DRN-3998088

The complaint

Mr J has a self-invested personal pension (SIPP) with Options UK Personal Pensions LLP (formerly) Carey Pensions UK LLP ("Options"). Mr J's complaint is that Options accepted his application to open a SIPP and invest in an overseas property-based investment arrangement without first making adequate checks on the adviser, who he says was unregulated, and the investment which he says is unsuitable for a pension investment.

What happened

Mr J says he was contacted by a firm I will call the introducer and advised to invest in property in the Cayman Islands with Crown Acquisitions Worldwide Limited ('Crown').

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

Mr J applied for a SIPP with Options in January 2012. On that application form, details of Mr J's financial adviser were recorded in print as the introducer firm in Gibraltar.

In the same month as the SIPP application form was signed, Mr J signed a document headed:

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

In that document Mr J instructed Options to purchase land through Crown in the Cayman Islands. The form contained a number of declarations including that Mr J:

- understood Options was acting on an execution only basis and was not giving any advice to him.
- was aware the investment was an "*Unregulated 'Alternative Investment' and as such is considered High Risk and Speculative.*
- agreed the land would be sold prior to any residential development.
- agreed he had not and would not receive any form of inducement for making the investment.
- would indemnify Options against any claims made against it in connection with the investment.

In March 2012, around £97,000 was transferred into the SIPP from Mr J's existing personal pensions with a different provider. Soon after, in April 2012, £95,000 was invested in the Crown investment.

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

In October 2015, Options contacted Mr J to inform him there was further legal work and costs to be paid to complete the investment and that it had obtained estimates for those costs from two law firms in the Cayman Islands.

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

In a letter dated July 2021, Mr J complained to Options with the help of a claims management company (CMC). It said:

- Options did not carry out sufficient levels of due diligence before accepting this pension transfer.
- Mr J was exposed to and his monies were invested in non-standard investments that were too high risk.
- Options did not exercise the necessary duty of care to establish if investments were suitable.
- Options should compensate Mr J for the losses he has suffered.

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

- Options does not give advice. It acts on a non-advisory basis and is obliged to follow its clients' instructions.
- Mr J was advised by the introducer, and it was authorised under an EEA passport to give advice. Mr J's complaint should be against the introducer.
- Options was not authorised to advise on the suitability of the investment for Mr J.
- Mr J signed the member declaration that acknowledged Options did not give advice, and that the investment was high risk and speculative.
- The guidance issued by the regulator, though helpful, is not the same as the rules and Options complied with the rules. Options gave other risk warnings also.
- As an execution-only SIPP Provider, Options was obliged under the rules to comply with Mr J's instructions.

When Mr J referred his complaint to the Financial Ombudsman Service, Options told us it thought the complaint was referred too late. It said Mr J's SIPP was opened in January 2012 and the Crown investment was completed in April 2012. Mr J's complaint was received by Options in August 2021 and so it was referred over six years after the relevant events.

In October 2015, Mr J was sent a letter advising him of additional costs and the need to appoint a solicitor to help with the required legal work.

Options says this letter reasonably ought to have made Mr J aware he had cause to complain as it put Mr J *"on notice on the status of the investment"*. As he did not make his complaint before October 2018 (within three years of October 2015), the complaint has been made late and Options does not give its consent for our service to consider it.

The complaint was looked at by one of our investigators. They thought the complaint wasn't made late and that it should be upheld. The investigator made a number of points including:

- To be aware of their cause for complaint, a complainant would need to know there was a problem, that they had or may suffer a loss and who was responsible for that loss.
- The investigator didn't think the October 2015 letter was sufficient to make Mr J aware that he had cause to complain to Options about its lack of due diligence.
- At that time, a reasonable retail investor such as Mr J, didn't have the required knowledge to understand Options' obligations to him or his SIPP.
- Mr J wasn't aware of reason to complain to Options until he spoke to his CMC and so the complaint was not made late.
- Options did not give advice and was not required to do so. It was still, however, under obligations as a non-advisory SIPP operator.
- Refusing to accept business does not amount to advice.
- The regulator has issued a number of publications which remind SIPP operators of their obligations.
- The introducer had an EEA passport to provide certain services in the UK. The passport covered investment advice, but it did not cover advice to transfer or switch pensions which required additional permissions which the introducer did not have.
- Options had explained on other cases that the introducer did not provide advice and only acted on an execution only basis.
- Options was aware that it was the introducer's intention to introduce non-advised clients to it in order to invest in Crown investments which are esoteric, high-risk investments. Options should have identified that such investments were unlikely to be suitable for most retail investors. And that only relatively small investments were likely to be suitable for sophisticated investors.
- The introducer's business model of introducing such investments to retail investors should have been a concern to Options and if it had acted fairly and reasonably it would not have accepted Mr J's application. And if it acted accordingly, Mr J would not have suffered the losses he has to his pension.

