.

I don't think Options met its regulatory obligations or the standards of good practice at the time, and it allowed Mr R's pension fund to be put at significant risk as a result.

So, for the reasons I've set out, I think it's fair for Options to compensate Mr R for the full losses he's suffered. I say this having given careful consideration to the Adams 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 R to the position he would now be in but for what I consider to be Options' failure to carry out adequate due diligence checks before accepting Mr R's SIPP application or for not terminating the transaction before completion.

In light of the above, I require Options to calculate fair compensation by comparing the current position to the position Mr R would be in if he had not transferred from his existing pension. In summary, Options should:

- Obtain the notional transfer value of Mr R's previous pension plan.
- Obtain the actual transfer value of Mr R's SIPP, including any outstanding charges.
- Pay a commercial value to buy any illiquid investments (or treat them as having a zero value).
- Pay an amount into Mr R's SIPP so as to increase the transfer value to equal the notional value established. This payment should take account of any available tax relief and the effect of charges.
- If the SIPP needs to be kept open only because of the illiquid investment/s and is used only or substantially to hold that asset, then any future SIPP fees should be

waived until the SIPP can be closed.

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

- Pay to Mr R an amount £500 to compensate him for the distress and inconvenience he's been caused.

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

Treatment of the illiquid assets held within the SIPP

I think it would be best if any illiquid assets held could be removed from the SIPP. Mr R would then be able to close the SIPP, if he wishes. That would then allow him to stop paying the fees for the SIPP. The valuation of the illiquid investment/s may prove difficult, as there is no market for them. For calculating compensation, Options should establish an amount it's willing to accept for the investment/s as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investment/s.

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

If Options is unable, or if there are any difficulties in buying Mr R's illiquid investment/s, it should give the holding/s a nil value for the purposes of calculating compensation. In this instance Options may ask Mr R to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the relevant holding/s.

That undertaking should only take effect once Mr R has been compensated in full, to include his receipt of any loss above our award limit and should allow for the effect of any tax and charges on the amount Mr R may receive from the investment/s and any eventual sums he would be able to access from the SIPP. Options will have to meet the cost of drawing up any such undertaking and Mr R's reasonable costs of taking advice in relation to it.

Calculate the loss Mr R has suffered as a result of making the transfer

Options should first contact the provider of the plan which was transferred into the SIPP and ask it to provide a notional value for the policy as at the date of calculation. For the purposes of the notional calculation the provider should be told to assume no monies would've been transferred away from the plan, and the monies in the policy would've remained invested in an identical manner to that which existed prior to the actual transfer.

Any contributions or withdrawals Mr R 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've enjoyed is allowed for.

If there are any difficulties in obtaining a notional valuation from the previous provider, then Options should instead arrive at a notional valuation by assuming the monies would have enjoyed a return in line with the FTSE UK Private Investors Income Total Return Index (prior

to 1 March 2017, the FTSE WMA Stock Market Income Total Return Index). That is a reasonable proxy for the type of return that could have been achieved over the period in question.

I acknowledge that Mr R 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 R'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 R received from the FSCS. And it will be for Mr R to make the arrangements to make any repayments he needs to make to the FSCS.

However, I do think it's fair and reasonable to allow for a temporary notional deduction equivalent to the payment Mr R actually received from the FSCS for a period of the calculation, so that the payment ceases to accrue any return in the calculation during that period.

As such, if it wishes, Options may make an allowance in the form of a notional withdrawal (deduction) equivalent to the payment Mr R received from the FSCS following the claim about Build your Wealth, and on the date the payment was actually paid to Mr R. Where such a deduction is made there must also be a corresponding notional contribution (addition), at the date of my final decision equivalent to all FSCS payments notionally deducted earlier in the calculation.

To do this, Options should calculate the proportion of the total FSCS' payment that it's reasonable to apportion to the transfer into the SIPP, this should be proportionate to the actual sum transferred in. And Options should then ask the operator of Mr R 's previous pension plan to allow for the relevant notional withdrawal(s) and contribution(s) in the manner specified above. The total notional deductions allowed for shouldn't equate to any more than the actual payment from the FSCS that Mr R received. Options must also then allow for a corresponding notional contribution (addition) as at the date of my final decision, equivalent to the accumulated FSCS payment notionally deducted by the operator of Mr R's previous pension plan.

Where there are any difficulties in obtaining a notional valuation from the previous operator, Options can instead allow for both the notional withdrawal(s) and contribution(s) in the notional calculation it performs using the index specified, provided it does so in accordance with the approach set out above.

The notional value of Mr R's existing plan if monies hadn't been transferred (established in line with the above) less the current value of the SIPP (as at date of my final decision) is Mr R's loss.

Pay an amount into Mr R's SIPP so that the transfer value is increased by the loss calculated above.

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

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr R 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 his likely income tax

rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

SIPP fees

If the investments can't be removed from the SIPP, and because of this it can't be closed after compensation has been paid, then it wouldn't be fair for Mr R to have to pay annual SIPP fees to keep the SIPP open. So, if the SIPP needs to be kept open only because of the illiquid investment/s and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.

Pay Mr R £500 for the distress and inconvenience caused

Mr R has been caused distress and inconvenience by the loss of his pension benefits. Mr R's pension is now worth significantly less than he thought it would be. This is money Mr R cannot afford to lose and its loss will naturally have caused him much distress and inconvenience. I consider a payment of £500 is appropriate to compensate for that.

Interest

The compensation resulting from this loss assessment must be paid to Mr R or into his SIPP within 28 days of the date Options receives notification of his acceptance of my final decision. The calculation should be carried out as at the date 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 decision to the date of settlement if the compensation is not paid within 28 days.

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

Assignment of rights

If Options believes other parties to be wholly or partly responsible for the loss, it is free to pursue those other parties. So, if Mr R's loss does not exceed £160,000, or if Options accepts my recommendation below that it should pay the full loss as calculated above, the compensation payable to Mr R may be contingent on the assignment by him to Options of any rights of action he may have against other parties in relation to his transfer to the SIPP and the investments if Options is to request this. Options should cover the reasonable cost of drawing up, and Mr R's taking advice on and approving, any assignment required.
If the loss exceeds £160,000 and Options does not accept my recommendation to pay the full amount, any assignment of Mr R' rights should allow him to retain all rights to the difference between £160,000 and the full loss as calculated above.

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

Determination and award: It's my final decision than I require Options UK Personal Pensions LLP to pay Mr R the compensation amount as set out in the steps above, up to a maximum of £160,000 plus interest and costs.

Where the compensation amount does not exceed £160,000, I additionally require Options UK Personal Pensions LLP to pay Mr R any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I only require Options UK Personal Pensions LLP to pay Mr R any interest as set out above on the sum of £160,000 plus any costs awarded.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Options UK Personal Pensions LLP pays Mr R the balance. I additionally recommend any interest calculated as set out above on this balance and any costs awarded be paid to Mr R.

If Mr R accepts my final decision, the award will be binding on Options UK Personal Pensions LLP. My recommendation is not part of my determination or award. Options UK Personal Pensions LLP doesn't have to do what I recommend. Further, it's unlikely that Mr R can accept my determination and go to Court to ask for the balance. Mr R may want to consider getting independent legal advice before deciding whether to accept my final decision.

My jursidiction decision

It's my decision that this complaint was made in time and can be considered by the Financial Ombudsman Service

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 5 August 2024.

Catarina Machado Pinto Simoes
Ombudsman