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Outer Temple Chambers

# *Adams v Options SIPP UK LLP (formerly Carey Pensions UK LLP)* [2020] EWHC 1229 (Ch): Judgment arrives two years after trial

**Clarity and relief for SIPP operators and execution only financial services businesses**

1. In March 2018 the Chancery Division heard the high-profile test case on the liability of *Carey Pensions UK LLP*, a provider and administrator of self-invested pension plans (SIPPs), to the Claimant investor, whose underlying investments were alleged to have been manifestly unsuitable.

2. A little over two years later Judgment has finally been handed down.

3. The SIPP industry (and indeed a wide range of institutions conducting business on an execution-only basis) will welcome the Judgment.

**Background - SIPP Operators and the FCA's guidance**

4. SIPP operators are regulated by the FCA. As long ago as 2013 the FCA published guidance on the regulatory requirements imposed. It reminded Operators that *inter alia* customers must be treated fairly and that their business should be conducted with due skill, care and diligence. The guidance explained that this included "*checking and monitoring introducers as well as assessing that investments are appropriate for personal pension schemes*".

5. On the relationship between introducers and SIPP operators, the FCA noted that "*[a]lthough the members' advisers are responsible for the SIPP investment advice given, as a SIPP operator the firm has a responsibility for the quality of the SIPP business it administers*". The FCA identified several examples of good practice:

   a. Confirming that introducers that advise clients are authorised and regulated by the FCA.
   b. Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.
   c. Understanding the nature of the introducers' work – ultimately being satisfied that they are appropriate to deal with.
   d. Being able to identify irregular investments.
   e. Using non-regulated introducer checklists which demonstrate the SIPP operators have considered the additional risks involved in accepting business from non-regulated introducers.

6. The FCA elaborated a little on its early guidance when it intervened in *Berkeley Burke Sipp Administration v Financial Ombudsman Service Limited v Mr Wayne Charlton, Financial Conduct Authority* [2018] EWHC 2878 (Admin) in October 2018.

7. The Judge's summary of the submissions made by the FCA was limited but the FCA's approach were outlined by the Megan Butler, Executive Director of Supervision – Investments, Wholesale and Specialists Division, in a letter to the Work and Pensions Select Committee in June 2018.

8. The premise of the FCA's submissions and approach (unsurprisingly, in light of the SIPP guidance) was that (i) acquiring the assets in a SIPP forms part of operating the SIPP; and (ii) under section 22 of FSMA establishing and operating a SIPP as well as buying and selling securities are regulated activities, therefore Principles 2 and 6 applied.

9. Ms Butler explained what the FCA expected SIPP operators to do in terms of due diligence:

    a. SIPP operators should take reasonable steps to ensure that it does not accept into the SIPP an asset that is likely to give rise to tax liabilities within the scheme.
    b. A SIPP operator has a responsibility to take reasonable steps to ensure that a proposed underlying investment for a SIPP is a genuine asset, and is not part of a fraud or scam.
    c. A key part of the task of a SIPP operator is to receive, hold and administer the underlying assets held in the SIPP. In order to carry out that role in accordance with the client's best interests in accordance with COBS 2.1.1R, a SIPP operator must satisfy itself that it or its trustee has proper custody of and good title to the underlying asset. Other FCA Handbook rules, in particular the Client Assets Sourcebook (CASS) and Principle 10 (a firm must arrange adequate protection for clients' assets when it is responsible for them) may also be relevant to the holding of client assets. The precise content of the duties depends on the type of asset in question.
    d. SIPP trustees are subject to specific obligations to provide clients with realistic annual valuations of the assets held in a SIPP. For a SIPP operator to accept an underlying asset into a SIPP without having taken reasonable steps to ensure that it or its trustee will be able to undertake realistic annual valuations would amount to a failure to act in the client's best interests, in breach of COBS 2.1.1R.

