DRN-4718951

The complaint

Mr M complains Options UK Personal Pensions LLP ('Options' - formerly Carey Pensions UK LLP) failed to undertake due diligence on his application for a Self-Invested Personal Pension ('SIPP') and subsequent investments in an overseas property-based investment scheme and an unregulated corporate bond that was introduced to it by an unregulated introducer.

The entities involved

Given the various parties involved in Mr M's SIPP investment, I've set out a summary of each and the investments themselves below.

'Options'

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

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

'Cape Verde4 Life'

Cape Verde4 Life was a UK based company. It was involved in overseas property-based investments. It was not regulated by the FCA, It was not therefore authorised to advise on investments covered by the Financial Services and Markets Act 2000 ('FSMA') in the UK. One of its Directors was an individual I shall call Mr C.

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

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

Oasis Atlántico Imobiliaria SARL ('Oasis')

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 divided into units (in effect hotel rooms).

'Salinas Sea'

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 they 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 the investor to buy a unit or part of a unit. Mr M invested in this way.

Buying a unit also involved entering into a Hotel Agreement under which the buyer/investor appointed the seller (Oasis) to operate the overall development (including the unit) as a hotel. When the unit was completed, Oasis was to let the buyer know it was available for inspection and then the contract was to be completed. The unit was to be part of the hotel and managed as a whole by the Manager (Oasis), not by the individual investor.

During the first three years the investor was to be paid an annual income of at least 5% of the price paid for the unit. 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 after the first three years, which involved pooling the rental income of all units rather than basing it on the occupancy of the investor's individual unit.

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

Alpha Business Centres Corporate Bond II ('ABC Corporate Bond II')

ABC Corporate Bond II was essentially a loan to a company named ABC Alpha Business Centres UK Ltd, who in turn lent the money to its parent company based in Dubai, Alpha Business Centres LLC, for the purpose of expanding its network of serviced business centres around the world. As I understand it, Alpha Business Centres LLC undertook to offer property assets as security for the loan.

The first version of the ABC Corporate Bond was issued in 2012 and it closed later that year after it became fully subscribed. Mr M invested in the second version, ABC Corporate Bond II, that was launched in January 2013 and had no subscription limit.

ABC Corporate Bond II was expected to provide a return of interest at a rate of 8.32% per annum over a three to four year investment term. The interest could be paid quarterly, or rolled up in order to achieve compounded returns over the term of the investment.
An incentive of 3% was offered at the end of the third year to remain invested for the full four year term. As I understand it, neither version of the bond was listed on an exchange and there wasn't an established market for them in the event an investor wished to redeem their investment early.

Investments in the ABC Corporate Bonds were managed and administered by a business that I'll call 'Business G,' that was regulated by the FSA, and later the FCA.

In early 2017, ABC Alpha Business Centres Ltd was put into administration and as I understand it, the ABC Corporate Bond II investment failed in that year.

What happened

Mr M says Cape Verde4 Life cold called him to offer him a free pension review. He says he then engaged Cape Verde4 Life to advise him on his pension options, and they advised him to open a SIPP with Options and transfer his existing pension into it, and then invest in a hotel room in the Salinas Sea resort and ABC Corporate Bond II. Neither Mr M nor Options have provided copies of documents recording the advice Mr M says he was given by Cape Verde4 Life.

On 19 October 2012, Mr M signed 'The [Options] Pension Scheme Application Form.' Mr M's personal details were entered on the form and in the section relating to investment choices, *"Salinas Sea"* was entered as the investment, and *"£45,000"* was entered as the amount to be invested. The details of an existing pension Mr M had, estimated to be worth around £46,000, were also entered in the section relating to transfers, and the relevant box to confirm advice had been received on the transfer wasn't ticked.

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

On 22 October 2012, Cape Verde4 Life sent Mr M's application form to Options and then on 24 October 2012, Options accepted his application and established his SIPP. Options says its records show Mr M used Cape Verde4 Life as his introducer and that he provided a letter of authority to that effect alongside his application.

After the SIPP was set up, Options sent a document to Mr M to complete headed 'SIPP Member Instruction and Declaration Alternative Investment - Salinas Sea.' It included a table at the start which detailed the scheme name, member name, scheme designation, investment name, investment type and adviser. I will refer to this document as the 'Member Declaration.'

