DRN-5114180

The complaint

Mr E complains that Embark Services Limited ('Embark') – previously Hornbuckle Mitchell Group plc ('Hornbuckle'), and I'll largely refer to Hornbuckle throughout for ease) failed to carry out sufficient due diligence into the introducer before accepting business from it and on the investment before accepting these into his Self-Invested Personal Pension ('SIPP'), causing him a financial loss. Mr E says it should compensate him for his loss.

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

What happened

I've outlined some of the key parties involved in Mr E's complaint below.

Involved parties

Embark

Embark (previously Hornbuckle) 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.

Douglas Baillie Ltd ('Douglas Baillie')/The Pension Specialist ('TPS')

Douglas Baillie was an FCA regulated financial adviser, of which TPS was an appointed representative from 24 May 2011 to 13 November 2013.

In October 2013 Douglas Baillie suspended its pension switching business, TPS, following FCA concerns about the standard of the advice it was giving. And, in 2016, Douglas Baillie went into Financial Services Compensation Scheme ('FSCS') default.

Opes Financial Planning Ltd ('Opes') – previously known as Money Advice Partnership Limited ('MAP'), the latter of which I'll largely refer to throughout.

MAP was an FCA regulated financial adviser – it was no longer authorised by the FCA from June 2020 and later went into liquidation FSCS default.

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.

Central Florida

The Map Central Florida Property investment was seemingly promoted by MAP Global Property Investments Limited ('MAPGPI' – previously Map International Properties). Hornbuckle has said that the Central Florida investment was a UCITS (undertaking for collective investment in transferable securities) with a unit trust feeder into a limited partnership ('LP'), where the LP invested in residential property in Orlando.

It seems that the fund established for SIPP investment was over a 5-year period, with a minimum investment of £15,000. It was intended that the funds would purchase below market value condominiums directly from US Banks, located in the central Florida area. And that the Funds will hold and maintain the property for the agreed period with marketed targeted returns of 15% IRR per annum.

The transaction

Mr E signed and dated his Hornbuckle SIPP application on 13 May 2011. And in the 'Financial/Professional Adviser Details' section – which asked for the details of the adviser who gave Mr E the advice leading to the application – Double Baillie's details were provided along with an email address for TPS. When asked whether Mr E had received advice from his adviser in respect of this transaction, the options 'yes' and 'at a distance' were ticked. And Mr E's application set out that Douglas Baillie would be paid an initial payment of 5% of the fund plus 0.5% of this per annum in renewal payments. Douglas Baillie signed this section of the form – along with other sections it was required to sign – on 17 May 2011 and it also went on to provide its name as the introducing firm. The SIPP application form also set out that Mr E was seeking to transfer an occupational pension scheme to the Hornbuckle SIPP.

Hornbuckle has said that Mr E's SIPP was established on 1 June 2011, that he subsequently sought to invest £28,800 in Harlequin, Las Canas, with contracts for this being exchanged on 14 July 2011 and that the contract said the development was to complete by the end of 2013. Although Hornbuckle doesn't appear to have provided us with a copy of Mr E's completed Harlequin investment application and associated investment documents from the time, that's despite me asking it to do so by the deadline to respond to my provisional decision.

On 22 July 2011, Hornbuckle also received an application from Mr E to invest £15,000 of his SIPP pension monies in the Central Florida investment, signed by Mr E on 19 July 2011.

The space for Mr E to sign the form, as well as the month, had an 'X' next to it. And the witness section was signed by a Mr T whose occupation was noted as 'IFA/DIRECTOR'.

On the same date, under a section headed 'Statements for Certified Sophisticated Investor' Mr E signed a statement – the application again had an 'X' next to the place he should sign and date – which said that:

- He was able to receive promotions which are exempt from the restrictions in financial promotions in FSMA 2000.
- He declared that he qualified as such in relation to investments in property assets.
- He accepted that the promotions he receives may not have been approved by an authorised person and therefore be subject to the controls that would otherwise apply. And that it was open to him to seep advice from someone who specialises in advising on this kind of investment.

Under this, the same Mr T signed and dated a section headed 'Certificate to be signed by an Authorised Person advising the investor' on 20 July 2011, noting that he was doing so as an adviser of MAP. Mr T also handwrote that '[Mr E] *works in the financial services sector and has a good awareness of investment/risk and reward*'.

Alongside this was a copy of Mr E's identity certification, stamped by Mr T as a director/financial advisor of MAP on 11 July 2011. As well as a declaration which Mr E signed on 19 July 2011 which said, amongst other things, that he understood:

- The investment was illiquid, no withdrawals could be made once investments and funds would be unavailable for the five year term.
- Although the monies would be used to form part of any retirement benefits calculation, they couldn't be used to provide monies to pay such benefits until the end of the term.
- He'd taken appropriate legal and financial advice on the issues involved.
- He'd received no advice from Hornbuckle and he indemnified it in respect of any scheme sanction charge HMRC may raise, which his pension scheme would pay.

On 25 July 2011, £15,000 of Mr E's SIPP pension monies was invested in the Central Florida investment.

Hornbuckle has said that in August 2011, TPS confirmed to it that it had only handled the establishment of Mr E's SIPP. And, at the end of September 2011, Hornbuckle received a letter from TPS enclosing a letter Mr E had signed on 12 September 2011, which said that the servicing of his SIPP should be transferred from TPS to Mr E's own financial advisory firm – which I'll call Firm C here.

Mr E doesn't appear to have received any returns from his Harlequin investment and he's said that the Central Florida investment closed with a loss.

Mr E's complaint

In or around December 2017, Mr E made a claim with the FSCS in respect of Douglas Baillie/TPS. And, in April 2018, the FSCS reviewed Mr E's claim and calculated his total losses to be just under £122,000. It paid him £50,000 in total which, as I understand it, was its compensation limit at that time. And, on request, the FSCS later reassigned legal rights back to Mr E.

Mr E complained, via his representatives, to Hornbuckle in or around July 2018. He said, in summary, that it didn't do enough due diligence on the introducer nor the investments, which were unregulated and high-risk. He said that Hornbuckle shouldn't have accepted his applications and this has caused him to lose out.

Hornbuckle sent Mr E its final response letter. And, amongst other things, it said in this and in its submissions to our Service in respect of Mr E's complaint that:

- His complaint had been made too late, as it had been made more than six years since the events complained of and more than three years after it wrote to all its clients who'd invested in Harlequin (on 2 November 2012, 13 February 2013 and 30 April 2013) making them aware of the status of the investment and its concerns at the lack of updates and information from the Harlequin group.
- As the SIPP provider, it didn't provide Mr E with any advice on the SIPP or its investments. Any advice would have been provided by a financial adviser. It wasn't party to those discussions and would not expect to be provided with any such details.
- It undertook its own due diligence checks to ensure the intended investment was suitable to be held within a SIPP and wouldn't attract a tax charge.
- When Mr E applied to invest in Harlequin, this was already known to it having previously made enquiries of Harlequin's operations.
- Mr E is listed as having previously held a CF21 Investment Adviser Function, so it's reasonable to think he had a good understanding of investment products. And, in addition, Mr E certified he was a sophisticated investor on his Central Florida investment application, which was certified by Mr T of MAP. It has also identified that Mr E holds financial planning certificates, as well as qualifications in investments. So it's reasonable to think Mr E was fully aware of the investments and the risks associated with these.
- When TPS confirmed to Hornbuckle that it only handled the establishment of Mr E's SIPP, this suggested that it wasn't involved with the investments and that Mr E was aware one adviser established the SIPP and another provided investment advice.
- It provided Terms and Conditions for an introducer to Douglas Baillie on 6 May 2010 when it became the servicing adviser to a group SIPP. And then Douglas Baillie first proposed to become an introducer of SIPP business to Hornbuckle in March 2011. And while the relationship ended in 2016 when the firm's FCA authorisation ended, it didn't receive any introductions from Douglas Baillie after March 2013.
- It no longer holds full records of the background checks/due diligence it completed on Douglas Baillie before accepting business from it, as the relationship ended some time ago. It said that the FCA register and permissions were checked and it indicatively provided a copy of an introducers questionnaire which it said showed the standard set out information it requested at the time.
- Advice on the suitability of the SIPP, including the investments, would have been provided by Douglas Baillie. And although it no longer has information of its understanding of the firm's business model and advice being given at the time, its questionnaire evidences the information it would have sought.
- When asked what further discussions and/or checks Hornbuckle undertook with Douglas Baillie about the client process and business they were referring to it, Hornbuckle said it completed a Creditsafe report on it in September 2013.
- It received nine introductions from Douglas Baillie between May 2011 and March 2013. Five of these involved transfers from occupational pension schemes, including Mr E who was the second introduction to it. And three of the customers introduced invested in non-mainstream investments.
- In respect of Harlequin, it reviewed the properties as an overall investment alongside the contracts which were to be the same for each resort, as well as literature.
- In respect of Cental Florida, it reviewed key investment product literature and said it

