

## The complaint

Mr W complains that Curtis Banks Limited ('CBL') shouldn't have accepted his application for a self-invested personal pension ('SIPP') and that it failed to undertake due diligence on the introducer and intended investments, causing him a financial loss. He says it should compensate him for his loss.

For simplicity, I refer to Mr W throughout, even where the submissions I'm referring to were made by his representative.

## What happened

I've outlined the key parties involved in Mr W's complaint below.

### Involved parties

#### *CBL*

CBL is a regulated pension provider and administrator. It's authorised to arrange deals in investments, deal in investments as principal, establish, operate or wind up a personal pension scheme and to make arrangements with a view to transactions in investments.

#### *1 Stop Financial Services ('1 Stop')*

At the time of the events complained of, 1 Stop was an independent financial adviser authorised by the then regulator – the Financial Services Authority ('FSA'), which later became the Financial Conduct Authority ('FCA'), the latter of which I'll largely refer to throughout for ease.

We've been provided with a copy of pages from 1 Stop's entry on the FCA Register. This says that 1 Stop's permissions included advising on investments (except on Pension Transfers and Pension Opt Outs). Other permissions 1 Stop held included arranging (bringing about) deals in investments.

In the FCA's final notice, dated 17 April 2014, it said for example that:

*"Specifically, [Mr R] failed to take reasonable steps to ensure that 1 Stop assessed the suitability of the underlying investment for the customer. Instead, 1 Stop's business model focussed solely on providing advice on the most suitable SIPP wrapper for the underlying investment."*

In an April 2014 publication on its website, updated the following month, the FCA explained that:

*"[Mr R] and [Mr H], partners at 1 Stop Financial Services (1 Stop), have been banned by the Financial Conduct Authority (FCA) from performing any significant influence function in relation to any regulated activity. [Mr R] and [Mr H] had advised customers to switch into self-invested personal pensions (SIPPs), which enabled those*

*customers to invest in unregulated and often high risk products, regardless of whether those products were suitable for the customers.”*

And that:

*“By enabling customers to invest in unregulated and often high risk products without assessing suitability, these men exposed customers to the risk of losing their hard earned pension funds. This was then compounded by the partners’ failure to ensure that their customers fully understood these risks”.*

#### *The Harlequin Group (Harlequin)*

The Harlequin group of companies were involved in the promotion, development and distribution of off-plan overseas property investments and resorts – primarily based in to Caribbean. None of these companies were regulated by the FCA.

Harlequin Management (South East) Limited promoted the investment to UK investors, either directly or through a network of agents and financial advisers. Investors could invest into resorts developed in the Caribbean in the hope of purchasing an individual hotel room, apartment, cabana or villa.

The developments failed and funds invested were not always used as intended. In March 2013 the Serious Fraud Office (‘SFO’), in conjunction with the police, started investigating the Harlequin Group of companies. Harlequin Management (South East) Limited subsequently went into administration and some senior figures were prosecuted for fraud.

Amongst other things, the SFO said that the business model relied upon investors paying a 30 percent deposit to purchase an unbuilt villa or hotel room, half of which went toward fees for Harlequin and relevant salespeople, while Harlequin put the remaining 15 percent toward construction. Investors were fraudulently told that the building of the properties would be further funded by external financial backing. And that, in reality, the scheme had no external or additional source of funding and it never delivered what was promised.

#### The transaction

Mr W signed a Harlequin Property Reservation form, dated 8 March 2010. This detailed, amongst other things, that Mr W was purchasing a studio in Two Rivers for £100,000 using his SIPP pension monies. It set out that Mr W would pay a £1,000 reservation fee by cheque to Harlequin. And, at the bottom, the details for someone I’ll refer to as ‘Mr B’ was provided under ‘*Agent Name to Invoice & Pay*’.

On 18 March 2010, 1 Stop sent CBL a letter which said it enclosed the:

- SIPP application form, dated the day before.
- Direct Investment Questionnaire.
- Property Questionnaire, which I can see was only partially completed and dated 17 March 2010.
- Transfer Instruction.

In the ‘Introducer’ Section of Mr W’s SIPP application form – which said that this was to be filled out if making the application as a result of advice from a financial adviser – Mr W provided Mr H of 1 Stop’s details and set out that it would be paid a one-off fee of £1,295 plus £200 in renewal payments. Under the signed ‘Introducer Declaration’ section Mr H of 1 Stop declared, amongst other things, that he had advised Mr W to take out the SIPP. And

that where transfers were made from other pension arrangements into the SIPP, he confirmed he had advised Mr W on the suitability of the transfer.

When Mr W was asked in the 'Investment Details' section '*If someone will be assisting you with investments, please give their details below*', he wrote Mr H of 1 Stop and ticked a box to say he wanted CBL to accept instructions from 1 Stop. He then said that he intended to invest in commercial property and he noted down that this was in Harlequin. And under '*Cancellation Rights*', Mr W ticked a box to confirm he wanted to waive his 30-day SIPP cancellation rights.

The Direct Investment Questionnaire said in bold at the top that:

*'[CBL] recommends that you obtain suitable financial advice in respect of any investment you make within your SIPP or SSAS. This questionnaire **must be completed** if you are making a complex investment **without such advice**' (my emphasis).*

It went on to say that the purpose of the questionnaire was for Mr W to confirm he understood all the issues involved with the investment, before it goes ahead. And that if he couldn't answer 'yes' to all the questions, then it suggested he reconsider and obtain suitable financial advice. And Mr W ticked to confirm, amongst other things, that:

- He understood he had received no advice from CBL or any financial adviser in respect of the suitability of the investment.
- He understood how the investment worked and any possible pitfalls.
- He'd read and understood the investment terms and conditions.
- He was comfortable with the level of risk for the investment and that, although higher risk could mean higher returns, there's no guarantee and he may get back less than he invests.
- He understood he might not be able to sell the investment easily and this could impact on its ability to pay the benefits.

On 23 March 2010, CBL sent Mr W a letter confirming his SIPP had been established.

Turning to the Property Questionnaire, it appears that Mr H of 1 Stop sent an updated version of this to CBL on 6 May 2010, albeit still signed and dated by Mr W on 17 March 2010. This now set out, amongst other things, that:

- Mr W wanted to invest in Harlequin Two Rivers.
- The purchase price was £125,000, with him financing this by way of 30% deposit and it said that the remainder was payable on completion. There was space for Mr W to detail how he'd fund the remainder, such as scheme borrowing or contribution, but no details were provided.
- The property completion date was to be advised and registered at the land registry on completion.

And at the bottom Mr W confirmed, amongst other things, that:

- He had read and understood the Property Guidance Notes issued by CBL – CBL doesn't appear to have provided our Service with a copy, despite being asked to do so by the deadline to respond to my provisional decision – and had satisfactorily resolved any queries with CBL or his adviser and he understood how this type of investment works and any possible pitfalls.
- He understood that the acquisition couldn't proceed until CBL had received all

- necessary information and had approved the purchase, and all financing is in place.
- He'd received no advice from CBL.
- He was comfortable with the level of risk with this type of investment and that values can fall, rents aren't guaranteed and past performance is no guarantee of further performance.
- He understood that property may not be as readily realisable as other types of investment.
- He understood that if the investment led to the scheme holding 'taxable property', such as residential property, there could be tax charges he'd be liable for.

On 11 May 2010, 1 Stop sent CBL Mr W's signed Harlequin Property Investments Declaration, that he'd signed the day before. Amongst other things, this said that:

*'You choose [sic] the investments for your SIPP and are responsible for the outcomes of your Investment decisions. You should take care in this process, making yourself fully aware of all the issues, so that you understand and are comfortable with the Investment you are making, and you should take professional advice where necessary. [CBL] cannot give you advice on the suitability of a Harlequin Investment and should not be relied on to have detailed ongoing knowledge of the Harlequin Property business'.*

It went on to say, amongst other things, that:

- The notes were general guidance on the issues involved and should be read in conjunction with the Property Notes, which describe the investment more generally.
- While the investment in a hotel should be acceptable for HMRC purposes, there's no guarantee and it accepts no liability for tax charges. And a condition of HMRC acceptability is that the member has no right to use the property, as explained in Harlequin's literature.
- Following the initial 30% deposit required, further stage payments are required as the property is built. From the outset Mr W should have a clear idea of how the total is likely to be financed by the SIPP. If it turns out Mr W's SIPP is unable to finance all the purchase, then Mr W would be required to personally pay the balance. His SIPP could borrow funds towards this, up to 50% of the net asset value of the property.
- Harlequin has said that borrowing is available and that properties are generally expected to appreciate in value. But if borrowing isn't available in future or increases aren't sufficient to support the borrowing needed, Mr W may have to find other means of financing the purchase. And that when Mr W completes its property questionnaire there is a section for him to indicate how he expects to finance the purchase.
- Mr W was purchasing an off plan unit and he should be aware of the associated risks, such as the developer may fail to complete this or it could turn out to be different to what he expected.

And Mr W was also asked to declare he understood that:

- He had received no advice from CBL or any financial adviser in respect of the suitability of the investment.
- The possible pitfalls as set out.
- That he nor anyone connected with him has any right to use the property.
- He had a clear idea as to how he expected to finance the purchase and was confident this could be achieved.
- He accepted full responsibility for the outcome of the investment and won't hold CBL liable for losses or charges he may incur.

On 14 May 2010, just under £42,500 was switched into Mr W's CBL SIPP from his existing personal pension scheme.

On 19 May 2010, CBL sent Harlequin the signed contract which set out, for example, the payment schedule and target completion date as December 2011.

And on 21 May 2010, Harlequin confirmed that it had received payment of Mr W's £37,500 investment.

Mr W doesn't appear to have received any returns from his Harlequin investment.

