DRN-5020374

The complaint

Mr V 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 investment, causing him a financial loss. He says it should compensate him for this.

For simplicity, I refer to Mr V 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 V'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.

Harris Knights and Co Limited ('Harris Knights')

At the time of the events complained of, Harris Knights 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 Harris Knights entry on the FCA Register. This says that Harris Knights permissions included advising on investments (except on Pension Transfers and Pension Opt Outs). Other permissions Harris Knights held included arranging (bringing about) deals in investments.

From July 2015, Harris Knights was no longer authorised by the FCA. And, in late 2015, it went into liquidation.

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. Almost no properties were ever constructed and 99 percent of those who invested made no return.

The transaction

On 17 August 2009, CBL received a letter from Harris Knights which said it enclosed, amongst other things, Mr V's:

- SIPP application form, signed and dated 13 August 2009.
- Two Harlequin Property Questionnaires, also signed and dated 13 August 2009.
- Relevant transfer forms.

In the 'Introducer' section of Mr V'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 – a Mr T of Harris Knights details were provided and it set out that Harris Knights would be paid a one-off fee of £900 plus £250 per annum in renewal payments. Under the signed 'Introducer Declaration' section Mr T of Harris Knights also declared, amongst other things, that he'd had advised Mr V to take out the SIPP. And that where transfers were made from other pension arrangements into the SIPP, he confirmed he had advised Mr V on the suitability of the transfer.

The 'Investment Details' section with a sub-heading '*If someone will be assisting you with investments, please give their details below*', had 'N/A' written in it. And Mr V went on to say that he intended to invest in commercial property and he noted down that this was in a hotel room. And under '*Cancellation Rights*', Mr V ticked a box to confirm he wanted to waive his 30-day SIPP cancellation rights.

Mr V also said on the application that he was employed as sole trader and that he expected to retire at age 65.

Mr V's Property Questionnaires set out, amongst other things, that:

- Mr V wanted to invest in Harlequin Marquis Estate and Merricks Beach Resort.
- The purchase prices were £200,000 and £130,000 respectively. There was space for Mr V to detail how he'd fund the remainder, such as scheme borrowing, cash within the scheme or contribution and 'TBA' was written in these sections, seemingly standing for 'To Be Arranged'.

And at the bottom Mr V 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 in response 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 24 August 2009, Mr V sent a firm (that I'll refer to as 'Firm C') a typed letter which said this was his letter of request to facilitate the transfer of his OPS to CBL with immediate effect and that as a financial adviser who'd been in the industry for years, he was fully aware of the benefits he was giving up and wished to go ahead with the transfer regardless. Mr V also said that he agreed to be charged 1.44% of the transfer value by Firm C, in addition to Harris Knights costs, along with a fee if the transfer didn't go ahead.

Firm C wrote to Mr V in response on 28 August 2009 and said that Harris Knights had contacted it in respect of the transfer of his DB scheme. It said that Harris Knights didn't have permissions to carry out pension transfer business, so it had asked Firm C to do so. And that under normal circumstances it would investigate the suitability of the transfer. However, Mr V had said that he didn't want any advice and wanted to transfer regardless to the CBL SIPP to purchase foreign property. And that:

> '*On the basis that you have informed us that you are a financial adviser, and therefore aware of the benefits you are giving up, you have asked us to process this transfer on an execution only basis i.e. we have given you no advice whatsoever on the suitability of this transfer or the receiving product or provider*'.

It seems the letter went on to say that Firm C had offered Mr V:

> '*full advice which you have declined, we have also offered to produce a full Transfer Analysis report which you have also declined, without this we believe it is unwise to conduct such a transfer, although you still wish to proceed. You wish to purchase a foreign property through a SIPP and are not concerned with what you may lose*.'.

It appears Mr V signed this letter, accepting the above statements and agreeing to the following declaration:

> '*I understand that I have not received any advice what-so-ever from* [Firm C] *and therefore do not hold them responsible for the transfer in any way.*
>
> *I fully accept that the likelihood is that guaranteed benefits will be lost as a result of this transfer and as a financial adviser myself, I take full responsibility for this decision.*
>
> [Firm C] *have explained that as I am not FSA Regulated for pension transfers the likelihood is that I may have missed some of the vital reasons why not to transfer.*'.

On 8 September 2009, CBL emailed Harris Knights explaining that it had heard from Firm C and understood that Mr V had chosen not to receive any advice on the suitability of the

transfer. So CBL asked Harris Knights to confirm whether it should indicate on its reports to the FCA that Mr V either didn't receive advice from Harris Knights or Firm C specifically.

In response, in an undated email, Harris Knights confirmed to CBL that its assumption was correct. Mr V received no advice from it and that it recommended he contact Firm C for correct advice, which it understands was rejected by Mr V who had elected as a past financial adviser to request an execution only transfer and proceed with that through Firm C. Such that a percentage of the transfer value would be paid to Firm C, while the agreed fees in the SIPP application would be paid to it as Harris Knights had set up the SIPP.

