DRN-3257978

The complaint

Mr M complains about the actions of Carey Pensions UK LLP (now Options UK Personal Pensions LLP) in 2011. Mr M is represented and his representative says that Carey accepted an introduction by an *"unregulated investment broker".* This introduction was made so that a pension switch could take place from Mr M's existing pension to a Carey SIPP. That was so that a high risk unregulated investment could be made within the SIPP – which was unsuitable for Mr M.

Mr M's representative says that Carey failed to carry out sufficient due diligence at the time on the introducer or the investment and this led to significant financial loss for Mr M. It says Carey did not check that the introducer had the relevant qualifications to provide advice on pensions. It said that Carey didn't act in Mr M's best interests.

What happened

Carey is now Options so, whilst I note that many of the matters that are the subject of this complaint occurred when Mr M was dealing with Carey, I will refer to Options throughout.

In 2011 Mr M says he was contacted by Mr Anthony Marchi of ILAWS Scotland (ILAWS) who offered to discuss his pension arrangements and persuaded him to switch his existing pension schemes into a SIPP. He was then advised by Mr Marchi to invest into Global Forestry Investments to generate better returns than his existing pension providers.

Mr M subsequently applied to switch his pensions to the Options SIPP in 2011 and subsequently instructed investment into a Global Forestry investment in Brazil.

I've set out the various parties involved in Mr M's pension switch and subsequent investment in detail below.

Options Plc

Options is a SIPP provider and administrator. It was regulated by the Financial Services Authority (FSA) at the time of the events complained about – now the Financial Conduct Authority (FCA). It was – and still is – authorised to arrange (bring about) deals in investments; deal in investments as principal; establish, operate and wind up a personal pension scheme; and make arrangements with a view to transactions in investments.

ILAWS

ILAWS is a business based in Scotland. It sets out on its website that it specialises in Will writing and asset protection. It is also set out that it can provide pension and savings reviews. ILAWS current website does not set out that it is regulated to provide any services by any regulatory body or authority. It does not say it is regulated by the FCA. ILAWS does not appear on the FCA Register of regulated businesses for any activities.

Easson Financial Services (EFS)

Mr Easson of EFS is recorded on Mr M's Options SIPP application as the adviser that provided him with advice as to his pension transfer. EFS is recorded on the FCA Register as a regulated firm from 15 October 2008. It is also recorded that it is an appointed representative of First Complete (FCA reference number 435779), and was an appointed representative of First Complete at the time of the events complained of. First Complete is authorised to undertake insurance activities. It is not authorised to provide pension and investment advice or undertake activities in respect of pensions and investments.

Global Forestry

Global Forestry was an investment in a leasehold plot of a Teak tree plantation in Brazil. This aim was for a positive investment return generated through the development of Teak trees. Mr M's specific investment was the 'Belem Sky Plantation Project'. Mr M invested
£40,000 of the money switched to his SIPP in this investment.

The relationship between ILAWS and Options

Options has not said how its relationship with ILAWS came about or what the nature of that relationship would be. It has not said what its agreement with ILAWS was. Factually speaking, it did accept an introduction from ILAWS (Mr M). And this seems to have been the first such introduction bearing in mind that when ILAWS sent Mr M's SIPP application to it, ILAWS said, "Please find enclosed applications for our first case with you."

Mr M's submissions

Mr M has said that he was contacted by Mr Marchi of ILAWS as he was a previous customer of Capital Mortgage Connections (CMC) - Mr Marchi's old firm. He said Mr Marchi offered to discuss his pension arrangements and persuaded him to switch his existing pension schemes into a SIPP. He was then advised by Mr Marchi to invest into Global Forestry Investments to generate better returns than his existing pension providers. He was then introduced to Options by ILAWS so that his pension could be switched to a SIPP and investment made in Global Forestry.

