

## **The complaint**

Mr S has a self-invested personal pension (SIPP) with Carey Pensions UK LLP now Options UK Personal Pensions LLP ("Options"). Mr S transferred his existing personal pension to the SIPP to invest in a property-based investment scheme in Cape Verde. Mr S's complaint is that Options was negligent in accepting his application to make such an investment from the unregulated introducer in his case.

## **What happened**

Your text here I will first set out my understanding of the various parties involved and their roles and the investment in this complaint.

## **Carey, now Options**

Options is a SIPP provider and administrator, regulated by the Financial Conduct Authority (FCA). Options is authorised, in relation to SIPPs, to arrange (bring about) deals in investments, deal in investments as principal, establish, operate or wind up a pension scheme and make arrangements with a view to transactions in investments. Carey was not and Options is not authorised to advise on investments.

## **Mr S**

Mr S is the complainant in this case, and he is represented by a claims management company.

Mr S applied for a SIPP with Options on 23 January 2013. He first complained to Options about it in 2017.

## **Cape Verde4 Life**

Cape Verde4 Life was a UK based company. It was involved in overseas property-based investments. It was not regulated by the FCA. It was not therefore authorised to advise on investments covered by the Financial Services and Markets Act 2000 in the UK. One of the directors was a man I will call Mr C.

Cape Verde4 Life was an introducer of business to Options. It introduced Mr S's application to open a SIPP to Options.

Cape Verde4 Life was at the time of Mr S's investment described as an authorised representative of Oasis Atlántico.

## **Oasis Atlántico**

Oasis Atlántico Inmobiliaria SARL ("Oasis") is a company incorporated under the laws of Cape Verde. It owned land in Cape Verde on which it was to build a tourism resort named Salinas Sea. The development was split into units (in effect hotel rooms).

As I understand it there was more than one way to invest in the Salinas Sea project. I have seen a brochure promoting investment via two special purpose vehicles (companies) which were intended to be set up on a basis that could be invested in within a UK SIPP. This form of investment involved buying shares in the companies which in turn invested in units in Salinas Sea.

This form of investment had a minimum investment of £10,000. The brochure said it was intended for authorised financial advisers and gave the impression it was an investment for high net worth clients and/or sophisticated investors.

Alternatively it was possible for the investor to buy a unit or part of a unit. Mr S invested in this way.

Buying a unit also involved entering into a Hotel Agreement under which the buyer/investor appointed the seller (Oasis) to operate the overall development (including the unit) as a hotel.

When the unit was completed, Oasis was to let the buyer know it was available for inspection and then the contract was to be completed.

The unit was to be part of the hotel and managed as a whole by the Manager not by the individual investor.

During the first three years the investor was to be paid an annual income of at least 5% of the price paid. There was also provision for payment of income at the same level if the hotel was not completed and opened on time.

There was a formula for calculating the rental income payable to the investor which involved pooling the rental income of all units rather than based on the occupancy of the investor's individual unit. Investors would receive income on this basis during the first three years if greater than 5% and calculated on this basis after the first three years.

An investor could sell their unit on the open market subject to the Hotel Agreement.

### **Mr S's investment**

Mr S paid around £55,000 for 50% of a unit. Mr S's investment was made in late February 2013.

Before making the investment, Mr S was provided with a Report on the Principal Terms of Documentation prepared by a firm of solicitors in London. He was also provided with a report on Oasis in English prepared by a lawyer in Cape Verde. And Mr S was required by Carey to sign a document headed SIPP Member Instruction and Declaration, Alternative Investment – Salinas Sea.

As I understand it, the resort was completed later in 2013 and Mr S was invited to inspect it in November 2013. The formalities for completing the purchase were to take place soon after.

### **The relationship between Cape Verde4 Life and Options**

As I understand it, Options relationship with Cape Verde4 Life began in April 2011. Cape Verde4 Life was an introducer of business to Options and Options has said it received 91

introductions between April 2011 and November 2013 when it ended its relationship with Cape Verde4 Life when it decided to stop accepting business from unregulated introducers.

Options says it acted properly in accepting introductions from Cape Verde4 Life. It was not prohibited from accepting introductions from unregulated introducers. It says it undertook due diligence checks on Cape Verde4 Life on a number of occasions and had no reason to believe it should not accept introductions from that business at the time of Mr S's introduction.

### **Due diligence carried out by Options on Cape Verde4 Life**

Options has provided the Financial Ombudsman Service with information about the due diligence it carried out on Cape Verde4 Life.

Options says:

- Cape Verde4 Life first proposed to become an introducer of SIPP business for Options in April 2011. It was an introducer from late April 2011 until November 2013 when Options made a business decision to no longer accept introductions from unregulated introducers.
- Cape Verde4 Life was working with a FCA regulated adviser, 1Stop Financial Services, who were at the time authorised to advise on pension transfers, "if investors wished to take advice".
- Options did not pay any commission to Cape Verde4 Life for introducing business to it. It did not see the details of any payments made to Cape Verde4 Life by the underlying provider, but Cape Verde did disclose on its "Introducer Profile" that it would receive approximately 8%.
- Options did not request copies of any suitability reports.
- Options did not consider the Salinas Seas investment to be a non-mainstream pooled investment. It says it was an investment "into bricks and mortar property where they could be rented out with the rental returned to the pension scheme bank account."

In addition to the above I note Cape Verde 4 Life completed a non-regulated introducer profile" with Options. It was sent to Cape Verde4 Life in March 2012 when Options said:

*"As you, Cape Verde4 Life, introduce business to Carey Pensions then for compliance records and for the sake of good order we need to put in place Non Regulated Introducer Information and Terms of Business between our companies.*

*I attach an Introducer Profile and terms of Business and would be grateful if you could agree and complete these and return to me.*

*I have used a commencement date of 28 April 2011 for the Terms which is the date of your first case with us..."*

The profile document was signed by Cape Verde4 Life in September 2012. The form recorded a number of points in relation to Cape Verde4 Life including:

- It had been operating for five years, that its principal address was in the UK and that it had a branch in Cape Verde.
- It promoted Salinas Seas and intended to distribute future resorts from Oasis.