The Member Declaration recorded the investment name as *"Salinas Sea"* and the investment type as *"Hotel Room – Aparthotel on Sal (Cape Verde Islands)."* In the section for the adviser's details, *"N/A"* was entered.

The declaration began:

> *"I* [Mr M] *being a member of the above scheme write to instruct* [Options] *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]*, for a consideration of £50,000 on my behalf for the above Scheme."*

The declaration then included a number of points including:

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

- Mr M confirmed he had reviewed and understood the information provided by Salinas Sea

- Mr M 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 M to indemnify Options against any claims etc in connection with the investment.

Mr M signed the Member Declaration on 13 November 2012. Mr M 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 member declaration, or in his SIPP application or otherwise.

Also in November 2012, a UK law firm Options had instructed issued a report titled 'Report on Principal Terms of Documentation Salinas Sea Sal Cape Verde.' This report indicated Mr M was to pay £50,000 for a 50% share of a unit in Salinas Sea. The investment would be funded by a deposit of around £32,500 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 December 2012.

Later in November 2012, Mr M's existing pension that was ultimately valued at around £82,100 was transferred into his Options SIPP.

It appears the first payment of £32,500 was paid out of Mr M's SIPP in December 2012.

Then in 2013, Oasis announced the completion of the Salinas Sea resort, and in December that year, Oasis invited Mr M to inspect his unit and informed him it was time to make any final preparations for the signing of the Deed of Purchase and Sale. As I understand it, the Deed would have been signed at some point after then, and the later payment of £17,500 would have been paid by way of a mortgage provided by Oasis on the unit.

On 18 March 2013, Mr M signed a document headed 'SIPP Member Instruction and Declaration Alternative Investment – ABC Corporate Bond II.' The format and contents of the document was very similar to the member declaration Mr M had signed in relation to his Salinas Sea investment. I'll refer to this document as the 'Member Declaration' as well.

In the table at the start of the document, the investment name was recorded as *"ABC Corporate Bond II,"* and the investment type as *"Corporate bond making loan to Alpha Business Centres LLC."* In the section for the 'Adviser / Introducer' details, *"*[Mr C], *Cape Verde4 Life"* was entered.

The declaration began:

> *"I* [Mr M] *the SIPP Member, Beneficiary, as described above instruct* [Options] *to purchase an ABC Corporate Bond II for a consideration of £40,000 on my behalf for the above Scheme."*

The declaration then included a number of points including:

- Mr M confirmed Options was acting on an execution only basis and had not given advice
- Mr M understood that the investment is *"an Unregulated "Alternative Investment" and as such is considered High Risk and Speculative and that it may prove difficult to value, sell / realise"*
- Mr M confirmed he had reviewed and understood the information provided by Alpha Business Centre
- Mr M 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 M to indemnify Options against any claims etc in connection with the investment.

Options received the signed member declaration on 22 March 2013. It wrote to Mr M on that date to confirm it had processed and sent off his application for the ABC Corporate Bond II investment to Alpha Business Centres. A payment of £40,000 was made from Mr M's SIPP on that date as well.

Then on 28 May 2013, Mr M signed another member declaration in relation to a proposed £7,000 investment in an ABC Corporate Bond II. Except for the consideration value, the contents of this declaration was essentially the same as the member declaration Mr M had signed in relation to his earlier investment in an ABC Corporate Bond II.

Options received this member declaration on 3 June 2013 and like it had done previously, it wrote to Mr M on that date to confirm it had received his investment application. Then on 5 June 2013, a payment of £7,000 was made from Mr M's SIPP.

I haven't been provided with any up to date information about the position of Mr M's SIPP.

The relationship between Cape Verde4 Life and Options

As I understand it, Options relationship with Cape Verde4 Life began in April 2011. Options has said it received around 90 introductions from Cape Verde4 Life between April 2011 and November 2013, when it ended its relationship with Cape Verde4 Life and it decided to stop accepting business from unregulated introducers generally.

