DRN-3534267

## The complaint

Mr B complains that Rowanmoor Personal Pensions Limited failed in its regulatory duties to carry out sufficient due diligence checks when accepting his Self-Invested Personal Pension ("SIPP") application.

Mr B says Rowanmoor should have had concerns about the business that introduced his application (CIB Life & Pensions Limited) and should now compensate him for the loss he's suffered as a result of allowing him to invest into The Resort Group via that SIPP.

## Background

*The parties*

*Rowanmoor Personal Pensions Limited ("Rowanmoor")*

Rowanmoor is a regulated pension provider and administrator. It's authorised to arrange deals in investments, arrange safeguarding and administration of assets, deal in investments as principal, establish, operate or wind up a pension scheme and to make arrangements with a view to transactions in investments.

*CIB (Life & Pensions) Limited ("CIB")*

At the time of the events in this complaint, CIB were authorised by the regulator - the Financial Services Authority ("FSA"), which later became the Financial Conduct Authority ("FCA") - to advise on regulated products and services including giving investment advice and arranging deals in investments such as pensions.

In May 2015, CIB went into liquidation, and has since been dissolved.

*Real SIPP LLP ("RealSIPP")*

RealSIPP were an appointed representative of CIB from April 2010 to June 2015. Rowanmoor was told by CIB in May 2010 that CIB had "developed" RealSIPP to be:

> "*… a packager and administrator of SIPPs for all networked developments and is set-up as an appointed representative of CIB (Life & Pensions) Ltd. However, RealSIPP will not be issuing suitability letters a recommendations as this is done directly by CIB (Life & Pensions) Ltd.*"

*Consumer Money Matters ("CMM")*

CMM was a claims management company that acted as an introducer of business to CIB. CMM dissolved on 8 July 2019.

*The Resort Group ("TRG")*

The Resort Group was founded in 2007. TRG owns a series of luxury resorts in Cape Verde. TRG sold luxury hotel rooms to UK consumers, either as whole entities or as fractional shares ownership in a company. TRG was not regulated by the financial services regulator.

This case involves an investment into TRG's Dunas Beach Resort.

*What happened?*

Mr B told us that he had dealings with CMM in relation to a PPI matter. After that was resolved, CMM contacted him again and introduced him to CIB to conduct a pension review. Mr B has explained that his pension was producing an annual return of around 0.1% at that time, but says he was promised returns of 7% if he invested in TRG.

Mr B says he was risk adverse, but that he was assured this was a safe and suitable investment. Mr B queried warnings on the paperwork he was asked to sign but was told they were just industry standard warnings and didn't really apply to this investment.

In early 2012 Mr B switched his personal pension funds of around £125,000 into the Rowanmoor SIPP and invested a significant proportion of those funds to make his investment in TRG.

TRG hasn't performed as Mr B was led to believe and he's suffered a considerable loss. The development was completed and is operating, but it doesn't generate the returns set out to Mr B incurs considerable fees. So, the investment is illiquid and essentially Mr B has lost his pension provision.

*Mr B's complaint*

Mr B complained to Rowanmoor in March 2016 setting out a number of points. But in summary he said:

- Rowanmoor failed to meet its regulatory duties and permitted him (as a retail client) to transfer to an unsuitable pension which facilitated the purchase of an unsuitable, high risk, illiquid investment.

- He had a low risk profile with little or no investment experience to demonstrate the suitability of the purchase.

- The investment was inappropriate for his pension as it's impossible to get his investment back.

- Rowanmoor has failed to answer a discrepancy about why there is a difference between the cost of the TRG property and actual price paid from his SIPP.

- Had Rowanmoor had proper controls in place it would have identified and raised concerns about the introduction from CIB.

*Rowanmoor's position*

Rowanmoor said it had fulfilled its regulatory duties by warning Mr B to seek financial advice from a regulated adviser before proceeding and that the investment had risks. Rowanmoor also said that it had carried out due diligence on TRG.

Mr B remained unhappy and so referred his complaint to our Service.

