DRN-4895379

Financial Ombudsman Service

The complaint

Ms C complains Options UK Personal Pensions LLP ('Options' - formerly Carey Pensions UK LLP) failed to undertake effective due diligence and accepted her application for a Self-Invested Personal Pension ('SIPP') and subsequent investment in an overseas property-based investment scheme when it shouldn't have done.

The entities involved

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

'Options'

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

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

The Financial Planning Partnership ('TFPP')

TFPP was a trading name of a financial adviser business that was owned and operated by an individual I shall call Mr B. It was regulated by the FSA from 10 November 2009 until 6 March 2013. As I understand it, TFPP was authorised to advise on investments and advise on pension transfers and opt-outs. The business failed in June 2018.

Mr B was also the Chief Executive and sole owner of a company called Investors Overseas Limited, that promoted overseas land and property based investments. It was incorporated on 14 October 2010 and dissolved on 30 May 2017, and it was not regulated by the FCA. It was not therefore authorised to advise on investments covered by the Financial Services and Markets Act 2000 ('FSMA') in the UK.

Oasis Atlántico Imobiliaria SARL ('Oasis')

Oasis is a company incorporated under the laws of Cape Verde. It owned land in Cape Verde on which it was to build a tourism resort named Salinas Sea. The development was divided into units (in effect hotel rooms).

A UK based company called Cape Verde4 Life was an authorised representative of Oasis. Cape Verde4 Life was involved in overseas property-based investments. It was not

regulated by the FCA, so it was not therefore authorised to advise on investments covered by FSMA in the UK.

'Salinas Sea'

As I understand it there was more than one way to invest in the Salinas Sea project.

I have seen a brochure promoting investment via two special purpose vehicles (companies) which were intended to be set up on a basis that they could be invested in within a UK SIPP. This form of investment involved buying shares in the companies which in turn invested in units in Salinas Sea. This form of investment required a minimum investment of £10,000. The brochure said it was intended for authorised financial advisers and gave the impression it was an investment for high net worth clients and/or sophisticated investors.

Alternatively, it was possible for the investor to buy a unit or part of a unit. Ms C invested in this way.

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

During the first three years the investor was to be paid an annual income of at least 5% of the price paid for the unit. There was also provision for payment of income at the same level if the hotel was not completed and opened on time.

There was a formula for calculating the rental income payable to the investor after the first three years, which involved pooling the rental income of all units rather than basing it on the occupancy of the investor's individual unit.

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

What happened

Ms C says she was advised by Mr B to open a SIPP with Options and transfer her existing pensions into it and then purchase a 100% share of a hotel room (a unit) in the Salinas Sea resort. She's said, via her representative, that:

> "[Mr B] *suggested putting some of the pension fund in the Cape Verde SIPP. She wasn't too keen because, she only had £60K to invest and the minimum investment was £100K.* [Mr B] *said a mortgage would make up the shortfall paid for from the income the hotel room generated…This was an advised transfer and was promoted as a hands off investment that was entirely suitable and fitting risk profile* [sic]."

She says she trusted Mr B's advice as he had advised her on other financial products from as early as 2004. Neither Ms C nor Options have provided copies of documents recording the advice Ms C says she was given by Mr B.

On 30 May 2012, Ms C signed 'The [Options] Pension Scheme Application Form.' Ms C's personal details were entered on the form and the details of five existing pensions she had, estimated to be worth around £111,000 in total, were entered in the section relating to transfers. The relevant boxes to confirm advice had been received on the transfers were

ticked for most of the transfers, and TFPP's details were entered in the spaces for the adviser's details.

The section of the form relating to investments included the following:

> *"Do you wish to appoint an Investment Manager?"* (Answered *"No"*)
>
> *"Is your Investment Manager also your Financial Adviser?"* (Answered *"No"*)
>
> *"If your Investment Manager is not your Financial Adviser do you wish us to accept instructions from your Financial Adviser on any investment matter?"* (Answered *"Yes"*)

And:

> *"**Type of Investment Authorisation***
>
> *Execution only – Investment Manager trades on your / your Financial Adviser instructions only"* (not ticked)
>
> *"Advisory – Investment Manager provides advice on which you / your Financial Adviser may act upon"* (ticked)
>
> *"Discretionary – Investment Manager manages your pensions fund and reports on investments made"* (not ticked)

The name and amount of the investment(s) to be made were not entered in the space for these details on the form. The relevant box was ticked to indicate Ms C intended to purchase commercial property within her SIPP. Although no details about the property were provided, it seems from Options' final response to Ms C's complaint that it understood from the outset of her application that she was intending to invest in Salinas Sea.

The application form included a page for the details of the applicant's financial adviser. This page recorded TFPP's details, and the relevant boxes were ticked to confirm that all correspondence should only be sent to them and that their initial fee of £495 should be paid from the SIPP.

A number of sections on the application form were left blank. These sections related to Ms C's occupation and eligibility, taking benefits from the SIPP, contributions into the SIPP and the nomination of beneficiaries.

Options accepted Ms C's application and it established her SIPP on 8 June 2012, and later that month, Ms C's existing pensions were transferred into her Options SIPP.

After establishing her SIPP, Options required Ms C to complete a document headed 'SIPP Member Instruction and Declaration Alternative Investment - Salinas Sea.' It included a table at the start which detailed the scheme name, member name, scheme reference, investment name, investment type and adviser. I will refer to this document as the 'Member Declaration.'

The Member Declaration recorded the investment name as *"Salinas Sea,"* and the investment type as *"Hotel Room – Aparthotel on Sal (Cape Verde Islands)."* And, unlike her application form, the Member Declaration recorded Ms C's adviser as *"Investors Overseas,"* rather than her regulated adviser TFPP.

The declaration began:

> *"I* [Ms C] *being the member of the above scheme write to instruct* [Options] *to purchase a Hotel Room with borrowing from the developer with Salinas Sea on the island of Sal in the Cape Verde Islands, managed on a "hotel room basis," through* [Oasis]*, for a consideration of £100,000 on my behalf for the above scheme."*

The declaration then set out a number of points including:

- Ms C confirmed Options was acting on an execution only basis and had not given advice
- Ms C understood that the investment is the purchase of a hotel room that is *"an Unregulated "Alternative Investment" and as such is considered High Risk and Speculative"*
- Ms C acknowledged and confirmed her understanding that the investment may prove difficult to value and/or sell / realise
- Ms C confirmed she had reviewed and understood the information provided by Salinas Sea
- Ms C confirmed that she had taken her own advice, including but not limited to, financial, investment and tax advice regarding the investment and its value, taxes, costs and fees

The declaration also included an agreement by Ms C to indemnify Options against any claims etc in connection with the investment. Ms C signed the member declaration on 5 July 2012 and returned it to Options. She was not asked to state or otherwise indicate or provide evidence to show that she was a high net worth individual or sophisticated investor in the member declaration, or in her SIPP application or otherwise.