The investigator then went on to explain how they thought Options should put things right. They also said Options should pay Mr J £500 for the distress caused to him by its failings.

Mr J accepted the investigator's opinion but Options did not reply. Because no agreement was reached, the case has been passed to me for review.

What I've decided – and why

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

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

Having considered everything carefully, I've come to a similar conclusion to our investigator. I'll explain why below.

Our jurisdiction

I've considered all the available evidence and arguments to decide whether Mr J's complaint is within the jurisdiction of the Financial Ombudsman Service.

This service is not able to consider every complaint that is referred to it. The rules in the Dispute Resolution: Complaints ("DISP") section of the Financial Conduct Authority ("FCA")

Handbook set limits to the extent of this service's jurisdiction. We are bound to follow these rules and so can only look at a complaint if allowed by them.

DISP Rule 2.8.2 R includes rules about general time limits. It says:

> *"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service …*
>
> *(2) more than:*
>
> *(a) six years after the event complained of; or (if later)*
>
> *(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;*
>
> *unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;*
>
> *unless:*
>
> *(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R … was as a result of exceptional circumstances; or…*
>
> *(5) the respondent has consented to the Ombudsman considering the complaint where the time limits … have expired …"*

Mr J's complaint relates to events in 2012 when his Options SIPP was opened, and his investments were made with Crown. Mr J first referred his complaint to Options in 2021 and so he complained over six years from the events in 2012.

I must therefore consider if Mr J complained within three years of when he became aware (or ought reasonably to have become aware) that he had cause for complaint. Specifically, cause to make this complaint about Options.

The term '*complaint*' is defined for the purposes of the DISP section in the FCA handbook Glossary as:

> *"any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a person about the provision of, or failure to provide, a financial service…which:*
>
> *(a) Alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience; and*
> *(b) Relates to an activity of that respondent, or any other respondent with whom that respondent has some connection in marketing or providing financial services or products …which comes under the jurisdiction of the Financial Ombudsman Service."*

Accordingly, the material points required for Mr J to have awareness of his cause for complaint about Options include:

- Awareness of a problem
- Awareness that the problem has or may cause him material loss; and

- Awareness that the problem was or may have been caused by an act or omission of Options

Options have provided us with a copy of the letter it sent to Mr J in October 2015. Amongst other things it said:

> *"As outlined in the investment brochure, which you received prior to making the investment, there are a number of completion costs attributable to your investment, for example Stamp Duty Land Tax and other costs as there is with any property or land purchase. This letter provides you with more information about those costs and the next steps in the process."*

It goes on to explain that Options had obtained quotes from two law firms and asks the investors to select their preference or, if they so choose, to name their own legal representative.

Having carefully considered the content of the letter, I'm not persuaded that this would have, or reasonably ought to have, caused Mr J to become aware of reason to complain to Options.

It does not point to any issues with the investments, but rather indicates that there are standard costs to be considered *("as there is with any property or land purchase")* and that these costs have been previously discussed within the investment brochure.

It also doesn't make Mr J aware of Options' responsibilities to complete any due diligence on the investments within his SIPP and I have seen nothing to indicate that Mr J, as a reasonable retail investor, would have been aware of these at the time.

So I don't think the receipt of the October 2015 letter would have (or ought to have) led Mr J to become aware of reason to complain to Options.

Having reviewed all the available evidence and correspondence, I note Mr J received a lawyers' report in May 2017, as well as subsequent annual valuations and correspondence for his investment.