- The Salinas Sea investment was accepted by a number of other named SIPP operators.
- Cape Verde4 Life and/or its agents obtain clients from a “UK distribution network” (without further elaboration).
- The sales process adopted by Cape Verde4 Life and/or its agents was noted as “Mainly pension review/non reg” (without further elaboration).
- The average client was described as aged 45 plus, employed and self-employed with an income of £20-50K.
- Typical commission structure was noted as “master agent commission circa 8%”
- Its objective for the coming 12 months was noted as “sell out Salinas Seas/launch new Oasis resorts”.
- Training was provided by an IFA and a compliance partner on SIPPs, and FSA and HMRC rules.
- The business produced by agents is monitored by Mr C reviewing all completed sales before submitting the application to the SIPP provider.
- Cape Verde4 Life worked with “1SFS IFA” and “TFPP IFA”. I understand those firms to be 1Stop Financial Services and The Financial Planning Partnership.
- Cape Verde 4 Life used a third-party compliance business to ensure no regulated activities were carried out by it.
- It had not been subject to any regulatory action or complaints.

Options entered into a terms of business agreement with Cape Verde4 Life in September 2012. It backdated that agreement to April 2011.

In September 2013 Carey conducted a “World Check” search on Mr C. The check did not reveal anything adverse.

### **Due diligence carried out by Options on Salinas Seas**

As I understand it Options carried out checks on the Salinas Sea investment in 2010. It concluded it was eligible for investment in a pension scheme. It also decided as a result of that review that all investors in its SIPPs should complete its Alternative Member Declaration and Indemnity.

I have seen a review of the Special Purpose Vehicle version of the investment carried out by a third party in April 2012 (ie before Mr S’s application) which was provided to Options. It includes a suggestion that SIPP operators obtain an acknowledgement from scheme members of the high risk, illiquid nature of the investment. And *“where the member is not investing through an FSA authorised investor, the SIPP operator may wish to obtain a copy of the high net worth/sophisticated investor certificate.”*

I will refer to that Declaration again below. It is enough to say here that because of its checks upon the Salinas Sea investment Options referred to the investment as an unregulated alternative investment considered high risk and speculative.

### **Mr S’s dealings with Carey and Cape Verde4 Life**

Mr S applied to open a SIPP with Carey in January 2013. As part of that application process Mr S applied to switch his existing personal pension [...] which had an estimated value of around £50,000. That application also said Mr S had chosen to invest in Salinas Sea.

The application form included a page for the details of the applicant's financial adviser. This page was not completed.

Options says its records show Mr S used Cape Verde4 Life as his introducer and that he provided a letter of authority to that effect with his application.

Options says that as Cape Verde4 Life is not a regulated adviser and acted only as an introducer Mr S was classified as a direct client of Options.

Mr S says he did not advise himself. He says he was advised by Cape Verde4 Life to invest in Salinas Sea and to set up a SIPP with Carey and move his existing pension to it. Mr S says this advice was given by Mr C and that it was following a cold call by Cape Verde4 Life. He says that matters were dealt with through the post rather than, say, a face-to-face meeting.

Neither Mr S nor Options have provided copies of documents recording the advice Mr S says he was given by Cape Verde4 Life.

I have seen a copy of Mr S's SIPP application form which was accompanied by a letter addressed to Carey signed by Mr S which has the look of a letter which was prepared for him to sign. It says:

*"I [Mr S] authorise and instruct Carey pensions UK LLP as the Administrator of my Carey Pension Scheme and Carey Pension Trustees UK Ltd as the Trustee to provide Cape Verde4 Life, the authorized representative of Oasis Atlántico, with any information whatsoever they may require in relation to my scheme's purchase of an investment into the Salinas Sea investment."*

After the SIPP was set up Options sent a document to Mr S to complete headed:

*"SIPP MEMBER INSTRUCTION AND DECLARATION  
ALTERNATIVE INVESTMENT – SALINAS SEA"*

I will refer to this document as the declaration. It recorded the investment type as "Hotel Room – Aparthotel on Sal (Cape Verde Islands)".

The declaration began:

*I [Mr S] being a member of the above scheme write to instruct Carey Pensions UK Ltd to purchase a Hotel Room with borrowing from the developer with Salinas Sea on the island of Sal in the Cape Verde Islands, managed on "hotel room basis", through Oasis Atlantic, for a consideration of [number given] on my behalf for the above scheme."*

The declaration then included a number of points including:

- Mr S confirmed Options was acting on an execution only basis and had not given advice.
- Mr S understood that the investment is the purchase of a hotel room that is "an Unregulated "Alternative Investment" and as such is considered High Risk and Speculative."
- Mr S acknowledged and confirmed his understanding that the investment may prove difficult to value and/or sell / realise.

- Mr S confirmed he had reviewed and understood the information provided by Salinas Sea.
- Mr S confirmed that he had taken his own advice, including but not limited to, financial advice, investment and tax advice regarding the investment and its value, taxes, costs and fees.

The declaration also included an agreement by Mr S to indemnify Options against any claims etc in connection with the investment.

Mr S signed the declaration in February 2013.

Mr S was not asked to state or otherwise indicate or provide evidence to show that he was a high net worth individual or sophisticated investor in the declaration, or in his SIPP application or otherwise.

Also in February 2013 Mr S was provided with a document from a UK law firm headed Report on Principal Terms of Documentation Salinas Sea Cape Verde. This showed Mr S was paying just over £50,000 for a 50% share in a unit in the Salinas Sea development.

Mr S was to pay £43,000 when the contract was signed and £11,500 on completion of the property. It was expected construction would be completed by the end of March 2013.

A Hotel Agreement was entered into at the same time relating to the management of the hotel room as part of the overall development. Income from the unit was to be pooled with other units. Income was guaranteed at a certain level for the first three years.

The unit could be sold on the open market subject to the Hotel Agreement which had a 25-year term.