10. The FCA's position has now been considered by the Court in the context of Part 7 litigation.

**The Judgment**

11. The claimant's case was dismissed on all grounds.

12. The facts as alleged by the claimant were that:

    a. Carey Pensions accepted retail clients procured by an unregulated introducer – CLP Brokers ("CLP").
    b. CLP operated from a business address at Partido de los Tableros, Malaga, Espana.
    c. In c.2012 Mr Adams, a lorry driver, saw a promotion for CLP on the internet and contacted them.
    d. CLP allegedly "*recommended that Mr Adams should transfer his PPP to a SIPP to be provided by CPUK and that the entire fund* [of £52,626.91) *should be invested in storepods"* (PoC ¶5) with Store First.
    e. CLP then provided a half-completed application form to open a SIPP with Carey Pensions. They had (allegedly) ticked a box on the application form waiving the claimant's cancellation rights.
    f. In 2015 the value of the SIPP was reduced by Carey Pensions by 50%.

13. Three causes of action were pleaded against Carey Pensions:

    a. Breach of the regulatory regime in establishing the SIPP as a result of the acts of CLP thereby rendering the SIPP unenforceable under s.27 FSMA, which the claimant identified as his primary case at trial ("the s.27 Claim");

    b. Breach of a duty under FSMA to comply with COBs ("the COBS Claim"); and

    c. Negligent investment advice provided by CLP for which the defendant was allegedly liable as a result of a joint venture, common design or agreed common business model ("the Tort Claim").

14. The Judge provided a summary of the defendant's case: "*The defendant's general position is as follows: first, the defendant carried on the business of setting up and administering SIPPS on an "execution-only" basis; secondly it was not authorised to and did not provide advice to the claimant as to whether to establish a SIPP or to whether*

*to enter into the underlying investment, thirdly; the contract makes clear that the underling investment is the sole responsibility of the claimant; fourth, the claimant was fully aware, before entering into the SIPP, that the underlying investment was high-risk or speculative but nevertheless decided to proceed with the transaction and caused his own loss.*"

15. The FCA was granted permission to intervene and made short submissions.

16. The court was entirely unpersuaded by the Claimant and the FCA.

**The s.27 Claim**

17. By way of reminder, section 27(1) provides that an agreement made by an authorised person (for example, an operator) in the course of carrying on a regulated activity in consequence of something said or done by a third party (for example, an introducer) in the course of a regulated activity carried on by the third party in contravention of the general prohibition on carrying on regulated activities without permission is unenforceable against the other party. A successful claimant is entitled to recover any money or other property paid or transferred by him under the agreement and compensation for any loss sustained as a result of having parted with it.

18. If the court is satisfied that it is "*just and equitable*" in the circumstances of the case it may allow the agreement to be enforced or money or property paid or transferred to be retained (s 28). The court would have regard to whether the provider knew that the third party was contravening the general prohibition.

19. The claimant argued that CLP had 'advised' (Art 53, RAO) him, and 'arranged' (Art 25, RAO) the SIPP and/or the investment in Store First, in breach of the general prohibition (relying, in particular, on *Re The Inertia Partnership LLP* [2008] BCC 656). There are, of course, exclusions from Article 25 including "*arrangements which do not or would not bring about the transaction to which the arrangements relate"* (Article 26).

20. The Judge dismissed the claim with (seemingly) little difficulty.

21. He rejected the claimant's submissions (which also appeared to be 'suggested' by the FCA (see ¶113)) that the causal link between the act or acts of arranging and the transaction itself would be established if the 'but-for' test was satisfied. The Judge

identified that the relevant words in Article 26 were "bring about" and concluded that the arrangements had "*to be a positive or effective cause, not merely a set of circumstances which may be no more than the context of the transaction which eventuates.*"

22. In circumstances where, the Judge concluded, CLP acted as a bare introducer its acts did not necessarily result in any transaction between the parties and the process was, in any event, out of CLP's hands to control.

23. There was apparently no evidence of advice from CLP to the claimant to enter into the SIPP. At its highest the evidence seemed to establish a "*recommendation of the defendant and not of any of their specific products"*. The Judge rejected the argument that "*steering an investor in the direction of a specific SIPP provider amounts to a recommendation of a specific SIPP or "advising" in the sense contemplated by Article 53.*"

**The COBS Claim**

24. The claimant relied on an alleged breach of COBS 2.1.1R – contending that the defendant failed to act "*honestly, fairly and professionally in accordance with [his]… best interests*".