The report, in summary, told the investors of some potential problems that arose with the investment. It notified the investors of a Court Case against Crown (brought by another SIPP provider) and of potential issues with Crown's credit worthiness.

In January 2018, Mr J received an annual valuation which informed him that the value of the investment had dropped considerably to approximately £47,500. This means it had dropped by over 50% since Mr J first made the investment.

In February 2018, Mr J was sent a notice to advise him that his SIPP would be transferred to the Carey Pensions Scheme 2 Trust (CPS2). Amongst other things it said:

*"The reason that we have decided to transfer your SIPP to the CPS2 SIPP Trust is because your Scheme contains investments that currently have little or no value due to them being in Liquidation, **they have a significantly reduced value** or are in a state of uncertainty. We therefore want a dedicated team to focus on monitoring and administering these distressed holdings within a single Trust for you." [my emphasis]*

Considering the report, subsequent valuation, and transfer notice, I'm satisfied that Mr J was made aware of a problem with the investment and that he should have realised he had suffered a material loss. But I have not seen anything that would have indicated to Mr J that

Options may have done something wrong and that he could complain to it about this. In fact, at the time, I think it's far more likely he would have equated these issues with the advice he received from the introducer, rather than with Options.

At the time, average retail investors - which I consider Mr J to have been - generally didn't have a good understanding of the rules and guidance which applied to SIPP providers, or the responsibilities SIPP providers have towards their clients.

It was only in late 2018, when the unsuccessful judicial review challenge in the R (*Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 287 ("*BBSAL*") judgment was published, that there was increased publicity around SIPP providers' duties. It was then when it became clearer that a SIPP provider could be responsible for the losses a consumer suffered in some circumstances.

So, allowing for some time for consumers to notice the change in the landscape following the BBSAL Judgment and to work out what this meant for them and their SIPP, I think Mr J ought reasonably to have become aware of Options' role and its potential responsibilities after the start of 2019.

It is from this point on that I expect Mr J (by now aware he had suffered a significant material loss) would have been able to question the potential issues with the investment, and, through some research, whether on his own or with the help of a representative, to have reasonably understood that his loss may have been caused by an act or omission of Options.

And Mr J did just that. He contacted his CMC and asked them to look into it for him. After some investigations, Mr J referred his complaint to Options in August 2021. As such, the complaint was referred within three years of January 2019 and so it was referred within the relevant time limits.

Overall, having considered all of the above, I'm not satisfied Mr J was (or ought to have been) aware of reason to complain to Options over three years before making his complaint, and so I've determined this complaint to be one our service can consider. I will now turn to the merits.

<u>The merits of Mr J's complaint</u>

Relevant considerations

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

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

The Principles

In my view, the FCA's Principles for Businesses are of particular relevance to my decision. The Principles for Businesses, which are set out in the FCA's handbook "*are a general statement of the fundamental obligations of firms under the regulatory system*" (PRIN

1.1.2G). And I consider that the Principles relevant to this complaint include Principles 2, 3 and 6 which say:

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

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

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

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

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

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

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

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

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

As outlined above, Ouseley J in the *BBA* case held that it would be a breach of statutory duty if I were to reach a view on a complaint without taking the Principles into account in deciding what is fair and reasonable in all the circumstances of a case. And Jacobs J adopted a similar approach to the application of the Principles in *BBSAL*. So, the Principles are a relevant consideration here and I will consider them in the specific circumstances of this complaint.

The *Adams* court cases and COBS 2.1.1R

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

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

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

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

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

I note that HHJ Dight found that the factual context of a case would inform the extent of the duty imposed by COBS 2.1.1R. HHJ Dight said at para 148:

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

The facts in Mr J’s case are different from those in *Adams*. There are also differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Mr J’s complaint. The breaches were summarised in paragraph 120 of the Court of Appeal judgment. In particular, HHJ Dight considered the contractual relationship between the parties in the context of Mr Adams’ pleaded breaches of COBS 2.1.1R that happened after the contract was entered into. In Mr J’s complaint, I am considering whether Options ought to have identified that the business introductions from the introducer involved a risk of consumer detriment and, if so, whether it ought to have ceased accepting introductions from the introducer prior to entering into a contract with Mr J.

