DRN-5041791

Financial Ombudsman Service

The complaint

Mr U complains that in 2015, Options UK Personal Pensions LLP ('Options', trading as Carey Pensions UK LLP at the relevant time) didn't carry out adequate due diligence when it accepted his Self-Invested Personal Pension ('SIPP') application and his application to open an account with fund custodian Reyker Securities plc ('Reyker'). He says this led to the investment of his pension monies in high risk, speculative, and unsuitable investments, and that he's suffered a loss as a result.

Mr U wants to be put back into the position he would have been in had Options not accepted his SIPP application.

What happened – the parties

Given the various parties involved in Mr U's pension transfer and subsequent investments I've set out a summary of each below.

Options

Options is a SIPP provider and administrator. At the time of the events in this complaint, Options was regulated by the Financial Conduct Authority ("FCA") – formerly the Financial Services Authority ("FSA"). Options was authorised, in relation to SIPPs, to arrange (bring about) deals in investments, to deal in investments as principal, to establish, operate or wind up a pension scheme, and to make arrangements with a view to transactions in investments.

Westbury Private Clients LLP

Westbury Private Clients LLP ('WPC') became authorised by the FCA on 1 July 2013. It was a wealth management firm and operated as investment manager/discretionary fund manager ('DFM') for what it called the 'Westbury SIPP' from 2014. WPC is in liquidation and was declared in default by the Financial Services Compensation Scheme ("FSCS") in May 2022.

Mr G was WPC's Founder and Chief Investment Officer. In August 2022 the FCA imposed on Mr G a financial penalty and made an order prohibiting him from performing any function in relation to any regulated activity. It also withdrew its approval for him to perform the controlled function of Partner at WPC. In a summary of reasons (the full 'Decision Notice' ran to 38 pages) the FCA said:

> "*… Between 7 October 2015 and 5 August 2016 (the "Relevant Period")* [Mr G] *breached Statement of Principle 1 (Integrity) of the Authority's Statements of Principle and Code of Practice for Approved Persons by acting recklessly when performing his controlled functions in relation to the pension business of Westbury.* [Mr G] *recklessly invested 207 pension funds in unsuitable, high risk investments and exposed pension holders to a significant risk of loss.*
>
> *During the Relevant Period,* [Mr G] *held the controlled functions of CF4 (Partner – now SMF27) and CF30 (Customer) at Westbury. He was the Chief Investment Officer and had ultimate responsibility for deciding on Westbury's business activity*

> *and investment decisions. …* [Mr G] *used self-invested personal pensions ("SIPPs") to invest retail pension holders' funds based on one of three model portfolios of assets which he created and managed ("the Model Portfolios"). The Model Portfolios exposed the majority of the pension holders … to an unacceptable risk of financial loss.* [Mr G] *was aware of, but unreasonably ignored, this obvious risk …*"

Mr G introduced Mr U's SIPP application to Options, and WPC acted as Mr U's DFM. In making this decision I acknowledge that the FCA's sanctioning of Mr G did not occur until many years after the events in this case. And my inclusion here of this detail about what happened later should not be interpreted as me saying that Options could or should have known *everything* that the FCA later discovered about Mr G and WPC when it accepted Mr U's application to open a SIPP in 2015. But I think the event of the FCA's regulatory action in 2022 remains helpful context when thinking about what might likely have been discoverable about WPC's business through sufficient due diligence in 2015. I'll detail what the evidence shows about the due diligence Options carried out on WPC below.

Reyker Securities plc

Reyker was an FCA authorised fund custodian that held cash and assets on behalf of its clients. Reyker was placed in Special Administration by its directors on 8 October 2019, and was declared in default by the FSCS in March 2020.

Options has shown that it carried out some due diligence on Reyker in September 2015 which included considering the Financial Services Register, Companies House records, Company and World Check entries, Reyker's own website, and documents such as Reyker's tariff of fees and charges, its general terms and conditions of business, its 2015 Financial Statements, and its 2014 Annual Report.

Via Developments Plc & Via Capital Ltd

Via Developments Plc was a company incorporated on 31 March 2015. It was formed to carry on the business of property development. Via Developments Plc would raise money from the proceeds of debenture stock sales on the ICAP Securities and Derivatives Exchange (ISDX) and then make these funds available by way of loans to subsidiary company Special Purpose Vehicles (SPVs) to enable the acquisition and development of sites identified as suitable by the SPVs.

Via Capital Ltd was incorporated on 14 October 2013 and remains active. The nature of its business is 'Development of building projects and Pension Funding'. This company shares several Directors with Via Developments Plc and in Via Capital Ltd's 2015 Loan Note Information Memorandum, Via Developments Plc was described as a "*partner*" firm "*who will be responsible for delivery property* [sic] *development projects*."

Options has shown that it considered the 'Via Capital' investment for acceptance into its SIPP, but in September 2016 Options' Technical Review Committee Meeting decided to decline it. The evidence I've seen indicates Options began its due diligence on this investment in July 2015.

According to Companies House, Via Developments Plc entered creditors voluntary liquidation 22 June 2020.

What happened – Options' relationships with WPC, Reyker and Via Developments Plc/Via Capital Ltd

WPC became an introducer of business to Options in March 2014. Mr G completed an Options' proforma titled "*UK Introducer Profile – Regulated Financial Services Firm*". This began:

> "*Carey Pensions UK LLP is delighted you have chosen it to provide pensions administration services for your clients. In order to assist our due diligence and on-boarding process, please can you complete this form and return it to* [Options]".

On the Introducer Profile Mr G entered basic company information for WPC, and confirmed that neither WPC nor any of its advisers had been subject to any regulatory action. In the 'Business Profile' section he made clear WPC would only be advising on the investment, not the transfer or SIPP product, and in response to 'Please indicate your average client profile and transfer value' Mr G wrote:

> "*HNW sophisticated, Min £250,000*"

'HNW' meaning High Net Worth.

Mr G also indicated that the type of investments WPC would be looking to use would be *"FCA regulated DFM, Platform – we use Praemium and Smartfunds Administration Ltd*".

In the 'Systems & Controls' section Mr G outlined how WPC monitored the quality and suitability of the advice provided. He wrote:

> "*Own psychometric risk profiling system, risk framework, investment process & risk adherence documentation etc all to do with* <u>*investment*</u> *advice*".

And he enclosed a copy of WPC's 'Investment Management Agreement'. This included descriptions in general terms of 7 portfolio types ranging from 1 (least risk) to 7 (most risk) and two further portfolio types 'Distribution' and 'Income'. For example, portfolio 7 was described like so:

> "*The objective of this portfolio is to have the highest risk, long term, with the highest degree of exposure to Equity (including an increased exposure to emerging market and generally higher risk and return equity) versus a low exposure to Fixed Interest through Exchange Traded Funds (ETFs), with the highest exposure to commodities. The portfolio will be broadly based, although the Manager may choose to substitute cash/cash equivalents for any of the asset classes in times of market uncertainty or high volatility*"

It also included sections for the client to detail the portfolios they'd like to open. I've not seen any evidence that Mr U completed an 'Investment Management Agreement', selecting portfolio types.

A WPC 'Rate Card' gave some detail about WPC's fees. This said the Annual Management Charge would be '1% + VAT' and under 'Key Fee Considerations' explained:

> "*Investment Management Fees – The Investment Management fee will apply to ALL assets held within the designated account and be applied yearly in advance.*
>
> *Third Party Fees, Costs & Expenses – These are related to supporting the management activity including and not limited to accounting, audit, corporate finance, sub-custody, insurance and compliance*."