Although CBL doesn't appear to have provided a copy in Mr V's case – despite being asked to do so in response to my provisional decision – I understand from other similar cases with our Service against CBL involving the Harlequin investment, that customers were asked to sign a Harlequin Property Investments Declaration which said, amongst other things, at the top in bold that:

> '*You choose 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'*.

And this 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 the customer should have a clear idea of how the total is likely to be financed by the SIPP. If it turns out the customer's SIPP is unable to finance all the purchase, then they 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 SIPP where increases in the property value can be taken into account.
- 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, the customer may have to find other means of financing the purchase. And that when the customer completes its property questionnaire there is a section to indicate how they expect to finance the purchase.
- The customer was purchasing an off-plan unit and 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 they expected.

And customers were also asked to declare that they understood that:

- They'd received no advice from CBL or any financial adviser in respect of the suitability of the investment.
- The possible pitfalls as set out.
- They nor anyone connected with them has any right to use the property.

- They had a clear idea as to how they expected to finance the purchase and were confident this could be achieved.
- They accepted full responsibility for the outcome of the investment and won't hold CBL liable for losses or charges they may incur.

Mr V's CBL SIPP was established. And, in mid-September 2009, just under £110,000 was switched into Mr V's CBL SIPP from three of his existing pension schemes, one of which was a defined benefit ('DB') occupational pension scheme.

Two Harlequin contracts were put in place which set out, for example, the payment schedule and target completion date of the end of December 2012 and 2013 respectively. And, on 14 September 2009, a total of £99,000 of Mr V's CBL SIPP pension monies was invested in Harlequin, representing the 30% first stage payment provided for in the contract schedules.

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

Mr V's complaint

Mr V made a claim to the Financial Services Compensation Scheme ('FSCS') about Harris Knights in or around July 2015. I can see that over the course of Mr V's FSCS correspondence he explained, amongst other things, that:

- He was referred to Harris Knights by Harlequin and no consideration was given to his personal circumstances or objectives. He put his trust in Harris Knights to do the right thing by him and relied on it, paying it a fee.
- Harris Knights advised him to take out the CBL SIPP as per the SIPP application form – he'd never heard of a SIPP or CBL before – but he received no advice on the suitability of the transfer. Harris Knights was the main influence in him taking out the CBL SIPP, while Harlequin influenced his investment decision.
- While Mr V previously held authorisation from 2001 to 2005, he was only an investment adviser during that time for 14 months, during that time he had very little experience of the investments sales process and he had no pensions knowledge, which is why he ended his investment authorisation in June 2003, over six years before his contact with Harris Knights.
- From that point on he became a mortgage adviser only, until he gave up financial services in 2007, two and a half years before his contact with Harris Knights. Mr V said that at that time he was experiencing financial difficulty and was as far removed from financial services as could be. At the time of the events complained of, he was working in construction rather than financial services, earning around £10,000 per year, with no savings or other investments and liabilities of around £20,000 in addition to a mortgage of around £150,000.

In mid-2015 and then again in 2018, the FSCS declined Mr V's claim. It most recently said, in summary, that Mr V's application to it confirmed that Harlequin referred him to Harris Knights, which suggests he'd already made his decision to invest prior to engaging it. And that while it wasn't suggesting that Mr V had any experience in such matters, given the content of Firm C's letter Mr V ought to have known he needed advice and that his refusal to do so was the primary cause of his loss.

Mr V wrote to CBL, via his representatives, in December 2018 detailing his complaint, seemingly after first approaching CBL to raise a dispute about this around late 2017. He said, in summary, that it didn't do enough due diligence on 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 February 2019. It said, in summary, that it requires new applications to be introduced to it via a regulated financial adviser, as this provides it with assurance that investors have received relevant financial advice, ensuring that the CBL product chosen is right for the customers circumstances and needs. Mr V signed declarations 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 investments worked and possible pitfalls. CBL said its duties were limited to ensuring the investment was permissible within the SIPP for tax purposes. The investments met CBL's allowable investment criteria and there was no reason to suggest that either was of a higher-than-expected risk. And, in addition, Mr V confirmed to Firm C that he wanted to transfer regardless of the benefits he was giving up.

Unhappy with this response, Mr V referred his complaint to our Service. And, amongst other things, CBL said in its responses in respect of Mr V's complaint and on another similar complaint with our Service involving the Harlequin investment that:

- On 21 July 2009, Mr K of Harris Knights 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 Harris Knights and its directors at intervals, such as July 2009, January and September 2010 and May 2011, to ensure it was regulated. And checks on Companies House.
- It would have carried out an internet search to check for any adverse media on the introducer, although CBL hasn't provided evidence that it did this at the time despite me asking it to do so in response to my provisional decision.
- It received its first introduction from Harris Knights on 17 August 2009 and the last on 29 April 2010. The introductions to it from Harris Knights accounted for around 10.05% of CBL's new business over that period. And 92% of the introductions invested in non-mainstream investments. 3.5% of the business it received from Harris Knights included defined benefit transfers.
- It stopped accepting business from Harris Knights in July 2015 when it ceased to be authorised by the FCA.
- It's an execution only SIPP provider. It didn't provide any advice to Mr V. 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.
- It made Mr V 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.
- 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 concern 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 Harlequin 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 me asking it to do so in response 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.