Options investigation of Mr M's complaint

In its response to the complaint, Options:

- Said Mr M instructed it to open his SIPP, switch his existing pensions to it and make the Global Forestry investment. Mr M decided to use ILAWS and also signed to indicate he had received advice from EFS.

- Said Options did not provide advice in relation to the SIPP or subsequent investment. It acted on Mr M's specific instructions. It acted on an execution only basis, as instructed by Mr M.

- Said Options is not responsible for the acts of ILAWS or EFS and it was not privy to any discussions Mr M had with them.

- Said Options had acted in a transparent and reasonable manner in its dealings with Mr M.

- Set out various declarations Mr M had signed when setting up the SIPP. These set out that Options wasn't responsible for any of the investment decisions Mr M made and it didn't provide him with any advice.

- Said its terms and conditions set out that it was Mr M's responsibility to ensure any transfers or investments were in his best interests, not Options.

- Set out that the documentation Mr M completed explained that it did not provide advice and was not responsible for any investment decisions the individual made. It said it noted that it was indicated that Mr Easson had provided Mr M with advice.

- Said ILAWS acted as an introducer to it and weren't regulated. ILAWS didn't provide advice. It did not act inappropriately in accepting an instruction from ILAWS.

- Said it did carry out due diligence on ILAWS. Whilst this was carried out after Mr M invested in Global Forestry through his SIPP, that due diligence showed no reason why it should not conduct business with it.

- Said it did check that the Global Forestry investment could be held in a SIPP.

- Said the SIPP application was submitted to it by Mr Anthony Marchi of ILAWS. The application was signed by Mr M on 26 April 2011. The financial adviser details part of the form, noting Mr Edward Easson, was received later – on 19 July 2011. The section was signed by Mr Easson on 6 July 2011 and Mr M on 14 July 2011.

- Said it received a completed Investment Member Declaration dated by Mr M on 19 September 2011 setting out he wished to invest in Global Forestry. This was witnessed by Mr Marchi. The investment was then made.

- Said that when Options became aware of issues with ILAWS it severed links with it and escalated its concerns to the FCA and Action Fraud. It said it came to its attention after the investment had been made that Mr Easson may not have provided Mr M with financial advice. It understands that Mr Easson's signature was forged by ILAWS. It had no reason to suspect there was anything untoward prior to this. Mr Marchi, *"had cleared due diligence checks and World-checks"* when these were carried out by Options.

- Said ILAWS is still an active company but it no longer accepts introductions from it.

- Confirmed it did not uphold Mr M's complaint.

Our investigator's view of the complaint

Mr M's complaint was considered by an investigator at this service. The investigator thought the complaint should be upheld. In summary she:

- Set out the relevant considerations – The FSA/FCA's Principles for Businesses and its communications relating to the duties of SIPP operators.

- Said that Options should have thought carefully about the business it accepted to meet its regulatory obligations.

- Said Options obligations would include undertaking appropriate due diligence on the introducer – ILAWS. She understood that Mr M was the first customer introduced to Options by ILAWS.

- Said that when Options received Mr M's application in April 2011 the financial adviser details page was missing. Options requested this and it was received in June 2011. However, it was not completed fully and Options requested a completed copy – which it did not receive until July 2011. The investigator thought that this missing information and the time it took to obtain it, should have resulted in Options treating the introduction with caution. Bearing that in mind, it should have checked the page carefully when it received it. Mr Edward Easson had apparently signed the page on the June and July copies. But the signatures differed markedly. The application form had also been altered to change Mr Easson's address to that of ILAWS. She said this should have put Options on alert and it should therefore have investigated the matter further.

