DRN-4375114

The complaint

Mr E has a self-invested personal pension (SIPP) with Options UK Personal Pension LLP (formerly) Carey Pension UK LLP ("Options"). Mr E's complaint is that Options accepted his application to open a SIPP and invest in a property-based investment arrangement without first making adequate checks. Mr E thinks Options should not have accepted his application and made that investment.

What happened

Mr E says he was contacted in 2012 by a man I will call Mr W on behalf of a firm based in Gibraltar I will call the introducer.

Initially in April 2012 Mr E authorised Mr W acting on behalf of a firm in Cyprus to obtain information about his existing pension so that firm could "review" that pension.

Mr E says Mr W advised him that he would be better off if he transferred his existing pension to a SIPP with Options to invest in a property-based investment in the Cayman Islands offered by Crown Acquisitions Worldwide Limited ("Crown").

Mr E applied for a SIPP with Options in May 2012. On that application form details of Mr E's financial adviser were recorded as the introducer firm in Gibraltar. The email address given for the introducer was Mr W's email address at that firm.

The introducer was regulated in Gibraltar and was authorised to carry on certain regulated business in the UK by the Financial Services Authority ("FSA") under a "MIFID passport" arrangement.

On the same day as the SIPP application form was signed, Mr E signed a document headed:

> "*SIPP MEMBER INSTRUCTION AND DECLARATION*
>
> *ALTERNATIVE INVESTMENT- CROWN ACQUISITIONS WORLDWIDE"*

In that document Mr E instructed Options to purchase land through Crown in the Cayman Islands.

The form contained a number of declarations including that Mr E:

- understood Options was acting on an execution only basis and was not giving any advice to Mr E.
- was aware the investment is an "*Unregulated 'Alternative Investment' and as such is considered High Risk and Speculative and that it might prove difficult to value, sell / realise."*
- agreed the land would be sold prior to any residential development.
- would indemnify Options against any claims made against it in connection with the

investment.

In June 2012 almost £50,000 was transferred into the SIPP from Mr E's existing personal pension with a different provider and later that month around £47,000 was invested in the Crown investment.

The investment involved a plot of land in the Cayman Islands on which Crown had obtained planning permission to develop the property into a subdivision comprising various residential lots. Crown had arranged the preparation of plans for the construction of residential lots and agreed to obtain necessary approvals for those plans to develop the individual lots. Investors could buy individual lots and those bought via a SIPP were to be sold from the SIPP before any residential building work commenced.

In October 2015 Options contacted Mr E and informed him there was further legal work and costs to be paid to complete the investment and that it had obtained estimates for those costs from two law firms in the Cayman Islands. The estimated costs varied between around £12,000 and around £16,000. These costs would be split between Options members invested in that Crown project. Options said there were 47 in all.

As I understand it there were then further problems with the Crown project – though I do not currently know the details. In May 2017 Options wrote to investors with a report from lawyers relating to the problems with the investment. It was mentioned there was a court case being brought by a different SIPP operator against Crown. It suggested obtaining valuations for the property.

In September 2018 Mr E complained to Options with the help of a claims management company (CMC). At that time it said the investment was worthless. The CMC made a number of points on behalf of Mr E including:

- Mr E was advised by the introducer. He received pre-completed paperwork from the introducer which was not explained to him.
- There must have been some prior understanding between the introducer and Options. And it's unlikely Mr E's case was the first referral to Options by the introducer for the purpose of investing in the Crown investment.
- The introducer was not authorised.
- Options should not have accepted business from the introducer. It should not have accepted Mr E's application to open a SIPP and invest in the Crown investment.
- No competent adviser would have recommended Mr E switch his existing pension to a SIPP and invest in the Crown investment scheme.
- Options had acted in breach of the various guidance issued by the regulator to SIPP operators.
- Carey had acted in breach of s.27 Financial Services and Markets Act 2000 (FSMA) in accepting business introduced to it in breach of the general prohibition.

Options did not uphold the complaint. It made a number of points in response including:

- Mr E will have had an opportunity to read and consider all documents before he signed them.
- The documentation made it clear that Options does not give advice.
- Mr E signed the member declaration that acknowledged Options did not give advice, and that the investment was high risk.
- The guidance issued by the regulator, though helpful, is not the same as the rules

and Options complied with the rules.

- Options was obliged under the rules to comply with Mr E's instructions.
- Options did not breach s.27 FSMA because the introducer was an authorised firm and had the necessary permissions.

