DRN-4648758

The complaint

Mrs W has a self-invested personal pension (SIPP) with Options UK Personal Pension LLP (formerly Carey Pension UK LLP) ("Options"). Mrs W's complaint is that Options should not have allowed an investment that was made in her SIPP.

What happened

Mrs W is represented by a claims management company (CMC). They complained to Options in 2021 about the suitability of its advice to Mrs W. Options said that it did not advise Mrs W. The CMC then submitted a complaint to the Financial Ombudsman Service in July 2021 on the basis that Options should not have allowed the investment which it says is unregulated and unsuitable. Options says Mrs W's complaint was made late and should not be considered.

To go back to the beginning, Mrs W applied for a SIPP with Options in January 2012. On the application form a man I will call Mr W was named as the "Investment Manager". (It is coincidence Mrs W and Mr W have the same initial – their last names are different.) Mr W's firm was also named as the Financial Adviser on the application form and Mr W was named as the contact at that firm. I will refer to Mr W's firm as the introducer.
The introducer's address is in Gibraltar where it was regulated. Mrs W was, and still is, resident in the UK.

The application form itself was sent to Options by Crown Acquisitions Worldwide PLC ("Crown Acquisitions"). Soon after this the SIPP was set up, and the transfer values requested by Options and received from Mr W's existing pensions. And shortly after that in February 2012 Mrs W invested almost £40,000 in a property-based investment with Crown Acquisitions in the Cayman Islands. This represented about 65% of Mrs W's pension fund. At this time Mrs W was only about a year away from her expected retirement age. And around a year after Mrs W took out the SIPP she crystallised her fund and put it into draw down. Nearly all of the drawdown fund was held in the Crown investment which paid no income and cannot be encashed.

The investment involved a plot of land in the Cayman Islands on which Crown had, or intended to obtain, 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 started.

As I understand it, in 2013 the introducer told Options that Mr W was no longer working with it and Options informed Mrs W that Mr W would no longer be the registered adviser for her pension.

Mrs W emailed Options on 15 March 2013:

"…thanks for the information regarding my pension adviser, as I am unsure as to how this will affect my pension plan/fund could you please explain any problems with not having an adviser.

Will it have any affect on my payout on my birthday. Is it essential I have an adviser? Is there anything else I need to know or can I leave it as it is in your hands?"

Options replied on 18 March 2013:

"I can confirm that there are no changes to your pension scheme.

The only difference is that we will deal with you on a direct basis going forward. I can also confirm that your drawdown payment on your [age stated] *birthday will not be affected.*

You do not need to have an adviser but we would always recommend that our members seek independent advice."

Mrs W's specified birthday was in 2013 and, as I understand it, drawdown started that year as planned.

In October 2015 Options contacted Mrs W and informed her 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. The estimated costs varied between around £12,000 and around £16,000. Some of these costs would be split between Options members invested in that Crown project. Options said there were 47 in all.

In January 2016 Mrs W contacted Options to say she had read her annual pension statement and wanted £1,500 from her pension.

Options replied to say that as legal fees were soon required in relation to the Crown investment it thought it would be prudent to ensure the fees are covered before any income is paid out. Options said it was therefore unable to pay any income at that time.

Mrs W replied by email on 1 February 2016. She said:

"There seems to be some breakdown in communication.

I am aware of the approaching transactions involving my Crown Investment, and although I have opted for my choice of Solicitors, I have also said that I may not agree to any further sale if the legal fees are more than I can afford.

I have been in touch with [name of member of staff at Options] *who is aware of my decisions, and at the moment there is no final figure involved, therefore, I would still like to go ahead with my drawdown, as it should not be considered part of my investment in Crown Acquisitions."*

Options replied that it had checked with the member of staff named by Mrs W before writing its email and that she had agreed that income will be paid once the *"legal fees and investment matters are completed."*

Mrs W replied on 2 February 2016:

"…I am having concerns that actions may be taken without my approval.

My biggest concern is, that this is my only investment which has used all my pension contributions, and I do not wish it to finance something I am not in agreement with, or will get no benefit from, I am trusting you to act in my best interest.

Due to my present circumstances, my drawdown payment is something I was depending on, and it is unfortunate that the other agenda has coincided with it, I would appreciate it if this could be addressed again, as it is beginning to sound as if I am going to end up with no return on my savings."

Options made a number of points in reply including:

- Options provides a member directed pension and so it requires Mrs W's instructions for any transaction.
- Options was carrying out Mrs W's instructions to purchase the Cayman Islands land investment and that there are still costs in relation to the investment in order to complete the purchase.
- It might be possible to market the plot in Mrs W's current state of beneficial rather than full legal ownership but any sale on that basis will still need to take into account the costs of completing the legal title.
- Once the solicitors' and surveyors' views were known things might become clearer.
- The amount that could be paid to Mrs W could then be considered when the way forward had been decided and the costs were known.

Mrs W emailed Options on 8 February 2016 to say she had been in touch with *"pension wise for advice"* and required a copy of the terms and conditions for the investment. She said she did not have a copy and did not recall seeing any. Mrs W said:

"As it looks from your emails that the actual purchase has yet to take place I would appreciate if all further actions regarding this investment were put on hold until I have received the paperwork from you (email copy is fine).