Mr V told us in a signed witness statement, amongst other things, that:

- He was first introduced to Harlequin by a friend, who'd also invested in it. After looking at his friend's brochures, Mr V was impressed and made an appointment to visit Harlequin's offices. Ways to invest were discussed including cash, remortgaging to raise capital and investing through a pension.
- Mr V returned to Harlequin a week later to go to a well-attended seminar and decided he wanted to invest after hearing of well-known partners and celebrity endorsements.
- A Harlequin representative told Mr V that his best option was to use his frozen pensions, as these wouldn't provide enough to live on in retirement. And the returns from it along with the funds from the sale of the property when he retired would be far more. Mr V was referred to Harris Knights to arrange this.
- Harris Knights set up the CBL SIPP and the meeting with Firm C. Harris Knights also agreed to take its fees from his pension, which was ideal as he didn't have enough to pay from his own resources.
- He decided to complete the transaction and invest as he'd gained total confidence and trust in Harlequin due to what he had heard from it and because of what he was subsequently told by Harris Knights. He was further reassured that professional regulated companies were involved with Harlequin.

One of our Investigators reviewed Mr V's complaint and didn't uphold it. They said that they hadn't considered whether or not CBL carried out sufficient due diligence into Harris Knight and/or the Harlequin investment, as they didn't think it would be fair or reasonable to ask CBL to compensate Mr V in the circumstances. This was on the basis that it was likely Mr V would have gone ahead to make the transfer and investment elsewhere in any event.

Mr V didn't agree. And his representative said, in summary, that:

- Mr V disagrees that the declarations made between him, Harris Knights and Firm C had any impact on the regulatory obligations owed to him by CBL.
- These advisers had a significant financial interest in Mr V proceeding with the transfer and investment, alerting CBL to a possible conflict of interest.
- The business model adopted by the advisers was clearly one attempting to avoid having to comply with the usual suitability requirements.
- Had CBL provided appropriate risk warnings to Mr V in respect of the investment then he wouldn't have gone ahead.
- The Investigator gave undue weight to the former regulatory status of Mr V.
- Mr V's controlled functions – which I don't intend to set out here, as these are known to both parties – had expired by the material time.
- Mr V has never been authorised to provide pension advice. He gave up his investment qualification as he did very little work in relation to this and solely provided mortgage advice. Mr V had no experience in respect of pension transfers or indeed, experience of advising on underlying investments. His only experience was in providing mortgage advice.
- And, in any event, this shouldn't have affected the manner in which CBL discharged

its obligations to Mr V in carrying out appropriate due diligence on the investment. Had it done so, Mr V would not have been able to proceed in the manner that he did.

As no agreement could be reached, the matter has been referred to me for a decision.

I issued a provisional decision on Mr V'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 us know that it wanted to offer to settle Mr V's complaint. However, Mr V let us know that he wanted to continue on with our Service to have a final decision and that he had no further comments to add in response to 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.

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've considered 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.

The Dispute Resolution ('DISP') Rules – found in the FCA's handbook – sets out the rules our Service is bound by and DISP 2.8.2R sets out the time limits in which we can and can't consider complaints. It doesn't seem to be in dispute that Mr V's complaint was made in time for our Service to consider it. And, in any event, I haven't seen anything to make me think that Mr V was or ought reasonably to have become aware that CBL had or may have responsibility for a problem with his pension more than three years before he first raised his unhappiness with it, which was seemingly around late 2017. So, I think Mr V's complaint has been made in time and 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 V'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 V'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 V'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 V's complaint, amongst other things, I'm considering whether CBL ought to have identified that the business introduced by Harris Knights and the Harlequin investment involved a significant risk of consumer detriment. And, if so, whether it ought to have declined to accept Mr V's applications.

The facts of Mr Adams' and Mr V's cases are also different. I make that point to highlight that there are factual differences between *Adams v Options SIPP* and Mr V's case. And I need to construe the duties CBL owed to Mr V 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 V'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 V on the SIPP and/or the underlying investments. Refusing to accept an application isn't the same thing as advising Mr V 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"*

<u>The later publications</u>

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 V'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 V. It's accepted CBL wasn't required to give advice to Mr V, 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 V'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 V'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 Harris Knights and the business it (Harris Knights) 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 V 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 V's complaint is whether it was fair and reasonable for CBL to have accepted his SIPP and Harlequin investment applications in the first place. So, I need to determine whether CBL carried out appropriate due diligence checks before deciding to accept Mr V's SIPP applications.

As noted above, CBL says it did carry out due diligence on Harris Knights and Harlequin before accepting business from it and permitting the investment within its SIPPs. 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 Harris Knights and/or investing in Harlequin were being put at significant risk of detriment. And, if so, whether CBL should therefore not have accepted Mr V's applications.

The contract between CBL and Mr V

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 V or otherwise have ensured the suitability of the SIPP or Harlequin investment for him. I accept that CBL made it clear to Mr V 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 V 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 V'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 V 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 V) 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 Harris Knights to ensure it was regulated to give advice. It also entered into TOB with it, as set out further below. And it's apparent from the below that CBL had access to some information about the type and volume of introductions it was receiving from Harris Knights.