On the same date, Ms C signed a letter of authority addressed to Options which instructed and authorised it *"to provide Cape Verde4 Life, the authorized representative of* [Oasis]*, with any information whatsoever they may require in relation to* [Ms C's] *scheme's purchase of an investment into the Salinas Sea investment."* So, it is clear that it was not only TFPP and Investors Overseas that were involved with Ms C's applications.

Also in July 2012, a UK law firm Options had instructed issued a report titled 'Report on Principal Terms of Documentation Salinas Sea Sal Cape Verde.' The report indicated that Ms C was to pay £100,000 for a 100% share of a unit in Salinas Sea. The investment would be funded by an initial deposit of £65,000 to be paid when the contract was signed, and the remaining balance would be paid when the Deed of Purchase and Sale was completed. The report noted the remaining balance could be funded by a mortgage provided by Oasis, that would then be repaid using rental income generated by the unit, and that all the rental income generated would be used for this purpose until the mortgage was repaid in full. The report said it was anticipated that construction of the unit would be completed by the end of December 2012.

On 17 July 2012, Options sent the signed contract to Oasis and £65,000 was paid out of Ms C's SIPP as a deposit on her investment.

In late August 2012, Ms C took a tax-free cash lump sum of £27,425 from her Options SIPP.

In March 2014, Options contacted Ms C to inform her that Oasis had completed the Salinas Sea resort and had invited her to inspect the unit she had invested in. Then in November 2015, Options wrote to Ms C to confirm it had completed the purchase of her unit in Salinas Sea. It confirmed the remaining balance was paid by way of a mortgage provided by Oasis on the unit.

In July 2020, Options reported the value of Ms C's SIPP in her annual statement as around £101,500, net of the remaining mortgage balance with Oasis of around £7,400. Options has provided a 'Holdings Summary Report' dated 16 May 2023 that stated the value of Ms C's unit in Salinas Sea as £0, and the cash account balance in her SIPP (the only other asset in the SIPP) as around £7,600. I haven't been provided with any more up to date information about the position of Ms C's SIPP.

On 18 July 2022, Ms C received £50,000 from the Financial Services Compensation Scheme ('FSCS') in settlement of a claim she made against TFPP. And on 11 February 2023, the FSCS agreed to reassign the rights to pursue Options in this matter to Ms C.

The relationship between TFPP and Options

As I understand it, Options' relationship with TFPP began in March 2012. Options has said Ms C was the only client introduced to it by TFPP between March 2012 and March 2013, when Options ended its relationship with TFPP because their authorisation was withdrawn by the FSA.

Options says it undertook due diligence on TFPP and verified that they were regulated by the FSA and held the appropriate permissions for the services they were purported to be providing. It says its due diligence provided no cause for concern about TFPP, or reason to suspect they weren't a suitable financial adviser for Ms C.

Due diligence carried out by Options on TFPP

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

Options says:

- TFPP first proposed to become an introducer of SIPP business for Options in March 2012. They were an introducer from early March 2012 until early March 2013, when Options terminated its agreement with them because their authorisation was withdrawn by the FSA

- Options carried out various checks on TFPP, including:

    - A review of their company website (without elaboration)

    - A check of the FSA register to ensure they had the appropriate permissions

    - A *"world check"* on the individual at TFPP who Options dealt with (the result of that check hasn't been provided to the Financial Ombudsman Service)

- Options did not pay any commission or fees to TFPP for introducing business to it
- Options did not request copies of any suitability reports
- Options carried out a later check on TFPP to ensure they were acting in accordance with its agreement with them, and that led it to discover an FSA warning
- Options did not consider the Salinas Sea investment to be a non-mainstream pooled investment. It says it was an investment *"into bricks and mortar property where they would be rented out with the rental* [income] *returned to the pension scheme bank account"*

In addition to the above, Options has provided an 'Independent Financial Adviser Introducer Profile' that TFPP completed and signed in March 2012. The document began with a statement that included the following:

> *"As an FSA regulated pensions company we are required to carry out due diligence on independent financial adviser firms looking to put business with us and gain some insight into the business they carry out."*

The document went on to record a number of points in relation to TFPP, including:

- They were based in the UK and had been directly authorised by the FSA since November 2010
- They were not and had not been subject to any regulatory action or complaints
- They had established 20 pensions in the previous 12 months, 18 of which were SIPPs. Of these newly established pensions, 80% were from transfers from existing schemes (all of which were personal pensions)
- The average value of its pension clients was between £75,000 and £100,000
- All pension transfers were signed off by a *"compliance firm"* (without elaboration)
- Of their overall business, 20% related to pensions and their pension business was *"growing"*
- They charged fees for their pensions advice ranging from £495 to £795 that was generally paid from the pension rather than from the client directly
- Their typical client was a *"personal retail client"* and the investment strategy they typically utilised within pension schemes, from a list of options provided on the document, included *"platforms", "DFM relationship"* and *"commercial property"* (without elaboration). The list of options on the document included *"Alternative Investments,"* but it wasn't ticked by TFPP
- The key features they were looking for from their pensions administration provider were *"setting up only* [and] *typical charges"* (without elaboration)

The document concluded with a declaration that required TFPP to remain authorised in accordance with FSMA, and to notify Options of any changes or events relating to their authorisation that could prejudice Options. The declaration also set out Options' right to stop the agreement and to stop accepting introductions should any such changes or events occur.

At the same time, Mr B signed another document from Options headed 'Introducing Business to [Options] – Roles & Responsibilities,' that set out the roles and responsibilities of both parties. TFPP's responsibilities included the following:

Under the *"Providing Advice"* section:

- *"To evaluate your client's financial circumstances and based on this assess their suitability for what, if any, of the* [Options] *pension range is appropriate;*

- *To document your recommendation together with suitable alternatives that could have been appropriate and why rejected* [sic] *in favour of the recommended product;"*

Under the "*Scheme Investments"* section:

- *"Where your client seeks advice, to provide fully documented advice to your client on the suitability of the Scheme investments, taking account of their financial objectives and attitude to investment risk;"*

Due diligence carried out by Options on Salinas Sea

As I understand it Options carried out checks on the Salinas Sea investment in 2010.
It concluded Salinas Sea was eligible for investment in a pension scheme. It also decided as a result of that review that all investors in its SIPPs should complete its 'Alternative Investment Member Declaration & Indemnity.'

I have seen a review of the Special Purpose Vehicle version of the investment carried out by a third party in April 2012 (before Ms C's investment in Salinas Sea) which was provided to Options. It includes a suggestion that SIPP operators obtain an acknowledgement from scheme members of the high risk, illiquid nature of the investment. And *"where scheme members are not transacting this through an FSA authorised adviser, the SIPP operator may wish to obtain a copy of the* [high net worth]*/sophisticated investor certificate."*

I will refer to the declaration mentioned above again later in this decision. It is enough to say here that because of its checks upon the Salinas Sea investment, Options referred to the investment as an unregulated alternative investment considered high risk and speculative.

