DRN-4705071

The complaint

Mr J has a self-invested personal pension ("SIPP") with Options UK Personal Pensions LLP ("Options"), formerly Carey Pensions UK LLP ("Carey"). Mr J transferred his existing SIPP with another provider – Business G to an Options SIPP to invest in a property-based investment scheme in Cape Verde and a corporate bond. Mr J's complaint is that Options was negligent in accepting his application, which was introduced to it by an unregulated introducer, to make such investments.

What happened

I will first set out my understanding of the various parties involved, their roles, and an overview of the investments in this complaint.

Options (formerly Carey)

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

Whilst Mr J's dealings were with Carey, I'll refer to Options throughout this decision for simplicity.

Mr J

Mr J is the complainant in this case, and he is represented by a claims management company. Mr J applied for a SIPP with Options in January 2013.

Cape Verde4 Life

Cape Verde4 Life ("CV4L") was a UK based company. It was involved in overseas property-based investments. It was not regulated by the FCA. It was therefore not authorised to advise on investments covered by the Financial Services and Markets Act 2000 ("FSMA") in the UK. One of the directors was a man I will call Mr C. CV4L was an introducer of business to Options. It introduced Mr J's application to open a SIPP to Options. CV4L was at the time of Mr J's investment described as an authorised representative of Oasis Atlántico.

Alternative Pension Investments Ltd

Alternative Pension Investments Ltd ("API") was also a UK based company not authorised by the FCA. The people who worked for API also appeared to be involved in CV4L. My understanding is that API would typically make contact with consumers and then pass them on to CV4L who would, in turn, make the introduction to Options. API had contact with Mr J in relation to the transactions that are the subject of this complaint.

Oasis Atlántico

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

As I understand it, there was more than one way to invest in the Salinas Sea project.

I have seen a brochure promoting investment via two special purpose vehicles (companies) which were intended to be set up on a basis that could be invested in within a UK SIPP. This form of investment involved buying shares in the companies which in turn invested in units in Salinas Sea.

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

Alternatively, it was possible for an investor to buy a unit or part of a unit. Mr J invested in this way and opted to purchase a 25% share of a unit.

Buying a unit also involved entering into a Hotel Agreement under which the buyer/investor appointed the seller (Oasis) to operate the overall development (including the unit) as a hotel. When the unit was completed, Oasis was to let the buyer know it was available for inspection and then the contract was to be completed. The unit was to be part of the hotel and managed as a whole by the manager, rather than the individual investor.

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

There was a formula for calculating the rental income payable to the investor which involved pooling the rental income of all units rather than based on the occupancy of the investor's individual unit. Investors would receive income on this basis during the first three years if greater than 5% and calculated on this basis after the first three years. An investor could sell their unit, or share of a unit, on the open market subject to the Hotel Agreement.

Alpha Business Centres ("ABC")

ABC was the recipient of an asset backed corporate bond managed by a firm I'll call Business G, an FCA regulated firm. Funds invested in the bond were loaned to companies within the ABC group.

An initial bond issue named "*ABC Corporate Bond*" was launched in 2012 and achieved full subscription of almost £4million before its closure date. A second issue with slightly different terms titled "*ABC Corporate Bond II"* was launched in January 2013. Mr J participated in the second bond issue.

It was expected that investors in ABC Corporate Bond II would receive quarterly interest at a rate of 8.32% per annum, and the return of their investment upon redemption of the bond.

The investment term was three to four years. As an incentive for investors to hold the bond for the full four years, bonus interest of 3% would be paid.

Mr J's investments

Salinas Sea

Mr J invested in a 25% holding of a unit with a purchase price of £27,250. Mr J funded the investment using approximately £18,000 from his SIPP as a deposit, with the remaining balance due once the unit and sale was completed. There was an option to fund the completion balance with a mortgage from Oasis.

Mr J's investment was made in February 2013. Prior to making the investment, Mr J signed a document headed "*SIPP Member Instruction and Declaration, Alternative Investment – Salinas Sea*".

The resort was completed later in 2013 and Mr J was invited to inspect the unit before completing the investment.

ABC corporate bond

Mr J invested £10,000 from his SIPP into an ABC corporate bond in March 2013. Prior to making the investment, Mr J signed a document headed "*SIPP Member Instruction and Declaration Alternative Investment – ABC corporate bond II*".

Companies within the ABC group subsequently entered administration. The investment has been valued at £nil within Mr J's SIPP since March 2017.

The relationship between CV4L and Options

As I understand it, Options' relationship with CV4L began in April 2011. CV4L was an introducer of business to Options and Options has said it received around 90 introductions between April 2011 and November 2013, when it ended its relationship with CV4L after it decided to stop accepting business from unregulated introducers generally.

Options says it acted properly in accepting introductions from CV4L. It was not prohibited from accepting introductions from unregulated introducers. It says it undertook due diligence checks on CV4L on a number of occasions and had no reason to believe it should not accept introductions from it at the time of Mr J's introduction.

Due diligence carried out by Options on CV4L

Options has provided the Financial Ombudsman Service with information about the due diligence it carried out on CV4L.

Options says:

- CV4L first proposed to become an introducer of SIPP business for Options in April 2011. It was an introducer from late April 2011 until November 2013 when Options made a business decision to no longer accept introductions from unregulated introducers.

- CV4L was working with an FCA regulated adviser, 1Stop Financial Services, who were at the time authorised to advise on pension transfers, "*if investors wished to take advice*".

- Options did not pay any commission to CV4L for introducing business to it. It did not see the details of any payments made to CV4L by the underlying provider, but CV4L did disclose on its "*Introducer Profile*" that it would receive approximately 8%.

- Options did not request copies of any suitability reports.