Mr G, on behalf of WPC, signed an Options "*FCA Regulated Introducers Terms of Business 2014*" (TOB) on 25 March 2014. In the section for 'Scheme investments' the TOB set out WPC's responsibilities which included the following:

> "*… to provide fully documented advice to your client on the suitability of the Scheme investments, taking account of their financial objectives and attitude to investment risk*;
>
> "*To provide any additional information requested by us to enable the investment approval process to be completed*;"

The TOB also included the following about Options' responsibilities:

> "*… Where considered appropriate by us, as directed by the Trustees, to analyse and request further information as required, in order to approve the investment …*
>
> "*To reserve the right to decline investments where it is felt a tax charge could apply or for any other reason which we will tell you about;*"

There is no mention of Options' Permitted Investment List within the copy of the TOBs I've been provided.

As part of its due diligence procedures on WPC Options has shown that it:

- Checked the Financial Services Register, to confirm WPC was FCA authorised, and its permissions.

- Checked the entries on the Financial Services Register for the four individuals linked to WPC, including the entry for Mr G.

- Viewed WPC's website – this described WPC as, "*a boutique Discretionary Wealth Management business offering a personalized service by founder and Chief Investment Officer* [Mr G]" and went on to say on the 'What We Do" pages:

  "*Our primary focus is to deliver wealth preservation for high net worth individuals whilst also at the same time further enhancing client's wealth in a risk adjusted way to deliver long-term real returns …*"

A decision was taken by Options to accept WPC as an introducer of business from 31 March 2014. I've seen an unsigned "Introducer Accept / Decline Proforma" which indicates completion of the following documents and tasks:

- Introducer Profile Received
- Signed Terms of Business
- Client Agreement
- Fee Schedule
- Check FCA Register
- Check Firm website
- Create DMS and Hard Copy Folder

In a space marked 'Any other comments' on the proforma the following was noted:

> "*Discretionary Wealth Managers – managing portfolio types such as SIPP/Trust/Ordinary Discretionary Portfolios/Offshore Bonds etc either offshore or onshore.*

Investment advice only – Professional client coming in as direct and appointing Westbury Private Clients as their investment adviser.

Permissions confirm that Westbury Private Clients are unable to advise on pension transfers".

Options has told us the following further detail about its relationship with WPC and Reyker:

- It was for WPC to assess the client's personal financial circumstances and risk profile and select appropriate investments for them. Options understood WPC would be risk assessing its current book of private clients to look to manage their pension scheme investments on a discretionary basis in line with the TOB agreed between WPC and Options.

- WPC were appointed on a discretionary mandate and had the authority to select and purchase investments that they considered matched a client's risk profile and objectives without having to seek authority from the client or Options, as Trustees of the SIPP.

- Options expected WPC to risk assess each member to be able to produce a suitable and risk appropriate investment portfolio for each individual that took account of Options' Permitted Investment List.

- WPC signed a TOB with Options and held the relevant FCA permissions – there was nothing to give Options cause for concern about WPC at the time it accepted introductions from WPC.

- Due diligence was done on WPC and ongoing checks were also carried out – "*the FCA register was checked each time a new instruction was received*".

- WPC introduced 15 members to Options, of whom 10 established SIPPs.

- Nine WPC introduced members went on to invest with Reyker, with five invested in the 'Via Development 7% Debenture'.

- Nine WPC introduced members had a transfer value of less than £250,000.

- Confirmation of a member's sophisticated or HNW status came in the form of a WPC statement signed by the member.

- WPC purchased investments direct via authority on the client's Reyker account. WPC did not inform Options that clients would be put into the unregulated investment, 'Via 7% Debenture' – "*they just went ahead and did it*". Options was not aware and didn't get an opportunity to refuse the purchase. WPC did not refer this investment to Options to ask if it was permissible. The investment had "*previously*" been rejected by Options.

- The first Options knew of this investment was when a member requested a valuation of their investment – "*This revealed a considerable drop in value from the original amount invested. It was at this point we found out that over 50% of the client's funds had been invested in the 7% Via Developments Debenture, an investment that had already been declined*."

- Options relied on WPC and Reyker to act in good faith and not invest outside of the mandate – once the investment was noticed Options challenged WPC over its

decision to purchase this investment.

- Options later discovered that WPC had been charging its clients an extra 5% ‘marketing fee’, which Options felt was an inappropriate deduction and not listed on WPC’s fee schedule.

- Options severed the relationship with WPC on 4 April 2017 “*because they had breached the TOBs agreed between us by investing in an unregulated investment without informing us in advance to allow us to carry out our due diligence checks in advance of investment. Options had already previously rejected the investment that Westbury Private Clients purchased for our members without our knowledge or approval. In addition, Westbury Private Clients took commission on the value of the cash as well as the value of the funds they arranged to invest, which is not acceptable to us on the basis there was no advice provided on the cash part*.”

- WPC invested outside the TOB agreed between Options and WPC and “*outside of the Permitted Investment List which they agreed to adhere to when they signed the Terms of Business*”.

As I’ve noted above, Options has provided evidence that it began considering the ‘Via Capital Loan Note’ investment in July 2015. This was after it was brought to Options by an investment platform for alternative investments and pension products which is unrelated to this case. Options received a bundle of due diligence information from Via Developments Plc in October 2015.

Options declined to accept the investment almost a year later. In an email to Via Capital in September 2016 it said:

> *“… we have now completed our due diligence on Via Capital and the overall proposal … Unfortunately, the final decision of our Executive Committee is that Carey Pensions UK LLP will not be accepting the Via Capital investment, either direct or through a model portfolio, for investment by The Carey Pension Scheme as it does not meet either the business acceptance policy of Carey Pensions UK LLP or the standards expected by our regulator, The Financial Conduct Authority. In particular, our Executive Committee has indicated that they do not have the appetite for the level of risk involved …*”

The minutes of Options’ Technical Review Committee Meeting, held in September 2016, noted:

> “*The Meeting resolved that, based on the information provided, although there may not be a tax charge liability for this investment, other factors as undernoted have also been taken into consideration and it is not therefore considered prudent to proceed further.*
>
> *The provider has no track record of developments and the property adviser is not a full member of RICS as he is not fully qualified as a Chartered Surveyor. It also does not segregate investor funds from the trading company funds, there is no ring fencing in the event of insolvency. There are inconsistencies in the literature in relation to the payment of interest and the investments listed are vague*.”

I’ve seen no evidence that Options rejected this investment prior to September 2016.

What happened – Mr U's dealings with WPC, Reyker and Options

Mr U has explained that in around 2015 he was given some advice to "*consolidate his pensions*". He recalls that it was the HR department of the company he was working for at the time who put him in touch with the 'adviser' and that many colleagues were similarly "*convinced to transfer to a SIPP*". He says he was told it would be easier to manage and "*performance would be better*", and that the investments were described as low to medium risk. Mr U says he's "*not financially astute and is very naïve when it comes to pensions*". He says he went along with it because he was sold the idea that it would be "*better for it all to be in one pot*".

In October 2015 Options received Mr U's SIPP application. The application form used was called "*The Carey Pension Scheme Application for Direct Clients*" and the front page included the wording:

> "*This application should only be used if you are a client establishing a SIPP without advice. You have made this decision independently and are aware of the implications of this decision*.

In a box headed "*The reason I want to establish a SIPP without the use of a Professional financial Adviser is:*", the following was written by hand:

> "*Better control & flexibility on* [sic] *my pension*"

A box was ticked indicating that Mr U was applying for a Standard SIPP allowing commercial property and land in the UK, but not unregulated investments.

The form included Mr U's name, address, date of birth, nationality, marital status, National Insurance Number, selected retirement age (65), and expression of wish regarding beneficiaries. The form also gave details of Mr U's employer and his job title – "Manager" – but the space for annual earnings was left blank. The three personal pension schemes Mr U intended to transfer to the SIPP were named, but no further detail about them was provided; there was no indication of the transfer values. No detail was given about the investment Mr U intended to make. A box waiving Mr U's right to cancel the SIPP within 30 days of establishment was ticked.

