DRN-4833073

The complaint

Mr C complains Options UK Personal Pensions LLP ('Options' - formerly Carey Pensions UK LLP) failed to fulfil its obligations in relation to its acceptance of his application for a Self-Invested Personal Pension ('SIPP') and subsequent investment in an overseas property-based investment scheme that was introduced to it by an unregulated introducer.

The entities involved

Given the various entities involved in Mr C's SIPP investment, I've set out a summary of each and the investment itself below.

'Options'

Options is a SIPP provider and administrator. At the time of the events in this complaint, Options was regulated by 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 C's dealings were with Carey, I'll refer to Options throughout this decision for simplicity.

'Business C'

Business C 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 S.

Business C was an introducer of business to Options. It was also described as an authorised representative of Oasis Atlántico.

Alternative Pension Investments ('API')

API was another UK based company. It described itself as *"an independent company dedicated to introducing individuals and businesses to a range of products and services from different providers,"* and as *"an agent of several product providers."* It purported to operate a *"pension review"* service. It was not regulated by the FCA, so it was not therefore authorised to advise on investments covered by FSMA in the UK.

The director of API was an individual who I shall call Mr W. Mr S of Business C also became a director of API in December 2013 and featured on the documentation obtained by Options when it began its relationship with API.

API was also an introducer of business to Options. We've been provided with notes of a meeting between Options, Mr W and Mr S of Business C from 2012. The notes indicate that API and Business C operated together. I'll comment more on this below.

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 C 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.

What happened

Mr C says he was approached by API via a cold call, further to which he applied for a SIPP with Options and transferred his existing pension into it, and then purchased a 25% share of a hotel room (a unit) in the Salinas Sea resort. He says API *"coached"* him through the process and he thought he was receiving regulated advice from them.

On 18 November 2013, Mr C signed 'The [Options] Pension Scheme Application Form.' Mr C's personal details were entered on the form and in the section relating to investment choices, *"Salinas Sea"* was entered as the investment, and *"TBN"* was entered in the space for the amount of the pension to be invested in it. The details of an existing personal pension Mr C had, estimated to be worth around £26,000, were entered in the section relating to transfers. 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.

Also on 18 November 2013, Mr C signed a series of documents from API. The first document was headed 'Pension Review Option' and included the following declaration:

> *"I confirm that I have been offered the option of an IFA pension review leading to a fully advised report and recommendations, and an information-only review (non-advised)."*

Mr C ticked the box corresponding to the information-only review option.

The second document was headed 'Execution Only Document' and included the following declaration:

> *"I confirm that I have been offered the option of an advised position, utilizing the services of an Independent Financial Advisor, and an Execution-only option. I confirm that these options have been explained to me fully and it is my decision to follow a non-advised execution-only pension strategy."*

The declaration went on to include a number of points that in summary, were as follows:

- Mr C understood no party, including API or Options had given or would give him advice on his choice of investments or the suitability of a SIPP
- Mr C confirmed it was his decision to transfer his pension to a SIPP and make the investments he had chosen
- Mr C understood alternative investments are regarded as high risk
- If in future Mr C changed his position to request advice then API would introduce him to an appropriately qualified IFA

The final document was headed 'Terms of Business' and amongst other things it set out that:

- API is an independent company that introduces individuals to a range of products and services from different providers. It is an agent of several product providers, but it isn't itself a provider of any products and it can't offer advice in relation to any products or services
- All the products API offers are offered free from financial advice and are not regulated by the FCA
- API won't keep under review the products and services it arranges, but it may make contact in future to discuss the relative merits of a product or service it feels may be of interest
- API will receive commission from product providers when one of their products or services is used
- API is not authorised by the FCA

Also on that date, Mr C signed a letter of authority addressed to Options giving it his authority *"to provide* [API] *with any information whatsoever they may require in relation to my scheme's purchase of investments."*

On 6 December 2013, Options accepted Mr C's application and established his SIPP. Options then sent him a welcome pack including the SIPP terms and conditions and key features on 23 December 2013.