- Said that if Options had investigated the matter further then it would have discovered that Mr Easson was an appointed representative of First Complete – which didn't have regulatory permissions to undertake investment and pension activities.
- Said the issues with the application and the lack of any permissions to undertake pension and investment activities should alone have caused Options to reject the application.
- Said that, in addition, a reasonable level of due diligence would have been to carry out checks on ILAWS and its Directors. If Options had carried out adequate due diligence on Mr Marchi it would have discovered that he had previously been a Director of CMC – which had been fined by the FSA in 2006 for breaches of FSA Principles.
- Said there were significant matters that should have put Options on notice that it should not accept Mr M's introduction. Options had said that after it had investigated the matter in 2014 that it discovered Mr Easson's signature had been forged. The investigator thought that a reasonable level of investigation would have likely discovered the same issue in 2011. Which would have led to the application being rejected.
- Said Mr M should never have got to the point of signing Options indemnities and declarations as his application should never have proceeded.
- Set out how compensation should be calculated.

We did not receive any response from Options to the investigator's assessment.

The complaint was then referred to me for review.

After considering Mr M's complaint, I issued a provisional decision on 17 November 2021. In the provisional decision I set out why I was minded to uphold the complaint and make an

award.

I have not received any further submissions from Options.

Mr M has accepted the provisional decision.

As I revisit my provisional findings below I will not include a summary of them here.

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 arriving at a decision that I believe is fair and reasonable in the circumstances, I have taken into account relevant law and regulations; regulators' rules; guidance and standards; codes of practice; and what I consider to have been good industry practice at the time.

Having reconsidered matters, I remain of the view set out in my provisional decision. So, as I have no further submissions to consider, I have repeated below the findings set out in my provisional decision.

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), 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):

"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 BBA 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 the Berkeley Burke case 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.

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

I note that the Principles for Businesses did not form part of Mr Adams' pleadings in his initial case against Options SIPP. And, HHJ Dight did not consider the application of the Principles to SIPP operators in his judgment. The Court of Appeal also gave no consideration to the application of the Principles to SIPP operators. So, neither of these judgments provide any assistance with the application of the Principles for Businesses, and in particular, they say nothing about how the Principles apply to an 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 Berkeley Burke. So the Principles are a relevant consideration here and I will consider them in the specific circumstances of this complaint.

Regulatory publications

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

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

I have set out below what I consider to be the key parts of the publications (although I have considered them in their entirety).

The 2009 Thematic Review Report

The 2009 report included the following statement:

> *"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses ('a firm must pay due regard to the interests of its 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.*** (my emphasis)

- *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.*** (my emphasis)

- *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.*** (my emphasis)

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

The later publications

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

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

All firms, regardless of whether they do or do not provide advice must meet Principle 6 and treat customers fairly. COBS 3.2.3(2) is clear that a member of a pension scheme is a "client" for SIPP operators and so is a customer under Principle 6. It is a SIPP operator's responsibility to assess its business with reference to our six TCF consumer outcomes." The October 2013 finalised SIPP operator guidance also set out the following:

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

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

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

Although the members' advisers are responsible for the SIPP investment advice given, as a SIPP operator the firm has a responsibility for the quality of the SIPP business it administers. Examples of good practice we have identified include:

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

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

"Due diligence

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

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

- *periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme*
- *having checks which may include, but are not limited to:*
    - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*
    - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*
- *ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified*
- *good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and*
- *ensuring these benchmarks clearly identify those instances that would lead a firm to decline the proposed business, or to undertake further investigations such as instances of potential pension liberation, investments that may breach HMRC tax- relievable investments and non-standard investments that have not been approved by the firm"*

The July 2014 *"Dear CEO"* letter provides a further reminder that the Principles apply and an indication of the FCA's expectations about the kinds of practical steps a SIPP operator might reasonably take to achieve the outcomes envisaged by the Principles.

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

- *Correctly establishing and understanding the nature of an investment*
- *Ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation*
- *Ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable)*
- *Ensuring that an investment can be independently valued, both at point of purchase and subsequently*
- *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 report (and the 2012 report and the *"Dear CEO"* letter) are not formal guidance (whereas the 2013 finalised guidance is). However, I am of the view the fact that the reports and *"Dear CEO"* letter did not constitute formal (i.e. statutory) guidance does not mean their importance or relevance should be underestimated.