So, I think CBL ought to have understood before it received Mr V's application that its obligations meant that it had a responsibility to carry out appropriate checks on Harris Knights 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 Harris Knights

As I've said, CBL had a duty to conduct due diligence and give thought as to whether to accept business from third parties arranging or advising on investments. That's consistent with the Principles and the regulators' publications as set out earlier in this decision.

This is also seemingly consistent with CBL's own understanding of its obligations at the relevant time. As set out in the background above, while CBL said it would have carried out internet searches for any adverse media on Harris Knights, 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 Harris Knights and what conclusions it drew from these, this shows that, by the time it accepted Mr V's application, CBL had:

- Checked the FCA register to ensure Harris Knights and its directors were regulated and authorised to give financial advice.

- Entered into TOB with Harris Knights in July 2009.

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 Harris Knights before accepting business from it, or that CBL failed to draw fair and reasonable conclusions from what it did know about Harris Knights. I think CBL ought reasonably to have concluded it shouldn't accept business from Harris Knights, or at the very least CBL shouldn't have accepted Mr V's particular application from it, for the following reasons.

The type and nature of business introduced by Harris Knights

CBL said in a letter to Harris Knights dated 9 October 2009 – which I note was just a few weeks after Mr V's investment was made – that it was seeking clarification and reassurance from it on the suitability of esoteric investments, such as Harlequin, and that it requested, for example, a sample copy of Harris Knights suitability letter to enhance its understanding of clients. While CBL said that it was doing so following the FCA's recent review, after seemingly chasing Harris Knights for the information in November 2009 without success CBL said to it in a follow up letter in December 2009 that:

> '*We do not wish to prevent the investments taking place, and we accept that clients can select the investments they want for their SIPPs, but we need to be comfortable that there is not widespread unsuitability on what is taking place.*'

CBL went on to say that because Harris Knights wasn't providing the information it needed to reassure itself as to this, it was proposing that clients wishing to invest in Harlequin complete a Direct Investment Questionnaire to ensure customers understand the investment and issues associated with it. And a statement of overall assets to ensure customers weren't '*putting all their eggs in one basket*', had sufficient assets to meet the stage payments and could cope financially if the investment failed, for example.

CBL also said that it might have to decline an application if it felt someone didn't understand what they were doing, for example. And, in conclusion, CBL said to Harris Knights that:

> '*Alternatively, if you feel that your own suitability assessment for clients deals with these issues, then we will be pleased to dispense with these forms, but we do need to see the information requested in my letter of 9 October*.'.

Looking at CBL's letter I think it's clear that it was concerned that the introductions to it from Harris Knights might have anomalous features. Including that the customers might not understand the investment and the issues associated with it and that they might not have the capacity for loss if this failed, despite Harris Knights having permission to give customers full advice on the suitability investment. And I think that the Direct Investment Questionnaire (set out more fully in 'What happened' above) that CBL said in its letter that it was introducing as a result supports this given it contained, amongst other things, a declaration that customers were aware they were making a complex investment without advice.

CBL has told our Service that it received introductions from Harris Knights between 17 August 2009 and 29 April 2010. Although it hasn't told us how many it received during this time, I'm aware it received its 48th introduction in early March 2010. CBL has also told us that these introductions accounted for around 10.05% of CBL's new business over that period and 92% of the introductions invested in non-mainstream investments. CBL has said that 3.5% of the business it received from Harris Knights included defined benefit transfers.

Harlequin was an unregulated overseas based investment with inherent high risks that made it very obviously unsuitable for all but a small category of investors and even then, only a small part of such an investor's portfolio. So I think CBL should've been concerned that such introductions – several per month on average – over just eight months, 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. And I think CBL was concerned given it's clear from the above December 2009 letter that it wasn't comfortable that *widespread* unsuitability wasn't taking place.

So I think that CBL was on notice that Harris Knights, although a regulated business that had permissions to advise on the business being introduced (except for pension transfers and opt outs, as in Mr V's case) wasn't a firm that was doing things in a conventional way. And I think CBL recognised that Harris Knights might be choosing to introduce consumers without them being given or even offered full regulated advice.

While I appreciate it appears Mr V's introduction to CBL by Harris Knights in August 2009 was one of the first it received and therefore took place prior to the above correspondence, as part of its due diligence on Harris Knights I think it's fair and reasonable to expect CBL, in line with its regulatory obligations, to have made some specific enquiries about Harris

Knights business model and obtained information about how it was operating *before* CBL accepted applications from it.

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.*'

I think that CBL, prior to accepting business from Harris Knights, should've checked with it 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.

CBL hasn't suggested or provided evidence to show that it discussed Harris Knights business model with it before accepting introductions and putting in place TOB with it.

If CBL had done this then I think it would likely have become aware of the above and the resulting significant potential risk of consumer detriment either from those initial discussions with Harris Knights or more detailed discussions this ought to have led. And, in the alternative, if Harris Knights had been unwilling to answer such questions if put to it by CBL, I think CBL should simply then have declined to accept introductions from Harris Knights.

