DRN-3248316

## The complaint

Mr A complains that Heritage Pensions Limited failed to carry out due diligence checks when accepting his application for a Self-Invested Personal Pension (SIPP). He says that it didn't carry out appropriate checks on the advisor who recommended the transaction, or on the investment to be held in the SIPP.

## What happened

The parties

**Heritage Pensions Limited**

Heritage is a regulated SIPP provider and administrator. It is authorised, in relation to SIPPs, to arrange (bring about) deals in investments, deal in investments as principal, establish, operate or wind up a pension scheme and make arrangements with a view to transactions in investments. It was not authorised to give investment advice.

**The adviser**

Mr A says he was advised by a man I will call Mr D. Mr D was an appointed representative of a well-known financial advice firm I will refer to as Mr D's Principal or the Principal.

Mr D was an appointed representative of the Principal for some time before the events in this complaint until March 2012.

In brief, only persons (which includes companies) authorised by the regulator may give regulated investment advice. An exception to this general rule is that an authorised person may appoint representatives to act for it and the authorised person must take responsibility for the activities it authorises the representative to carry out. In this relationship the authorised person is called the principal.

Mr D was therefore authorised by his Principal to carry on the activities it authorised him to carry out. The Principal firm is not an independent financial adviser. It advises on and deals in a limited range of investments. There is no direct relationship between the Principal and Heritage.

**The introducer**

In 2010 Mr D set up a separate business I will call Mr D's company. This was set up by Mr D to act as an introducer for unregulated investments.

Mr A signed an introducer's agreement with Mr D's company in March 2011 recording that it was to introduce Mr A to a proposed purchase of a property which was part of a hotel in St Lucia. It went on to say that the company or its owner or directors did not act as Mr A's financial adviser but as agent for the seller of the property, Harlequin.

The investment

*Harlequin Property*

The Harlequin group of companies was involved in the development and distribution of overseas property investments and resorts, primarily based in the Caribbean and promoted by a UK registered company.

The developments failed and funds invested were not always used as intended. A number of Harlequin entities are now in insolvency, with some senior figures involved with those companies facing prosecution.

Mr D's investment was in an off-plan property on the Marquis Estate development in St Lucia priced at £125,000. Mr D paid £33,000 from his SIPP in April 2011 which was a first payment with the balance to be paid by stages as the building work progressed. The target completion date was December 2013.

<u>The relationship between Mr D and Heritage</u>

Heritage has explained things as follows:

> Mr D was introduced to it in September 2009 by an adviser with whom it had an established business relationship.
>
> Mr D said he had been granted permission by the Principal to use his own preferred SIPP provider to write low volume high quality business.
>
> It conducted the appropriate due diligence on Mr D and agreed to allow him to introduce business to it.
>
> In July 2010 Mr D provided Heritage with information about the Harlequin investment. He explained this could be of interest to a number of his existing clients.
>
> Heritage undertook their own due diligence on the investment and allowed it into the SIPP.
>
> In October 2010 Mr D said he intended to operate as an appointed representative of the Principal to give regulated advice. He had also set up his company to promote the Harlequin investment to his clients.
>
> Heritage understood Mr D, acting on behalf of his company would introduce the Harlequin investment. If clients liked the idea, Mr D would give regulated advice on behalf of the Principal.
>
> In October 2010 Heritage asked Mr D to sign new terms of business and to provide more information to complete an Introducer Profile.

*<u>What happened</u>*

In 2011 Mr A wanted to remortgage. A family member recommended an adviser with the Principal and he saw that adviser for mortgage advice. Mr A says he also saw Mr D with that adviser.

Mr A says soon after, in March 2011, Mr D came to his home to talk with him about his pension and persuaded him to transfer his existing personal pension (which was not with the Principal) to a SIPP with Heritage in order to invest in a Harlequin investment.

Mr A says everything was done at that single meeting where he signed all the various forms Mr D asked him to.

Mr D applied to open a SIPP and transfer his existing personal pension to it. And he applied to invest in the Harlequin investment in his SIPP. He agreed to pay a deposit of £33,000 for the property (which was slightly less than the usual contractual 30% deposit which would have been £37,500) with the remainder of the purchase price to be paid by stages as the property was built.