- Options did not consider the Salinas Sea investment to be a non-mainstream pooled investment. It says it was an investment "*into bricks and mortar property where they could be rented out with the rental returned to the pension scheme bank account.*"

In addition to the above, I note CV4L completed a "*non-regulated introducer profile*" with Options. It was sent to CV4L in March 2012 when Options said:

> "*As you,* [CV4L], *introduce business to* [Options] *then for compliance records and for the sake of good order we need to put in place Non Regulated Introducer Information and Terms of Business between our companies.*
>
> *I attach an Introducer Profile and terms of Business and would be grateful if you could agree and complete these and return to me.*
>
> *I have used a commencement date of 28 April 2011 for the Terms which is the date of your first case with us…*"

The profile document was signed by CV4L in September 2012. The form recorded a number of points in relation to CV4L including:

- It had been operating for five years, its principal address was in the UK, and it had a branch in Cape Verde.

- It promoted Salinas Sea and intended to distribute future resorts from Oasis.

- The Salinas Sea investment was accepted by a number of other named SIPP operators.

- CV4L and/or its agents obtain clients from a "*UK distribution network*" (without further elaboration).

- The sales process adopted by CV4L and/or its agents was noted as "*Mainly pension review/non reg*" (without further elaboration).

- The average client was described as aged 45 plus, employed and self-employed with an income of £20-50K.

- Typical commission structure was noted as "*master agent commission circa 8%*".

- Its objective for the coming 12 months was noted as "*sell out Salinas Sea/launch new Oasis resorts*".

- Training was provided by an IFA and a compliance partner on SIPPs, and Financial Services Authority ("FSA") and HMRC rules.

- The business produced by agents was monitored by Mr C reviewing all completed sales before submitting the application to the SIPP provider.

- CV4L worked with "*1SFS IFA*" and "*TFPP IFA*". I understand those firms to be 1Stop Financial Services and The Financial Planning Partnership.

- CV4L used a third-party compliance business to ensure no regulated activities were carried out by it.

- It had not been subject to any regulatory action or complaints.

Options entered into a terms of business agreement with CV4L in September 2012. It backdated that agreement to April 2011. In April 2013, Options conducted a "*World Check*" search on Mr C of CV4L. The check did not reveal anything adverse.

Due diligence carried out by Options on Salinas Sea

As I understand it, Options carried out checks on the Salinas Sea investment in 2010. It concluded it was eligible for investment in a pension scheme. It also decided as a result of that review that all investors in its SIPPs should complete its Alternative Member Declaration and Indemnity. I'll refer to this document throughout this decision as "the declaration".

I have seen a review of the Special Purpose Vehicle version of the investment carried out by a third party in April 2012 (prior to Mr J's investment), which was provided to Options. It includes a suggestion that SIPP operators obtain an acknowledgement from scheme members of the high risk, illiquid nature of the investment. And "*where scheme members are not transacting this through an FSA authorized adviser, the SIPP operator may wish to obtain a copy of the* [high-net-worth]*/sophisticated investor certificate."*

I will refer to the declaration mentioned above again later in this decision. It is enough to say here that because of its checks upon the Salinas Sea investment, Options referred to the investment as an unregulated alternative investment considered high risk and speculative.

Due diligence carried out by Options on the ABC corporate bond

It's my understanding Options carried out checks on the ABC corporate bond investment initially in 2012 and again when the second bond issue was announced in January 2013. Options concluded that it was eligible for investment within a pension scheme.

Options considered the bond an unregulated, alternative investment, which was high risk and speculative, and as such, required investors to complete a copy of its declaration before accepting the investment into their SIPPs.

Mr J's dealings with Options, CV4L/API

Mr J applied to open a SIPP with Options in January 2013. As part of that application process, Mr J applied to switch his existing SIPP. Mr J's application to Options said he had chosen to invest in Salinas Sea.

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

Options says that as CV4L was not a regulated adviser and acted only as an introducer, Mr J was classified as a direct client of Options.

Mr J told us he was advised to open an Options SIPP, move his existing pension to it, and invest in Salinas Sea. Whilst Options' contact was with CV4L with regards to Mr J's application, Mr J said his main contact was with a representative of API who I'll call Mr H. Mr J couldn't recall how he initially came into contact with Mr H, but believes he either received a phone call, or home visit.

Mr J said he had several telephone conversations with Mr H and was brought paperwork to sign. He said Mr H initially advised him to transfer his personal pension to a SIPP with Business G. There is evidence that he received advice from 1 Stop Financial Services at this point – I'll refer again to this business below. He recalls there being an issue with the planned investment for the Business G SIPP and so he was advised to move the SIPP to Options and invest in Salinas Seas and the ABC bond. Mr J said he had no investment experience and was not a high-net-worth individual.

Neither Mr J nor Options have provided copies of documents recording the advice Mr J says he was given. Mr J says Mr H, "*was never to be seen again, once I had signed on the dotted line*".

On 1 February 2013, a solicitor Options had instructed issued a report setting out the terms of agreement for the Salinas Sea investment. This report indicated Mr J had agreed to pay £27,250 for a 25% share of a hotel unit. The investment would be funded by a deposit of around £18,000 paid when the contract was signed, and the remaining balance paid when the deed of purchase and sale was completed. The report noted the remaining balance could be funded by a mortgage provided by Oasis, being repaid using rental income generated by the unit. It was expected construction would be completed by the end of March 2013.

I understand a Hotel Agreement was entered into relating to the management of the hotel room as part of the overall development. I understand income from the unit was to be pooled with other units. Income was guaranteed at a certain level for the first three years. The unit could be sold on the open market subject to the Hotel Agreement which had a 25-year term.

Mr J was required to sign Options' member declarations prior to the investments being made. In respect of the Salinas Sea investment, the declaration recorded the investment type as "*Hotel Room – Aparthotel on Sal (Cape Verde Islands)*".