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

And, in that case, I think CBL should have concluded, and before it accepted Mr V's business from Harris Knights, that it shouldn't accept introductions from it.

Mr V's particular application

Turning to Mr V's particular application, I'd reasonably have expected CBL to be mindful that his introduction to it was seemingly some of the first business CBL had received from Harris Knights when considering his applications and related correspondence given the newness of the business relationship.

As set out above, the SIPP application Harris Knights sent to CBL gave Mr T of Harris Knights' details in the 'Introducer' Section, which set out that this was to be filled out if making the application as a result of advice from a financial adviser. And, under the signed 'Introducer Declaration' section Mr T of Harris Knights also declared, amongst other things, that he'd advised Mr V to take out the SIPP and on the suitability of the transfer. That's seemingly despite Harris Knights not having appropriate permissions to do so in respect of transfers from a DB scheme. And I note that there was no reference to any involvement of Firm C at the time in the SIPP application.

I recognise Firm C went on to tell CBL that Mr V had been referred to it for full advice on the DB transfer, which he'd declined on the basis he was a financial adviser and wanted to go

ahead regardless. And that Harris Knights also later told CBL that it hadn't provided Mr V with any advice, such that he was seemingly proceeding on an execution only basis.

But Mr V was transferring to the CBL SIPP from a DB scheme to invest nearly the full amount of his SIPP pensions monies in a high-risk unregulated investment, which are unusually only suitable for a small number of customers and in respect of a small proportion of their SIPP monies, and waiving his cancellation rights. 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.

The 2009 report said that SIPP operators should, as an example of good practice, be:

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

And I think this concern ought to have been even greater in a case like Mr V's where a DB scheme was involved. At the relevant date COBS 19.1.6G stated:

> "*When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme whether to transfer or opt-out, a firm should start by assuming that a transfer or opt-out will not be suitable. A firm should only then consider a transfer or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer or opt-out is in the client's best interests*".

While I acknowledge this aims to define the expectation of a regulated financial adviser when determining the suitability of a pension transfer, it emphasises the regulator's concern about the potential detriment such a transaction could expose a consumer to. Given the nature of its business and regulatory status, I'd expect CBL to have been familiar with the guidance contained in the COBS – even if it didn't apply directly to it. This was a further clear and obvious potential risk of consumer detriment.

Harris Knights told CBL that it hadn't provided Mr V with any advice in response to CBL querying which firm he hadn't received advice from for the purposes of its FCA reporting obligations, which indicates to me that CBL was concerned about its records for compliance purposes at that stage, rather than on the quality of business it had received from Harris Knights in respect of Mr V's particular application. And by the time Harris Knights said this, it had already sent CBL the completed SIPP application – which contained the information I've highlighted above in respect of Harris Knights having advised Mr V on the SIPP transfer – and Harlequin Questionnaires to facilitate the transfer, in my view opening the door to this for Mr V. And seemingly before there had even been any correspondence between Mr V and Firm C, the firm which had permission to advise on pension transfers.

Harris Knights also set out in the SIPP application that it would take an ongoing annual fee from the SIPP in addition to the £900 one off fee, which to my mind seems unusual if it was purely just facilitating the SIPP application.

In light of the above red flags and potential risk of customer detriment, I think that CBL ought to have queried this further with Harris Knights and/or sought to contact Mr V for clarification in line with guidance in the 2009 Thematic Review Report, which said for example that:

> '…*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***.' (my emphasis)

I think that doing so would have given CBL insight into Harris Knights business model, and helped to clarify to clarify its involvement and verify the position put forward in the documentation. This was a fair and reasonable step to take in the circumstances.

Had CBL contacted Mr V, or at the very least reviewed FCA information about him that was readily available in the public domain at the time, then I think it's likely it would have found out that he was no longer a practicing financial adviser. And he hadn't worked in investments for several years, having only worked in it for a short time and as a trainee for some of it. It seems Mr V had largely worked in mortgages since and had no pensions experience to understand the risks involved in this particular transaction, which I'll come back to later. And, while it seems Mr V was eager to pursue the Harlequin investment, there's no reason for me to think he wouldn't have told CBL the above if it had contacted him for verification and clarification of the position in light of the concerns I think it ought reasonably to have had in the circumstances of the application.

In which case, CBL ought to have concluded that it would not be consistent with its regulatory obligations to accept Mr V's business from Harris Knights and proceed with his applications.

In conclusion

In summary, even if I didn't think there were red flags in respect of Mr V's particular application which ought reasonably to have caused CBL to decline to accept this from Harris Knights, I think CBL should have concluded, and before it accepted Mr V's business from Harris Knights, that it shouldn't accept introductions from it.

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

I recognise CBL has said that Mr V would have proceeded in any event in the circumstances. And this is something I'll address later.

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.
- 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 SIPPs 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 for 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 satisfied CBL undertook sufficient due diligence on Harlequin before it decided to accept the investment into its SIPPs. 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 with Mr V, 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 SIPPs, for the following reasons.