The various forms and letters signed by Mr A included:

- The Heritage SIPP application form. This included:
    - a supplemental deed that was signed by Mr A and witnessed by Mr D,
    - a confirmation of identity section completed by Mr D who referred to himself as a financial adviser with the Principal and gave its FSA registration number,
    - the financial adviser details in an Appendix which names Mr D of the Principal.
- The introducer agreement with Mr D's company referred to above.
- A letter of understanding relating to the Harlequin investment.
- A Heritage form entitled Harlequin Property Appropriateness Test.

The SIPP was opened in March 2011 and almost £38,000 was transferred in from Mr A's existing personal pension. In early April £33,000 was paid to Harlequin from the SIPP.

As mentioned above, later Harlequin got into difficulties and so far as I am aware the property Mr D agreed to buy has not been built and it looks like Mr A has lost his money.

<u>The complaint against the Principal</u>

Mr A complained to the Principal about the advice Mr D had given.

As I understand it, a number of other clients of Mr D who he introduced to Heritage to invest in Harlequin also complained to the Principal about Mr D's advice and it settled those complaints. However it did not agree to settle Mr A's complaint. As I understand it, the Principal said Mr D was not authorised by it to advise on Mr A's existing personal pension, SIPPs with Heritage or investments with Harlequin.

Mr A complained to the Financial Ombudsman Service about the Principal and that complaint was not upheld.

Mr A then complained to Heritage.

*<u>Our investigation</u>*

The complaint about Heritage was referred to the ombudsman service and one of our investigators looked into it. He thought the complaint should be upheld. He made a number of points including:

- Mr D was not an agent for Heritage and so it is not responsible for his acts and omissions.

- Heritage was not responsible for giving Mr A investment advice.

- Heritage did however have an obligation to think about the quality of the business it accepted.

- Where appropriate it could have refused to accept business referred to it without giving investment advice.

- Heritage made checks on Mr D. It accepted what Mr D said when he told it that the Principal had agreed to him using his own SIPP provider.

- Heritage did however know that the Principal had a different SIPP provider on its panel of approved providers. And that it would be highly unusual for a principal with a limited panel to allow its appointed representative to recommend a competitor's product. So it wasn't reasonable to take what Mr D said at face value. Heritage should have made further enquiries.

- Heritage was aware Mr D had set up his unregulated company to receive commissions for any introductions made to Harlequin. This should have given Heritage cause for concern.

- Heritage dealt with Mr D on the basis of him calling into its office to hand in documents and give oral explanations of the business he was introducing. If it had, for example, asked to see copies of his recommendation reports it would have realised he was rarely if ever giving regulated investment advice in relation to Heritage and Harlequin and that he was not acting in the way he told Heritage he would. This should have given Heritage significant cause for concern.

- Business from Mr D constituted nearly 14% of its total new business between October 2010 and March 2012. And 95% of that business involved non-mainstream investments which the investigator said he assumed was mainly Harlequin.

- Mr D's business model which involved an unregulated introducer and recommendations into a high-risk esoteric investment, should have alerted Heritage to the risk of consumer detriment.

- The investment into Harlequin would generally, and reasonably at the time, have been regarded as complex and higher risk. This doesn't make them unsuitable for a SIPP. But they would generally be considered unsuitable for most retail investors. This means there was a high likelihood of unsuitability if the consumers were buying those investments without individual advice about the investment as in the process set up by Mr D.

- In Mr A's case the investment involved buying a property for £125,000 and his investment from the SIPP was a deposit of £33,000. Mr A would have needed to find further funds or obtain finance at a later date to complete the investment once built and this increased risk of consumer detriment.

- While the investments may have been suitable for SIPPs the process that led to the investment in those investments was flawed and involved a considerable risk of consumer detriment.

- Heritage should not have accepted Mr A's application. If it had not it is more likely than not that he would not have invested in Harlequin at all. And so it's fair and reasonable that Heritage compensate Mr A for the losses he has suffered.

Mr A agrees. Heritage does not. It has made a number of points including:

- Both Mr D and Mr A represented to Heritage that Mr A had received regulated advice on the pension switch to Heritage and the investment in Harlequin from Mr D acting for the Principal. It was reasonable for it to rely on those assurances and not consider that any advice was being given on an unregulated basis.

- Mr A signed an appropriateness test form used when a client wanted to instruct Heritage to invest in a complex investment and had not sought advice from an authorised financial adviser. Mr A also signed a letter of understanding which identified many of the risks associated with the Harlequin investment.

- It was fair and reasonable for Heritage to rely on the assurances and declarations it had received.