Ms C's complaint to Options

In November 2022, Ms C complained to Options via a professional representative. In summary, it said:

- Ms C had suffered a considerable financial loss resulting from Options' due diligence failures in accepting her application for a SIPP and her subsequent investment in Salinas Sea
- Options failed to meet its regulatory duties in facilitating Ms C's pension transfers to a SIPP and investment in a high risk, illiquid investment that was unsuitable for her
- To resolve Ms C's complaint, Options should compensate Ms C to put her in the position she would be in had she not transferred her existing pensions into an Options SIPP and made the subsequent investment

Options rejected Ms C's complaint, explaining in its final response dated 25 November 2022 that, in summary:

- Options provides execution only (i.e. non-advised) SIPP administration services and this was explained to Ms C in all the documentation she signed in June 2012. Options could not and is not obligated to go beyond the paperwork Ms C signed
- Options would have been in breach of COBS 11.2.19 if it had not executed Ms C's specific instructions to make the Salinas Sea investment – by virtue of this rule Options are not liable to Ms C
- Options followed its processes and ensured Ms C was aware that it was acting on an execution only basis, and it complied with all its obligations as an execution-only SIPP operator in its dealings with her
- Options did not and is not permitted to provide any form of advice on the suitability of a SIPP or the investment, or even a customer's choice of financial adviser. Had Options taken the steps Ms C says it should have taken, it would have breached the general prohibition
- Ms C's application was introduced to Options by TFPP, and her application confirmed she had received advice from them about both the pension switches and investment in Salinas Sea. Ms C's complaint about the investment should therefore be directed to TFPP instead of Options
- Options completed due diligence on Salinas Sea to ensure it could be held within a UK registered pension scheme such as its SIPP
- Options provided Ms C with documentation that contained all the necessary information and guided her to obtain financial advice, and Ms C signed the documentation to confirm she had read and understood the contents
- Options isn't an investment manager and it has no involvement in the operation of the underlying investments chosen by its members, so it isn't responsible for the performance of the investments

Overall, Options said it had complied with its regulatory and contractual obligations to Ms C and was not liable to her for her loss.

Our Investigator's view

Ms C's complaint was referred to the Financial Ombudsman Service.

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

- They had considered whether the complaint had been made within the applicable time limits and concluded it had been
- The considerations relevant to reaching their view on Ms C's complaint included the FCA's Principles for Businesses and rule COBS 2.1.1 that are set out in the FCA's Handbook, publications issued by the FCA, and relevant case law

- Options was not responsible for giving Ms C advice, nor was it responsible for checking any advice given to her was suitable for her individual circumstances and requirements

- Options was obliged to safeguard consumers against facilitating SIPPs that are unsuitable or detrimental to them. This included deciding whether or not to accept or reject particular referrals of business or investments

- Declining business does not amount to advice

- Options ought to have been prompted to carry out more thorough checks on TFPP by Ms C's signed member declaration (that referred to Salinas Sea as an alternative investment), as TFPP didn't tell Options they utilised such investments in their clients' pension investment strategies

- There was a conflict of interest in Mr B advising Ms C to invest in an overseas property investment while he was also the director of a company – Investors Overseas – that promoted these investments. It's reasonable to assume TFPP's advice to Ms C to invest in Salinas Sea was driven by this

- There was no mention of any proposed investment(s) on Ms C's SIPP application, so Options didn't do anything wrong by accepting her application

- Had Options carried out further checks on Mr B when it received Ms C's investment instruction, as it ought to have done, it would have discovered his involvement in Investors Overseas. That should have ultimately led it to reject Ms C's investment instruction because of the risk of consumer detriment

Finally, our Investigator set out how Options should put things right by putting Ms C as far as possible, into the position she would now be in but for Options facilitating her investment in Salinas sea following her introduction by TFPP. They considered that if Options had acted appropriately, it's more likely than not that Ms C would have invested her pension differently, but that it's not possible to say precisely what she would have done differently. So, our Investigator set out how Options should calculate her losses and compensate her.

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

Ms C's representative confirmed she accepted what the Investigator said, and it asked for Options to pay any amount due to the FSCS directly out of the total redress due to Ms C so that she wouldn't have to draw down such an amount from her pension to repay to the FSCS.

Options did not respond to what the Investigator said. So, as no agreement could be reached, the complaint was passed to me to decide.

My provisional decision

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

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

I invited both parties to respond with any comments they wished to make in light of my provisional findings, including any evidence to confirm if the pension Ms C transferred to her SIPP contained any guaranteed benefits that were lost upon transfer, or any information about how Ms C would have taken her pension benefits if she believes she has suffered a loss of opportunity to do so because of the current position of her SIPP investments. Options did not respond to the provisional decision. Ms C responded to say she accepted the provisional decision and she didn't have any further comments to add.

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

What I've decided – and why

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

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

Where the evidence is incomplete, inconclusive, or contradictory, I've reached my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence, what I've seen on similar cases and the wider surrounding circumstances.

Relevant considerations

I'm required to determine this complaint by reference to what I consider to be fair and reasonable in all the circumstances of the case. When considering what is fair and reasonable, I am required to take into account: relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to

have been good industry practice at the relevant time.

The Principles

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

> *"Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence*
>
> *Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems*
>
> *Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly"*

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

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

And at paragraph 77 of BBA Ouseley J said:

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

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

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

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

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

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

The 'Adams' court cases and COBS 2.1.1R

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

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

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

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

Although the Court of Appeal ultimately overturned HHJ Dight's judgment, it rejected that part of Mr Adams appeal that related to HHJ Dight's dismissal of the COBS claim on the basis that Mr Adams was trying to advance a case that was radically different to that found in his initial pleadings. The Court found that this part of Mr Adams' appeal did not so much

represent a challenge to the grounds on which HHJ Dight had dismissed the COBS claim, but rather was an attempt to put forward an entirely new case.

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

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

The facts in Ms C's case are different from those in Adams. There are also differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Ms C's complaint. The breaches were summarised in paragraph 120 of the Court of Appeal judgment. In particular, HHJ Dight considered the contractual relationship between the parties in the context of Mr Adams' pleaded breaches of COBS 2.1.1R that happened after the contract was entered into. In Ms C's complaint, I am considering whether Options ought to have identified that the introduction from TFPP and/or the investment in Salinas Sea involved a risk of consumer detriment and, if so, whether it ought to have decided not to accept such introductions and/or investments before it established her SIPP in June 2012 and before it proceeded to invest her money in Salinas Sea in July 2012.

As already mentioned, I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And, in doing that, I am required to take into account relevant considerations which include: law and regulations; regulator's rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. This is a clear and relevant point of difference between this complaint and the judgments in both Adams cases. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

I have proceeded on the understanding Options was not obliged – and not able – to give advice to Ms C on the suitability of its SIPP or the Salinas Sea investment for her personally. But I am satisfied Options' obligations included deciding whether to accept particular investments into its SIPP and/or whether to accept introductions of business from particular businesses.