After the SIPP was set up, Options sent a document to Mr C 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 reference, 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 C] *being the 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 £28,625 on my behalf for the above scheme."*

The declaration then included a number of points including:

- Mr C confirmed Options was acting on an execution only basis and had not given advice
- Mr C 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 C acknowledged and confirmed his understanding that the investment may prove difficult to value and/or sell / realise
- Mr C confirmed he had reviewed and understood the information provided by Salinas Sea
- Mr C 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 C to indemnify Options against any claims etc in connection with the investment.

Mr C signed the Member Declaration on 22 January 2014 and returned it to Options. Mr C 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.

Options has said it followed its 'call back' procedure in Mr C's case which involved calling him to check he had understood the documents he had read and signed, and completing a 'call-back pro-forma' during the call. I haven't been provided with a copy of the pro-forma or a recording of the call.

On 27 January 2014, Options wrote to Mr C confirming his existing pension, ultimately valued at around £26,000, had been received into his Options SIPP. Options wrote to him again the next day confirming that his first deposit payment of £18,606 on a 25% share of a unit in Salinas Sea had been paid to Oasis.

On 8 September 2014, Oasis wrote to Options stating that everything was prepared for the Deeds of Purchase and Sale to be signed. As I understand it, the Deed would have been signed at some point after then, and the remaining balance to complete Mr C's purchase of his share of the unit would have been paid by way of a mortgage provided by Oasis on the unit.

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

The relationship between API and Options

Options has told the Financial Ombudsman Service that its relationship with API began in November 2013 and ended in *"early 2014,"* when it says it decided to stop accepting business from unregulated introducers generally, not because of any concerns it had about API. It has told us it received 20 introductions from API in that time.

Options says it acted properly in accepting introductions from API, and that administering SIPPs for members who had chosen to use them as an introducer was the extent of the relationship. It was not prohibited from accepting introductions from unregulated introducers. It says it undertook due diligence checks on API and had no reason to believe it should not accept introductions from them at the time of Mr C's introduction.

The relationship between API and Business C

Options has provided evidence of its dealings with Business C that evidence the relationship between Business C and API.

A handwritten memo dated 26 October 2012, which I understand to have been written by Options, included the following details:

- Mr W had been at Business C until 2008
- Business C was a distribution business for Oasis
- API was *"lead generator"* for pension review and worked with *"1SFS"* and *"TFPP Scotland."* I understand those firms to be 1Stop Financial Services and The Financial Planning Partnership

An email sent between members of Options' staff on 25 November 2013 in response to an email from Mr S included the following:

> *"I didn't think we were taking on new business through* [Business C]*, which I notice* [Mr S] *is emailing from. From my discussion with* [another Options staff member]*, I understand that any new business will be coming in via API and should come from*

an API email account. That said, API are yet to be approved as Introducers."

Due diligence carried out by Options on API

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

In addition to what I set out in the section above, Options says:

- It obtained a completed Introducer Profile (which I'll set out in detail below) and Terms of Business detailing API's obligations. It also obtained identification documents for Mr W and Mr S for anti-money laundering purposes

- It understood API was an introducer only and obtained its clients through a *"UK distribution network and by clients making contact via online contact request"*

- It didn't conduct ongoing checks on API because of the limited time its agreement with them was in effect

- It didn't record commission or fees paid to API as it didn't accept or pay any commissions to unregulated introducers

- It didn't request suitability reports as there was no expectation that advice would be given by API. API's paperwork made it clear it wouldn't provide advice and that if advice was required, then the prospective member was guided to seek regulated advice

- 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"*

Options has provided a document titled 'Business Profile for Non-Regulated Introducers' that API completed in November 2013. The following was set out by Options at the top of the document:

> *"As an FCA 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 out. We therefore request that a Director/Partner of the Firm complete and sign this Profile questionnaire and our Terms of Business agreement as part of our internal compliance requirements."*

The profile document was signed by Mr W and amongst other details, it set out the following:

- API had been trading for two years at that point and had nine agents who were self-employed

- The investments promoted by API were *"Best International: ABC Bond, Borge Alle Vigne Bond, Dubai Car Parks, Student Property Bond, Salinas Sea and Dolphin."* These investments were said to have been accepted by four other SIPP providers who were listed, and to have not been rejected by any pension scheme operators

- API obtained its clients by *"direct marketing,"* and an *"in-house call centre"* and they took *"prospects through a process of educating them about alternative investments"*