#### Mr W's complaint

Mr W made a claim to the Financial Services Compensation Scheme ('FSCS') about 1 Stop. After having initially calculated Mr W's loss to be just over £42,500 in November 2016, the FSCS reviewed Mr W's claim again in February 2017 and calculated these to be just over £66,500. It paid him £50,000 in total which, as I understand it, was its compensation limit at that time. And, on request, the FSCS later reassigned legal rights against CBL back to Mr W.

Mr W first complained, via his representatives, to CBL in May 2018. He said, in summary, that it didn't do enough due diligence on Firm B – which had a flawed advice model and wasn't advising on the suitability of the underlying investments – or the investments, which were unregulated and high-risk. He said that CBL shouldn't have accepted his applications and this has caused him to lose out.

CBL replied in July 2018. It said, in summary, that its duties were limited to ensuring the investment was permissible within the SIPP for tax purposes. Mr W signed declarations at the time confirming he was relying on his own decisions or financial advice when making the investments, that he was solely responsible and that CBL didn't give him any advice. He also declared that he understood how the investment worked and possible pitfalls. It also said it considered Mr W's complaint to be out of time, as the investment was made more than six years before, in May 2010 and Mr W ought reasonably to have been aware of his cause for complaint more than three years ago.

Unhappy with this response, Mr W referred his complaint to our Service. And, amongst other things, CBL said in its responses in respect of Mr W's complaint that:

- On 2 November 2009, Mr H of 1 Stop signed an application form with CBL agreeing to its terms of business ('TOB') and to enter into a business relationship with it as a financial adviser.
- It carried out checks of the FCA register on Mr H and/or Mr R and 1 Stop at intervals, such as August 2010 and May 2011, to ensure it was regulated.
- It would have carried out a google search to check for any adverse media on the introducer, although CBL hasn't provided evidence that it did this at the time despite being asked to do so by the deadline to respond to my provisional decision.
- It thinks that 1 Stop's business model would have been discussed in the initial meetings between it and the adviser, but it doesn't have meeting notes from the time. However, it said that from the emails saved it was expected 20-30 introductions per month – CBL doesn't appear to have provided us with a copy of these emails, despite being asked to do so by the deadline to respond to my provisional decision.
- It didn't have any further discussions with 1 Stop about the business being referred after the TOB were put in place. But it assessed the documentation presented to it on an individual SIPP basis.

- It didn't request copies of any suitability reports provided to clients in respect of whether 1 Stop had given advice. It would have only done that if the business was a transfer from a DB scheme. And, in any event, CBL isn't qualified to analyse suitability reports.
- 14 organic clients (i.e. not including those which it later took over as part of the acquisition of another business in May 2011) were introduced to CBL from 1 Stop over a six month period. It received the first organic referral in December 2009 and the last in May 2010. None included defined benefit transfers. This accounted for around 2.25% of its new business over that period. Just under 79% of these invested in Harlequin at some point via their SIPP. Mr W's was the seventh introduction and out of those, two invested in standard assets only.
- It stopped accepting business from 1 Stop in December 2012 when its permissions were frozen by the FCA in November 2012 and then withdrawn in 2014. And it didn't have any arrangement with 1 Stop to introduce business to it in exchange for commission.
- It's an execution only SIPP provider. It didn't provide any advice to Mr W. It can only provide relevant information in line with the instructions received as to what is and what isn't permissible under scheme rule and HMRC legislation.
- The plan was introduced by a regulated financial adviser who was responsible for suitability. It's unclear as to the level of involvement by 1 Stop in providing advice, however the direct investment questionnaire Mr W signed said he didn't receive advice on the suitability of the investment.
- It made Mr W aware of the risks involved and he confirmed he understood these and wished to proceed.
- Non-standard investments are allowable within a SIPP. Having no immediate market for sale doesn't mean these should be prohibited within a SIPP.
- By the time of Mr W's investment in May 2010, Harlequin literature had already been assessed for other clients.
- It had been accepting the Harlequin investment within its SIPPs from September 2009. Harlequin had been an established trading company since 2001 with positive returns. There was no cause for cause or reason for it to be considered an unallowable investment, until 2013 as highlighted by the FCA.
- It carried out a CreditSafe check on the investment in March 2010, which provided a very good credit worthiness score, relevant as of January 2010.
- It said that all business, including SIPP applications and any investments are received against its allowability criteria and that it was still awaiting a copy of the investment product literature from its operations team – CBL hasn't provided us with a copy of this criteria or literature when requested though, despite being asked to do so by the deadline to respond to my provisional decision.
- It reviewed Harlequin's accounts from January 2010. While the information available showed this was a non-standard investment, it was showing positive returns at the time so met CBL's criteria in respect of liquidity. And, in respect of the valuation of Harlequin, it based this on the information in the company reports. However, it understood the potential risks, which is why it highlighted to clients that this was a non-standard investment and asked them to complete a declaration, which evidences they understood the risks and what was involved yet wanted to proceed on the basis it was a direct investment and they weren't receiving advice, including a property questionnaire and direct investment questionnaire.
- It met the standards expected of it at the time, as set out in the FCA's 2009 and 2012 reviews.

During the course of Mr W's complaint he's said, amongst other things, that:

- He was introduced to a financial adviser by a person I'll call 'Mr B'. Mr B was a

- colleague of his who knew the adviser well, so Mr W believed them to be trustworthy.
- He was taken to a mock-up display of potential new developments and the gains were clearly explained with a representative of Harlequin. The sales talk was very clear and backed up with connections to big enterprises, such as football clubs. He was also led to believe that several high-end celebrities had invested, as this was a good opportunity.
- He didn't receive any advice reports or correspondence.
- He hadn't been contributing to his existing pension, which was from a number of years ago, and believed the investment was a good idea due to the possibility of around £10,000-£15,000 per annum in returns.
- He has never been a high-net worth or sophisticated investor. At the time he was employed full-time and earning around £45,000 and owned a mortgaged property.
- He wasn't aware he had cause to complain about CBL until after he'd received compensation from the FSCS and the FSCS' January 2018 summary note claims for SIPP operators declared in default was brought to his attention.

One of our Investigators reviewed Mr W's complaint and said that they hadn't seen anything in the information provided which suggests Mr W was aware, or ought reasonably to have been aware, of cause for complaint against CBL more than three years before his complaint was made to it. She asked CBL to let her know if it disagreed with this. And she also went on to say that she felt that Mr W's complaint should be upheld.

While Mr W accepted our Investigator's findings, CBL responded with further comments. It said, amongst other things, that:

- It doesn't agree that the volume of business it received from 1 Stop with esoteric investments subsequently being made would be enough of a threshold to have triggered alarm bells for it. This sample size is too small for any quantitative research, management information or trends to be noticed. And 1 Stop's business only accounted for a small percentage of referrals to it.
- We've said that had it requested a suitability report it would have identified that 1 Stop didn't provide Mr W with advice on the underlying investment. But such a request, while an example of good practice, isn't a legislative requirement. In any event, Mr W confirmed he hadn't received advice on this in the declarations, that he understood the investment and risks and wanted to proceed regardless. And CBL highlighted in bold at the top of the Direct Investment Questionnaire that Mr W should obtain advice on the investment.
- Clients aren't prevented from making investments because they've chosen not to seek advice on the particular investment. It wouldn't be in the spirit of treating customers fairly to veto them from doing so. Particularly when the client, such as Mr W, confirmed they were aware of the risks, that they should seek advice but had chosen not to and yet still wished to proceed. Mr W had a few months in which he could have changed his mind, but he didn't.
- It drew parallels with *Adams v Carey* and said that in the High Court ruling, the judge confirmed the relationship between Mr Adams and Carey was on an execution-only basis and that he was responsible for his own investment decisions. The High Court held that the obligations of COBS 2.1.1 must be seen in the context of that relationship.
- It considered Mr W's investment instruction in line with information available at the time, as well as against what was and wasn't permissible under its scheme rules and HMRC legislation.
- Checks were completed to ensure Mr W was comfortable to proceed with the investment and furthermore, Mr W was resolute to proceed with this choice prior to CBL's involvement.

- Mr W has already been compensated for his claim by the FSCS and wouldn't ordinarily be granted application to litigate on the same claim again by the courts. And it doesn't agree that a top up of investment losses can be sought from it.
- By not accepting Mr W's business an inference could be made that it was making a judgement and provided advice as to the suitability of the investment, in direct contravention of its FCA permissions.
- It doesn't agree that it's unlikely another SIPP provider would have facilitated Mr W's transactions, given there was clearly a widespread SIPP provider acceptance of business from 1 Stop.

Because no agreement could be reached the case was passed to me for a decision.

I issued a provisional decision on Mr W's complaint and concluded that it had been made within our time limits and that it should be upheld.

While CBL didn't respond with any further information in respect of the content of the provisional decision itself, it did let Mr W know it was prepared to offer to settle his complaint. However, Mr W let us know that wanted to continue on with our Service to have a final decision and that he accepted my provisional decision.

### **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.

Having done so, I remain of the view that Mr W's complaint has been made within our time limits and that it should be upheld for largely the same reasons as those set out in my provisional decision, which I've largely repeated below.

When deciding what's fair and reasonable in all the circumstances of this complaint, I need to take account of relevant law and regulations, regulator's rules, guidance and standards, codes of practice and, where appropriate, what I think was good industry practice at the relevant time.

While I've considered the entirety of the detailed submissions the parties have provided, my decision focuses on what I consider to be the central issues. The purpose of my decision isn't to comment on every point or question made, rather it's to set out my decision and reasons for reaching it.

#### **Preliminary point – time limits**

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

While CBL raised our Service's 'time limits' in its final response letter, it no longer appears to be in dispute that Mr W's complaint was made in time for our Service to consider it. And, even if I thought Mr W's complaint was made more than three years after he was aware, or ought reasonably to have become aware, there may be a problem with his pension, I haven't seen anything to make me think he was or ought reasonably to have become aware that CBL may have responsibility for this more than three years before he complained to it in May 2018. So, I haven't considered this issue any further.