- Heritage did not breach any regulatory requirement in accepting Mr A's investment and allowing him to invest in Harlequin. Or by not requesting copies of any suitability letters from Mr D.

- Even if Heritage had refused Mr A's transfer he would have transferred his pension to another SIPP provider and invested in Heritage in any event.

- Culpability for the losses suffered by Mr A in relation to Harlequin lies with Mr D and his Principal.

More generally Heritage says it is an execution only SIPP provider and that the ombudsman service wrongly treats the supposed obligation on Heritage as an execution only provider to decline to do business with an introducer as not entailing any suitability assessment or advice. It is impossible to separate this supposed obligation from the making of such an assessment.

**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.

In considering what's fair and reasonable in all the circumstances of this complaint, I've taken into account relevant law and regulations; regulators rules, guidance and standards; codes of practice; and, where appropriate, what I consider to be good industry practice at the relevant time.

***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). And, I consider that the Principles relevant to this complaint include Principle 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've carefully considered the relevant law and what this says about the application of the FCA's Principles. In *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin) ("BBA") Ouseley J said at paragraph 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 the BBA judgment including paragraph 162 set out above, said (at paragraph 104 of BBSAL):

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

The BBSAL judgment also considers section 228 of Financial Services & Markets Act 2000 ("FSMA") and the approach an ombudsman is to take when deciding a complaint. The judgment of Jacobs J in BBSAL upheld the lawfulness of the approach taken by the ombudsman in that complaint, which I have described above, and included the Principles and good industry practice at the relevant time as relevant considerations that were required to be taken into account.

I've considered the High Court decision in *Adams v Options SIPP*. Since that decision the Court of Appeal has handed down its judgment following its consideration of Mr Adams' appeal. I've taken both judgments into account when making this decision.

I've considered whether the judgments mean that the Principles should not be taken into account in deciding this case and I find that they don't. In the high court judgment, *Adams v Options SIPP*, HHJ Dight did not consider the application of the Principles and they didn't form part of the pleadings submitted by Mr Adams. The Court of Appeal judgment gave no consideration to the application of the Principles either. So, *Adams v Options SIPP* says nothing about the application of the FCA's Principles to the ombudsman's consideration of a complaint.

As outlined above, Ouseley J in the BBA case held that it would be a breach of statutory duty if I were to reach a view on a complaint without taking the Principles into account in deciding what is fair and reasonable in all the circumstances of a case. And, Jacobs J adopted a similar approach to the application of the Principles in BBSAL. I am therefore satisfied that the FCA's Principles are a relevant consideration that I must take into account when deciding this complaint.

**COBS 2.1.1R**

The rule says:

> "*A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*"

I acknowledge that COBS 2.1.1R overlaps with certain of the Principles, and that this rule was considered by HHJ Dight in the *Adams v Options* SIPP 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 the *Adams* case.

The Court of Appeal rejected Mr Adams' appeal against HHJ Dight's dismissal of the COBS claim on the basis that Mr Adams was seeking to advance a case that was radically different to that found in his initial pleadings. The Court found that this part of Mr Adam's 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.

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

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

So I have considered COBS 2.1.1R - alongside the remainder of the relevant considerations, and within the factual context of Mr A's case, including Heritage's role in the transaction. However, I think it is important to emphasise that I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And, in doing that, I am required to take into account relevant considerations which include: law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. This is a clear and relevant point of difference between this complaint and the judgments in *Adams v Options SIPP*. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

***The 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.

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

I have considered those publications but will only refer to the 2009 Thematic Review in detail.

***The 2009 Thematic Review Report***

The 2009 report included the following statement:

*"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses ('a firm must pay due regard to the interests of its 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 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 analyzing data regarding the aggregate volume of such business.*

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

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 didn't constitute formal guidance doesn't mean their importance should be underestimated. They provide a *reminder* that the Principles for Businesses apply and are an indication for 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 at the time, and I am therefore satisfied it is appropriate to take them into account.

Like the ombudsman in the BBSAL case, I don't think the fact that the publications (other than the 2009 Thematic Review Report) post-date the events that are the subject of this complaint mean that the examples of good industry practice they provide were not good practice at the time of the events. The later publications were published after the events subject to this complaint, but the Principles that underpin them existed throughout, as did the obligation to act in accordance with those Principles.

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

It is important to bear in mind that 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.