- API's average client was 40-60 years old, either employed or self-employed, with an average salary of £30,000-£50,000. *"Almost all"* of its business involved pension transfers

- API typically earned 7-9% commission from the companies that own the investments and this commission was its only source of fees

- API's objective for the following 12 months was to grow its client base by 100 clients a month

- API's agents/consultants regularly undertook *"full product and process training."* API said that the consultants have a *"good knowledge of the 'traditional' pension market,"* and that *"before completion of the transfer each client is called by* [Mr S] *or* [Mr W] *to ensure that they have been treated responsibly and fairly"*

- API worked with a regulated firm referred to as *"my IFA friend"*

- API's documentation *"describes clearly and without ambiguity"* that it does not undertake any regulated activities

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

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 C'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, which Mr C signed in January 2014, 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.

Mr C's complaint to Options

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

- Options accepted Mr C's application for a SIPP and subsequent investment in an overseas, high risk, illiquid and unregulated investment despite knowing he hadn't received regulated advice to do so, and therefore wouldn't have had the benefit of the protection that such advice would have provided to him

- Options wasn't required to give advice, but it ought to have been aware that the transactions Mr C proposed to undertake were unlikely to be suitable for him. Options should have insisted Mr C took advice before proceeding, and in the absence of regulated advice, it had a heightened duty of care to him

- Options ought to have questioned Mr C on whether he had taken regulated advice, and if he hadn't then why he hadn't. Had Options done so, Mr C would not have proceeded with the transactions

- Options didn't treat Mr C fairly by classifying him as a direct customer and using various disclaimers and indemnities to absolve itself of its responsibilities

- In accepting Mr C's application via an introduction from API, Options breached several of the regulators' principles and rules and it failed to take into account the contents of relevant publications issued by the regulator

- Options accepted introductions from API despite knowing their actions as an unregulated introducer were in breach of S21 of FSMA (Restrictions on financial promotion)

- There were various points in the course of Mr C's application that should have alerted Options to the poor nature of this business. Had Options carried out sufficient due diligence on API, it would have identified several points of concern that would have led it to the decision not to accept business from them, and Mr C's application would not have proceeded

- To resolve Mr C's complaint, Options should compensate Mr C to put him in the position he would be in had he not transferred his existing pension into an Options SIPP and made the subsequent investment. Options should also pay Mr C compensation for the considerable upset its failings have caused him

Options rejected Mr C's complaint, explaining in its final response dated 14 May 2018 that, in summary:

- API acted only as an introducer, they weren't known to Options as advisers and Options wasn't aware they held themselves out to be advisers. Options had no relationship with them other than administering SIPPs for members who used them as an introducer

- Options provides execution only (i.e. non-advised) SIPP administration services and this was explained to Mr C in all the documentation he reviewed at the outset

- 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 C in the documents provided to him at the time of his SIPP application

- Options followed its processes and acted in good faith, and proceeded on the unambiguous instructions that Mr C provided to it throughout. It could not and was not obligated to go beyond this

- Mr C confirmed to Options that he was instructing it to establish a SIPP and invest in Salinas Sea on an execution only basis, and that he understood API weren't regulated and hadn't provided him with advice. He didn't inform Options he had received advice and he confirmed in his SIPP application form that he hadn't received advice. It wasn't for Options to look beyond this

- Options doesn't consider S21 of FSMA applies to Mr C's complaint as no evidence has been provided showing Mr C was advised or received a financial promotion. Even if S21 of FSMA did apply, a Court would exercise its discretion under S30 of FSMA to enforce Options' agreement with Mr C

- Options acted properly in accepting introductions from API. It completed due diligence on them and had no reason to believe it shouldn't accept introductions from them at the time of Mr C's application. It only later stopped accepting introductions from API because of a change in its Business Acceptance Policy, not because it had any concerns about API's conduct

- Options wasn't prohibited from accepting introductions from unregulated introducers

- Options ensured the Salinas Sea investment was suitable to be held in a SIPP and it provided Mr C with all the necessary information and guided him to seek financial advice so that he could make an informed decision whether to proceed with the SIPP and the investment

- Options took steps to check Mr C had received this information and had read and understood it. Mr C confirmed he understood the information provided to him and that he wanted to proceed without advice. It wasn't for Options to look beyond this