The declaration began:

> *"I,* [Mr J] *being a member of the above scheme write to instruct* [Options Trustees] *to purchase a Hotel Room, with borrowing from the developer, with Salinas Sea on the island of Sal in the Cape Verde Islands, managed on "hotel room basis", through Oasis* Atlántico*, for a consideration of £27,250.00 on my behalf for the above Scheme."*

The declaration then included a number of points including:

- Mr J confirmed Options was acting on an execution only basis and had not given advice.

- Mr J understood that the investment was the purchase of a hotel room that was *"an Unregulated "Alternative Investment" and as such is considered High Risk and Speculative."*

- Mr J acknowledged and confirmed his understanding that the investment may prove difficult to value and/or sell/realise.

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

The declaration also included an agreement by Mr J to indemnify Options against any claims etc in connection with the investment. Mr J signed the declaration on 7 February 2013. Mr J completed a separate declaration with similar wording for the ABC corporate bond dated 25 February 2013.

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

On 13 February 2013, Options wrote to Mr J and CV4L confirming the transfer from Mr J's existing PPP had completed. Approximately £30,000 was transferred into his SIPP. Options also confirmed the deposit of approximately £18,000 for Mr J's investment in Salinas Sea had been sent to Oasis.

On 28 March 2013, £10,000 from Mr J's SIPP was invested in the ABC corporate bond. ABC wrote to Mr J the following month to provide a copy of the corporate bond note. The letter explained interest would be paid at a rate of 8.32% on a quarterly basis for four years and bonus interest of 3% would be paid at the end of the fourth year.

In November 2013, Oasis announced the resort had been completed, and Mr J was invited to inspect his unit, following which completion of the purchase could take place.

In 2015, Mr J instructed a financial adviser who contacted Options to request details about his pension and investments. In October 2015, Mr J's adviser explained Mr J was looking to move away from the Salinas Sea investment and asked Options if there were any liquidity issues. Options explained Mr J hadn't completed the purchase, so the investment couldn't be marketed or transferred on an in-specie basis.

In November 2015, Options told Mr J there were insufficient funds within his SIPP to complete the purchase of his share in the Salinas Sea investment, and reminded him of the option to fund completion using the mortgage offered by Oasis. Mr J responded in December 2015 stating he'd been ill-advised about the Salinas Sea investment and didn't want to agree to a mortgage, as this wasn't what he'd signed up for.

I understand Mr J's purchase of the Salinas Sea investment ultimately completed, with the mortgage provided by Oasis used to fund the remaining balance.

A SIPP annual valuation dated 11 February 2019 showed the mortgage had a remaining balance of around £8,000. The valuation recorded both the ABC corporate bond and SIPP bank accounts as having a £nil value.

I understand Mr J made a claim to the Financial Services Compensation Scheme ("FSCS") about the advice he received from 1 Stop Financial Services to transfer a previously held personal pension plan to a SIPP with Business G (prior to transferring his SIPP to Options). The FSCS upheld his claim in February 2017 and awarded compensation. I've seen a copy of the FSCS's decision letter and award calculation, which excluded the amount Mr J transferred from Business G to Options from the compensation award. I've also seen a copy of a reassignment of rights agreement dated 22 May 2023, which reassigned the right to complain to Options from the FSCS back to Mr J.

Mr J’s complaint to Options

In August 2018, Options received a complaint letter from Mr J with the help of a claims management company. Mr J said Options failed to carry out an appropriateness test in relation to his investments and said Options had breached a number of the Principles for Businesses (“the Principles”) set out by the FCA. Mr J said Options should have refused to accept the transaction and should compensate him for his losses as a result of the unsuitable investments, which he deemed to be worthless.

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

- It acted properly in accepting and acting on Mr J’s instructions on an execution only basis and cited COBS 11.2.19 to demonstrate its obligation to act in accordance with client instructions.

- It was not permitted to provide advice and could not therefore assess the suitability of the SIPP, transfer or investments for Mr J. Options did however provide risk warnings and made it clear to Mr J that it considered the investments to be high risk and speculative.

- It carried out relevant due diligence checks on the investments and was satisfied they were suitable to be held in a UK pension scheme.

- Mr J signed member declarations in respect of both investments, which were designed to highlight the risks associated with the investments.

- It was not responsible for the performance of Mr J’s investment.

Unhappy with Options’ response, Mr J referred his complaint to the Financial Ombudsman Service.

One of our Investigators considered the complaint. He asked for information about the due diligence carried out by Options, but it didn’t respond to this request. The Investigator thought the complaint should be upheld. He made a number of points including:

- The Principles for Businesses (“the Principles”), and in particular Principles 2, 3 and 6 were relevant to his findings.

- The regulator had issued a number of publications which discussed the Principles and gave examples of good industry practice in relation to SIPP operators.

- Options was not responsible for giving Mr J advice. Nor was it responsible for checking any advice to him was suitable for his individual circumstances and requirements.

- Options was, however, obliged to safeguard consumers against facilitating SIPPs that were unsuitable or detrimental to them and to make enquiries about the nature or quality of proposed investments before deciding whether to accept them into members’ SIPPs.

- Declining business does not amount to advice.

- Options had not provided any evidence relating to its due diligence carried out on CV4L.

- Options had not provided any information to show that it took steps to ensure CV4L was not providing advice to the clients it introduced to Options.

- The type of investments Mr J entered into were only suitable for a small proportion of investors such as sophisticated investors and, even then, only if they made up a small proportion of their overall portfolio.

- Options should have been concerned about a lack of regulated advice in the circumstances.

- It seems implausible that business such as in Mr J's case would have taken place without a regulated activity occurring, so Options should have been concerned about accepting such business from an unregulated firm.

- In all the circumstances it was not fair and reasonable for Options to accept Mr J's application.

The Investigator thought it was unnecessary to go on to consider the due diligence (if any) carried out by Options on the investments.