I appreciate and understand that there will be charges involved if I have to pull out from this investment but my circumstances now are such that I do require funds to be available for regular drawdown to be made.

Your help is much appreciated and I hope a solution suitable for everyone can be found as soon as possible."

Options sent copies of relevant documents to Mrs W on 26 February 2017. Its email included:

"…the member declaration confirms your investment instruction and the contracts are the legal contract to secure the investment in Crown. Your investment instruction to purchase the plot has not yet completed, as such, your instruction is not fully complete. There are fees to be paid to enable us to complete your purchase, therefore the cash balance is required for this purpose."

Mrs W emailed Options again in 2017 about drawdown payments. On 24 May 2017 Mrs W said:

"Still waiting for some response to my enquiry for a drawdown payment, I am experiencing severe financial problems and would really appreciate some assistance."

On 7 June 2017 Options said:

> *"Unfortunately, as there are still costs associated with your purchase into Crown Acquisitions we are unable to pay you any benefits at this time.*
>
> *Your chosen investment into Crown Acquisitions cannot currently be sold as you have not completed the purchase yet.*
>
> *As our previous email explained, our Cayman Island Lawyers have advised us that the contract contains no get out clause and therefore our investors will need to complete. The next steps are to obtain a current valuation for the land, and also see if Crown will offset the costs of the planning permission which we do not need to assist with the costs of completion."*

Mrs W replied on 8 June 2017 as follows:

> *"Thanks for info.*
>
> *However I find the reason for withholding funds to be totally unacceptable, if there are extra funds required to complete the deal with Crown I think that should be down to you not me, I invested on your recommendation and I believed that there would be no additional payments to make.*
>
> *If extra funds are required do you not need my permission anyway to release the funds?, permission I might add that will not be given.*
>
> *As to there being "no get out clause" I find it almost beyond belief that you would invest other peoples funds without ensuring those funds were safe.*
>
> *I agree that no planning permission should be needed as the land will be sold almost immediately and I suggest you push this through as soon as possible as I will not be adding any extra funds into what is looking to be a slightly dodgy scheme.*
>
> *I trust this clarifies my position and I repeat, I can see no reason for withholding any drawdown payment."*

In 2018 Mrs W asked what the next step would be if she did not wish to complete on the Cayman Island investment.

On 17 May 2018 Options replied:

> *"You have to complete or your deposit may be lost. This is a legally binding contract that has been entered into with Crown Acquisitions.*
> *Once the completion has occurred, you will then need to sell the land in order to draw this money from your pension fund."*

In February 2019 Mrs W contacted the CMC and it sent a data subject access request to Options in April 2019 so that it could review relevant documents and form a view about Mrs W's position. The CMC says it chased up that request in June 2019. After a further two months as the information requested had not been received the CMC asked Mrs W if she could provide relevant documents. The CMC says it was when doing this it discovered Mrs W had been advised by the introducer who ceased to be regulated years before the advice to Mrs W.

The CMC has explained that it therefore needed a further letter of authority from Mrs W to make contact with the introducer.

This was not returned to the CMC before it had to close down its business because of the Covid 19 pandemic. It closed its business from March 2020 until January 2021.

In February 2021 the CMC made a complaint to Options on behalf of Mrs W. It made a number of points including:

- Mrs W had been advised by Options' financial adviser. (This was despite, apparently, learning that it was the introducer who advised Mrs W, not Options.)
- Mrs W intended to retire the year after the SIPP was taken out.
- Mrs W was advised to transfer her existing pension to a SIPP with Options and to invest in the Crown property investment.
- The amount transferred (about £60,000) did not justify the recommendation of a SIPP.
- Investing over 60% of the fund in the unregulated Crown investment was reckless and inappropriate.
- At retirement 98% of the drawdown fund was held in the Crown investment which pays no income and cannot be encashed so cannot provide income or capital for Mrs W's retirement.
- A firm should treat its customers fairly and should ensure its advice is suitable.

In March 2021 Options made a number of points in response including:

- it provides an execution only service and had not advised Mrs W.
- Mrs W was introduced to Options by the introducer which was an EEA authorised firm.
- The complaint should be directed to the introducer.
- it had carried out Mrs W's instructions as it was obliged to do under the conduct of business rules it is subject to (COBS 11.2.19R).

Mrs W's CMC wrote again to Options in May 2021 with details of the Court of Appeal decision in the case of *Adams v Carey Pensions*. As Options did not offer to settle Mrs W's complaint, the CMC referred it to the Financial Ombudsman Service. The CMC said Mrs W holds Options responsible for allowing an unregulated investment, which was unsuitable for Mrs W and is now worthless, into her SIPP.

Mrs W's complaint was considered by one of our investigators. She thought the complaint should be upheld. The investigator made a number of points including:

- 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 Mrs W's application. If it had not done so Mrs W would not have suffered the losses she has suffered in her pension.

