DRN-4901453

The complaint

Mrs M complains, with the help of a representative, that Options UK Personal Pensions LLP ('Options' – formerly Carey Pensions) didn't undertake sufficient due diligence before accepting her application to open a self-invested personal pension ('SIPP') and her instruction to invest in carbon credits. She says she's suffered a loss to her pension provision as a result.

What happened

Mrs M has told us she enquired about a free will writing service and subsequently two representatives of a firm called ILAWS visited her at home. During this visit, they asked her about her pensions. She recalls them telling her that she was paying around £700 per year from her defined benefit pensions in administration fees and if she transferred she would be able to draw down funds to help with the costs of her upcoming wedding.

Mrs M says the representatives recommended she invest the remainder of her funds in carbon credits, *"as everyone* [was] *looking to reduce their carbon footprint"* and she would be *"guaranteed a 12% annual bonus"* if she transferred, *"with no admin fees"*. She remembers the representatives saying that they were investing in carbon credits too, as they were *"that good."* She says the representatives explained that Options was *"going to look after"* her SIPP.

Mrs M says the representatives offered her and her partner at the time an upfront payment of £6,000, which appealed to them as they *"were in a lot of debt at the time, but really wanted to get married"*. She's told us they used the £6,000 to pay off some debts.

Mrs M has explained that she and her partner at the time decided to proceed as *"ilaws had been so good with us"* and so *"we could start our guaranteed investment, we were so happy that this was going to guarantee our future, when we retire"*.

The carbon credits Mrs M invested in were sold by the Carbon Advice Group Limited ('CAG'). 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 equivalent (tC02e) equivalent to one tonne of carbon dioxide.

ILAWS wasn't regulated by the Financial Services Authority ('FSA', now the Financial Conduct Authority – 'FCA'). The Director of ILAWS, who I'll call Mr T, submitted the paperwork to Options. He had previously been the Director of two firms that provided mortgage advice. However, Mr T wasn't regulated in any capacity when he submitted Mrs M's SIPP application to Options.

ILAWS sent Options Mrs M's SIPP application in December 2011. The cover letter stated:

> *"Client wishes to invest…£80k Carbon Advice Group"*.

The application form confirmed that Mrs M was employed, earning approximately £18,000 per year. And that she wished to transfer two pensions, with a total value of around £63,000, to the SIPP. Under the heading *"Investments"*, it was noted that Mrs M wished to invest £57,500 with CAG.

Under *"Financial Adviser Details"*, the details of a business I'll call Firm E were given. According to the FCA Register, Firm E was an appointed representative of another firm, which I'll call Firm F – and it was Firm F's FSA authorisation number that was provided. However, the contact details provided for the adviser were those of ILAWS, including the postal address, email address and phone number. The adviser was to receive an initial fee of £3,000, but it's not clear which firm received this.

The declaration Mrs M signed as part of the application form stated, amongst other things, that:

- She agreed to indemnify Options against any claim in respect of any decision made by herself or her Financial Adviser/Investment Manager or any other professional adviser she chose to appoint from time to time;

- She understood that Options wasn't in any way able to provide her with any advice;

- She was establishing the SIPP on an execution-only basis.

Mrs M also signed to waive her SIPP cancellation rights.

Mrs M's application was accepted by Options, and the SIPP was established the same month. Options has told us that it received the proceeds from one of the pensions Mrs M was transferring to the SIPP in February 2012 and the proceeds from the second pension in June 2012.

Mrs M signed a Member Declaration and Indemnity form for the carbon credits investment in June 2012, instructing Options to open an account with CAG to purchase and sell carbon credits for a consideration of £65,000. 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 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 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 a result, it asked Mrs M to acknowledge, amongst other things, that:

- She had a good understanding of carbon credits, Voluntary Emission Reductions ('VERs') and the Verified Carbon Standard ('VCS').
- Options was acting on an execution-only basis and hadn't provided any advice.
- She understood she was purchasing an unregulated alternative investment which, as such, was considered high-risk and/or speculative and could be difficult to value and/or sell/realise.
- She had taken her own advice, including but not limited to, financial, investment and tax advice regarding the investment and its value, taxes, costs and fees.
- Should the investment be subject to a tax charge within the scheme this would be paid directly from her fund or by her.
- She hadn't received an inducement.
- She indemnified Options against any and all liability arising from the investment.

Options invested £65,004 from Mrs M's SIPP into carbon credits in early July 2012.

An Emissions Reduction Purchase Agreement ('ERPA') between CAG and Options was completed and signed the same month. This stated:

> *"The Purchaser* [Options] *agrees to buy and the Seller* [CAG] *agrees to sell the following Contract Certified Emission Reductions ("CERs") according to the attached Terms and Conditions:*
>
> *Quantity of CERs:* *5417*
>
> *Price per tonne (£)* *£12.00*
>
> *Total consideration (£)* *£65004"*

In late July 2012, CAG wrote to Options confirming it had transferred the legal and beneficial title to the CERs to it. CAG also provided the serial numbers and a link to the project.