#### **Relevant considerations**

I think the FCA's Principles for Businesses – which are set out in the FCA's Handbook – are of particular relevance. These *“are a general statement of the fundamental obligations of firms under the regulatory system”* (PRIN 1.1.2G – at the relevant date). And Principles 2, 3 and 6 provide:

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

*“The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The Specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirements 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 hadn't 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 s.228 of the 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’ve 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 decision on a complaint without taking the Principles into account in deciding what’s 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. I’m therefore satisfied that the Principles are a relevant consideration that I must take into account when deciding this complaint.

On 18 May 2020, the High Court handed down its judgment in the case of *Adams v Options SIPP* [2020] EWHC 1229 (Ch). Mr Adams subsequently appealed the decision of the High Court and, on 1 April 2021, the Court of Appeal handed down its judgment in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474. I’ve taken account of both judgments when making this decision on Mr W’s case.

I note that the Principles for Businesses didn’t form part of Mr Adams’ pleadings in his initial case against Carey SIPP. And, HHJ Dight didn’t consider the application of the Principles to SIPP operators in his judgment. The Court of Appeal also gave no consideration to the application of the Principles to SIPP operators. So, neither judgment said anything about how the Principles apply to an Ombudsman’s consideration of a complaint. But, to be clear, I don’t say this means *Adams* isn’t a relevant consideration at all. As noted above, I’ve taken account of both judgments when making this decision on Mr W’s case.

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 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 had complied with the best interests rule on the facts of Mr Adams’ case.

The Court of Appeal rejected Mr Adams’ appeal against HHJ Dight’s dismissal of the COBS claim, on the basis he was seeking to advance a case that was radically different to that found in his initial pleadings. The Court found that this part of Mr Adams’ appeal didn’t 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 in *Adams v Options SIPP*, 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 paragraph 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.”*

I note there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams (summarised in paragraph 120 of the Court of Appeal judgment) and the issues in Mr W's complaint. 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. And he wasn't asked to consider the question of due diligence before Carey SIPP agreed to accept the investment into its SIPP.

In Mr W's complaint, amongst other things, I'm considering whether CBL ought to have identified that the business introduced by Mr H of 1 Stop and the Harlequin investment involved a significant risk of consumer detriment. And, if so, whether it ought to have declined to accept Mr W's applications.

The facts of Mr Adams' and Mr W's cases are also different. I make that point to highlight that there are factual differences between *Adams v Options SIPP* and Mr W's case. And I need to construe the duties CBL owed to Mr W under COBS 2.1.1R in light of the specific facts of his case.

So, I'm satisfied that COBS 2.1.1R is a relevant consideration – but that it needs to be considered alongside the remainder of the relevant considerations, and within the factual context of Mr W's case.

However, it's important to emphasise that I must determine this complaint by reference to what I think is fair and reasonable in all the circumstances of the case. And, in doing that, I'm 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. There is a clear and relevant point of difference between this complaint and the judgments in *Adams v Options SIPP*. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

I also want to emphasise that I don't say that CBL was under any obligation to advise Mr W on the SIPP and/or the underlying investments. Refusing to accept an application isn't the same thing as advising Mr W on the merits of the SIPP and/or the underlying investments. But I am satisfied CBL's obligations included deciding whether to accept particular investments into its SIPP and/or whether to accept introductions from particular businesses.

### The regulatory publications

The FCA (and its predecessor, the FSA) issued a number of publications which reminded SIPP operators of their obligations and which 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.

I've considered the relevance of these publications. And I've set out material parts of the publications here, although I've considered them in their entirety.

### The 2009 Thematic Review Report

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 clients and treat them fairly’) insofar as they are obliged to ensure the fair treatment of their customers. COBS 3.2.3(2) states that a member of a pension scheme is a ‘client’ for COBS purposes, and ‘Customer’ in terms of Principle 6 includes clients.*

*It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six TCF consumer outcomes.*

*...*

*We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the members 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 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 customers’ interests in this respect, with reference to Principle 3 of the Principles for Businesses (‘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”*

### The later publications

In the October 2013 finalised SIPP operator guidance, the FCA stated:

*“This guide, originally published in September 2009, has been updated to give firms further guidance to help meet the regulatory requirements. These are not new or amended requirements, but a reminder of regulatory responsibilities that became a requirement in April 2007.*

*All firms, regardless of whether they do or do not provide advice must meet Principle 6 and treat customers fairly. COBS 3.2.3(2) is clear that a member of a pension scheme is a ‘client’ for SIPP operators and so is a customer under Principle 6. It is a SIPP operator’s responsibility to assess its business with reference to our six TCF consumer outcomes.”*

The October 2013 finalised SIPP operator guidance also set out the following:

### ***“Relationships between firms that advise and introduce prospective members and SIPP operators***

*Examples of good practice we observed during our work with SIPP operators include the following:*

- *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for unauthorised business warnings.*
- *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*
- *Understanding the nature of the introducers’ work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.*
- *Being able to identify irregular investments, often indicated by unusually small or large transactions; or higher risk investments such as unquoted shares which may be illiquid. This would enable the firm to seek appropriate clarification, for example from the prospective member or their adviser, if it has any concerns.*
- *Identifying instances when prospective members waive their cancellation rights and the reasons for this.*

*Although the members' advisers are responsible for the SIPP investment advice given, as a SIPP operator the firm has a responsibility for the quality of the SIPP business it administers. Examples of good practice we have identified include:*

- conducting independent verification checks on members to ensure the information they are being supplied with, or that they are providing the firm with, is authentic and meets the firm's procedures and are not being used to launder money*
- having clear terms of business agreements in place which govern relationships and clarify responsibilities for relationships with other professional bodies such as solicitors and accountants, and*
- using non-regulated introducer checklists which demonstrate the SIPP operators have considered the additional risks involved in accepting business from nonregulated introducers*

In relation to due diligence, the October 2013 finalised SIPP operator guidance said:

***"Due diligence***

*Principle 2 of the FCA's Principles for Businesses requires all firms to conduct their business with due skill, care and diligence. All firms should ensure that they conduct and retain appropriate and sufficient due diligence (for example, checking and monitoring introducers as well as assessing that investments are appropriate for personal pension schemes) to help them justify their business decisions. In doing this SIPP operators should consider:*

- ensuring that all investments permitted by the scheme are permitted by HMRC, or where a tax charge is incurred, that charge is identifiable, HMRC is informed and the tax charge paid*
- periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme*
- having checks which may include, but are not limited to:*
  - ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*
  - undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*
- ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified*
- good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and*
- ensuring these benchmarks clearly identify those instances that would lead a firm to decline the proposed business, or to undertake further investigations such as instances of potential pension liberation, investments that may breach HMRC tax-relievable investments and non-standard investments that have not been approved by the firm"*

The July 2014 “*Dear CEO*” letter provides a further reminder that the Principles apply and an indication of the FCA’s expectations about the kinds of practical steps a SIPP operator might reasonably take to achieve the outcomes envisaged by the Principles.

The “*Dear CEO*” letter also sets out how a SIPP operator might meet its obligations in relation to investment due diligence. It says those obligations could be met by:

- correctly establishing and understanding the nature of an investment
- ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation
- ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable)
- ensuring that an investment can be independently valued, both at point of purchase and subsequently, and
- ensuring that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc.)

Although I’ve referred to selected parts of the publications to illustrate the relevance, I’ve considered these in their entirety.

I acknowledge that the 2009 and 2012 reports and the “*Dear CEO*” letter aren’t formal guidance (whereas the 2013 finalised guidance is). However, the fact that the reports and “*Dear CEO*” letter didn’t constitute formal guidance doesn’t mean the importance of these should be underestimated. These 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’s 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 go some way to indicate what I consider amounts to good industry practice, and I’m therefore satisfied it’s appropriate to take these into account.

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

At its introduction the 2009 Thematic Review Report says:

*“In this report, we describe the findings of this thematic review, and make clear what we expect of SIPP operator firms in the areas we reviewed. It also provides examples of good practices we found.”*

And, as referenced above, the report goes on to provide “*...examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms.*”

So, I’m satisfied that the 2009 Report is a reminder that the Principles apply and it gives 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. The Report set out the regulator's expectations of what SIPP operators should be doing and therefore indicates what I consider amounts to good industry practice at the relevant time. So I remain satisfied it's relevant and therefore appropriate to take it into account.

I think the Report is also directed at firms like CBL acting purely as SIPP operators, rather than just those providing advisory services. The Report says that *"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses..."* And it's noted prior to the good practice examples quoted above that *"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."*

I'm also satisfied that CBL, at the time of the events under consideration here, thought the 2009 review was relevant. CBL acknowledged in its submissions that the review is relevant to how it conducts its business and highlights some areas of good practice.

The remainder of the publications also provide a *reminder* that the Principles apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and to produce the outcomes envisaged by the Principles. In that respect, these publications also go some way to indicate what I consider amounts to good industry practice at the relevant time. I therefore remain satisfied it's appropriate to take them into account too.

Like the Ombudsman in the *BBSAL* case, I don't think the fact that some of the publications post-date the events that took place in relation to Mr W's complaint, mean that the examples of good practice they provide weren't 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 these existed throughout, as did the obligation to act in accordance with the Principles.

It's also clear from the text of the 2009 and 2012 Thematic Review 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's clear the standards themselves hadn't changed.

I note CBL's point that the judge in the *Adams* didn't consider the 2012 Thematic Review Report, 2013 SIPP operator guidance and 2014 *"Dear CEO"* letter to be of relevance to their consideration of Mr Adams' claim. But it doesn't follow that those publications are irrelevant to my consideration of what's fair and reasonable in the circumstances of this complaint. I'm required to take into account good industry practice at the relevant time. And, as mentioned, the publications indicate what I consider to amount to good industry practice at the relevant time.