The investigator then went on to explain how she thought Options should put things right. Mrs W agrees with the investigator. Options does not. It has made a number of points in response, including the following:

- Mrs W's complaint was made more than six years after the events the complaint is about.
- Mrs W's complaint was also made to Options more than three years after the time when Mrs W was aware or ought reasonably to have been aware she had cause for complaint.
- Options wrote to Mrs W in 2015 to inform her of the additional costs and requirements for completing the investment. In 2016 and 2017 Options repeated its position.
- Mrs W took advice from 'pension wise' in 2016 so she was concerned about her investment then.
- In 2017 Mrs W said the reasons for withholding funds to pay the additional costs for the investment was 'totally unacceptable' and refused permission to pay any such fees. So if Mrs W was not aware she had cause for complaint in 2016 she was in 2017.
- The complaint, made more than three years later in 2021, was therefore made out of time and the complaint should not be considered.
- If the complaint is considered, the ombudsman must take account of the legal and contractual context of the relationship between it and Mrs W. Options acts on a strictly execution only/non-advised basis and is member directed throughout.
- Options does not give advice and the ombudsman should not come to a finding that places on it a legal duty that does not exist.
- The investigator's findings are based on duties that would not be recognised by a court without explaining why that is appropriate.
- The complaint has been considered on the basis of guidance that had not been published at the time of events in this case.
- No evidence has been provided to show that the introducer was undertaking regulated activities.
- There is no evidence the introducer gave advice.
- In any event SIPP operators are permitted to accept introductions from non-regulated introducers.
- There was no reason why Options should not accept introductions of business from

the introducer.

- There was no breach of duty by Options.
- Against this background it is unfair and unreasonable to place liability for the losses flowing from the investment on the execution-only SIPP operator. It is unfair to make a SIPP operator responsible for the member's poor investment choices.
- Options did not cause Mrs W to suffer a loss. It is likely Mrs W was keen to proceed with the investment and would have done so even if Options had not accepted business from the introducer.
- The redress methodology suggested by the investigator is unfair. The index proposed is higher than the approach used in other cases.
- Options requests an oral hearing in order properly to determine Mrs W's complaint. It's procedurally unfair and inappropriate that a fact sensitive matter such as this should be decided (if it is not time-barred) wholly on the papers.

On the time bar point, Mrs W's CMC says Mrs W made her complaint to Options in 2021 which was within three years of the time when she was aware she had cause to make her complaint against Options. Or alternatively Mrs W's email of 8 June 2017 met the definition of a complaint under the DISP rules and should have been treated as such by Options. This means that Mrs W complained within six years of the events complained about.

Mrs W's complaint was referred to me and I issued a Provisional Decision on 15 December 2023 in which I explained:

- why I thought the complaint had not been referred late and could be considered.
- why I thought this complaint could be fairly determined without an oral hearing.
- the relevant considerations I am required to take into account to decide what is fair and reasonable in all the circumstnces.
- why I thought the complaint should be upheld.
- and, in general terms, the approach that should be taken to work out how things should be put right.

I invited Options and Mrs W to let me have any comments they wished to make in response to my Provisional Decision by 12 January 2024. I also asked Mrs W and/or her representatives to provide more information about what she would have done with her pension if she had not transferred her pension to Options and made the Crown investment. Mrs W responded to my provisional decision to say she agreed with it and she said what she thought she would have done with her pension. That information was passed on to Options. I also arranged for my further views on how things should be put right, in the light of what Mrs W said, to be sent to Options and Mrs W.

Options has not responded to my Provisional Decision or to my views about how things should be put right.

What I've decided – and why

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

In my Provisional Decision I said:

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

Preliminary point – time bar

For the avoidance of doubt, I am considering this point, and the other preliminary point below, on the basis of the applicable rules and law and not on the basis of what is fair and reasonable in all the circumstances.

Options argues that Mrs W's complaint has been made late and should not be considered.

We cannot consider all the complaints we receive. We can only consider those complaints that are within our jurisdiction. The rules setting out the jurisdiction of the Financial Ombudsman Service are in the DISP section of the Financial Conduct Authority Handbook. At the time Mrs W referred her complaint to us, DISP 2.8.2R said:

> "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 in *DISP 2.8.2 R* … have expired …"

Options hasn't consented to this complaint being considered by our service. Given the above provisions, I need to consider a number of issues in order to decide whether we may consider Mrs W's complaint, including:

- What is a complaint?
- What is the complaint in this case?
- When was the complaint first referred to Options?
- Whether the referral was made within the above time limits?

What is a complaint?

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."*

What is Mrs W's complaint?

Mrs W's complaint has been confused as Mrs W's original position, as initially repeated by her CMC, was that Options gave unsuitable advice. That complaint has evolved into a complaint that Options should not have allowed the investment in its SIPP essentially because it is a high risk unregulated investment which has provided her with no income and cannot be encashed.

When was Mrs W's complaint first referred to Options?

DISP 2.8.2R sets out two possible clock stopping events. The first mentioned is when:

> *"…the complainant refers it to the Financial Ombudsman Service…"*

The second mentioned is:

> *"…unless the complainant referred the complaint to the respondent… and has a written acknowledgement or some other record of the complaint having been received"*

So, Mrs W needs to refer her complaint to the Financial Ombudsman Service or to have referred her complaint to Options to stop the clock in the time bar rule.