understands it also received a partnership agreement, documents relating to the application to invest in the unit trust via pension product and a final version of the brochure, but it hadn't been able to locate these.
- The Central Florida investment risks were brought to Mr E's express attention and he signed a warning document in respect of this. Mr E also chose to invest the minimum amount possible limiting his financial exposure to the investment.
- The investments were considered permissible in accordance with HMRC guidelines to be held within a SIPP and wouldn't attract a tax charge. And at the point the investments were approved and Mr E's funds remitted, it hadn't seen anything to suggest these were unsuitable for a SIPP.

Unhappy with this response, Mr E referred his complaint to our Service in August 2018. And during the course of Mr E's complaint to our Service and in his initial submission to the FSCS he's said, amongst other things, that:

- He transferred to the SIPP to make the investments – this is his only pension provision, aside from state pension. He was led to believe that the investments were safe and that, while these were high risk on paper, there was no risk to capital as it was minimised by guarantees.
- Had the firm explained the true nature of the investments and risks he would never have gone ahead with the SIPP transfer and investments. He'd have left him pension where it was if this meant security.
- He isn't and has never been a sophisticated investor and had no idea he signed such a form. He was a retail investor with a low attitude to risk. At the time, his annual income was between £10,000 to £40,000, he had £15,000 in savings and an ISA, as well as property worth around £150,000 with an outstanding mortgage balance of around £100,000 and outstanding credit of around £19,500.
- He was invited to a MAPGPI presentation, which sold both investments as very low risk. Mr T of MAP was present and told him about the possibility of using old/frozen pensions for financing the investments, which would achieve a much higher growth than leaving his pension as it was. He trusted Mr T, as well as a Mr P of MAPGPI.
- At the time he believed that Mr T was responsible for having given him advice and that it had an agreement in place with TPS for processing cases, although he's since found out Douglas Baillie was noted as his adviser. He was told Hornbuckle was used as it specialised in these kinds of investments. Forms were passed back and forth which he was told needed to be completed due to legislative changes – he was told that the indemnity form was just part of the process.
- He received £3,000 as a referral fee, which he used for day to day living.
- While Mr E is authorised as a mortgage and insurance/protections adviser, he's never been qualified to advise on pensions or complex investments.
- He first realised he might have a complaint about Douglas Baillie in July 2017. His representative confirmed to him that the investments were classed as UCIS and therefore weren't a suitable investment and then he made an FSCS claim. He had very little correspondence with Hornbuckle at the time and it was then first recognised that a complaint should be put forward to Hornbuckle on receipt of the FSCS decision showing vast losses.

One of our Investigators reviewed Mr E's complaint and said that it should be upheld. And while Mr E accepted our Investigator's findings, Hornbuckle responded with further comments. It said, amongst other things, that:

- Mr E's complaint had been made too late for our Service to consider it.
- Mr E has a significant degree of investment knowledge and experience, he was FCA registered, as well as a self and IFA certified as a sophisticated investor. Mr E had a

long history of financial services experience, most notably he was an investment adviser, holding a CF21 qualification, from 2001 and he had his own financial services firm that was regulated from October 2008. He was a ten-year qualified investment adviser, who would have understood about investment risk, classes and the consequences of these being overseas and unregulated. As well as an understanding of gearing, relevant to the Harlequin investment structure, as a mortgage adviser. Mr E also held financial planning certificates and qualifications in Accounting, Marketing, Economics, Law and Investment from a chartered institute.

- Seemingly because he had concerns on their approach, Mr E terminated his retainer with Douglas Baillie in late 2011 and transferred his SIPP servicing rights to his financial services firm, showing he had sufficient experience of pensions and investments to deal with the SIPP.
- Prior to the Central Florida investment and around the time of the Harlequin investment, Mr E self-certified as a sophisticated investor (and declined to take legal advice) and this was supplemented by Mr T of MAP who added the handwritten note about Mr E's circumstances.
- Mr E has said he wasn't made aware the investment was deemed high risk nor understood what the term UCIS means. However, this is in contrast with a decision previously given by our Service, which recorded Mr E as the financial adviser advising on the UCIS investment involved. And the above also supports that Mr E would always likely have gone ahead with the investments.
- Our Service is considering the history of Douglas Baillie with the benefit of hindsight following extensive FCA and FSCS investigation into it.
- Mr E was only the second introduction to it from Douglas Baillie and at the time there was no reason to undertake more extensive due diligence than it did. Hornbuckle had no reason to think Douglas Baillie was giving limited advice. It was only sometime after that the potential for this came to light and by that point Mr E was receiving separate advice from MAP.
- Hornbuckle had clear terms and conditions for an introducer to follow, emphasising the obligations to comply with FCA rules. And Douglas Baillie will have completed an Introducer Questionnaire prior to SIPP applications being accepted, although Hornbuckle doesn't have a completed copy from 2011 due to changes in ownership and computer systems. There was nothing to cause Hornbuckle concern.
- In respect of Harlequin, its technical team had completed due diligence on this in November 2009, approving it as suitable but requiring certain contractual amendments for added protection for members. For example, Hornbuckle insisted on a formal independent valuation on the Harlequin developments being carried out so that this, and any associated borrowing, could be checked against SIPP values and lawyers were instructed to review contracts.
- In November 2009, Hornbuckle confirmed it was introducing a robust sense check for Treating Customers Fairly purposes to ensure approval would only be granted in compliance with the FCA position, rather than only dealing with compatibility with HMRC rules, as was previously the case.
- Hornbuckle made it mandatory for all staff dealing with this to comply with procedures and checklists. The latter of which were designed to ensure all required forms were received and evaluated including prospectuses and proposal documents. The checklists were supplemented by detailed flowcharts and explanations for staff.
- The Harlequin investment itself had an inbuilt limiter of risk in that payments were to be made in stages, reflecting development progress. While the initial deposits were therefore at risk, no further payments would have been sanctioned by Hornbuckle without independent appraisals of progress and market valuations.

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

I issued a provisional decision upholding Mr E's complaint. Hornbuckle didn't respond. Mr E said in response that he doesn't currently pay income tax on his earnings, as these are below the threshold, and that basic rate would be the highest tax band expected for him in retirement.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so, I remain of the view that Mr E's complaint is one that our Service can consider and that it should be upheld for the reasons previously set out in my provisional decision, which I've largely repeated below.

Preliminary point – time limits

For the avoidance of doubt, I have 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.

Our Service must follow the rules we're bound by, known as the Dispute Resolution ('DISP') Rules – found in the Financial Conduct Authority's handbook. And DISP 2.8.2R says that, unless the business consents (Hornbuckle doesn't), we can't consider a complaint if it's referred to us:

> "… (2) more than:
>
> > (a) six years after the event complained of; or (if later)
> > (b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;
>
> unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;
>
> unless:
>
> (3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2R…was as a result of exceptional circumstances;

I think the events complained of here – that Hornbuckle failed to exercise sufficient due diligence on Douglas Baillie and the investments before accepting Mr E's applications in 2011, causing him to lose out – took place more than six years before he referred his complaint to Hornbuckle in July 2018 and then to our Service.

So I've considered whether M E was aware or should reasonably have become aware he had cause for complaint about this respondent firm, Hornbuckle, more than three years before he first made his complaint to it in July 2018.