Our Investigator's view

Mr C'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 C'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 C 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. This included deciding whether or not to accept or reject particular referrals of business or investments

- Declining business does not amount to advice
- Options had not provided any evidence relating to its due diligence carried out on API
- The type of investment Mr C 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
- The likelihood of API receiving commission in connection with this business meant there was a significant risk of consumer detriment
- Options should have sought greater assurances that API were not carrying out regulated activities in the course of introducing clients to Options
- It seems implausible that business such as in Mr C'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 C wasn't required to take advice, but Options should have been concerned about a lack of regulated advice in the circumstances
- FSMA S27 provides a further basis on which Mr C's complaint should be upheld as API carried on regulated activities in the UK without authorisation, Mr C's agreement with Options came about as a result of that, and Options knew or should have known this
- They believe a Court would not determine it to be just and equitable that the agreement should be enforced (FSMA S28) in the circumstances
- In all the circumstances it was not fair and reasonable for Options to accept Mr C's application from API. Therefore it's unnecessary to go on to consider the due diligence carried out by Options on the Salinas Sea investment

Finally, our Investigator set out how Options should put things right by putting Mr C as far as possible, into the position he would now be in but for Options accepting the business from API. They considered that if Options had acted appropriately, it's more likely than not that Mr C would have remained a member of the pension scheme 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 C £500 for the distress caused by Options' actions.

Options did not respond. So, 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 C's complaint should be upheld, albeit for different reasons to our Investigator's.

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 C 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 C responded to say he had no further comments to make.

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.

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.

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 Businesses, which are set out in the FCA's handbook, *"are a general statement of the fundamental obligations of firms under the regulatory system"* (PRIN 1.1.2G). 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 C'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 C'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 C's complaint, I am considering whether Options ought to have identified that the introductions from API 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 C.

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; regulators' 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 C on the suitability of its SIPP or the Salinas Sea investment for him personally. But I am satisfied Options' obligations included deciding whether to accept particular investments into its SIPP and/or whether to accept introductions of business from particular businesses.

Regulatory publications

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

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

The 2009 report included the following statement:

> *"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses ('a firm must pay due regard to the interests of its customers and treat them fairly') insofar as they are obliged to ensure the fair treatment of their customers. COBS 3.2.3(2) states that a member of a pension scheme is a 'client' for COBS purposes, and 'Customer' in terms of Principle 6 includes clients.*
>
> *It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six TCF consumer outcomes."*

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 C'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 C. It is accepted Options was not required to give advice to Mr C, 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, that by the time it received Mr C's application 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 API 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 regulators' rules and regulations, Options should have carried out due diligence on API. And in my opinion, Options should have used the knowledge it gained from its due diligence to decide whether to accept or reject a referral of business.

The due diligence carried out by Options on the investment

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

Options has told the Financial Ombudsman Service 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 C 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 in a hotel room in a development that was not yet complete, where the property would form part of a hotel. Mr C 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 C'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, or should have been a factor in, the checks made by Options on API since it planned to introduce clients for the purpose of investing in Salinas Sea and other, similar investments.

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 API.

I note that Options' non-regulated introducer profile form which it completed with API 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 API and understand its business model.

But, Options hasn't provided any evidence of any assessment it made of the risks posed by accepting business from API based on the information it had gathered about them. In my view Options should have completed a due diligence assessment on API before it first agreed to accept any business from them in November 2013.

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 Options had made a reasonable initial assessment to accept business in November 2013, Option could reverse its decision if it thought it appropriate to do so.

Options has said it didn't carry out ongoing checks on API and that it only stopped accepting business from them because of a business decision to stop accepting introductions from unregulated introducers. I conclude then that either Options never carried out such an assessment and it accepted business from API by default, or it carried out an assessment and was comfortable with the risks in accepting business from API.

It's important to highlight here that API was not a completely new unknown entity to Options in November 2013. Options knew from as early as October 2012 that API and Business C worked together to generate leads and investments, in particular those owned by Oasis such as Salinas Sea. This is evidenced by Options' handwritten memo from 26 October 2012 which described Business C as *"distribution business for Oasis,"* and API as *"lead generator"* for pension review.