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

Due diligence carried out by Options on Cape Verde4 Life

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

Options says:

- Cape Verde4 Life first proposed to become an introducer of SIPP business for Options in April 2011. It was an introducer from late April 2011 until November 2013 when Options made a business decision to no longer accept introductions from unregulated introducers

- Cape Verde4 Life was working with a FCA regulated adviser, 1Stop Financial Services, who were at the time authorised to advise on pension transfers, *"if investors wished to take advice"*

- Options did not pay any commission to Cape Verde4 Life for introducing business to it. It did not see the details of any payments made to Cape Verde4 Life by the underlying provider, but Cape Verde4 Life 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 would be rented out with the rental returned to the pension scheme bank account"*

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

> *"As you, Cape Verde4 Life, introduce business to* [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 Cape Verde4 Life in September 2012. The form recorded a number of points in relation to Cape Verde4 Life, including:

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

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

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

- Cape Verde4 Life and/or its agents obtained clients from a *"UK distribution network"* (without further elaboration)

- The sales process adopted by Cape Verde4 Life and/or its agents was noted as *"Mainly pension review/non reg"* (without further elaboration)

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

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

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

- Training was provided by an IFA and a compliance partner on SIPPs, and FSA and HMRC rules

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

- Cape Verde4 Life worked with *"1SFS IFA"* and *"TFPP IFA"*. I understand those firms to be 1Stop Financial Services and The Financial Planning Partnership

- Cape Verde4 Life used a third-party compliance business to ensure no regulated activities were carried out by it

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

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

In April 2013, Options conducted a "World Check" search on Mr C. 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 Salinas Sea 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 Investment Member Declaration & Indemnity.'

I have seen a review of the Special Purpose Vehicle version of the investment carried out by a third party in April 2012 (before Mr M's investment in Salinas Sea) 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 authorised 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 ABC Corporate Bond II

As I understand it Options carried out checks in late 2012 on the first ABC Corporate Bond that was issued, and further checks in early 2013 on ABC Corporate Bond II. These checks included background checks on the entities and individuals involved with the investment, and reviews of documents and information that Options had gathered about the investment itself.

In both instances Options concluded the respective versions of the ABC Corporate Bond were eligible for investment in a pension scheme. Options considered the investment to be unregulated, potentially illiquid and an alternative investment which was high risk and/or speculative. As a result, it decided that all investors in its SIPPs should complete its 'Alternative Investment Member Declaration & Indemnity.'

Mr M's complaint to Options

In August 2018, Mr M complained to Options via a professional representative. In summary, it said:

- Options failed to adequately manage the risks of consumer detriment in accepting business from Cape Verde4 Life
- Mr M wasn't a sophisticated or wealthy investor. He relied on advice he received from Cape Verde4 Life in transferring his existing pension to Options and investing in Salinas Sea and ABC Corporate Bond II
- Options ought to have been concerned about the volume of introductions it was receiving from Cape Verde4 Life, given they were a small, unregulated introducer and many of their clients, including Mr M, were purportedly high risk and were transferring high value pensions to Options
- Options failed to ensure Mr M had been provided with adequate advice and risk warnings about the investments he was proposing to make in his SIPP. Had it done so, Mr M wouldn't have transferred his existing pension to Options and made the investments
- Options should have recognised the investments were, or were similar in nature to Unregulated Collective Investment Schemes (UCIS). Therefore, it shouldn't have accepted Mr M's decision to make these investments without informing him they were inherently risky and probably unsuitable
- Options should have considered whether the investments could have been accurately and independently valued, and whether there was a secondary market into which they could be sold
- To resolve Mr M's complaint, Options should compensate Mr M to put him in the position he would have been in had he not transferred his existing pension into an Options SIPP and made the subsequent investments

Options rejected Mr M's complaint, explaining in its final response dated 22 October 2018 that, in summary:

