Neutral Citation Number: [2021] EWCA Civ 474

Case No: A3/2020/1284

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
His Honour Judge Dight CBE (sitting as a Judge of the High Court)
[2020] EWHC 1229 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/04/2021

Before:

LORD JUSTICE NEWEY
LADY JUSTICE ROSE
and
LADY JUSTICE ANDREWS

- -

Between:

RUSSELL DAVID EDWARD ADAMS	**Appellant**
- and -	
OPTIONS UK PERSONAL PENSIONS LLP (formerly OPTIONS SIPP UK LLP and CAREY PENSIONS UK LLP)	**Respondent**
- and -	
THE FINANCIAL CONDUCT AUTHORITY	**Intervener**

- -
- -

Gerard McMeel QC and Jay Jagasia (instructed by **Wixted & Co**) for the **Appellant**
Andrew Green QC and Fenner Moeran QC (instructed by **Eversheds Sutherland (International) LLP**) for the **Respondent**
Nicholas Vineall QC (instructed by **The Financial Conduct Authority**) for the **Intervener**

Hearing dates: 2-4 March 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be Thursday 01 April 2021 at 10:30am

Lord Justice Newey:

1. This appeal arises out of the transfer by the claimant, Mr Russell Adams, of a pension fund into a "self-invested personal pension" (or "SIPP") and the investment of the proceeds in "storepods". The investment having proved very unsuccessful, Mr Adams sought relief under the Financial Services and Markets Act 2000 ("FSMA") against the operator of the SIPP. His Honour Judge Dight CBE, sitting as a Judge of the High Court, dismissed the claim, but Mr Adams appeals against that decision.

Basic facts

2. The defendant was incorporated in 2009. Until last year, when following a change of ownership its name was altered first to Options SIPP UK LLP and then to Options UK Personal Pensions LLP, the company was called Carey Pensions UK LLP and I shall refer to it as "Carey" in this judgment.

3. Carey has throughout carried on business as a SIPP provider and administrator. Christine Hallett, the company's chief executive officer, stressed that it acts on what she termed an "execution only" basis. She explained in a witness statement that the company "does not provide any advice and acts only on the express instructions of its members".

4. Carey's pension scheme was constituted by a declaration of trust which Carey executed on 27 July 2009. The declaration of trust provided for the "establish[ment] under irrevocable trusts [of] a pension scheme to be known as the 'Carey Pension Scheme'" to be governed by attached rules. Carey was appointed as the scheme administrator and Carey Pension Trustees UK Limited ("Carey Trustees"), an associated entity, as the scheme trustee.

5. The rules provided for Carey Trustees to hold the assets of the pension scheme at the disposal of Carey, which was to apply the fund upon the trusts contained in the rules to provide benefits in accordance with them. No member of the pension scheme was to have any claim, right or interest in respect of the fund except under the rules, but the parts of the fund which Carey determined to be attributable to particular members ("Individual Funds") were to be applied in securing benefits in respect of those members and their dependants. As would be expected, there was provision for income withdrawal, lump sums and death benefits. Carey was given full powers of investment, but, in relation to an Individual Fund, was generally to exercise those powers only in accordance with any directions given by the relevant member or dependant. Carey could opt to transfer an Individual Fund, or an amount representing it, to another pension scheme or to buy out a member's benefits by arranging for them to be secured with an insurance company.

6. During the relevant period, Carey offered two "brands" of SIPP: a "Full SIPP" and a "Restricted Investment SIPP". A wider range of investments was possible in a "Full SIPP". Investments such as commercial land and property, unquoted shares, direct holdings of quoted shares, loans, borrowings, derivatives and hedge funds were not permitted in a "Restricted Investment SIPP".

7. In 2011, Carey started to accept into SIPPs investments in "storepods". The investments comprised long leases of units in a storage facility in Blackburn,

Lancashire granted by a company called Store First Limited ("Store First"). Income was to be generated by the sub-letting of the units.

8. In all, Carey had some 580 clients who invested in the storepod scheme. The investments were made over a period of six months and averaged about £50,000 each. The total amount invested represented approximately 10% of the assets held with Carey and, as Mrs Hallett explained when giving oral evidence, storepods accounted for 20% of Carey's income in 2011 and nearly 30% of its income in 2012.