The contract was signed in February 2013. Later in 2013 Oasis Atlántico announced the completion of the resort, and Mr S was invited to inspect his unit following which completion of the purchase was to take place.

In June 2017 Mr S complained to Options with the help of a claims management company. It said Mr S's capital had "been destroyed" and said his investment was worthless. It said a bad situation was made worse by Options continuing to charge Mr S fees for his SIPP. The CMC said Options should not have accepted such a poor investment. The CMC claimed compensation to restore Mr S to the position he would have been in if he had not switched his pension to Options.

Options did not uphold Mr S's complaint. It made a number of points including:

- it acted properly in accepting and acting on Mr S's instructions.
- it is not responsible for the performance of Mr S's investment.
- It carried out relevant due diligence checks on the investment to ensure it was suitable for holding in a UK pension scheme.
- the development was completed and is trading and Options continues to value the investment in the SIPP accounts at the price Mr S paid for it (though it could be worth more or less and a valuation by an appropriately experienced surveyor would be needed to know the current value).
- although legal completion of the purchase has not taken place, income had been accruing at 5% per year from 2014 on the deposit paid which would be paid on

completion, and then 5% per year for three years from completion.

- Mr S's solicitors had been instructed to complete the purchase.
- It had charged its fees in accordance with the agreement with Mr S.

### ***The complaint to the Financial Ombudsman Service***

Mr S then referred his complaint to the Financial Ombudsman Service.

One of our investigators considered the complaint. He asked for information about the due diligence carried out by Options but it did not respond. The investigator thought the complaint should be upheld. He made a number of points including:

- The Principles for Business, and in particular Principles 2, 3 and 6 are relevant.
- The regulator has issued a number of publications which discussed the Principles and gave examples of good industry practice in relation to SIPP operators.
- Options was not responsible for giving Mr S advice. Nor was it responsible for checking any advice to him was suitable for his individual circumstances and requirements.
- Options was obliged to safeguard consumers against facilitating SIPPs that are unsuitable or detrimental to them and make enquiries about the nature or quality of proposed investments before deciding whether to accept them into their SIPs.
- Declining business does not amount to advice.
- Options had not provided any evidence relating to its due diligence carried out on Cape Verde4 Life.
- Options had not provided any information to show that it took steps to ensure Cape Verde4 Life was not providing advice to the clients it introduced to Options.
- The type of investment Mr S entered into is only suitable for a small proportion of investors such as sophisticated investors and, even then, only for a small proportion of their overall portfolio.
- Options should have been concerned about a lack of regulated advice in the circumstances.
- It seems implausible that business such as in Mr S's case would have taken place without a regulated activity occurring so Options should have been concerned about accepting such business from an unregulated firm.
- In all the circumstances it was not fair and reasonable for Options to accept Mr S's application.

The investigator thought it was unnecessary to go on to consider the due diligence (if any) carried out by Options on the Salinas Sea investment.

The investigator then set out how he thought Options should put things right.

Options does not agree with the investigator. It provided information about the due diligence it had carried out. It made a number of other points including:

- The Ombudsman must take into account the legal and contractual context of the relationship it has with Mr S. Options provides Mr S with a SIPP on an execution/non-advised basis.
- Options does not provide advice and is not permitted to do so. Options does not

therefore comment on the suitability of investments. The investigator's finding amount to a finding that it was required to give advice.

- The investigator should not unfairly extend the obligations on Options. The investigator has not explained the foundations of the obligations he says Options is under.
- No evidence has been produced to show that Cape Verde4 Life was undertaking regulated activities.
- The regulatory publications referred to by the investigator cannot found a claim for compensation in themselves and do not assist in interpreting the Principles.
- Hindsight should not be used in assessing the complaint. Nor should guidance that was published after the events complained about be considered.
- Options is permitted to deal with unregulated introducers.
- Given the proper scope of Options regulatory duties as established in the *Adams* High Court judgment there can be no breach of those duties on Options part as a result of its decision to accept customers introduced by Cape Verde4 Life. The judge in that case rejected duties of the type suggested by the investigator.
- Options did not cause Mr S to suffer a loss.
- It is likely Mr S was keen to invest and would have done so in any event. At the very least Mr S should bear some responsibility, to be reflected in any redress awarded, for the position he is in.
- The investigator's view, if allowed to stand, would seriously impact the SIPP industry ultimately leading to less consumer choice.
- Options requests that the Ombudsman holds an oral hearing in order properly to determine Mr S's complaint.
- The hearing should deal with the issue of whether the complaint is time barred.

I issued a provisional decision in this case in July 2023. I set out my provisional findings as follows:

### **Time bar**

Options has said that the issue of whether the complaint is time barred should be considered.

This complaint is about events at the time of Mr S's SIPP application and investment in 2013.

As mentioned above Mr S complained to Options in June 2017 and Options issued its final response letter in reply in July 2017.

The complaint was made within six years of the events the complaint is about. Further, the complaint was referred to the Financial Ombudsman Service in August 2017 and so was referred to the Financial Ombudsman Service within six months of the final response letter.

Mr S's complaint is not time barred.

### **Options' request for an oral hearing**

Options say an oral hearing is necessary in order properly to determine Mr S's complaint. It says time bar should be considered as a preliminary issue. It also says it is unfair that fact sensitive matters should be decided wholly on the papers.

The Ombudsman Service provides a scheme under which certain disputes may be resolved quickly and with minimum formality (section 225 of the Financial Services and Markets Act 2000 (FSMA)). DISP 3.5.5R of the FCA Dispute Resolution rules provides the following:

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

Given my statutory duty under FSMA to resolve complaints quickly and with minimum formality, I am satisfied that it would not normally be necessary for me to hold a hearing in most cases (see the Court of Appeal's decision in *R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service* [2008] EWCA Civ 642).

It's clear this complaint is not time barred. So the key question for me to consider when deciding whether a hearing should be held is whether or not the complaint can be fairly determined without convening a hearing.