- Options provides execution only (i.e. non-advised) SIPP administration services and this was explained to Mr M in all the documentation he signed in October 2012
- Options would have been in breach of COBS 11.2.19 if it had not executed Mr M's specific instructions – by virtue of this rule Options are not liable to Mr M
- Cape Verde4 Life acted only as an introducer, and this was made clear in all documentation and communications with Mr M. They aren't known to Options as advisers and Options isn't aware that they held themselves out to be advisers
- Options isn't permitted to provide any advice on the suitability of a SIPP or the underlying investment, nor is it permitted to comment on the suitability of an introducer. This was explained to Mr M in the documents provided to him at the time of his SIPP application
- Options guided Mr M to seek independent financial advice in the communications it sent him and he had several opportunities to do so. It was his decision to engage Cape Verde4 Life and not seek advice from a regulated adviser, and Options isn't responsible for his decision
- Mr M didn't inform Options he had received any financial advice and it wasn't mandatory for him to seek regulated financial advice before proceeding. As such, Options understood there was no suitability report available on Mr M's proposed transactions
- Mr M confirmed he wished to be treated as a direct client in his SIPP application, and Options dealt with him as such throughout
- Options carried out due diligence checks on Cape Verde4 Life on a number of occasions, and it had no reason to believe it should not accept introductions from Cape Verde4 Life at the time of Mr M's application
- Options isn't restricted to dealing only with regulated introducers and it hadn't acted inappropriately in dealing with Cape Verde4 Life
- Options ensured Mr M's chosen investments were suitable to be held in a SIPP, and it provided him with all the necessary information about the SIPP and the risks of his chosen investments
- Mr M confirmed he understood the information provided to him and that he wanted to proceed without advice. It wasn't for Options to look behind this
- Options doesn't consider the Salinas Sea investment to be a UCIS
- Ultimately, Options acted appropriately and in line with the terms and conditions of the SIPP which Mr M confirmed he had read and understood, and it carried out his instructions to proceed with his chosen investments as it was obligated to do

Our Investigator's view

Mr M's complaint was referred to the Financial Ombudsman Service.

One of our investigators considered the complaint and thought it should be upheld.
In summary, they said:

- The considerations relevant to reaching their view on Mr M's complaint included the FCA's Principles for Businesses and rule COBS 2.1.1 that are set out in the FCA's Handbook, publications issued by the FCA and relevant case law
- Options was not responsible for giving Mr M advice, nor was it responsible for checking any advice given to him was suitable for his individual circumstances and requirements
- Options was obliged to safeguard consumers against facilitating SIPPs that are unsuitable or detrimental to them, and to make enquiries about the nature or quality of proposed investments before deciding whether to accept them into their SIPPs
- Declining business does not amount to advice
- Options had not provided any evidence relating to its due diligence carried out on Cape Verde4 Life
- Options had not provided any information to show that it took steps to ensure Cape Verde4 Life was not providing advice to the clients it introduced to Options
- The type of investment Mr M entered into is only suitable for a small proportion of investors such as sophisticated investors and, even then, only for a small proportion of their overall portfolio
- It seems implausible that business such as in Mr M'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
- Mr M wasn't required to take advice, but Options should have been concerned about a lack of regulated advice in the circumstances
- In all the circumstances it was not fair and reasonable for Options to accept Mr M's application from Cape Verde4 Life. Therefore it's unnecessary to go on to consider the due diligence (if any) carried out by Options on the Salinas Sea and ABC Corporate Bond II investments

Finally, our Investigator set out how Options should put things right by putting Mr M as far as possible, into the position he would now be in but for Options accepting the business from Cape Verde4 Life. They considered that if Options had acted appropriately, it's more likely than not that Mr M would have remained a member of the pension schemes he transferred into the SIPP. So, our Investigator set out how Options should calculate his losses and compensate him.

Our Investigator also recommended Options pay Mr M £500 for the distress caused by Options' actions.

Options didn't respond to what our Investigator said, but later on it sent Mr M a further response to his complaint. In this response Options said Mr M's complaint was time barred because his SIPP was established and the investments were made more than six years before Options received his complaint, and Mr M had been made aware of a cause to make this complaint more than three years before then as well.

Our Investigator considered what Options said and concluded Mr M's complaint had been made in time. They explained that Mr M's complaint was first made to Options on 28 August 2018, and his SIPP was established less than six years before then.

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

My provisional decision

I recently issued a provisional decision on this complaint. I concluded Mr M's complaint should be upheld, albeit for different reasons to our Investigator's.

At the same time, I set out my decision that Mr M's complaint is not time barred and can be considered by the Financial Ombudsman Service. My conclusion about that remains unchanged and I shan't repeat it here.

I invited both parties to respond with any comments they wished to make in light of my provisional findings, including any information about how Mr M would have taken his pension benefits if he believes he has suffered a loss of opportunity to do so because of the current position of his SIPP investments. Options did not respond to the provisional decision. Mr M responded to say he didn't have any further comments or information to add.

As I have not received any further submissions from either party, and have not been persuaded to depart from my provisional findings, I have repeated my provisional findings below, as my final decision, and have not therefore included any further detail of them in this background summary.

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.

As noted above, having not received any further submissions from either party since issuing my provisional decision, I have not been persuaded to depart from my provisional findings, and have repeated those findings below, with a few minor changes, as my final 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.