The definition of complaint under DISP (set out above) was recently considered by the Court of Appeal in *Davis v Lloyds Bank* [2021] EWCA Civ 557. The judge in that case said:

> *"… the observation of Ouseley J in R (British Bankers Association) v FSA [2011] EWHC 999 (Admin), [2011] Bus LR 1531 at [38] that the definition of "complaint" in DISP is a broad one. So indeed it is, but it is still a defined term. There are three relevant aspects to the definition. First, so far as the form of a complaint is concerned, there must be an expression of dissatisfaction. Although the definition does not say so in terms, it is obvious that the expression of dissatisfaction must be one that is communicated to the provider of the financial service. Second, it is not just any expression of dissatisfaction that qualifies as a complaint. The expression of dissatisfaction must be about "the provision of, or failure to provide, a financial service or a redress determination" ... Third, a complaint must also allege that the complainant "has suffered (or may suffer) loss" etc. It is common ground that*

because the definition of "complaint" includes part of a complaint, a complaint (as defined) may be contained in a series of communications.

Whether a communication or series of communications meets this test is a question of interpretation. The ultimate question is: what meaning would be conveyed to a reasonable recipient of the communication or series of communications? In determining that meaning, the context in which the communication was made is of the utmost importance…"

From the above it's clear that although the term complaint is broad it is still a defined term and that the communication in question has to be considered in context so as to "*answer what meaning would be conveyed to a reasonable recipient of the communication".*

Bearing all that in mind I have considered Mrs W's e-mail of 8 June 2017 which I repeat again here for ease of reference:

"Thanks for info.

However I find the reason for withholding funds to be totally unacceptable, if there are extra funds required to complete the deal with Crown I think that should be down to you not me, I invested on your recommendation and I believed that there would be no additional payments to make.

If extra funds are required do you not need my permission anyway to release thee funds?, permission I might add that will not be given.

As to there being "no get out clause" I find it almost beyond belief that you would invest other peoples funds without ensuring those funds were safe.
I agree that no planning permission should be needed as the land will be sold almost immediately and I suggest you push this through as soon as possible as I will not be adding any extra funds into what is looking to be a slightly dodgy scheme.

I trust this clarifies my position and I repeat, I can see no reason for withholding any drawdown payment."

Taking the points made in the Court of Appeal judgment in turn:

- *First, so far as the form of a complaint is concerned, there must be an expression of dissatisfaction… communicated to the provider of the financial service*:

Mrs E says she:

- considers Options reasons for withholding funds she wishes to draw from her pension *"totally unacceptable".*
- thinks she should not have to pay any further fees as (she says) she invested on its recommendation and she believed there would be no additional payments to make.
- finds it *"almost beyond belief"* that Options would invest its members money without ensuring those funds were safe, and that the scheme seems *"slightly dodgy".*

It is clear that Mrs W is dissatisfied with Options. The definition of a complaint makes it clear that an expression of dissatisfaction comes within the definition for the rules whether it is justified or not. So it does not matter that Options did not recommend the investment to Mrs W.

It is my view that the email is an expression of dissatisfaction.

- *Second, … the expression of dissatisfaction must be about "the provision of, or failure to provide, a financial service or a redress determination"*

The dissatisfaction is about the failure to provide the requested drawdown funds given the circumstances of the recommendation of the investment to Mrs W when she believed there would be no further repayments to make. And against the background of the implicitly made allegation that Options failed to safeguard her interests as a SIPP member.

These are allegations of unfairness and/or failings in relation to the financial services of giving investment advice and operating the pension scheme. Both of these services are matters which come within the jurisdiction of the financial ombudsman service.

In my view this part of the test is also satisfied.

- *Third, a complaint must also allege that the complainant "has suffered (or may suffer) loss etc"*

It is important to remember the context of the letter of 8 June 2017. Mrs W wants to be paid funds held in her SIPP. Options says it won't pay those funds to her because it wants to keep funds back to pay the legal fees required to complete the purchase of the investment. Mrs W is saying in the letter she should not have to pay those fees, instead Options should. So she is alleging Options conduct is causing her to suffer a loss or an expense which in her view she should not have to suffer so she is alleging that Options conduct is causing her a loss.

It was also clear when viewed in context and as confirmed by the force with which Mrs W is expressing herself, that not providing the income is or is likely to be causing Mrs W to suffer material distress.

Also implicit in Mrs W's complaint is that Mrs W thinks she has or may suffer loss in that she has, in her view because of failures on the part of Options, invested in what seems to be a "slightly dodgy" scheme in which her pension money is not safe.

In my view this part of the test is also satisfied.

It is therefore my view that the email of 8 June 2017 was a complaint, as defined in the DISP rules, from Mrs W. And that complaint is essentially the same as the complaint now made by Mrs W – that Options was at fault for recommending the investment, and/or for allowing the investment in its SIPP, that is unsatisfactory in some way and is not providing, or has not provided, an income and cannot be encashed.

Whether the referral was made within the above time limits?