We do not operate in the same way as the Courts. Unlike a Court, we have the power to carry out our own investigation. And the rules (DISP 3.5.8R) mean I, as the Ombudsman determining this complaint, am able to decide the issues on which evidence is required and how that evidence should be presented. I am not restricted to oral cross-examination to further explore or test points.

I have carefully considered the submissions Options has made. However, I am satisfied that I am able to fairly determine this complaint without convening a hearing. In this case, I am satisfied I have sufficient information to make a fair and reasonable decision. So, I do not consider a hearing is required.

As I am satisfied it is not necessary for me to hold an oral hearing, I will now turn to consider the merits of Mr S's complaint.

### **Relevant considerations**

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

### **The Principles**

The Principles for Business, 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). 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 considered the relevant law and what this says about the application of the FCA’s Principles. In *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin) (“BBA”) Ouseley J said at paragraph 162:

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

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

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

In *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878 (“BBSAL”), Berkeley Burke brought a judicial review claim challenging the decision of an ombudsman who had upheld a consumer’s complaint against it. The ombudsman considered the FCA Principles and good industry practice at the relevant time. He concluded that it was fair and reasonable for Berkeley Burke to have undertaken due diligence in respect of the investment before allowing it into the SIPP wrapper, and that if it had done so, it would have refused to accept the investment.

The ombudsman found Berkeley Burke had therefore not complied with its regulatory obligations and had not treated its client fairly. Jacobs J, having set out some paragraphs of *BBA* including paragraph 162 set out above, said (at paragraph 104 of *BBSAL*):

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

*circumstances, but instead to impose general duties such as those set out in Principles 2 and 6.”*

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

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

### **The Adams court cases and COBS 2.1.1R**

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

I’ve considered whether these judgments mean that 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 trying to advance a case that was radically different to that found in his initial pleadings. The Court found that this part of Mr Adams’ appeal did not so much represent a challenge to the grounds on which HHJ Dight had dismissed the COBS claim, but rather was an attempt to put forward an entirely new case.

I note that 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 S’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 S’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 S’s complaint, I am considering whether Options ought to have identified that the introductions from Cape Verde 4 Life and/or the investment in Salinas Seas involved a risk of consumer detriment and, if so, whether it ought to have ceased accepting such introductions and/or making such investments prior to entering into a contract with Mr S.

As already mentioned, 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.

I have proceeded on the understanding Options was not obliged – and not able – to give advice to Mr S on the suitability of its SIPP or the FPI 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 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."*

Although I've only referred to one of the above publications in detail, I have considered all of 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 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 regulators 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 have been 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 and 2012 Thematic Review Reports), post-date the events that took place in relation to Mr S'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 pension was suitable for Mr S. It is accepted Options was not required to give advice to Mr S, 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. 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 in this case, that by early 2012 if not before, it understood and accepted that as a non-advisory SIPP operator its obligations meant it had a responsibility to carry out due diligence on Cape Verde4 Life and that it could and should decide not to do business with an introducer if it thought that was appropriate.

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 Cape Verde4 Life. 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.

### **The due diligence carried out by Options on the investment**

Because of what I say below about the introducer I do not need to refer to the due diligence carried out by Options of the Salinas Sea investment in detail.

Options has recently told us that the investment was not considered a non-mainstream pooled investment. It says it was a bricks and mortar property to be rented out with the rental income paid to the SIPP.

In my view this is an oversimplification. Mr S was not making a straightforward purchase of, say, a holiday apartment or villa that he could occupy or rent out as he saw fit and freely sell on the open property market. He was buying a half share in a hotel room in a development that was not yet complete, where the property would form part of hotel. Mr S is in principle free to sell the investment if he wants to, but he

must sell subject to the hotel agreement so the ability to sell, in practice, depends on there being a market for part shares in a hotel room investments.

These points were or were largely understood by Options at the time of Mr S's investment when it categorised the investment as an unregulated alternative investment that was high risk and speculative which might be difficult to sell/realise. And this understanding of the investment formed part of the context in which, or was a relevant factor in, the checks made by Options on Cape Verde4 Life since it planned to introduce clients for the purpose of investing in Salinas Sea.

### **The due diligence carried out by Options on the introducer**

Options was permitted to accept business from unregulated introducers. It was not therefore at fault simply because it accepted business introduced from Cape Verde4 Life.

I note that Options' non-regulated introducer profile form which it completed with Cape Verde4 Life began with the following words:

*"As an FSA regulated pensions company, we are required to carry out due diligence as best practice on unregulated introducer firms looking to introduce clients to us, to gain some insight into the business they carry on."*

So there is no dispute that Options took steps to make checks on Cape Verde4 Life and understand its business model. It seems to have sent the form to Cape Verde 4 Life to complete in March 2012. The completed form was signed in September 2012. Both dates are before Mr S's application to Options.

Although Options asked Cape Verde4 Life to complete the non-regulated introducer profile in 2012, in my view it should have completed a due diligence assessment on Cape Verde before it first agreed to accept any business from Cape Verde4 Life in 2011.

I also consider that good industry practice was to carry out further checks on introducers from time to time and not just on a one-off basis. So even if a reasonable initial assessment had been made to accept business in 2011, that decision could be reversed if Options thought it appropriate to do so. And in this case I note that Options decided to reverse its decision to accept business from Cape Verde4 Life (and all other unregulated introducers) in November 2013.

In this case Options gathered information to carry out a due diligence assessment in 2012 using the unregulated introducer profile form referred to above. The due diligence assessment used a form headed UK introducer assessment proforma. The version of this form I have seen is not dated but I note the regulator is referred to on the form as FCA rather than FSA. The FSA was replaced by the FCA in April 2013 so the form, and therefore the due diligence assessment, would seem to have been completed after April 2013.

The due diligence assessment proforma form seems to have been completed by Options using the information from the unregulated introducer profile which was signed in September 2012. As mentioned above all that information had been provided before Mr S's application and could and should have been analysed by Options by the time of his application in January 2013.

It is also my view that essentially this same analysis should have been carried out in 2011 before agreeing to accept business from Cape Verde4 Life.