That doesn't mean that in considering what's fair and reasonable, I'll only consider CBL's actions with these documents in mind. The reports, *"Dear CEO"* letter and guidance gave non-exhaustive examples of good practice. They didn't 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.

The regulator also issued an alert in 2013 about advisers giving advice to consumers on SIPPs without consideration of the underlying investment to be held in the SIPP. The alert (*"Advising on pension transfers with a view to investing pension monies into unregulated products through a SIPP"*) set out that this type of restricted advice didn't meet regulatory requirements. It said:

*"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 which may be in Unregulated Collective Investment Schemes).*

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

The alert post-dates the events in this complaint – but, again, it didn't set new standards. It highlighted that advisers using the restricted advice model discussed in the alert generally weren't meeting *existing* regulatory requirements and set out the regulator's concerns about industry practices at the time.

To be clear, I don't say the Principles or the publications obliged CBL to ensure the transactions were suitable for Mr W. It's accepted CBL wasn't required to give advice to Mr W, and couldn't give advice. And I accept the publications don't alter the meaning of, or the scope of, the Principles. But as I've said above these 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. And, as per the FCA's Enforcement Guide, publications of this type *"illustrate ways (but not the only ways) in which a person can comply with the relevant rules"*. So it's fair and reasonable for me to take them into account when deciding this complaint.

I'd also add that, even if I agreed that any publications or guidance that post-dated the events subject of this complaint don't help to clarify the type of good industry practice that existed at the relevant time (which I don't), that doesn't alter my view on what I consider to have been good industry practice at the time. That's because I find that the 2009 Report together with the Principles provide a very clear indication of what CBL could and should have done to comply with its regulatory obligations that existed at the relevant time before accepting Mr W's applications.

It's important to keep in mind the judge in *Adams v Options* didn't consider the regulatory publications in the context of considering what's fair and reasonable in all the circumstances, bearing in mind various matters including the Principles (as part of the regulator's rules) or good industry practice.

And in determining this complaint, I need to consider whether, in accepting Mr W's

application to establish a SIPP and to invest in Harlequin, CBL complied with its regulatory obligations: to act with due skill, care and diligence; to take reasonable care to organise and control its affairs responsibly and effectively; to pay due regard to the interests of its customers and treat them fairly; and to act honestly, fairly and professionally. In doing that, I'm looking to the Principles and the publications listed above to provide an indication of what CBL should have done to comply with its regulatory obligations and duties.

I'm deciding what's fair and reasonable in the circumstances of this complaint – and for all the reasons I've set out above I'm satisfied that the Principles and the publications listed above are relevant considerations to that decision.

And taking account of the factual context of this case, I think that in order for CBL to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), amongst other things it should have undertaken sufficient due diligence into 1 Stop and the business it (1 Stop) was introducing, both initially and on an ongoing basis.

In deciding what's fair and reasonable in the circumstances, it's appropriate to take an inquisitorial approach. And, ultimately, what I'll be looking at here is whether CBL took reasonable care, acted with due diligence, and treated Mr W fairly, in accordance with his best interests. And what I think's fair and reasonable in light of that. I consider the key issue in Mr W's complaint is whether it was fair and reasonable for CBL to have accepted his SIPP application in the first place. So, I need to determine whether CBL carried out appropriate due diligence checks on 1 Stop before deciding to accept Mr W's SIPP application.

As noted above, CBL says it did carry out due diligence on 1 Stop before accepting business from it. And from what I've seen I accept that it undertook some checks. However, the question I need to consider is whether CBL ought to, acting fairly and reasonably to meet its regulatory obligations and good industry practice, have identified that consumers introduced by 1 Stop were being put at significant risk of detriment. And, if so, whether CBL should therefore not have accepted Mr W's application from 1 Stop in the first place.

### *The contract between CBL and Mr W*

My decision is made on the understanding that CBL acted purely as a SIPP operator. I don't say CBL should (or could) have given advice to Mr W or otherwise have ensured the suitability of the SIPP or Harlequin investment for him. I accept that CBL made it clear to Mr W that it wasn't giving, nor was it able to give, advice and that it played an execution-only role in his SIPP investments. And that forms Mr W signed confirmed, amongst other things, that losses arising as a result of CBL acting on his instructions were his responsibility.

I've not overlooked or discounted the basis on which CBL was appointed. And my decision on what's fair and reasonable in the circumstances of Mr W's case is made with all of this in mind. So, I've proceeded on the understanding that CBL wasn't obliged – and wasn't able – to give advice to Mr W on the suitability of the SIPP or Harlequin investment. But I remain satisfied that, to meet its regulatory obligations when conducting its operation of SIPPs business, CBL had to decide whether to accept introductions of business and/or investments with the Principles in mind. And I don't agree that it couldn't have rejected introductions or applications without contravening its regulatory permissions by giving investment advice.

### *What did CBL's obligations mean in practice?*

The business CBL was conducting was its operation of SIPPs. The regulatory publications provided some examples of good industry practice observed by the FCA during its work with SIPP operators, including being satisfied that it should accept applications from a particular introducer, and being satisfied that a particular investment is an appropriate one to accept.

So I'm satisfied that, to meet its regulatory obligations and good industry practice, when conducting its business, CBL was required to consider whether to accept or reject particular referrals of business and particular applications for investment in its SIPPs.

CBL was under a regulatory obligation to conduct its business with due skill, care and diligence, organise and control its affairs responsibly and effectively, and pay due regard to the interests of its customers (including Mr W) and treat them fairly. Its obligations and duties in this respect weren't prescriptive and depended on the nature of the circumstances, information and events on an ongoing basis.

And I think CBL understood this at the time too, as I've seen that it did more than just check the FCA entries for 1 Stop to ensure it was regulated to give advice. It also entered into TOB with it, as set out further below. And it's apparent that CBL had access to some information about the type and volume of introductions it was receiving from 1 Stop, as it has been able to provide us with information about this when requested.

So, I think CBL ought to have understood before it received Mr W's application that its obligations meant that it had a responsibility to carry out appropriate checks on 1 Stop to ensure the quality of the business it was introducing. And I think CBL also ought to have understood that its obligations meant that it had a responsibility to carry out appropriate due diligence on investments, like Harlequin, before accepting these into its SIPPs.

So I'm satisfied that, to meet its regulatory obligations when conducting its business, CBL was also required to consider whether to accept or reject a particular investment (here Harlequin), with the Principles in mind.

#### CBL's due diligence on 1 Stop

As set out in the background above, while CBL said it would have carried out a google search to check for any adverse media on 1 Stop's and that it thinks that 1 Stop's business model would have been discussed in the initial meetings with it, CBL hasn't provided evidence that it did this at the time.

Having looked at the evidence CBL has provided to show what due diligence checks it carried out on 1 Stop and what conclusions it drew from these, this shows that, by the time it accepted Mr W's application, CBL had checked the FCA register to ensure 1 Stop and its directors were regulated and authorised to give financial advice. And that CBL had entered into TOB with 1 Stop.

These steps go some way towards meeting CBL's regulatory obligations and good industry practice. But I think CBL failed to conduct sufficient due diligence on 1 Stop before accepting business from it, or that CBL failed to draw fair and reasonable conclusions from what it did know about 1 Stop.

I think CBL ought reasonably to have concluded it shouldn't accept business from 1 Stop, and CBL shouldn't have accepted Mr W's application from it. I say this because:

- CBL was aware or should have been aware of potential risks of consumer detriment associated with business introduced by 1 Stop by the time of Mr W's application, as:
  - Consumers were being introduced to CBL by 1 Stop without having been given full regulated advice (that is advice on the transfer or switch to the SIPP and advice on the intended investment).
  - The introductions had anomalous features – high-risk business for unregulated overseas property developments and other esoteric investments.

And, even though 1 Stop had the necessary permissions to give full advice on the business it was introducing, it wasn't giving any advice on a large proportion of that business.

- CBL should've taken steps to address these risks (or, given these risks, have simply declined to deal further with 1 Stop).
- Such steps should have involved getting a fuller understanding of 1 Stop's business model – through requesting information from it and through independent checks.
- Such understanding would've revealed there was a significant risk of consumer detriment associated with introductions of business from 1 Stop.
- In the alternative 1 Stop would have been unwilling to answer or fully answer the questions about its business model.
- In either event CBL should've concluded it shouldn't accept introductions from 1 Stop.

I've set out below some more detail on the potential risks of consumer detriment either knew about or ought to have known about at the time of Mr W's application. These points overlap, to a degree, and should have been considered by CBL cumulatively.

#### *The type of investments being made by 1-Stop introduced consumers*

As I've said, it's clear CBL had access to information about the number and nature of introductions that 1 Stop made to it, as it's been able to provide details about this when requested. An example of good practice identified in the FCA's 2009 review was:

*“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.”*

Given all that I've said above, I don't think simply keeping records without scrutinising the information would be consistent with good industry practice and CBL's regulatory obligations. As highlighted in the 2009 review, the reason why the records are important is so that potentially unsuitable SIPPs can be identified.

During our investigation of Mr W's complaint, CBL said that 14 organic clients (i.e. not including those which it later took over as part of the acquisition of another business in May 2011) were introduced to CBL from 1 Stop over a six-month period between December 2009 and May 2010. While CBL has said this only accounted for around 2.25% of its new business over that period, it also said that just under 79% of these invested in Harlequin via their SIPP. And that Mr W's was the seventh introduction, albeit two of those invested in standard assets only.

So, by the time of Mr W's application in March 2010, CBL had already received several introductions from CBL over a period of four months and most of those customers invested in Harlequin or other non-standard investments.

I've also seen internal emails of CBL's from December 2012 in respect of 1 Stop's permissions being frozen, where CBL said it assumed this was because 1 Stop was selling all UCIS and advice had been questioned. While CBL may well have been surmising as to what might have happened, it's reasonable to think that CBL's comments were reflective of

and grounded in its experience of the type of business it had received from 1 Stop to date, as set out above.