*Our investigator's assessment*

One of our investigators looked into the complaint and reviewed everything. He noted Rowanmoor had monitored the business it received from CIB, but he concluded that by the time it received Mr B's application it should have been aware that there was a high risk of consumer detriment. So, he said Rowanmoor should not have accepted Mr B's application and should now compensate him for the resulting losses.

Mr B responded accepting the investigator's view.

Rowanmoor has not responded or provided any comments in relation to the investigator's assessment.

As no agreement could be reached, the complaint has been passed to me to review afresh and make a decision.

**My findings**

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 is fair and reasonable in all the circumstances of this complaint, I have 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.

I'd like to assure both parties that I've looked at all of their submissions with care. In reviewing the complaint I've considered everything specifically in relation to Mr B's circumstances, but in this decision I've concentrated on the key arguments and evidence that are material to my determination of the complaint.

***What are the 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 – Clients' interests – A firm must pay due regard to the interests of its clients and treat them fairly."*

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

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

And at paragraph 77 of BBA Ouseley J said:

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

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

Jacobs J, having set out some paragraphs of 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 and the relevant time as relevant considerations that were required to be taken into account.

I've considered whether *Adams v Options* means that the Principles should not be taken in account in deciding this case. And, I find that it doesn't. In *Adams v Options*, the judge did

not consider the application of the Principles and they did not form part of the pleadings submitted by Mr Adams. So, *Adams v Options* 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.

I know that Rowanmoor says that the application of COBS in *Adams v Options* serves as guide to the application of Principle 6. But it's not possible to say that conduct that does not amount to a breach of COBS *automatically* means that the Principles have been satisfied or that the conduct amounts to good industry practice at the relevant time.

***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.

***The 2009 Thematic Review Report***

The 2009 report included the following statement:

> *"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses ('a firm must pay due regard to the interests of its clients and treat them fairly') insofar as they are obliged to ensure the fair treatment of their clients. 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 analysing 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).*

***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 clients fairly. COBS 3.2.3(2) is clear that a member of a pension scheme is a "client" for SIPP operators and so is a customer under Principle 6. It is a SIPP operator's responsibility to assess its business with reference to our six TCF consumer outcomes."*

The October 2013 finalised SIPP operator guidance also set out the following:

> ***"Relationships between firms that advise and introduce prospective members and SIPP operators***
>
> *Examples of good practice we observed during our work with SIPP operators include the following:*
>
> - *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for un- authorised business warnings.*
>
> - *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*
>
> - *Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.*
>
> - *Being able to identify irregular investments, often indicated by unusually small or large transactions; or higher risk investments such as unquoted shares which may be illiquid. This would enable the firm to seek appropriate clarification, for example from the prospective member or their adviser, if it has any concerns.*
>
> - *Identifying instances when prospective members waive their cancellation rights and the reasons for this.*
>
> *Although the members' advisers are responsible for the SIPP investment advice given, as a SIPP operator the firm has a responsibility for the quality of the SIPP business it administers.*
>
> *Examples of good practice we have identified include:*
>
> - *conducting independent verification checks on members to ensure the information they are being supplied with, or that they are providing the firm with, is authentic and meets the firm's procedures and are not being used to launder money*

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

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

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

> ***"Due diligence***
>
> *Principle 2 of the FCA's Principles for Businesses requires all firms to conduct their business with due skill, care and diligence. All firms should ensure that they conduct and retain appropriate and sufficient due diligence (for example, checking and monitoring introducers as well as assessing that investments are appropriate for personal pension schemes) to help them justify their business decisions. In doing this SIPP operators should consider:*
>
> - *ensuring that all investments permitted by the scheme are permitted by HMRC, or where a tax charge is incurred, that charge is identifiable, HMRC is informed and the tax charge paid*
>
> - *periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme*
>
> - *having checks which may include, but are not limited to:*
>
>   - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*
>
>   - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*
>
> - *ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified*
>
> - *good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and*
>
> - *ensuring these benchmarks clearly identify those instances that would lead a firm to decline the proposed business, or to undertake further investigations such as instances of potential pension liberation, investments that may breach HMRC tax- relievable investments and non-standard investments that have not been approved by the firm"*

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

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

- *Correctly establishing and understanding the nature of an investment.*
- *Ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation.*
- *Ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable).*
- *Ensuring that an investment can be independently valued, both at point of purchase and subsequently.*
- *Ensuring that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc).*

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

I acknowledge that the 2009 and 2012 reports and the *"Dear CEO"* letter are not formal *"guidance"* (whereas the 2013 finalised guidance is). However, the fact that the reports and *"Dear CEO"* letter did not constitute formal guidance does not mean their importance should be underestimated. They provide a *reminder* that the Principles for Businesses apply and are an indication 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 regulators expectations of what SIPP operators should be doing also goes 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 Berkeley Burke 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 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.