25. It was alleged that the defendant was in breach of duty by *inter alia* establishing an unsuitable SIPP, agreeing to take the (allegedly) unsuitable store pod investment into the SIPP, and failing to implement FCA guidance. At trial the claimant argued that the Defendant was required to take "*responsibility for the quality of the SIPP business which it was to administer if the store pods investment proceeded."*

26. The Judge's summary of the FCA's submissions on this claim are of particular note.

27. The Judge said that the FCA agreed that the function of the firm, as determined by the contract with an investor, will govern that is required to comply with COBS Rule 2.1.1 "*but they point to the fact that firms cannot exclude or restrict their duties under COBS (cf Rule 2.1.2) and do not accept that the obligations arising under Rule 2.1.1 must be limited by the contract.*"

28. Further, and consistent with its previously stated position, "*The FCA submits that Rule 2.1.1 imposes an obligation to undertake an assessment in respect of both the proposed introducer and the proposed investment and* [the Operator] *may refuse to proceed with*

*the investment in an appropriate case, without having to give advice to the investor himself.*"

29. Finally, the FCA argued that Rule 2.1.1 "*does include a duty not to accept into a SIPP an investment of a kind that is inappropriate for any SIPP investment, or for any SIPP investment by a retail customer who is not known to have received independent regulated advice about the investment.*"

30. Pausing there it might be said that the FCA's reading of Rule 2.1.1 would (or at the very least might) impose a very serious burden on firms operating execution-only business. It would appear to import (and no doubt the FCA would say that its position is much more subtle and sophisticated) a requirement for firms conducting execution-only business to act as a further check and balance on investment decisions made when operating an execution-only business.

31. The Judge rejected the claimant's case and the FCA's submissions.

32. The Judge held that it was, in fact, "*obvious*" that the correct starting point was the contract between the claimant and the defendant. He concluded that in order to identify the extent of the duty imposed by Rule 2.1.1 one had to identify the relevant factual context – the context impacted on the ascertainment of the extent of the duty.

33. This was not a case where the contract was alleged not to reflect the reality of the situation or the roles which were to be ascribed to the parties. The essence of the contract was that the role of the defendant was execution-only and that the claimant was to be responsible for his own investment decisions. Accordingly, the obligations imposed by COBS Rule 2.2.1 had to be read in that light.

34. In circumstances where the contract expressly provided that the defendant was not advising on the SIPP, and the defendant was not authorised to advise on the SIPP, Rule 2.1.1 could not be construed as imposing an obligation to advise which would not only be unlawful but which the parties had specifically agreed in their contract not to impose on the defendant.

35. Moreover, the defendant was not required to assess the suitability of the investment within the contractual (and statutory) framework in which it was operating. Doing so would have required the defendant to make detailed enquiries about the claimant's

financial circumstances, take advice on the value of the investment, evaluate the risks inherent in the investment and make a judgment call on the question of whether those risks were appropriate for the claimant. The defendant had not agreed to do so under the contract and COBS Rule 2.1.1 did not require the defendant to take those steps.

36. As to the submission that Rule 2.1.1 imposes a duty to refuse to accept high-risk investments into an execution-only SIPP, the Judge held that consideration of such a question had to be made in the light of the particular facts.

37. On the facts of the case before him, the claimant had acknowledged that the investment was high risk and/or speculative. He had accepted responsibility for evaluating that risk and for deciding to proceed in knowledge of the risk. Accordingly, a duty to act honestly, fairly and professionally in the best interests of the client, who is to take responsibility for his own decisions, could not be construed as meaning that the terms of the contract should be overlooked, that the client is not to be treated as able to reach and take responsibility for his own decisions and that his instructions are not to be followed.