Mrs M's complaint

Mrs M complained to Options directly in November 2019. She requested compensation because Options had accepted business from an unauthorised firm.

Options issued its final response in January 2020. It didn't uphold Mrs M's complaint. In summary, it said:

- It provides execution-only (i.e. non-advised) SIPP administration services as explained in all the documentation provided to Mrs M when she signed up to her SIPP.
- It isn't permitted to provide advice, or to comment on the suitability of a SIPP, the underlying investments or the introducer chosen by the member.
- It undertook due diligence on ILAWS, giving it no reason to believe it shouldn't accept

introductions from this source, at the time of setting up Mrs M's SIPP.

- It wasn't restricted to dealing only with regulated introducers. ILAWS was at all times treated as an unregulated introducer and it had strict processes in place for dealing with such firms, which were followed.

- Mrs M signed documentation which made clear she was a direct client, hadn't received advice, her investment choices were her sole responsibility and suggested she seek regulated financial advice.

- Mrs M didn't inform it that ILAWS had advised her, and it can't be held responsible for information which wasn't disclosed to it.

- It explained the potential risks of the investment to Mrs M and ensured it was suitable to be held in a SIPP.

- Mrs M elected to invest in carbon credits prior to Options' involvement.

Mrs M didn't agree with Options' findings and referred her complaint to the Financial Ombudsman Service.

In January 2021, a professional representative raised a further complaint with Options on Mrs M's behalf. The representative said Options had acted negligently and in breach of its statutory duty by accepting business from an unregulated introducer and investing Mrs M's funds into a complex, high-risk and illiquid investment. It doesn't appear that Options responded to this later complaint.

One of our Investigators considered Mrs M's complaint. In summary, they:

- Thought the complaint had been made in time, on the basis that it was unlikely Mrs M, as an ordinary retail investor with a limited understanding of Options' obligations as a SIPP operator, would have known, or ought reasonably to have known, of her cause to complain to Options more than three years before she first complained in November 2019. So, they went on to consider the merits.

- Set out the considerations relevant to reaching their view on the merits of Mrs M's complaint, including the FCA's Principles for Businesses, publications issued by the FCA (and its predecessor, the FSA), and relevant case law.

- Acknowledged Options wasn't responsible for assessing the suitability of the SIPP or the investment for Mrs M. They explained that they were considering how Options should have acted to treat Mrs M fairly and reasonably when accepting her business.

- Considered Options should have, as a minimum, identified carbon credits as high-risk and non-standard; ensured it was a suitable investment for a pension scheme, worked as claimed, could be independently valued and there was a viable way to sell it; and been aware that CAG wasn't regulated.

- Said they had to draw negative inferences about Options' due diligence on the investment because it had failed to provide evidence of the same, despite requests.

- Felt that had Options carried out appropriate due diligence on carbon credits, it would have concluded that it wasn't an acceptable investment for Mrs M's SIPP, given the high risk of consumer detriment.

- Said that had Options refused the business, then the transfers to the SIPP and the subsequent investment would, more likely than not, not have taken place.

The Investigator went on to set out how Options should put things right, by calculating if Mrs M would have been better off remaining in the schemes she transferred to the SIPP and paying her compensation.

Another Investigator reviewed the case and agreed it should be upheld. Amongst other things, they said Options should pay Mrs M £500 for the trouble and upset the matter had caused her.

Options didn't respond to either Investigator. As no agreement was reached, the complaint was passed to me for a decision.

I recently issued a provisional decision on this complaint. I concluded that Mrs M's complaint should be upheld.

Mrs M accepted the findings in my provisional decision, but Options didn't respond.

As I haven't received any further submissions from either party, and haven't been persuaded to depart from my provisional findings, I've repeated those findings below, as my final decision. I've therefore not provided any further detail about my provisional findings in this background summary.

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 noted above, I haven't received any further submissions from either party since issuing my provisional decision and haven't been persuaded to depart from my provisional findings. So, I've repeated those findings below, with a few minor changes, as my final decision.

Relevant considerations

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

The Principles

I think 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 1.1.2 G). And I consider that the Principles relevant to this complaint include Principles 2, 3 and 6 which say:

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

I have 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 R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service [2018] EWHC 2878) ('BBSAL'), Berkeley Burke brought a judicial review claim challenging the decision of an Ombudsman who had upheld a consumer's complaint against it. The Ombudsman considered the FCA Principles and good industry practice at the relevant time. He concluded that it was fair and reasonable for Berkeley Burke to have undertaken due diligence in respect of the investment before allowing it into the SIPP wrapper, and that if it had done so, it would have refused to accept the investment. The Ombudsman found Berkeley Burke had therefore not complied with its regulatory obligations and hadn't treated its client fairly.