Mr E referred his complaint to the Financial Ombudsman Service, and it was considered by one of our investigators. She thought the complaint should be upheld. The investigator made a number of points including:

- Options did not give advice and was not required to do so. It was still, however, under obligations as a non-advisory SIPP operator.
- Refusing to accept business does not amount to advice.
- The regulator has issued a number of publications which remind SIPP operators of their obligations.
- The introducer had an EEA passport to provide certain services in the UK. The passport covered investment advice, but it did not cover advice to transfer or switch pensions which required additional permissions which the introducer did not have.
- Options had explained on other cases that the introducer did not provide advice and only acted on an execution only basis.
- Options was aware that it was the introducer's intention to introduce non-advised clients to it in order to invest in Crown investments which are esoteric, high-risk investments. Options should have identified that such investments were unlikely to be suitable for most retail investors. And that only relatively small investments were likely to be suitable for sophisticated investors.
- The introducer's business model of introducing such investments to retail investors should have been a concern to Options and if it had acted fairly and reasonably it would not have accepted Mr E's application. And if it had done so Mr E would not have suffered the losses he has suffered in his pension.

The investigator then went on to explain how she thought Options should put things right. Mr E agrees with the investigator. Options does not. It has made a number of points in response, including the following:

- The ombudsman must take account of the legal and contractual context of the relationship between it and Mr E. Options acts on a strictly execution only/non-advised basis and is member directed throughout.
- Options does not give advice and the ombudsman should not come to a finding that places on it a legal duty that does not exist.
- The investigator's findings are based on duties that would not be recognised by a court without explaining why that is appropriate.
- The complaint has been considered on the basis of guidance that had not been published at the time of events in this case.
- No evidence has been provided to show that the introducer was undertaking regulated activities.
- There is no evidence the introducer gave advice.
- Even if the introducer gave advice, it held the necessary permissions to do so. There was no pension transfer, as defined in the rules, in this case. This was a switch from one personal pension to another.

- In any event SIPP operators are permitted to accept introductions from non-regulated introducers.
- There was no reason why Options should not accept introductions of business from the introducer.
- There was no breach of duty by Options.
- Against this background it is unfair and unreasonable to place liability for the losses flowing from the investment on the execution-only SIPP operator. It is unfair to make a SIPP operator responsible for the member's poor investment choices.
- Options did not cause Mr E to suffer a loss. It is likely Mr E was keen to proceed with the investment and would have done so even if Options had not accepted business from the introducer.
- The redress methodology suggested by the investigator is unfair. The index proposed is higher than the approach used in other cases.
- Options request an oral hearing in order properly to determine Mr E's complaint. It's procedurally unfair and inappropriate that a fact sensitive matter such as this should be decided (if it is not time-barred) wholly on the papers.

I issued a provisional decision on 31 August 2023 in which I set out why I thought the complaint:

- was not made out of time
- can be fairly determined without an oral hearing
- should be upheld and what Options should do to put things right.

I asked Mr E and Options to let me have any comments they wished to make in response to my provisional decision by 28 September 2023. Mr E agrees with my provisional decision. Options has not responded.

What I've decided – and why

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

I've considered all of the points made by the parties. I have not however responded to all of them below, I have concentrated on what I consider to be the main issues.

Preliminary point – time bar

For the avoidance of doubt, I am considering this point, and the other preliminary point below, on the basis of the applicable rules and law and not on the basis of what is fair and reasonable in all the circumstances.

Options has made a passing reference to this case perhaps being time barred.

Mr E's complaint is made about events at the time of his SIPP application in May 2012 and his investment in June 2012. And Mr E complained to Options just over six years later in September 2018.

The Financial Ombudsman Service cannot deal with a complaint unless it is made within six years of the event complained of, or if later within three years of the time when the complainant was aware or ought reasonably to have been aware that they had cause for complaint.

In this case I am not satisfied Mr E was aware or should reasonably have been aware he had cause for complaint against Options before September 2015. I am not aware of anything that ought to have made Mr E aware there was a problem with his SIPP or the investment he made in it, that he had any reason to think he had suffered any loss or damage at that point and that if he had, that Options was or might be responsible. Mr E does not seem to have had that awareness until 2017 or 2018 and I cannot see any basis for saying he should reasonably have had that awareness earlier than he did,

I do not therefore consider that this complaint was made late.