### **The 2013 introducer assessment proforma**

Options has said it chose to stop accepting business from Cape Verde4 Life as a result of a business decision to stop accepting introductions from unregulated introducers. It must follow that the decision was not made as a result of the assessment made based on the proforma. I conclude from this that Options either decided to continue to accept business based on that assessment or it failed to complete its due diligence assessment and so just continued to accept business from Cape Verde4 Life by default until it made its business decision relating to all unregulated introducers.

Whatever the reason I have considered the contents of the proforma and whether it was reasonable to continue to accept business from Cape Verde4 Life in the light of the assessment it should reasonably have made based on that proforma.

The introducer assessment proforma form uses a red, amber, green system for grading the information provided by a potential (or in the case of Cape Verde4 Life, an actual) introducer. Green equates to what Options called low risk, amber to medium risk and red to high risk.

The form has three sections:

- company personnel and advice
- client profile
- investment

And at the end of the form it says:

<i>“Accept:</i>	<i>Low risk All green</i>
<i>Queries to raise:</i>	<i>Medium Risk Mixture of Green and Amber Raise with TRC before proceeding</i>
<i>Decline:</i>	<i>High Risk All Red Or Mixture of red and Amber Issue standard letter/email and decline.”</i>

So to pause there for a moment, by the time Options was using this form it was satisfied that in its role as a non-advisory SIPP operator it could make checks on an introducer and choose not to accept business from the introducer if it thought that was the appropriate thing to do.

The form has around 20 cells that can be completed in a column headed “Results from Introducer Enquiry”. On the completed form I have seen one is rated red. One shows in amber and two more have amber written in them by hand. Three are green. The rest have not been completed. Some have information written in them with no colour code applied. Most are left blank.

In the client profile section three cells have not been graded. The cells related to the following:

- Detail whether clients are UK or non-UK residents. The following alternative answers were given:
  - Green/Low Risk:  
Non-UK Residents  
UK Residents and Company has relevant permissions
  - Amber/medium risk:  
UK residents through another entity (Need to carry out DD on this other entity)
  - Red/High Risk  
UK Residents but there is no evidence of any entity having relevant permissions.
- Detail average value of typical clients [sic] pension: the following alternative answers were given:
  - Green/low risk:  
£25K & above to regulated investments
  - Amber/medium risk:  
£25K & above to mix of regulated and non-regulated investments
  - £25K & above to non-regulated investments  
Less than £25K to full SIPP/ non-regulated investment SIPP
- Detail client profile as described by company. The following alternative answers were given:
  - Green/low risk  
Fully advised
  - Amber/medium risk  
Execution only-high net worth/sophisticated
  - Red/high risk  
Execution only client  
Not high net worth [or]  
Sophisticated investor

The answer to the first question should have been amber since Cape Verde 4 Life was dealing with UK clients but apparently involving a UK IFA. According to the proforma this meant Options should also have carried out “DD” – due diligence – on the IFA(s). I note that reference has been made to working with 1 Stop Financial Services and The Financial Planning Partnership.

I do not know if Options carried out due diligence on these firms.

I note that in 2014 two partners in 1 Stop Financial Services were subject to disciplinary sanction by the FCA. The regulator had taken action in relation to that firm’s business model between October 2010 and November 2012. The two partners were fined and banned from performing any significant influence function in relation to any regulated activity. According to the FCA 1 Stop Financial Services had advised customers to switch their pensions to SIPPs which enabled them to invest in

unregulated and often high-risk products regardless of whether those products were suitable for the customers.

1 Stop Financial Services business model involved receiving introductions from unregulated introducers who typically promoted investments such as overseas property investments. 1 Stop Financial Services would then give advice on the suitability of switching an existing pension to a SIPP to make that investment. It did not give advice on the suitability of the investment.

I do not say that Options ought to have been aware of action taken by the regulator against the 1 Stop Financial Services partners before its decision was published. But I do consider that Option could and should have found out about 1 Stop Financial Services' business model.

In relation to that business model, on 18 January 2013 the FSA issued an alert which included the following:

*Advising on pension transfers with a view to investing pension monies into unregulated products through a SIPP*

*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 of which may be Unregulated Collective Investment Schemes). Examples of the unregulated investments are diamonds, overseas property developments, storepods, forestry and film schemes, among other non-mainstream propositions.*

*The cases we have seen tend to operate under a similar advice model. An introducer will pass customer details to an unregulated firm, which markets an unregulated investment (eg an overseas property development). When the customer expresses an interest in the unregulated investment, the customer is introduced to a regulated financial adviser to provide advice on the unregulated investment. The financial adviser does not give advice on the unregulated investments and says it is only providing advice on a SIPP capable of holding the unregulated investment...*

*The FSA is investigating a number of firms and has secured a variation of their Part IV permission so that they are unable to continue operating in that way. The FSA is also considering taking enforcement action against these firms.*

*We have seen cases where, as a result of these advisory strategies involving unauthorised firms, customers have transferred out of more traditional pension schemes and invested their retirement savings wholly in unregulated assets via SIPPs, taking very high and often entirely unsuitable levels of risk despite receiving advice on the pension transfer from regulated firms.*

*...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 investment held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as a SIPP and other wrappers), consideration of the suitability of the overall proposition, that is the wrapper and the expected underlying investments in unregulated schemes....*

*For example, where a financial adviser recommends a SIPP knowing that the customer will transfer out of a current pension arrangement to release funds to invest in an overseas property investment under a SIPP, then the suitability of the overseas property investment must form part of the advice about whether the customer should transfer into the SIPP...*

Mr S's SIPP application was dated 28 January 2013. It seems to have been received by Options on 31 January 2013. This was after the above alert had been issued and Options ought to have been aware of that alert by the time of Mr S's application. But even if it was not, it should as I have said been aware of 1 Stop Financial Services' business model and the implications it had for its SIPP members. It meant their members were apparently choosing to invest in unregulated high risk speculative investments with the very considerable risk of suffering significant detriment, without the benefit of regulated financial advice in relation to the investment.