9. Most of the clients who invested in storepods were introduced to Carey by CLP Brokers Socieded Limitada ("CLP"), which operated from premises in Spain. Unlike Carey, CLP was never authorised by the Financial Conduct Authority or its predecessor, the Financial Services Authority (for both of which I shall use "FCA" in this judgment). Carey first accepted a referral from CLP in August 2011 and the Judge observed in paragraph 14 of his judgment:

> "It is obvious from emails passing directly between CLP and [Carey] in early August 2011 that [Carey] knew that investors in the Store First scheme would be directed to [Carey] to invest their pension funds via a SIPP to be provided by [Carey] and it put in place a system for handling such investments, including the use of conveyancing solicitors to complete the acquisition of the underlying investments."

Also in August 2011, Mrs Hallett sent CLP an email detailing what had been agreed in a conference call which included the following:

> "Money Laundering, CH indicated needed Photographic and Address, CLP stated they would always endeavour to provide one photo and one address but where no photo id available would Carey accept two forms without photo. ANSWER YES
>
> …
>
> CLP to get clients to obtain Discharge forms from transferring schemes or to provide Carey with letter of authority addressed to Insurance Company to allow Ins. Com or transferring scheme to talk to Carey ACTION CLP to implement
>
> Current Letter of Authority of client to allow Carey to talk to CLP about client scheme needs to be reworded to be wider [than] the pension transfer and suggest insert 'all matters relating to my pension arrangements' ACTION CLP to change and obtain emails from existing clients who have already provided letter of authority"

10. On 29 September 2011, CLP completed a "Non-Regulated Introducer Profile" form for Carey in which it confirmed that it typically received commission from the investment provider of between 2% and 5% of the amount invested. It also identified those running the company as Terence Wright and Lesley Wright. Although Carey was unaware of this until May 2012, the FCA had posted a warning notice in respect

of Mr Wright in 2010. The notice warned that Mr Wright was not authorised under FSMA to carry on a regulated activity in the United Kingdom, explaining that it believed that he "may be targeting UK customers via the firm Cash In Your Pension".

11. The relationship between Carey and CLP came to be governed by written "Terms of Business" which were not signed until 20 March 2012 but had effect from 15 August 2011 and the Judge found in paragraph 20 of his judgment that the Terms of Business "reflected the discussions between [Carey] and CLP and the basis of the relationship between them and their respective roles from August 2011 prior to it being signed". The document, which was headed "Non-regulated Introducer Agreement", explained that it:

> "covers the relationship between The Business Introducer [i.e. CLP] and The SIPP Operator [i.e. Carey] whereby The Business Introducer may introduce clients to The SIPP Operator for the purposes of applying on an execution only basis and commencing a Carey SIPP".

Carey "reserve[d] the right to decline any application and [was] not required to give any reason for refusing any such application". CLP undertook:

i) That "they will not provide advice as defined by the Act [i.e. FSMA] in relation to the SIPP", and that was stated for "the avoidance of doubt" to extend to "advice on the selection of The SIPP Operator, contributions, transfer of benefits, taking benefits and HMRC rules";

ii) That it would inform Carey "[i]f for any reason [it] believes that any employee, representative or agent has provided advice in respect of the SIPP";

iii) That it would "only introduce Clients to [Carey] in accordance with the procedures agreed between the parties";

iv) That, prior to any application being submitted to Carey, it would issue to the client Carey's "Key Features Document", "Fee Schedule", "Terms and Conditions" and "Evidence that the client has received, read and understood these documents";

v) That it would "not make promises or statements on behalf of [Carey] without [Carey's] prior written consent"; and

vi) That it would inform Carey "[i]f for any reason [CLP] conducts or believes they may be conducting activities subject to the Act".