Preliminary point - Options' request for an oral hearing

Options says an oral hearing is necessary to explore issues such as how Mr E came to hear about the investment and his understanding of the investment and the roles played by the parties, and Mr E's motivation for entering into the transaction.

The Financial Ombudsman Service provides a scheme under which certain disputes may be resolved quickly and with minimum formality (s.225 FSMA). DISP 3.5.5R of the Financial Conduct Authority's ("FCA") Dispute Resolution rules provides the following:

> "*If the Ombudsman considers that the complaint can be fairly determined without convening a hearing, he will determine the complaint. If not, he will invite the parties to take part in a hearing. A hearing may be held by any means which the Ombudsman considers appropriate in the circumstances, including by telephone. No hearing will be held after the Ombudsman has determined the complaint*."

Given my statutory duty under FSMA to resolve complaints quickly and with minimum formality, I am satisfied that it would not normally 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.

I have considered the submissions Options has made. However, I am satisfied that I am able to fairly determine this complaint without convening a hearing. In this case, I am satisfied I have sufficient information to make a fair and reasonable decision. So, I do not consider a hearing is required. The key question is whether Options should have accepted Mr E's

application at all. Mr E's understanding of matters are secondary to this. And I am, in any event, able to test this to the extent I think necessary by asking questions of Mr E in writing.

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 E as a witness. Our hearings do not follow the same format as a Court. We are inquisitorial in nature and not adversarial. And 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 am satisfied it is not necessary for me to hold an oral hearing, I will now turn to considering the merits of Mr E's complaint.

Relevant considerations

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

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

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

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

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

> "*The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The Specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirement they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules*."

And at paragraph 77 of *BBA* Ouseley J said:

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

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

The *Adams* court cases and COBS 2.1.1R

I confirm I have taken account of the judgment of the High Court in the case of *Adams v Options SIPP* [2020] EWHC 1229 (Ch) and the Court of Appeal judgment in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474. I note the Supreme Court refused Options permission to appeal the Court of Appeal judgment.

I've considered whether these judgments mean the Principles should not be taken into account in deciding this case. And I am of the view they do not. In the High Court case, HHJ Dight did not consider the application of the Principles and they did not form part of the pleadings submitted by Mr Adams. One of the main reasons why HHJ Dight found that the judgment of Jacobs J in *BBSAL* was not of direct relevance to the case before him was because "*the specific regulatory provisions which the learned judge in Berkeley Burke was*

asked to consider are not those which have formed the basis of the claimant's case before me."

Likewise, the Principles were not considered by the Court of Appeal. So, the *Adams* judgments say nothing about the application of the FCA's Principles to the ombudsman's consideration of a complaint.

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 was not 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*."

The facts in Mr E's case are different from those in *Adams*. There are also significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Mr E'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. In Mr E's complaint, I am considering whether Options ought to have identified that the business introductions from the introducer involved a risk of consumer detriment and, if so, whether it ought to have ceased accepting introductions from the introducer prior to entering into a contract with Mr E.

On this point, I think it is also important to emphasise that I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And, in doing that, I am required to take into account relevant considerations which include: law and regulations; regulator's rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. This is a clear and relevant point of difference between this complaint and the judgments in both *Adams* cases. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

To be clear, I have proceeded on the understanding Options was not obliged – and not able – to give advice to Mr E on the suitability of its SIPP or the Crown investment for him personally. But I am satisfied Options' obligations included deciding whether to accept

particular investments into its SIPP and/or whether to accept introductions of business from particular businesses.

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.

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 the 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 clients' interests in this respect, with reference to Principle 3 of the Principles for Business ('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 introducer, 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.*"

Although I've quoted from the 2009 Review, I have considered all of the publications I referred to above 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 goes 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.

Like the Ombudsman in the *BBSAL* case, I do not think the fact the publications, (other than the 2009 Thematic Review Report), post-date the events that took place in relation to Mr E's complaint, mean that the examples of good practice they provide were not good practice at the time of the relevant events. Although the later publications were published after the events subject to this complaint, the Principles that underpin them existed throughout, as did the obligation to act in accordance with the Principles.

It is also clear from the text of the 2009 and 2012 reports (and the "Dear CEO" letter in 2014) that the regulator expected SIPP operators to have incorporated the recommended good practices into the conduct of their business already. So, whilst the regulators' comments suggest some industry participants' understanding of how the good practice standards shaped what was expected of SIPP operators changed over time, it is clear the standards themselves had not changed.