It is also 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.

Another relevant consideration in this complaint is the regulator's alert about advisers giving advice to consumers on SIPPs without consideration of the underlying investment to be held in the SIPP. The regulator issued an alert in 2013 ("Advising on pension transfers with a view to investing pension monies into unregulated products through a SIPP") setting out that this type of restricted advice did not meet regulatory requirements. It said:

> *"It has been brought to the FSA's attention that some financial advisers are giving advice to customers on pension transfers or pension switches without assessing the advantages and disadvantages of investments proposed to be held within the new pension. In particular, we have seen financial advisers moving customers' retirement savings to self-invested personal pensions (SIPPs) that invest wholly or primarily in high risk, often highly illiquid unregulated investments (some which may be in Unregulated Collective Investment Schemes)…*
>
> *Financial advisers using this advice model are under the mistaken impression that this process means they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect.*
>
> *The FSA's view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes."*

The alert post-dates the events in this complaint – but, again, it didn't set new standards. It set out the regulator's concerns about industry practices at the time. I'll explain the impact of this on Mr B's complaint in my findings.

It's important to keep in mind the judge 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 Rowanmoor 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 B), 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 Rowanmoor could have done to comply with its regulatory obligations and duties.

***Rowanmoor's contractual obligations***

Rowanmoor says that, consistent with the decision in *Adams v Options*, the nature of its obligations must be looked at through the prism of the contractual documents between Mr B and Rowanmoor. I don't think the considerations in the *Adams v Options* case are analogous to the circumstances in this complaint, in which I'm considering the Principles.

But, notwithstanding that, I *have* taken into account the contractual documents that Rowanmoor refers to and I agree they are relevant in clarifying some aspects of the

relationship between Rowanmoor and Mr B. I accept that Rowanmoor made it clear to Mr B that it was not giving, nor able to give, advice to him and that it played an execution-only role in his SIPP investments.

The indemnity Mr B signed sought to confirm that he was aware the investment was high risk, had been given advice, and would not hold Rowanmoor responsible for any liability resulting from the investment.

The FSA's 2009 report said that SIPP operators should, as an example of good practice, be:

> *"Routinely identifying instances of execution-only clients who have signed disclaimers taking responsibility for investment decisions and gathering and analysing data regarding the aggregate volume of such business."*

With this in mind, I think Rowanmoor ought to have been cautious about accepting Mr B's application even though he had signed an indemnity. I think there was an imbalance of knowledge and Rowanmoor should have taken very little comfort from the indemnity. It had already shown concern that CIB was not giving full regulated advice to consumers.

But unlike the situation in the case of *Adams v Options* where the SIPP provider relied upon the indemnity that was signed by the consumer, the circumstances here are different. Rowanmoor has confirmed its process was to only accept applications on the basis that regulated advice had been provided on the underlying investment. This was specifically agreed as a requirement by Rowanmoor's board and is recorded as such in its board minutes and internal email communications from 2009.

In its submissions to this Service, Rowanmoor confirmed:

> *"Of particular note, a member of Rowanmoor's risk and compliance team met with a representative of CIB in June 2009 to discuss CIB's business and its responsibilities (including the need for CIB to provide advice to clients)… Rowanmoor accepted introductions of investments in TRG on the express understanding that CIB was providing advice to the clients concerned"*.

So, although it says that acceptance of Mr B's SIPP was on an "execution-only" basis, its own policy was that acceptance of business was conditional upon him having received advice.

In this case the contractual documents assume that Mr B (and most likely all investors in TRG that had been introduced by CIB) had received financial advice. Rowanmoor's failure to check that financial advice had in fact been received by Mr B is a due diligence issue and inconsistent with its own policy.