12. The claimant, Mr Adams, who was born on 17 December 1960, is a goods vehicle driver. In early 2012, he and his wife jointly owned their home, which was worth about £380,000 but subject to a mortgage of about £170,000, and he had a personal pension plan with Friends Life valued at some £52,000. In the previous year, however, HSBC had obtained judgment against Mr Adams on a loan and so he was looking for ways in which to meet this liability. As he explained in his witness statement, he "saw an ad saying 'release some cash from your pension' (or words to

that effect)" and "was led to CLP website which claimed that [he] could do much better with [his] pension by investing with them".

13. Mr Adams gave this account in his witness statement of what happened next:

> "7. I first spoke to CLP in February 2012 when I spoke to Ben Newman, although I think he called himself Ben Shepherd as well ('Ben'). Ben said I could unlock some pension money if I moved my pension on his advice and reinvested it with StoreFirst by buying Storage Pods and that the arrangements CLP offered were all legitimate and aboveboard ….
>
> 9. When I talked to Ben about my pension I was told that because I had a frozen pension, which he implied should be doing better, I could transfer it into a pension that would perform better and allow me to invest in better investments. I did not know much, if anything, about pension investment at the time and trusted what CLP told me.
>
> 10. Because we were talking about pension money I did not believe that it could lose out because CLP always assured me that it would be held with reputable UK pension provider. Ben talked about investment into Storage Pods as the only thing that seemed to be good for me. He was very keen on this because it was property and he made it sound safe and good for me.
>
> 11. I was told that Storage Pods were an investment in the new developing business of storage facilities and that Store First would sell me (through my pension if it were in a SIPP) Storage Pods which they would rent out. Because this was property in the UK I [thought] it had to be safe. Ben said that it would all be managed for me and my pension would grow, and after 5 years I would be able to cash out for the original investment and should have made between 5% and 7% a year over that time.
>
> 12. Ben recommended Carey as a large, reputable pension management company ….
>
> 16. Out of the money I invested Ben said I could release about £4,000 ….
>
> 17. I always thought [that] Ben and CLP were advising me as they sounded knowledgeable and they were recommending that I do as they advised.
>
> 18. The discussion with CLP persuaded me that I should follow their advice and guidance to transfer my pension and invest it in Storage Pods in accordance with their advice because I believed that, as they said, my pension would do

> better and it would be safely and securely held with a reputable UK based pension provider – Carey.
>
> 19. CLP assured me that there was nothing illegal about the cashback arrangement however I have since learned that I am liable to HMRC for tax and a penalty on that money."

14. Mr Adams having "confirmed to CLP that [he] wanted to follow their advice", CLP sent him a Carey application form, a letter of authority entitling Carey to liaise directly with CLP in "respect of all matters regarding my pension arrangement", a schedule listing Carey's fees and a "Key Features Document". The covering letter explained that Mr Adams was required to supply certain "original Anti Money Laundering documents" (such as a passport and a utility bill) and that the "completed forms and your anti money laundering documents will be collected by courier and taken to Carey Pensions UK". The letter ended by telling Mr Adams that if he had any questions regarding "the pension transfer or investment then [he should] contact [CLP] directly".

15. Mr Adams said this about the Carey application form in his witness statement:

> "CLP sent me a covering letter with that application form which confirmed that they had pre-completed the application form so that I could just sign it. I completed those parts CLP told me to and signed the forms on 23 February 2012. I can see that the pre-completed form had a printed tick to waive my cancellation rights although I do not think I had much choice in this. I think I sent these back a day or so later with the courier which CLP arranged."

16. The application form was headed "The Carey Pension Scheme Application Form for Direct Clients". There followed these words:

> "(SIPP to be established on execution only)
>
> This form should be used if you are a client establishing a SIPP without advice. You have made this decision independently and are aware of the implications of this decision.
>
> Please read the Key Features Document, Terms & Conditions and Fee Schedules prior to completing this application form ….
>
> Carey Pensions UK LLP, and Carey Pensions Trustees UK Ltd have not provided any advice and are not responsible for the suitability or appropriateness of your decision to establish a SIPP."