Finally, our Investigator set out how Options should put things right by putting Mr J as far as possible, into the position he would now be in but for it accepting the business from CV4L. He considered that if Options had acted appropriately, it's more likely than not that Mr J would've kept his previous pension. He set out how Options should calculate his losses and compensate him.

Our Investigator also recommended Options pay Mr J £500 for the distress that had likely been caused by the sudden loss of a significant amount of his pension fund.

Mr J's representative didn't provide any further comments in response to the Investigator's view. Options didn't respond to our Investigator to confirm if it agreed with his findings, but it provided our Service with further evidence regarding the due diligence it carried out on CV4L and the Salinas Sea investment, which I briefly set out earlier in this decision and will refer to in more detail below.

As no agreement could be reached, the complaint was passed to me to decide.

My provisional decision

In advance of this decision, I issued my provisional findings to the parties, in which I explained why I'd concluded Mr J's complaint should be upheld – although for different reasons to those reached by the Investigator.

I invited both parties to respond with any comments they wished to make in light of my provisional findings, including any evidence to confirm if Mr J has suffered a missed opportunity to take retirement benefits as a result of the current status of his SIPP investments. Mr J's representative confirmed Mr J accepted my provisional findings and provided some additional evidence regarding Mr J's previous claim with the FSCS, which I've referred to above. Options didn't respond to my provisional decision.

As the parties made no further submissions in relation to this complaint, I don't consider that I need to depart from the findings that I provisionally reached on Mr J's complaint in any way. I've decided that Mr J's complaint should be upheld. I'll explain why.

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.

Where the evidence is incomplete, inconclusive, or contradictory, I've reached my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence, what I've seen on similar cases and the wider surrounding circumstances. In reaching my decision I've carefully reviewed all points raised by Mr J and Options, but will limit my reasoning to what I consider to be the key issues.

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.

<u>The Principles</u>

The Principles, which are set out within the FCA's handbook "*are a general statement of the fundamental obligations of firms under the regulatory system*" (PRIN 1.1.2G). I consider that the Principles relevant to this complaint include Principles 2, 3 and 6 which say:

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

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

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

And at paragraph 77 of BBA Ouseley J said:

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

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

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

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

The BBSAL judgment also considered 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.

<u>The Adams court cases and COBS 2.1.1R</u>

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

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

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

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

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

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

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

The facts in Mr J's case are different from those in Adams. There are also differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Mr J's complaint. The breaches were summarised in paragraph 120 of the Court of Appeal Judgment. In particular, HHJ Dight considered the contractual relationship between the parties in the context of Mr Adams' pleaded breaches of COBS 2.1.1R that happened after the contract was entered into. In Mr J's complaint, I am considering whether Options ought to have identified that the introductions from CV4L and/or the investments in Salinas Sea and the corporate bond involved a risk of consumer detriment and, if so, whether it ought to have ceased accepting such introductions and/or making such investments prior to entering into a contract with Mr J.

As already mentioned, I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And, in doing that, I am required to take into account relevant considerations which include: law and regulations; regulator's rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. This is a clear and relevant point of difference between this complaint and the judgments in both Adams cases. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

I have proceeded on the understanding Options was not obliged – and not able – to give advice to Mr J on the suitability of its SIPP or the investments 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 Financial Services Authority ("FSA")) has issued a number of publications which remind SIPP operators of their obligations and set out how they might achieve the outcomes envisaged by the Principles, namely:

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

The 2009 report included the following statement:

> *"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses ('a firm must pay due regard to the interests of its customers and treat them fairly') insofar as they are obliged to ensure the fair treatment of their customers. COBS 3.2.3(2) states that a member of a pension scheme is a 'client' for COBS purposes, and 'Customer' in terms of Principle 6 includes clients.*
>
> *It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six TCF consumer outcomes.*
>
> *We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the member to confirm the position, or by contacting the firm giving advice and asking for clarification. Moreover, while they are not responsible for the advice, there is a reputational risk to SIPP operators that facilitate the SIPPs that are unsuitable or detrimental to clients.*
>
> *Of particular concern were firms whose systems and controls were weak and inadequate to the extent that they had not identified obvious potential instances of poor advice and/or potential financial crime. Depending on the facts and circumstances of individual cases, we may take enforcement action against SIPP operators who do not safeguard their clients' interests in this respect, with reference to Principle 3 of the Principles for Business ('a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems').*
>
> *The following are examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms:*
>
> - *Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm's*

clients, and that they do not appear on the FSA website listing warning notices.

- *Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.*

- *Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified.*

- *Being able to identify anomalous investments, e.g. unusually small or large transactions or more 'esoteric' investments such as unquoted shares, together with the intermediary that introduced the business. This would enable the firm to seek appropriate clarification, e.g. from the client or their adviser, if it is concerned about the suitability of what was recommended.*

- *Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely.*

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

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

Although I've only referred to one of the above publications in detail, I have considered all of them in their entirety.

I acknowledge that the 2009 and 2012 reports and the "Dear CEO" letter are not formal "guidance" (whereas the 2013 finalised guidance is). However, the fact that the reports and "Dear CEO" letter did not constitute formal guidance does not mean their importance should be underestimated. They provide a reminder that the Principles 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 have been good industry practice in the BBSAL case, the Ombudsman found that "*the regulator's reports, guidance and letter go a long way to clarify what should be regarded as good practice and what should not*." And the judge in BBSAL endorsed the lawfulness of the approach taken by the Ombudsman.

Like the Ombudsman in the BBSAL case, I do not think the fact the publications, (other than the 2009 and 2012 Thematic Review Reports), post-date the events that took place in relation to Mr J's complaint, mean that the examples of good practice they provide were not good practice at the time of the relevant events. Although the later publications were published after the events subject to this complaint, the Principles that underpin them existed throughout, as did the obligation to act in accordance with the Principles.

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

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

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

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

What did Options' obligations mean in practice?