Regulatory publications

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

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

The 2009 report included the following statement:

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

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

And:

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

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

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

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

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

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

- *Being able to identify anomalous investments, e.g. unusually small or large transactions or more 'esoteric' investments such as unquoted shares, together with the intermediary that introduced the business. This would*

enable the firm to seek appropriate clarification, e.g. from the client or their adviser, if it is concerned about the suitability of what was recommended.

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

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

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

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

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

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

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

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

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

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

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

What did Options' obligations mean in practice?

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

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

I am satisfied that, in order to meet the appropriate standards of good industry practice and the obligations set by the regulator's rules and regulations, Options should have carried out due diligence on TFPP and Salinas Sea on a continual basis (as the guidance I've referenced above set out that SIPP operators have a responsibility to "***continuously analyse*** *the individual risks to themselves and their clients*" (emphasis added)). And in my opinion, Options should have used the knowledge it gained from its due diligence to decide whether to accept or reject a referral of business.

The due diligence carried out by Options on the investment

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

Options has told us that the Salinas Sea investment was not considered a non-mainstream pooled investment. It says it was a bricks and mortar property to be rented out with the rental income paid to the SIPP.

In my view this is an oversimplification. Ms C was not making a straightforward purchase of, say, a holiday apartment or villa that she could rent out as she saw fit and freely sell on the open property market. She was buying a 100% share in a hotel room in a development that was not yet complete, where the property would form part of a hotel. Ms C is in principle free to sell the investment if she wants to, but she must sell subject to the hotel agreement. So,

the ability to sell, in practice, depends on there being a market for hotel room or part shares in a hotel room investments.

These points were, or were largely, understood by Options at the time of Ms C's investment when it categorised the investment as an unregulated alternative investment that was high risk and speculative which might be difficult to sell/realise. And this understanding of the investment formed part of the context in which, or was a relevant factor in, Options' decision to proceed with Ms C's introduction to it by TFPP since Options has said it understood they were responsible for advising her/had advised her on the suitability of the investment.

The due diligence carried out by Options on the introducer

As I noted above it's clear that before Options' relationship with TFPP commenced, Options understood and accepted its obligations meant it had a responsibility to carry out due diligence on TFPP. The paragraph at the start of Options' 'Independent Financial Adviser Introducer Profile' included the following:

> *"As an FSA regulated pensions company we are required to carry out due diligence on independent financial adviser firms looking to put business with us and gain some insight into the business they carry out."*

This document was completed and signed by Mr B before Options received Ms C's application. So, there is no dispute that Options took some steps to make checks on TFPP and understand their business model before it accepted Ms C's application from them.

The 'Introducing Business to [Options] – Roles & Responsibilities' document set out, amongst other things, that TFPP were responsible for providing and documenting advice to their clients on the suitability of the Options SIPP and the investments to be made within it.

Options has told us that it checked the FSA register at the outset of its relationship with TFPP to ensure they had the appropriate permissions, that it checked the register to ensure they were still regulated before accepting any new applications, and that it ended the relationship because they ceased to be authorised. Options hasn't provided evidence showing what permissions TFPP had at the time of the relationship, but I've proceeded on the understanding that these permissions would have included carrying on the regulated activities of *"advising on investments"* and *"advising on pension transfers and opt-outs."*

From what I've said above, it's apparent that in deciding to accept business from TFPP, Options relied heavily on the fact they were authorised and regulated by the FSA at the time. I don't think it was unreasonable of Options to rely somewhat on this fact, but it should not on its own have satisfied Options that there was no risk of consumer detriment in accepting business from TFPP.

From the information and documents Options has provided to the Financial Ombudsman Service about its relationship with TFPP, I'm satisfied Options did take *some* steps towards meeting its regulatory obligations and good industry practice. However, I don't think those steps went far enough or were sufficient to meet Options' regulatory obligations and standards of good industry practice.

Prior to Ms C's application, Options had not received any introductions from TFPP that would have formed a track record of business they introduced that Options could have referred to. This meant that, at the time of Ms C's application, Options did not have an understanding of what the information TFPP had given it at the outset of their relationship

meant in practice. In short, the relationship at that time lacked the assurances that a track record might otherwise have provided. Options should have been aware of this and it ought therefore to have been keen to check what service TFPP were providing to their clients, especially in relation to the provision of advice. In my view, a reasonable step Options could have taken to achieve this would have been to request copies of suitability reports / advice from TFPP or the client.

Options has told us that it didn't request copies of suitability reports from TFPP or the client because it neither had the permissions or experience to advise or comment on the suitability of the transactions, and the client had appointed a regulated adviser to provide such advice. But this limited Options' understanding of the business TFPP introduced to it when it should have been taking steps to gain a better understanding of this as I explained above. It also meant Options was unable to check TFPP were fulfilling their responsibilities, particularly in relation to the provision of advice, in the course of introducing business to it.

While I accept Options could not and was not obliged to give advice or even comment on the advice TFPP gave, it was obliged to take steps to ensure it wasn't facilitating SIPPs that were unsuitable or otherwise detrimental to consumers. As the FSA's 2009 report set out, having the information that a suitability report contained would enhance a SIPP operator's understanding of its clients, making the facilitation of unsuitable SIPPs less likely. So, I maintain it was a reasonable step that Options should have taken to request copies of suitability reports from TFPP. Had it done so I think it's likely it would have discovered information which ought to have caused it to think twice about accepting Ms C's application. I'll explain more about what I think a suitability report would have revealed or indicated below.

Ms C's application

Ms C's SIPP application form did not provide Options with a clear picture of who was involved in her application or what she intended to invest in within her SIPP. The answers given in the section of the form relating to investments indicated that Ms C had not appointed an Investment Manager, that her Investment Manager was not her financial adviser (TFPP), and that Options was to accept instructions on investment matters from TFPP. But the later answers given in this section indicated that Ms C's Investment Manager was to provide advice that she or TFPP would act upon.

These answers provided Options with an unclear picture of TFPP's role in the application, and also pointed to the involvement of an unnamed Investment Manager. I accept it might be the case that this section of the form wasn't completed accurately. But Options could not have known that to be the case without making checks on Ms C's application, and it should not have assumed that to be the case especially given this was the first application it had received from TFPP. Options should have identified this and taken steps to clarify who was involved in Ms C's application and, importantly, the extent of TFPP's role in it.

In addition, Ms C's SIPP application form provided no details of the investment(s) she intended to make in her SIPP other than an indication that she intended to invest in commercial property. TFPP told Options at the beginning of their relationship that the investments they typically utilised in pension schemes included commercial property. So Ms C's intention to invest in commercial property wasn't by itself a cause for concern for Options. But her application form also set out that the value of the pensions to be transferred into the SIPP amounted to around £111,000. Given Options charged additional fees in connection with commercial property investments, it ought to have identified that its fees

were likely to be disproportionate to the value of Ms C's SIPP which could lead to her detriment.