The term 'cause for complaint' is not defined in the Handbook. The term complaint (in italics) is defined, and it is reasonable to infer in light of the above guidance on interpreting the Handbook (and guidance in GEN 2.2.1R in the Handbook: "Every provision in the Handbook must be interpreted in the light of its purpose.") that the definition of the word complaint, was intended to apply to the phrase 'cause for complaint'.

The term ‘complaint‘ is defined for the purposes of DISP in the FCA handbook as:

> “…any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a *person* about the provision of, or failure to provide, a financial service, *claims management service* or a *redress determination*, which:
>
> > (a) alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience; and
> > (b) relates to an activity of that *respondent*, or of any other *respondent* with whom that *respondent* has some connection in marketing or providing financial services or products or *claims management services*, which comes under the jurisdiction of the *Financial Ombudsman Service*..”

So the Glossary definition of ‘complaint’ requires that the act or omission complained of must relate to an activity of ‘that respondent’ or firm.

Accordingly, the material points required for Mr E to have awareness of a cause for complaint include:

- awareness of a problem
- awareness that the problem had or may have caused him material loss, and
- awareness that the problem was or may have been caused by an act or omission of Hornbuckle (the respondent in this complaint).

As such, in order to be aware of cause for complaint the complainant should reasonably know there is a problem, that they have or may suffer loss or damage, and that someone else is or may be responsible for the problem – and who that someone is, as the respondent to the complaint. Knowledge of a loss or damage alone is not enough. It can’t be assumed that upon obtaining knowledge of a loss a consumer had knowledge of its cause.

So to have knowledge of his cause for complaint about Hornbuckle, Mr E had to be aware, or be in a position where he ought reasonably to have become aware, that there was a problem which had or may have caused him loss or damage and that Hornbuckle was or may be responsible for this.

Hornbuckle has said that in 2012, 2013 and 2014 it wrote to investors, including Mr E, about concerns with investment delays and explaining that the SFO was looking into Harlequin, for example. It has also said that Regulatory Legal (relating to the Harlequin Investors Group) made clear its concerns about entities who’d advised on and/or facilitated the investment.

I think the position relating to the Harlequin investments had become unclear and very worrying. Parts of Harlequin had gone into administration – though not the part developing the properties in the Caribbean. And senior figures in the Harlequin Group were apparently being investigated by the SFO and the police. Mr E will likely have been receiving information about Harlequin, some of which will have seemed contradictory. And it’s possible he received some information from Regulatory Legal.

However, I haven’t seen anything to suggest that Mr E was told or provided with any information more than three years before his complaint to Hornbuckle in July 2018, that made him aware or ought reasonably to have made him aware, that Hornbuckle may have done something wrong and caused him to think it had or may have responsibility either wholly or in part for the position he was in – that of having a SIPP with an investment that had or may have suffered a loss.

I've considered the possibility that Mr E's representative made him aware when he first instructed it that SIPP operators obligations meant he may have a potential cause for complaint against Hornbuckle too, even though the first action taken was to pursue an FSCS claim about the adviser in late 2017. But Mr E's representative has said it was first recognised that a Hornbuckle complaint should be put forward on receipt of the FSCS outcome, which was in April 2018. And, in any case, it seems Mr E was first in touch with his representative at some point in 2017, which was within three years of when Mr E first made his complaint to Hornbuckle, in July 2018.

As set out below, the FCA published reports on the results of two thematic reviews on SIPP operators in 2009 and 2012, issued guidance for SIPP operators in 2013 and wrote to the CEOs of SIPP operators in 2014. A common theme of those communications is that the FCA considered that SIPP operators had obligations in relation to their customers even where they don't give advice, and that many SIPP operators had a poor understanding of those obligations.

I don't think Mr E would need to have understood the details of a SIPP provider's obligations to have been aware (or in a position whereby he ought reasonably to have become aware) of his cause for complaint. But I think Mr E would have needed to have actual or constructive awareness that an act or omission of Hornbuckle had, or may have, a causative role in his loss. And, as I've said, I haven't seen anything to suggest that Mr E was told or provided with any information more than three years before his complaint was made to Hornbuckle that ought reasonably to have made him aware that he could or may be able to attribute his problem to acts or omissions by it.

In summary, I haven't seen anything to make me think that Mr E was aware, or that he ought reasonably to have become aware, that he had cause for complaint against Hornbuckle more than three years before his complaint was raised with it in July 2018. So, I think that Mr E's complaint has been made in time and I haven't considered this issue any further.

The due diligence Hornbuckle carried out

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.

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 E's case.

I note that the Principles for Businesses didn't form part of Mr Adams' pleadings in his initial case against Hornbuckle 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 E'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 E'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 Options SIPP agreed to accept the investment into its SIPP.

In Mr E's complaint, amongst other things, I'm considering whether Hornbuckle ought to have identified that the business introduced by Douglas Baillie and the Harlequin and

Central Florida investments involved a significant risk of consumer detriment. And, if so, whether it ought to have declined to accept Mr E's applications.

The facts of Mr Adams' and Mr E's cases are also different. I make that point to highlight that there are factual differences between *Adams v Options SIPP* and Mr E's case. And I need to construe the duties Hornbuckle owed to Mr E 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 E'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 Hornbuckle was under any obligation to advise Mr E on the SIPP and/or the underlying investments. Refusing to accept an application isn't the same thing as advising Mr E on the merits of the SIPP and/or the underlying investments. But I am satisfied Hornbuckle's obligations included deciding whether to accept particular investments into its SIPP and/or whether to accept introductions from particular businesses.

The regulatory publications

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

- The 2009 and 2012 Thematic Review reports.
- The October 2013 finalised SIPP operator guidance.
- The July 2014 "*Dear CEO*" letter.

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

The 2009 Thematic Review Report

The 2009 report included the following statement:

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

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

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

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

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

- *Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm's clients, and that they do not appear on the FSA website listing warning notices.*

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

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

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

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

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

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

The later publications

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

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

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

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

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

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

- *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for unauthorised business warnings.*

- *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*

- *Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.*

- *Being able to identify irregular investments, often indicated by unusually small or large transactions; or higher risk investments such as unquoted shares which may be illiquid. This would enable the firm to seek appropriate clarification, for example from the prospective member or their adviser, if it has any concerns.*

- *Identifying instances when prospective members waive their cancellation rights and the reasons for this.*

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

- *conducting independent verification checks on members to ensure the information they are being supplied with, or that they are providing the firm with, is authentic and meets the firm's procedures and are not being used to launder money*

- *having clear terms of business agreements in place which govern relationships and clarify responsibilities for relationships with other professional bodies such as*

solicitors and accountants, and

- *using non-regulated introducer checklists which demonstrate the SIPP operators have considered the additional risks involved in accepting business from nonregulated introducers*

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

*"**Due diligence***

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

- *ensuring that all investments permitted by the scheme are permitted by HMRC, or where a tax charge is incurred, that charge is identifiable, HMRC is informed and the tax charge paid*

- *periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme*

- *having checks which may include, but are not limited to:*

    - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*
    - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*

- *ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified*

- *good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and*

- *ensuring these benchmarks clearly identify those instances that would lead a firm to decline the proposed business, or to undertake further investigations such as instances of potential pension liberation, investments that may breach HMRC tax-relievable investments and non-standard investments that have not been approved by the firm"*

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

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

- correctly establishing and understanding the nature of an investment

- ensuring that an investment is genuine and not a scam, or linked to fraudulent

activity, money-laundering or pensions liberation

- ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable)

- ensuring that an investment can be independently valued, both at point of purchase and subsequently, and

- ensuring that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc.)

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

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

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

At its introduction the 2009 Thematic Review Report says:

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

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

So, as I've said, 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.

While the judge in *R. (on the application of Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service* [2017] EWHC 352 (Admin) made some observations about the application of our statutory remit, that remit remains unchanged. And, as noted above, in considering what's fair and reasonable in all the circumstances of a case, I'm required to take into account (where appropriate) what I consider to have been good industry practice at the relevant time.