I note that HHJ Dight in the *Adams* case did not consider the 2012 thematic review, 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 SIPP application, pension switch and SIPP investment were suitable for Mr E. It is accepted Options was not required to give advice to Mr E, and could not give advice. And I accept the publications do not alter the meaning of, or the scope of, the Principles. But they are evidence of what I consider to have been good industry practice at the relevant time, which would bring about the outcomes envisaged by the Principles.

What did Options' obligations mean in practice?

In this case, the business Options was conducting was its operation of SIPPs on a non-advisory basis. I am satisfied that meeting its regulatory obligations when conducting this business would include deciding whether to accept or reject particular investments and/or referrals of business. 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.

It is clear from Options' 'Non-Regulated Introducer Profile', referred to below, that it understood and accepted its obligations meant that it had a responsibility to carry out due diligence on the introducer. The introductory paragraph at the head of the form says the following:

> "*As an FSA regulated pensions company we are required to carry out due diligence on independent financial introducer firms looking to put business with us and gain some insight into the business they carry out. We therefore request that you or the appropriate individual in your firm complete and sign this Profile questionnaire and our Terms of Business Agreement as part of our internal compliance requirements*.
>
> *Thank you for taking the time to complete these documents to ensure the FSA requirements are met."*

I am satisfied that, to meet its regulatory obligations, when conducting its business, Options was required to consider whether to accept or reject particular referrals of business, with the Principles in mind. This seems consistent with Options' own understanding. I note in submissions on other complaints Options has told us that "*adherence to TCF*" is something it had in mind when considering its approach to introducer due diligence i.e. the question of whether it should accept business from a particular introducer.

All in all, I am satisfied that, in order to meet the appropriate standards of good industry practice and the obligations set by the regulator's rules and regulations, Options should have

carried out due diligence on the introducer and the investment which was consistent with good industry practice and its regulatory obligations at the time. And in my opinion, Options should have used the knowledge it gained from its due diligence to decide whether to accept or reject a referral of business or particular investment.

Options position in broad terms:

In very broad terms Options position is:

- It carried out due diligence to a degree that was appropriate for its role as non-advisory SIPP operator.
- There is no evidence the introducer gave advice to Mr E.
- Even if the introducer did advise Mr E it had the regulatory permissions to do so.
- It is unfair to hold Options responsible for Mr E's losses.

Due diligence carried out by Options on the introducer:

It's clear that Options did carry out some due diligence on the introducer. Amongst other things it carried out an assessment of the introducer using a questionnaire it called an introducer profile. This was completed in October 2011. That questionnaire recorded a number of points relating to the introducer including the following:

- It was regulated in Gibraltar.
- It had no pensions advisers and no pensions specialists.
- It essentially carried on no pensions business.
- It had recently "*employed a new appointed rep specialising in SIPPS business but all on an execution only basis".*
- Its typical clients were "HNW clients" – meaning high net worth.
- It was intending to use SIPPs to hold investments with Crown.

Options does not seem to have asked about the new "appointed rep" who specialised in SIPPs despite that person being the source of the new business that would be referred to it. It did not seem to ask about, or at least record on that form, expected levels of business or how that business would be sourced by the "appointed rep".

Options was satisfied from the checks it made that the introducer was regulated in Gibraltar and had permission to carry on regulated activities in the UK as result of an EEA passport.

Due diligence carried out on the investment:

Little to no information has been provided about the investment in this case and the checks made on it by Options.

I do not however need to deal with this area at length. This investment involved buying a "lot" on a larger parcel of land all of which was to be developed.

I am satisfied that Options knew enough about the investment to understand that, from the point of view of a UK based pensions investor, the investment should be regarded as high risk, and esoteric. It was likely to be difficult to value and illiquid. I note that Options very

largely referred to the investment in these terms on the Member Declaration it required Mr E to sign as part of the application process.

From its assessment of the investment Options ought to have understood It was unlikely to be suitable for most retail investors and even for high net-worth investors and/or sophisticated investors it was unlikely to be suitable for more than a small proportion of their pension.

I do not say Options was under any obligation to assess the suitability of the investment for individual members. But it should have been aware that there was a considerable risk of consumer detriment if this investment was sold to investors for which it was not suitable. Options also ought to have been sceptical about the likelihood of investors choosing to invest their pensions in such an investment without being advised or possibly unfairly encouraged to do so.