That said, it appears Options knew what investment Ms C intended to make despite the lack of any details on her SIPP application form. Options said in its final response to Ms C's complaint that she *"had decided prior to approaching* [Options] *that she wished to invest her funds into Commercial Property, Salinas Sea Cape Verde Resort, via* [Oasis]." Although I've not seen any evidence of how or precisely when Options came to know Ms C intended to invest in Salinas Sea, it's clear she had selected or been guided to select the investment before her relationship with Options began. I also note Options arranged for Ms C to sign the member declaration and it instructed a law firm to produce a report on Salinas Sea. So, I consider that Options knew or could have known on receipt of her application, or very shortly after receiving it, what investment she intended to make.

When Options knew Ms C intended to invest in Salinas Sea, it ought to have identified her introduction was atypical of the business TFPP had told Options they would introduce to it. Options has told the Financial Ombudsman Service that the Salinas Sea investment was a bricks and mortar property to be rented out with the rental income paid to the SIPP, thereby giving the impression that Options considered it to be a commercial property investment. However, the evidence of Options' due diligence on Salinas Sea that it carried out in 2010 confirms it considered Salinas Sea to be an alternative investment, and this was reflected in the member declaration it required Ms C to sign in order to make the investment. This was not the sort of investment TFPP had told Options it would be utilising in introductions to it.

Furthermore, Options also charged additional fees in connection with alternative investments like it did with commercial property investments. So the risk of detriment to Ms C from being charged fees that were disproportionate to the value of her SIPP remained. Options may have drawn some comfort from the fact that TFPP had told it they used a "*Compliance Firm"* to sign off their pension transfers. But no details about this firm were provided on the form or otherwise, so Options should not reasonably have been comforted by this element of TFPP's business without understanding who that firm was and making further checks.

In summary, it's my view that Options should have identified the points I have set out above when it received Ms C's SIPP application, and it should have made checks on her application to satisfy itself that there wasn't a risk of consumer detriment before accepting it.

What should Options have discovered?

Options has told us that it did carry out a check on TFPP after entering into an agreement with them to *"ensure they were acting in accordance with Introducer Agreement* [sic]," and that it was *"the point at which we discovered the FSA warning."* Options hasn't provided any details of what this check entailed or when it was carried out, or which FSA warning it's referring to. It's also not said whether this check was routine or whether it was prompted by some specific event or concern.

Given TFPP's authorisation and relationship with Options ended in March 2013, the FSA warning that Options says it discovered must have been issued before then. I'm aware that in other cases that have been referred to the Financial Ombudsman Service relating to the Salinas Sea investment involving different complainants, it has been evidenced that TFPP and another regulated firm were working with an unregulated introducer called Cape Verde4 Life. And that in those cases, it was understood to be the case that both regulated firms were operating a restricted advice business model, that included the provision of advice on pension transfers but not on the subsequent investment. Therefore, it's my understanding

that the FSA alert Options says it discovered when it carried out a later check on TFPP, was an alert issued on 18 January 2013 that included the following:

> "*Advising on pension transfers with a view to investing pension monies into unregulated products through a SIPP*
>
> *It has been brought to the FSA's attention that some financial advisers are giving advice to customers on pension transfers or pension switches without assessing the advantages and disadvantages of investments proposed to be held within the new pension. In particular, we have seen financial advisers moving customers' retirement savings to self-invested personal pensions (SIPPs) that invest wholly or primarily in high risk often highly illiquid unregulated investments (some of which may be Unregulated Collective Investment Schemes). Examples of the unregulated investments are diamonds, overseas property developments, storepods, forestry and film schemes, among other non-mainstream propositions.*
>
> *The cases we have seen tend to operate under a similar advice model. An introducer will pass customer details to an unregulated firm, which markets an unregulated investment (e.g. an overseas property development). When the customer expresses an interest in the unregulated investment, the customer is introduced to a regulated financial adviser to provide advice on the unregulated investment. The financial adviser does not give advice on the unregulated investments and says it is only providing advice on a SIPP capable of holding the unregulated investment…*
>
> ***The FSA is investigating a number of firms and has secured a variation of their Part IV permission so that they are unable to continue operating in that way. The FSA is also considering taking enforcement action against these firms.***
>
> *We have seen cases where, as a result of these advisory strategies involving unauthorised firms, customers have transferred out of more traditional pension schemes and invested their retirement savings wholly in unregulated assets via SIPPs, taking very high and often entirely unsuitable levels of risk despite receiving advice on the pension transfer from regulated firms.*
>
> *…*
>
> *Financial advisers using this advice model are under the mistaken impression that this process means they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect.*
>
> *The FSA's view is that the provision of suitable advice generally requires consideration of the investment held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as a SIPP and other wrappers), consideration of the suitability of the overall proposition, that is the wrapper and the expected underlying investments in unregulated schemes…*
>
> *For example, where a financial adviser recommends a SIPP knowing that the customer will transfer out of a current pension arrangement to release funds to invest in an overseas property investment under a SIPP, then the suitability of the overseas property investment must form part of the advice about whether the customer should transfer into the SIPP…*"

The alert came after the events in this complaint – Ms C's SIPP application was dated 30 May 2012, and it seems to have been received by Options sometime between then and 8 June 2012 when it established Ms C's SIPP - but, again, it didn't set new standards. It highlighted that advisers using the restricted advice model discussed in the alert generally weren't meeting existing regulatory requirements, and set out the regulator's concerns about industry practices at the time.

Had Options taken reasonable steps to make checks on Ms C's application, such as requesting TFPP's suitability report / advice from them or Ms C, to ensure it had a good understanding of her application and to check TFPP were meeting their responsibilities, I think Options would more than likely have discovered they were operating a business model of the sort the FSA alert concerned. This would have meant Ms C was apparently choosing to invest in an unregulated investment that Options considered to be high risk and speculative, with the very considerable risk of suffering significant detriment, without the benefit of regulated financial advice in relation to the investment.

Clearly Options could not have known about the FSA alert before it received Ms C's application. And I accept that at the beginning of the relationship, TFPP had signed the 'Introducing Business to [Options] – Roles & Responsibilities' document, confirming they agreed that their responsibilities included providing advice to their clients on the scheme investments. But as I explained above, Options had not received any introductions from TFPP before Ms C's that could have assured Options that TFPP reliably met their responsibilities. So it would have been prudent of Options to check TFPP's suitability report to Ms C to ensure they were meeting their responsibilities. Had Options done that, I think Options would likely have discovered that TFPP had not provided Ms C with advice on the suitability of the Salinas Sea investment.