The Principles

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

"Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence

Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems

Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly"

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

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

And at paragraph 77 of BBA Ouseley J said:

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

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

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

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

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

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

The 'Adams' court cases and COBS 2.1.1R

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

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

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

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

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

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

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

context is the agreement into which the parties entered, which defined their roles and functions in the transaction."

The facts in Mr M'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 M'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 M's complaint, I am considering whether Options ought to have identified that the introductions from Cape Verde4 Life and/or the investment in Salinas Sea 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 M.

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 M on the suitability of its SIPP or the Salinas Sea, or the ABC Corporate Bond II 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 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.

And:

We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the member to confirm the position, or by contacting the firm giving advice and asking for clarification. Moreover, while they are not responsible for the advice, there is a reputational risk to SIPP operators that facilitate the SIPPs that are unsuitable or detrimental to clients.

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

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

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

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

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

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

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

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

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

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

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

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

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

What did Options' obligations mean in practice?

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

It is clear from Options' non-regulated introducer profile in this case, that by early 2012 if not before, it understood and accepted that as a non-advisory SIPP operator, its obligations meant it had a responsibility to carry out due diligence on Cape Verde4 Life and that it could and should decide not to do business with an introducer if it thought that was appropriate.

I am satisfied that, in order to meet the appropriate standards of good industry practice and the obligations set by the regulator's rules and regulations, Options should have carried out due diligence on Cape Verde4 Life. And in my opinion, Options should have used the knowledge it gained from its due diligence to decide whether to accept or reject a referral of business.

The due diligence carried out by Options on the 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 and the ABC Corporate Bond II investments in detail.

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 M was not making a straightforward purchase of, say, a holiday apartment or villa that he could occupy or rent out as he saw fit and freely sell on the open property market. He was buying a half share in a hotel room in a development that was not yet complete, where the property would form part of a hotel. Mr M is in principle free to sell the investment if he wants to (pending completion of his purchase of it), but he must sell subject to the hotel agreement. So, the ability to sell, in practice, depends on there being a market for hotel room, or part shares in a hotel room, investments.

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

As I mentioned above, Options considered ABC Corporate Bond II to be unregulated, potentially illiquid and an alternative investment which was high risk and/or speculative. Options had reached that view of the investment before it received either of Mr M's applications to invest in it. And as Cape Verde4 Life was recorded as the *"Adviser / Introducer"* on the member declarations Mr M signed in relation to his ABC Corporate Bond II investments, Options' view on this investment would have been a relevant factor in its due diligence on Cape Verde4 Life.

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 by Cape Verde4 Life.

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

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

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

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

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

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

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

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

The 2013 introducer assessment proforma

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

Whatever the reason, I have considered the contents of the proforma and whether it was reasonable to accept business from Cape Verde4 Life in light of the assessment it should reasonably have made based on that proforma (and as I explained above, an assessment or one essentially similar to it that Options should have made before it accepted any introductions from Cape Verde4 Life).

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

The form has three sections:

- company personnel and advice
- client profile
- investment

And at the end of the form it says:

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

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

- *"Detail whether clients are UK or non-UK residents."* The following alternative answers were given:

  Green/low risk: *"Non-UK Residents*
  UK Residents and Company has relevant permissions"

  Amber/medium risk: *"UK residents through another entity (Need to carry out DD on this other entity)"*

  Red/high risk: *"UK Residents but there is no evidence of any entity having relevant permissions"*

- *"Detail average value of typical clients* [sic] *pension."* The following alternative answers were given:

  Green/low risk: *"£25K & above to regulated investments"*

  Amber/medium risk: *"£25K & above to mix of regulated and non-regulated investments"*

  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"*

  Red/high risk: *"Execution only client*
  Not high net worth [or] *Sophisticated investor"*

The answer to the first question should have been amber since Cape Verde4 Life was dealing with UK clients but apparently involving a UK IFA. According to the proforma this meant Options should also have carried out *"DD"* – due diligence – on the IFA(s). I note that reference has been made to Cape Verde4 Life working with 1 Stop Financial Services and The Financial Planning Partnership.