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

It is clear from Options' non-regulated introducer profile in this case, that by early 2012, if not before, it understood and accepted that as a non-advisory SIPP operator, its obligations meant it had a responsibility to carry out due diligence on CV4L and that it could, and should decide not to do business with an introducer if it thought that was appropriate.

I am satisfied that, in order to meet the appropriate standards of good industry practice and the obligations set by the regulator's rules and regulations, Options should have carried out due diligence on CV4L. And in my opinion, Options should have used the knowledge it gained from its due diligence to decide whether to accept or reject a referral of business.

The due diligence carried out by Options on the investments

Because of what I say below about the introducer, I'm satisfied I do not need to refer to the due diligence carried out by Options on the Salinas Sea investment, or the corporate bond investment in detail.

Salinas Sea

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

In my view this is an oversimplification. Mr J was not making a straightforward purchase of, say, a holiday apartment or villa that he could occupy or rent out as he saw fit and freely sell on the open property market. He was buying a 25% share of a hotel room in a development that was not yet complete, where the property would form part of a hotel. Mr J would, in principle, be free to sell the investment if he wanted to (pending completion), but he must sell subject to the Hotel Agreement. So, the ability to sell, in practice, depends on there being a market for part shares in hotel room investments.

These points were, or were largely, understood by Options at the time of Mr J's investment, when it categorised the investment as an unregulated alternative investment that was high risk and speculative, which might be difficult to sell/realise. And this understanding of the investment formed part of the context in which, or was a relevant factor in, the checks made by Options on CV4L since it planned to introduce clients for the main purpose of investing in Salinas Sea.

ABC corporate bond

As mentioned earlier in this decision, Options also categorised this investment as high risk/speculative following the checks that were carried out on it. This categorisation would also form a relevant factor in Options' due diligence on CV4L.

The due diligence carried out by Options on the introducer

Options was permitted to accept business from unregulated introducers. It was not therefore at fault simply because it accepted business introduced from CV4L.

I note that Options' non-regulated introducer profile form, which it completed with CV4L began with the following words:

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

So, there is no dispute that Options took steps to make checks on CV4L and understand its business model. It seems to have sent the form to CV4L to complete in March 2012. The completed form was signed in September 2012. Both dates are before Mr J's application to Options.

Although Options asked CV4L to complete the non-regulated introducer profile in 2012, in my opinion, it should have completed a due diligence assessment on CV4L before it first agreed to accept any business from CV4L in 2011.

I also consider that good industry practice was to carry out further checks on introducers from time to time and not just on a one-off basis. So even if a reasonable initial assessment had been made to accept business in 2011, that decision could be reversed if Options thought it appropriate to do so. And in this case, I note that Options decided to reverse its decision to accept business from CV4L (and all other unregulated introducers) in November 2013.

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

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

It is also my view that essentially this same analysis should have been carried out in 2011 before agreeing to accept any business from CV4L.

The 2013 introducer assessment proforma

Options has said it chose to stop accepting business from CV4L as a result of a business decision to stop accepting introductions from unregulated introducers generally. It must follow that the decision was not made as a result of the assessment made based on the proforma. I conclude from this, that Options either decided to continue to accept business based on that assessment, or it failed to complete its due diligence assessment and so just continued to accept business from CV4L by default until it made its business decision relating to all unregulated introducers.

Whatever the reason, I have considered the contents of the proforma and whether it was reasonable to continue to accept business from CV4L in the light of the assessment it should reasonably have made based on that proforma.

The introducer assessment proforma form used a *red, amber*, and *green* system for grading the information provided by a potential (or in the case of CV4L, an actual) introducer. *Green* equated to what Options called low risk, *amber* to medium risk and *red* to high risk.

The form had three sections:

- company personnel and advice
- client profile
- investment

And the end of the form said:

"Accept:	*Low risk*
	All green
Queries to raise:	*Medium Risk*
	Mixture of Green and Amber
	Raise with TRC before proceeding

Decline: *High Risk*

All Red

Or Mixture of red and Amber

Issue standard letter/email and decline."

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

The form had around 20 cells that could be completed in a column headed "*Results from Introducer Enquiry*". On the completed form I have seen one was rated red. One was rated amber, and two more had amber written in them by hand. Three were rated green. The rest had not been completed. Some had information written in them with no colour code applied. Most were left blank.

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

- **Detail whether clients are UK or non-UK residents:** The following alternative answers were given:
  - Green/Low Risk: *Non-UK Residents*

    UK Residents and Company has relevant permissions
  - Amber/medium risk: *UK residents through another entity (Need to carry out DD on this other entity)*
  - Red/High Risk *UK Residents but there is no evidence of any entity having relevant permissions.*
- **Detail average value of typical clients' pension**: the following alternative answers were given:
  - Green/low risk: *£25K & above to regulated investments*
  - Amber/medium risk: *£25K & above to mix of regulated and non-regulated investments*
  - Red/High Risk: *£25K & above to non-regulated investments*

    Less than £25K to full SIPP/ non-regulated investment SIPP
- **Detail client profile as described by company:** The following alternative answers were given:
  - Green/low risk: *Fully advised*
  - Amber/medium risk: *Execution only high-net-worth/sophisticated investor*

- Red/high risk: *Execution only client*

  Not high-net-worth/sophisticated investor

The answer to the first question should have been recorded as amber, since CV4L was dealing with UK clients, but apparently involving a UK IFA. According to the proforma, this meant Options should also have carried out "DD" – due diligence – on the IFA(s). I note that reference has been made to CV4L working with 1 Stop Financial Services and The Financial Planning Partnership. I don't know if Options carried out due diligence on these firms.