Options also knew that Mr S of Business C was integrally involved with API, even though he wasn't a director of API at the time of Mr C's application. Mr S and Business C (who Mr W had previously been involved with) had been making introductions to Options since April 2011 for clients investing in Salinas Sea via a SIPP. API recorded in the 'Business Profile for Non-Regulated Introducers' they completed for Options that *"each client is called by* [Mr S] *or* [Mr W] *to ensure that they have been treated responsibly and fairly."* Furthermore, Options' internal email from 25 November 2013 gives the impression that it considered Mr S to be representing both Business C and API by then, and that any new business would come via API. This is consistent with other, similar complaints the Financial Ombudsman Service has received in which the documentation surrounding the applications and instructions to Options from individual customers feature API and Business C interchangeably.

So, based on the above, I think it's reasonable to conclude that API and Business C were largely synonymous. They worked together to introduce clients to "alternative" unregulated investments and Mr S was the critical link between the two entities. I think Options knew this, but if it didn't know this, it ought to have been obvious to it.

Therefore, my view is that any due diligence undertaken by Options on API before accepting introductions from them should have included analysis of Business C, taking into account what Options already knew about Business C.

What Options should have concluded about Business C?

The Financial Ombudsman Service has decided a number of cases involving Business C. I don't intend to set out the findings of those decisions in detail, but in summary we have concluded (based on the evidence we've seen) that:

- Options carried out a proforma based assessment on Business C. It didn't do this at the start of its relationship with Business C in 2011 – but it should have done so

- Options carried out an incomplete assessment. Had it completed its assessment, it would have come out with an assessment showing a considerably higher risk in accepting business from Business C than the incomplete assessment it carried out

- In any event, once Options had carried out its assessment, if it had acted reasonably, in a way that was consistent with its role as a non-advisory SIPP operator and its obligations in that role under the Principles and with good industry practice, it would not have accepted business from Business C

- Options knew that Business C:

    - was involved in promoting the Salinas Sea investment and had become an introducer in order to introduce clients to invest in it within their pensions

    - 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%

- Options knew that Business C purported to work with two regulated firms – 1SFS and TFPP. It's not clear whether Options carried out due diligence on these two firms. But had it done so, it would have discovered that these firms operated business models that involved receiving introductions from unregulated introducers, who typically promoted overseas property investments, and then giving advice on the suitability of switching an existing pension to a SIPP to make that investment, *without* giving advice on the suitability of the investment

- So Options knew or should have known that the business model Business C was involved in lacked the safeguard of effective independent regulated advice. And so the involvement of these IFAs with this business model ought to have been a red flag item that should have given Options concerns

- Options knew or should reasonably have known that the Salinas Sea 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 Business C operated and in particular how it found its clients

- 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 Business C 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

I've reviewed the evidence relating to Business C and I agree with the findings summarised above.

So my view is that, taking all these points into account, Options knew or should have known when agreeing to accept introductions from Business C that there was a real risk of customer detriment. Acting fairly and reasonably and in accordance with its obligations as a SIPP operator, Options should not have accepted business from Business C.

What impact should this have had on Options' decision whether to accept business from API?

Given the relationship between API and Business C, and what I've said above about Business C, I think the starting point for Options' assessment of API should have been that it would decline business from API too.

I think it would only have been fair and reasonable for Options to accept business from API if it was satisfied, based on additional evidence and safeguards, that the risks associated with Business C had been comprehensively addressed by November 2013. However, the available evidence doesn't show that those risks had been addressed.

Options knew from API's responses in the 'Business Profile for Non-Regulated Introducers' and its 26 October 2012 memo that, like Business C, API were:

- Promoting investments such as Salinas Sea that were high risk, unregulated, speculative overseas property-based investments that were likely to be highly illiquid and unsuitable for the vast majority of retail client investors

- Not authorised to give regulated investment advice, and in some circumstances were working with the same IFAs as Business C, which operated business models that didn't include investment advice and therefore lacked the effective safeguard of regulated independent investment advice

- Taking on clients that earned on average between £30,000 and £50,000 a year who were therefore unlikely to be reasonably classified as high net worth or as sophisticated investors

- Receiving commission of 7-9% from the owners of the investments they were promoting and were not receiving any other fees or commission, and so were susceptible to putting their own interests ahead of their clients' interests

In my view the similarities in key aspects of the business models of Business C and API should have led Options to decline business from API as it should have done from Business C.