The final page of the SIPP application form included a declaration at the end which included, amongst other statements, the following:

> "*I agree to indemnify Carey Pensions UK LLP 'The Administrator' and Carey Pension Trustees UK Ltd against any claim in respect of any decision made by myself and/or my Professional Financial Adviser/Investment Manager or any other Professional Adviser I choose to appoint from time to time*;"
>
> "*I understand that Carey Pensions UK LLP and Carey Pensions Trustees UK Ltd are not in any way able to provide me with any advice*;"
>
> "*I confirm that I am establishing the Carey Pension Scheme on an execution only basis*;"

Mr U signed the SIPP application form on 29 September 2015.

Although no detail about the intended investment was given on the application form, I've seen that Mr G told Options in early October 2015, "*Every single application you are receiving is going to Reyker and should always be the default* …"

Mr U also signed WPC's Investment Management Services Terms and Conditions. This 34-page document included the following:

> "*Unless otherwise agreed, You will be treated as a* ***Professional Client*** *… Accordingly, WPC will not be required to fulfil certain United Kingdom regulatory requirements that relate to the treatment of retail clients …*"

A declaration at the end of WPC's Terms and Conditions asked the client to confirm their understanding of several points. One of those points read:

> "*I have been classified as a professional, high net worth individual*"

Mr U signed this declaration on 29 September 2015. On the same date he also signed WPC's "*Notice of Treatment as a Professional Client*" which said:

> "*We have assessed your expertise and knowledge based on information we already possess about you and believe you can make your own investment decision and understand the risks involved (qualitative). You also satisfy two of the following:*
>
> - *Carried out significant transactions/investments Carried out significant transactions/investments to a frequency of 10 per quarter over previous four quarters.*
> - *Your cash deposits and financial portfolio amount to over EUR 500,000.*
> - *You have worked in the financial sector for more than 1 year and have knowledge of investment management …*
>
> *I want to be treated as a professional client and have seen and understood what waiving retail protection means*."

A separate sheet summarised what waiving retail protections meant and said that, amongst other things, WPC would not be obliged to warn clients of the nature of any risks involved in any investment, nor obliged to disclose the basis or amount of its charges or any income it might receive from third parties.

Mr U also signed another document titled 'Westbury Private Clients Self Invested Personal Pension "SIPP" (Without Pension Advice)". This again mentioned that Mr U was to be treated as a Professional Client and said WPC would be providing investment advice as an FCA regulated DFM.

On 6 October 2015 Mr U's SIPP was established by Options. The welcome letter explained that Options had received an investment instruction from Mr G, on behalf of Mr U, to invest in Reyker but that the amount was to be confirmed.

On 8 October 2015 Options sent Reyker an application to establish an account in Mr U's name. The form was branded with WPC's logo but gave Reyker's address as the destination for completed applications. The 'Investment Details' were completed "TBC", and in the space for 'Risk Score' Options wrote "Investment Manager to Provide". 'The Service Type' selected was "Discretionary", and the approximate value to be transferred was entered as "£101,000".

Options then initiated the transfer of Mr U's funds from Prudential, Aegon, and Standard Life – totalling a little over £100,000. Between 29 October 2015 and 10 February 2016 Options sent Reyker around £100,000 of Mr U's pension monies for investment. According to a Reyker valuation dated December 2017 Mr U's funds were invested like so:

7% Via Developments Debenture	£49,644
Barclays	£6,663.18
Centrica	£6,662.92
Legal & General	£6,714.28
Man Group	£6,668.32
Cash	£25,730.32

On 30 March 2017 Options let Mr U know that both it and Reyker had ended their relationships with WPC and that Options no longer had a TOB in place with WPC.

Mr U transferred out of his Options SIPP in October 2019 with around £52,450.

Mr U's complaint

In November 2019 Mr U complained to Options via the Financial Ombudsman Service. He questioned how Options had allowed things to happen as they did. He said the investment a large proportion of his money had been put into was "*not something that* [he] *would ever have chosen*" and added that he had little knowledge of pensions and had relied on the advice he'd been given by the person who he now understood to have been an introducer to, rather than a representative of, Options.

Options responded to Mr U's complaint on 10 August 2020, rejecting it. In summary, it said it had acted appropriately at all times as Mr U's SIPP administrator.

Unhappy with Options' response, Mr U asked this service to look into things. He said, with the help of a representative, that he had been 'advised' to move his pension assets to Options and described it as "*highly improbable*" with his limited knowledge of pensions that he would have approached a SIPP provider "*out of the blue*" and "*decide on a whim to set up a SIPP*" and then hold a small amount of shares, plus a debenture as the core investment, without having been advised to do so. He said he didn't think Options ought to have accepted his SIPP application and asked to be put back in the position he would have been in if his Options SIPP had not been set up.

Mr U told us that he moved his entire pension provision to Options, and that he was reliant on advice and "*definitely not a sophisticated investor*". He said he has limited assets/savings, and has always had a modest income - below £50,000 per year. When asked why he signed paperwork which asked him to confirm he understood he'd been classified as a professional, high net worth individual, he said that he'd signed what he was given by the adviser without reading it. He added that the adviser would've known the statements weren't true – he was an employee, did not own property, had no investment experience, and had relatively small pension pots.

Options' submissions

Options provided its files, the information I've already detailed above about its relationship with the other parties, and an eight-page response to Mr U's complaint. I've considered its response in its entirety, but I consider these to be its main points:

- Options does not (and is not permitted to) provide any advice to clients in relation to the establishment of a SIPP, the transfers in or the underlying investments. It did not advise nor purport to advise, Mr U. Mr U was classed as a direct client. Options is an execution only business and acted on this basis at all material times.

- Options' role, and the extent of it, was made clear to Mr U in the application form he signed and all the documentation he received when he applied for his SIPP.

- Mr U appointed WPC as his Investment Manager and accepted they were not providing any advice in relation to the establishment of the SIPP or the transfer of his pensions to a SIPP. He agreed he was a ‘Professional Client’ by signing WPC’s forms to that effect.

- Mr U did not inform Options that WPC had provided any form of advice to him in relation to the establishment of the SIPP or transfers in.

- As WPC held the relevant FCA permissions to act as investment manager/adviser and satisfactory due diligence was completed, there was nothing to give Options cause for concern about WPC.

- Options had a TOB with WPC.

- Options would have been in breach of COBS 11.2.19 had they not followed Mr U’s instructions – that rule requires firms to execute an order following a specific instruction – by virtue of COBS 11.2.19 Options is not liable to Mr U.

- It is not mandatory for individuals to appoint a regulated financial adviser to advise them on the appropriateness of establishing a SIPP and making a pension transfer to it, although Options always guides its members to do so.

- Options did not suggest or recommend the investment to Mr U. It was WPC that purchased the underlying investment in the “*7% Via Development Debenture*”. It did so without referring to Options to check it was acceptable. It was not an investment that was acceptable for investment by the Options scheme and WPC purchased it in contravention of Options’ Permitted Investment List.

- Options carried out due diligence on Reyker and concluded this standard and regulated investment was suitable to be held within a UK pension scheme.

- Reyker should have declined to execute the purchase until it had referred it to Options – Mr U should consider raising this with Reyker directly.

- Overall, Options acted properly in all its dealings with Mr U.

Our Investigator’s view

Mr U’s complaint was considered by one of our Investigators who concluded it had been referred to us within the time limits that apply to the Financial Ombudsman Service and should be upheld. In summary, the investigator said:

- Checking that WPC and Reyker were authorised, and entering into a TOB with WPC, can be considered good practice, but Options did not do all that was expected of it in terms of due diligence on the parties on an initial and ongoing basis.

- Options ought to have considered WPC’s business model, its investment approach, marketing material, model portfolios and considered what WPC’s typical investments looked like before any members’ monies were invested.

- He’d been provided with no evidence that Options sought to understand WPC’s business model for investments before accepting it as an introducer of business – simply obtaining an agreement from an introducer is not sufficient.

- Options ought to have routinely recorded and reviewed the type and size of

investments being made in its SIPPs, even where investments were being made by a DFM through an investment account held within Options' SIPP.