Furthermore, had Options made reasonable checks and enquiries (in response to the unclear and incomplete contents of Ms C's SIPP application form) on the potential involvement of an Investment Manager, the extent of TFPP's involvement, and about how Ms C had come to select the Salinas Sea investment, it would likely have discovered one or more unregulated entities were involved in her application. There is evidence which I think could have been discovered at the time of, or very shortly after, receiving Ms C's application that Cape Verde4 Life and Investors Overseas, both unregulated firms, had some role in Ms C's application and investment decisions.

When it discovered, as I think it could and ought to have done, that TFPP had not advised Ms C on her investment selection, Options ought to have checked how she had come to select the Salinas Sea investment. Where there were indicators of consumer detriment in an introduction, the FSA's 2009 report said these could be addressed in an appropriate way by contacting the member or the introducer. Had Options contacted Ms C then, as it would have been reasonable for Options to do, I think Ms C would have told it that Mr B had given her advice on the Options SIPP and the Salinas Sea investment. I say this as she's told us that Mr B suggested putting some of her pension fund in the *"Cape Verde SIPP,"* and that *"this was an advised transfer and was promoted as a hands off investment that was entirely suitable and fitting risk profile* [sic]."

Options ought to have identified, and been concerned, that Ms C's understanding was inconsistent with the advice I think TFPP would have documented that it had given her. I say this, about what I think TFPP would likely have documented, with the fact in mind that the advisor named on the member declaration was not TFPP, but Mr B's unregulated firm, Investors Overseas. This supports my view that the documented advice would not have tried to conceal where the regulated advice ended. And this should have prompted Options to ask

questions of Mr B about his involvement, and the involvement of any other parties, in bringing about Ms C's application.

At the time of Ms C's application, besides operating TFPP, Mr B was also operating an unregulated company – Investors Overseas Limited – that promoted overseas land and property based investments, such as Salinas Sea. Had Options asked questions of Mr B about his involvement in bringing about Ms C's application, as it would have been reasonable for Options to do, I think it would have discovered Investors Overseas Limited was involved in Ms C's application, or at least that Mr B operated an unregulated company that promoted the Salinas Sea investment.

Had Options then carried out due diligence and/or made checks on Investors Overseas at the time of Ms C's application, as I consider would have been a reasonable step it should have taken, it would have discovered:

- Investors Overseas weren't on the FSA's register of authorised and regulated firms
- Their website included a page listing Mr B as the Chief Executive of the company, and on a different page a list of hotel room investments in various overseas locations was set out, including one in Cape Verde that matched the description of Salinas Sea. Their website included a disclaimer which said:

  > *"Investors Overseas Limited offer property and land investments. We do not provide advice on SIPP's direct and we will introduce all interested clients to an authorised Financial Services Firm.*
  >
  > *Please note that Investors Overseas Limited is not authorised to give financial advice and are not regulated by the Financial Services Authority."*

- Investors Overseas Limited was listed on the Companies House Register of Companies. Its entry showed it was registered at the same address as TFPP, that Mr B was a Director and sole owner of the company, that it was incorporated on 14 October 2010, and that its nature of business was *"Real estate agencies"*

This meant Mr B was involved in promoting overseas property investments (including Salinas Sea), that Options considered to be high risk and speculative, via an unregulated business. While at the same time, Mr B purportedly provided regulated advice (or was responsible for providing regulated advice) via TFPP to Ms C on transferring her pensions to an Options SIPP and making such an investment. It would or should have been obvious to Options from this discovery that there was a conflict of interest between the dual roles Mr B was apparently playing, that clearly had the potential to breed unsuitable advice and cause consumer detriment.

In addition, the seller of the Salinas Sea investment, Oasis (who, based on what Options said in its final response to Ms C's complaint, Options had identified when it received her application) were represented at the time by Cape Verde4 Life. I'm aware from other cases that have been referred to the Financial Ombudsman Service relating to the Salinas Sea investment and Cape Verde4 Life involving different complainants, that Cape Verde4 Life were also an unregulated introducer of business to Options. I note that in those other cases, Options carried out due diligence on Cape Verde4 Life and reached the conclusion to accept business from them.

However, the Ombudsman in those cases reached the conclusion that Options should not have accepted introductions from Cape Verde4 Life. I've reviewed the evidence relating to

Cape Verde4 Life and it is enough to say here that I agree with the Ombudsman's findings in those cases. The point here being that I think it's likely that had Options made checks on Ms C's application, it would have discovered Cape Verde4 Life were involved in it in some way. This meant there likely was a second unregulated entity involved in Ms C's application that Options should have been aware of and, as the Ombudsman found in those other cases, should have decided not to deal with.

Options should have been alerted to the risk of consumer detriment by the involvement of unregulated entities undermining the safeguards that dealing with a regulated firm might normally provide. And by the conflict of interest that existed between Mr B's dual roles potentially leading him to put his own interests ahead of Ms C's in this case.

Moreover, the fact that Ms C's introduction from TFPP was being made by a regulated firm should not therefore have provided the comfort to Options that it might otherwise have done, and which Options relied heavily on in deciding to accept business from TFPP. It should have known that the business TFPP were introducing to it lacked the safeguard of unrestricted, effective independent regulated advice, and that TFPP were not meeting their responsibilities in their relationship with Options by restricting their advice to only the suitability of the pension transfer.

Ultimately, Options should have considered there to be a high risk of consumer detriment based on what it would have discovered about Ms C's application had it made further checks on it. And in my view, acting fairly and reasonably and in accordance with its obligations as a SIPP operator, this should have led it to reject Ms C's application from TFPP.

What Options ought to have decided

In my view Options ought to have requested information from Ms C and TFPP about the advice they gave her to enhance its understanding of her introduction to it by TFPP. In particular, Options ought to have requested information about what TFPP advised Ms C on, who was involved in bringing about her application and how her selection of the Salinas Sea investment came about. Had Options done that, it would have discovered the restricted advice TFPP gave Ms C and the risk that she was also being guided by an unregulated entity. Whilst there is nothing that says consumers must take full regulated advice, the fact that Ms C was a retail client intending to invest in an unregulated investment without having received regulated advice to do so was a red flag which should, in my view, have led Options to reject her application.

Whilst, as I've said, I think Options would have discovered TFPP were providing restricted advice before it decided to accept Ms C's application, I have considered what Options ought to have done if, after making checks on Ms C's application, TFPP had shown that, to some extent, regulated advice was given on the investment.

On receipt of Ms C's investment instruction, Options should have known Investors Overseas Limited and Cape Verde4 Life were involved in guiding her to select the Salinas Sea investment at the very least. The member declaration Ms C signed stated *"Investors Overseas"* were her adviser, and the letter of authority Options received alongside that stated Ms C authorised Options to deal with Cape Verde4 Life in relation to her purchase of the Salinas Sea investment.