I think the Report is also directed at firms like Hornbuckle 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*."

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.

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 Hornbuckle's point that the judge in the *Adams* case 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 Hornbuckle'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 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 Hornbuckle to ensure the transactions were suitable for Mr E. It's accepted Hornbuckle wasn't required to give advice to Mr E, 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 find that the 2009 Report together with the Principles provide a very clear indication of what Hornbuckle could and should have done to comply with its regulatory obligations that existed at the relevant time before accepting Mr E'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 E's application to establish a SIPP and to invest in Harlequin and Central Florida, Hornbuckle 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 Hornbuckle should have done to comply with its regulatory obligations and duties.

Submissions have been made about breaches of the Principles not giving rise to any cause of action at law, and breaches of guidance not giving rise to a claim for damages under the Financial Services and Markets Act. I've carefully considered these but, to be clear, it's not my role to determine whether something that's taken place gives rise to a right to take legal action. 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 Hornbuckle to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), amongst other things it should have undertaken sufficient due diligence into Douglas Baillie/the business it was introducing and the Harlequin and Central Florida investments *before* deciding to accept Mr E's applications.

Ultimately, what I'll be looking at here is whether Hornbuckle took reasonable care, acted with due diligence and treated Mr E fairly, in accordance with his best interests. And what I think is fair and reasonable in light of that. And I think the key issue in Mr E's complaint is whether it was fair and reasonable for Hornbuckle to have accepted his SIPP application and investment applications in the first place. So, I need to consider whether Hornbuckle carried out appropriate due diligence checks before deciding to do so.

And the questions I need to consider include whether Hornbuckle ought to, acting fairly and reasonably to meet its regulatory obligations and good industry practice, have identified that consumers introduced by Douglas Baillie and/or investing in Harlequin and Central Florida were being put at significant risk of detriment. And, if so, whether Hornbuckle should therefore not have accepted Mr E's applications.

The contract between Hornbuckle and Mr E

Hornbuckle made some submissions about its contract with Mr E and I've carefully considered what it has said about this.

My decision is made on the understanding that Hornbuckle acted purely as a SIPP operator. I don't say Hornbuckle should (or could) have given advice to Mr E or otherwise have ensured the suitability of the SIPP or investments for him. I accept that Hornbuckle made it clear to Mr E 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 the form Mr E signed confirmed, amongst other things, that losses arising as a result of Hornbuckle acting on his instructions were his responsibility.

I've not overlooked or discounted the basis on which Hornbuckle was appointed. And my decision on what's fair and reasonable in the circumstances of Mr E's case is made with all of this in mind. So, I've proceeded on the understanding that Hornbuckle wasn't obliged – and wasn't able – to give advice to Mr E on the suitability of the SIPP or investments.

What did Hornbuckle's obligations mean in practice?

In this case, the business Hornbuckle was conducting was its operation of SIPPs. And I remain satisfied that, to meet its regulatory obligations, when conducting its operation of SIPPs business, Hornbuckle had to decide whether to accept or reject particular investments and/or referrals of business with the Principles in mind. To be clear, I don't agree that it couldn't have rejected applications without contravening its regulatory permissions by giving investment advice.

The regulators' reports and guidance provided some examples of good practice observed by the FCA during its work with SIPP operators. This included being satisfied that an introducer is appropriate to deal with and that a particular investment is appropriate to accept. That involves conducting due diligence checks to make informed decisions about accepting business. This obligation was a continuing one.

I am satisfied that, to meet its regulatory obligations, when conducting its business, Hornbuckle was required to consider whether to accept or reject particular business, with the Principles in mind.

All in all I am satisfied that, in order to meet the appropriate standards of good industry practice and the obligations set by the regulator's rules and regulations, Hornbuckle should have carried out due diligence which was consistent with good industry practice and its regulatory obligations at the time. And in my opinion, Hornbuckle should have used the

knowledge it gained from this to decide whether to accept or reject business or a particular investment.

Hornbuckle's due diligence on Douglas Baillie

As I've said, Hornbuckle 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. And this is also seemingly consistent with Hornbuckle's own understanding of its obligations at the relevant time.

Hornbuckle has said that it carried out due diligence on Douglas Baillie before accepting any business from it, including verifying at the point of acceptance of each SIPP that it remained authorised by the FCA and had the requisite permissions. Hornbuckle has said that it provided Douglas Baillie with its Terms and Conditions for an introducer and obtained a completed Introducers Questionnaire from it, which Hornbuckle has said showed the standard information it requested at the time.

While the steps Hornbuckle has said it carried out go some way towards meeting its regulatory obligations and good industry practice, Hornbuckle hasn't provided evidence that it carried these out or of what it found out at the time. And, in any event, Hornbuckle hasn't provided us with sufficient information when asked to persuade me that it conducted sufficient due diligence on Douglas Baillie before accepting business from it, or that it didn't fail to draw fair and reasonable conclusions from what it did know about Douglas Baillie.

Mr E's SIPP application form noted Douglas Baillie as his adviser. However, I've seen no evidence that Mr E was offered full regulated advice on transferring to the SIPP and making the investments that he did by Douglas Baillie.

In my experience, Douglas Baillie has previously recognised that it wasn't providing customers with full regulated advice around this time. For example, when another SIPP provider made enquiries with Douglas Baillie in October 2012, Douglas Baillie openly said in response that it hadn't previously sought to find out what the intended investment was as part of its process in respect of SIPP transfers and that it still didn't intend to comment on the investments. And it seems that its suitability reports, when provided, made it clear that it wouldn't provide advice on the investments. So Douglas Baillie was making no secret of the fact it hadn't been offering or giving customers full regulated advice.

In the circumstances of Mr E's complaint, although Hornbuckle doesn't appear to have provided us with a copy of the correspondence from the time, it has said that Douglas Baillie confirmed to it in August 2011 that it had only handled the establishment of Mr E's SIPP – Hornbuckle has said it understood this to suggest that Douglas Baillie wasn't involved with the investments.

In addition, it seems Mr E was introduced to the investments by Mr T of MAP who then involved Douglas Baillie in respect of the SIPP transfer, which I think is unusual considering it seems Mr T was a regulated adviser with the necessary permissions to give full advice in the circumstances. And, in any event, I've seen no evidence that Mr E was offered or provided with full regulated advice on the suitability of the overall proposition by Douglas Baillie or any other regulated advisory firm.

In which case, Douglas Baillie wasn't doing things in a conventional way. It seems Douglas Baillie wasn't advising customers, including Mr E, on the suitability of the investments, including the risks and issues associated with this in respect of their particular circumstances. Douglas Baillie wasn't undertaking to proffer full regulated advice on the

suitability of the overall proposition, despite being a regulated business that seemingly had permissions to do so. And the possibility full regulated advice hadn't been given or made available was a clear and obvious potential risk of consumer detriment here.

Other anomalous features with Mr E's applications

Looking at Mr E's particular Central Florida investment application and certified sophisticated investor statement which were made shortly after his SIPP application, this was witnessed by Mr T of MAP and there were 'X''s in all places where Mr E needed to sign the form, indicating it was filled out for him and that he was then prompted on where to sign. And this is in line with Mr E's testimony that he was passed papers to sign.

Alongside this, I think it's unusual that Mr T was noted as having advised Mr E on the investment and having certified him as sophisticated, when Douglas Baillie had only recently been noted as being Mr E's ongoing regulated servicing adviser for his Hornbuckle SIPP on his SIPP application form. And when Hornbuckle was yet to receive anything from Mr E or Douglas Baillie to suggest that he no longer wanted it to act in such a capacity for him.

In addition, MAP and MAPGPI (the latter being one of the businesses closely involved in the Central Florida investment) shared the same registered business address at the time. And publicly available information shows that one of Mr T of MAP's fellow directors, a Mr P, was also a director of MAPGPI at the time.

In which case, I think the above were red flags and that there was a risk of customer detriment and cause for concern about Mr T's motivation and competency in the circumstances.

What should Hornbuckle reasonably have done?