What Options ought to have decided

In my view Options should have completed a due diligence assessment on API before it first agreed to accept any business from them in November 2013. If it had done so and 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, after taking into account all of the concerns surrounding Business C and API, it should have come to the conclusion not to accept introductions from API before Mr C's application.

Options knew or should have known when agreeing to accept introductions from API that there was a real risk of customer detriment in doing so. All of the issues that it ought to have been aware of regarding Business C were still relevant for API and had not been sufficiently addressed.

Options relied on the contents of API's paperwork to satisfy itself that they weren't giving advice. I accept API's paperwork stated they weren't regulated and they didn't provide advice, and that the option to receive advice from an *"appropriately qualified IFA"* was provided. But in the circumstances I don't think it was fair and reasonable for Options to rely on this without question.

Options knew or should have known that:

- It's unlikely that ordinary retail investor clients would choose to transfer their personal pension to a SIPP without advice
- API's business model did not require their clients to obtain regulated advice

These points should have given Options cause for concern about how API was bringing about the business it was proposing to introduce to it. The information API provided to Options in the 'Business Profile for Non-Regulated Introducers' about how it obtained clients ought not to have relieved Options of this concern.

API told Options they obtained clients by *"direct marketing agents, in house call centre* [sic]*,"* and that they provided *"full product and process training"* to their agents, who had a *"good knowledge of the 'traditional' pensions market."* But Options didn't ask API what this meant in practice or for evidence of the training it provided. So, Options could not reasonably have been satisfied that API's stated method of taking clients through a *"process of educating them about alternative investments"* could be undertaken without the risk of API giving advice.

API also explained that Mr S or Mr C called each client before the completion of the pension transfer to ensure that the client had been treated responsibly and fairly by API's agents. But this was obviously not an adequate safeguard as it was not an independent process.

API also told Options that they worked with a regulated firm they referred to as *"my IFA friend."* But Options didn't obtain any details about that IFA or undertake any checks on them, their business model or their relationship with API. So, this didn't provide Options with any meaningful assurance that clients of API, even those who had opted to receive advice, were benefitting from independent regulated advice.

When Options agreed to accept business from API 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.

I'm aware that Options contacted (by telephone) at least some customers introduced by API to ask templated questions about whether they understood the risks involved in the investments proposed, and to confirm that API had not given the customer advice. Options has said it followed this 'call-back' procedure in Mr C's case, but it hasn't provided any supporting evidence of this.

Whilst I think Options' 'call-back' procedure was a reasonable step to take, it doesn't appear it was done consistently. In any event, I've seen a document from API notifying its clients that they would be contacted by Options asking these questions. So, the effectiveness of the call back was also clearly diminished by the fact that API knew the questions Options would ask and could 'coach' their clients – who they had already enticed into transferring their pension - on how to respond to questions without the client then properly understanding the implications of what they were being asked. For example, consumers may not realise that the giving of advice need not take the form of a formal written recommendation in order for the regulated activity of "giving advice" to have been undertaken.

Furthermore, this step was taken after Options began to accept introductions from API. It should have been satisfied about these important matters before accepting any instruction. So overall, I think this 'call-back' procedure had limited value in the context of the relationship with API as a whole.

Options' response to the risk of customer detriment was to require potential clients to sign the declaration I referred to above and to call some customers. In my view that was not a fair and reasonable approach bearing in mind the Principles for Businesses and good industry practice. In my view the fair and reasonable approach would have been to decline to accept business from API from the outset.

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

In my view, for the reasons given, Options should have refused to accept Mr C'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 C's application.

I acknowledge Mr C signed the member declaration which gave warnings about the high-risk, speculative nature of the Salinas Sea investment. And it included a declaration that Mr C wouldn't hold Options responsible for any losses resulting from the investment. However, I do not think this document demonstrates Options acted fairly and reasonably in proceeding with Mr C's instructions.

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

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

Is it fair to require Options to compensate Mr C?