The publications provide a *reminder* that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its

customers fairly and to produce the outcomes envisaged by the Principles. In that respect, these publications also go some way to indicate what I consider amounts to good industry practice at the relevant time. I am therefore satisfied it is appropriate to take them into account.

I do not think the fact that the later publications (i.e. those other than the 2009 Thematic Review Report), post-date the events that 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 relevant events. It is 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 regulators' 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.

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. 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 investment in the Global Forestry was suitable for Mr M. It is accepted Options was not required to give advice to Mr M, 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.

I would also add, that even if I took the view that any publications or guidance that post-dated the events subject of this complaint do not help to clarify the type of good industry practice that existed at the relevant time (which I don't), that does not alter my view on what I consider to have been good industry practice at the time. That is because I find that the 2009 report together with the Principles provide a very clear indication of what Options could and should have done to comply with its regulatory obligations that existed at the relevant time before accepting any introduction from ILAWS and/or allowing the investment into the SIPP.

Ultimately, in determining this complaint, I need to consider whether Options 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, 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 Options could have done to

comply with its regulatory obligations.

COBS2.1.1R

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 am of the view that neither of the judgments say anything about how the Principles apply to an ombudsman's consideration of a complaint. But, to be clear, I do not say this means Adams is not a relevant consideration *at all.* As noted above, I have taken account of both judgments when making this decision on Mr M's case.

I acknowledge that COBS2.1.1R (*A firm must act honestly, fairly and professionally in accordance with the best interests of its client)* was considered by HHJ Dight in the High Court case. Mr Adams pleaded that Options SIPP owed him a duty to comply with COBS 2.1.1R, a breach of which, he argued, was actionable pursuant to section 138(D) of FSMA ("the COBS claim"). HHJ Dight rejected this claim and found that Options SIPP had complied with the best interests rule on the facts of Mr Adams' case.

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

I note that there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Mr M'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.

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 Adams v Options SIPP. 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 M on the suitability of its SIPP or the Global Forestry 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.

I acknowledge Options has applied to the Supreme Court for permission to appeal the Court of Appeal judgment and the outcome of that application is awaited. However, the grounds of appeal are in respect of issues not directly relevant to my determination of this case and therefore it is unnecessary to await either the consideration of the application or, if permission is granted, the Supreme Court judgment. I am satisfied it is appropriate to determine this complaint now.

what did Options' obligations mean in practice?

In this case, the business Options was conducting was its operation of SIPPs. I am satisfied that meeting its regulatory obligations when conducting this business would include deciding whether to accept or reject 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 and a particular investment is an appropriate one for a SIPP.

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.

the due diligence carried out by Options on ILAWS and what it should have concluded

I have considered what a level of due diligence consistent with Options regulatory obligations and the standards of good practice at the time ought to have revealed. And what, with those same obligations and standards in mind, Options ought to have concluded about ILAWS. And, when doing this, I have taken into account the evidence I have mentioned above.

As set out above, the 2009 Thematic Review Report deals specifically with the relationships between SIPP operators and introducers or "*intermediaries".* And it gives non exhaustive examples of good practice. In my view, to meet these standards, and its regulatory obligations, set by the Principals, Options ought to have identified a significant risk of consumer detriment arising from accepting business from ILAWS. And so Options ought to have ensured it thought very carefully about accepting applications from ILAWS and, therefore, Mr M's application.

I think it is fair and reasonable to say such consideration should have involved Options getting a full understanding of the business model of the introducer, the nature of the investments to be made and putting a clear agreement in place between it and the introducer and ensuring careful thought was given to the risk generally posed to consumers by the introducer.

I have not seen any evidence that Options put into place an agreement with ILAWS that set out their respective responsibilities or what the nature of the relationship was to be. I have not seen that Options obtained any understanding of the nature of the business that ILAWS would introduce or that it established the nature of the firm and what its objectives were, the types of clients it would deal with, the levels of business to be introduced or the types of investments it would introduce.