Since it was Options that first referred us to the 8 June 2017 email, and provided a copy from its records, it must follow that it received that email and, more likely than

not, will have done so on the date it was sent. And so although I have not seen an acknowledgement, I am presently satisfied that Mrs W first referred her complaint to Options on 8 June 2017 and that the complaint was received and recorded in Options records relating to Mrs W and her SIPP and its admission of such now serves as a record for Mrs W if Options did not send an acknowledgment at the time.

The complaint relates to events in 2012. The complaint was first referred to Options less than six years later and so it was referred within the time limits set out in the DISP rules.

Preliminary point - Options' request for an oral hearing

Options says an oral hearing is necessary to explore issues such as how Mrs W came to hear about the investment and her understanding of the investment and the roles played by the parties, and Mrs W's motivation for entering into the transaction.

The Financial Ombudsman Service provides a scheme under which certain disputes may be resolved quickly and with minimum formality (s.225 FSMA). DISP 3.5.5R 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).

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.

If I decide particular information is required to decide a complaint fairly, in most circumstances we are able to request this information from either party to the complaint, or even from a third party.

I have 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. The key question is whether Options should have accepted Mrs W's application at all. Mrs W's understanding of matters are secondary to this. And I am, in any event, able to test this to the extent I think necessary by asking questions of Mrs W in writing.

In any event – and I make this point only for completeness – even if I were to invite the parties to participate in a hearing, that would not be an opportunity for Options to cross-examine Mrs W as a witness. Our hearings do not follow the same format as a Court. We are inquisitorial in nature and not adversarial. And the purpose of any hearing would be solely for the Ombudsman to obtain further information from the parties that they require in order to fairly determine the complaint. The parties would not usually be allowed direct questioning or cross-examination of the other party to the complaint.

My view on the question of whether Mrs W's complaint may be considered and whether there should be an oral hearing remain the same. So, for the reasons set out above it is my view that we can consider Mrs W's complaint and that I can fairly determine this complaint without an oral hearing.

I went on to say the following in my Provisional Decision:

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 *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 *BBSA*L 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 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 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 Mrs W's case are different from those in *Adams*. There are also significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Mrs W'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 Mrs W'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 Mrs W.

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 to give advice to Mrs W 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 Mrs W'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 Mrs W. It is accepted Options was not required to give advice to Mrs W, 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 Mrs W.
- Even if the introducer did advise Mrs W it had the regulatory permissions to do so.
- It is unfair to hold Options responsible for Mrs W's losses.

Due diligence carried out by Options on the introducer:

It's clear that 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:

Little to no information has been provided about the investment in this case and the checks made on it by Options.

I do not however need to deal with this area at length. 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 very largely referred to the investment in these terms on the Member Declaration it required Mrs W 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? And/or did the introducer arrange deals in investments?

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 Mrs W’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), Mrs W's existing personal pension and [her] new SIPP both 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 her 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.

Mrs W says she was contacted on the phone and offered pensions advice though she cannot now remember who it was that called her. Mrs W says she was advised to amalgamate her existing pensions to get a better pension. Mrs W says she believed the person to be a pensions expert who was offering professional advice. Mrs W says that as she is not knowledgeable in these matters she went with the investment that was recommended.

Although Mrs W cannot recall who she spoke to on the phone about her pension according to Options' records Mrs W was introduced to it by the introducer.
Mr W of the introducer was named as the Financial Adviser on the SIPP application form signed by Mrs W on 18 January 2012.

And I am aware from dealing with other complaints involving Options and the introducer that the introducer did deal with clients on the phone and that Mr W used the job title 'Financial Adviser' at the introducer.

I note that Mrs W has been confused about who advised her and seems to have formed the view that the adviser and/or the introducer and Options were all one and the same. As a consequence when she has realised she is unhappy with the situation she is in she has initially said that this was as a result of Options adviser's recommendation. Options does not employ advisers. It accepts business introduced to it by introducers who may or may not give advice and in my view that is what has

happened in Mrs W's case.

Certainly there is evidence to show Mr W of the introducer firm was involved in Mrs W's application and he was named as the adviser on the investment instruction and declaration form Mrs W signed.

Mrs W says the person she dealt with advised her to amalgamate her pensions to get a better return and that he recommended the Crown investment.
I consider Mrs W's account of events as regards whether or not she was advised by the person she dealt with, to be plausible. It is consistent with the documentary evidence.

Mrs W's version of events is also consistent with the picture presented by the documentation. Mrs W presents as a normal retail investor. She lived in the UK. She was recorded as unemployed – with nothing to indicate any previous relevant employment history in finance or pensions for example. The transfer values of the pensions she was planning to switch to the SIPP (and which she did switch) were estimated at £18,000, almost £24,000 and nearly £9,000.

There is nothing in the SIPP application form to suggest Mrs W was for example a high net worth or sophisticated investor.

Mrs W was a normal retail investor. And it is difficult to see why such a retail investor should choose to move her pensions from ordinary personal pensions with reputable providers to a SIPP, which is a fairly specialist pension arrangement, to invest in a property-based investment in the Cayman Islands unless she 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 her on an execution only basis.

There is also the point that this was not a one-off. 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 reality 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.