On this point, I think it is also important to emphasise that I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case.

And, in doing that, I am required to take into account relevant considerations which include: law and regulations; regulator’s rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time.

This is a clear and relevant point of difference between this complaint and the judgments in both *Adams* cases. That was a legal claim which was defined by the formal pleadings in Mr Adams’ statement of case.

To be clear, I have proceeded on the understanding Options was not obliged – and not able – to give advice to Mr J on the suitability of its SIPP or the Crown investment for him personally. But I am satisfied Options’ obligations included deciding whether to accept particular investments into its SIPP and/or whether to accept introductions of business from particular businesses.

Regulatory publications

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

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

The 2009 report included the following statement:

> “*We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses (‘a firm must pay due regard to the interests of its customers and treat them fairly’) insofar as they are obliged to ensure the fair treatment of their customers. COBS 3.2.3(2) states that a member of a pension scheme is a ‘client’ for COBS purposes, and ‘Customer’ in terms of Principle 6 includes clients.*
>
> *It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six TCF consumer outcomes. We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then*

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

Of particular concern were firms whose systems and controls were weak and inadequate to the extent that they had not identified obvious potential instances of poor advice and/or potential financial crime. Depending on the facts and circumstances of individual cases, we may take enforcement action against SIPP operators who do not safeguard their clients' interests in this respect, with reference to Principle 3 of the Principles for Business ('a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems').

The following are examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms:

- *Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm's clients, and that they do not appear on the FSA website listing warning notices.*
- *Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.*
- *Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified.*
- *Being able to identify anomalous investments, e.g. unusually small or large transactions or more 'esoteric' investments such as unquoted shares, together with the intermediary that introduced the business. This would enable the firm to seek appropriate clarification, e.g. from the client or their introducer, if it is concerned about the suitability of what was recommended.*
- *Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely.*
- *Routinely identifying instances of execution-only clients who have signed disclaimers taking responsibility for their investment decisions, and gathering and analysing data regarding the aggregate volume of such business.*
- *Identifying instances of clients waiving their cancellation rights, and the reasons for this.*"

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

I acknowledge that the 2009 and 2012 reports and the "Dear CEO" letter are not formal "guidance" (whereas the 2013 finalised guidance is). However, the fact that the reports and "Dear CEO" letter did not constitute formal guidance does not mean their importance should be underestimated. They provide a reminder that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect the publications, which set out the regulator's expectations of what SIPP operators should be doing, also goes some way to indicate what I consider amounts to good industry practice and I am, therefore, satisfied it is appropriate to take them into account.

It is relevant that when deciding what amounted to good industry practice in the *BBSAL* case, the ombudsman found that "*the regulator's reports, guidance and letter go a long way to clarify what should be regarded as good practice and what should not*." And the judge in *BBSAL* endorsed the lawfulness of the approach taken by the ombudsman.

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

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

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

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

To be clear, I do not say the Principles, or the publications, obliged Options to ensure the SIPP application, pension switch and SIPP investment were suitable for Mr J. It is accepted Options was not required to give advice to Mr J, and could not give advice. And I accept the publications do not alter the meaning of, or the scope of, the Principles. But they are evidence of what I consider to have been good industry practice at the relevant time, which would bring about the outcomes envisaged by the Principles.

What did Options' obligations mean in practice?

In this case, the business Options was conducting was its operation of SIPPs on a non-advisory basis. I am satisfied that meeting its regulatory obligations when conducting this business would include deciding whether to accept or reject particular investments and/or referrals of business. The regulatory publications provided some examples of good industry practice observed by the FSA and FCA during their work with SIPP operators including being satisfied that a particular introducer is appropriate to deal with.

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

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

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

All in all, I am satisfied that, in order to meet the appropriate standards of good industry practice and the obligations set by the regulator's rules and regulations, Options should have carried out due diligence on the introducer and the investment which was consistent with good industry practice and its regulatory obligations at the time. And in my opinion, Options should have used the knowledge it gained from its due diligence to decide whether to accept or reject a referral of business or particular investment.