It doesn't appear Options took any action in response to receiving these documents other than to make the arrangements for Ms C's investment in Salinas Sea to proceed. So I consider that Options either failed to notice the details I've highlighted above, or it was aware

of Investors Overseas and Cape Verde4 Life and it wasn't concerned about dealing with them.

Either way, with its obligations and responsibilities in mind, Options' response ought to have been to make checks on the involvement of Investors Overseas Limited and Cape Verde4 Life in Ms C's selection of the Salinas Sea investment and her application overall, and to revisit its due diligence on TFPP in light of what it found.

Had Options done that, it would have found:

- Two unregulated entities were involved in bringing about Ms C's application, in particular her investment in Salinas Sea
- One of the unregulated entities was operated by the same individual who had purportedly given Ms C regulated advice on her application in the guise of TFPP, and that unregulated entity's business was solely concerned with promoting overseas land and property based investments
- The introduction TFPP had made to it included an investment of the sort they didn't typically utilise in their client's pension schemes

So, in effect, Ms C's investment instruction provided Options with a further opportunity to make some of the discoveries I think it ought to have made when it received her SIPP application which ought to have led it to reject Ms C's application.

Overall, in either event, it is my view that if Options had acted reasonably, in a way that was consistent with its role as a non-advisory SIPP operator, in a way that was consistent with its obligations in that role under the Principles and with good industry practice, it would not have accepted Ms C's application or proceeded with facilitating her investment.

In addition to these points, Options knew or should reasonably have known the investment was likely to be highly illiquid. It knew or should have known the investment was likely to be difficult to value and that it might well be difficult to sell when the member wanted to take benefits from their pension. Options should have recognised this was particularly pertinent in Ms C's case. Ms C had already reached the age from which she could take the benefits from her pension when she made her SIPP application. So, it was likely she would have wanted to take further benefits sooner rather than later, and consequently more likely that she would face difficulties in selling the, at the time of her application, unfinished investment.

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

When Options agreed to accept Ms C's application, it did not take steps to obtain answers to the unanswered questions on her application form. It did not carry out checks such as ensuring she had received regulated advice on the suitability of the investment, or confirming she was a high net worth or sophisticated investor. Nor did it impose conditions such as only allowing a limited proportion of her SIPP fund to be invested in Salinas Sea. Rather it allowed Ms C to invest almost the total value of five personal pensions into Salinas Sea.

Taking all these points into account, Options knew or should have known before deciding to accept Ms C's application via TFPP that there was a real risk of consumer detriment. Options' apparent response to some of this risk was to require Ms C to sign the member

declaration I referred to above. In my view that was not a fair and reasonable approach bearing in mind the Principles for Businesses and good industry practice. In my view the fair and reasonable approach would have been to decline Ms C's application as Options was entitled to do.

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

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

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

Asking Ms C to sign the declaration and indemnity absolving Options of all its responsibilities, and then accepting it despite the concerning details it contained, when it ought to have known that Ms C's dealings with TFPP were putting her at significant risk of detriment was not the fair and reasonable thing to do. And it was not an effective way for Options to meet its regulatory obligations in the circumstances. It was not fair and reasonable to proceed on that basis.

Further I do not consider it fair and reasonable for Options to avoid responsibility now on the basis of the indemnity Ms C signed. Had Options acted appropriately in the circumstances, Ms C should not have been able to proceed with her application.

Is it fair to require Options to compensate Ms C?

I have considered what Ms C would have done had Options rejected her application, and on balance, I don't think Ms C would have proceeded even if Options had rejected her application. It appears Mr B (whether he was acting as TFPP or Investors Overseas Limited) suggested the Salinas Sea investment to Ms C, and that she wasn't looking for such investments. I acknowledge Ms C had a longstanding relationship with Mr B, and that she evidently trusted him. But I'm not persuaded this alone would have outweighed Options' rejection of her application, and explanation of its reasons why, in Ms C's decision-making. She would have had no reason to doubt Options' integrity, and while she evidently trusted Mr B, she's also made clear that she had a reservation about making the Salinas Sea investment. There is also nothing to indicate Ms C was highly motivated to make the investment or that she was being paid any kind of incentive payment to do so. I have not seen anything that makes me think Ms C would have sought out another SIPP provider if Options had declined the application, or terminated the application, and explained why.

In any event, I think any SIPP provider acting fairly and reasonably should have reached the conclusion it should not accept Ms C's application via an introduction from TFPP. I do not think it would be fair to say Ms C should not be compensated based on speculation that another SIPP operator might have made the same mistakes as Options did.

I think it's fair and reasonable instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted the application, or would have terminated the transaction before completion.

I’ve decided to uphold Ms C’s complaint on the basis that Options shouldn’t have accepted her introduction from TFPP. I therefore don’t consider it necessary to consider whether or not Options should’ve allowed the Salinas Sea investment into Ms C’s SIPP. I make no finding about the appropriateness of the investment for the Options SIPP which Ms C opened.

Putting things right

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

I think Ms C would have remained with her previous providers, however I cannot be certain that a value will be obtainable for what the previous policies would have been worth. I am satisfied what I have set out below is fair and reasonable, taking this into account and given what I understand of Ms C's circumstances and objectives when she invested.

I’ve seen no evidence that the pensions Ms C transferred to her SIPP contained any guaranteed benefits that were lost on transfer, or that Ms C would’ve already taken further benefits from her pension had she not opened her SIPP with Options and invested in Salinas Sea. My direction for Options’ calculation of redress reflects this understanding.

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

- Obtain the notional transfer values of Ms C’s previous pension plans as of the date of this final decision
- Obtain the actual transfer value of Ms C’s SIPP, including any outstanding charges as of the date of this final decision
- Pay a commercial value to buy any illiquid investments (or treat them as having a zero value) and relieve Ms C of any liabilities linked to the investments
- Pay an amount into Ms C’s SIPP so as to increase the transfer value to equal the sum of the notional values established. This payment should take account of any available tax relief and the effect of charges, and 8% simple interest should be added to it if it is not made within 28 days of the date Options receives notification of her acceptance of this final decision
- If the SIPP needs to be kept open only because of the illiquid investment/s and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed
- If Ms C has paid any fees or charges from funds outside of her pension arrangements, Options should also refund these to Ms C. Interest at a rate of 8% simple per year from date of payment to date of refund should be added to this
- Pay to Ms C £750 to compensate her for the distress and inconvenience

she's been caused by Options' failings

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

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

As set out at the start of this section of my decision and outlined in the Investigator's assessment of this complaint, our aim in putting things right is to put Ms C into the position she would likely have been in had it not been for Options' failings. The outcome of this should be that, in so far as is possible, finality is brought to the matter about which Ms C complains for both parties to the complaint. Had Options acted appropriately, I think it's *more likely than not* that Ms C would not have invested in Salinas Sea and would not have entered into any loan arrangement to finance part of the purchase of the investment.