38. Notably, the Judge also dismissed the claimant's attempt to rely upon, or draw support for his claim from, the FCA's Guidance. The FCA's power to give guidance is set out in s.139A FSMA and it has (as noted above) given extensive guidance to SIPP Operators but, as the Judge concluded (at ¶162), *"[t]here is no express provision in FSMA which provides a right to an investor to make a claim based on an alleged breach of the guidance issued by the FCA from time to time. This is in direct contrast to the specific right contained in section 138D(2) to seek damages for breach of rules made by the FCA, such as the COBS Rules. The Thematic Review cannot properly be described as a set of rules or even guidance and in my judgment cannot give rise to a claim for failing to follow the suggestions which it makes. Nor in my judgment is it a proper aid to statutory construction of the COBS Rules which must be construed in accordance with the usual principles of construction."*

**The Tort Claim**

39. The Tort Claim was also dismissed without difficulty.

40. It required the Judge to consider whether the defendant had assisted in the commission of an alleged tort by CLP (negligent misstatement). The Judge held

(applying the criteria identified by Lord Sumption in *Sea Shepherd UK v Fish & Fish Ltd* [2015] AC 1229) that:

a. His findings of fact were entirely inconsistent with a conclusion that the defendant had assisted in the commission of a tort by CLP. Their roles were separate.
b. There was no common design.
c. The claimant's evidence did not establish that there was a (tortious) negligent misstatement. A recommendation was not the same thing.

**Conclusion**

41. The case is likely to prove a relief for the SIPP industry and indeed for the financial services industry more widely.

42. The most recent data published by the Financial Ombudsman Service (11 February 2020) evidences that in 2018-19 over 4,500 enquires about SIPPs were received. The number of new cases appears to have reduced in the last financial year, but the volume of complaints is still significant.

43. Notably, the number of complaints upheld by the Ombudsman does appear to have reduced over the last nine months. In April to June 2019, 62% of SIPP complaints were upheld, in July to September that percentage had reduced to 56% and in October to December 2019 it reduced further to 49%. The industry will hope that the downward trend accelerates to reflect the Judgment in circumstances where the factual case now addressed by the Court in *Adams* will bear comparison with many of the cases before the Ombudsman.

44. Notwithstanding the now well-known jurisdiction of the Ombudsman to determine complaints by reference to what is, in his opinion, "*fair and reasonable in all the circumstances of the case*" (DISP 3.6.1R) the Ombudsman will need to consider the significance of the Judgment. DISP 3.6.4R requires the Ombudsman to take into account "*law and regulations*" when considering what is fair and reasonable. The court's focus on the contractual relationship between the parties and the limited impact of the regulatory regime on that contractual relationship (at least in the particular circumstances of *Adams*) may prove significant.

45. The FCA's consumer protection objective requires it to secure an appropriate degree of protection for consumer. It was introduced, at least in part, to reflect the pressure

from consumer groups that whilst consumers should take responsibility for their own financial decisions there were information asymmetries which required regulatory intervention. In Cmnd 8031 (June 2011) "*A new approach to financial regulation: the blueprint for reform*" the Government acknowledged the concerns and explained that it was (at ¶2.89) "*returning a number of specific factors which the FCA must take into account in interpreting its consumer protection objective (specifically under FSMA new section 1C(2))*"(see the more recent discussion of the issue in the FCA's March 2016 Occasional Paper 13 on "*Economics for Effective Regulation*").

46. The Judgment suggests that, in respect of clear contractual arrangements recording agreements to conduct execution-only business, the existence of information asymmetries and the consumer protection objective will not intervene to protect a consumer from poor investment decisions.

47. It is impossible not to feel sympathy for Mr Adams in the circumstances of the case, but the evidence was entirely clear that he wanted to make the investment because of the benefits he perceived would flow from doing so (see *inter alia* ¶¶12, 54, 56 of the Judgment). Given those very clear findings of fact, the Judgment is, at least to the extent it was fact dependent, unsurprising.

48. The impact of the Judgment on the wider industry is likely to be very significant indeed. The FCA's response may prove telling but, for now at least, the Judgment provides clarity that will be welcomed by the SIPP industry and financial services providers more widely.

**Nicholas Hill**

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