- Options ought to have had procedures in place to enable it to promptly identify when investments had been placed outside its permitted investments list.

- On the evidence provided by Options he wasn't satisfied that Options had adequate systems and controls in place – it did not show that it had performed any regular due diligence on WPC to ensure it complied with Options' TOB, and it's difficult to understand how Options could ensure WPC's performance in accordance with the agreement without some degree of monitoring.

- Despite five WPC clients being invested in the 'Via Development 7% Debenture', Options didn't realise this until more than a year after Mr U's investment, and when it did so it ended its agreement with WPC.
- Had Options done sufficient due diligence on WPC it would, or should, have terminated its business relationship with it before accepting Mr U's application and making his investment.

Our Investigator also said he was satisfied it is appropriate and fair in the circumstances for Options to compensate Mr U to the full extent of the financial losses he's suffered due to its failings. Our Investigator set out how Options should put things right by putting Mr U as far as possible, into the position he would now be in but for it accepting his SIPP application. They considered that if Options had acted appropriately, it's more likely than not that Mr U would've remained a member of his previous pension schemes. They set out how Options should calculate his losses and compensate him. Our Investigator also recommended Options pay Mr U £300 for the distress caused by Options' failings.

Options did not take the opportunity to respond to the Investigator's view.

As a resolution couldn't be reached, this complaint was passed to me for a decision.

My provisional findings

I recently issued a provisional decision in which I concluded that Mr U's complaint should be upheld.

In summary, I said it wasn't fair or reasonable for Options to have accepted Mr U's application to open a SIPP. I agreed with the Investigator that Options hadn't done all that was expected of it in terms of due diligence on WPC. I concluded that Options ought to have identified several issues with WPC's business model and Mr U's application before it accepted Mr U's application in October 2015. I said these issues would, or should, have led to Options declining to accept Mr U's application.

I went on to explain why I considered it fair for Options to compensate Mr U to the full extent of the financial losses he's suffered, having taken into account the involvement of other parties, Mr U's own part in what happened, and Options' contention that it did not cause Mr U's loss because he would have found a way to invest even if Options had not been dealing with WPC. I found it more likely than not that Mr U wouldn't have established an Options SIPP, transferred his pension monies into it or invested in the way he did if Options had declined his application. So, I said Options should undertake a redress calculation for Mr U, and also pay him £500 compensation for the distress caused by Options' failings.

Mr U accepted my provisional findings and decision.

Options said it "*strongly disagrees with the outcome*" of my provisional decision. I've summarised below what I consider to be Options' key new points. However, I'd like to be clear that I've carefully considered Options' response to my provisional decision in full. Options said:

- The provisional decision does not properly reflect the regulatory and legal regime within which Options acted at the time. To say that Options should not have accepted Mr U's business "*illegitimately impos*[es] *upon Options UK regulatory duties to which it was not subject*."
- The Ombudsman failed to take account of relevant law and regulations, as required by section 228(2) of FSMA and DISP 3.6.4R, or to set out whether and, if so, the basis upon which it is appropriate to depart from the relevant law. They didn't state whether the due diligence duty they found to exist is one recognised by law (rather than some broader professional standards) and, if so, the legal foundation of the duty. The position of Options is that the duties suggested would not be recognised in a Court and legal liability would not be established.
- The provisional decision seeks to place liability for investment losses on the execution-only SIPP provider, when there was a regulated investment advisor involved, by the device of retrospectively imposing new and unexpected duties of due diligence.
- It "*carried out more than adequate due diligence on all of the FCA regulated entities involved in Mr U's transactions*".
- The Ombudsman appears to be holding Options responsible for the actions of a regulated financial services third party, WPC. It "*cannot be held responsible for an unconnected FCA regulated third party 'going rogue'*".
- Options ought to have been able to take some level of comfort in WPC's regulated investment advisor status – it was WPC, not Options, that held the regulatory permission to assess Mr U's personal financial circumstances, investment experience, and risk appetite.
- There was nothing at the time that would have alerted Options to the possibility that WPC may have been acting improperly. It's not fair or reasonable for the Ombudsman to consider the complaint with the benefit of hindsight or in the context of the FCA's later sanctioning of WPC.
- Mr U may have been one of the first of WPC's clients to hold these investments and so "*there would have been nothing in any of the due diligence searches that Options UK could have done to reveal* [WPC's] *business strategy*".
- In 2018 the judge in *Adams* found that Options had not breached any of its obligations under the FCA Handbook COBS Rules. Options has complied with all of these in its dealings with Mr U.
- Options is not obligated to go beyond the paperwork that Mr U has signed – "*there was no reason to expect that a person signing to say that they had read and agreed to something, had not read and agreed to them when signing their name!*"
- Mr U signed a declaration agreeing with WPC's assessment that he satisfied the conditions to be regarded as a professional investor – Options accepted his documentation in good faith. "*Mr U was careless, reckless and his action could be deemed an act of fraud as a result of signing paperwork he knew or ought to have*

known was inaccurate …"

- Mr U significantly contributed to his own loss by signing documentation that he knew not to be true and accurate.
- It told WPC to sell the 7% Debenture investment as soon as it became aware of the purchase "*but it was found to be unable to be sold on any investment exchange*".
- The Ombudsman does not appear to have asked any questions of Mr U in order to seek to understand his motivation to transfer his pension, how he came to contact WPC, or why he provided signed paperwork declaring his status as a Professional Client.
- The information relied on by the Ombudsman falls far short of the questions asked of the claimant in *Adams*. The Ombudsman should seek to understand more about Mr U's motivation at the time his investment completed.
- In any event, it is more likely than not that Mr U would have proceeded with the transactions. Mr U was committed to switching his existing pensions, whether this be to Options or another provider. And other providers must have been accepting WPC's business at the time because the FCA found cause to investigate WPC and this could not solely have been as a result of the cases of WPC clients who were introduced to Options. It's not reasonable to conclude that there is "*no possibility*" that Mr U would have proceeded elsewhere had Options declined to accept his instructions.
- The contract between Mr U and Options relieved Options of any liability it might otherwise bear – concluding otherwise would render void and unenforceable a validly concluded contract. No other legally recognised duty (e.g., in tort or under COBS 2.1.1R) would justify the conclusion the Ombudsman reached. And restitution under section 27 of the FSMA 2000 would not be available in this case.
- Mr U must bear a measure of responsibility for his own actions, and this should be reflected in the calculation of any compensation due – to hold Options wholly responsible and discount the liability of Mr U or WPC is not fair or reasonable. The Ombudsman must have regard to the law, the statutory regime under the Civil Liability (Contribution) Act 1978, and the approach a Court would take.
- The Ombudsman said Options should pay Mr U £500 compensation for distress and inconvenience, but they've provided no evidence to support their claim that Mr U has suffered any upset.
- If the provisional decision stands, Options would be penalised for failing to act in a way which was inconsistent with the contractual documentation Mr U agreed to, and in a way which it is not obligated to, and not permitted to.
- And there would also be serious wider consequences for consumers and for execution-only SIPP providers. Because if execution-only SIPP providers are made liable for the poor investment choices of consumers, the execution-only SIPP market will reduce, depriving consumers of a low-cost investment route.

Finally, Options formally requested that I hold an oral hearing before determining Mr U's complaint.

I'm now able to make my decision. But I'll first address Options' request for an oral hearing.

Oral hearing request

Options says that an oral hearing is necessary to explore: Mr U's motivations for entering into the transactions; his understanding of the parties' respective roles; what he would have done if given additional information; and to what extent any award should be reduced to reflect Mr U's contribution to what happened.

The Ombudsman Service provides a scheme under which certain disputes may be resolved quickly and with minimum formality (section 225 of the Financial Services and Markets Act 2000 ("FSMA")). DISP 3.5.5R of the FCA Dispute Resolution rules provide 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 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 both our Investigator's view and my provisional decision.