Requesting information directly from Douglas Baillie

While I appreciate Douglas Baillie was a regulated adviser, as part of Hornbuckle's due diligence on Douglas Baillie, I think it's fair and reasonable to expect it, in line with its regulatory obligations, to have made some specific enquiries and obtained information about Douglas Baillie's business model at the outset. Hornbuckle ought to have found out more about how Douglas Baillie was operating *before* it accepted applications from it.

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

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

> *'Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.'*

I think that Hornbuckle, prior to accepting business from Douglas Baillie, 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, what its arrangements with any unregulated businesses or third

parties 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.

Hornbuckle has said that its Introducer Questionnaire shows the standard information it would have sought about Douglas Baillie's business model and the advice being given. And I can see that this Questionnaire asked about the service provided to clients and how new clients were targeted, for example. So Hornbuckle doesn't seem to dispute that asking for the type of information I've mentioned above was a fair and reasonable step to take in the circumstances, to meet its regulatory obligations and good industry practice.

And, while Hornbuckle no longer has a copy of the completed Introducer Questionnaire from the time, if it did or had asked Douglas Baillie the type of questions I've noted above then, considering it was being open that it wasn't offering or providing customers with full regulated advice on the intended investments, I think it's likely that Hornbuckle therefore was, or should reasonably have become aware of, the significant potential risk of consumer detriment either from those initial discussions with Douglas Baillie or more detailed discussions this ought to have led to.

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

Either way, I think Westerby should have concluded, and before it received Mr E's business from Douglas Baillie, that it shouldn't accept introductions from Douglas Baillie. I therefore conclude that it's fair and reasonable in the circumstances to say that Hornbuckle shouldn't have accepted Mr E's SIPP application from Douglas Baillie.

Making independent checks

In light of what I've said above anomalous features in respect of Mr E's particular Central Florida investment application, I think that Hornbuckle ought reasonably to have queried this further with Douglas Baillie and/or sought to contact Mr E 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.'.*

I think that doing so would have helped to clarify Douglas Baillie's and Mr T's involvement and verify the position put forward in the documentation. This was a fair and reasonable step to take in the circumstances.

If Hornbuckle had made independent checks at that point as to whether it was still the servicing adviser, for example, as it had received an application where Mr T had instead said that he was the adviser in respect of the investment and that he'd certified Mr E as sophisticated, I think it's likely to have found out from Douglas Baillie that although it was still the servicing adviser at the time it hadn't and wasn't providing Mr E with any advice in respect of the investments.

And had Hornbuckle contacted Mr E, or least reviewed information about him that was readily available in the public domain at the time, then I think it's likely to have found Mr E hadn't worked in investments for several years, having only worked in it for a short time. It seems Mr E had largely worked in mortgages and insurance since and had no pensions experience to understand the risks involved in the particular transaction (other than having recently made the Harlequin investment, which I'll come to later). And I think it's likely to have found out Mr E had little to no involvement with Douglas Baillie, who he understood had just processed his SIPP application. There's no reason for me to think Mr E wouldn't have told Hornbuckle this type of information 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.

In which case, Hornbuckle ought to have concluded that it would not be consistent with its regulatory obligations to accept Mr E's investment application and certification from Mr T and to proceed with this.

In summary

I think Hornbuckle should have concluded, and before it received Mr E's business from Douglas Baillie and his later investment applications, that it shouldn't accept introductions from Douglas Baillie. I therefore conclude that it's fair and reasonable in the circumstances to say that Hornbuckle shouldn't have accepted Mr E's SIPP application from Douglas Baillie.

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

As I've explained above, Hornbuckle shouldn't have accepted Mr E's introduction from Douglas Baillie in the first place. I think it is fair and reasonable to uphold this complaint on that basis alone. Nevertheless, I've also considered the due diligence that Hornbuckle carried out on the Harlequin investment. I have taken the same approach to considering this as I did to considering the due diligence undertaken on Douglas Baillie.

In doing so, I've only considered the Harlequin investment. I haven't felt it necessary to consider the due diligence Hornbuckle carried out on the Central Florida investment. This is because, while Mr E's SIPP application didn't detail the intended investments, Harlequin was the first investment he applied for and this came soon after his SIPP application. This is also where most of Mr E's SIPP pension monies was ultimately invested – two thirds were invested in Harlequin. So I think it's clear that the main driver behind the transfer to the SIPP was likely to invest in high-risk unregulated investments like Harlequin. This is also in line with Mr E's testimony that he was told Hornbuckle was used as it specialises in this type of investment.

Hornbuckle's due diligence on Harlequin

As I've said, Hornbuckle 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 regulator's publications as set out earlier in this decision.

Hornbuckle has said that it undertook the following in respect of the Harlequin investment:

- Its own due diligence checks to ensure the investment was suitable to be held within a SIPP and wouldn't attract a tax charge in accordance with HMRC guidelines and it

was considered permissible.

- It reviewed the properties as an overall investment alongside the contracts which were to be the same for each resort, as well as literature.
- Its technical team had completed due diligence on the Harlequin investment in November 2009, approving it as suitable but requiring certain contractual amendments for added protection for members. For example, Hornbuckle insisted on a formal independent valuation on the Harlequin developments being carried out so that this and any associated borrowings could be checked against SIPP values. And lawyers were instructed to review contracts.
- In November 2009, Hornbuckle confirmed it was introducing a robust sense check for Treating Customers Fairly purposes to ensure approval would only be granted in compliance with the FCA position, rather than only dealing with compatibility with HMRC rules, as was previously the case.
- Hornbuckle made it mandatory for all staff dealing with this investment to comply with procedures and checklists, the latter of which were designed to ensure all required forms were received and evaluated including prospectuses and proposal documents. The checklists were supplemented by detailed flowcharts and explanations for staff.
- Potential investors considering Harlequin investments were advised to seek appropriate legal, tax and financial advice from professionals experienced in direct investments in overseas property.

Looking at the internal correspondence from the time that Hornbuckle has provided in respect of the Harlequin investment, I can see it was first approached about this investment around mid-2007 and that HMRC told it that a hotel room investment would be permissible within a SIPP.

In December 2008, Hornbuckle shared emails with Harlequin, including seemingly providing Harlequin with its hotel room application and purchase guide, which asked for finance details including the investment purchase price, whether borrowing would be required, how much, at what interest rate and how any loan would be repaid, for example. And, amongst other things, Hornbuckle's purchase guide said that:

- The application needed completing in respect of the proposed purchase, including funding. A deposit is often payable by the scheme to secure the hotel room, with the balance being due at a set period. And it was the members responsibility to ensure sufficient monies in the scheme bank account.
- If borrowing is to be taken to assist with the purchase, it must fall within HMRC limits of 50% of the net assets of the pension scheme (minus existing borrowing).

On 2 December 2008 (and seemingly again on 10 March 2009), Hornbuckle was provided with promotional information about the SIPP opportunity with Harlequin, which included a presentation, flyer and booklet. And, on 15 December 2008, when discussing the investment, Hornbuckle's technical department said it had '*already asked questions about this one and we are happy to do this*…'.

On 10 March 2009, Hornbuckle said that the way Harlequin worked out what customers pay and when was a problem. It said that provided a loan wasn't required through the developer to fund the remaining 70% stage payments then this was ok, but it had otherwise said no to applications. It explained that if the instalments weren't paid there's an interest charge, so there's the option of borrowing the 70% from the developer. But the developer uses an inflated property value at the end of the development to calculate the borrowing, which doesn't comply with HMRC rules. Although Hornbuckle said the SIPP could borrow from a bank to fund the instalments, as it could control to borrowing to make sure it fell within rules.

In June 2009, Hornbuckle clarified this further and that it could only allow borrowing based on the value of the scheme at the time of the borrowing. That in today's climate it wouldn't be happy to take out borrowing based on a possible future date, where there was also a question of what might happen if a developer went 'bust' in the meantime. And it said that there was '*too big a risk here and neither did* [it] *think it sits comfortably with HMRC rules*.'.

On 7 August 2009, when discussing a customer's Harlequin application it was noted that the '*investment itself had already been approved'* by Hornbuckle.