In my view Options should have been concerned about the introducer's new business model which involved a new "appointed rep" who apparently specialised in SIPP business, but only on an execution only basis, where the SIPPs were being set up in order to invest in Crown investments.

Did the introducer give advice in this case? And/or did the introducer arrange deals in investments?

Chapter 12 of the then FSA's, now FCA's, Perimeter Guidance Manual (PERG) provided guidance to firms, such as Options, running personal pension schemes. The guidance at the time of Mr E's application included:

> **Q2. What is a personal pension scheme for the purposes of this regulated activity?**
> The term is defined in the *Financial Services and Markets Act 2000 (Regulated Activities) Order 2001* (the *Regulated Activities Order*) as any scheme other than an *occupational pension scheme* (OPS) or a *stakeholder pension scheme* that is to provide benefits for people:
>
> - on retirement; or
> - on reaching a particular age; or
> - on termination of service in an employment.
>
> …This will include *self-invested personal pension schemes* ('SIPPs') as well as personal pensions provided to consumers by product companies such as insurers, unit trust managers or deposit takers (including free-standing voluntary contribution schemes).

So, under the Regulated Activities Order (RAO), Mr E's existing personal pension and his new SIPP both come within the definition of a personal pension. And Article 82 of the Regulated Activities Order provides that rights under a personal pension are a specified investment.

Advising a person in his capacity as an investor or potential investor to buy or sell such an investment is a regulated activity under Article 53 RAO.

And making arrangements for another person to buy or sell such an investment is a regulated activity under Article 25 RAO. So too is making arrangements with a view to a person who participates in the arrangements buying or selling such an investment.

As explained by Andrews LJ in the Court of Appeal in the *Adams* case, the question of whether there has been advice under Article 53 should be approached by standing back and looking at what the consumer was told in a realistic and common sense manner.

And a holistic assessment of the behaviour should be made when considering whether there has been making of arrangements under Article 25.

Mr E says he was contacted by the introducer, who was based in Gibraltar, offering to review his pension. As the introducer seemed knowledgeable Mr E agreed. Mr E says the introducer advised him that he should open a SIPP with Options, then called Carey, transfer his existing personal pension into the SIPP and invest in a plot of land in the Cayman Islands. Mr E says he accepted that advice as he thought he was being well advised.

All of that said, there is evidence that Mr W apparently acting for a different firm in Cyprus requested information from Mr E's existing pension provider so the Cyprus based firm could review the existing pension. There is however no evidence the alleged advice was given on behalf of the firm in Cyprus rather than the introducer in Gibraltar.

Mr E has said he "received Carey's pre-completed paperwork". And I notice that the SIPP application is part completed in print and part by hand. Mr E's personal information on the first page of the form is completed in print. On the second page details of Mr E's occupation and earnings and selected retirement age have been completed by hand. The details of Mr E's existing pension on the fourth page are printed – and I note this was information Mr W had gathered.

The seventh and eighth pages are also completed in print as is the verification of identity page. These pages give details of the introducer.

The page with the nomination of beneficiaries/expression of wish is completed by hand. In the circumstances it does indeed seem that Mr E was presented with a largely pre-completed application form with the form pre-completed by Mr W acting for the introducer and not the firm in Cyprus.

The SIPP member instruction and declaration was similarly pre-prepared as it pre-printed instructions to invest in the Crown investment.

It is not clear if Mr W was aware of the involvement of the Cypriot firm. And I have seen no further evidence of its involvement. The SIPP application form does however show that the introducer is named as the financial adviser on the SIPP application form and Mr W at the introducer firm is the email address given.

And Mr W with the job title "Financial Adviser" at the introducer firm is recorded on the SIPP application form as the FSA Regulated or EU Regulated Introducer who verified Mr E's identity as part of the application process.

There is therefore evidence that Mr W of the introducer firm was involved in Mr E's application.

I consider Mr E's account of events is plausible. It is consistent with the documentary evidence and that evidence also confirms Mr E's account of being provided with pre-completed documentation.