In the *Adams v Carey* case, the judge found that Mr Adams would have proceeded with the transaction regardless. HHJ Dight said (at para. 32):

> *"The Claimant knew that it was a high risk and speculative investment but nevertheless decided to proceed with it, because of the cash incentive…"*

But in this case Mr B has confirmed that he was not given any incentive or 'welcome bonus'. He had already been 'sold' on the idea of the TRG investment and so I think he signed the indemnity without a full understanding of what high risk meant, assured by what he was told. This is why Rowanmoor should have been wary of dealing with CIB – as it had already introduced business without providing full advice – contrary to what Rowanmoor had stipulated.

My view is supported by the fact that many other consumers were not fully advised by CIB and accepted risks they say they did not understand. Rowanmoor did not check with Mr B whether he had in fact been fully advised.

The Principles exist to ensure regulated firms treat their clients fairly.

The contractual documents don't absolve, nor do they attempt to absolve, Rowanmoor of its regulatory obligations to treat customers fairly when deciding whether to accept or reject business.

Rowanmoor had to act in a way that was consistent with the regulatory obligations I've set out in this decision. In my view, asking Mr B to sign an indemnity absolving Rowanmoor of all responsibility, and relying on such an indemnity, when it ought to have known Mr B's dealings with CIB were putting him at significant risk was not the fair and reasonable thing to do.

***Adams v Options and the Principles***

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 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. I remain of the view that neither of these judgments say anything about the Principles – or how they apply to an ombudsman's consideration of a complaint.

To be clear, I do not say this means *Adams v Options* is not a relevant consideration *at all.* As noted above, I have taken account of both judgments where relevant when making this decision on Mr B's case.

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

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 must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And, in doing that, I'm required to take into account relevant considerations which include: law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. This is a clear and relevant point of difference

between Mr B's complaint and the judgments in *Adams v Options*. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

I disagree with Rowanmoor's understanding of its obligations. The Principles, COBS 2.1.1R and the whole regulatory framework provide an ongoing set of responsibilities with which a business must comply.

***Rowanmoor's role***

I accept that Rowanmoor did not and could not give advice to Mr B. I have conducted my assessment on the understanding that Rowanmoor could not have assessed the suitability of a course of action its customers wished to take.

Instead, I am assessing whether Rowanmoor acted fairly and reasonably in relation to its distinct obligations to Mr B as a client or potential client, using the Principles, regulation and regulatory publications that I have laid out above as a guide.

It is apparent to me from the text of the 2009 and 2012 reports, 2013 guidance and the "Dear CEO" letter in 2014 that the regulator expected SIPP operators to have incorporated the recommended good practices into their business models already. In addition, the regulator continued to express disappointment with SIPP operators' failure to have implemented such practices.

Taking everything into account, I'm satisfied Rowanmoor should have thought carefully about:

- Whether accepting the business from CIB was treating Mr B fairly; taking reasonable care; and acting with due skill, care and diligence.

- Whether accepting the investment into TRG's Dunas Beach Resort was treating its customer fairly; taking reasonable care; and acting with due skill, care and diligence.

To accept everything that came its way and ask Mr B to accept warnings absolving it of the consequences wasn't enough. Declining to accept business doesn't amount to advice and Rowanmoor could have declined to accept the SIPP application without giving investment advice. I therefore need to consider whether Rowanmoor gave enough thought to the nature of Mr B's referral to it and the investment that was being requested.

***Rowanmoor's due diligence on CIB***

I understand Rowanmoor considers it did undertake sufficient due diligence on CIB and satisfied its obligations under regulatory guidance. I accept that at the outset of its relationship with CIB, Rowanmoor did carry out some checks – it says that, as it was dealing with another regulated business, it had no obligation to do more or later due diligence. I disagree with this.

Rowanmoor monitored the business it was receiving from CIB, keeping information on each introduction from it, such as the plan commencement date and the introduced number. From this information they told us that:

- It accepted its first business from CIB in June 2009 and last in October 2013.

- In total, Rowanmoor accepted 1,387 introductions from CIB from June 2009 to October 2013. This is 26.90% of all business received by Rowanmoor during this period.