I have carefully considered the submissions Options has made. And I am satisfied that I'm 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 U 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 the merits of Mr U's complaint.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable

in the circumstances of this complaint.

Having done so I've reached the same conclusion as I did in my provisional decision, I'm upholding Mr U's complaint. I'll explain why.

As a preliminary point, the purpose of this decision is to set out my findings on what's fair and reasonable, and explain my reasons for reaching those findings, not to offer a point-by-point response to every submission made by the parties to the complaint. And so, whilst I've carefully considered all the submissions made by both parties, I've focussed here on the points I believe to be key to my determination of what's fair and reasonable in the circumstances.

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 key relevant considerations to deciding what is fair and reasonable in this case.

Relevant considerations

The Principles

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

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

I have 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 had not treated its client fairly.

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

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

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

As outlined above, Ouseley J in the BBA case held that it would be a breach of statutory duty 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 and I will consider them in the specific circumstances of this complaint.

The *Adams* court cases and COBS 2.1.1R

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

I've considered whether *Adams* means that the Principles should not be taken into account in deciding this case. I note that the Principles for Businesses didn't form part of Mr Adams' pleadings in his initial case against Options SIPP. And, HHJ Dight didn't consider the

application of the Principles to SIPP operators in his judgment. The Court of Appeal also gave no consideration to the application of the Principles to SIPP operators. So, neither of the judgments say anything about how the Principles apply to an Ombudsman's consideration of a complaint. But, to be clear, I don't say this means *Adams* isn't a relevant consideration at all. As noted above, I've taken account of the *Adams* judgments when making this decision on Mr U'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.

Although the Court of Appeal ultimately overturned HHJ Dight's judgment, it rejected that part of Mr Adams appeal that related to HHJ Dight's dismissal of the COBS claim on the basis that Mr Adams was 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 HHJ Dight found that the factual context of a case would inform the extent of the duty imposed by COBS 2.1.1R. HHJ Dight said at para 148:

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

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

In Mr U's complaint, I'm considering whether Options ought to have declined to accept introductions from WPC and, specifically, Mr U's application.

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

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

However, I think it's important to emphasise that I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And, in doing that, I'm required to take into account relevant considerations which include law and regulations; regulators' rules, guidance and standards; codes of practice; and,

where appropriate, what I consider to have been good industry practice at the relevant time. This is a clear and relevant point of difference between this complaint and the judgments in *Adams v Options SIPP*. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

I also want to emphasise that I don't say that Options was under any obligation to assess Mr U's personal financial circumstances or to advise Mr U on the SIPP and/or the underlying investments. Refusing to accept an application, having given the introducer and the application proper scrutiny and identifying concerning issues, isn't the same thing as advising Mr U on the merits of the SIPP and/or the underlying investments.

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

Options has pointed out that a contravention of the Principles cannot in itself give rise to any cause of action at law. It says the duties suggested would not be recognised in a Court and legal liability would not be established. That may be true. However, I am dealing with a complaint, not a cause of action, and what I am seeking to identify here is what is relevant to my consideration of what is fair and reasonable in the circumstances of this case. And I'm satisfied that the FCA's Principles are a relevant consideration that I must take into account when deciding this complaint.

Regulatory publications

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

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

I've considered the relevance of these publications, all of which were published before Options' acceptance of Mr U's SIPP application. And I've set out material parts of the publications here, although I've considered them in their entirety.

<u>*The 2009 Thematic Review Report*</u>

The 2009 report included the following statement:

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

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

We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable

SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the member to confirm the position, or by contacting the firm giving advice and asking for clarification. Moreover, while they are not responsible for the advice, there is a reputational risk to SIPP operators that facilitate 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.*"

<u>*The later publications*</u>

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

> "*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 nonregulated 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
- 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)

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

I acknowledge that the 2009 and 2012 reports and the “Dear CEO” letter are not formal “guidance” (whereas the 2013 finalised guidance is). However, the fact that the reports and “Dear CEO” letter did not constitute formal guidance does not mean their importance should be underestimated. They provide a reminder that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect the publications, which set out the 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 am, therefore, satisfied it is appropriate to take them into account.

It is 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. Options says that I’m, “*illegitimately imposing upon Options UK regulatory duties to which it was not subject*.” But I’m satisfied that the standards I’m holding Options to do apply and were applicable at the time.

At its introduction the 2009 Thematic Review Report says:

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

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

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

Options argues that many of the matters which the Report invites firms to consider are directed at firms providing advisory services. But to be clear, I think the Report is also directed at firms like Options acting purely as SIPP operators. 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 therefore remain satisfied it's appropriate to take them into account too.

The obligation to act in accordance with the Principles existed throughout the events in this case. 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 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 is clear the standards themselves had not changed.

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

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

To be clear, I do not say the Principles or the publications obliged Options to ensure the transactions were suitable for Mr U. It is accepted Options was not required to give advice to Mr U, and could not give advice. And I accept the publications do not alter the meaning of, or the scope of, the Principles. But, as I've said above, they're evidence of what I consider to have been good industry practice at the relevant time, which would bring about the outcomes envisaged by the Principles. As Options has previously noted from 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*". And so, it's fair and reasonable for me to take them into account when deciding this complaint.

It's important to keep in mind the judge in *Adams v Options* didn't consider the regulatory publications in the context of considering what's fair and reasonable in all the circumstances

bearing in mind various matters including the Principles (as part of the regulator's rules) or good industry practice.

And in determining this complaint, I need to consider whether, in accepting Mr U's application to establish a SIPP and to invest in Reyker, 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.

What did Options' obligations mean in practice?

In this case, the business Options was conducting was its operation of SIPPs. I am satisfied that meeting its regulatory obligations when conducting this business would include deciding whether to accept or reject referrals of business and/or particular investments. The regulatory publications provided some examples of good industry practice observed by the FSA and FCA during their work with SIPP operators including being satisfied that a particular introducer is appropriate to deal with. Significantly, the guidance did not say that SIPP operators only needed to concern themselves with these considerations when dealing with *unregulated* introducers; the expectations applied to relationships with *regulated* introducers too.

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 into WPC and Reyker *before* deciding to accept Mr U's application.

Options has said it is being held liable because it is the only remaining regulated entity over which the Financial Ombudsman Service has jurisdiction. It's also said, in response to my provisional decision, that it is being held responsible for the "*rogue*" actions of an unconnected FCA regulated third party. But what I'm considering here is whether Options took reasonable care, acted with due diligence and treated Mr U fairly, in accordance with his best interests. And what I think is fair and reasonable in light of that. And I think the key issue in Mr U's complaint is whether it was fair and reasonable for Options to have accepted his SIPP application in the first place. So, I need to consider whether Options carried out appropriate due diligence checks on WPC before deciding to accept Mr U's application.

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 introduced by WPC were being put at significant risk of detriment. And, if so, whether Options should therefore not have accepted Mr U's application for the Options SIPP.

Did Options act fairly and reasonably by accepting Mr U's SIPP application from WPC?

Although Options undertook some due diligence on WPC in March 2014, and says it found no reason not to accept introductions from it, I have not seen any evidence that Options undertook sufficient due diligence on WPC or that it drew reasonable conclusions from the information it did have available to it before it accepted and progressed with Mr U's SIPP application in October 2015.

As I've set out above, WPC did complete an Introducer Profile in March 2014 and signed a TOB with Options, and I've seen that Options checked WPC's FCA authorisation,

permissions and the disciplinary history for the individuals involved. I accept that these activities are examples of good practice and consistent with Options' obligations as a SIPP operator. However, I don't think these activities were enough to fulfil Options' obligations under the Principles or to meet Options' responsibility to ensure the fair treatment of its customers.