Despite CBL's concerns, it seems to have accepted what Harlequin told it in response. And that CBL did so without seeking, or being given, any further evidence to satisfy itself as to, for example, the sales values and growth levels it had been provided with and the likelihood of the SIPP being able to borrow enough to complete the purchase while keeping within the limit of 50% of net asset value. 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 the declarations and questionnaires contained wording to try to make customers aware that, for example, 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. However, it's unclear when some of these were introduced. The Direct Investment Questionnaire seemingly wasn't introduced until December 2009, after CBL had already begun to accept applications to invest in Harlequin. CBL hasn't provided us with a copy of any Harlequin Property Investments Declaration that Mr V might have completed. And, in any event, 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. Particularly when I think 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.

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 declarations 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 V's for him to tell CBL how he would fund the remainder of the purchase price, no details were provided as to this in Mr V's case and I can't see that CBL queried this any further with him or Harris Knights 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 made further enquiries into how customers intended on making the stage repayments, asked Harlequin for more information about the lending arrangements that it said were available to it and for evidence of the sales values and growth levels, then I think that CBL would likely have received confirmation of its concerns in light of what I've explained above in 'What happened' in respect of Harlequin. 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 into its SIPPs. While I recognise the above emails CBL had with Harlequin were in March 2010, after Mr V's application and investment was made, I think these were the sort of enquiries CBL ought reasonably to have made before permitting the Harlequin investment into its SIPPs. Had it done so, I think it's likely to have received the same or similar responses from Harlequin that it did.

And, based on what was or what ought reasonably to have been known at the time, CBL ought to have drawn the conclusion I've set out. 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 V 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 V 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 V 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 V.

So my finding isn't that CBL should have concluded that Mr V wasn't a candidate for high risk investments. It's that CBL should have concluded the investment wasn't acceptable for its SIPPs and it thereby failed to treat Mr V 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 SIPPs.

Summary of my findings on due diligence

For the reasons given above, CBL shouldn't have accepted Mr V's application to invest in Harlequin. And, to be clear, even if I thought CBL had undertaken adequate due diligence on Harris Knights and acted appropriately in accepting Mr V's business from it (which, as I've explained earlier, I don't), I'd still consider it fair and reasonable to uphold Mr V'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 V 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 V's business from Harris Knights 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 V fairly by accepting his business from Harris Knights. And because, separately, CBL also didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr V 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 V to be put at significant risk of detriment as a result.

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

CBL has said that it was reasonable to proceed in the light of the indemnity, as Mr V signed forms confirming he was relying on his own decisions when making the investments, that he was solely responsible and that he wanted to proceed regardless. And that Mr V also declared that he understood how the investment worked and possible pitfalls.

For the reasons given above, I think CBL should have refused Mr V's application from Harris Knights and/or refused to permit the Harlequin investment within its SIPPs. So things shouldn't have progressed beyond that.

The indemnity

The indemnity sought to confirm that Mr V 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 V 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 V 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 V's dealings with Harris Knights 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 V 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 V's applications.

The Principles exist to ensure regulated firms treat their clients fairly. And I don't think the paperwork Mr V 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 V'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 V's applications.

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 V'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 V'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 V's application.

Is it fair to ask CBL to compensate Mr V in the circumstances?

The involvement of other parties

In this decision I'm considering Mr V's complaint about CBL. However, I accept that other regulated parties were involved in the transactions complained about, such as Harris Knights. But our Service won't look at complaints against Harris Knights, for example, as it's been dissolved and no longer exists as a regulated business.

And, in any event, 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 V fairly. The starting point therefore is that it would be fair to require CBL to pay Mr V 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 V 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 V to the full extent of the financial losses he's suffered due to CBL's failings.

I accept that Harlequin and Harris Knights might have some responsibility for initiating the course of action that led to Mr V'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 V 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 V 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 V.

To be clear, I'm not making a finding that CBL should have assessed the suitability of the SIPP or investment for Mr V. I accept that CBL wasn't obligated to give advice to Mr V, 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 V 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 V'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 V's introduction from Harris Knights nor permitted his investment application. That should have been the end of the matter – if that had happened, I'm satisfied the arrangement for Mr V 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 Harris Knights and reach the right conclusions. I think it failed to do this. And merely having Mr V sign forms containing declarations wasn't an effective way of CBL meeting its obligations, or of escaping liability where it failed to meet these.

Harris Knights and Firm C were regulated firms with the necessary permissions to advise on the transactions this complaint concerns. I'm satisfied that in his dealings with it, Mr V trusted these to act in his best interests. Mr V 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 V for the loss he's suffered. I don't think it would be fair to say in the circumstances that Mr V should suffer the loss because he ultimately instructed the transactions to be effected.

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

I've considered whether, in the circumstances, Mr V would have gone ahead with the switch and the investment if CBL had refused his applications. 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.'*

I recognise Mr V was clearly eager to go ahead with the Harlequin investment, that he had previous financial experience and had held positions of influence. Mr V declared he wanted to go ahead with the transactions on an execution only basis without advice. And that he signed a CBL declaration confirming he understood and accepted the level of risk and wished to proceed.