Mr E's version of events is also consistent with the picture presented by the documentation. Mr E presents as a normal retail investor. He lived and worked in the UK. He was earning a little over average but not by very much. He had a managerial job but not in the financial services industry. He was not a high net-worth investor. Nor was he a sophisticated investor. He was a normal retail investor. And it is difficult to see why such a retail investor should choose to move his pension from an ordinary personal pension to a SIPP, which is a fairly specialist pension arrangement, to invest in a property-based investment in the

Cayman Islands unless he was advised to do so. It is not particularly plausible that such a retail investor would choose to act in that way without advice and would instruct a firm, based in Gibraltar, to arrange that for him on an execution only basis.

There is also the point that this was not a one-off. The introducer entered into an introducer agreement with Options in order to introduce members who were going to invest in Crown's property-based investments. It therefore seems that the economic reality was that it was the introducer's intention to act as an introducer of business to Crown. Or put another way, it had a business interest in encouraging people to invest in Crown investments.

And in this case the introducer was named as the Financial Adviser on the SIPP application form. Strictly speaking this meant the introducer was to act as the Financial Adviser in relation to the SIPP and does not in and of itself establish that the introducer gave advice that led to the SIPP. However that is a fine distinction which is not especially clear from the form and the appointment of the introducer as the Financial Adviser would seem to be consistent with how Mr E understood the introducer's role and the "Financial Adviser" job title Mr W appears to have used.

On balance it is my finding that it is more likely than not that Mr W acting for the introducer did advise Mr E that he would be better off investing his pension in the Crown investment than in his existing personal pension. And that he advised Mr E to open a SIPP with Options, close his existing pension and switch the funds to Options to make the Crown investment and that this was all one single piece of advice.
It is also my view that Options should have realised there was a real risk that the introducer would give such advice when introducing consumers to it to take out SIPPs in order to invest in Crown investments.

It is possible that the Crown investment in this case is not a specified investment under FSMA. That does not however mean that regulated investment advice was not given. In my view the situation here is essentially the same as that considered by the Court of Appeal in the *Adams* case where Newey LJ said:

> *82. In short, CLP's recommendation that Mr Adams invest in storepods carried with it advice that he transfer out of his Friends Life policy and put the money into a Carey SIPP. Investment in storepods may have been the ultimate objective, but it was to be gained by transferring out of the Friends Life policy and into a Carey SIPP. CLP thus proposed that Mr Adams undertake those transactions too and, in so doing, gave "advice on the merits" of selling a "particular investment which is a security" (viz. the Friends Life policy) and buying another "particular investment which is a security" (viz. a Carey SIPP). Although, therefore, the advice to invest in storepods was not of itself covered by article 53 of the RAO, CLP nonetheless gave Mr Adams advice within the scope of article 53 and so acted in contravention of the general prohibition."*

As well as giving advice the introducer arranged the deal it recommended. It entered into an arrangement with Options under which it would refer such business to it. And I note that as part of that arrangement the introducer was able to submit to Options both the application form and the member declaration (which expressly referred to the Crown investment) at the same time. The introducer also part completed the application for Mr E. And the introducer was involved in setting up the investment with Crown. For example Mr E's CMC has provided a copy of an email dated 13 June 2012 from Mr W at the introducer to Crown which said:

> *"Hi* [first name given]
> *Can you allocate a lot for the above client* [Mr E] *for £* [number given] *K.*
> [Different first name given] – *Can you prepare contracts and send to Carey's?*
> *Thanks all*

Kind Regards
[Mr W]

In all the circumstances it is my present view that the acts carried out by the introducer were sufficiently instrumental in the overall transaction - the transfer from the existing personal pension to Options and the investment into the Crown investment - as to amount to the regulated activity of arranging deals in investments under Article 25 RAO.

It is my provisional finding that the introducer gave investment advice relating to Mr E's rights in his personal pension (Article 53 RAO) and arranged deals in relation to his rights in his personal pension (Article 25 RAO).

The regulatory status of the introducer:

The introducer profile did not identify where the introducer was intending to carry on the execution only business that would lead to referrals of business to Options, but it would need to be authorised in the UK for any regulated activity it carried on in the UK. And Options satisfied itself that the introducer was registered in the UK. It had an EEA passport under the MIFID Directive to carry on certain activities in the UK including "investment advice" relating to certain investments.