- 341 schemes introduced by CIB involved 1 or more occupational transfers. Of the 1,387 clients introduced, this is 24.59%.

It's clear from documentation made available Rowanmoor had concerns as early as July 2009 that CIB was introducing significant volumes of execution-only business and wasn't operating under the business model it believed to be in place.

In contemporaneous minutes from a Rowanmoor board meeting, it was agreed that one of the directors would meet with CIB and investigate the concerns about the business model and whether consumers were being fully advised. In the subsequent board meeting it was recorded the director had a telephone conversation with CIB and was given a verbal assurance that "*going forward, full advice would be given*". But Rowanmoor seems to have accepted that assurance without checking to ensure advice was in fact being given.

By the time Rowanmoor received Mr B's application, I think it ought reasonably to have been aware there was a high risk of consumer detriment. Therefore, I don't think Rowanmoor should have accepted Mr B's application.

***What, acting fairly and reasonably, should CIB have done?***

I think Rowanmoor should have thought carefully about whether accepting Mr B's business from CIB was consistent with its regulatory obligations.

I'd expect Rowanmoor to have carried out some initial due diligence into CIB and then continually review what it knew. I've considered whether Rowanmoor carried out enough due diligence into CIB and what it knew, or ought to have known, at the point it received Mr B's application - and I don't think it did – as I'll explain below.

Prior to accepting CIB's business, Rowanmoor had no agreement in place with CIB, so there was no formal understanding between the two businesses setting out each other's obligations.

In the FSA's initial report of the findings of its 2009 thematic review of SIPP operators indicated concern that some operators did not gather and analyse management information tracking where the business of their introducer firms came from, together with indicators as to its suitability for clients. The FSA indicated an example of good practice included:

> *"Routinely recording and reviewing the type (i.e. 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."*

Rowanmoor provided our Service with a list which includes information about the number of introductions made by CIB, the investments made by each client, the date the SIPP accounts were opened, etc. Based on the information provided by Rowanmoor, I've assumed that such a system was in place before Mr B's application to it – which I think is good practice. This would mean that management information was readily available.

But I don't think it was enough for Rowanmoor to simply record this information. It should also have been considering the information and acting on anything which ought to have caused concern. Based on the referrals it received from CIB, Rowanmoor would have

seen that CIB was referring a large number of clients to open a SIPP in order to invest into one esoteric investment TRG's Dunas Beach Resort.

Prior to Mr B's introduction in February 2012, it would appear that a significant number of introductions were made by CIB, all investing in a high-risk investment. I think Rowanmoor ought to have been concerned about how CIB were obtaining this number of customers when this type of investment is only suitable for a small proportion of people. I think the volume ought to have caused them concern and led Rowanmoor to ask questions long before Mr B's application. For example, the type of consumers it would be referring to it for this purpose, how they were being obtained and how there was enough time to give everyone suitable advice. I can't see Rowanmoor did that at any point before accepting Mr B's application.

Mr B transferred his pension and invested in this high-risk investment without receiving any regulated advice. TRG's Dunas Beach Resort is a commercial property and high-risk esoteric investment, and so in my view would only be suitable for a small number of investors.

Rowanmoor knew that not all consumers that had been referred to it were being fully advised from outset, and its board had specifically discussed that issue as recorded in its meeting minutes. So it ought to have identified there was a possibility that CIB was not providing advice on the TRG investment to Mr B and that he was at risk of consumer detriment. In order to meet its regulatory obligations, Rowanmoor reasonably ought to have undertaken further due diligence in relation to the introductions that CIB was making.

The FSA's September 2009 report explicitly indicated that requesting copies of suitability reports was an example of what it regarded as good practice. And that having this information *"would enhance the firm's understanding of its client. Making the facilitation of unsuitable SIPPs less likely."*

I think Rowanmoor should have requested examples of the literature CIB was sharing with its consumers and done this long before Mr B's application.