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

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

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

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

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

> "*<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 (e.g. 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 M's SIPP application was dated 19 October 2012. It seems to have been received by Options sometime between then and 24 October 2012, when it established Mr M's SIPP. Although this was before the above alert had been issued, Options could and should have been aware of 1 Stop Financial Services' business model and the implications of that model for its SIPP members. It meant these 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 M's application that the owners of 1 Stop Financial Services would, in 2014, be fined and banned for their work in relation to SIPPs. But what it could and should have known was that the IFA Cape Verde4 Life said it was involved with was giving no advice on the suitability of the unregulated investment for Cape Verde4 Life's clients. 1 Stop Financial Services had been operating its business model since before Cape Verde4 Life first became an introducer and that business model had therefore been discoverable if Options had carried out checks on that firm in 2011.

This meant that the involvement of a regulated IFA should not have provided the comfort to Options that it might otherwise have done. It meant that Options' potential new clients from Cape Verde4 Life were not getting advice from an authorised and regulated financial adviser on the suitability of their investing potentially all of their pension in unregulated investments Options considered to be high risk and speculative. So it knew or should have known that the business model Cape Verde4 Life was involved in lacked the safeguard of effective independent regulated advice. So the involvement of the IFA with its business model ought to have been a red flag item that should have given Options concerns.

The other IFA firm Cape Verde4 Life 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 involving an unregulated introducer of the type highlighted by the FSA in its alert. So again if Options had made checks on that firm, it is likely those checks would also have given cause for concern rather than comfort.

The above points relating to the two IFA firms Cape Verde4 Life said it worked with also mean that the following question in the company personnel and advice section of the proforma that were rated amber should have been reconsidered:

"Does the company hold FCA or Equivalent permissions for investment advice?"

The amber rated answer was:

> *"No but this is provided by FCA regulated professional (Need to complete further DD in respect of this adviser)"*

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

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

> *"Are investments generally used regulated or unregulated – all unregulated"* (red rated answer)
>
> *"Which countries are investments generally based in – Other overseas"* [i.e. not UK or EEA] (red rated answer)
>
> *"Does company promote unregulated investments, state which investments are promoted – Yes,* [Salinas Sea and ABC Corporate Bond II]*"* (red rated answer)
>
> *"Detail investment type most often used – Non EEA Commercial Property, Non-Regulated Investments, Unquoted Shares, Loans"* (red rated answer)

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

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

What Options ought to have decided

In my view Options gathered information on which it could and should reasonably have made an assessment in 2012, and should have come to the conclusion not to accept introductions from Cape Verde4 Life before it received Mr M's application in October 2012.

In my view Options should have carried out its proforma based assessment, or an essentially similar assessment, before it first agreed to accept introductions from Cape Verde4 Life in 2011. If it had done so it would have rejected Cape Verde4 Life's request to act as an introducer. Alternatively, if it carried out such an exercise within a short time of allowing introductions without first carrying out the assessment in full, it should have decided not to continue to accept business from Cape Verde4 Life.

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

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

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

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

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

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

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

Taking all these points into account Options knew or should have known when agreeing to accept introductions from Cape Verde4 Life there was a real risk of customer detriment. Options response to this was to require potential clients to sign the member declarations I referred to above. In my view that was not a fair and reasonable approach bearing in mind the Principles for Business and good industry practice. In my view the fair and reasonable approach would have been to decline to accept business from Cape Verde4 Life as Options' own process on its own proforma assessment form provided for, or as any reasonable essentially similar process would have provided for.

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

In my view, for the reasons given, Options should have refused to accept Mr M's application. So, things should not have got beyond that. However, for completeness, I have considered whether it was fair and reasonable for Options to proceed with Mr M's application.

I acknowledge Mr M signed the member declarations which gave warnings about the high-risk, speculative nature of the Salinas Sea and the ABC Corporate Bond II investments. And they included declarations that Mr M wouldn't hold Options responsible for any losses resulting from the investments. However, I do not think these documents demonstrate Options acted fairly and reasonably in proceeding with Mr M's instructions.

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

Further I do not consider it fair and reasonable for Options to avoid responsibility now on the basis of the indemnities Mr M signed. Had Options acted appropriately in the circumstances, Mr M 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 M?

I have considered what Mr M would have done had Options rejected his application, and I have seen no evidence to show he would have proceeded if Options had rejected his application. It seems Mr M was contacted by representatives of Cape Verde4 Life and that he wasn't looking for such investments. There is nothing to indicate Mr M was highly motivated to make the investment or that he was being paid any kind of incentive payment to do so. I have not seen anything that makes me think Mr M would have sought out another SIPP provider if Options had declined the application, or terminated the application, and explained why.