At the end of the form, Mr Adams signed a declaration by which he applied for "membership as a direct client of the Carey Pension Scheme" and confirmed that he was "establishing the Carey Pension Scheme on an Execution only basis" and understood that "Carey Pensions UK LLP and Carey Pension Trustees UK Ltd are not in anyway able to provide me with any advice". Boxes earlier in the document in

respect of "Personal Details", "Occupation & Eligibility", "Transfers", "Investments" and "Nomination Of Beneficiaries" had been completed. The "Transfers" box erroneously named the provider with which Mr Adams' existing pension plan was held as SunLife when it was in fact Friends Life. The "Investments" box identified the company with which Mr Adams' fund was to be invested as "Storefirst". Printed notes in this section of the form stated:

> "As you do not have a Financial Adviser, your investment choices are your sole responsibility. You will instruct us and we will act on those instructions as long as it is an accepted investment in the Carey Pension Scheme.
>
> Carey Pensions UK LLP and Carey Pension Trustees UK Ltd will not at any time review any aspects of your appointed Investment Manager's financial status or investment and risk strategies nor have any involvement in your investment choices and selection, nor give advice on the suitability of your investment choices. We would always recommend independent advice be obtained from a suitably qualified adviser."

17. The Key Features document included passages in these terms:

> "Once you have established a Scheme with Carey Pensions UK, your commitments include … Taking responsibility for the management of the investments in your fund. You can manage them yourself or through an investment adviser"
>
> "Remember that you are responsible for the investment decisions, although you may delegate this to an adviser agreed with us"
>
> "In general terms, investment of less than £25,000-£50,000 into a Full SIPP won't provide the opportunity to take advantage of the investment flexibility and may mean that the fees levied would be considered excessive in relation to the size of the fund"
>
> "You are recommended to take advice from a suitably qualified financial adviser when deciding whether the Carey Pension Scheme as a Self Invested Personal Pension, is the right option for you."

18. Carey's terms and conditions, with which Mr Adams was also supplied, explained that they set out "the terms of your personal pension and how it will be operated". The terms and conditions included the following:

i) Clause 1 said:

> "This document sets out the main terms and conditions of the scheme. They are subject to the provisions of the Rules. If there is any inconsistency between the detail set out in these terms

> and conditions and the provisions of the Rules, the Rules prevail";

ii) Clause 3.2 explained that the scheme "has been established and is governed by the Rules";

iii) Clause 4 stated that nothing provided by Carey should be construed as financial or investment advice as defined by FSMA, unless expressly stated;

iv) Clause 7.2 provided:

> "It is your responsibility to ensure a transfer of pension benefits is in your best interests. Consequently you should take advice from a suitably qualified financial adviser. As described in section 4, we do not provide advice. Our acceptance of a transfer is in no way an endorsement of the suitability for you of the transfer";

v) Clause 10 stated, among other things, "You may direct us to invest amounts held for your fund" and "We are not responsible for the investment decisions you make"; and

vi) Clause 11.1 provided:

> "11.1 The trustee, as directed by us, will be involved, as outlined in this section, with the investment process. Investments are made at our discretion and we may refuse to secure or cash in or dispose of any investments for the following reasons:
>
> 11.1.1 your instructions are not confirmed to us in writing;
>
> 11.1.2 in our opinion making the proposed investment would give rise to a tax charge …
>
> 11.1.3 in our opinion the proposed investment is unlawful, impracticable, contrary to a court order or contrary to legislation;
>
> 11.1.4 there are insufficient cleared funds available within your fund;
>
> 11.1.5 in our opinion the proposed investment could expose your fund and/or the scheme to liabilities your fund may not be able to meet;
>
> 11.1.6 it is shown to our satisfaction, that you no longer have the capacity to enter into agreements or contracts …."

19. Carey received the application form on 27 February 2012. That same day, it wrote to Mr Adams acknowledging receipt of his driving licence and a telephone bill, but explaining that it was unable to accept a telephone bill for anti-money laundering

purposes. It asked Mr Adams to supply a gas, electricity, water or bank statement or a council tax bill. Further, Carey commissioned World-Check, an organisation offering screening services, to run a check on Mr Adams.

20. On 28 February 2012, Carey both emailed Mr Adams and sent him a letter in which it referred to his scheme having been established with effect from 27 February. Copies of Carey's terms and conditions and the Key Features document were attached to the email.