Clearly Options could not have known before Mr S's application that the owners of 1 Stop Financial Services would, in 2014, be fined and banned for their work in relation to SIPPs. But what it could and should have known was that the IFA Cape Verde4 Life said it was involved with was giving no advice on the suitability of the unregulated investment for Cape Verde 4 Life's clients. This meant that the involvement of a regulated IFA should not have provided the comfort to Options that it might otherwise have done. It meant that Options potential new clients from Cape Verde4 Life were not getting advice from an authorised and regulated financial adviser on the suitability of their investing potentially all of their pension in an unregulated investment Options considered to be high risk and speculative. So it knew or should have known that the business model Cape Verde4 Life was involved in lacked the safeguard of effective independent regulated advice. So the involvement of the IFA with its business model ought to have been a red flag item that should have given Options concerns.

I also note that 1 Stop Financial Services voluntarily varied its permissions with the regulator so that with effect from 10 November 2012 it was no longer permitted to carry on any regulated activities. Accordingly this information was not available (since it had not yet taken place) when Options first agreed to accept business from Cape Verde4 Life or if had carried out an assessment in September 2012 when the introducer profile was signed. But it was available by the time of Mr S's application in January 2013. (And in any event 1 Stop Financial Services had been operating its business model since before Cape Verde4 Life first became an introducer and that business model had therefore been discoverable if Options had carried out checks on that firm in 2011.)

The other IFA firm Cape Verde said it worked with was The Financial Planning Partnership. As I understand it the Financial Planning Partnership was a trading name used by [another business] from 2010 to 21 December 2012. According to the

FCA register [that other business] was not using the trading name The Financial Planning Partnership after 2009.

And as I understand it, Financial Planning Partnership/[the other business] also operated a business model with an unregulated introducer ... of the type highlighted by the FSA in its alert. So again if Options had made checks on that firm before it stopped trading it is likely it would also have given cause for concern rather than comfort.

The above points relating to the two IFA firms Cape Verde said it worked with also mean that the following question in the company personnel and advice section of the proforma that were rated amber should have been reconsidered:

- Does the company hold FCA or Equivalent permissions for investment advice?
- No but this is provided by FCA regulated professional Need to complete further DD in respect of this adviser

Returning to the proforma assessment, Cape Verde4 Life was only introducing clients to invest in unregulated investments and their clients were not high net worth or sophisticated investors so the next two questions should have been rated as red.

In the investment section of the proforma there is an amber and a green cell. The rest are not completed. The answers to the questions which have not been completed should have been graded as red:

- Are investments generally used regulated or unregulated – all unregulated (red answer)
- Which countries are investments generally based in Other overseas [ie not UK or EEA] (red answer)
- Does company promote unregulated investments, state which investments are promoted. Answer yes, Salinas Sea. (red answer)
- Detail investment type most often used – red answer was “Non EEA Commercial Property, Non-Regulated Investments, Unquoted Shares, Loans.” (red answer)

Having considered the proforma, it is my view that in 2012/2013 Options carried out an incomplete assessment. Had it completed its assessment, based on its own process, it would have come out with an assessment showing considerably more red than the incomplete assessment it carried out.

In my view based on its own processes Options should have concluded that as the form showed, or should have shown, mostly red and amber assessments it should have declined to do further business with Cape Verde4 Life.

***What Options ought to have decided:***

In my view Options gathered information on which it could and should reasonably have made an assessment in 2012 and should have come to the conclusion not to accept introductions from Cape Verde 4 Life before it received Mr S's application in January 2013.

In my view Options should have carried out its proforma based assessment, or an essentially similar assessment, before it first agreed to accept introductions from

Cape Verde4 Life. If it had done so it would have rejected Cape Verde4 Life's request to act as an introducer. Alternatively if it carried out such an exercise within a short time of allowing introductions without first carrying out the assessment in full it should have decided not to continue to accept business from Cape Verde4 Life.

In either event it is my view that if Options had acted reasonably, in a way that was consistent with its role as a non-advisory SIPP operator, in a way that was consistent with its obligations in that role under the Principles and with good industry practice, it would not have accepted business from Cape Verde4 Life by the time of Mr S's application and it would not have accepted his application.

By the time of Mr S's application Options had carried out due diligence checks in relation to Cape Verde4 Life and the Salinas Sea investment which meant it knew Cape Verde4 Life:

- was involved in promoting the Salinas Sea investment.
- became an introducer to Options in order to introduce clients to invest in Salinas Sea within their pensions while Options considered Salinas Sea an unregulated high risk and speculative alternative investment.
- was not authorised to give regulated investment advice.
- apparently worked with regulated IFAs in some circumstances but not in all cases and that it would make direct introductions to Options on the basis that the client was acting on an execution only basis.
- had mostly clients that could not reasonably be classified as high net worth or as sophisticated investors.
- was receiving commission of around 8%.

In addition to these points Options knew or should reasonably have known the investment was likely to be highly illiquid. It knew or should have known the investment was likely to be difficult to value and that it might well be difficult to sell when the member wanted to take benefits from their pension.

Options knew or should have known that it is unlikely that an ordinary retail investor client would choose to transfer their personal pension to a SIPP without advice. And Options knew or should have known that it did not have a good understanding of the way Cape Verde4 Life operated and in particular how it found its clients. For example on the introducer profile Cape Verde4 Life said it obtained its clients from a "UK Distributions Network" without any recorded explanation of what that meant in practice. And the sales process was described as "mainly pension review/non reg" again without any recorded explanation of what that meant.

Options also knew that investing in an unregulated alternative investment that is high risk and speculative is unsuitable for most retail investors and that it is only likely to be suitable for high net worth or sophisticated investors on the basis that such an investment makes up only a small proportion of their portfolio.

When Options agreed to accept business from Cape Verde4 Life it did not impose conditions on it such as for example only accepting such business where regulated advice had been given and/or only business involving high net worth or sophisticated investors, and/or only allowing a limited proportion of the SIPP fund to be invested in Salinas Sea.