At the time of Mr E's SIPP application (and at the time the Introducer Profile was completed) SUP App 3 in the Regulators Handbook set out guidance on passporting issues including a table at SUP App3.9.7G which included the following:

Services set out in Annex I to MiFID

SUP App 3.9.5 G

Table 2: *MiFID investment services and activities*		Part II RAO Investments	Part III RAO Investments
	A *MiFID investment services and activities*		
1.	Reception and transmission of orders in relation to one or more financial instruments	Article 25	Article 76-81, 83-85, 89
5.	Investment advice	Article 53	Article 76-81, 83-85, 89

Accordingly, arranging deals in investments under Article 25 and advising on investments under Article 53 RAO are not covered by a MIFID passport if the activity relates to Article 81 investments i.e. rights under a person pension.

And guidance at SUP 14A.1.2G of the Handbook, in existence at the time of Mr E's application and when the introducer profile was completed, made clear that an EEA firm that wanted to carry on activities in the UK which are outside the scope of its EEA rights would require a "top up" permission.

It was Options understanding that the introducer would introduce business to it under which SIPPs were to be set up for the purpose of investing in Crown investments in the SIPPs. The introduction of applications to Options to establish a SIPP and the instruction to make investments in that SIPP would, more likely than not, amount to arranging deals in investments.

If the introducer gave advice on the merits of taking out the SIPP or making the investment this would amount to advising on investments.

Accordingly the introducer would need the relevant top up permission to carry on one or other or both of those activities. The introducer did not however have such a top up permission.

my view so far:

In summary it is my present view that Options should have:

- had serious concerns about the business model of the introducer
- considered that it was more likely than not that the introducer's conduct, as it understood it, would amount to arranging deals in investments
- considered there was a real risk that the introducer, despite saying it would only act on an execution only basis, would very likely stray into giving advice to take out Crown investments and advise consumers to set up a SIPP with Options SIPPs and transfer their existing pensions to it in order to make the Crown investment
- understood that the introducer did not have the necessary top up permissions to advise on or arrange deals in relation to rights in personal pensions
- considered that it was exposing its customers to an unacceptable level of risk of unsuitable SIPPs, and the real risk of considerable detriment which might include serious, possibly complete, loss of their pension.

The court decision in the *BBSAL* case referred to above makes it clear that COBS rule 11.2.19 about the execution of orders only applies once the decision to execute an order is made. And that a SIPP operator is able to decide not to carry out the member's instructions if it thinks it appropriate not to do so.

In all the circumstances it is my view that Options should have decided not to accept business from the introducer.

And it should not have accepted Mr E's application for a SIPP or his instruction to request the transfer of his existing pension to it or his instruction to invest in the Crown investment.

Is it fair to ask Options to compensate Mr E?

In deciding whether Options is responsible for any losses that Mr E has suffered on the Crown investment I need to look at what would have happened if Options had done what it should have done i.e. had not accepted Mr E's SIPP application in the first place.

When considering this I have taken into account the Court of Appeal's supplementary judgment in *Adams* ([2021] EWCA Civ 1188), insofar as that judgment deals with restitution/compensation.

I am required to make the decision I consider to be fair and reasonable in all the circumstances of the case and I do not consider the fact that Mr E signed the indemnity means that he shouldn't be compensated if it is fair and reasonable to do so.

Had Options acted fairly and reasonably it should have concluded that it should not accept Mr E's application to open a SIPP. That should have been the end of the matter – it should have told Mr E that it could not accept the business. And I am satisfied, if that had

happened, the arrangement for Mr E would not have come about in the first place, and the loss he suffered could have been avoided. The financial loss has flowed from Mr E transferring out of his existing pension and into a SIPP. For the reasons I set out below I am satisfied that, had the SIPP application not been accepted, the loss would not have been suffered.

Had Options explained to Mr E why it would not accept the application from the introducer or was terminating the transaction, I find it very unlikely that Mr E would have tried to find another SIPP operator to accept the business.

So I'm satisfied that Mr E would not have continued with the SIPP, had it not been for Options' failings, and would have remained in his existing pension. And, whilst I accept that the introducer is responsible for initiating the course of action that has led to his loss, I consider that Options failed unreasonably to put a stop to that course of action when it had the opportunity and obligation to do so.