I've reviewed a number of complaints against Rowanmoor involving CIB, I haven't seen that Rowanmoor asked to see CIB's suitability report for any of the introductions made to it. If Rowanmoor had taken these steps, it would have established CIB was not providing full advice to its customers and there was a risk of consumer detriment. So, it was not in accordance with its regulatory obligations nor good industry practice for Rowanmoor to proceed to accept business from CIB.

*Did Rowanmoor carry out sufficient due diligence into the investment?*

I haven't gone on to consider whether or not sufficient due diligence was carried out by Rowanmoor into the TRG investment – as I don't consider it necessary.

As set out, had Rowanmoor acted fairly and reasonably they wouldn't have accepted this application from CIB. So Rowanmoor wouldn't have been in a position to either accept or reject
the investment application in any event.

***Is it fair to ask Rowanmoor to pay Mr B compensation in the circumstances?***

Rowanmoor considers it unfair to hold it wholly responsible for Mr B's losses. It says a consumer must be held liable for their own investment decisions and CIB was the regulated party at fault. To ask Rowanmoor to bear the full loss to the exclusion of those parties is unfair.

But, I don't think that it's fair and reasonable that Rowanmoor should have no responsibility for Mr B's losses simply because he signed the documents he did.

Rowanmoor failed to carry out appropriate due diligence on CIB and reach the right conclusions. I understand that another regulated party (CIB) was involved here. But our Service can't look at a complaint against CIB as it was dissolved and no longer exists as a regulated business.

To be clear, I'm not making a finding that Rowanmoor should have assessed the suitability of the investment or the SIPP for Mr B. I accept that Rowanmoor had no obligation to give advice to Mr B or otherwise ensure the suitability of a pension product or investment for him. I'm looking at Rowanmoor's separate role and responsibilities – and for the reasons I've explained, I think it failed in meeting those responsibilities.

CIB's business model was based upon submitting large volumes of business through Rowanmoor and had it refused to accept business from Rowanmoor, I think another SIPP operator wouldn't have processed Mr B's transaction if it had carried out sufficient due diligence. Further, if Rowanmoor had ensured Mr B was fully advised and understood the risks, I think he would've left his pension where it was.

But for Rowanmoor's failings, Mr B's pension switch would not have occurred in the first place. So, I'm not asking Rowanmoor to account for loss that goes beyond the consequences of its failings.

Mr B has already received some compensation from the FSCS for failings by CIB. But under the terms of the reassignment between Mr B and the FSCS, Mr B is contractually bound to repay the FSCS from any compensation he receives from Rowanmoor.

It was necessary for Mr B to accept the terms of the reassignment set by the FSCS in order for him to pursue the balance of his losses. So, I don't think that was an unreasonable thing for him to do and, as he will be required to repay the compensation received from the FSCS from any compensation he receives from Rowanmoor, I don't think it would be fair and reasonable for me to not take the reassignment into account. I have set out my thinking on this when setting out fair compensation below

**Fair compensation**

My aim is to return Mr B to the position he would now be in but for what I consider to be Rowanmoor's failure to carry out adequate due diligence checks before accepting his SIPP application from CIB.

Mr B has raised concerns regarding the value of the TRG investment that was purchased with his pension funds. He feels there was a discrepancy of around £12,000 between the purchase price of the property and its value in Euros. Based on what I've seen, I don't believe there's a discrepancy in the value of the property and the price paid, as Rowanmoor paid the price for the property as stated in the contract. But as I intend to put Mr B into the position he would be in had Rowanmoor never accepted his business, any discrepancy in the sum paid for the investment is not an issue that needs further consideration in any event.

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

- Calculate the loss Mr B has suffered as a result of making the transfer.
- Take ownership of the TRG investment if possible.
- Pay compensation for the loss into Mr B's pension. If that is not possible pay compensation for the loss to Mr B direct. In either case the payment should take into account necessary adjustments set out below.
- Pay £500 for the trouble and upset Mr B has experienced.

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

*1. Calculate the loss Mr B has suffered as a result of making the transfer ("the loss calculation")*

Rowanmoor should calculate redress for Mr B's pension in line with The FCA's pension review guidance in October 2017 (updated March 2021) https://www.fca.org.uk/publication/finalised-guidance/fg17-9.pdf using the most recent financial assumptions published.