On 10 August 2009, Hornbuckle questioned what was to stop the developer reclaiming the plot due to breach of contract, for example, if the stage instalments weren't paid and whether it should be requiring individual site valuations like another SIPP provider was doing. One of Hornbuckle's senior staff members went on to note that Hornbuckle had tried to speak to that SIPP provider, but the response had been 'cagey'. They said that if there's borrowing from the developer then Hornbuckle has to meet criteria, seemingly in reference to earlier concerns about HMRC rules. They also said that they'd thought it strange to '*just take a value from the developer*', that they were interested in how to 'get around' these concerns and that their IFA – who they'd told the investment was ok – was doing a lot of business. And, in response, it was clarified that Hornbuckle had previously agreed that it could allow the investment with borrowing from the developer or externally, if it insisted on a formal independent valuation which was checked against the SIPP value.

And, in November 2009, Hornbuckle noted, amongst other things, that:

- The next round of payments was due in respect of Harlequin.
- It was going to make a decision about valuing the Harlequin investment at any given time, as the documentation didn't state how this would be valued once the first payment had been made and before the completion date.
- If the scheme failed to pay the purchase price the member becomes responsible. And that no doubt financial advisers would draw this to customers attention.
- It understood it had already approved the investment, but it was still awaiting some details from Harlequin to push things forwards, specifically including how gearing within the SIPP would work.

On 11 November 2009, Hornbuckle confirmed that it could now process the investment, as the appropriate processes were set up. And, later in November 2009, Hornbuckle said that the Harlequin investment is one it had already approved, having spent a lot of time understanding the proposal and processes involved. It added that in regard to the investment approval it was revising its procedure in line with the FCA position. And that as well as checking basic compatibility with HMRC rules, it would also be carrying out a 'sense check' from a compliance perspective to ensure it can address the Treating Customers Fairly issues as well and that its processes were now more robust in respect of this.

On 30 November 2009, Hornbuckle said that it had put *future* Harlequin investments on hold until procedures were in place to *continue* with the purchase of this, which were now in place. And I understand it put in place checklists and user manuals for its staff members for use in respect of Harlequin applications.

What Hornbuckle should have concluded

Having carefully considered all of the information that's been made available to date to evidence the checks Hornbuckle carried out on the Harlequin investment, including the above, I'm not satisfied it undertook sufficient due diligence on Harlequin before it decided to accept the investment into its SIPPs. As such, in my view, Hornbuckle didn't comply with its

regulatory obligations and good practice, and it didn't act fairly and reasonably in its dealings Mr E, by not undertaking sufficient due diligence on the Harlequin investment *before* it accepted his application to invest in this.

Further, based on what Hornbuckle knew or ought reasonably to have known had it undertaken sufficient due diligence, I think some of the information should have given Hornbuckle real cause for concern about the risk of consumer detriment associated with this. And I don't think Hornbuckle's actions went far enough or that it drew a reasonable conclusion on accepting this investment into its SIPPs.

While Hornbuckle has confirmed to us that it *completed* its due diligence on Harlequin and introduced further processes as a result of the FCA's 2009 Report in November 2009, it had seemingly accepted the Harlequin investment within its SIPPs for some time prior to this. I say this because, in November 2009, it also talked about being able to *continue* with applications, as well as the *next* round of Harlequin stage payment instalments being due suggesting that such investments had already been made via its SIPPs and initial deposits paid.

I think Hornbuckle's recognition that its due diligence into the investment wasn't complete until November 2009 and its introduction of further processes at the time as a result of the FCA's 2009 report supports that its previous actions – which seem to largely relate to concerns about funding the investment in respect of developer borrowing – hadn't gone far enough to comply with its obligations. That's despite, as I've said above, the 2009 Report together with the Principles providing a very clear indication of what Hornbuckle could and should have already been doing to comply with its regulatory obligations that existed at the relevant time *before* permitting the Harlequin investment within its SIPP.

Hornbuckle was clearly aware that investors and their SIPPs had potential liability for the remaining investment balance. I can see it had concerns about the way in which investors were going to fund this. And I appreciate that, at one stage in June 2009, Hornbuckle showed concern that developer borrowing was risky for reasons other than the risk of tax charges.

However, in light Hornbuckle's above correspondence, I think it's fair to say that its main concern was in respect of HMRC rules and the risk that using developer borrowing would breach these and result in tax charges, as did the step it took in limiting the application types it was willing to accept as a result. Hornbuckle's obligations went beyond checking that the Harlequin investment existed and would not result in tax charges though. And I think that when undertaking due diligence into the proposed Harlequin investment and *before* permitting this into its SIPP at all, Hornbuckle should have had regard to, and given careful consideration to, Harlequin's marketing material and the way it was marketed to investors.

Rolling up payments until completion and the lending Harlequin said it could arrange (developer borrowing) for individuals to fund the remaining 70% balance, as well as the two-year rental guarantee, were seemingly some of the main selling points of the investment. I think also giving the impression of the investment being lower risk than it would have otherwise been as a result.

I can see that the marketing material available online in October and November 2008, which was around the time Hornbuckle first made enquiries with Harlequin, and which I think was easily discoverable on Harlequin's website at the time, said in a few places that:

> '***We guarantee investors*** *70% guaranteed mortgage…Two year 10% RENTAL GUARANTEE followed by 50% net room rate share*' (no emphasis added).

As did Harlequin's website in April 2009, which said that '…*a 70% loan to value guaranteed mortgage is available*…' as well as a '…*rental guarantee of 10%.*'.

As I've said above, on 2 December 2008 and seemingly again on 10 March 2009, Hornbuckle was provided with information explaining the SIPP opportunity with Harlequin which included a presentation, flyer and booklet. Looking at this, amongst other things, the information said that the developer would provide '*a guaranteed 10% income in the first two years of completion, followed by a 50% net room rate share*'.

In addition, Hornbuckle was provided with an updated Harlequin Property branded presentation which said, amongst other things, that '*We offer 100% funding*' and '*Pre-agreed, guaranteed funding*', with a guaranteed annual rent income equating to 10%.

And I can see that, in an email dated 24 June 2009 in respect of scheme borrowing, Hornbuckle recognised that '*As you are aware the developer is guaranteeing 10% income for the first 2 years and 50% of rental income*'.

I recognise that, around March 2010, Harlequin's website had seemingly been revised to say that '*Harlequin will assist investors to obtain finance for completion*'. And that the October 2010 Las Canas Price list now had an asterix next to the sentence '*70% developer loan will be available on completion*' which said this was '*subject to status*'. But the marketing materials I've seen continued to offer a '*Two year 10% RENTAL GUARANTEE followed by 50% net room rate share*.'. And, in any event, Hornbuckle had already permitted the Harlequin investment within its SIPPs by this point.

In my view, the marketing material from around the time that Hornbuckle approved the Harlequin investment and permitted this within its SIPPs does not provide any explanation of the guarantees offered. For example, it doesn't explain how the developer was planning to fund the guaranteed 10% rental income for two years post completion. Nor does it provide any information on the developer borrowing available, including how this was guaranteed and likely to be funded.

So the investment was presented as having guarantees, of which Hornbuckle was aware or ought reasonably to have become aware of. It's unclear how it was anticipated that these guarantees could be met though. I can't see that Hornbuckle sought to verify this information by requesting evidence to support the above statements, for example. And, as set out above, in reality the developer had no external or additional source of funding. So, had Hornbuckle sought to verify the strength of the guarantees before accepting the Harlequin investment into its SIPPs, I think it ought to have had cause for concern that there was a real risk of customer detriment.

Questions like those I've mentioned were also relevant to establishing an understanding of the nature of the Harlequin investment and trying to ensure this was genuine at the outset. Such that Hornbuckle should also have obtained answers to questions akin to these *before* it allowed Harlequin investments to be held in *any* of its SIPPs.

And I think that's especially true in circumstances like these where I think that Hornbuckle should have identified, and before permitting the Harlequin investments to be held in its SIPPs, that there was a significant risk that potential investors were being misled by Harlequin's marketing material.