I think Options relied too heavily on WPC's FCA authorisation and permissions when deciding to accept introductions from WPC, and therefore failed to give the firm or Mr U's individual application scrutiny beyond that. Options has said, in response to my provisional decision, that it ought to have been able to take some level of comfort in WPC's regulated investment advisor status and rely on its assessments of Mr U's personal financial circumstances, investment experience, and risk appetite. And that Options would have been acting outside of its own permissions if it had tried to substitute these assessments for its own. But whilst I accept this, I'm also clear that Options could not rely on WPC's regulated status alone in the circumstances and could not disregard anomalies in Mr U's application on the basis that WPC was regulated. And I consider that its due diligence activities stopped short of where they ought to have gone.

In my view, there were a number of further enquiries that Options ought to have made about WPC and Mr U's application, and the information that I'm satisfied those further enquiries would have revealed, ought to have caused Options to be concerned about doing business with WPC and accepting Mr U's application.

The types of investments WPC would make

I have seen no evidence that Options took sufficient steps to gain an understanding of the nature of WPC's business or the firm beyond taking a look at its website and receiving an answer on the Introducer Profile that said its typical client was high net worth and sophisticated with a *minimum* transfer value of £250,000. So, I don't think Options had a good understanding of WPC's business objectives, the volume of business it did or, crucially, the types of investments they were using, or intended to use, their discretionary mandate to invest clients' pension monies in. I think they ought to, and could, have obtained a better understanding of the nature of WPC's work before being "*satisfied that they* [were] *appropriate to deal with*".

Of the clients I've seen WPC introduced to Options all applied for a Standard SIPP allowing commercial property and land in the UK, but not unregulated investments. But I can't see that Options asked WPC, in advance of accepting introductions, for any information about its typical or model portfolios. It seems to have known only that WPC used Praemium and Smartfunds Administration Ltd – two investment platforms. Reyker, I note, was not mentioned on the Introducer Profile, but I've seen no evidence that Options asked why WPC had switched to this custodian for the majority of clients it introduced – nine of the ten that established Options SIPPs. And I don't see that Options obtained any detail about what the investments WPC intended to make would look like before it accepted applications.

Options says that Mr U may have been one of the first of WPC's clients to hold these investments and so "*there would have been nothing in any of the due diligence searches that Options UK could have done to reveal* [WPC's] *business strategy*". But I don't agree. Whilst it's true that WPC, and specifically Mr G, may not have had a long history of the activities the FCA later sanctioned him for prior to 7 October 2015 (the start of the "Relevant Period" mentioned in the FCA's 'Decision Notice'), I still think that checking WPC's model portfolios, their typical appetite for using unregulated investments, and pausing to query such things as why WPC was now using Reyker and not the investment platforms WPC had said it usually used, would most likely have been revealing. And I think, by not obtaining a

clear understanding of WPC's work (something I'll say more about later), Options missed a significant opportunity to avoid facilitating unsuitable SIPPs.

Having not obtained a clear understanding of the nature of WPC's business, nor its business model, from the start of its relationship, Options then seems to have failed to monitor what WPC was actually doing with clients' pension funds. Options has told us that the first it knew of WPC investing significant portions of members' funds in the 'Via Development 7% Debenture' was when a member requested a valuation of their investment. Although Options hasn't given us a date for when this valuation was requested and it made this discovery, it seems that it wasn't long before Options ended its relationship with WPC in April 2017. So, between March 2014 when Options first began accepting introductions from WPC (it's said the first WPC managed funds were invested in June 2014) and early 2017, Options does not appear to have been "*routinely recording and reviewing*" the type of investments made by WPC or "*gathering and analysing*" the information it ought to have seen as part of its continuous obligation to "*safeguard their customers' interests*". It cannot be right that a SIPP operator discovers that a DFM is operating outside of its expectations by accident and then only because a valuation request made by a SIPP member has prompted it to look.

I also note that the majority of Mr U's ceding scheme funds, almost £80,000, were not received into his newly established SIPP until February 2016. So, even if Options were correct to say that WPC's activities or intentions *could not* have been discovered in early October 2015 when it accepted his SIPP application, which I don't agree, I still think it could and should have gained an understanding of what WPC was doing *before* it sent his funds on to Reyker.

If Options had been acting fairly and reasonably, I think it would have known more about the typical investments made by WPC *before* it started accepting introductions from it, and it should have identified the regular use of the high-risk debenture stock as a core investment much sooner than it did. Had Options been monitoring WPC's investment activity, it stands to reason that it would likely have ceased accepting WPC's business much earlier, possibly before Mr U's application was progressed. I say this because Options considered WPC's investment selections to contravene the TOB, and also because when Options considered this investment for inclusion in its SIPP it concluded it didn't have the appetite for the level of risk involved.

Overall, I think Options failed to treat Mr U fairly by missing opportunities to understand and have visibility of WPC's investment selections within the Reyker custodian account. It relied exclusively on WPC to adhere to its Permitted Investments List (which, as I've said above, is not mentioned in the copy of the TOB I've been provided with), and did not identify potentially poor advice and the potential for consumer detriment when they ought to have done.

Mr U's application and his classification as a 'Professional Client'

Mr U's SIPP application was received by Options around the start of October 2015 and, having considered a copy of the application form carefully, I think there were a number of 'red flags' or issues with it, and the other applicant information Options had at the outset, that ought to have prompted Options to ask more questions and, ultimately, to refuse to accept it.

Options has said in its response to my provisional decision that it "*cannot, and is not obligated, to go beyond the paperwork that Mr U … signed*". I accept that the signature of a consumer is ordinarily taken as confirmation that the consumer has read and agreed to the contents and accuracy of a document. But where there are anomalies, omissions or contradictions in the information provided in those documents I don't think the presence of a signature absolves a firm – one with the due diligence responsibilities I've described – from

querying those issues. Indeed, the October 2013 finalised SIPP operator guidance highlighted as an example of good practice:

> "*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*"

I think this is a clear articulation of an expectation that SIPP operators should, as good practice, "*go beyond*" paperwork. And I'm not persuaded that a firm could ensure the quality of the SIPP business they administer, or identify possible instances of consumer detriment, without ever looking at signed documentation with a critical eye.

On the front page of the application Options had posed an important statement for completion by the applicant – "*The reason I want to establish a SIPP without the use of a Professional Financial Adviser is*:". I say 'important statement' because I think it's right that Options was seeking to understand why/how it was that consumers using the "*Application for Direct Clients*" were establishing SIPPs and transferring monies into them if this wasn't as a result of advice received from the business holding itself out as the introducer, in this case WPC.

On Mr U's application the statement was completed, in handwriting, like so:

> "*Better control & flexibility* on [sic] *my pension*"

But whilst this answer may give some rationale for wanting to transfer out of a personal pension plan and establish a SIPP, I don't think it provided Options with any understanding of their applicant's reasons for not using a Professional Financial Adviser. I also note that this answer was given, in identical terms and in strikingly similar handwriting, on at least one other application received by Options via WPC around the same time. So, I think Options ought to have been concerned that an incomplete and impersonalised answer had been provided here. In my view this indicated that someone other than Mr U had completed the application form, and that his only contribution was the signature. And I think, in those circumstances, it would have been fair and reasonable for Options to have contacted Mr U to "*confirm the position*".

Had Options done so, I think it's likely Mr U would have explained that he thought he *had* received advice from WPC on the transfer to a SIPP. As his representative has said, given his experience and modest assets, I agree it's improbable that Mr U decided "*on a whim*" and without advice to set up a SIPP. Options has said that Mr U didn't tell it that WPC had provided any form of advice to him in relation to the establishment of the SIPP or transfers in, but that's only, in my view, because it didn't ask. And asking this question would, or should, have changed things significantly because WPC, as Options had already noted, didn't have permissions to advise on pension transfers/switches, only investments. By Options asking Mr U more about this he too would likely have become aware that WPC was not providing the service he thought, and I think that alone could have stopped things progressing. And to be clear, I don't think Options contacting Mr U in this way would have amounted to it going beyond its execution-only role.