*2. Take ownership of the TRG investment*

In order for the SIPP to be closed and further SIPP fees to be prevented, the investment needs to be removed from the SIPP. To do this, Rowanmoor should calculate an amount it is willing to accept as a commercial value for TRG and pay that sum into the SIPP and take ownership of the relevant investments. This amount should be taken into account for the loss calculation.

If Rowanmoor is unwilling or unable to purchase the investment the value of it should be assumed to be nil for the purposes of the loss calculation.

Provided Mr B is compensated in full, Rowanmoor may ask Mr B to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the investment in the future. That undertaking should allow for the effect of any tax and charges on the amount Mr B may receive from the investment and any eventual sums he would be able to access from any costs in drawing up the undertaking.

If Rowanmoor does not take ownership of the of the TRG investment, and it continues to be held in Mr B's SIPP there will be ongoing fees in relation to the administration of that SIPP. Mr B would not be responsible for those fees if Rowanmoor had not accepted the transfer of his pension into the SIPP. So, I think it is fair and reasonable for Rowanmoor to waive any SIPP fees until such time as Mr B can dispose of the TRG investment and close the SIPP.

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

Since the loss Mr B 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 his SIPP. 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 B could claim. The notional allowance should be calculated using Mr B's marginal rate of tax in retirement.

On the other hand, it may not be able to pay the compensation into the SIPP. If so compensation for the loss should be paid to Mr B 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 B should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mr B's marginal rate of tax in retirement. For example, if Mr B 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 B would have been able to take a tax-free lump sum, the notional allowance should be applied to 75% of the total amount.

I appreciate that Mr B has been paid some compensation by the FSCS. But, as explained above, I don't think I can ignore the terms of the reassignment agreement he had to sign as part of his claim to the FSCS. To do so would mean that Mr B would not be compensated for Rowanmoor's failings – which, as I've said above, has caused his entire loss irrespective of the separate roles and obligations of other parties.

So, I will make no allowance for what has been paid by the FSCS and award Mr B compensation for the full loss he has suffered. Mr B is contractually bound by the terms of his reassignment from the FSCS to pay back any monies it awarded to him. Mr B has confirmed that he understands that he is contractually bound to repay those monies to the FSCS and that he will do so. I am satisfied that Mr B will act in accordance with his contractual obligations in good faith – and so I am satisfied that no real risk of 'double recovery' arises.

I understand that CIB is dissolved, but if Rowanmoor believes other parties to be wholly or partly responsible for the loss, it is free to pursue those other parties. So, compensation payable to Mr B should be contingent on the assignment by him to Rowanmoor of any rights of action he may have against other parties in relation to his transfer to the SIPP and the investments.

*4. Pay £500 for the trouble and upset caused.*

Mr B has been caused some distress and inconvenience by the loss of his pension benefits. This is money that Mr B cannot afford to lose, and its loss has caused him to lose all confidence in pension providers. I consider that a payment of £500 is appropriate to compensate for that upset.

*interest*

The compensation resulting from this loss assessment must be paid to Mr B or into his SIPP within 28 days of the date Rowanmoor 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**

For the reasons given, my decision is that I uphold Mr B's complaint against Rowanmoor Personal Pensions Limited.

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £150,000, plus any interest and or costs that I think are appropriate. If I think that fair compensation is more than £150,000, I may recommend that the business pays the balance.

The full extent of Mr B's losses have not yet been calculated (as set out above), but it is possible his loss may exceed the £150,000 award limit.

***Decision and award*:** I uphold the complaint. I think that fair compensation should be calculated as set out above. My decision is that Rowanmoor should pay Mr B the amount produced by that calculation – up to a maximum of £150,000. It should also pay any interest accrued if the compensation is not paid within 28 days of acceptance of a final decision by Mr B.

***Recommendation:*** If the amount produced by the calculation of fair compensation is more than £150,000, I recommend that Rowanmoor pays Mr B the balance.

This recommendation is not part of my determination or award. Rowanmoor doesn't have to do what I recommend. It's unlikely that Mr B can accept my decision and go to court for the balance. Mr B may want to get independent legal advice before deciding whether to accept this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 16 September 2022.

Ross Hammond
**Ombudsman**