To be clear, if parties involved in the Harlequin investment were unwilling or unable to fully answer Hornbuckle's questions and to provide information sought then I think, consistent with its regulatory obligations and good practice Hornbuckle should simply have concluded it wouldn't permit the Harlequin investment to be held within its SIPPs.

Harlequin investment summary

From the evidence I've seen I think the information being published about the Harlequin investment before Mr E's Hornbuckle monies were invested with it, including marketing material available, gave rise to a significant risk that potential investors were being misled. And I think that Hornbuckle ought to have identified this *before* permitting the Harlequin investment into its SIPPs. This is a clear point of concern, which I think Hornbuckle ought reasonably to have identified before it accepted Mr E's application to invest in Harlequin.

In my opinion it's fair and reasonable to say that Hornbuckle ought to have concluded there was an obvious risk of consumer detriment here. All in all, I am satisfied that Hornbuckle ought to have had significant concerns about the Harlequin investment from the beginning. And I think such concerns ought to have been a red flag for Hornbuckle when it was considering whether to accept this investment into its SIPPs at all, rather than just limiting the type of applications it might be willing to accept. Such concerns emphasise the importance of sufficient due diligence being undertaken before investments are accepted and before SIPP investors monies are invested.

Had Hornbuckle done what it should have, and drawn reasonable conclusions from what it knew or ought to have known, I think that it ought to have concluded there was a significant risk of consumer detriment if it accepted the Harlequin investment into its SIPPs and that this wasn't acceptable for its SIPPs.

As such, and based on the available evidence, I don't think Hornbuckle undertook appropriate steps or drew reasonable conclusions from the information that I'm satisfied would have been available to it, had it undertaken adequate due diligence into the Harlequin investment before it accepted this into its SIPPs. I don't think Hornbuckle met its regulatory obligations and, in accepting Mr E's application to invest in Harlequin, it allowed his funds to be put at significant risk.

To be clear, I'm not saying Hornbuckle should have foreseen the issues which later came to light with the Harlequin investment. I'm only saying that, based on the information available to Hornbuckle at the relevant time, it should have drawn a similar overall conclusion – that there was a significant risk that potential investors were being misled. I'm satisfied, on a fair and reasonable basis, that a significant risk of consumer detriment ought to have been apparent from the information available to Hornbuckle at the time. And I do think that appropriate checks would have revealed issues which were, in and of themselves, sufficient basis for Hornbuckle to have declined to accept the Harlequin investment in its SIPPs and before Mr E invested in it. And it's the failure of Hornbuckle's due diligence that's resulted in Mr E being treated unfairly and unreasonably.

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 Hornbuckle wasn't expected to, nor was it able to, give advice to Mr E on the suitability of the SIPP and/or the Harlequin investment for him personally. To be clear, I'm not making a finding that Hornbuckle should have assessed the suitability of the Harlequin investments for Mr E. I accept Hornbuckle had no obligation to give him advice, or to otherwise ensure the suitability of an investment for him.

And I'm also not saying that Hornbuckle shouldn't have allowed the Harlequin investment into its SIPPs because it was high risk. My finding here isn't that Hornbuckle should have concluded that Mr E wasn't a candidate for high-risk investments or that an investment in Harlequin was unsuitable for Mr E. Instead, it's my fair and reasonable decision that there were things Hornbuckle knew or ought to have known about the Harlequin investment and

how this was being marketed, which ought to have led Hornbuckle to conclude it wouldn't be consistent with its regulatory obligations or good practice to allow this investment into its SIPPs. And that Hornbuckle failed to act with due skill, organise and control its affairs responsibly, or treat Mr E fairly by accepting the Harlequin investment into his SIPP.

Acting fairly and reasonably to investors (including Mr E), Hornbuckle should have concluded that it wouldn't permit the Harlequin investment to be held in its SIPPs at all. And, as explained above, I'm satisfied that it's likely the main driver behind Mr E's pension monies being switched to Hornbuckle was to effect the Harlequin investment. And that the likely intention was to switch to SIPP to invest in high-risk unregulated investments, such as this. So, I think it's more likely than not that if Hornbuckle hadn't permitted the Harlequin investments to be held in its SIPPs at all that Mr E's pension monies wouldn't have been switched to Hornbuckle. Further, that Mr E wouldn't then have suffered the losses he has as a result of doing so.

While I've concluded both that Hornbuckle shouldn't have accepted Mr E's business from Douglas Baillie 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 Hornbuckle didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr E fairly by accepting his business from Douglas Baillie. And because, separately, Hornbuckle also didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr E fairly, by accepting the Harlequin investments into his SIPP. And to my mind, Hornbuckle didn't meet its regulatory obligations or good industry practice at the relevant times, and allowed Mr E to be put at significant risk of detriment as a result.

Did Hornbuckle act fairly and reasonably in proceeding with Mr E's instructions?

Hornbuckle might say that Mr E signed forms confirming he was relying on his own decisions when making the investments, that he was responsible and that he understood how the investment worked, for example.

Before considering this point, it's important to reiterate that, for the reasons given above, it was not fair and reasonable for Hornbuckle to have accepted Mr E's applications in the first place, considering I don't think it should have accepted business from Douglas Baillie nor permitted the Harlequin investment within its SIPPs in the first place. So in my opinion, Mr E's SIPP should not have been established and the opportunity to execute investment instructions or proceed in reliance on an indemnity should not have arisen at all.

Indemnities

In my view it's fair and reasonable to say that having Mr E sign declarations wasn't an effective way for Hornbuckle to meet its regulatory obligations to treat him fairly, given the concerns Hornbuckle ought to have had about Douglas Baillie, Mr E's introduction by it and the likely intended investments. Such forms intended to indemnify it against losses that arose from acting on his instructions. And, in my opinion, relying on such indemnities when Hornbuckle knew, or ought to have known, Mr E's dealings with Douglas Baillie 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 any declaration stating that Mr E took responsibility for his decisions and understood the 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 E's applications.

The Principles exist to ensure regulated firms treat their clients fairly. And I don't think the

paperwork Mr E signed meant that Hornbuckle could ignore its duty to treat him fairly. I'm satisfied that indemnities contained within the contractual documents don't absolve Hornbuckle of its regulatory obligations to treat customers fairly when deciding whether to accept or reject business.

Hornbuckle had to act in a way that was consistent with the regulatory obligations that I've set out in this decision. In my view, Hornbuckle was not treating Mr E fairly by asking him to sign an indemnity absolving it of all responsibility, and relying on such an indemnity, when it ought to have known that Mr E was being put at significant risk.

I'm satisfied that Mr E's Hornbuckle SIPP shouldn't have been established and the opportunity to execute investment instructions or proceed in reliance on such indemnities 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 Hornbuckle to proceed with Mr E's applications.

COBS 11.2.19R

Hornbuckle might say that it's an execution only SIPP provider and that COBS 11.2.19R obliged it to execute investment instructions. As I've said though, it wasn't fair and reasonable for Hornbuckle to have accepted Mr E's applications in the first place. So matters shouldn't have gotten beyond that.

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 E'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 Hornbuckle to proceed with Mr E's application.

Is it fair to ask Hornbuckle to compensate Mr E in the circumstances?

The involvement of other parties

In this decision I'm considering Mr E's complaint about Hornbuckle. However, I accept that other regulated parties were involved in the transactions complained about, such as Douglas Baillie and MAP. But our Service won't look at complaints against these, for example, as these businesses have been dissolved and no longer exist 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 Hornbuckle accountable for its own failure to comply with its regulatory obligations, good industry practice and to treat Mr E fairly. The starting point therefore is that it would be fair to require Hornbuckle to pay Mr E 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 Hornbuckle to compensate Mr E 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 Hornbuckle to compensate Mr E to the full extent of the financial losses he's suffered due to Hornbuckle's failings.

I accept that Harlequin and the other parties involved might have some responsibility for initiating the course of action that led to Mr E's loss. However, I'm satisfied that it's also the case that if Hornbuckle had complied with its own distinct regulatory obligations as a SIPP operator, the arrangement for Mr E 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 Hornbuckle has said into consideration. And it's my view that it's appropriate and fair in the circumstances for Hornbuckle to compensate Mr E to the full extent of the financial losses he's suffered due to Hornbuckle'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 Hornbuckle's liable to pay to Mr E.