21. Delay ensued as a result of Mr Adams' existing pension provider having been misidentified. Mr Adams initially supplied Carey with a letter authorising SunLife to transfer his pension fund to Carey. However, on 23 May 2012 Mr Adams signed a further form, this time addressed to Friends Life, and Carey passed this on to Friends Life. In turn, Friends Life told Carey in a letter dated 6 June 2012 that arrangements were being made for £55,507.66 to be paid to Carey.

22. On 19 June 2012, Mr Adams received from Carey and returned a form headed "Alternative investment – Storefirst … Member declaration & indemnity" instructing Carey "to Purchase a Leasehold Storage Unit(s) in the Storefirst investment … for a consideration of £52,500 on my behalf for the above Scheme". The form went on to say:

> "I am fully aware that this is investment is an Alternative Investment and as such is High Risk and/or Speculative.
>
> As the Member of the Pension Scheme, I confirm that neither I nor any person connected to me is receiving a monetary or other inducement for transacting this investment.
>
> I confirm that I have read and understand the documentation regarding this investment and have taken my own advice, including financial, investment and tax advice.
>
> I am fully aware that both Carey Pensions UK LLP and Carey Pensions Trustees UK Ltd act on an Execution Only Basis and confirm that neither Carey Pensions UK LLP nor Carey Pensions Trustees UK Ltd have provided any advice whatsoever in respect of this investment."

23. On 7 July 2012, Carey returned to the subject of anti-money laundering requirements, asking Mr Adams to provide further proof of address. It explained that it was unable to accept for this purpose a mobile phone bill he had sent. Mr Adams subsequently supplied a bank statement.

24. On 17 July 2012, Carey notified Mr Adams that £53,116 had been sent to Store First in accordance with his instructions. On 5 October, Carey told Mr Adams that the purchase of the storepods had been completed. On 16 November, Carey Trustees was registered as the proprietor of leases of six storepods at Unit 6, Centurion Park, Davyfield Road, Blackburn, Lancashire for a term of 250 years from 1 March 2012 for a premium of £52,500 at an initial annual rent of £175. At some stage, Mr Adams received a £4,000 payment from CLP.

25. The storepods were not a successful investment. From the beginning of 2016 at the latest, Mr Adams raised with Store First concerns that his storepods had not been rented out and were not generating any income. Some of the storepods were rented out in the course of 2016, but they generated no more than a few hundred pounds in rental income. Having heard expert evidence, the Judge concluded in paragraph 72 of his judgment that the market value of the leases in January 2017 was £15,000.

26. Going back in time, on 20 May 2012 Sheri Eggington of Carey sent Mrs Hallett an email in which she said:

> "Further to our discussions about Storefirst and CLP Brokers, I have spoken to Mark Talbot of Storefirst.
>
> He confirmed that commissions paid to introducers are typically 10-12% of the transaction value …. Mark believes that CLP receive 12% …."

27. Five days later, on 25 May 2012, Carey terminated its agreement with CLP. In an email of that date, Ms Eggington told CLP:

> "Despite your assurances that no clients have been or will be offered inducements (monetary or otherwise) for making investments through their SIPPs with us, we have received enquiries as to when clients can expect to receive their money and have today been informed by a new client that they are expecting circa £2,000 on completion of the Storefirst Investment purchase, which they confirmed was offered by a member of your staff.
>
> We have advised this client that we will not proceed with his case.
>
> In light of this, it is with regret that I have to notify you that we are terminating our Introducer Agreement with you, with immediate effect, and can no longer accept business from you."

28. In cross-examination, Ms Hallett also attributed Carey's decision to sever the relationship to its discovery that Mr Wright was the subject of a warning notice from the FCA. Checking the FCA's website in May 2012, Carey found the notice.

29. Carey told CLP that it would continue with investments where the SIPP had already been established. Pressed on this in cross-examination, Ms Hallett said:

> "But that is why we had our processes for member declarations and make sure that ultimately the client, who came in on an execution-only basis and direct, actually had the last say. So by signing the member declaration, it was them confirming to us that they hadn't received an inducement and that they understood they still wanted to proceed. But because they had established the SIPP and our relationship was directly with the client anyway, we just followed the process through to its own

> natural conclusion, which was the client making their own decisions…
>
> …[T]he member declaration forms were still and are still in play in terms of our process because that is the absolute final point when the client instructs us, on an execution-only basis, to make that investment for them that they have chosen."