I note in this case that the SIPP application form was sent to Options by Crown rather than the introducer which suggests that the introducer first sent the application to Crown in order to ensure that Crown was aware that the application to invest, which would soon come from Options, had been introduced by it.

In this case the introducer was named as the Financial Adviser on the SIPP application form. Strictly speaking this meant the introducer was to act as the Financial Adviser in relation to the SIPP and does not in and of itself establish that the introducer gave advice that led to the SIPP. However that is a fine distinction which is not especially clear from the form and the appointment of the introducer as the Financial Adviser would seem to be consistent with how Mrs W understood the introducer's role (albeit she may have been, or become over time, confused about who he was performing that role for) and the "Financial Adviser" job title Mr W appears to have used.

On balance it is my finding that it is more likely than not that Mr W acting for the introducer did advise Mrs W that she would be better off investing her pension in the Crown investment than in her existing personal pension. And that he advised Mrs W

to open a SIPP with Options, close her existing pensions and switch the funds 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.

It is possible that the Crown investment in this case is not a specified investment under FSMA. That does not however mean that regulated investment advice was not given. In my view the situation here is essentially the same as that considered by the Court of Appeal in the *Adams* case where Newey LJ said:

> *"82. In short, CLP's recommendation that Mr Adams invest in storepods carried with it advice that he transfer out of his Friends Life policy and put the money into a Carey SIPP. Investment in storepods may have been the ultimate objective, but it was to be gained by transferring out of the Friends Life policy and into a Carey SIPP. CLP thus proposed that Mr Adams undertake those transactions too and, in so doing, gave "advice on the merits" of selling a "particular investment which is a security" (viz. the Friends Life policy) and buying another "particular investment which is a security" (viz. a Carey SIPP). Although, therefore, the advice to invest in storepods was not of itself covered by article 53 of the RAO, CLP nonetheless gave Mr Adams advice within the scope of article 53 and so acted in contravention of the general prohibition."*

As well as giving advice the introducer arranged the deal it recommended. It entered into an arrangement with Options under which it would refer such business to it. And I note that as part of that arrangement the introducer was able to submit applications to Options – albeit in this case that was via Crown.

In the circumstances it is my present view that the acts carried out by the introducer were sufficiently instrumental in the overall transaction - the transfer from the existing personal pension to Options and the investment into the Crown investment - as to amount to the regulated activity of arranging deals in investments under Article 25 RAO.

It is my provisional finding that the introducer gave investment advice relating to Mrs W's rights in her personal pension (Article 53 RAO) and arranged deals in relation to her rights in her personal pension (Article 25 RAO).

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 Mrs W'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 App3.9.7G 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 3.9.5G**

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 14A.1.2G of the Handbook, in existence at the time of Mrs W'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 under which SIPPs were to be set up for the purpose of investing in Crown investments. The introduction of applications to Options to establish a SIPP and the instruction to make investments in that SIPP would, more likely than not, 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 to carry on one or other or both of those activities. The introducer did not however have such a top up permission.

my view so far:

In summary it is my present view that Options should have:

- had serious concerns about the business model of the introducer.
- considered that it was more likely than not that the introducer's conduct, as it understood it, would amount to arranging deals in investments.
- 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 SIPPs 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 or arrange deals in relation to rights in personal pensions.
- 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 Mrs W's application for a SIPP or her instruction to request the transfer of her existing pensions to it or her instruction to invest in the Crown investment.

Is it fair to ask Options to compensate Mrs W?

In deciding whether Options is responsible for any losses that Mrs W 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 Mrs W'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 Mrs W signed the indemnity means that she 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 Mrs W's application to open a SIPP. That should have been the end of the matter – it should have told Mrs W that it could not accept the business. And I am satisfied, if that had happened, the arrangement for Mrs W would not have come about in the first place, and the loss she suffered could have been avoided. The financial loss has flowed from Mrs W transferring out of her existing pensions 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 Mrs W why it would not accept the application from the introducer or was terminating the transaction, I find it very unlikely that Mrs W would have tried to find another SIPP operator to accept the business.

So I'm satisfied that Mrs W would not have continued with the SIPP, had it not been for Options' failings, and would have remained in her existing pension. And, whilst I accept that the introducer is responsible for initiating the course of action that has led to her 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 Mrs W's actions mean she 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 Mrs W was warned of the high risk and declared she understood that warning. But Options did not share significant warning signs with her so that she could make an informed decision about whether to proceed or not. In any event, Options should not have asked her to sign the indemnity at all as the 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 Mrs W for the loss she has suffered.

I accept that its failure will have caused Mrs W serious financial loss. She has lost most of her pension at a time when she wanted to take an income from it which made her financial situation much more difficult than it would otherwise have been and caused her considerable distress and worry.

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 Mrs W's right to fair compensation from Options for the full amount of her loss.

I then went on to explain how I thought things should be put right.

Options has not responded to my Provisional Decision.