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

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

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

In relation to that business model, on 18 January 2013 (i.e. before Options received Mr J's SIPP application), the FSA issued an alert which included the following:

> *"<u>Advising on pension transfers with a view to investing pension monies into unregulated products through a SIPP</u>*
>
> *It has been brought to the FSA's attention that some financial advisers are giving advice to customers on pension transfers or pension switches without assessing the advantages and disadvantages of investments proposed to be held within the new pension. In particular, we have seen financial advisers moving customers' retirement savings to self-invested personal pensions (SIPPs) that invest wholly or primarily in high risk often highly illiquid unregulated investments (some of which may be Unregulated Collective Investment Schemes). Examples of the unregulated investments are diamonds, overseas property developments, storepods, forestry and film schemes, among other non-mainstream propositions.*
>
> *The cases we have seen tend to operate under a similar advice model. An introducer will pass customer details to an unregulated firm, which markets an unregulated investment (eg an overseas property development). When the customer expresses an interest in the unregulated investment, the customer is introduced to a regulated financial adviser to provide advice on the unregulated investment. The financial adviser does not give advice on the unregulated investments and says it is only providing advice on a SIPP capable of holding the unregulated investment…*

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

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

…Financial advisers using this advice model are under the mistaken impression that this process means they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect.

The FSA's view is that the provision of suitable advice generally requires consideration of the investment held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as a SIPP and other wrappers), consideration of the suitability of the overall proposition, that is the wrapper and the expected underlying investments in unregulated schemes….

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

Mr J's SIPP application was dated 25 January 2013. It seems to have been received by Options on or around 30 January 2013. This was after the above alert had been issued and Options ought to have been aware of that alert by the time of Mr J's application. But even if it was not, it should, as I have said, been aware of 1 Stop Financial Services' business model and the implications it had for its SIPP members. It meant their members were apparently choosing to invest in unregulated, high-risk speculative investments with the very considerable risk of suffering significant detriment, without the benefit of regulated financial advice in relation to the investment.

Clearly Options could not have known before Mr J's application that the owners of 1 Stop Financial Services would, in 2014, be fined and banned for their work in relation to SIPPs. But what it could and should have known, was that the IFA CV4L said it was involved with was giving no advice on the suitability of the unregulated investment for CV4L's clients. This meant that the involvement of a regulated IFA should not have provided the comfort to Options that it might otherwise have done. It meant that Options' potential new clients from CV4L were not getting advice from an authorised and regulated financial adviser on the suitability of their investing potentially all of their pension in an unregulated investment Options considered to be high risk and speculative. So, it knew, or should have known that the business model CV4L was involved in lacked the safeguard of effective independent regulated advice. So, the involvement of the IFA with its business model ought to have been a red flag item that should have given Options concerns.

I also note that 1 Stop Financial Services voluntarily varied its permissions with the regulator so that with effect from 10 November 2012, it was no longer permitted to carry on any regulated activities. Accordingly, this information was not available (since it had not yet taken place) when Options first agreed to accept business from CV4L, or if it had carried out an assessment in September 2012 when the introducer profile was signed. But it was available by the time of Mr J's application in January 2013. And, in any event, 1 Stop Financial

Services had been operating its business model since before CV4L first became an introducer and that business model had therefore been discoverable if Options had carried out checks on that firm in 2011.

The other IFA firm CV4L said it worked with was The Financial Planning Partnership. As I understand it, The Financial Planning Partnership was a trading name used by another business that I'll call Business F. According to the FCA register, Business F was using the trading name The Financial Planning Partnership from 2009.

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

The above points relating to the two IFA firms CV4L said it worked with also mean that the following question in the company personnel and advice section of the proforma document that was rated amber should have been reconsidered:

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

Returning to the proforma assessment, CV4L was only introducing clients to invest in unregulated investments and their clients were not high-net-worth or sophisticated investors, so the next two questions should have been rated as red.

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

- **Are investments generally used regulated or unregulated** – *all unregulated* (red answer).

- **Which countries are investments generally based in** – *other overseas [ie not UK or EEA]* (red answer).

- **Does company promote unregulated investments, state which investments are promoted** - *yes, Salinas Sea, ABC corporate bond* (red answer).

- **Detail investment type most often used** – *non EEA commercial property, non-regulated investments, unquoted shares, loans, corporate bonds* (red answer).

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

Based on its own processes, I think Options should have concluded that as the form showed, or should have shown mostly red and amber assessments, it should have declined to do further business with CV4L.

What Options ought to have decided:

In my view, Options gathered information on which it could and should reasonably have made an assessment in 2012 and should have come to the conclusion not to accept introductions from CV4L before it received Mr J's application in January 2013.

I think Options should have carried out its proforma based assessment, or an essentially similar assessment, before it first agreed to accept introductions from CV4L. If it had done so it would have rejected CV4L's request to act as an introducer. Alternatively, if it carried out such an exercise within a short time of allowing introductions without first carrying out the assessment in full, it should have decided not to continue to accept business from CV4L.

In either event, it is my opinion that if Options had acted reasonably, in a way that was consistent with its role as a non-advisory SIPP operator, in a way that was consistent with its obligations in that role under the Principles, and with good industry practice, it would not have accepted business from CV4L by the time of Mr J's application. And so, Mr J's application would have been refused.

By the time of Mr J's application, Options had carried out due diligence checks in relation to CV4L, the Salinas Sea and ABC corporate bond investments which meant it knew CV4L:

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

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

Options knew or should have known that it was unlikely that an ordinary retail investor client such as Mr J, would choose to transfer their personal pension to a SIPP without advice. And Options knew or should have known that it did not have a good understanding of the way CV4L operated and in particular how it found its clients. For example, on the introducer profile CV4L said it obtained its clients from a "*UK Distributions Networ*k", without any recorded explanation of what that meant in practice. And the sales process was described as "*mainly pension review/non reg*" again without any recorded explanation of what that meant.

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

When Options agreed to accept business from CV4L, it did not impose conditions on it such as for example only accepting such business where regulated advice had been given and/or only business involving high-net-worth or sophisticated investors, and/or only allowing a limited proportion of the SIPP fund to be invested in Salinas Sea/other non-mainstream investments.