30. On 5 April 2013, Carey's technical review committee met to consider Store First's investment scheme. The minute records as follows:

> "This investment was suspended 17.08.2012 because of concerns about the administration and system and controls of the investment provider ….
>
> The Meeting resolved that, based on the information provided, although there may not be a tax charge liability for this investment, other factors as undernoted have also been taken into consideration and it is not therefore considered prudent to proceed further.
>
> Lack of clarity in respect [of] the scheme being a UCIS and concerns raised by FSA (now FCA);
> Loans outstanding to the director TS Whittaker;
>
> The meeting did not consider the suitability of the investment for any other purpose."

31. The present proceedings were begun on 13 March 2015 and they came on for trial before the Judge in March 2018. Regrettably, there was a delay of more than two years before judgment was handed down, on 18 May 2020. In the same month, the Judicial Conduct Investigations Office issued a statement to the effect that the delay had amounted to judicial misconduct and that the Judge had been given formal advice.

32. Mr Adams advanced three heads of claim before the Judge. The first was that his agreement with Carey was rendered unenforceable under section 27 of FSMA because it had been "made in consequence of something said or done by another person ('the third party') in the course of … a regulated activity carried on by the third party in contravention of the general prohibition", the relevant "third party" being identified as CLP ("the Section 27 Claim"). Secondly, Carey was said to have acted in breach of the FCA's Conduct of Business Sourcebook COBS 2.1.1R, which required Carey to act "honestly, fairly and professionally in accordance with the best interests of its client" ("the COBS Claim"). Thirdly, it was alleged that Carey was a joint tortfeasor with CLP and so shared responsibility for negligent advice given by CLP.

33. The Judge did not accept Mr Adams' contentions and dismissed his claim. Mr Adams now challenges the Judge's decision in this court, by reference to the first two heads of claim. He has not renewed the joint tortfeasorship arguments.

The Section 27 Claim

34. It is Mr Adams' case that he agreed to transfer his pension fund to the Carey SIPP in consequence of things said and done by CLP in contravention of the "general prohibition" imposed by section 19 of FSMA and, hence, that he is entitled to recover his investment pursuant to section 27 of FSMA. He alleges that CLP breached the general prohibition by carrying on activities specified in articles 25 and 53 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("the RAO"). Articles 25 and 53 are respectively concerned, in the words of their headings, with "Arranging deals in investments" and "Advising on investments". According to Mr Adams, CLP contravened the general prohibition in relation to, first, the transfer of his pension away from Friends Life, secondly, the transfer of the proceeds into the Carey SIPP and, thirdly, the investment of the money in storepods.

35. Carey denies that CLP contravened the general prohibition in any of the respects alleged. It disputes that the investment in storepods can be a relevant transaction for this purpose, maintains that there was no breach of either article 25 or article 53 of the RAO and contends that there was in any event no sufficient causal link between any breach and Mr Adams' entry into the SIPP. In the alternative, Carey argues that the Court should exercise its discretion under section 28 of FSMA and allow it to enforce its agreement with Mr Adams and to retain the money which it received pursuant to it.

The statutory framework

36. Section 19 of FSMA imposes the "general prohibition" barring anyone but an "authorised person" or an "exempt person" from carrying on a "regulated activity" in the United Kingdom. By section 22, an activity is a "regulated activity" for the purposes of the Act:

> "if it is an activity of a specified kind which is carried on by way of business and–
>
> (a) relates to an investment of a specified kind; or
>
> (b) in the case of an activity of a kind which is also specified for the purposes of this paragraph, is carried on in relation to property of any kind."

"Specified" means "specified in an order made by the Treasury" (see section 22(5)) and the RAO serves this purpose.