But, for the reasons given above, I think CBL should have had concerns about the transaction. So it should not have accepted at face value Mr V signing a form to say he understood the above. Particularly when considering that someone who has been unfairly persuaded or pressurised to take out an investment that they don't really understand will sign such forms.

As I've said, it would have been better if CBL had found out more about Mr V. For example, if he was a pension transfer specialist (or maybe a former one) and really did understand the risks involved in what he was doing since transfers are specialist matters considered beyond non-additionally qualified financial advisers. And since Mr V was not and also had very little investment experience, and since he was investing nearly all his pension and given his difficult financial position – not having the cash to pay for any of the services he was receiving and his low income – CBL should have been concerned, in my view.

In the circumstances, I don't think Mr V could reasonably have been expected to be able to find out and understand the type of information that CBL as a SIPP provider was expected to consider in respect of the complex and speculative Harlequin investment in order for him to fully understand the nature of the investment and risks involved. For example, in regard to the net asset value for SIPP borrowing and the gearing. And, as I've said, this was the majority of Mr V's private pension provision and his entire provision within the CBL SIPP.

In any event, I'm not satisfied that Mr V 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 V 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 V, 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 V for his loss on the basis of speculation that another SIPP operator would've made the same mistakes as I've found CBL did. Any other SIPP operator ought reasonably to have done what I've set out above in respect of finding out more about Mr V, for example. And I think it's fair to assume that another SIPP provider would've also complied with its regulatory obligations and acted according to good industry practice, and therefore wouldn't have accepted Mr V's application from Harris Knights nor permitted the Harlequin investment had Mr V gone elsewhere.

On balance, I think it's fair and reasonable to direct CBL to pay Mr V 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 V'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 V'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 V's application from Harris Knights, 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 V 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 V. 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 V for the full measure of his loss. Harris Knights was reliant on CBL to facilitate access to Mr V's pension. CBL accepted Mr V's business from Harris Knights and, but for CBL's failings, I'm satisfied that Mr V'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 V'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 V wouldn't have suffered the loss he's suffered. As such, I'm of the opinion that it's appropriate and fair in the circumstances for CBL to compensate Mr V 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.

Conclusion

Having carefully considered all of the circumstances, I'm satisfied it's fair and reasonable to conclude that if CBL had refused to permit the Harlequin investment in its SIPPs then Mr

V would've retained his existing pensions and wouldn't have switched to a SIPP or subsequently made the investments that he did. So CBL should put him back in the position he would have been in.

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.

As set out above, I'm satisfied that CBL should've declined Mr V's applications and that any subsequent investments wouldn't have gone ahead if it had treated Mr V fairly and reasonably. I've carefully considered causation, contributory negligence, apportionment of damages and DISP 3.6.4. But in the circumstances here, I'm still satisfied it's fair for CBL to compensate Mr V for his full loss.

Putting things right

My aim is to return Mr V to the position he would now be in but for what I consider to be CBL's failure to carry out adequate due diligence checks before accepting business from Harris Knights and before permitting the Harlequin investment within its SIPPs.

Had CBL acted appropriately, I think it's *more likely than not* that Mr V would have remained a member of the pension schemes he transferred into the SIPP. So, I think that CBL should calculate fair compensation by comparing the current position to the position Mr V would be in if he hadn't done so.

Mr V transferred monies from three different pension schemes into the SIPP, including a DB scheme and two other pension schemes. To date, we haven't received anything to suggest that the other two schemes were anything other than defined contribution plans without any guarantees attached. Neither Mr V 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.

To put things right CBL will need to undertake different types of loss calculations, one in relation to the monies that originated from his DB scheme and another in relation to monies that originated from his personal pension schemes. As part of doing this CBL will need to calculate the portion of Mr V's current SIPP value that's attributable to each of the respective transfers/switches and apply these to the relevant calculations.

In light of the above, CBL should:

- Obtain the actual transfer value of Mr V's SIPP, including any outstanding charges.
- Pay a commercial value to buy any illiquid investments (or treat them as having a zero value).
- Undertake loss calculations as set out below in respect of each of the schemes from which monies were transferred into the SIPP and pay any redress owing in line with the steps set out below.
- If the SIPP needs to be kept open only because of the illiquid investment and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.
- If Mr V has paid any fees or charges from funds outside of his pension arrangements, CBL should also refund these to Mr V. Interest at a rate of 8% simple per year from date of payment to date of refund should be added to this to reflect Mr V having been deprived of the use of these monies. Income tax may be payable on any interest paid. If CBL deducts income tax from the interest, it should tell Mr V how much has been taken off. And CBL should also then give Mr V a tax deduction

certificate in respect of interest if he asks for one.

- Pay to Mr V £500 to compensate him for the distress and inconvenience he's been caused.

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

Treatment of the illiquid assets held within the SIPP

I think it would be best if any illiquid assets held could be removed from the SIPP. Mr V would then be able to close the SIPP and transfer away from CBL if he wishes. That would then allow him to stop paying the fees for the SIPP. The valuation of the illiquid investment may prove difficult, as there may be no market for it. CBL should establish an amount it's willing to accept for the investment as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investment.