Taking all these points into account, Options knew or should have known when agreeing to accept introductions from CV4L that there was a real risk of customer detriment. Options' response to this was to require potential clients to sign the declarations I referred to above.

In my view, that was not a fair and reasonable approach bearing in mind the Principles and good industry practice. I think the fair and reasonable approach would have been to decline to accept business from CV4L as Options' own process on its own proforma assessment form provided for, or as any reasonable and similar process would have provided for.

Was it fair and reasonable to proceed with Mr J's instructions?

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

Mr J was asked to sign a declaration in respect of each investment. The declarations gave warnings about the high-risk speculative nature of the Salinas Sea and corporate bond investments. They also included a declaration that Mr J wouldn't hold Options responsible for any losses resulting from the investments. However, I do not think these documents demonstrate that Options acted fairly and reasonably in proceeding with Mr J's instructions.

Asking Mr J to sign the declarations and indemnities absolving Options of all its responsibilities when it ought to have known that Mr J's dealings with CV4L were putting him at significant risk of detriment was not the fair and reasonable thing to do. And it was not an effective way for Options to meet its regulatory obligations in the circumstances. It was not fair and reasonable to proceed on that basis.

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

Is it fair to require Options to compensate Mr J?

For completeness, I've also considered a point I'm aware Options has raised on similar cases that it did not cause members' losses because it was very likely that they were keen to proceed with the investments and would have found a way to invest even if Options had not been dealing with CV4L. I don't agree.

I have seen no evidence to show Mr J would have proceeded even if Options had rejected his application.

There is nothing to indicate Mr J was highly motivated to make the investments or that he was being paid any kind of incentive payment to do so. If Options had declined his application, and explained why, I am not convinced Mr J would have approached another SIPP provider, but, in any event, I think any SIPP provider acting fairly and reasonably should have reached the conclusion it should not deal with CV4L. I do not think it would be fair to say Mr J should not be compensated based on speculation that another SIPP operator might have made the same mistakes as Options did.

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

I've decided to uphold Mr J's complaint on the basis that Options shouldn't have accepted his introduction from CV4L. I therefore don't consider it necessary to consider whether CV4L carried out any regulated activities in breach of the general prohibition that Options ought to have been aware of. Or, whether or not Options should've allowed the Salinas Sea and ABC corporate bond investments into Mr J's SIPP. I make no findings about the appropriateness of the investments for the Options SIPP which Mr J opened.

Fair compensation

I consider that Options failed to comply with its regulatory obligations and good industry practice and did not reject Mr J's application to open a SIPP in order to invest in Salinas Sea and the ABC corporate bond. My aim in awarding fair compensation is to put Mr J back into the position he would likely have been in had it not been for Options' failings.

Mr J funded his Options SIPP with cash he had in his Business G SIPP (which he opened in October 2012). Had Options not accepted his application in January 2013, I consider it more likely than not that he'd have continued to make investments through Business G, or another personal pension provider, rather than keep his funds in cash.

Had Options acted appropriately, I think Mr J would have invested his pension funds differently. However, it's not clear exactly how Mr J would've invested had he not transferred to Options. So, rather than asking Options to obtain a notional value from his previous pension provider, I'm requiring Options to calculate redress by reference to a benchmark, which I'll set out in more detail below.

Earlier in this decision, I mentioned Mr J had previously made a claim to the FSCS about the advice he received from 1 Stop Financial Services to transfer his previously held personal pension plan to a SIPP with Business G, which the FSCS upheld in February 2017. The FSCS reassigned the right to complain to Options to Mr J in May 2023. Whilst the FSCS's compensation award excluded the monies that were transferred from Business G to Options – and which form the subject of this complaint – I note the terms of the reassignment of rights require Mr J to return compensation to the FSCS in the event his claim against Options is successful. I understand the FSCS will ordinarily enforce the terms of the assignment if required. But that is a matter for Mr J and FSCS, and I make no comment about it.

I am satisfied what I have set out below is fair and reasonable, taking the above into account and given what I understand of Mr J's circumstances and objectives when he invested.

Putting things right

I consider that Options failed to comply with its own regulatory obligations and didn't put a stop to the transactions that are the subject of this complaint. My aim in awarding fair compensation is to put Mr J, as far as possible, into the position he would now be in had it not been for Options' failings. Had Options acted appropriately, I think it's most likely that Mr J wouldn't have invested in the manner he did.

I take the view that Mr J would have invested differently. It's not possible to say *precisely* what he would have done differently. But I'm satisfied that what I've set out below is fair and reasonable under the circumstances.

In light of the above, I require Options to:

- Calculate the notional transfer value of Mr J's pension plan as at the date of this final decision.

- Obtain the actual transfer value of Mr J's SIPP, including any outstanding charges as at the date of this final decision.

- Pay a commercial value to buy any illiquid investments (or treat them as having a zero value) and take responsibility for any liabilities linked to the SIPP.

- Pay an amount into Mr J's SIPP so as to increase the transfer value to equal the notional value established. This payment should take account of any available tax relief and the effect of charges. Options should add interest to this payment if it is not made within 28 days of notification of Mr J's acceptance of this final decision.

- If the SIPP needs to be kept open only because of the illiquid investments and is used only or substantially to hold those assets, then any future SIPP fees should be waived until the SIPP can be closed.

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

- Pay to Mr J an amount of £750 to compensate him for the distress and inconvenience he's been caused by Options' failings.

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

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

Options should arrive at a notional valuation by assuming the monies would have enjoyed a return in line with the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, this was called the FTSE WMA Stock Market Income Total Return Index). That is a reasonable proxy for the type of return that could have been achieved over the period in question. This should be calculated as at the date of this final decision.

Any contributions or withdrawals Mr J has made will need to be taken into account in the calculation.