Options position in broad terms:

In very broad terms Options position is:

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

Due diligence carried out by Options on the introducer:

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

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

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

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

Due diligence carried out on the investment:

This investment involved buying a “lot” on a larger parcel of land all of which was to be developed.

I am satisfied that Options knew enough about the investment to understand that, from the point of view of a UK based pensions investor, the investment should be regarded as high risk, and esoteric. It was likely to be difficult to value and illiquid. I note that Options largely referred to the investment in these terms on the Member Declaration it required Mr J to sign as part of the application process.

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

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

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

Did the introducer give advice in this case?

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

> **Q2. What is a personal pension scheme for the purposes of this regulated activity?**
>
> The term is defined in the *Financial Services and Markets Act 2000 (Regulated Activities) Order 2001* (the *Regulated Activities Order*) as any scheme other than an *occupational pension scheme* (OPS) or a *stakeholder pension scheme* that is to provide benefits for people:
>
> - on retirement; or
> - on reaching a particular age; or
> - on termination of service in an employment.

> …This will include *self-invested personal pension schemes* ('SIPPs') as well as personal pensions provided to consumers by product companies such as insurers, unit trust managers or deposit takers (including free-standing voluntary contribution schemes).

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

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

And making arrangements for another person to buy or sell such an investment is a regulated activity under Article 25 RAO. So too is making arrangements with a view to a person who participates in the arrangements buying or selling such an investment.
As explained by Andrews LJ in the Court of Appeal in the *Adams* case, the question of whether there has been advice under Article 53 should be approached by standing back and looking at what the consumer was told in a realistic and common sense manner.

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

I am satisfied the introducer made contact with Mr J. This in turn led to Mr J agreeing to switch his existing personal pension to a SIPP, with Options, in order to invest in the property-based investment with Crown in the Cayman Islands...

And there is evidence the introducer was involved in helping with the SIPP application as can be seen from the application form. I note that introducer firm was named on the SIPP application as the financial adviser and investment manager for the SIPP.

I consider Mr J's account of events - that he was advised to make the investment, and to transfer his pensions to a SIPP with Options to do so- to be plausible.

Mr J's version of events is also consistent with the picture presented by the documentation. He was not a high net-worth investor. Nor was he a sophisticated investor. He was a normal retail investor. And it is difficult to see why such a retail investor should choose to move his pension from an ordinary personal pension to a SIPP, which is a fairly specialist pension arrangement, to invest in a property-based investment in the Cayman Islands unless he was advised to do so. It is not particularly plausible that such a retail investor would choose to act in that way without advice and would instruct a firm, based in Gibraltar, to arrange that for him on an execution only basis.

The introducer entered into an introducer agreement with Options in order to introduce members who were going to invest in Crown's property-based investments. It therefore seems that the situation was that it was the introducer's intention to act as an introducer of business to Crown. Or put another way, it had a business interest in encouraging people to invest in Crown investments.

So I am satisfied there is evidence that the introducer did advise Mr J to make the Crown investment. And that it advised Mr J to open a SIPP with Options, close his existing pension and switch to Options to make the Crown investment and that this was all one single piece of advice.

It is also my view that Options should have realised there was a real risk that the introducer would give such advice when introducing consumers to it to take out SIPPs in order to invest in Crown investments.

The regulatory status of the introducer:

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

At the time of Mr J's SIPP application (and at the time the Introducer Profile was completed) SUP App 3 in the Regulator's Handbook set out guidance on passporting issues including a table at SUP App 3.9.5G which included the following setting out the investments and activities covered by a MiFID/a MiFID passport:

Services set out in Annex I to MiFID

SUP App 3.9.5 $\boxed{\text{G}}$

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

Accordingly, arranging deals in investments under Article 25 and advising on investments under Article 53 RAO are not covered by a MIFID passport if the activity relates to Article 82 investments ie rights under a personal pension.

And guidance at SUP 13A.1.2G of the Handbook, in existence at the time of Mr J's application and when the introducer profile was completed, made clear that an EEA firm that wanted to carry on activities in the UK which are outside the scope of its EEA rights would require a "top up" permission.