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

Mr E 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 E's actions mean he should bear the loss arising as a result of Hornbuckle's failings.

For the reasons given above, I think that if Hornbuckle had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted Mr E's introduction from Douglas Baillie 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 E wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

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

Douglas Baillie and MAP 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 E trusted

these to act in his best interests. Mr E also then used the services of a regulated personal pension provider in Hornbuckle. So, overall, I'm satisfied that in the circumstances, for all the reasons given, it's fair to say Hornbuckle should compensate Mr E for the loss he's suffered. I don't think it would be fair to say in the circumstances that Mr E should suffer the loss because he ultimately instructed the transactions to be effected.

Would Mr E's application have gone ahead elsewhere if Hornbuckle had declined it?

I've considered whether, in the circumstances, Mr E would have gone ahead with the switch and the investment if Hornbuckle 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 E attended the MAPGPI event having been invited and that he had previous financial experience. But, for the reasons given above, I think Hornbuckle should have had concerns about the transaction. So it should not have accepted at face value Mr E signing any forms 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 Hornbuckle had found out more about Mr E. 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 E was not and it seems he also had little previous investment experience, Hornbuckle should have been concerned, in my view.

I recognise Hornbuckle has said that Mr E terminated his retainer with Douglas Baillie in late 2011 and transferred servicing rights of his SIPP to his financial services firm, showing he had sufficient experience on pensions and investments to deal with the SIPP. But this was seemingly in respect of the day-to-day servicing of the SIPP following the investments having already been made. And I can't see that Mr E went on to make any further investments within his Hornbuckle SIPP after doing so.

In addition, in the circumstances, I don't think Mr E could reasonably have been expected to be able to find out and understand the type of information that Hornbuckle as a SIPP provider was expected to consider in respect of the complex and speculative Harlequin investment for him to fully understand the nature of the investment and risks involved. As I've said, this was Mr E's only private pension provision (aside from state pension) and the majority of his Hornbuckle SIPP pension monies. And Mr E has said that if he'd been told the true nature of the investments and the risks he would never have gone ahead with the SIPP transfer. He said that he'd have left him pension where it was if this meant security.

I've taken into account Hornbuckle's comments about a previous decision given by our Service in respect of another customer – it has said that the application form recorded Mr E as that customer's financial adviser in respect of the UCIS investment and that this supports that Mr E would always likely have gone ahead with the investments that he made. I think it's worth noting though that the previous decision details, amongst other things, that it was understood that Mr E's details had been forged on the customer's application form. In any event, I'm considering the particular circumstances of Mr E's complaint. And, for the reasons given, I'm not persuaded that Mr E would have gone ahead with the transfer and investment if Hornbuckle had refused his applications.

In any event, I also think it's fair to assume that another SIPP provider would've complied with its regulatory obligations and acted according to good industry practice, and therefore wouldn't have accepted Mr E's application from Douglas Baillie nor permitted the Harlequin investment had Mr E gone elsewhere.

On balance, I think it's fair and reasonable to direct Hornbuckle to pay Mr E 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 E's loss, I consider that Hornbuckle 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 E's applications.

Having carefully considered all of the circumstances, I'm satisfied it's fair and reasonable to conclude that if Hornbuckle had refused to accept Mr E's application from Douglas Baillie and to permit the Harlequin investment within its SIPPs, the transactions this complaint concerns wouldn't still have gone ahead. So, overall, I do think it's fair and reasonable to direct Hornbuckle to pay Mr E 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 E. In my view, in considering what fair compensation looks like in this case, it's reasonable to make an award against Hornbuckle that requires it to compensate Mr E for the full measure of his loss. Douglas Baillie and MAP was reliant on Hornbuckle to facilitate access to Mr E's pension. Hornbuckle accepted Mr E's business from Douglas Baillie and, but for Hornbuckle's failings, I'm satisfied that Mr E's pension monies wouldn't have been transferred to Hornbuckle or invested in the Harlequin investment.

As such, I'm not asking Hornbuckle 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 E's right to fair compensation from Hornbuckle for the full amount of his loss. The key point here is that but for Hornbuckle's failings, Mr E 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 Hornbuckle to compensate Mr E 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 Hornbuckle had refused to accept business from Douglas Baillie and to permit the Harlequin investment in its SIPPs then Mr E would've retained his existing pension and wouldn't have switched to a SIPP or subsequently made the investments that he did. So Hornbuckle 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 Hornbuckle should've declined Mr E's applications and that any subsequent investments wouldn't have gone ahead if it had treated Mr E 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 Hornbuckle to compensate Mr E for his full loss.

Putting things right

A fair and reasonable outcome would be for the business to put Mr E, as far as possible, into the position he would now be in but for Hornbuckle's failings. I consider Mr E would have most likely remained in his defined benefit occupational pension scheme but for the respondent business' failings.

In light of the above, Hornbuckle should calculate fair compensation by comparing the current position to the position Mr E would have been in if he hadn't transferred from his existing scheme. In summary, Hornbuckle should:

1. Take ownership of any illiquid investments if possible.
2. Calculate and pay compensation for the loss Mr E's pension provisions have suffered as a result of Hornbuckle accepting his applications.
3. Pay Mr E £500 for the distress and inconvenience he's suffered.

I've set out how Hornbuckle should carry out these steps in more detail below.

1. *Take ownership of any illiquid investments within the SIPP if possible.*

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

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

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

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

2. *Calculate and pay compensation for the loss Mr E's pension provision has suffered as a result of Hornbuckle accepting his applications.*

Hornbuckle must therefore 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, from what I understand Mr E has not yet retired, and has no plans to do so at present. So, 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 PS22/13 and 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 E's acceptance of the decision.

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

- always calculate and offer Mr E redress as a cash lump sum payment,

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

    - their 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 their redress prudently is to use it to augment their DC pension

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

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

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

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

For the purposes of the calculation that's being carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4, if it wishes, Hornbuckle may notionally, for the period from the point of their payment through until the valuation date (as per the DISP App 4 definition of that term), allow for that proportion of the payment(s) Mr E received from the FSCS following the claim about Douglas Baillie as an income withdrawal payment.

Where such an allowance is made then Hornbuckle must also, at the end of the calculation, allow for a notional addition to the overall calculated loss that's equivalent to the payment(s) Mr E received from the FSCS following the claim about Douglas Baillie. The effect of this notional addition will be to increase the overall loss calculated using the most recent financial assumptions in line with PS22/13 and DISP App 4, by a sum that's equivalent to the payment(s) Mr E received from the FSCS.

Account should also be taken of the £3,000 referral payment Mr E says he received in the calculation by way of treating it as an income withdrawal payment paid at the outset.

Redress paid directly to Mr E 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), Hornbuckle may make a notional deduction to allow for income tax that would otherwise have been paid. Mr E'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.

Both parties were given the opportunity to dispute this income tax rate assumption in response to my provisional decision and were made aware that it won't be possible for us to amend this once a final decision has been issued. As I've said, Embark didn't respond. And Mr E has said that 20% would be the highest tax band expected for him in retirement, not that he doesn't expect to pay any. So I'm not minded to change my position.

SIPP fees

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

3. *Pay Mr E £500 for the distress and inconvenience he's suffered.*

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

My final decision

For the reasons given, it's my final decision that this complaint is upheld and Embark Services Limited must calculate and pay fair compensation to Mr E as set out above.

Where I uphold a complaint, I can award fair compensation of up to £150,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £150,000, I may recommend that the business pays the balance.

Determination and award: I require Embark Services Limited to pay Mr E the compensation amount as set out in the steps above, up to a maximum of £150,000.

Recommendation: If the compensation amount exceeds £150,000, I also recommend that Embark Services Limited pays Mr E the balance.

My recommendation would not be binding. Further, it's unlikely that Mr E can accept my final decision when issued and go to court to ask for the balance. Mr E may want to consider getting independent legal advice before deciding whether to accept the final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr E to accept or reject my decision before 27 November 2024.

Holly Jackson

Ombudsman