Taking all these points into account Options knew or should have known when agreeing to accept introductions from Cape Verde4 Life there was a real risk of

customer detriment. Options response to this was to require potential clients to sign the declaration I referred to above. In my view that was not a fair and reasonable approach bearing in mind the Principles for Business and good industry practice. In my view the fair and reasonable approach would have been to decline to accept business from Cape Verde4 Life as Options' own process on its own proforma assessment form provided for or as any reasonable essentially similar process would have provided for.

### **Was it fair and reasonable to proceed with Mr S's instructions?**

In my view, for the reasons given, Options should have refused to accept Mr S's application. So, things should not have got beyond that.

Mr S was asked to sign the declaration. The declaration gives warnings about the high-risk speculative nature of the Salinas Sea investment. And it included a declaration that Mr S wouldn't hold Options responsible for any losses resulting from the investment. However, I do not think this document demonstrates Options acted fairly and reasonably in proceeding with Mr S's instructions.

Asking Mr S to sign the declaration and indemnity absolving Options of all its responsibilities when it ought to have known that Mr S's dealings with Cape Verde4 Life were putting him at significant risk of detriment was not the fair and reasonable thing to do. And it was not an effective way for Options to meet its regulatory obligations in the circumstances. It was not fair and reasonable to proceed on that basis.

Further I do not consider it fair and reasonable for Options to avoid responsibility now on the basis of the indemnity Mr S signed. Had Options acted appropriately in the circumstances Mr S should not have been able to proceed with his application. And, as mentioned, he should not have got to the stage of signing the declaration.

### **Is it fair to require Options to compensate Mr S?**

Options said it did not cause Mr S's loss because it is very likely he was keen to proceed with the investment and would have found a way to invest even if Options had not been dealing with Cape Verde 4 Life. I don't agree.

I have seen no evidence to show Mr S would have proceeded even if Options had rejected his application. Mr S was contacted by Cape Verde 4 Life, he was not looking for such investments. There is nothing to indicate Mr S was highly motivated to make the investment or that he was being paid any kind of incentive payment to do so. I have not seen anything that makes me think Mr S would have sought out another SIPP provider if Options had declined the application, or terminated the application, and explained why. In any event, I think any SIPP provider acting fairly and reasonably should have reached the conclusion it should not deal with Cape Verde4 Life. I do not think it would be fair to say Mr S should not be compensated based on speculation that another SIPP operator might have made the same mistakes as Options did.

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

## Fair compensation

I consider that Options failed to comply with its regulatory obligations and good industry practice and did not reject Mr S's application to open a SIPP in order to invest in Salinas Sea. My aim in awarding fair compensation is to put Mr S back into the position he would likely have been in had it not been for Options' failings. Had Options acted appropriately, I think it's *more likely than not* that Mr S would have remained a member of the pension he transferred into the SIPP.

I think Mr S would have remained with his previous provider, however I cannot be certain that a value will be obtainable for what the previous policy would have been worth. I am satisfied what I have set out below is fair and reasonable, taking this into account and given what I understand of Mr S's circumstances and objectives when he invested.

...Further I note that Mr S is in his 70s and wants to take benefits from his pension. Mr S should therefore let me know when he thinks he would have taken benefits from his pension if his pension had remained with his original pension provider. He should also say in what form and he, or his representative, should explain the reasons for the answers he has given. I will then consider further any loss of income Mr S has suffered as a result of not being able to take pension benefits.

I accept that Mr S has been caused distress and inconvenience in relation to his SIPP and Salinas Sea investment generally and I note that he consulted a CMC and made a complaint [some years ago now when he was in his 60's]. I accept that in particular not being free to take his pension benefits at a time of his choosing because of the illiquidity of the Salinas Sea investment will have caused worry, upset and financial strain to Mr S over and above his financial loss.

I then set out how I thought Options should put things right for Mr S.

My provisional decision was sent to both parties and both parties were invited to provide their comments.

Mr S's CMC responded to my provisional decision on behalf of Mr S. It made a number of points including the following:

- Mr S's existing pension with his original pension provider was a straightforward money purchase personal pension without any guarantees.
- Mr S was under 65 at the time he was persuaded to take out the SIPP and invest in Salinas Sea and had thought he would probably take his pension from 65.
- By the time Mr S reached 65 his wife was seriously ill, and has since died, and Mr S decided to continue working to build up his pension and eventually started to draw his work and state pension when he was 67.
- If Mr S had not taken out a SIPP and invested in Salinas Sea he would most likely in these circumstances have taken the maximum tax free cash from the pension and taken out an annuity on a single life basis as his wife had her own pension.
- Mr S's current income in retirement is made up of state pension of roughly £250 per week, his works pension of roughly £100 per week and widower's pension of about £75 a week from his wife's pension.

- Given that Mr S's existing pension had a transfer value of around £45,000 in 2013 this lost pension would have made up a large part of Mr S's non-state pension income.
- It would be helpful, in order to avoid any future difficulty, if the final decision would make it clear that the Salinas Sea investment should be treated as worth zero.
- The final decision should fully protect Mr S from having to pay any SIPP fees in the future.

The above comments were made in two emails from the CMC. Both emails were sent to Options and it was given the opportunity to comment on the points made by the CMC as well as the provisional decision.

Options has not provided any further comments either in response to my provisional decision or the additional comments made since by the CMC.

### **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.

It is my view that for the reasons set out in my provisional decision:

- it is not necessary for me to hold an oral hearing to be able to fairly determine this complaint
- this complaint is not time barred
- Options should have refused to accept Mr S's application to open a SIPP, transfer his existing pension rights to it, and invest in the Salinas Sea investment.
- it is fair and reasonable to require Options to compensate Mr S for the loss and damage he has suffered.

### **Putting things right**

My aim in awarding fair compensation is to put Mr S back into the position he would likely have been in had it not been for Options' failings.