It's also important to keep in mind the judgments in *Adams v Options* did not consider the regulatory publications in the context of considering what is 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.

Overall, in determining this complaint I need to consider whether Heritage complied with its regulatory obligations as set out by the Principles to act with due skill, care and diligence, to take reasonable care to organise its business affairs responsibly and effectively, to pay due regards to the interests of its customers (in this case Mr A), to treat them fairly, and to act honestly, fairly and professionally. And, in doing that, I'm looking to the Principles and the publications listed above to provide an indication of what Heritage could have done to comply with its regulatory obligations and duties.

***The role of Mr D – and why Heritage should not have done business with him***

It is Heritage's understanding that Mr D had a duel role in relation to Mr A's SIPP. Mr D was an appointed representative of his Principal. In that capacity he gave Mr A advice to transfer his existing personal pension to a SIPP with Heritage.

Mr D acting on behalf of his company he was also an introducer for Harlequin. And in that capacity Mr D introduced Mr A to his Harlequin investment made in his SIPP.

Heritage understood this to be Mr D's way of operating by the time of Mr A's application. And it had entered into an Introducer Agreement with Mr D acting for his Principal in order to accept business from Mr D.

Heritage should not have agreed to do business with Mr A in this way.

Heritage is a regulated a business. It is an execution only SIPP operator. And it was under a regulatory obligation to conduct its business, in that limited non-advisory capacity, with due skill, care and diligence.

In 2009 the regulator gave this example of good industry practice:

*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.*

Heritage should have had a reasonable understanding of the need for those giving regulated advice to be regulated. It should reasonably have understood the appointed representative/principal relationship. It should have understood that the appointed representative's regulated status relies entirely on its principal – it is not free to do whatever it wants to do independently.

And Heritage should reasonably have understood the Principal's business model in this case – because it was a large and well-known firm. And because it thought it was doing business with one of its representatives so it should have found out if it did not already know.

Heritage should have known that the Principal is a firm that offers advice on only a restricted range of products. It should have understood that the Principal had no relationship with it. And it should have understood that it was inherently implausible that it would have allowed one of its representatives to choose to do business with it rather than the SIPP operator on its panel.

It was not fair and reasonable to just take Mr D's word on this point. It is no answer to suggest that he could be relied on because he was a regulated individual. It should have checked with the Principal.

Heritage should have realised that there was a real risk that Mr D was acting in a way that had not been approved by the Principal which is a point that goes to Mr D's reliability and integrity. It should also have realised that if Mr D was giving investment advice that went beyond the boundaries of what was authorised by the Principal the advice would not be authorised. Heritage should have realised that if things were not as Mr D said there was a real risk of harm to its customers and to it.

Further it knew that Mr D was hoping to introduce investors for the purpose of investing in Harlequin – an investment that would be considered high risk and not suitable for the pensions of most retail investors. So it also knew there was a real risk of consumer harm if Mr D was acting inappropriately.

There is no evidence that the Principal did in fact authorise Mr D to do business with Heritage and it has refused to accept responsibility for the advice Mr D gave to Mr A. (It may have accepted responsibility in other cases but that is likely to be because the pensions other consumers switched out of were pensions Mr D was authorised to advise on.)

If Heritage had checked with the Principal, it would have discovered that Mr D was not authorised to do business with it. And in turn it would have refused to accept any business from Mr D. Heritage could and should have refused Mr A's application without going beyond its normal contractual role and regulatory permissions and giving him advice on the suitability of the investment for him.

Heritage should not have accepted Mr A's application for a SIPP and transferred his existing personal pension to it. And this means it would not have made the investment to Harlequin for Mr A because he would have had no SIPP to make the investment from.

### *Did Heritage's failings cause Mr A's loss?*

Heritage has said that Mr D and the Principal caused Mr A's loss.

As I understand it a complaint about the Principal has not been upheld and I have no jurisdiction over Mr D. In this decision I've looked at Heritage's separate role and responsibilities, and I've found that it failed to meet those responsibilities. So, I need to consider what Mr A would have done if that had not happened.

I cannot see that there is any evidence that Mr A was motivated to open his SIPP and invest in Heritage because of, for example, an incentive payment as in the *Adams v Options SIPP* case. I acknowledge that Mr A had some relations who invested in the same way but as I understand it they were also clients of Mr D. In my view, there is nothing to indicate that Mr A would have moved his pension if he had not been encouraged to do so by Mr D. And Mr D only acted in that way because Heritage agreed to accept the business he referred to it.