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

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

The BBSAL judgment also considers section 228 of the Financial Services and Markets Act 2000 ('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'm therefore satisfied that the Principles are a relevant consideration that I must take into account when deciding this complaint.

The Adams court cases and COBS 2.1.1 R

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 both these judgments into account when making this decision on Mrs M's case.

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

I acknowledge that COBS 2.1.1 R (*"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 owed him a duty to comply with COBS 2.1.1 R, 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 had complied with the best interests rule on the facts of Mr Adams' case.

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

I note that in the High Court judgement, HHJ Dight found that the factual context of a case would inform the extent of the duty imposed by COBS 2.1.1 R. HHJ Dight said at paragraph 148:

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

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

In Mrs M's complaint, amongst other things, I'm considering whether Options ought to have identified that the carbon credits investment involved a significant risk of consumer detriment. And if so, whether it ought to have declined Mrs M's application.

The facts of Mr Adams and Mrs M's cases are also different. And I need to construe the duties Options owed to Mrs M under COBS 2.1.1 R in light of the specific facts of her case.

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

However, it's important to emphasise that I must determine this complaint by reference to what I think is fair and reasonable in all the circumstances of the case. And, in doing that, I'm required to take into account relevant considerations which include law and regulations; regulators' rules, guidance and standards; codes of practice; and where appropriate, what I consider to have been good industry practice at the relevant time. This is a clear and relevant point of difference between this complaint and the judgments in both *Adams* cases. 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 Options was under any obligation to advise Mrs M on the SIPP and/or the underlying investments. Refusing to accept an application isn't the same thing as advising Mrs M on the merits of the SIPP and/or the underlying investments. But I'm satisfied Options' obligations included deciding whether to accept particular referrals of business and investments into its SIPP. And I don't accept that it couldn't make such an assessment without straying into giving advice.

Regulatory publications

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

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

I've considered the relevance of these publications. And I've set out what I consider to be the 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 un-authorised business warnings.*
>
> - *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*
>
> - *Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.*
>
> - *Being able to identify irregular investments, often indicated by unusually small or large transactions; or higher risk investments such as unquoted shares which may be illiquid. This would enable the firm to seek appropriate clarification, for example from the prospective member or their adviser, if it has any concerns.*
>
> - *Identifying instances when prospective members waive their cancellation rights and the reasons for this.*
>
> *Although the members' advisers are responsible for the SIPP investment advice given, as a SIPP operator the firm has a responsibility for the quality of the SIPP business it administers.*

Examples of good practice we have identified include:

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

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

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

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

"Due diligence

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

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

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

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

    - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*

    - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*

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

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

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

The July 2014 *"Dear CEO"* letter provided 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. They provide a reminder that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it's treating its customers fairly and producing the outcomes envisaged by the Principles. In that respect, the publications, which set out the regulator's expectations of what SIPP operators should be doing, also go some way to indicate what I consider amounts to good industry practice, and I'm therefore satisfied it's appropriate to take them into account.

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

The introduction to 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 gives an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and producing 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 R (on the application of Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service [2017] EWHC 352 (Admin). 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 *"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 apply and are an indication of the kinds of things a SIPP operator might do to ensure it's treating its customers fairly and producing 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 Mrs M's SIPP application and investment in carbon credits. But like the Ombudsman in the BBSAL case, I don't 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 Mrs M's complaint, mean that the examples of good practice they provide weren't 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's also clear from the text of the 2009 and 2012 thematic review reports (and the *"Dear CEO"* letter in 2014) that the regulator expected SIPP operators to have incorporated the recommended good practices into the conduct of their business already. So, while the regulator's comments suggest some industry participants' understanding of how the good practice standards shaped what was expected of SIPP operators changed over time, it's clear the standards themselves hadn't changed.

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

To be clear, I don't say the Principles or the publications obliged Options to ensure the transactions were suitable for Mrs M. It's accepted Options wasn't required to give advice to Mrs M, and couldn't give advice. And I accept the publications don't alter the meaning of, or the scope of, the Principles. But as I've said above, they 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 agreed with Options that any publications or guidance that post-dated the events which are the 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 Mrs M's SIPP application.

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

Taking account of the factual context of this case, I think that in order for Options to meet its regulatory obligations, (under the Principles and COBS 2.1.1 R), amongst other things, it should have undertaken sufficient due diligence checks into the carbon credits investment *before* accepting Mrs M's application.

Ultimately, what I'll be considering is whether Options took reasonable care, acted with due diligence and treated Mrs M fairly, in accordance with her best interests. And what I think is fair and reasonable in light of that. In my view, the key issue in Mrs M's complaint is whether it was fair and reasonable for Options to have accepted her application in the first place. So, I need to consider whether Options carried out appropriate due diligence checks on the carbon credits investment before deciding to do so.