It was Options' understanding that the introducer would introduce business to it whereby SIPPs were to be set up for the purpose of investing in Crown investments in the SIPPs. The introduction of applicants to Options to establish a SIPP and the instruction to make investments in that SIPP would likely amount to arranging deals in investments. If the introducer gave advice on the merits of taking out the SIPP or making the investment this would amount to advising on investments.

Accordingly, the introducer would need the relevant top up permission if it carried on one or other or both of those activities in the UK. And carrying on one or other or both of those activities was a realistic possibility in the circumstances of the introducer arrangement between the introducer and Options. And Options thought the introducer was regulated to carry on those activities in the UK. However, the introducer did not have top up permissions needed to carry on those activities in relation to the rights under personal pensions.

my view so far:

In summary it is my view that Options should have:

- had serious concerns about the business model of the introducer.
- considered there was a real risk that the introducer, despite saying it would only act on an execution only basis, would very likely stray into giving advice to take out Crown investments and advise consumers to set up a SIPP with Options and transfer their existing pensions to it in order to make the Crown investment.
- understood that the introducer did not have the necessary top up permissions to advise on rights in personal pensions (or arrange deals relating to them under Article 25 RAO).
- considered that it was exposing its customers to an unacceptable level of risk of unsuitable SIPPs, and the real risk of considerable detriment which might include serious, possibly complete, loss of their pension.

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

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

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

Is it fair to ask Options to compensate Mr J?

In deciding whether Options is responsible for any losses that Mr J has suffered on the Crown investment I need to look at what would have happened if Options had done what it should have done i.e. had not accepted Mr J's SIPP application in the first place. When considering this I have taken into account the Court of Appeal's supplementary judgment in *Adams* ([2021] EWCA Civ 1188), insofar as that judgment deals with restitution/compensation.

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

Had Options acted fairly and reasonably it should have concluded that it should not accept Mr J's application to open a SIPP. That should have been the end of the matter – it should have told Mr J that it could not accept the business. And I am satisfied, if that had happened, the arrangement for Mr J would not have come about in the first place, and the loss he suffered could have been avoided. The financial loss has flowed from Mr J transferring out of his existing pension and into a SIPP. For the reasons I set out below I am satisfied that, had the SIPP application not been accepted, the loss would not have been suffered.

Had Options explained to Mr J why it would not accept the application from the introducer or was terminating the transaction, I find it very unlikely that Mr J would have tried to find another SIPP operator to accept the business. Rather it seems that Mr J had to be pursuaded to make the investment and would more likely have dropped the idea if Options had rejected the application than do anything he could to make the investment in some other way with some other pension provider.

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

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

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

For all the reasons I've set out, I'm satisfied that it would not be fair to say Mr J's actions mean he should bear the loss arising as a result of Options' failings. I do not say Options should not have accepted the application because the investment was high risk. I acknowledge Mr J was warned of the high risk and declared he understood that warning.

But Options did not share significant warning signs with him so that he could make an informed decision about whether to proceed or not. In any event, Options should not have asked him to sign the SIPP member instruction and indemnity (or should not have considered and accepted it) as the SIPP application should never have been accepted or alternatively the transaction should have been terminated at a much earlier stage in the process.

So I am satisfied in the circumstances, for all the reasons given, that it is fair and reasonable to conclude that Options should compensate Mr J for the loss he has suffered. I accept that Options' failure will have caused Mr J serious financial loss. I accept Mr J will also have suffered much worry, and distress and Options should compensate Mr J for this also.

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

Putting things right

My aim is to return Mr J to the position he would now be in but for what I consider to be Options' failure to carry out adequate due diligence checks before accepting Mr J's SIPP application from the introducer or for not terminating the transaction before completion.

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

- Obtain the notional transfer value of Mr J's previous pension plan (s).

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

- Pay a commercial value to buy any illiquid investments (or treat them as having a zero value).

- Pay an amount into Mr J's SIPP so as to increase the transfer value to equal the notional value established. This payment should take account of any available tax relief and the effect of charges.

- If the SIPP needs to be kept open only because of the illiquid investment/s and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.

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

- Pay to Mr J an amount of £500 to compensate him for the distress and inconvenience he's been caused.