My understanding is that Oasis offered financing for up to 35% of the purchase price (under the terms of the investment the interest on the lending is set at Euribor 6 (six) month rate plus 5.8%), which would be repaid by way of the rental payments from the investment. If Ms C utilised this financing and has an outstanding balance then Options must settle this with Oasis. How it goes about doing this is a matter for Options and Oasis, but the outcome of this must be that this isn't an ongoing concern for Ms C and that there is no risk of her having to pay anything in connection with this. To be clear, this should be the resultant position whether or not the asset is removed from the SIPP (as per the below).

I think any illiquid assets held should be removed from the SIPP. Ms C would then be able to close the SIPP, if she wishes. That would then allow her to stop paying the fees for the SIPP. The valuation of the illiquid investment may prove difficult, as there is no market for it. For calculating compensation, Options should establish an amount it's willing to accept for the investment as a commercial value. Given that both the investment provider and the underlying investment are ongoing concerns, I expect this to be achievable. It should then pay the sum agreed plus any costs and take ownership of the investment and ensure that in doing so it takes on or otherwise removes all liability Ms C may have for any financing taken out to part fund the purchase of the investment.

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

If Options is unable, or if there are any difficulties in buying Ms C's illiquid investment, it should give the holding a nil value for the purposes of calculating compensation. In this instance Options must still take on or otherwise remove all liability Ms C may have for any financing taken out to part fund the purchase of the investment. If the total calculated redress in this complaint is less than £170,000, Options may ask Ms C to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the relevant holding. That undertaking should allow for the effect of any tax and charges on the amount Ms C may receive from the investment and any eventual sums she would be able to access from the SIPP. Options will have to meet the cost of drawing up any such undertaking.

If the total calculated redress in this complaint is greater than £170,000 and Options doesn't pay the recommended amount (set out below), Ms C should retain the rights to any future return from the investment until such time as any future benefit that she receives from the investments together with the compensation paid by Options (excluding any interest and/or costs) equates to the total calculated redress amount in this complaint. Options may ask Ms C to provide an undertaking to account to it for the net amount of any further payment the

SIPP may receive from these investments thereafter. That undertaking should allow for the effect of any tax and charges on the amount Ms C may receive from the investment from that point, and any eventual sums she would be able to access from the SIPP. As above, Options will need to meet any costs in drawing up the undertaking.

If the total calculated redress in this complaint is greater than £170,000, Options must in the first instance take on or otherwise remove all liability Ms C may have for any financing taken out to part fund the purchase of the investment so as to ensure that Ms C is left unencumbered by this.

Calculate the loss Ms C has suffered as a result of making the transfer

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

Any withdrawal out of the SIPP should be deducted at the point it was actually paid so it ceases to accrue any return in the calculations from that point on. The same applies for any contributions made, these should be added to the notional calculations from the date they were actually paid, so any growth they would've enjoyed is allowed for. As multiple plans were transferred into the SIPP, any withdrawals or contributions should be apportioned proportionately to each of the plans in the notional value calculations.

If there are any difficulties in obtaining notional valuations from the previous providers, then Options should instead arrive at notional valuations by assuming the monies would have enjoyed a return in line with the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, this was called the FTSE WMA Stock Market Income Total Return Index). That is a reasonable proxy for the type of return that could have been achieved over the period in question.

I acknowledge that Ms C has received a sum of compensation from the FSCS, and that she has had the use of the monies received from the FSCS. The terms of Ms C's reassignment of rights require her 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 Ms C received from the FSCS. And it will be for Ms C to make the arrangements to make any repayments she needs to make to the FSCS. However, I do think it's fair and reasonable to allow for a temporary notional deduction equivalent to the payment Ms C actually received from the FSCS for a period in the calculation, so that the payment ceases to accrue any return in the calculation during that period.

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

To do this, Options should calculate the proportion of the total FSCS' payment(s) that it's reasonable to apportion to each transfer into the SIPP, this should be proportionate to the actual sums transferred in. And Options should then ask the operators of Ms C's previous pension plans to allow for the relevant notional withdrawal in the manner specified above. The total notional deductions allowed for shouldn't equate to any more than the actual payment from the FSCS that Ms C received. Options must also then allow for a corresponding notional contribution (addition) at the date of this final decision, equivalent to the accumulated FSCS payment notionally deducted by the operators of Ms C's previous pension plans.

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

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

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

Since the loss Ms C has suffered is within her pension it is right that I try to restore the value of her pension provision if that is possible. So, if the redress calculations demonstrate a loss, the compensation should if possible be paid into Ms C's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Ms C as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Redress paid to Ms C as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, Options may make a notional deduction to cash lump sum payments to take account of tax that consumers would otherwise pay on income from their pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to her likely income tax rate in retirement – presumed to be 20%. I understand Ms C has already taken a tax-free lump sum from her pension. However, if Ms C would have been able to take a further tax-free lump sum, the reduction should only be applied to that portion of the compensation that couldn't have been taken as a tax-free lump sum. For example, if Ms C would have been able to take a tax-free lump sum of 25%, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

SIPP fees

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

Interest

The compensation resulting from this loss assessment must be paid to Ms C or into her SIPP within 28 days of the date Options receives notification of her acceptance of this final decision. The calculations should be carried out as at the date of this final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of this final decision to the date of settlement if the compensation is not paid within 28 days.

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

Distress & inconvenience

Ms C's application for an Options SIPP involved consolidating a number of existing pension provisions, so it's reasonable to think her Options SIPP represented a not insignificant portion of her pension provision for retirement. Ms C's investment in Salinas Sea represents the majority of her Options SIPP and is essentially illiquid. So, whatever value the investment has can't be readily realised and made available to Ms C to draw down from when she wants to take further benefits from her pension.

Given Ms C had already reached the age from which she could take her pension benefits when she made her application, the inability to realise the majority of these benefits that she was likely to have been reliant on in retirement, and the number of years the matter has gone on for, I think it's fair to say this would have caused Ms C some considerable distress. So, I consider Options should pay her £750 to appropriately compensate her for that.

Determination and money award: It's my final decision that I require Options to pay Ms C compensation as set out above, up to a maximum of £170,000 plus any interest and/or costs payable.

Until the calculations are carried out, I don't know how much the compensation will be, and it may be nowhere near £170,000, which is the maximum sum that I'm able to award in Ms C's complaint. But I'll also make a recommendation below in the event that the compensation is to exceed this sum, although I can't require that Options pays this.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £170,000, I also recommend that Options pays Ms C the balance.

If Ms C accepts this final decision, the money award and the requirements of the decision will be binding on Options. My recommendation won't be binding on Options.

Further, it's unlikely that Ms C will be able to accept my final determination and go to court to ask for the balance of the compensation owing to her after the money award has been paid. Ms C may want to consider getting independent legal advice before deciding whether to accept this final decision.

My final decision

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

Under the rules of the Financial Ombudsman Service, I’m required to ask Ms C to accept or reject my decision before 5 August 2024.

Asa Burnett
Ombudsman