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 therefore not have accepted Mrs M's application.

The contract between Options and Mrs M

Options has said that it provides execution-only (i.e. non-advised) SIPP administration services. It said this was clearly set out to Mrs M in its product documentation. To be clear, I don't say Options should (or could) have given advice to Mrs M or otherwise have ensured the suitability of the SIPP or investment for her. I accept that Options made it clear to Mrs M that it wasn't giving, nor was it able to give, advice and that it played an execution-only role in her SIPP investment. And that forms Mrs M signed, confirmed amongst other things, that losses arising as a result of Options acting on her instructions were her responsibility.

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 Mrs M'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 Mrs M on the suitability of the SIPP or investments. But I don't agree that it couldn't have rejected applications without contravening its regulatory permissions by giving investment advice.

What did Options' obligations mean in practice?

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

In this case, the business Options was conducting was its operation of SIPPs. It's my view that to meet its regulatory obligations (under the Principles and COBS 2.1.1R) when conducting this business, Options had to decide whether to accept or reject particular introductions and 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 Mrs M's application for a SIPP in order to hold it. 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 nor sufficient. And if Options didn't look at an investment in detail, when such a detailed review would have revealed that it might not be secure, might be fraudulent, couldn't be independently valued, or that it was impaired, it wouldn't in my view be fair and reasonable to say Options had exercised due skill, care and diligence – or treated its customer fairly – by accepting such an investment.

The due diligence Options carried out on the carbon credits investment – and what it should have concluded

I consider that Options' due diligence obligations went beyond checking that the carbon credits investment existed and wouldn't result in tax charges. I think Options understood this at the time, as while we were investigating another complaint, it sent us documents in May 2023 that it considered before accepting the investment as appropriate to be held in its SIPPs. The evidence provided shows that Options:

- Carried out checks through 'World Check' in respect of CAG and its directors.
- Searched Companies House records for CAG and its directors.
- Reviewed the investment brochure provided by CAG, project brochures and CAG's website.
- Reviewed sample applications and investment agreements.
- Reviewed the Technical Infrastructure Overview document.
- Reviewed an investment overview produced by 'Enhance'.
- Held an Investment Committee meeting in August 2011 to consider whether to permit carbon credits investments, which included reviewing the above materials.

The committee concluded that there didn't appear to be a tax charge liability for the investment, so it was to be permitted. However, the committee required the following in order to proceed:

- Alternative Investment Member Declaration and Indemnity for each client that wished to transact in the investment.
- Alternative Investment Adviser Notification letter signed by each adviser.
- Alternative Investment Provider Notification letter signed by CAG.
- Options' Limitation of Liability wording added to all contracts and assignment documents.

So, while Options did undertake some due diligence checks before permitting the investment to be held in its SIPPs, I think it needed to do more to satisfy its obligations under the Principles. And it's 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.

In August 2011, before Mrs M made her investment, and likely after Options had approved the carbon credits investment as an appropriate investment for its SIPPs, the FSA (the then regulator) issued a consumer warning about the risks of investing in carbon credit schemes. Although it stressed that 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 often not made clear to investors that trading on Over-The-Counter (OTC) markets requires experience and skill. You may lose money on your investment by not getting a competitive rate when trading a small volume of carbon credits or not being able to sell your credits 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.

I think this was something Options recognised, given it approved the investment to be held in its SIPPs with caveats. Options wrote to CAG on 1 August 2011 following the Investment Committee meeting, stating that it had approved the investment but had some additional requirements, which included members taking their own tax, investment and financial advice to determine whether it was a suitable investment for them. And that it suggested no more than 50% of members' funds should be invested in this asset given the potential liquidity issues.

For these reasons, the indemnity Options required Mrs M to sign asked her to confirm she had taken appropriate advice. And given the regulator's warning, I think requiring investors to take regulated financial advice would have gone some way to meeting the requirements under the Principles and to protect consumers from detriment.

It's my view that Options ought to have known Mrs M hadn't taken advice from a regulated firm given her introduction was made through ILAWS, which wasn't regulated in any capacity. And as I'll go on to explain below, I think the involvement of Firm E shouldn't have led Options to conclude that Mrs M had received advice. This alone ought to have given Options grounds for refusing to permit Mrs M's application in carbon credits. But I also think Options ought to have had other serious concerns about some of the information it gathered during the due diligence process and drawn different conclusions about the appropriateness of the investment to be held in its SIPPs. Moreover, other information it should have obtained, ought to have given Options real cause for concern about the risk of consumer detriment associated with this business.

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.
- Identified that Mrs M hadn't received regulated advice.

A key issue with carbon credits in general is that 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 a result, there could have been a very significant difference between the price the units were acquired at and the price at which they were sold to Mrs M. This is something Options could and should have investigated further.