As mentioned, I think it's fair to say that such investments are highly unlikely to be suitable for the vast majority of retail clients. They will generally only be suitable for a small proportion of the population – sophisticated and/or high net worth investors – and in respect of a small proportion of their pension. So I think CBL should've been concerned that introductions over a short period of time, relating largely to consumers investing in high-risk esoteric investments such as Harlequin, was unusual. This was a clear and obvious potential risk of consumer detriment.

### Lack of advice

CBL hasn't told us how many of the introductions from 1 Stop were transacted as execution-only business (i.e. without full regulated advice being given by it). But in light of the FCA publications, set out in the background above, it's reasonable to think this was most, if not all, of the business 1 Stop introduced to CBL. And, bearing in mind what I've said about the timing of Mr W's introduction to CBL, I think it's likely that 1 Stop had introduced business to CBL without providing full advice on several occasions before it received his application.

So I think that, from early on, CBL ought to have been on notice that 1 Stop, although a regulated business that had permissions to advise on all the business being introduced, wasn't a firm that was doing things in a conventional way. And I think CBL ought to have recognised that there was a risk here that CBL might be choosing to introduce some consumers not only without them being given full regulated advice but also without them having been offered full regulated advice.

I think this ought to have been a red flag for CBL in its dealings with 1 Stop, as it's highly unusual for regulated advice firms to be involved in execution-only transactions involving pension transfers to invest in high-risk esoteric investments, such as unregulated overseas property investment schemes. That's because the risks involved in such transactions are unlikely to be fully understood by most people, without obtaining regulated advice. I think it's fair to say that most advice firms decline to be involved in such transactions and certainly don't transact this kind of business in volume.

So, I think CBL either was aware, or ought reasonably to have been aware, that the type of business 1 Stop was introducing was high-risk and therefore carried a potential risk of consumer detriment on this basis too. And that it ought to have viewed this as serious cause for concern.

CBL entered into TOB with 1 Stop and, as part of this process, it was open to CBL to enquire whether full regulated advice would be made available to applicants introduced to it by 1 Stop. Particularly given CBL has said it anticipated around 20-30 introductions per month from 1 Stop, albeit I recognise it didn't go on to receive as many as that. But no correspondence I've seen between CBL and 1 Stop mentioned this.

As I've said, I've seen no evidence in this particular case that Mr W was offered and received (or declined) full regulated advice on his switch to and investment in the SIPP by 1 Stop (or any other regulated advisory firm). While Mr H of 1 Stop declared that he had advised Mr W to take out the SIPP in the SIPP application form, Mr W said later in the form that Mr H would be *assisting* him with – not advising him on, I note – the investments and that he intended to invest in Harlequin. And Mr W went on to declare elsewhere that he was making a complex investment – in Harlequin – without advice on this. And that he understood he hadn't received advice from any financial adviser in respect of the suitability

of the investment. In fact, Mr W confirmed on a few different CBL documents that he hadn't received any advice on the investment.

In light of this, I think CBL was made reasonably aware that Mr W hadn't received full regulated advice from 1 Stop. CBL doesn't seem to dispute this. Instead, it seems to have accepted Mr W's applications still on the basis that he confirmed he understood the investment risks himself and wanted to proceed regardless, having chosen not to seek advice on this.

I also think CBL ought to have been alive to the risk that an unregulated third party might have been involved in promoting the Harlequin investment to investors, like Mr W. I think it's unlikely that Mr W, based on his testimony and circumstances, found out about and independently determined to invest in Harlequin without any input from a third party. And the evidence suggests that Mr W was introduced to Harlequin and 1 Stop by an unregulated third-party, Mr B. As I've said above, Mr B's details were provided under '*Agent Name to Invoice & Pay*' on Mr W's Harlequin Property Reservation form.

Given CBL was aware customers like Mr W weren't receiving any regulated advice from 1 Stop on their Harlequin investments, I think it ought to have had significant cause for concern and that this ought to have caused CBL to consider the business it was receiving from 1 Stop very carefully.

Mr W was switching his pension to invest entirely in an esoteric overseas investment scheme – a move which was highly unlikely to be suitable for the vast majority of retail clients. And given full regulated advice hadn't been given or made available to Mr W, there was a clear and obvious potential risk of consumer detriment here.

#### *What fair and reasonable steps should CBL have taken in the circumstances?*

CBL could simply have concluded that, given the potential risks of consumer detriment – which I think were clear and obvious at the time – it shouldn't have continued to accept applications from 1 Stop and before it received Mr W's application. That would have been a fair and reasonable step to take in the circumstances. Alternatively, CBL could have taken fair and reasonable steps to address the potential risks of consumer detriment. I've set these out below.

#### *Requesting information directly from 1 Stop*

As part of its due diligence on 1 Stop, I think it's fair and reasonable to expect CBL, in line with its regulatory obligations, to have made some specific enquiries and obtained information about 1 Stop's business model. CBL ought to have found out more about how 1 Stop was operating before it accepted applications from it.

As set out above, the 2009 Thematic Review explained that the regulator would expect SIPP operators to have procedures and controls, and for management information to be gathered and analysed, so as to enable the identification of, amongst other things, '*consumer detriment such as unsuitable SIPPs*'. Further, that this could then be addressed in an appropriate manner '*...for example by contacting the members to confirm the position, or by contacting the firm giving advice and asking for clarification*'.

The October 2013 finalised SIPP guidance gave an example of good practice as:

*'Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they*

*recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.'*

And I think that CBL, prior to accepting Mr W's application, should've checked with 1 Stop about things like: how it came into contact with potential clients, what agreements it had in place with its clients, whether all of the clients it was introducing were being offered full regulated advice, what its arrangements with any unregulated businesses promoting investments were, how and why retail clients were interested in making these esoteric investments, whether it was aware of anyone else providing information to clients, how it was able to meet with or speak with all its clients, and what material was being provided to clients by it.

As I've said above, the type of form – the Direct Investment Questionnaire – that 1 Stop sent to CBL with Mr W's initial SIPP application pack said on it that this particular form was to be used when going ahead without advice on the investment. And the contents of the documentation we've seen on this complaint doesn't suggest 1 Stop was trying to mask what it was doing. And, on balance, I think it's more likely than not that if CBL had checked with 1 Stop and asked the type of questions I've mentioned earlier on in this section that 1 Stop would have provided a full response to the information sought.

CBL says that it would have discussed 1 Stop's business model at its initial meetings with it, although it hasn't provided any evidence to show what was discussed. CBL therefore was, or should have been aware of, the significant potential risk of consumer detriment either from those initial discussions with 1 Stop or more detailed discussions this ought to have led to.

In the alternative, if 1 Stop had been unwilling to answer such questions if put to it by CBL, I think it should simply then have declined to accept introductions from 1 Stop.

CBL might say that it didn't have to obtain this information from 1 Stop. But I think this was a fair and reasonable step to take, in the circumstances, to meet its regulatory obligations and good industry practice.

### *Making independent checks*

I think, in light of what I've said above, it would also have been fair and reasonable for CBL to meet its regulatory obligations and good industry practice, to have taken independent steps to satisfy itself that full regulated advice was being offered to applicants like Mr W.

The 2009 Thematic Review Report said:

*'...we would expect [SIPP operators] 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 members to confirm the position, or by contacting the firm giving advice and asking for clarification.**' (bold my emphasis)*

The 2009 Thematic Review Report also said that an example of good practice was:

*'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.'*

So I think it would've been fair and reasonable for CBL to speak to some applicants, like

Mr W, directly and to ask whether they'd been offered full regulated advice on their transactions and/or seek copies of the suitability reports.

CBL might say it couldn't comment on advice without potentially being in breach of its permissions. Again, I confirm that I accept CBL couldn't give advice. But it had to take reasonable steps to meet its regulatory obligations. And in my view such steps included addressing a potential risk of consumer detriment by speaking to applicants and/or having sight of advice letters, as this could have provided CBL with further insight into 1 Stop's business model, and helped to clarify to CBL whether full regulated advice on the overall proposition was being offered/given. This was a fair and reasonable step to take in reaction to the clear and obvious risks of consumer detriment I've mentioned.

*Had it taken these fair and reasonable steps, what should CBL have concluded?*

If CBL had undertaken these steps I think it ought to have identified, amongst others, the following risks before it received Mr W's application:

- Consumers were being introduced to CBL by 1 Stop without having been offered full regulated advice on the overall proposition.
- 1 Stop was having business referred to it by third parties, including unregulated introducers, and it was then introducing business to CBL.
- Some consumers might have been sold on the idea of transferring pension monies so as to invest in unregulated investments before the involvement of any regulated parties.

Each of these in isolation is very serious, but cumulatively I think they demonstrate that there was a significant risk of consumer detriment associated with introductions from 1 Stop. CBL ought to have concluded 1 Stop had a disregard for its consumers' best interests, and wasn't meeting many of its regulatory obligations.

As I've mentioned, the contemporaneous documentation, such as the questionnaires and investment purchase declarations, suggests that 1 Stop was being open about the limited service it was offering to consumers like Mr W. And had CBL carried out the type of due diligence I've mentioned above, I think it should have identified that consumers like Mr W introduced by 1 Stop hadn't been offered, or received, full regulated advice from 1 Stop on their transactions.

The approach 1 Stop was taking was a highly unusual role for an advisory firm to take. 1 Stop hadn't discussed the specific risks associated with unregulated investments with consumers like Mr W and it wasn't advising on the suitability of the overall proposition for consumers (i.e. including advice about the intended post-transfer unregulated investments). This raises significant questions about the motivations and competency of 1 Stop – particularly where consumers were being introduced by an unregulated third party like Mr B.

Had CBL taken appropriate steps in reaction to this, such as seeking clarification from some applicants introduced by 1 Stop at the time, like Mr W, I think it's more likely than not that the information CBL obtained would have accorded with what 1 Stop was stating in the contemporaneous documentation we've seen in Mr W's complaint, and with what is stated in the FCA's 14 April 2014 Final Notice. Namely, that 1 Stop wasn't offering consumers it was introducing to CBL any advice on investing in high-risk unregulated investments, like Harlequin, which investments consumers' pension monies were being transferred to CBL so as to effect.