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

If CBL is unable, or if there are any difficulties in buying Mr V's illiquid investment, it should give the holding a nil value for the purposes of calculating compensation. To be clear, this would include the investment being given a nil value for the purposes of ascertaining the current value of Mr V's SIPP. In this instance CBL may ask Mr V to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the relevant holding. That undertaking should allow for the effect of any tax and charges on the amount Mr V may receive from the investment and any eventual sums he would be able to access from the SIPP. CBL will have to meet the cost of drawing up any such undertaking.

Calculate the loss Mr V has suffered as a result of making the transfer in relation to monies originating from his DB scheme

CBL must undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in policy statement PS22/13 and set out in the Regulator's handbook in DISP App 4: https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter.

For clarity, compensation should be based on the scheme's normal retirement age, as per the usual assumptions in the FCA's guidance.

This calculation should be carried out using the most recent financial assumptions in line with DISP App 4. In accordance with the Regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr V's acceptance of the final decision.

If the redress calculation demonstrates a loss, as explained in policy statement PS22/13 and set out in DISP App 4, CBL should:

- Always calculate and offer Mr V redress as a cash lump sum payment,

- explain to Mr V before starting the redress calculation that:

    -the redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and a straightforward way to invest the redress prudently is to use it to augment his personal pension

- offer to calculate how much of any redress Mr V receives could be augmented rather than receiving it all as a cash lump sum,

- if Mr V accepts CBL's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr V for the calculation, even if he ultimately decides not to have any of his redress augmented, and

- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr V's end of year tax position

Redress paid to Mr V as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4, CBL may make a notional deduction to cash lump sum payments to take account of tax that Mr V would otherwise pay on income from his pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr V's likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

Redress paid directly to Mr V as a cash lump sum in respect of a future loss includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4.3.31G(3), CBL may make a notional deduction to allow for income tax that would otherwise have been paid. Mr V's likely income tax rate in retirement is presumed to be 20%. In line with DISP App 4.3.31G(1) this notional reduction may not be applied to any element of lost tax-free cash.

If either CBL or Mr V dispute that this is a reasonable assumption, they must let me know as soon as possible so that the assumption can be clarified and Mr V receives appropriate compensation. It won't be possible for us to amend this assumption once any final decision has been issued on the complaint.

Calculate the loss Mr V has suffered as a result of making the transfer in relation to monies originating from personal pension schemes

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

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

Any withdrawal out of the SIPP should be deducted at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. The same applies for any contributions made, these should be added to the notional calculation from the date they were actually paid, so any growth they would have enjoyed is allowed for. To be clear withdrawals here doesn't include SIPP charges or fees paid to third parties like an adviser. But it would include any pension commencement lump sums or pension income Mr V actually took after his pension monies were transferred to CBL.

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

is a reasonable proxy for the type of return that could have been achieved over the period in question.

The notional value of Mr V's existing plan(s) if monies hadn't been transferred (established in line with the above) less the proportion of the current value of the SIPP that's attributable to monies transferred in from the same existing plan(s) (as at the date of calculation) is Mr V's loss.

Pay an amount into Mr V's SIPP so that the transfer value is increased by the loss calculated above in relation to monies originating from personal pension schemes

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

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr V as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

Neither CBL nor Mr V have disputed that this is a reasonable assumption, despite being given the opportunity to do so in response to my provisional decision and being made aware that it won't be possible for us to amend this assumption once any final decision has been issued on the complaint.

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

SIPP fees

If the illiquid investment cannot be removed from the SIPP, and because of this it cannot be closed after compensation has been paid, then it wouldn't be fair for Mr V to have to continue to pay annual SIPP fees to keep the SIPP open. So, if the SIPP needs to be kept open only because of the illiquid investment and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.

Distress & inconvenience

In addition to the distress that Mr V has suffered as a result of the problems with his pension since the transfer into the CBL SIPP, I think the impact of CBL's failings and the loss of a significant portion of his pension provision caused Mr V distress. I think it is fair and reasonable that CBL should pay Mr V £500 to compensate him for this.

Interest

The compensation resulting from this loss assessment must be paid to Mr V or into his SIPP within 28 days of the date CBL receives notification of Mr V'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 I uphold Mr V's complaint and Curtis Banks Limited must pay fair redress as set out above.

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £150,000, plus any interest and/or costs/interest on costs that I think are appropriate. If I think that fair compensation is more than £150,000 I may recommend that the business pays the balance.

Decision and award: I uphold the complaint. I think that fair compensation should be calculated as set out above. My provisional decision is that Curtis Banks Limited should pay Mr V the amount produced by that calculation – up to a maximum of £150,000 (including the award for distress and inconvenience but excluding costs) plus any interest set out above.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that Curtis Banks Limited pay Mr V the balance plus any interest on the balance as set out above.

The recommendation isn't part of my determination or award. Curtis Banks Limited doesn't have to do what I recommend. It's unlikely that Mr V could accept a decision and go to court to ask for the balance and Mr V may want to get independent legal advice before deciding whether to accept any final decision I might make along the above lines.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr V to accept or reject my decision before 11 October 2024.

Holly Jackson
Ombudsman