Also, assuming that Mrs M would hold valid units or credits, there doesn't appear to be any measure of the quality of the credits in question. There is reference in the CAG investment brochure to the carbon credits it offered having the VCS accreditation. But the brochure described the carbon credits available through the voluntary carbon market as VERs. And the other information Options appears to have reviewed was specific to VERs.

However, the agreement Mrs M actually completed was for CERs. The ERPA showed Mrs M had purchased 5,417 CERs with a unit price of £12 per tonne. So, the information Options had reviewed prior to agreeing to permit the carbon credits investments didn't correlate to the investment Mrs M went on to make. And this purchase agreement didn't state the project or the standard of the units she was investing in.

I appreciate that the transfer certificate for the CERs sent to Options included the serial numbers for the credits purchased and a web link to the project the credits originated from on the United Nations Framework Convention on Climate Change ('UNFCCC') website. I've been able to access this website using the internet archive 'Wayback Machine' and a snapshot from 26 December 2009 shows that Mrs M's carbon credits were derived from a hydroelectric project in China. And, it does appear the credits were registered with the UNFCCC and as such, were valid.

However, while Options could have been satisfied the credits Mrs M was purchasing were valid, I haven't seen that it was demonstrated there was any ready market for Mrs M's units. It wasn't demonstrated how Mrs M would find businesses to buy her small allocation of carbon credit units. And I note the Terms and Conditions attached to the ERPA stated:

> *"There may be a big difference between the buying price and the selling price of Carbon Credits. If you have to sell them immediately, you may get back much less than you paid for them. You may have difficulty in selling Carbon Credits at the price you wish to achieve and, in some circumstances; it may be difficult to sell them at any price. It can be difficult to assess what would be a proper market price for these investments. You should not invest in Carbon Credits unless you have thought carefully about whether you can afford to do so and have taken appropriate advice."*

I think Options also appreciated there might not be a market for the carbon credits and that there was no guarantee the credits could be sold at a profit. This is because it included these warnings in the indemnity it asked Mrs M to sign (although the indemnity referred to VERs not CERs). The immaturity of the market was also something the Investment Committee noted as a risk; therefore, it wanted the indemnity to reflect its suggestion to limit the exposure to the carbon credits investments in its SIPPs to less than 50%. But in spite of this, Options permitted Mrs M to invest over 95% of the funds in her SIPP in carbon credits.

So, at the time of Mrs M's investment there was little confirmation that her 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 Mrs M aware of these issues through a 'Member Declaration and Indemnity' was consistent with the Principles and good practice. I think

Options needed to weigh up these concerns and features and consider whether carbon credits were an appropriate investment to be held in retail investors' 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 undertaking appropriate due diligence, imposes requirements on it 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 Mrs M's proposed investment to meet its regulatory obligations and standards of good practice. And I don't accept this amounts to a conclusion that Options should have assessed the suitability of the carbon credits investment for Mrs M'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 it accepted the carbon credits investment into its SIPP to satisfy its reasonable responsibilities as a SIPP provider.

If Options had completed sufficient due diligence on Mrs M's carbon credits investment, what should it reasonably have concluded?

I think the carbon credits Mrs M was intending to purchase were likely legitimate, given what I've seen on the UNFCCC website. And this reflects the FSA's warning that not all carbon credit investments are scams. 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 carbon credits even though there was a market for them. And even the ERPA terms acknowledged it might not be possible to sell the credits at all. So, although they might technically have worked as claimed, the reality was very different.

The FSA warning was published before Mrs M'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, or should have been, aware of at the time, and it should have considered this as a significant factor in deciding whether to permit the investment. The fact Mrs M might have struggled to realise the investment should have caused it significant concern – especially considering that a substantial amount of the funds in Mrs M's SIPP were invested in carbon credits. It also isn't clear how Mrs M would be able to take benefits from her pension if the investment was difficult to value or realise.

At the point Mrs M's investment was arranged, Options would have been aware that she was investing almost all her 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 amount being invested in carbon credits was the entirety of Mrs M's pension savings because she may have had other benefits elsewhere. But it was an indicator of the kind of risk to which Mrs M was being exposed. These were 'red flags', so to speak, which should have 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 isn't 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 have 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 have identified. It should have 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 Mrs M fairly.

I reiterate that I'm not making a finding that Options should have assessed the suitability of the carbon credits investment for Mrs M. I accept Options had no obligation to give advice to Mrs M, or to ensure otherwise the suitability of an investment for her.

I'm satisfied Options could have 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, which ought to have led it to conclude it shouldn't accept the carbon credits investment into its SIPPs before it accepted Mrs M's application to invest. It ought to have identified that there was a high risk of consumer detriment. And it's the failure of Options' due diligence that's resulted in Mrs M being treated unfairly and unreasonably.

I'm therefore of the opinion *that* Options didn't meet its regulatory obligations or the standards of good practice at the time, and it allowed Mrs M'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 Mrs M fairly, by accepting the carbon credits investment in her SIPP.