I therefore think CBL ought to have concluded Mr W – and most likely applicants before him – didn't have full regulated advice on the overall proposition made available to them by 1 Stop. And I think that CBL ought to have viewed this as a significant point of concern. As retail consumers, like Mr W were switching pension monies to CBL to invest in high-risk esoteric investments like Harlequin, without the benefit of having been offered full regulated advice on those investments, by an advisory business which appeared to be actively avoiding its responsibility to give advice on the intended investments.

1 Stop was a regulated business that had permissions to advise on the establishment of a SIPP, the switch of monies into that SIPP and where monies would be invested post-transfer. But I think that from very early on CBL was aware, or ought to have been aware, that 1 Stop wasn't a firm that was doing things in a conventional way.

As I've said, it's unusual for regulated advice firms to be involved in transactions involving transfers to a SIPP to invest in high-risk esoteric investments, such as Harlequin, where no advice is being given by that firm on the esoteric investments. That's because the risks involved in such investments are unlikely to be fully understood by most people, without obtaining regulated advice. I think it's fair to say that most advice firms decline to be involved in such transactions. This ought to have been a red flag for CBL in its dealings with 1 Stop. And I think CBL ought to have identified that there was a risk that 1 Stop was choosing to introduce consumers without their having been offered full regulated advice. I think CBL ought to have viewed this as a serious cause for concern – this was a clear and obvious potential risk of consumer detriment in this case.

And I think CBL should have concluded, and before it accepted Mr W's business from 1 Stop, that it shouldn't accept introductions from it. I therefore conclude that it's fair and reasonable in the circumstances to say that CBL shouldn't have accepted Mr W's application from 1 Stop.

CBL didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr W fairly by accepting his application from 1 Stop. To my mind, CBL didn't meet its obligations or good industry practice at the relevant time, and allowed Mr W to be put at significant risk of detriment as a result.

#### *CBL's due diligence on Harlequin and what it should have concluded*

As I've said, CBL had a duty to conduct due diligence and give thought to whether to permit the investments within its SIPP. That's consistent with the Principles and the regulators' publications as set out earlier in this decision. And this is also seemingly consistent with CBL's own understanding of its obligations at the relevant time given that, amongst other things, it has said the following in respect of Harlequin:

- It had been accepting the Harlequin investment within its SIPPs from September 2009. And that by the time of Mr W's investment in May 2010, Harlequin literature had already been assessed for other clients.
- Harlequin had been an established trading company since 2001 with positive returns on investment. There was no cause for cause or for it to be considered an unallowable investment, until 2013 as highlighted by the FCA.
- It carried out a CreditSafe check on the investment in March 2010, which provided a very good credit worthiness score, relevant as of January 2010.
- It had investment allowability criteria.
- It reviewed Harlequin's accounts from January 2010. While the information available showed this was a non-standard investment, it was showing positive returns at the time so met CBL's criteria in respect of liquidity. And, in respect of the valuation of

- Harlequin, it based this on the information in the company accountancy reports.
- It understood the potential risks, which is why it highlighted to customer's that this was a non-standard investment and asked clients to complete a declaration evidencing they understood the risks and what was involved yet wanted to proceed on the basis it was a direct investment and they weren't receiving advice, including a property questionnaire and direct investment questionnaire.

I can also see that, on another case against CBL with our Service involving the Harlequin investment, CBL provided us with emails between its Managing Director and Harlequin Sales Director from 9 March 2010. CBL has said that these showed there was ongoing dialogue about the structure of the investment and ensuring there would be no issues that HMRC may treat it as property. In the emails, CBL said, amongst other things that:

- '[CBL's] **main concern** is that SIPP investors have a fairly good idea from the outset on how they are going to fund the total purchase' (my emphasis). And that it understood 30% was payable by initial deposit and that the SIPP is able to borrow funds, but only up to 50% of the net asset value.
- Harlequin had told it that the purchase price of a unit is generally well below final market value, with substantial growth in values in practice. And that Harlequin had previously told CBL about examples of current and final values on completion and of prices properties were currently being sold at. CBL said it understood that with that sort of growth there was ample scope for SIPP's to borrow to complete the purchase and keep within the limit of 50% of net asset value. And, in two places in its email, CBL asked Harlequin for any evidence to support the valuations (i.e. the values given in the verbal examples previously provided to CBL).
- Harlequin had told CBL that should capital growth not be sufficient the SIPP to borrow the full balance to complete the purchase, then Harlequin could arrange a loan for the individual investors. There would be joint ownership between the SIPP and individual though in that case and loans would be available on that basis.
- CBL asked Harlequin to confirm its understanding was correct.

It seems that rolling up payments until completion and the lending Harlequin said it could arrange for individuals to fund the remaining balance were some of the main selling points of the investment. And I think it's clear from the above that CBL had concerns about how investors were going to fund the remaining balance. CBL was clearly aware that individual investor's had potential liability for this, where the SIPP was only being used to fund the 30% deposit. And, as a result, CBL was seeking further evidence and reassurance from Harlequin as to this and the funding Harlequin had said it could arrange.

While I can see Harlequin told CBL in response that sales prices were showing enormous growth, that it invited CBL to its offices to prove this was the case and that Harlequin confirmed CBL's understanding in respect of funding, having carefully considered the information made available to us to date, I don't think CBL's actions went far enough or that CBL reached the correct conclusion.

I'm not currently satisfied CBL undertook sufficient due diligence on Harlequin before it decided to accept the investment into its SIPP's. As such, in my view, CBL didn't comply with its regulatory obligations and good practice, and it didn't act fairly and reasonably in its dealings Mr W, by not undertaking sufficient due diligence on the Harlequin investment before it accepted his application to invest in this. Further, based on what CBL knew or ought to have known had it undertaken sufficient due diligence, I think it failed to draw a reasonable conclusion on accepting this investment into its SIPP's, for the following reasons.

Despite CBL's concerns, it seems to have accepted what Harlequin told it in response without seeking or being given any further evidence in support of the sales values and growth levels it had been provided with in order to satisfy itself as to this in the way I think it should have. And I can't see that CBL asked Harlequin for any supporting information or evidence surrounding the lending it said it could arrange for consumers either.

I note that CBL declarations contained wording to try to make customers, such as Mr W, aware that if borrowing wasn't available in future or increases weren't sufficient to support the borrowing needed, then they would be required to personally pay the balance and that they were asked to declare that they had arrangements in place for this and that CBL wasn't liable for any losses. So it's clear that CBL still had concerns about how consumers would be able to fund the remaining payments, despite Harlequin's reassurances as to available borrowing. And I don't think it's reasonable for CBL to have sought to simply circumvent the concerns it had identified via such declarations to look to protect itself from the risks.

There doesn't appear to have been any *real* exploration by CBL as to whether a consumer could secure the funds needed from any source to meet contractual obligations and make staged payments. While CBL said in the declaration that there is a section in its property questionnaire for a customer to indicate how they expected to finance the purchase and there was a space in Mr W's for him tell CBL how he would fund the remainder of the purchase price, no details were provided as to this in Mr W's case and I can't see that CBL queried this any further with him or 1 Stop to satisfy itself as to this concern.

I'm not saying that CBL should have provided advice, but it should have ensured no consumer detriment by sense checking the transaction overall. Had CBL asked made further enquiries into how customers intended on making the stage repayments or asked Harlequin for more information about the lending arrangements that it said were available to it, CBL would likely have received confirmation of its concerns. And such declarations in the absence of CBL satisfying itself as to the viability of the borrowing arrangements advertised to allow customers to complete the investment isn't reasonable where there's a real risk of customer detriment.

In my opinion, the issues I've identified above should have, when considered objectively, put CBL on notice that there was a significant risk of consumer detriment. And, without more evidence to ensure the investment was an appropriate one to permit within its SIPPs, I'm satisfied that CBL shouldn't have accepted the Harlequin investment.

CBL ought to have drawn the conclusion I've set out, based on what was known at the time. It ought to have identified significant points of concern, which ought to have led it to conclude it should not accept the Harlequin investment. It ought to have identified that there was a high risk of consumer detriment here. And it's the failure of CBL's due diligence that's resulted in Mr W being treated unfairly and unreasonably.

To my mind, CBL didn't meet its regulatory obligations or good industry practice at the relevant time. I think it's fair and reasonable to conclude that CBL didn't act with due skill, care and diligence, and it didn't treat Mr W fairly, by accepting the Harlequin investment in his SIPP.

There's a difference between accepting or rejecting a particular investment for a SIPP and advising on its suitability for the individual investor. I accept that CBL wasn't expected to, nor was it able to, give advice to Mr W on the suitability of the SIPP and/or investment for him personally. To be clear, I'm not making a finding that CBL should have assessed the suitability of the investment for Mr W.

So my finding isn't that CBL should have concluded that Mr W wasn't a candidate for high

risk investments. It's that CBL should have concluded the investment wasn't acceptable for its SIPP's and it thereby failed to treat Mr W fairly or act with due skill, care and diligence when accepting the Harlequin investment into his SIPP.

I think it's important I emphasise here that I'm not saying that CBL should necessarily have discovered everything that later became known had it undertaken sufficient due diligence before accepting the investment into its SIPP. But I do think that appropriate checks would have revealed some fundamental issues which were, in and of themselves, sufficient basis for CBL to have declined to accept the Harlequin investment in its SIPP's.

### Summary of my findings on due diligence

For the reasons given above, CBL shouldn't have accepted Mr W's application to invest in Harlequin. And, to be clear, even if I thought CBL had undertaken adequate due diligence on 1 Stop and acted appropriately in accepting Mr W's business from it (which, as I've explained earlier, I don't), I'd still consider it fair and reasonable to uphold Mr W's complaint on the basis that CBL didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr W fairly, by accepting the Harlequin investment into his SIPP.