Mr A had a relatively small pension pot and I do not consider it likely that he would have been advised to move his pension by Mr D acting on behalf of his Principal appropriately advising on its approved products. I consider it unlikely Mr D would have opened a SIPP and transferred his pension to it without getting advice. And I consider that any other regulated financial adviser acting reasonably would have advised Mr A that investing his pension in the Harlequin investment was not suitable for him and would have advised him against it. I say this notwithstanding the fact that Mr A received warnings about the risk of the investment with Harlequin. Risk warnings are not the same as being advised that the investment is unsuitable and that is what reasonable advice to Mr A from a regulated adviser would have been. I consider it more likely than not that Mr A would have accepted such advice and that he would not have insisted on investing in Harlequin against that advice.

I therefore consider it unlikely that Mr A would have suffered the same loss if Heritage had refused to accept his application because it had decided not to accept business from Mr D.

### *In conclusion*

It is my view that in the light of what Heritage knew, or ought to have known, about Mr D and his Principal before it received Mr A's application, it didn't comply with good industry practice, act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr A fairly by accepting his application. And I think that, in not doing so, it allowed him to be put at significant risk of detriment.

For the avoidance of doubt, I'm not saying that Heritage should have assessed the suitability of the investment or the SIPP for Mr A. I accept that Heritage had no obligation to give advice to Mr A, or otherwise ensure the suitability of a pension product or investment for him. My finding is not that Heritage should have concluded that the investment or SIPP was not suitable for Mr A. Rather it is that Heritage did not meet its regulatory obligations, or treat Mr A fairly, by accepting his application for a SIPP introduced by Mr D.

## Putting things right

My aim is that Mr A should be put as closely as possible into the position he would reasonably be in if things had not gone wrong. In my view that means comparing Mr A's present position to the position he would be in if he had not moved his existing personal pension.

It is therefore my view that Heritage should put things right as follows:

Heritage should calculate fair compensation by comparing the value of Mr A's pension, if he had not transferred, with the current value of his SIPP. In summary:

1. Obtain the notional transfer value of Mr A's previous pension plan, if it had not been transferred to the SIPP.

2. Obtain the actual transfer value of Mr D's SIPP, including any outstanding charges.

3. Pay a commercial value to buy the Harlequin investment (or treat it as having a zero value in the above calculations – see below).

4. Pay an amount into Mr A's SIPP so that the transfer value is increased to equal the value calculated in (1). This payment should take account of any available tax relief and the effect of charges. It should also take account of interest as set out below.

5. If the SIPP needs to be kept open only as a result of the Harlequin investment and used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.

6. Heritage should also refund to Mr A any fees or charges he has paid from money other than the money originally transferred in form his personal pension together with 8 % simple interest per year from the date the fee or charge was paid until the date of this decision.

7. Pay Mr A £500 for the distress and inconvenience the avoidable problems with his pension will have caused him.

If there are any difficulties in obtaining a notional valuation of the previous pension, then the FTSE WMA Stock Market Income Total Return Index should be used instead. That is a reasonable proxy for the type of return that could have been achieved if suitable funds had been chosen taking account of Mr A's likely attitude to risk.

If Heritage is unwilling or unable to purchase the investment the *actual value* should be assumed to be nil for the purposes of the above calculation. And Heritage may ask Mr A to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the investment. That undertaking should allow for the effect of any tax and charges on the amount Mr A may receive from the investments and any eventual sums he would be able to access from the SIPP. Heritage will need to meet any costs in drawing up the undertaking.

If Heritage is unable to pay the total amount (other in steps 6 and 7 above) into Mr A's SIPP it should pay the compensation as a lump sum to Mr A. But had it been possible to pay into the SIPP it would have provided a taxable income. So the total amount should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

The *notional* allowance should be calculated using Mr A's marginal rate of tax at retirement. For example, if Mr A is 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 A would have been able to take a tax free lump sum, the *notional* allowance should be applied to 75% of the total amount.

The compensation resulting from this loss assessment must be paid to Mr A or into his SIPP within 28 days of the date Heritage receives notification of his acceptance of this 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

I uphold Mr A's complaint against Heritage Pensions Limited and direct it to pay fair compensation and interest on it as set out above

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 7 March 2022.

Philip Roberts
**Ombudsman**