Options' due diligence on ILAWS

Options also had a duty to conduct due diligence on ILAWS and give thought to whether to accept Mrs M's application from it. That's consistent with the Principles and the regulatory publications set out earlier in this decision.

But I don't think I need to consider Options' due diligence on ILAWS. That's because I'm satisfied the transfer of Mrs M's existing pensions to a SIPP was arranged for the purpose of investing in carbon credits. I say this because the SIPP application form stated that Mrs M intended to invest in carbon credits. So, from the outset of Mrs M's relationship with Options, it was aware that it was her intention to invest her pension funds in carbon credits.

Accordingly, I don't think it's necessary to consider what due diligence checks Options ought to have carried out on ILAWS, and what it ought to have determined from those checks had it carried them out in detail. That's because I think Options failed to comply with its regulatory obligations and good industry practice at the relevant time when it accepted Mrs M's application to invest in carbon credits through her SIPP. And I'm satisfied it ought to have declined to accept Mrs M's application to make the investment in the first place.

That said, I do think there were obvious issues with the introduction from ILAWS, and the process Options required Mrs M to take before it allowed her to make the investment. It ought to have been clear to Options from the outset that ILAWS wasn't regulated in any capacity to arrange or advise on investments or pensions. But had it checked ILAWS' website at the time of the introduction it would have found that ILAWS was holding itself out as being able to advise on pensions. The involvement of Firm E also ought to have been questioned, particularly as all contact and correspondence with Options came from ILAWS and Firm E gave ILAWS' contact details in the SIPP application form. And in signing the application form declaration, Mrs M confirmed she was establishing the SIPP on an execution-only basis. In short, Options had no evidence to assure it that Mrs M had received the regulated financial advice which the FSA alert in August 2011 had strongly recommended consumers should receive before getting involved in the carbon credit trading market.

Furthermore, the Member Declaration and Indemnity Options asked Mrs M to sign in order to invest with CAG required her to confirm she had taken appropriate advice. But Options ought to have known that Mrs M didn't have a financial adviser, other than ILAWS. Options also ought to have known ILAWS wasn't regulated and as such, not authorised to give her such advice. And Options should have been alive to the risk that ILAWS was advising customers and this posed a significant risk. At the very least, Options ought to have been aware that ILAWS had arranged the SIPP and investments, actions which were likely to be in breach of regulations. And it ought to have proceeded with extreme caution so as to limit the risk of detriment to Mrs M.

I also note that Options appears to have undertaken some due diligence checks on ILAWS from 2012 to 2014, including putting a non-regulated introducer agreement in place. This was after the introduction of Mrs M's business. However, Options' relationship with ILAWS, and in particular, Mr T, was terminated in 2014 because of the misleading information he was providing to customers. And in February 2013, it was noted by a representative of Options that Mr T and ILAWS had been *"delisted"* for some time. So, it seems to me that if Options had carried out sufficient due diligence checks on ILAWS *before* accepting Mrs M's application, it would have likely declined to deal with ILAWS for the same reasons Options decided to terminate its relationship with it in 2014.

Nevertheless, based on what I've seen, Mrs M's application to take out the SIPP was to make the carbon credits investment. And, for reasons I'll come on to below, if that instruction had been declined then her application to open the SIPP and transfer her pensions wouldn't have gone ahead. Her SIPP therefore wouldn't have been opened and her pensions would have stayed where they were.

So, I've not gone on to consider the due diligence Options may have carried out on ILAWS and whether this was sufficient to meet its regulatory obligations in any more detail.

Did Options act fairly and reasonably in proceeding with Mrs M's instructions?

Options may say that it was reasonable to proceed in light of the indemnity, and that it was obliged to proceed in accordance with COBS 11.2.19 R.

COBS 11.2.19 R

On similar cases, Options has made the point that COBS 11.2.19 R obliged it to execute investment instructions. It effectively says that once the SIPP has been established, it's required to execute the specific instructions of its client.

Options' argument about having to execute the transaction as a result of COBS 11.2.19 R 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 instruction.

The indemnity

In my view, for the reasons given, Options should have refused to allow Mrs M's investment in carbon credits and her 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, I think the only fair and reasonable conclusion it could reach was to decline to permit the investment.

Further, just having Mrs M sign declarations or indemnities wasn't, in my view, an effective way for Options, acting fairly and reasonably, to meet its regulatory obligations to treat her fairly, given the concerns Options ought to have had about the investment.

Options knew that Mrs M had signed forms intended, amongst other things, to indemnify it against losses that arose from acting on her 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 Mrs M signed meant that Options could ignore its duty to treat her 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 Mrs M'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.

I share the same view about Mrs M signing the Member Declaration which included a statement that she hadn't received an inducement, when she's told us she received one. Had Options acted as it should have, Mrs M's application would never have reached the point of her having to sign this document.