Another issue with the application form is that it wasn't complete. In particular, it didn't include Mr U's approximate annual earnings as someone who described their occupational status as 'employed' and title as 'Manager'. In that way the application form provided no support for Mr U's classification by WPC as a 'Professional Client'. In fact, Options sought no verification from WPC, or Mr U, for his 'Professional Client' status. Nor does Options appear to have had any insight into how WPC had assessed Mr U's risk appetite, or indeed what that assessment concluded. On the application Options completed to establish a Reyker

account in Mr U's name, the space for 'Risk Score' was completed with "Investment Manager to Provide". Yet, despite these gaps in its information Options didn't obtain a copy of WPC's documented advice to Mr U and didn't request any evidence of Mr U's investment experience, net worth or financial sector experience, to explain or support his categorisation.

So, although I accept Options was not responsible for the advice given by WPC, I do think it ought to have gathered some more information here to enhance its understanding of the applicant's position and to meet its obligation to avoid facilitating "*SIPPs that are unsuitable or detrimental to clients*". I think Options should have noticed that WPC introduced clients were routinely signing these 'Professional Client' disclaimers taking responsibility for their investment decisions and, acting fairly and reasonably, Options ought to have taken some steps to authenticate the basis of those disclaimers.

Had Options merely asked Mr U or WPC for some evidence of his high net worth or professional status, for some details about how long he'd been a client of WPC, and/or for a copy of the suitability reports, I think it's likely Options would have become aware, and before progressing with Mr U's application and transfer requests, that WPC had been asking clients to sign multiple statements, alongside the application form, which had no basis in fact – Mr U simply wasn't a professional client as defined in COBS 3.5 at the relevant time. And I think this would or should, in turn, have resulted in Options declining to accept Mr U's application and ending its relationship with WPC.

I also think it was remiss of Options to accept Mr U's application without further question when it had no understanding of why he, and the other WPC introduced clients, were waiving their cancellation rights. And also without questioning why the majority of WPC introduced clients had transfer values well below the £250,000 that WPC said would be the *minimum* transfer value for its average clients. Options has said that it understood WPC would be introducing clients from "*its current book of private clients*", but I can't see that Options had any particular basis for that understanding. And I think this obvious anomaly between what Options had been led to expect from WPC and the reality should have led Options to question whether WPC was really introducing private clients it already knew well and had properly assessed or whether clients were, in fact, coming to WPC via a different source, a source from which it wouldn't have known the average transfer value when it completed the Introducer Profile in March 2014 i.e., new retail clients. Again, I don't think Options did what it ought to have done to obtain a clear understanding of WPC's work.

WPC's fees

Options has explained that part of its decision to sever its relationship with WPC in 2017 was because it discovered WPC was charging clients "an extra 5% 'marketing fee'" not listed in its fees schedule, and also took commission on the value of the cash as well as the value of the funds they arranged to invest when there was no advice provided on the cash part. But the fact that Options didn't discover this issue, an issue which contributed to its decision to cease accepting business from WPC, until early 2017 I think speaks to the inadequacy of Options due diligence on WPC in March 2014 and its failure to have sufficient "procedures and controls" to enable it to identify potential consumer detriment.

It also tells me that Options gave the limited due diligence information it did collect about WPC in March 2014 no more than a cursory examination, because WPC's 'Rate Card' did say that it's fee would "apply to ALL assets held within the designated account". So, the fact that WPC would be including cash in its commission calculation was something Options could have established *before* deciding to accept business from it. And, given what Options did do when it made this discovery, I think it's more likely than not Options would have come to a similar conclusion in 2014; a conclusion that the way WPC was charging clients was "*not acceptable*".

In short, I think that if Options had carried out sufficient due diligence on WPC at the start of its relationship in March 2014 or regularly thereafter, as it was obliged, acting fairly and reasonably, to do, it would have identified several issues with WPC's business model and Mr U's application before it accepted Mr U's application in October 2015. And I think the identification of the issues I've mentioned above (WPC's selection of high risk investments, its role in clients deciding to transfer to a SIPP, its classification of retail clients as professional, the differences between the business it said it would introduce to what it did, and its fee charging) would, or should, have led to Options declining to accept Mr U's application.

Each of these issues in isolation is significant, but cumulatively I think they demonstrate that there was a significant risk of consumer detriment associated with the introductions Options received from WPC. I think that Options ought to have had real concerns that WPC wasn't acting in customers' best interests and wasn't meeting its regulatory obligations.

Should Options have accepted Mr U's application to open the Reyker account?

Because I've decided to uphold Mr U's complaint on the basis that Options shouldn't have accepted, or progressed with, his introduction from WPC, it's not necessary for me to consider whether or not Options should've allowed the Reyker investment in Mr U's SIPP. I make no findings about the appropriateness of the Reyker custodian account for the Options SIPP which Mr U opened.

In conclusion

Taking all of the above into consideration – individually and cumulatively – I think in the circumstances it's fair and reasonable for me to conclude that Options ought reasonably to have concluded, had it complied with its regulatory obligations which required it to conduct sufficient due diligence on WPC and draw fair and reasonable conclusions from what it discovered, that it shouldn't accept business from WPC, including Mr U's application. I therefore conclude that it's fair and reasonable in the circumstances to say Options shouldn't have accepted, or progressed with, Mr U's application from WPC.

Did Options act fairly and reasonably in proceeding with Mr U's instructions?

Options has said it was the decision of clients to proceed on an execution-only basis and Options made this clear to them. Options has also made the point 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. Before considering this point, I think it is important for me to reiterate that, it was not fair and reasonable for Options to have accepted Mr U's SIPP application from WPC in the first place. So, in my opinion, Mr U's SIPP should not have been established and the opportunity to execute investment instructions or proceed in reliance on an indemnity should not have arisen at all.

In any event, 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."

Therefore, I don't think Options' argument on this point is relevant to its obligations under the Principles to decide whether or not to accept an application to open a SIPP in the first place or to execute the instruction to make the investments i.e., to proceed with the application.

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

In my view, for the reasons given, Options simply should've refused to accept Mr U's application. So, things shouldn't have got beyond that. However, for completeness, I've considered whether it was fair and reasonable for Options to proceed with Mr U's application.

I acknowledge Mr U was asked to sign the declaration within the application form and Options will have put some reliance on that. The declaration sought to confirm Mr U would indemnify Options against any claim in respect of any decision made by him or any appointed advisers. However, I don't think this demonstrates Options acted fairly and reasonably by proceeding with Mr U's application and instructions. The Principles exist to ensure regulated firms treat their clients fairly. And I don't think the paperwork Mr U 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 business or investments.

Asking Mr U to sign an indemnity absolving Options of all its responsibilities when it ought to have known that Mr U's dealings with WPC were putting him at significant risk of detriment was not the fair and reasonable thing to do, and was not an effective way for Options to meet its regulatory obligations in the circumstances. So, it was not fair and reasonable to proceed, on the basis of this. I make this point only for completeness – the primary point is Mr U should simply not have been able to proceed, he should not have got to the stage of signing declarations as the business shouldn't have come about at all. His application should simply not have been accepted.

Is it fair to require Options to compensate Mr U?

<u>The involvement of other parties</u>

In this decision I'm considering Mr U's complaint about Options. But I accept other parties were involved in the transactions complained about, including WPC and Reyker.

As I understand it, Mr U has not pursued an FSCS claim against either WPC or Reyker.

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

In my opinion it's fair and reasonable in the circumstances of this case to hold Options accountable for its *own* failure to comply with its regulatory obligations, good industry practice and to treat Mr U fairly.

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

I accept that other parties, including WPC, might have some responsibility for initiating the course of action that led to Mr U's loss. However, 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 arrangement for Mr U wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

It's my view that it's appropriate and fair in the circumstances for Options to compensate Mr U to the full extent of the financial losses he's suffered due to Options' failings. And, having carefully considered everything, I don't think that it would be appropriate or fair in the circumstances to reduce the compensation amount that Options is liable to pay to Mr U.