In any event, I think any SIPP provider acting fairly and reasonably should have reached the conclusion it should not deal with Cape Verde4 Life. I do not think it would be fair to say Mr M 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 M's complaint on the basis that Options shouldn't have accepted his introduction from Cape Verde4 Life. I therefore don't consider it necessary to consider whether or not Options should've allowed the Salinas Sea and the ABC Corporate Bond II investments into Mr M's SIPP. I make no finding about the appropriateness of the investments for the Options SIPP which Mr M opened.

Putting things right

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

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

In light of the above, I require that Options should:

- Obtain the notional transfer value of Mr M's previous pension plan as of the date of this final decision

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

- Pay a commercial value to buy any illiquid investments (or treat them as having a zero value) and relieve Mr M of any liabilities linked to the Salinas Sea investment

- Pay an amount into Mr M'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, and 8% simple interest should be added to it if it is not made within 28 days of this final decision

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

- If Mr M has paid any fees or charges from funds outside of his pension arrangements, Options should also refund these to Mr M. 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 M £500 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.

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 M 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 M complains for both parties to the complaint. Had Options acted appropriately, I think it's *more likely than not* that Mr M would not have invested in Salinas Sea or ABC Corporate Bond II and would not have entered into any loan arrangement, which I understand he may have entered into, to finance part of the purchase of the Salinas Sea investment.

My understanding is that Oasis offered financing for up to 35% of the 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 M 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 M 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 asset is removed from the SIPP (as per the below).

I think any illiquid assets held should be removed from the SIPP. Mr M 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 ABC Corporate Bond II failed in 2017 and I've not been provided with any information about the position of Mr M's investment in it within his SIPP. In the event that it remains an illiquid asset in his SIPP, Options should consider the below applies to Mr M's ABC Corporate Bond II investment as well as his Salinas Sea investment.

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. It should then pay the sum agreed plus any costs and take ownership of the investments and ensure that in doing so it takes on or otherwise removes all liability Mr M may have for any financing taken out to part fund the purchase of the Salinas Sea investment.

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

If Options is unable, or if there are any difficulties in buying Mr M'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 M may have for any financing taken out to part fund the purchase of the Salinas Sea investment. If the total calculated redress in this complaint is less than £150,000, Options may ask Mr M 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 M 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 M 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 and/or costs) equates to the total calculated redress amount in this complaint. Options may ask Mr M 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 M 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 M may have for any financing taken out to part fund the purchase of the Salinas Sea investment so as to ensure that Mr M is left unencumbered by this.

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

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

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

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

If there are any difficulties in obtaining a notional valuation from the previous provider, then Options should instead arrive at a notional valuation by assuming the monies would have enjoyed a return in line with the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, 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.

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

Pay an amount into Mr M'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 M'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 M as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Redress paid to Mr M 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 the investments can't be removed from the SIPP, and because of this it can't be closed after compensation has been paid, then it wouldn't be fair for Mr M to have to continue to pay annual SIPP fees to keep the SIPP open. So, if the SIPP needs to be kept open only because of the illiquid investment/s and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.

Interest

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

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

Distress & inconvenience

Mr M's investments in Salinas Sea and ABC Corporate Bond II represented the majority of his Options SIPP. The ABC Corporate Bond II investment has since failed and Mr M's investment in Salinas Sea is essentially illiquid. So, the original value of his ABC Corporate Bond II investment will have been lost from his SIPP, and whatever value the Salinas Sea investment has can't be readily realised and made available to Mr M to draw down from when he wants to take his pension benefits.

I think it's fair to say this would have caused Mr M some distress and the matter has gone on for some years now. So, I consider Options should pay him £500 to appropriately compensate him for that.

Determination and money award: It's my final decision that I require Options to pay Mr M compensation as set out above, up to a maximum of £150,000 plus any interest and/or costs payable.

Until the calculation is 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 M's complaint. But I'll also make a recommendation below in the event that 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 M the balance.

If Mr M 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 M will be able to accept my final determination and go to court to ask for the balance of the compensation owing to him after the money award has been paid. Mr M may want to consider getting independent legal advice before deciding whether to accept this final decision.

My final decision

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

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr M to accept or reject my decision before 1 May 2024.

Asa Burnett
Ombudsman