Is it fair to ask Options to compensate Mrs M?

The involvement of other parties

In this decision I'm considering Mrs M's complaint about Options. However, I accept it is likely other parties were involved in the transaction complained about, including ILAWS and CAG and possibly Firm E/Firm F.

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 3.7.2 R).

As 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 Mrs M fairly. The starting point, therefore, is that it would be fair to require Options to pay Mrs M compensation for the loss she's suffered as a result of its failings.

But I've carefully considered if there's any reason why it wouldn't be fair to ask Options to compensate Mrs M for her loss, including whether it would be fair to hold another party liable in full or in part. While I accept that it may be the case that another party might have some responsibility for initiating the course of action that has led to Mrs M's loss, I'm satisfied 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 she's suffered could have been avoided.

Consequently, it's my view that it's appropriate and fair in the circumstances for Options to compensate Mrs M to the full extent of the financial losses she's suffered due to its 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 Mrs M.

Mrs M taking responsibility for her own investment decisions

In similar cases, Options has said that the member ought to bear some responsibility for their 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'm satisfied that it wouldn't be fair nor reasonable to say Mrs M's actions mean she should bear the loss arising as a result of Options' failings.

Mrs M 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 Mrs M's investment in carbon credits wouldn't have been made in the first place.

I've carefully considered what Options has said about Mrs M being made aware that the investment was high risk. But I'm not satisfied that Mrs M understood the risks of the carbon credits investment. Indeed, in her submissions to this service, Mrs M has said she was told the investment would provide guaranteed returns. I also note that Mrs M signed the Member Declaration and Indemnity around six months after she signed her SIPP application form, so some time after the investment was recommended and when the decision to transfer her pensions to the SIPP had already been made and the process initiated.

But even if Mrs M had received an explanation of the risks involved with the investment, for the reasons 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 her SIPP. So, the loss she's suffered could have been avoided in any event.

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

Had Options declined to accept Mrs M's investment in carbon credits, would the transaction complained about still have been effected elsewhere?

In similar cases, Options has said 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 Mrs M for her 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 Mrs M'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…"*

I've considered this point carefully, as Mrs M has told us that she and her partner at the time were paid a sum of £6,000 to transfer to Options. However, I'm not satisfied that Mrs M proceeded knowing that the investment she was making was high risk, and that she was determined to move forward with the transaction to take advantage of the cash incentive.

There is nothing to show Mrs M genuinely understood the risks involved. She's explained that representatives from ILAWS told her the returns from the carbon credits investment were *"guaranteed"* and if she transferred she would no longer have to pay administration fees from her pensions.

I'm not persuaded that the incentive payment offered meant Mrs M would have proceeded had she understood the risks involved. I acknowledge that the incentive payment would have been appealing to Mrs M given she has told us she was in debt at the time and wanted to get married. But I don't think if Mrs M understood the risks involved she would have transferred regardless in order to obtain the incentive payment. Mrs M contacted ILAWS to enquire about writing a will. She didn't contact them to obtain money so she could pay off her debts. That possibility appears to have been suggested to her by ILAWS.

Mrs M's comments suggest that she was persuaded to transfer on the basis that her pension provision would grow securely without fees. So, I find it more likely than not that had she had been aware returns weren't guaranteed with the carbon credits investment and there would still be fees to pay in the SIPP, she would have considered whether the incentive payment was too good to be true. I'm not persuaded she would have proceeded if she had known her pension provision was at significant risk.

Therefore, in my opinion, Mrs M's 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 had Options refused to accept Mrs M's application to invest in carbon credits and explained to her its reasons for doing so, the transactions this complaint concerns wouldn't have gone ahead.

So, overall, I do think it's fair and reasonable to direct Options to pay Mrs M compensation in the circumstances. While I accept that ILAWS and/or CAG might have some responsibility for initiating the course of action that's led to Mrs M'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 Mrs M'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 Mrs M. 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 Mrs M for the full measure of her loss, while taking into account the payment she received for completing the investment. But for Options' failings, I'm satisfied the transactions this complaint concerns wouldn't have occurred in the first place.

That means 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 Mrs M's right to fair compensation from Options for the full amount of her loss.

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

In conclusion

Having carefully considered all of the circumstances, I'm satisfied it's fair and reasonable to conclude that had Options refused to permit the carbon credits investment in its SIPPs then Mrs M would have retained her existing pensions and wouldn't have transferred them to a SIPP or subsequently made the investment that she did. So, Options should put her back in the position she would have been in if it hadn't accepted her application.

As set out above, I'm satisfied Options should have put a stop to the transactions and that the carbon credits investment wouldn't have taken place if it had treated Mrs M fairly and reasonably. I've carefully considered causation, contributory negligence, apportionment of damages and DISP 3.6.4. But in the circumstances, I'm still satisfied it's fair for Options to compensate Mrs M for her full loss.