Mr U taking responsibility for his own actions and decisions

In reaching my conclusions in this case I've thought about section 5(2)(d) of the FSMA (now section 1C). This section requires the FCA, in securing an appropriate degree of protection for consumers, to have regard to, amongst other things, the general principle that consumers should take responsibility for their own investment decisions.

I've considered this point carefully and I'm satisfied that it wouldn't be fair or reasonable to say Mr U's actions mean he should bear the loss arising as a result of Options' failings.

In my view, if Options had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted Mr U's business from WPC or accepted his application to invest in Reyker. That should have been the end of the matter – if that had happened, I'm satisfied the arrangement for Mr U wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

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

I acknowledge that Mr U provided Options with signed paperwork declaring his status as a Professional Client. Options says it was entitled to rely on this and that Mr U's actions "*ultimately mis-led Options UK, causing it to do something it may not have done had Mr U been truthful*". But, whilst nothing I say here should be taken as me condoning the signing of documentation without first reading it and checking its accuracy, I'm conscious that what Mr U did was in the context of a professional, regulated adviser presenting these documents to him for his signature. And it's clear that Mr U trusted who he was dealing with, WPC, to act in his best interests. Mr U also then used the services of a regulated personal pension provider, Options. And if Options had acted in accordance with its regulatory obligations and good industry practice, I'm satisfied that his signing of those statements would not have been determinative and the arrangement for Mr U wouldn't have come about in the first place.

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 U for the loss he's suffered. I don't think it would be fair to say in the circumstances that Mr U should suffer the loss, or part of it, because he ultimately signed the application documentation prepared for him by WPC and instructed the transactions to be executed.

Had Options declined Mr U's business from WPC, would the transactions complained about still have been effected elsewhere?

Options has argued that it did not cause Mr U's loss because, even if it had rejected his business, he was committed to switching his existing pensions and if it had refused to process his application for any reason, he'd likely have made the same investment via a different SIPP provider. So, he would have suffered the same loss.

It also says that my "*determination amounts to a finding that there was no possibility that Mr U would have proceeded elsewhere had Options UK declined to accept his instructions*". But, before I go on, I should make it clear that that's not the right test here – I don't have to be satisfied that there is *no possibility* that things wouldn't have progressed as they did if Options had done what I think it ought to have. I must only be satisfied that, on balance, it's *more likely than not* Mr U would have remained in his ceding schemes.

Options has provided no evidence to support an argument that Mr U wanted to open a SIPP and invest his SIPP monies in Reyker no matter what, and I've thought carefully about what Mr U would likely have done if Options had told him it was rejecting his business and why.

From what Mr U has said, I think that his pension monies were transferred to Options principally in order to follow WPC's advice and consolidate his personal pension pots. I've seen no evidence that Mr U was motivated by any other reason – for example, he doesn't appear to have accessed any benefits from the SIPP or received any incentive payments from WPC. So, I'm satisfied a transfer wouldn't have been effected elsewhere at the time, just so as to access a pension commencement lump sum and/or other income.

And I don't think it's fair and reasonable to say that Options shouldn't compensate Mr U for his loss based on speculation that another SIPP operator would've made the same mistakes as I've found Options did. Options has said that other SIPP operators must have accepted WPC's business or else there would have been no basis for the FCA to later investigate WPC. That may be true, but that doesn't alter my decision that I think it's unlikely Mr U would have gone elsewhere. I think if Options had made the further enquiries of Mr U that I think it ought to, he'd have begun to understand the truth about what was happening and ended his relationship with WPC. In any event, I don't believe it would be reasonable to assume that another SIPP operator would've accepted the introduction and proceeded with the transaction, had Options not. I think it's fair instead to assume that another SIPP provider would've complied with its regulatory obligations and good industry practice, and therefore wouldn't have allowed the transaction to go ahead.

In the circumstances, I'm satisfied it's fair and reasonable to conclude that if Options had refused to accept Mr U's application from WPC the transactions wouldn't still have gone ahead, and Mr U would have retained his monies in his personal pension schemes.

Overall, I think it's fair and reasonable to direct Options to pay Mr U compensation in the circumstances. While I accept that other parties might have some responsibility for initiating the course of action that's led to Mr U's loss, I consider that Options failed to comply with its own regulatory obligations and didn't put a stop to the transactions proceeding by declining to accept Mr U's applications when it had the opportunity to do so. And I'm satisfied that

Mr U wouldn't have established the Options SIPP, and transferred monies in from his personal pension schemes if it hadn't been for Options' failings.

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 U for the full measure of his loss.

Options has confirmed that Mr U closed his Options SIPP in 2019, disinvesting around £52,450 and investing that elsewhere. What I've set out below takes this into account. It's also based on my understanding that the pensions Mr U transferred into the Options SIPP contained no guarantees (safeguarded benefits as per their current FCA Handbook glossary definition).

Putting things right

I consider that Options failed to comply with its own regulatory obligations and didn't put a stop to the transactions. My aim in awarding fair compensation is to put Mr U back into the position he 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 Mr U would've remained a member of the Standard Life, Aegon and Prudential personal pension plans he transferred into the SIPP.

Whilst I cannot be certain that a value will be obtainable for what the previous policies would have been worth. I am satisfied what I have set out below is fair and reasonable, taking this into account and given what I understand of Mr U's circumstances and objectives when he invested.

Where below I refer to the 'end date' this is the date Mr U closed his Options SIPP and moved his pension monies elsewhere.

In light of the above, Options should:

- Obtain the notional transfer value of Mr U's previous pension plans had he stayed with the previous providers until the end date.

- Obtain the actual transfer value of Mr U's SIPP, including any outstanding charges, as at the end date. If the actual value is greater than the notional value, no compensation is payable. If the notional value is greater than the actual value, there is a loss and compensation is payable.

- Add 8% simple interest per year on any loss from the end date to the date of settlement.

- Pay an amount into Mr U's current pension to increase its value by the amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief.

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

- Pay to Mr U £500 to compensate him for the distress and inconvenience he's been caused by Options' failings.

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

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

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

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

Any withdrawal out of the Options 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. To be clear this doesn't include SIPP charges or fees paid to third parties like an adviser. But it does include any pension commencement lump sums or pension income Mr U actually took after his pension monies were transferred to Options.

Similarly, any contributions made to the Options SIPP should be added to the notional calculation from the date they were actually paid, so any growth they would have enjoyed is allowed for.

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

The notional value of Mr U's existing plans if monies hadn't been transferred (established in line with the above) less the value of the SIPP as at the end date is Mr U's loss.

8% simple interest per year should be added to any loss from the end date to the date of settlement.

Pay an amount into Mr U's current pension 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 U'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 U 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.

Fees or charges from funds outside of pension arrangements

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

Income tax on interest

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

Distress and inconvenience

The loss of a significant portion of his pension benefits will naturally have caused Mr U much upset; he's clearly been worried that his retirement provision has been reduced. I consider that a payment of £500 is appropriate to compensate him 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 Mr U can be contingent on the assignment by him to Options of any rights of action he may have against other parties in relation to his 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 Mr U is paid to him. Options should only benefit from the assignment once Mr U has been fully compensated for his 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 Mr U'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 Mr U's original investment fell well within our award limit, and the compensation may be nowhere near £160,000, 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 Mr U the amount produced by that calculation – up to a maximum of £160,000. In addition to any losses subject to the award limit, if applicable, Options should pay the interest awards set out above.

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

Options doesn't have to do what I recommend. It's unlikely that Mr U will be able to accept my decision and go to court to ask for the balance. Mr U may want to get independent legal advice before deciding whether to accept this, my final decision.

My final decision

For the reasons given, my decision is that I uphold this complaint. To put things right I require that Options UK Personal Pensions LLP must calculate and pay Mr U the award set out above.

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

Beth Wilcox
Ombudsman