I make this point here to emphasise that while I've concluded *both* that CBL shouldn't have accepted Mr W's business from 1 Stop and also that it shouldn't have accepted his application to invest in Harlequin, had I only reached the conclusions I've set out above on one of those aspects and not also gone on to reach findings on the other aspect for completeness, I'd still consider it fair and reasonable in all the circumstances to uphold this complaint. That's because CBL didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr W fairly by accepting his business from 1 Stop. And because, separately, CBL also didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr L fairly, by accepting the investment into his SIPP. And to my mind, CBL didn't meet its regulatory obligations or good industry practice at the relevant times, and allowed Mr W to be put at significant risk of detriment as a result.

### Did CBL act fairly and reasonably in proceeding with Mr W's instructions?

CBL has said that it was reasonable to proceed in the light of the indemnity, as Mr W signed forms confirming he was relying on his own decisions or financial advice when making the investments, that he was solely responsible and that CBL didn't give him any advice. And that Mr W also declared that he understood how the investment worked and possible pitfalls.

For the reasons previously given above, I think CBL should have refused to accept Mr W's application from 1 Stop. So things shouldn't have got beyond that.

### *The indemnity*

The indemnity sought to confirm that Mr W was aware the investment was high risk, that he accepted responsibility for the outcome and would not hold CBL liable for any losses he may incur.

In my view it's fair and reasonable to say that just having Mr W sign indemnity declarations wasn't an effective way for CBL to meet its regulatory obligations to treat him fairly, given the concerns CBL ought to have had about his introduction and the intended investment.

CBL knew that Mr W had signed forms intended to indemnify it against losses that arose from acting on his instructions. And, in my opinion, relying on such indemnities when CBL knew, or ought to have known, Mr W's dealings with 1 Stop and the intended investments were putting him at significant risk wasn't the fair and reasonable thing to do. In the

circumstances I think very little comfort could have been taken from the declaration stating that Mr W understood the investment risks. Having identified the risks I've mentioned above, it's my view that the fair and reasonable thing to do would have been to refuse to accept Mr W's applications.

The Principles exist to ensure regulated firms treat their clients fairly. And I don't think the paperwork Mr W signed meant that CBL could ignore its duty to treat him fairly. I'm satisfied that indemnities contained within the contractual documents don't absolve CBL of its regulatory obligations to treat customers fairly when deciding whether to accept or reject business.

I'm satisfied that Mr W's SIPP shouldn't have been established and the opportunity to execute investment instructions or proceed in reliance on an indemnity shouldn't have arisen at all. And I'm firmly of the view that it wasn't fair and reasonable in all the circumstances for CBL to proceed with Mr W's application.

### **COBS 11.2.19R**

CBL has said that it's an execution only SIPP provider and it might say that COBS 11.2.19R obliged it to execute investment instructions. As I've said though, it wasn't fair and reasonable for CBL to have accepted Mr W's applications in the first place. So his SIPP shouldn't have been established and the opportunity to execute investment instructions shouldn't have arisen at all.

In any event, an argument about having to execute the transaction as a result of COBS 11.2.19R was considered and rejected by the judge in BBSAL. In that case Jacobs J said:

*'The heading to COBS 11.2.1R shows that it is concerned with the manner in which orders are to be executed: i.e. on terms most favourable to the client. This is consistent with the heading to COBS 11.2 as a whole, namely: "Best execution". The text of COBS 11.2.1R is to the same effect. The expression "when executing orders" indicates that it is looking at the moment when the firm comes to execute the order, and the way in which the firm must then conduct itself. It is concerned with the "mechanics" of execution; a conclusion reached, albeit in a different context, in Bailey & Anr v Barclays Bank [2014] EWHC 2882 (QB), paras [34] – [35]. It is not addressing an anterior question, namely whether a particular order should be executed at all. I agree with the FCA's submission that COBS 11.2 is a section of the Handbook concerned with the method of execution of client orders, and is designed to achieve a high quality of execution. It presupposes that there is an order being executed, and refers to the factors that must be taken into account when deciding how best to execute the order. It has nothing to do with the question of whether or not the order should be accepted in the first place.'*

So I'm satisfied that Mr W's SIPP shouldn't have been established and the opportunity to execute investment instructions or proceed in reliance on an indemnity shouldn't have arisen at all. And I'm firmly of the view that it wasn't fair and reasonable in all the circumstances for CBL to proceed with Mr W's application.

### **Is it fair to ask CBL to compensate Mr W in the circumstances?**

#### ***The involvement of other parties***

In this decision I'm considering Mr W's complaint about CBL. However, I accept that other regulated parties were involved in the transactions complained about – 1 Stop and Mr B. But

our Service won't look at complaints against 1 Stop, as it's been dissolved and no longer exists as a regulated business. We also can't look at complaints about Mr B.

The DISP rules set out that when an Ombudsman's determination includes a money award, then that money award may be such amount as the Ombudsman considers to be fair compensation for financial loss, whether or not a Court would award compensation (DISP 3.7.2R).

As I set out above, I think it's fair and reasonable in the circumstances of this case to hold CBL accountable for its own failure to comply with its regulatory obligations, good industry practice and to treat Mr W fairly. The starting point therefore, is that it would be fair to require CBL to pay Mr W compensation for the loss he's suffered as a result of its failings. I've carefully considered if there's any reason why it wouldn't be fair to ask CBL to compensate Mr W for his loss, including whether it would be fair to hold another party liable in full or in part. And, in the circumstances, I consider it appropriate and fair in the circumstances for CBL to compensate Mr W to the full extent of the financial losses he's suffered due to CBL's failings.

I accept that Harlequin, 1 Stop and Mr B might have some responsibility for initiating the course of action that led to Mr W's loss. However, I'm satisfied that it's also the case that if CBL had complied with its own distinct regulatory obligations as a SIPP operator, the arrangement for Mr W wouldn't have come about in the first place, and the loss he's suffered could have been avoided. I want to make clear that I've carefully taken everything CBL has said into consideration. And it's my view that it's appropriate and fair in the circumstances for CBL to compensate Mr W to the full extent of the financial losses he's suffered due to CBL's failings. And, taking into account the combination of factors I've set out, I'm not persuaded that it would be appropriate or fair in the circumstances to reduce the compensation amount that CBL's liable to pay to Mr W.

To be clear, I'm not making a finding that CBL should have assessed the suitability of the SIPP or investment for Mr W. I accept that CBL wasn't obligated to give advice to Mr W, or otherwise to ensure the suitability of the pension wrapper or investments for him. Rather, I'm looking at CBL's separate role and responsibilities – and for the reasons I've explained, I think it failed in meeting those responsibilities.

#### *Mr W taking responsibility for his own investment decisions*

Section 5(2)(d) of the FSMA (now section 1C) requires the FCA, in securing an appropriate degree of protection for consumers, to have regard to, amongst other things, the general principle that consumers should take responsibility for their own investment decisions.

Having considered this point I'm satisfied that it wouldn't be fair or reasonable to say Mr W's actions mean he should bear the loss arising as a result of CBL's failings.

For the reasons given above, I think that if CBL had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted Mr W's introduction from 1 Stop. That should have been the end of the matter – if that had happened, I'm satisfied the arrangement for Mr W wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

As I've made clear, CBL needed to carry out appropriate due diligence on 1 Stop and reach the right conclusions. I think it failed to do this. And merely having Mr W sign forms containing declarations wasn't an effective way of CBL meeting its obligations, or of escaping liability where it failed to meet these.

1 Stop was a regulated firm with the necessary permissions to advise on the transactions this complaint concerns. I'm satisfied that in his dealings with it, Mr W trusted 1 Stop to act in his best interests. Mr W also then used the services of a regulated personal pension provider in CBL. So, overall, I'm satisfied that in the circumstances, for all the reasons given, it's fair to say CBL should compensate Mr W for the loss he's suffered. I don't think it would be fair to say in the circumstances that Mr W should suffer the loss because he ultimately instructed the transactions to be effected.

*Would Mr W's application have gone ahead elsewhere if CBL had declined it?*

I've considered whether, in the circumstances, Mr W would have gone ahead with the switch and the investment if CBL had refused his application from 1 Stop. In *Adams v Options SIPP*, the judge found that Mr Adams would've proceeded with the transaction regardless. HHJ Dight says (at paragraph 32):

*'The Claimant knew that it was a high risk and speculative investment but nevertheless decided to proceed with it, because of the cash incentive.'*

Mr W has said that he recalls being told about the potential investment returns and that it was a good opportunity. And I recognise Mr W signed a declaration confirming he understood and was comfortable with the high level of risk and wished to proceed. But Mr W was a retail customer. This was all of Mr W's pension monies with the SIPP. And, as I've said, I think CBL was made aware that Mr W hadn't been given regulated advice on the switch or the underlying investments.

And, in any case, I'm not satisfied that Mr W was determined to move forward with the transactions in order to take advantage of a cash incentive. I've not seen any evidence to show Mr W was paid a cash incentive. It therefore cannot be said he was incentivised to enter into the transaction. And, on balance, I'm satisfied that Mr W, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for himself. So, in my opinion, this case is very different from that of Mr Adams.

Further, I don't think it's fair and reasonable to say that CBL shouldn't compensate Mr W for his loss on the basis of speculation that another SIPP operator would've made the same mistakes as I've found CBL did. I think it's fair instead to assume that another SIPP provider would've complied with its regulatory obligations and acted according to good industry practice, and therefore wouldn't have accepted Mr W's application from 1 Stop or permitted the Harlequin investment.

On balance, I think it's fair and reasonable to direct CBL to pay Mr W compensation in the circumstances. While I accept that other parties might have some responsibility for initiating the course of action that's led to Mr W's loss, I consider that CBL failed to comply with its own regulatory obligations and didn't put a stop to the transactions proceeding when it had the opportunity to do so by declining to accept Mr W's applications.