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

Treatment of the illiquid assets held within the SIPP

I think it would be best if any illiquid assets held could be removed from the SIPP. Mr J would then be able to close the SIPP, if he wishes. That would then allow him to stop paying the fees for the SIPP. The valuation of the illiquid investment/s may prove difficult, as there is no market for them. For calculating compensation, Options should establish an amount it's willing to accept for the investment/s as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investment/s.

If Options is able to purchase the illiquid investment/s then the price paid to purchase the holding/s will be allowed for in the current transfer value (because it will have been paid into the SIPP to secure the holding/s).

If Options is unable, or if there are any difficulties in buying Mr J's illiquid investment/s, it should give the holding/s a nil value for the purposes of calculating compensation. In this instance Options may ask Mr J to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the relevant holding/s. That undertaking should only take effect once Mr J has been compensated in full, to include his receipt of any loss above our award limit, and should allow for the effect of any tax and charges on the amount Mr J may receive from the investment/s and any eventual sums he would be able to access from the SIPP. Options will have to meet the cost of drawing up any such undertaking and Mr J's reasonable costs of taking advice in relation to it.

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

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

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

Any withdrawal out of the SIPP should be deducted at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. The same applies for any contributions made, these should be added to the notional calculation from the date they were actually paid, so any growth they would've enjoyed is allowed for.

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

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

Pay an amount into Mr J's SIPP so that the transfer value is increased by the loss calculated above.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr J's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr J as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

SIPP fees

If the investments can't be removed from the SIPP, and because of this it can't be closed after compensation has been paid, then it wouldn't be fair for Mr J to have to continue to pay annual SIPP fees to keep the SIPP open. So, if the SIPP needs to be kept open only because of the illiquid investment/s and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.

Pay Mr J £500 for the distress and inconvenience caused.

Mr J has been caused distress and inconvenience by the loss of his pension benefits. Mr J's pension is now worth significantly less than what he thought it would be. This is money Mr J cannot afford to lose and its loss will naturally have caused him much distress and inconvenience. I consider a payment of £500 is appropriate to compensate for that.

Interest

The compensation resulting from this loss assessment must be paid to Mr J or into his SIPP within 28 days of the date Options receives notification of his acceptance of my final decision. The calculation should be carried out as at the date 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.

Options may be required by His Majesty's Revenue & Customs to deduct tax from any interest paid to Mr J. Should Mr J request it, Options must provide him with a certificate setting out the amount of tax deducted so that he can reclaim it if appropriate.

Assignment of rights

If Options believes other parties to be wholly or partly responsible for the loss, it is free to pursue those other parties. So, if Mr J's loss does not exceed £160,000, or if Options accepts my recommendation below that it should pay the full loss as calculated above, the compensation payable to Mr J may be contingent on the assignment by him to Options of any rights of action he may have against other parties in relation to his transfer to the SIPP and the investments if Options is to request this. Options should cover the reasonable cost of drawing up, and Mr J's taking advice on and approving, any assignment required.

Where I uphold a complaint, I can award fair compensation of up to £160,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £160,000, I may recommend that the business pays the balance.

Determination and award: I require Options to pay Mr J the compensation amount as set out in the steps above, up to a maximum of £160,000 plus any interest and/or costs.

Where the compensation amount does not exceed £160,000, I additionally require Options UK Personal Pensions LLP to pay Mr J any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £160,000, I only require Options UK Personal Pensions LLP to pay Mr J any interest as set out above on the sum of £160,000 plus interest on any costs awarded.

Recommendation: If the compensation amount exceeds £160,000, I also recommend that Options UK Personal Pensions LLP pays Mr J the balance. I additionally recommend any interest calculated as set out above on this balance and any costs awarded be paid to Mr J.

If Mr J accepts my decision, the award is binding on Options UK Personal Pensions LLP. My recommendation is not part of my determination or award. Options UK Personal Pensions LLP doesn't have to do what I recommend. Further, it's unlikely that Mr J can accept my determination and go to Court to ask for the balance. Mr J may want to consider getting independent legal advice before deciding whether to accept this decision.

My jursidiction decision

It's my decision that this complaint was made in time and can be considered by the Financial Ombudsman Service

My final decision

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

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr J to accept or reject my decision before 17 April 2024.

Catarina Machado Pinto Simoes
Ombudsman