I consider the points made for Mr S about how he would have taken his pension benefits if he had not taken out the SIPP with Options, transferred his existing pension to it, and invested in the Salinas Sea investment to be plausible and reasonable and I accept what he has said. Accordingly it is my finding that but for the error made by Options Mr S would have taken benefits from his original pension at the same time as he took his work and state pension. And that he would have taken benefits by taking the maximum available tax-free cash and would then have bought a single life annuity without guarantee with the remaining fund using the open market option available to him. It is not possible to be certain about precisely what would have happened and when, but some certainty is needed in order to

carry out the relevant calculations and so the calculations should be carried out as at one calendar month after the date of Mr S's 67<sup>th</sup> birthday – "the calculation date".

In relation to financial loss or damage Mr S will have suffered both a past loss and a loss of future benefits.

Options should therefore obtain from Mr S's original pension provider the notional value of Mr S's pension (taking into account any additional payments into or withdrawal from the pension so a reasonable like for like comparison is made) had it remained with the original pension provider up to the calculation date. Options should obtain details of the tax-free cash that would have been paid as at the calculation date and the value of the remaining fund which would have been used to buy an annuity.

If there are any difficulties in obtaining a notional valuation from the previous provider then the FTSE UK Private Investors Income Total Return index should be used to calculate the value. That is likely to be a reasonable proxy for the type of return that could have been achieved.

The illiquid assets in Mr S's SIPP should now be removed so that he can close the SIPP. That would then allow him to stop paying the fees for the SIPP. The valuation of the illiquid investment may prove difficult, as there is no market for it. 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 the price paid to purchase the holding will be allowed for in the current transfer value (because it will have been paid into the SIPP to secure the holding).

If Options is unable, or if there are any difficulties in buying Mr S's illiquid investment, it should give the holding a nil value for the purposes of calculating compensation. In this instance Options may ask Mr S to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the relevant holding. That undertaking should only take effect once Mr S has been compensated in full, to include any loss above our award limit, and should allow for the effect of any tax and charges on the amount Mr S 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.

If the SIPP cannot be closed because of the need to continue to hold the illiquid asset, Options is to waive all future SIPP fees since Mr S wants to take the benefits from his pension and would now close it (and not incur any future SIPP fees) but for the error made by Options.

I accept that Mr S has been caused distress and inconvenience in relation to his SIPP and Salinas Sea investment generally and I note that he consulted a CMC and made a complaint some years ago now when in his 60's. I accept that in particular not being free to take his pension benefits at a time of his choosing because of the illiquidity of the Salinas Sea investment will have caused worry, upset and financial strain to Mr S over and above his financial loss.

With regards to the tax-free cash, Options should:

- A) pay Mr S a sum equal to the tax free cash lump sum he would have received at the calculation date.

- B) Mr S has not had the use and benefit of that money since the calculation date and so it is right that Options also pay interest on that sum. Interest is to be paid at the rate of 8% simple interest per year from the calculation date to the date of my final decision.

With regard to past loss income, Options should:

- C) Establish the level of income that Mr S would have been able to purchase on the open market as at the calculation date, assuming Mr S would have purchased the highest available annuity on a single life basis with no guarantees or increases paying monthly. Options should then calculate the total of all the notional payments which Mr S should have received from this annuity, net of his marginal rate of tax (presumed to be basic rate), from the calculation date to the date of my final decision with interest added to each payment at 8% simple interest per year from the date each payment was due to be paid to the date of my final decision.
- D) Options should also calculate all of the actual payments Mr S has received from his SIPP, if any, net of Mr S's marginal rate of tax, from the calculation date to the date of my final decision with interest added to each payment at 8% simple interest per year from the date each payment was paid to the date of my final decision.
- E) Past loss of income is C minus D. This should be paid direct to Mr S.

With regard to Mr S's future loss of income, Options should:

- F) Establish the current capital cost of purchasing income on the open market at the level and on the same terms that Mr S would have had as in C) above.
- G) Establish the current transfer value of Mr S's SIPP taking into account any outstanding charges. Any illiquid assets should be treated as set out above.
- H) The capital value of the future loss of pension is F minus G.
- I) If there is a loss at G above Options should pay compensation to make good that loss. Since the loss Mr S has suffered is within his pension it is right that I try to restore the value of his pension provision to the value at H) above if that is possible. So if possible the compensation for the loss should be paid into the pension. The compensation shouldn't be paid into the pension if it would conflict with any existing protection or allowance. Payment into the pension should allow for the effect of charges and any available tax relief.

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

With regard to distress and inconvenience, Options should:

- J) Pay compensation to Mr S for the substantial distress and inconvenience he has

suffered as result of losing a sizeable proportion of his overall pension provision and in not being able to take an income from this part of his pension since the calculation date – a period of more than six years. While I had previously said I thought £750 would be an appropriate figure it is my view that this is not enough and that bearing in mind, particularly the inconvenience and unnecessary financial strain caused by losing income since the calculation date, £1,500 is a more appropriate figure.

With regard to interest:

- K) Options is to pay compensation calculated above promptly. If Options does not pay the compensation within 28 days of being notified of Mr S's acceptance of my final decision, Options is to pay 8% simple interest per year on the compensation from the date of this decision until the date of payment.

Options should also provide details of all of its calculations to Mr S in a form that should be understandable to him.

### **My final decision**

For the reasons given above I uphold Mr S's complaint against Options UK Personal Pensions LLP.

**Decision and award:** I uphold the complaint. I think that fair compensation should be calculated as shown above. My decision is that Options UK Personal Pensions LLP should pay Mr S the amount produced by that calculation – up to a maximum of £150,000 (including the £1,500 to compensate for the distress and inconvenience Options' actions caused) plus interest as set out at K) above if applicable.

**Recommendation:** If the amount produced by the calculation of fair compensation is more than £150,000, I recommend that Options pays Mr S the balance. This recommendation is not part of my determination or award. Options doesn't have to do what I recommend. It's unlikely that Mr S can accept my decision and go to court to ask for the balance. Mr S 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 S to accept or reject my decision before 16 October 2023.

Philip Roberts  
**Ombudsman**