So in my view there isn't evidence that Options undertook a reasonable level of due diligence with respect to ILAWS and this clearly created the risk that consumer detriment would result.

Options has said that ILAWS/Mr Marchi cleared due diligence checks and a 'World-check' but it has not said what due diligence it carried out. And Options has pointed out that it undertook those checks *after* Mr M's introduction and investment. Be that as it may, a reasonable level of due diligence before accepting Mr M's introduction and

setting up his SIPP would have revealed information that should have given Options cause for concern about accepting business from Mr Marchi or ILAWS and led it to investigate further.

Mr Anthony Marchi

Mr Marchi was a Director of ILAWS.

The evidence indicates that Mr Marchi was the primary contact with Options in terms of Mr M's introduction. He submitted the SIPP application and witnessed that application. So being both a Director of ILAWS and the individual dealing with Options and specifically introducing Mr M, in fulfilling its obligations under the Principles Options should have carried out sufficient due diligence on him (as well as ILAWS and its other Directors).

If Options had carried out a basic level of due diligence, including checking the (at the time) FSA Register, it would have discovered that Mr Marchi was previously a Director of CMC. CMC was a mortgage broker, involved in the sale of mortgages and mortgage related insurance. In was previously authorised by the FSA to carry out such activities. Mr Marchi is listed on the Register as being CMC's CF1 - Director and CF3 - Chief Executive. He would therefore have been directly involved in the oversight and operation of that business.
The FSA imposed a financial penalty on CMC of £17,500 in 2006 for failing to comply with FSA Principles. This is clearly recorded on the Register and would have been recorded at the time of Mr M's introduction.

This was a clear 'red flag' that should have put Options on notice to treat an application from Mr Marchi and ILAWS with caution. Options should clearly have queried this and thought carefully about accepting introductions from him without further investigation.

The SIPP application

There is a letter from ILAWS dated 6 May 2011 to Options. This said it enclosed *"applications for our first case with you".* It was signed by *"Tony Marchi".* An application for Mr M was attached.

On the application were sections indicating which pension *"Transfers"* were to be made to Options. These sections contained the question, *"Please tick the box to indicate that you have received advice on the transfer of this policy".* The box was 'ticked'.

There followed the question, *"If you have ticked above please provide details of who has provided you with advice in respect of this transfer".* The name *"Edward Easson"* was noted. *"Global Forestry"* was noted as the investment choice for the SIPP. The application was 'signed' by *"Anthony Marchi"* on 26 April 2011. The *"Regulating Firm"* was noted as *"First Complete"* with the FSA reference number 435779. Mr M signed the application on 26 April 2011.

I understand that when the application was first submitted, the page which requested details of the advice provided was not completed. So it was returned to ILAWS for completion. The second time (in June 2011) the relevant page was submitted Mr Easson was noted as the financial adviser. The section was still not fully completed so was returned to ILAWS again. Mr Easson was also noted as the financial adviser when the document was returned.
However, as the investigator said, the signatures on the relevant pages looked markedly different.

Putting that to one side, Options had been approached by an unregulated introducer, ILAWS, and had apparently agreed to accept introductions from it on that basis and on the basis that Mr M was not being advised. However, it then received documentation which set out that Mr M *had* received financial advice – from a party that had not previously been mentioned.

It is unclear on what basis Options was treating this business – on the basis that Mr M had received advice from a regulated party as to the suitability of the SIPP and investment, or on the basis that he had not received such advice and was being referred by an unregulated introducer. But the information it was supplied with in June and July 2011 did indicate that Mr M had received advice.

Rights under a personal pension scheme are a security and relevant investment. Under Article 25(1) Regulated Activity Order (RAO), making arrangements for another person to buy and sell these types of investments is a regulated activity. And under Article 25(2) RAO, making arrangements with a view to a person who participates in the arrangements buying and selling these types of investments is also a regulated activity.