I have considered paragraph 154 of the *Adams v Options* High Court judgment, which says:

> *"The investment here was acknowledged by the claimant to be high risk and/or speculative. He accepted responsibility for evaluating that risk and for deciding to proceed in knowledge of the risk. A duty to act honestly, fairly and professionally in the best interests of the client, who is to take responsibility for his own decisions, cannot be construed in my judgment as meaning that the terms of the contract should be overlooked, that the client is not to be treated as able to reach and take responsibility for his own decisions and that his instructions are not to be followed."*

For all the reasons I've set out, I'm satisfied that it would not be fair to say Mr E's actions mean he should bear the loss arising as a result of Options' failings. I do not say Options should not have accepted the application because the investment was high risk. I acknowledge Mr E was warned of the high risk and declared he understood that warning. But Options did not share significant warning signs with him so that he could make an informed decision about whether to proceed or not. In any event, Options should not have asked him to sign the indemnity at all as the application should never have been accepted or alternatively the transaction should have been terminated at a much earlier stage in the process.

So I am satisfied in the circumstances, for all the reasons given, that it is fair and reasonable to conclude that Options should compensate Mr E for the loss he has suffered.

I accept that its failure will have caused Mr E serious financial loss. He has lost most of his pension in his 50's – a time when he would want more certainty for his pension and when he would have little prospect of being able to recover such serious losses. Mr E will therefore naturally have suffered much worry, and distress and Options should compensate Mr E for this also.

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

Putting things right

My aim is to return Mr E to the position he would now be in but for what I consider to be

Options' failure to carry out adequate due diligence checks before accepting Mr E's SIPP application from the introducer or for not terminating the transaction before completion.

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

1. Calculate the loss Mr E has suffered as a result of making the transfer.

2. Take ownership of the Crown investment if possible.

3. Pay compensation for the loss into Mr E's pension. If that is not possible pay compensation for the loss to Mr E direct. In either case the payment should take into account necessary adjustments set out below.

4. Pay Mr E £500 for the distress and inconvenience caused.

I'll explain how Options should carry out the calculation set out at 1-3 above in further detail below:

1. Calculate the loss Mr E has suffered as a result of making the transfer

To do this, Options should work out the likely value of Mr E's pension as at the date of my final decision, had he left it where it was instead of transferring to the SIPP.

Options should ask Mr E's former pension provider to calculate the current notional transfer value had he not transferred his pension. If there are any difficulties in obtaining a notional valuation then the FTSE UK Private Investors Income Total Return index should be used to calculate the value. That is likely to be a reasonable proxy for the type of return that could have been achieved if suitable funds had been chosen.

I consider both the above to be fair and reasonable and consistent with my stated aim of trying to return Mr E to the position he would now be in but for what I consider to be Options' failure to carry out adequate due diligence checks before accepting Mr E's SIPP application from the introducer or for not terminating the transaction before completion.

The notional transfer value should be compared to the transfer value of the SIPP at the date of this decision and this will show the loss Mr E has suffered. The Crown investment should be assumed to have no value.

2. Take ownership of the Crown investment

Options should take ownership of the Crown investment, for a nil consideration, if possible.

If Options is unable to take ownership of the Crown investment it should remain in the SIPP. I think that is fair as it seems unlikely it will have any significant realisable value in the future

3. Pay compensation to Mr E for loss he has suffered calculated in (1).

Since the loss Mr E has suffered is within his pension it is right that I try to restore the value

of his pension provision if that is possible. So if possible the compensation for the loss should be paid into the pension. The compensation shouldn't be paid into the pension if it would conflict with any existing protection or allowance. Payment into the pension should allow for the effect of charges and any available tax relief.

On the other hand, Mr E may not be able to pay the compensation into a pension. If so compensation for the loss should be paid to Mr E direct. But had it been possible to pay the compensation into the pension, it would have provided a taxable income. Therefore, the compensation for the loss paid to Mr E should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mr E's marginal rate of tax in retirement. For example, if Mr E is likely to be a basic rate taxpayer in retirement, the notional allowance would equate to a reduction in the total amount equivalent to the current basic rate of tax. However, if Mr E would have been able to take a tax free lump sum, the notional allowance should be applied to 75% of the total amount.

4. Pay Mr E £500 for the distress and inconvenience caused.

Mr E has been caused distress and inconvenience by the loss of his pension benefits. Mr E's pension is now worthless. This is money Mr E cannot afford to lose and its loss will naturally have caused him much distress and inconvenience. I consider a payment of £500 is appropriate to compensate for that.

interest

The compensation must be paid as set out above within 28 days of the date Options receives notification of his acceptance of my final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation is not paid within 28 days.

My final decision

For the reasons given, my decision is that I uphold Mr E's complaint. Options UK Personal Pensions LLP should calculate and pay compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr E to accept or reject my decision before 27 October 2023.

Philip Roberts
Ombudsman