As mentioned above I asked Mrs W and/or her representatives to say what she would have done with her pension had she not transferred to Options and had she not invested in the Crown investment. In response Mrs W's CMC said:

"[Mrs W] *has said that she would have kept her pension until retirement upon which she said 'upgrade car first, then a short break so around £4/£5000 would have been used for that, rest would be for enjoying retirement'."*

And when asked to provide more details the CMC said:

"[Mrs W] *would have used draw down and again she says she would have taken roughly £5K of the tax free lump sum for the car and holiday. She said she would have put the rest of the pension pot in the bank to get interest, 'to ensure future bills, rent etc were covered without having to juggle finances as we do at the moment ie work out who to pay and who can wait'."*

And:

"[Mrs W] *has had to continue to work part time 3 days a week ... as all she can manage with ongoing health issues she said. Not sure when she will stop working*

depends on her health. Also, she does receive a small work place pension through her employment but valued at roughly £500."

I've considered all of the evidence and arguments and my view remains as set out in the Provisional Decision. For the reasons set out in the Provisional Decision I consider Options was at fault and that it caused Mrs W harm which it should put right.

I therefore need to consider what would have happened but for Options' error. The lack of detail in Mrs W's answers on this point is understandable. She is not a pensions expert and had to deal as best she could with the situation she was in and not make plans for a situation she was not, in fact, in.

From what Mrs W says it is my view that Mrs W's position is that:

- She would have taken benefits from her pension at her planned retirement age - the time from which she did in fact request drawdown.

- She would most likely have taken benefits in drawdown form rather than buy an annuity.

- She would have needed to effect changes to her existing pension arrangement to enable her to access tax free cash *and* pension income payments. There are a number of ways in which Mrs W could have sought to achieve this. Also, Mrs W might have moved her pension in readiness for drawdown at broadly the time she transferred to Options or she might have left her pensions where they were for a little longer and made the changes closer to the time when she did take benefits.

- Either way her pensions would have been invested in a way that would allow her to take benefits when she wanted rather than in illiquid investments.

- She would have taken the maximum available tax free cash which would have provided some funds for the expenses she has mentioned and some money that could be held in cash and drawn against as needed. (Mrs W transferred into the SIPP about £60,000 only a year before she started drawdown in 2013. This suggests Mrs W ought to have had access to tax free cash of around £15,000 at the point she started drawdown had all her fund been available to her rather than a sizeable proportion of it tied up in an illiquid investment.)

- She would have invested the remaining fund in liquid investments so that her fund was available to her to drawdown as and when needed.

And so broadly speaking I think the way to put things right should, for convenience and to provide a reasonable level of certainty with which to work, proceed on the basis that Mrs W would have:

- Moved her pension when she did.

- Invested her fund on a basis that would have produced a return in what I will refer to for simplicity here as the 50:50 benchmark. I will explain what that means in more detail below.

- Taken the maximum available tax free cash from the time she crystalised her pension fund.

- Left the remainder of the fund invested as before.

- Made any payments into the pension and any withdrawals from the pension in the same way and at the same time.

I appreciate that some of these assumptions are a bit artificial (for example Mrs W may not have needed to make some of the withdrawals that she made when she made them if she had received a larger tax free cash payment than the one that was actually paid to her.) However some assumptions have to be made and it is best to try to keep things as straightforward as possible by basing things on what actually happened so far as it is reasonable to do so.

I also consider that Mrs W has suffered significant worry, distress and inconvenience in relation to her pension. For example the natural upset and worry she has suffered in seeing significant losses in her pension, and the considerable inconvenience in not being able to draw funds from her pension at the rate she wanted from 2013 or at all from around 2016. Also Mrs W did not have access to all of the tax free cash lump sum which ought to have been available to her to spend how and when she wanted. All of this has caused Mrs W financial hardship, and considerable worry and distress.

I consider an additional award to compensate Mrs W for the distress and inconvenience she has been caused is appropriate. In my Provisional Decision I said I thought £1,000 was an appropriate sum. But now, after reading Mrs W's account of how she has had to get by without access to her full pension I have reconsidered. While not all of the financial strain Mrs W has suffered since 2013 is due to her pension problems it has certainly made things more difficult for her. In the circumstances I consider an award of £2,000 is appropriate.

Putting things right

My aim is to return Mrs W to the position she would now be in but for what I consider to be Options' failure to carry out adequate due diligence checks before accepting Mrs W'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 Mrs W would be in if she had not transferred from her existing pensions to Options and invested in the Crown investment but would instead have:

- Still moved her pension when she did.

- Invested her fund on a basis that would have produced a return in what I will refer to for simplicity here as the 50:50 benchmark.

- From the point Mrs W crystalised her pension fund she would have taken the maximum available tax free cash.

- The remainder of the fund would have remained invested.

- And any payments into the pension and any withdrawals made from the pension would have been made in the same way and at the same time.

What Options must do?

Tax-free cash:

1) Calculate the maximum tax-free cash Mrs W could have taken from the monies transferred into the Options SIPP had the transferred monies achieved a return in line with the 50:50 benchmark from the date they were transferred to Options through until the date Mrs W actually first took tax free cash from her Options SIPP.

   By the 50:50 benchmark I mean for half the investment the FTSE UK Private Investors Income Total Return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) and for the other half the average rate from fixed rate bonds. Options should use the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

2) Ascertain the tax-free cash Mrs W actually took from her Options SIPP.