Given that and the conflicting information it had received as to the nature of Mr M's application (advised or non-advised), Options, acting fairly and reasonably to meet its regulatory obligations and good practice at the time, ought to have undertaken a reasonable level of due diligence on Mr Easson and the noted business, Easson Financial Services. If it had done that, it would have discovered that Mr Easson was an appointed representative of First Complete. First Complete was not authorised to give advice on pensions and investments and consequently neither was Mr Easson.

If Options had investigated the matter further it is likely that it would then have discovered, as it did later, that there were issues with Mr Easson's involvement – Options has said that his signature was being forged by ILAWS.

It is clear that there were a number of issues here which individually should have caused Options concern as to whether to accept introductions from ILAWS and specifically Mr M's introduction and application.

Other matters

When considering Mr Easson's belated, apparent, involvement, not only should Options have recognised the inconsistency between the signatures it had received, but it also should

have noted that the contact email for him was "info@ilawsscotland.co.uk" – ILAWS contact email. Furthermore on the last application pages that Options received, Mr Easson's address details had been crossed through and different address details substituted. Those address details have been altered to ILAWS business address.

So all contact was being diverted to ILAWS. There could have been an explanation for this – but Options did not apparently query it and it is clear that there was an overall picture of concern created by the various inconsistencies.

Global Forestry

As I have set out above, I think that if due diligence which was consistent with Options regulatory obligations and the standards of good practice at the time had been carried out

on ILAWS and EFS, that ought to have led to the conclusion Options should not accept Mr M's application from ILAWS at all. So it doesn't necessarily follow that the due diligence on the Green Forestry investment needs to be considered. Having said that, I have not seen evidence from Options that it did carry out any due diligence on the investment. I have not seen, for example, that Options checked there was a valid lease agreement for the plot or checked it was not fraudulent.

But when considering Options due diligence on ILAWS and whether Options should have accepted an introduction from it, it is relevant that what was being proposed was the investment of most of the pension fund in an unregulated esoteric high risk overseas asset. So it was clear that there were significant risks in investing in that kind of product – of the type that the FSA/FCA had highlighted in its guidance. Options should have borne that in mind as another relevant factor when considering the other matters that should have caused concern.

In summary:

- Options should have been aware that Mr Marchi was previously the Director of a regulated business that had a financial penalty imposed by the regulator for breaches of the Principles. And it should have been aware of that at the beginning of its relationship with him and ILAWS, and before it accepted Mr M's introduction.
- Options had received inconsistent information from ILAWS about the nature of the application and whether Mr M had received advice.
- Options had belatedly been informed that, according to ILAWS, advice had been given and a regulated adviser was involved.
- There was an inconsistency in the signatures noted for that adviser on the documentation.
- The adviser noted as providing advice was not authorised to give that advice or carry out activities in relation to pensions or investments.
- The proposed investment was an unregulated, esoteric, high risk overseas investment in which most of Mr M's pension fund was being invested.

After considering these points, I don't regard it as fair and reasonable to conclude that Options acted with due skill, care and diligence, or treated Mr M fairly by accepting Mr M's introduction and setting up the SIPP, facilitating the switches to it, or facilitating the investment in Green Forestry. Options didn't meet its regulatory obligations or the standards of good practice at the time, and it allowed Mr M's funds to be put at significant risk as a result.

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

In my view, for the reasons given, Options simply should have refused to accept Mr M's application. So things should not have got beyond that. Had Options acted in accordance with its regulatory obligations and best practice, it is fair and reasonable in my view to conclude that it should not have accepted Mr M's application to open a SIPP.

I acknowledge Mr M was asked to sign an Options SIPP application and member's

declaration(s) and it would have put some reliance on that. The indemnities sought to confirm that Mr M wouldn't hold Options responsible for any liability resulting from the investment.

However, I don't think this document demonstrates Options acted fairly and reasonably when proceeding with Mr M's instructions.