Putting things right

My aim in awarding fair compensation is to put Mrs M back into the position she would likely have been in had it not been for Options' failings. Had Options acted appropriately, I think it's more likely than not that she would have remained a member of the schemes that she transferred to the SIPP.

In light of the above, Options should:

- Obtain the actual transfer value of Mrs M's SIPP, including any outstanding charges.

- Pay a commercial value to buy any illiquid investments (or treat them as having a zero value).

- Undertake loss calculations as set out below in respect of each of the schemes from which monies were transferred into the SIPP and pay any redress owing in line with the steps set out below.

- If the SIPP needs to be kept open only because of the illiquid investment 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 Mrs M has paid any fees or charges from funds outside of her pension arrangements, Options should also refund these to her. Interest at a rate of 8% simple per year from date of payment to date of refund should be added to this.

- Pay to Mrs M £500 to compensate her for the distress and inconvenience she's been caused by Options' failings.

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

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. Mrs M would then be able to close the SIPP, if she wishes. That would then allow her to stop paying the fees for the SIPP. For calculating compensation, Options should establish an amount it's willing to accept for the investment as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investment.

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

If Options is unable, or if there are any difficulties in buying Mrs M's illiquid investment, it should give the holding a nil value for the purposes of calculating compensation. In this instance Options may ask Mrs M to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the relevant holding. That undertaking should allow for the effect of any tax and charges on the amount Mrs M may receive from the investment and any eventual sums she would be able to access from the SIPP. Options will have to meet the cost of drawing up any such undertaking and any reasonable costs for advice required by Mrs M to approve it. Options should only benefit from the undertaking once Mrs M has been fully compensated for her loss (to be clear, this includes any loss that's in excess of our award limit).

Calculate the loss Mrs M has suffered as a result of making the transfers

Options must undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in Policy Statement PS22/13 and set out in the regulator's handbook in DISP App 4.

For clarity, Mrs M hasn't yet retired and has no firm plans to do so at present. So, compensation should be based on the scheme's normal retirement age, as per the usual assumptions in the FCA's guidance.

The calculation should take account of the incentive payment received by Mrs M. Given Mrs M's partner at the time of the events has raised a similar and separate complaint, and it's not possible to determine how the ILAWS representatives funded the £6,000 incentive payment they received as a couple, I think it's fairest and simplest to consider that Mrs M has had the benefit of half the incentive payment i.e. £3,000.

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

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

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

Redress paid directly to Mrs M as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4, Options may make a notional deduction to allow for income tax that would otherwise have been paid. Mrs M's likely income tax rate in retirement is presumed to be 20%. However, if Mrs M would have been able to take 25% tax-free cash from the benefits the cash payment represents, then this notional reduction may only be applied to 75% of the compensation, resulting in an overall notional deduction of 15%.

SIPP fees

If the illiquid investment 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 Mrs M to have to continue 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 and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.

Fees or charges from funds outside of pension arrangements

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

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

Distress and inconvenience

It's clear from Mrs M's submissions to this service that the loss of her pension benefits has caused her significant worry and upset. I consider that a payment of £500 is appropriate to compensate her for that.

Assignment of rights

If Options believes other parties to be wholly or partly responsible for the loss, it's free to pursue those other parties. So, compensation payable to Mrs M can be contingent on the assignment by her to Options of any rights of action she may have against other parties in relation to her transfers to the SIPP and the investment. The assignment should be given in terms that ensure any amount recovered by Options up to the balance due to Mrs M is paid to her. Options should only benefit from the assignment once Mrs M has been fully compensated for her loss (to be clear, this includes any loss that's in excess of our award limit). Options should cover the reasonable cost of drawing up, and Mrs M's taking advice on and approving, any assignment required.

Award limit

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £160,000, plus any interest and/or costs/interest on costs that I think are appropriate. If I think that fair compensation is more than £160,000, I may recommend that the business pays the balance.

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

Decision and award: I uphold the complaint. I think that fair compensation should be calculated as set out above. My final decision is that Options should pay Mrs M the amount produced by that calculation – up to a maximum of £160,000. In addition to any losses subject to the award limit, Options should pay interest to Mrs M if she's paid any fees or charges from funds outside of her pension arrangements, as set out above.

Recommendation: If the amount produced by the calculation of fair compensation is more than £160,000, I also recommend that Options pays Mrs M the balance.

This recommendation doesn't form part of my determination or award. Options doesn't have to do what I recommend. It's unlikely that Mrs M will be able to accept my decision and go to court to ask for the balance. Mrs M may want to get independent legal advice before deciding whether to accept this decision.

My final decision

My final decision is that I uphold this complaint. To put things right, Options UK Personal Pensions LLP must calculate and pay Mrs M the award set out above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mrs M to accept or reject my decision before 7 August 2024.

Alex Salton
Ombudsman