3) If the sum provided for in step 1 is greater than the sum in step 2 then Options must pay the difference, and without any notional reduction for income tax, directly to Mrs W plus interest. Interest should be added at 8% simple from the date Mrs W first actually took tax-free cash from her Options SIPP through until the date of my final decision. Income tax may be payable on any interest paid. If Options deducts income tax from the interest, it should tell Mrs W how much has been taken off. And Options should also then give Mrs W a tax deduction certificate in respect of interest if Mrs W asks for one.

Residual pension fund:

To compensate Mrs W fairly, Options must:

- Compare the performance of Mrs W's SIPP with that of the benchmark shown below. If the actual value is greater than the fair value, no compensation is payable. If the fair value is greater than the actual value, there is a loss and compensation is payable.

- Options should add interest as set out below.

- Options should pay into Mrs W's pension plan to increase its value by the total amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

- If Options is unable to pay the total amount into Mrs W's pension plan, it should pay that amount direct to her. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore, the total amount should be reduced to *notionally* allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mrs W won't be able to reclaim any of the reduction after compensation is paid.

- The *notional* allowance should be calculated using Mrs W's actual or expected marginal rate of tax at her selected retirement age.

- It's reasonable to assume that Mrs W is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%.

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

- Pay to Mrs W £2,000 for the distress and inconvenience caused to her as referred to above.

Options UK Personal Pensions LLP should provide details of its calculation to Mrs W in a clear, simple format.

Income tax may be payable on any interest paid. If Options deducts income tax from the interest it should tell Mrs W how much has been taken off. Options should give Mrs W a tax deduction certificate in respect of interest if Mrs W asks for one, so she can reclaim the tax on interest from HM Revenue & Customs if appropriate.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
The monies transferred into the Options SIPP	Still exists but illiquid	For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	Date of transfer into the SIPP	Date of my final decision	8% simple per year from the date of my final decision to settlement (if not settled with 28 days of Options being notified of Mrs W's acceptance of my final decision.

Actual value

This means current transfer value of Mrs W's Options SIPP at the end date.
It may be difficult to find the *actual value* of the illiquid investment/s. This is complicated where an asset is illiquid (meaning it could not be readily sold on the open market) as in this case. 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 to purchase the illiquid assets, their value should be assumed to be nil for the purpose of calculating the *actual value*. Options may require that Mrs W provides an undertaking to pay Options any amount she may receive from the illiquid assets in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Options will need to meet any costs in drawing up the undertaking.

Fair value

This is what the monies transferred into the SIPP would have been worth at the end date had it produced a return using the benchmark.

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, Options should use the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis. Any additional sum paid into the investment should be added to the *fair value* calculation from the point in time when it was actually paid in.

Any withdrawal from the SIPP Mrs W has actually made, except tax-free cash which I address separately later in this paragraph, should be deducted from the fair value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if Options totals all those payments and deducts that figure at the end to determine the fair value instead of deducting periodically. Options should also allow for a notional withdrawal, as at the date Mrs W first actually took tax-free cash from her Options SIPP, equivalent to the maximum tax-free cash Mrs W could have taken as set out in the tax free cash section above.

SIPP fees

If the investment/s 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 Mrs W to have to pay annual SIPP fees to keep the SIPP open. 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.

Distress and inconvenience

I think the loss of the pension provision that is the subject of this complaint caused Mrs W significant distress and inconvenience as I have said above and Options should pay Mrs W £2,000 to compensate her for this.

Why is this remedy suitable?

I've decided on this method of compensation because:

- I can't say definitively into what holdings, and in what proportions, Mrs W's monies would have been invested had Options not accepted her application. However, bearing in mind her wish to be able to drawdown her funds when she needed to but also the need to try to maintain the value of the fund during her retirement if possible Mrs W needed income with some growth and it seems reasonable to say she will have wanted only a small risk to her capital.

- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to her capital.

- The FTSE UK Private Investors Income ***Total Return*** index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.

- But as mentioned it seems reasonable to say Mrs W would have taken a small level of risk to attain her investment objectives. So, the 50/50 combination would reasonably put Mrs W into that position. It does not mean that Mrs W would have invested 50% of her money in a fixed rate bond and 50% in some kind of index tracker investment. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mrs W could have obtained from investments in line with her objectives.

My final decision

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £160,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £160,000, I may recommend the business to pay the balance.

Determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My decision is that Options UK Personal Pensions LLP should pay Mrs W the amount produced by that calculation – up to a maximum of £160,000 (including compensation for distress and inconvenience but excluding costs) plus any interest on the amount set out above.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £160,000, I recommend that Options UK Personal Pensions LLP pays Mrs W the balance plus any interest on the amount as set out above.

This recommendation is not part of my determination or award. It does not bind Options UK Personal Pensions LLP. It is unlikely that Mrs W can accept my decision and go to court to ask for the balance. Mrs W may want to consider getting independent legal advice before deciding whether to accept this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs W to accept or reject my decision before 26 March 2024.

Philip Roberts
Ombudsman