For the reasons set out, I don't think Options should have accepted the application from ILAWS. So, Mr M shouldn't have got to the point of signing declarations as the business shouldn't have come about at all. Furthermore, asking Mr M to sign declarations absolving Options of all its responsibilities when it ought to have known that Mr M's dealings with ILAWS were putting him at significant risk was not the fair and reasonable thing to do.

My remit is, of course, to make a decision on what I think is fair and reasonable in all the circumstances. And my view is that it's fair and reasonable to say that just asking Mr M to sign declarations was not an effective way for Options to meet its regulatory obligations to treat him fairly, given the concerns Options ought to have had about his introduction.

I am also satisfied that, had Options not accepted Mr M's application to open a SIPP introduced from ILAWS, the arrangement for Mr M would not have come about in the first place, and the loss he suffered could have been avoided.

Mr M was contacted by ILAWS and he was not actively looking to do anything with his pension. And ILAWS was clearly reliant on Options to facilitate things – but for Options' acceptance of the application, Mr M's business would not have been able to proceed.

In any event, I think it fair to say Mr M should simply have been unable to complete this transaction. I do not think any SIPP operator, acting properly, would have dealt with ILAWS.

Options might argue that another SIPP operator would have accepted Mr M's application, had it declined it. But I don't think it's fair and reasonable to say that Options should not compensate Mr M for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found it did.

I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted the application from Caledonian, or would have terminated the transaction before completion.

For all the reasons I've set out, I'm satisfied that it would not be fair to say Mr M actions mean he should bear the loss arising as a result of Options' failings. In the circumstances, I am satisfied that Options should not have asked him to sign the declarations at all. For the reasons I have set out, I am satisfied that the application should never have been accepted in the first place.

Putting things right

Bearing in mind and that I have not received any further submissions since the issue of my provisional decison, having reviewed the complaint, I would confirm that my decision remains that the complaint should be upheld.

I am satisfied that Options failure to comply with its regulatory obligations and industry best practice at the relevant time have led to Mr M suffering a significant loss to his pension. And, my aim is therefore to return Mr M to the pension position he would now be in but for Options failings.

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

1. Calculate the loss Mr M has suffered as a result of making the switch.

2. Take ownership of the Global Forestry investment if possible.

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

4. Pay £500 for the trouble and upset 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 M has suffered as a result of making the transfer

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

Options should ask Mr M's former pension provider to calculate the current notional transfer value(s) had he not switched 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.

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 M has suffered. The Global Forestry investment should be assumed to have no value.

2 Take ownership of the Global Forestry investment

If Options is unable to take ownership of the Global Forestry investment it should remain in the SIPP. I think that is fair because I think it is unlikely it will have any significant realisable value in the future. However, it would not be fair for Mr M to have any ongoing fees to pay in relation to the SIPP. So, in the event Options is unable to take ownership of the Global Forestry investment (and it can't otherwise be removed from the SIPP), it should waive any fees associated with the SIPP, until such a time as the SIPP can be closed.

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

Since the loss Mr M 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. This may mean the compensation should be increased to cover the charges and reduced to notionally allow for the income tax relief Mr M could claim. The notional allowance should be calculated using Mr M's marginal rate of tax.

On the other hand, Mr M may not be able to pay the compensation into a pension. If so compensation for the loss should be paid to Mr M 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 M should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mr M's marginal rate of tax in retirement. For example, if Mr M 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 M 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 £500 for the trouble and upset caused.

Mr M has been caused some distress and inconvenience by the loss of his pension benefits. This is money Mr M cannot afford to lose and its loss has undoubtedly caused him distress. I consider that 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 Mr M's 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. If Options considers that it is legally required to deduct income tax from the interest, it must send a tax deduction certificate with the payment. Mr M can reclaim the tax from HM Revenue and Customs if appropriate.

My final decision

I uphold the complaint and order that Options UK Personal Pensions LLP calculate and pay compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 17 February 2022.

David Bird
Ombudsman