Having carefully considered all of the circumstances, I'm satisfied it's fair and reasonable to conclude that if CBL had refused to accept Mr W's application from 1 Stop, the transactions this complaint concerns wouldn't still have gone ahead. So, overall, I do think it's fair and reasonable to direct CBL to pay Mr W compensation in the circumstances.

In making these findings, I've taken into account the potential contribution made by other parties to the losses suffered by Mr W. In my view, in considering what fair compensation looks like in this case, it's reasonable to make an award against CBL that requires it to compensate Mr W for the full measure of his loss. 1 Stop was reliant on CBL to facilitate access to Mr W's pension. CBL accepted Mr W's business from 1 Stop and, but for CBL's

failings, I'm satisfied that Mr W's pension monies wouldn't have been transferred to CBL or invested in the Harlequin investment.

As such, I'm not asking CBL to account for loss that goes beyond the consequences of its failings. I'm satisfied those failings have caused the full extent of the loss in question. That other parties might also be responsible for that same loss is a distinct matter. However, that fact shouldn't impact on Mr W's right to fair compensation from CBL for the full amount of his loss. The key point here is that but for CBL's failings, Mr W wouldn't have suffered the loss she's suffered. As such, I'm of the opinion that it's appropriate and fair in the circumstances for CBL to compensate Mr W to the full extent of the financial losses he's suffered due to its failings, and notwithstanding any failings by other firms involved in the transactions.

### In conclusion

Taking everything into account, I think that in the circumstances of this case it's fair and reasonable for me to conclude that CBL should have decided not to accept business from 1 Stop before it had received Mr W's application from it. I conclude that if CBL hadn't accepted Mr W's introduction from 1 Stop, he wouldn't have established a CBL SIPP, transferred his pension monies into it or invested in the Harlequin investment.

I say this having given careful consideration to the *Adams v Options* judgments, but also bearing in mind that my role is to reach a decision that's fair and reasonable in the circumstances of the case having taken account of all relevant considerations.

### **Putting things right**

My aim is to return Mr W to the position he would now be in but for what I consider to be CBL's due diligence failings.

In light of the above, I think that CBL should calculate fair compensation by comparing the current position to the position Mr W would be in if he hadn't switched from his existing pension plan.

To date, we haven't received anything to suggest this was anything other than a defined contribution plan without any guarantees attached. Neither Mr W nor CBL have disputed this, despite being made aware it won't be possible for us to amend this once any final decision has been issued on the complaint. So, I've proceeded on the basis that there were no such guarantees.

In summary, CBL should:

1. Obtain the current notional value, as at the date of this decision, of Mr W's previous pension plan, if this hadn't been transferred to the CBL SIPP.
2. Obtain the actual current value of Mr W's CBL SIPP, as at the date of this decision, less any outstanding charges.
3. Deduct the sum arrived at in step 2) from the sum arrived at in step 1).
4. Pay a commercial value to buy any illiquid investments (or treat them as having a zero value).
5. Pay an amount into Mr W's CBL SIPP, so that the transfer value of this is increased by an amount equal to the loss calculated in step 3). This payment should take account of any available tax relief and the effect of charges. The payment should

also take account of interest as set out below.

6. Pay Mr W £500 for the distress and inconvenience the problems with his pension have caused him.

I've explained how CBL should carry out the calculation, set out in steps 1 - 6 above, in further detail below:

1. Obtain the current notional value, as at the date of this decision, of Mr W's previous pension plan, if it hadn't been transferred to the CBL SIPP.

CBL should ask the operator of Mr W's previous pension plan to calculate the current notional value of this, as at the date of this decision, had he not transferred into the SIPP. CBL must also ask the same operator to make a notional allowance in the calculations, so as to allow for any additional sums Mr W has contributed to, or withdrawn from, his CBL SIPP since the outset. To be clear this doesn't include SIPP charges or fees paid to third parties like an adviser.

Any notional contributions or notional withdrawals to be allowed for in the calculations should be deemed to have occurred on the date on which monies were actually credited to, or withdrawn from, the CB SIPP by Mr W.

If there are any difficulties in obtaining a notional valuation from the operator of Mr W's previous pension plan, CBL should instead calculate a notional valuation by ascertaining what the monies transferred away from this would now be worth, as at the date of this decision, had these achieved a return from the date of transfer equivalent to the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index).

I'm satisfied that's a reasonable proxy for the type of return that could have been achieved over the period in question.

I acknowledge that Mr W has received a sum of compensation from the FSCS, and that he has had the use of the monies received from the FSCS. The terms of Mr W's reassignment of rights require him to return compensation paid by the FSCS in the event this complaint is successful, and I understand that the FSCS will ordinarily enforce the terms of the assignment if required. So, I think it's fair and reasonable to make no *permanent* deduction in the redress calculation for the compensation Mr W received from the FSCS. And it will be for Mr W make the arrangements to make any repayments he needs to make to the FSCS. However, I do think it's fair and reasonable to allow for a *temporary* notional deduction equivalent to the payment(s) Mr W actually received from the FSCS for a period of the calculation, so that the payment(s) ceases to accrue any return in the calculation during that period.

As such, if it wishes, CBL may make an allowance in the form of a notional withdrawal (deduction) equivalent to the payment(s) Mr W received from the FSCS following the claim about 1 Stop, and on the date the payment(s) was actually paid to Mr W. Where such a deduction is made there must also be a corresponding notional contribution (addition), at the date of my final decision equivalent to all FSCS payment(s) notionally deducted earlier in the calculation.

To do this, CBL should calculate the proportion of the total FSCS' payment(s) that it's reasonable to apportion to each transfer into the SIPP, this should be proportionate to the actual sums transferred in. And CBL should then ask the operators of Mr W's previous pension plan(s) to allow for the relevant notional withdrawal(s) in the

manner specified above. The total notional deductions allowed for shouldn't equate to any more than the actual payment(s) from the FSCS that Mr W received. CBL must also then allow for a corresponding notional contribution (addition) as at the date my final decision, equivalent to the accumulated FSCS payment(s) notionally deducted by the operators of Mr W's previous pension plan(s).

Where there are any difficulties in obtaining notional valuations from the previous operators, CBL can instead allow for both the notional withdrawal(s) and contribution(s) in the notional calculation it performs, provided it does so in accordance with the approach set out above.

2. Obtain the actual current value of Mr W's CBL SIPP, as at the date of this decision, less any outstanding charges.

This should be the current value as at the date of this decision.

3. Deduct the sum arrived at in step 2) from the sum arrived at in step 1).

The total sum calculated in step 1) minus the sum arrived at in step 2), is the loss to Mr W's pension provisions.

4. Pay a commercial value to buy Mr W's share in any investments that cannot currently be redeemed.

I'm satisfied that Mr W's CBL SIPP only still exists because of the illiquid investments that are held within it. And that but for these investments Mr W's monies could have been transferred away from CBL. In order for the SIPP to be closed and further SIPP fees to be prevented, any remaining investments need to be removed from the SIPP.

To do this CBL should reach an amount it's willing to accept as a commercial value for the investments, and pay this sum into the SIPP and take ownership of the relevant investments.

If CBL is unwilling or unable to purchase the investments, then the actual value of any investments it doesn't purchase should be assumed to be nil for the purposes of the redress calculation. To be clear, this would include their being given a nil value for the purposes of ascertaining the current value of Mr W's SIPP in step 2).

If CBL doesn't purchase the investments, it may ask Mr W to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from these investments. That undertaking should allow for the effect of any tax and charges on the amount Mr W may receive from the investments, and any eventual sums he would be able to access from the SIPP. CBL will need to meet any costs in drawing up the undertaking.

5. Pay an amount into Mr W's CBL SIPP, so that the transfer value of this is increased by an amount equal to the loss calculated in step 3). This payment should take account of any available tax relief and the effect of charges. The payment should also take account of interest as set out below.

The amount paid should allow for the effect of charges and any available tax relief. Compensation shouldn't be paid into a pension plan if it would conflict with any existing protections or allowances.

If CBL is unable to pay the compensation into Mr W's SIPP, or if doing so would give rise to protection or allowance issues, it should instead pay that amount direct to her. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore, the compensation should be reduced to notionally allow for any income tax that would otherwise have been paid.

The notional allowance should be calculated using Mr W's actual or expected marginal rate of tax in retirement at his selected retirement age.

It's reasonable to assume that Mr W is likely to be a basic rate taxpayer at his selected retirement age, so the reduction would equal 20%. However, if Mr W would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

Neither Mr W nor CBL have disputed that this is a reasonable assumption. That's despite me having let them know that it won't be possible for us to amend this assumption once any final decision has been issued on the complaint.

6. Pay Mr W £500 for the distress and inconvenience the problems with his pension have caused him.

In addition to the financial loss that Mr W has suffered as a result of the problems with his pension, I think that the loss suffered to Mr W's pension provision has caused him distress. Mr W lost most of his CBL SIPP pension provision when he was in his 50's and I think it's unlikely he can afford such a loss, so I think this is likely to have caused him worry. And I think that it's fair for CBL to compensate him for this as well.

CBL must also provide the details of its redress calculation to Mr W in a clear, simple format.

#### *SIPP fees*

If the investment/s can't be removed from the SIPP, and because of this it can't be closed compensation has been paid, then it wouldn't be fair for Mr W to have to pay annual SIPP fees to keep the SIPP open. So, if the SIPP needs to be kept open only because of the illiquid investments 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 W or into his SIPP within 28 days of the date CBL receives notification of Mr W's acceptance of my final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation isn't paid within 28 days.

#### **My final decision**

For the reasons given, my final decision is that this complaint is upheld and Curtis Banks Limited must calculate and pay fair compensation to Mr W as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 24 July 2024.

Holly Jackson  
**Ombudsman**