I have considered what Mr C would have done had Options rejected his application, and I have seen no evidence to show Mr C would have proceeded even if Options had rejected his application. Mr C was contacted by representatives of API, seemingly unprompted by him, and he wasn't looking for such investments. There is nothing to indicate Mr C 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 C 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 API. I do not think it would be fair to say Mr C 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 C's complaint on the basis that Options shouldn't have accepted his introduction from API. I therefore don't consider it necessary to consider whether API 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 investment into Mr C's SIPP. I make no finding about the appropriateness of the investment for the Options SIPP which Mr C opened.

Putting things right

It's my finding that Options failed to comply with its regulatory obligations and good industry practice in accepting Mr C's application to open a SIPP in order to invest in Salinas Sea. My aim in awarding fair compensation is to put Mr C 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 C would have remained a member of the pension scheme he transferred into the SIPP.

I think Mr C 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 C's circumstances and objectives when he invested.

I've seen no evidence that Mr C would've already taken benefits from his pension had he not opened his SIPP with Options and invested in Salinas Sea. My direction for Options' calculation of redress reflects this understanding.

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

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

- Obtain the actual transfer value of Mr C'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 C of any liabilities linked to the investments

- Pay an amount into Mr C'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 the date Options receives notification of his acceptance 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 C has paid any fees or charges from funds outside of his pension arrangements, Options should also refund these to Mr C. 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 C £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.

Treatment of the illiquid assets held within the SIPP (Salinas Sea)

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 C 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 C complains for both parties to the complaint. Had Options acted appropriately, I think it's *more likely than not* that Mr C would not have invested in Salinas Sea 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 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 C 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 C 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 C would then be able to close the SIPP, if he wishes. That would then allow him to stop paying the fees for the SIPP. The valuation of the illiquid investment may prove difficult, as there is no market for it. For calculating compensation, Options should establish an amount it's willing to accept for the investment as a commercial value. 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 investment and ensure that in doing so it takes on or otherwise removes all liability Mr C may have for any financing taken out to part fund the purchase of the investment.

If Options is able to purchase the illiquid investment 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 C's illiquid investment, it should give the holding a nil value for the purposes of calculating compensation. In this instance Options must still take on or otherwise remove all liability Mr C may have for any financing taken out to part fund the purchase of the investment. If the total calculated redress in this complaint is less than £150,000, Options may ask Mr C to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the relevant holding. That undertaking should allow for the effect of any tax and charges on the amount Mr C may receive from the investment 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 C should retain the rights to any future return from the investment 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 C 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 C may receive from the investment 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 C may have for any financing taken out to part fund the purchase of the investment so as to ensure that Mr C is left unencumbered by this.

Calculate the loss Mr C 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 plan, and the monies in the policy would've remained invested in an identical manner to that which existed prior to the actual transfer.

Any contributions or withdrawals Mr C has made will need to be taken into account whether the notional values are 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 C’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 C’s loss.

Pay an amount into Mr C’s SIPP so that the transfer value is increased by the loss calculated above

If the redress calculations demonstrate a loss, the compensation should if possible be paid into Mr C’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 C as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Redress paid to Mr C 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 C 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 C 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 C how much has been taken off. Options should give Mr C a tax deduction certificate in respect of interest if Mr C asks for one, so he can reclaim the tax on interest from HMRC if appropriate.

Distress & inconvenience

Mr C says he has lost valuable benefits because of Options’ failings and he’s increasingly worried about his income in retirement as a result. I also note that Mr C said he was on long term sick leave when his complaint was referred to us.

Mr C's investment in Salinas Sea represents the majority of his Options SIPP and is essentially illiquid. So, whatever value the investment has can't be readily realised and made available to Mr C to draw down from when he wants to take his pension. This is particularly pertinent in Mr C's case because he had already reached the age from which he could take his pension benefits when he made his application.

I think it's fair to say this would have caused Mr C some considerable distress, and that his long term sickness and the number of years the matter has gone on for now would have exacerbated that and the worries he understandably feels about his income in retirement. So, I consider Options should pay him £750 to appropriately compensate him for that.

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

If Mr C 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 C 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 C 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 C's complaint. I require Options UK Personal Pensions LLP to calculate and pay Mr C the award, and take the actions, set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 2 July 2024.

Asa Burnett
Ombudsman