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

The notional value of Mr J's pension plan if monies hadn't been transferred (established in line with the above) less the transfer value of his Options SIPP (as at the date of this final decision) is Mr J's loss.

Treatment of the illiquid assets held within the SIPP

As set out at the outset of this section of my decision and outlined in the investigator's assessment of this complaint, our aim in putting things right is to *put* Mr J into the position he would likely have been in had it not been for Options' failings. The outcome of this should be that, in so far as is possible, finality is brought to the matter about which Mr J complains for both parties to the complaint. Had Options acted appropriately, I think it's *more likely than not* that Mr J would not have invested in Salinas Sea or the ABC corporate bond and would not have entered into any loan arrangement to finance part of the purchase of the Salinas Sea investment.

My understanding is that Oasis offered financing for up to 35% of the Salinas Sea unit purchase price (under the terms of the investment, the interest on the lending is set at Euribor 6 (six) month rate plus 5.8%), which would be repaid by way of the rental payments from the investment. If Mr J utilised this financing and has an outstanding balance then Options must settle this with Oasis, how it goes about doing this is a matter for Options and Oasis, but the outcome of this must be that this isn't an ongoing concern for Mr J and that there is no risk of him having to pay anything in connection with this. To be clear, this should be the resultant position whether or not the Salinas Sea asset is removed from the SIPP (as per the below).

I think any illiquid assets held should be removed from the SIPP. Mr J would then be able to close the SIPP, if he wishes. That would then allow him to stop paying the fees for the SIPP. The valuation of the illiquid investments may prove difficult, as there is no market for them. For calculating compensation, Options should establish an amount it's willing to accept for the investments as a commercial value. In respect of Salinas Sea, given that both the investment provider and the underlying investment are ongoing concerns, I expect this to be achievable for this investment. It should then pay the sum agreed plus any costs and take ownership of the investment and ensure that in doing so it takes on or otherwise removes all liability Mr J may have for any financing taken out to part fund the purchase of the investment.

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

If Options is unable, or if there are any difficulties in buying Mr J's illiquid investments, it should give the holdings a £nil value for the purposes of calculating compensation. In this instance Options must still take on, or otherwise remove all liability Mr J may have for any financing taken out to part fund the purchase of the investments. If the total calculated redress in this complaint is less than £150,000**,** Options may ask Mr J to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the relevant holdings. That undertaking should allow for the effect of any tax and charges on the amount Mr J may receive from the investments and any eventual sums he would be able to access from the SIPP. Options will have to meet the cost of drawing up any such undertaking.

If the total calculated redress in this complaint is greater than £150,000, and Options doesn't pay the recommended amount (set out below), Mr J should retain the rights to any future return from the investments until such time as any future benefit that he receives from the investments together with the compensation paid by Options (excluding any interest) equates to the total calculated redress amount in this complaint. Options may ask Mr J to provide an undertaking to account to it for the net amount of any further payment the SIPP may receive from these investments thereafter. That undertaking should allow for the effect of any tax and charges on the amount Mr J may receive from the investments from that point, and any eventual sums he would be able to access from the SIPP. As above, Options will need to meet any costs in drawing up the undertaking.

If the total calculated redress in this complaint is greater than £150,000, Options must in the first instance take on or otherwise remove all liability Mr J may have for any financing taken out to part fund the purchase of the Salinas Sea investment so as to ensure that Mr J is left unencumbered by this.

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

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

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

SIPP fees

If Options doesn't take ownership of the investments, and they continue to be held in Mr J's SIPP, there will be ongoing fees in relation to the administration of that SIPP. Mr J would not be responsible for those fees if Options hadn't accepted the transfer of his previous pension into the SIPP. So, I think it is fair and reasonable that Options must waive any SIPP fees until such a time as Mr J can dispose of the investments and close the SIPP.

Fees and charges paid outside the SIPP

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

Income tax may be payable on any interest paid. If Options deducts income tax from the interest, it should tell Mr J how much has been taken off. Options should give Mr J a tax deduction certificate in respect of interest if Mr J asks for one, so he can reclaim the tax on interest from HMRC if appropriate.

Distress & inconvenience

I think Mr J will have been caused considerable distress and inconvenience in relation to his SIPP and both investments. I note that he consulted a CMC and made a complaint some years ago now.

I think the problems with the corporate bond that I set out earlier in this decision and seeing a large proportion of his pension valued at £nil, coupled with the understanding that he is not free to take his pension benefits at a time of his choosing because of the illiquidity of the Salinas Sea investment, will have caused significant worry and upset to Mr J over and above his financial loss. Mr J indicated an intention to move away from his Salinas Sea investment in 2015, but was unable to disinvest. I consider that a payment of £750 is appropriate to compensate for the distress and inconvenience Options' failures will likely have caused him.

Interest

The compensation must be paid as set out above within 28 days of the date Options receives notification of Mr J's acceptance of this final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of this final decision to the date of settlement if the compensation is not paid within 28 days.

Determination and money award: my final decision is that I require that Options pay Mr J compensation as set out above, up to a maximum of £150,000 plus any interest payable.

Until the calculations are carried out, I don't know how much the compensation will be, and it may be nowhere near £150,000, which is the maximum sum that I'm able to award in Mr J's complaint. But I'll also make a recommendation below in the event the compensation is to exceed this sum, although I can't require that Options pays this.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I also recommend that Options pays Mr J the balance.

If Mr J accepts this final decision, the money award and the requirements of the decision will be binding on Options. My recommendation won't be binding on Options.

Further, it's unlikely that Mr J will be able to accept my determination and go to court to ask for the balance of the compensation owing to him after the money award has been paid. Mr J may want to consider getting independent legal advice before deciding whether to accept this decision.

My final decision

It's my final decision to uphold Mr J's complaint. I require Options UK Personal Pensions LLP to calculate and pay the award, and take the actions, set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 23 April 2024.

Becky Faiers
Ombudsman