37. Section 23 of FSMA renders contravention of the general prohibition a criminal offence (though it is a defence for the accused to show that he took all reasonable precautions and exercised all due diligence to avoid committing the offence – see section 23(3)), but breach may also have civil consequences. Sections 26-30 of FSMA are concerned with these. Sections 26 and 27 deal respectively with two-party and three-party situations. Section 26 addresses a case in which a person makes an agreement in the course of carrying on a regulated activity in contravention of the general prohibition. Section 26(2) renders such an agreement unenforceable against the other party and entitles the latter to recover money or other property paid or transferred under the agreement and compensation for any loss. Section 27 applies

where an authorised person (termed "the provider") makes an agreement in the course of carrying on a regulated activity, but the agreement was made in consequence of a third party's breach of the general prohibition. Once again, a relevant agreement is unenforceable against the other party, and the other party is entitled to recover money or other property paid or transferred and compensation for any loss.

38. In 2011-2012, section 27 was in these terms:

> "(1) An agreement made by an authorised person ('the provider')–
>
> (a) in the course of carrying on a regulated activity (not in contravention of the general prohibition), but
>
> (b) in consequence of something said or done by another person ('the third party') in the course of a regulated activity carried on by the third party in contravention of the general prohibition,
>
> is unenforceable against the other party.
>
> (2) The other party is entitled to recover–
>
> (a) any money or other property paid or transferred by him under the agreement; and
>
> (b) compensation for any loss sustained by him as a result of having parted with it.
>
> (3) 'Agreement' means an agreement–
>
> (a) made after this section comes into force; and
>
> (b) the making or performance of which constitutes, or is part of, the regulated activity in question carried on by the provider.
>
> (4) This section does not apply if the regulated activity is accepting deposits."

39. Section 28 of FSMA gives the Court a discretion to allow an agreement to be enforced, and money and property to be retained, notwithstanding a breach of the general prohibition. The section provides:

> "(1) This section applies to an agreement which is unenforceable because of section 26 or 27 ….
>
> (2) The amount of compensation recoverable as a result of that section is–
>
> (a) the amount agreed by the parties; or

> (b) on the application of either party, the amount determined by the court.
>
> (3) If the court is satisfied that it is just and equitable in the circumstances of the case, it may allow–
>
> (a) the agreement to be enforced; or
>
> (b) money and property paid or transferred under the agreement to be retained.
>
> (4) In considering whether to allow the agreement to be enforced or (as the case may be) the money or property paid or transferred under the agreement to be retained the court must–
>
> (a) if the case arises as a result of section 26, have regard to the issue mentioned in subsection (5); or
>
> (b) if the case arises as a result of section 27, have regard to the issue mentioned in subsection (6).
>
> (5) The issue is whether the person carrying on the regulated activity concerned reasonably believed that he was not contravening the general prohibition by making the agreement.
>
> (6) The issue is whether the provider knew that the third party was (in carrying on the regulated activity) contravening the general prohibition …."

40. The activities specified for the purposes of section 22 of FSMA by the RAO include, by article 25, "Arranging deals in investments". In 2011-2012, article 25 provided so far as relevant:

> "(1) Making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite a particular investment which is—
>
> (a) a security,
>
> (b) a relevant investment, or
>
> (c) an investment of the kind specified by article 86, or article 89 so far as relevant to that article,
>
> is a specified kind of activity.
>
> (2) Making arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting investments falling within paragraph (1)(a),(b) or (c) (whether as principal or agent) is also a specified kind of activity …."

41. Article 25 of the RAO is followed, however, by various exclusions. Those material for present purposes are these:

Article 26 ("Arrangements not causing a deal")

> "There are excluded from articles 25(1), 25A(1), 25B(1), 25C(1) and 25E(1) arrangements which do not or would not bring about the transaction to which the arrangements relate."

Article 27 ("Enabling parties to communicate")

> "A person does not carry on an activity of the kind specified by article 25(2), 25A(2), 25B(2), 25C(2) or 25E(2) merely by providing means by which one party to a transaction (or potential transaction) is able to communicate with other such parties."

Article 33 ("Introducing") (as in force in 2011-2012)

> "There are excluded from articles 25(2), 25A(2), 25B(2), 25C(2) and 25E(2) arrangements where—
>
> (a) they are arrangements under which persons ('clients') will be introduced to another person;
>
> (b) the person to whom introductions are to be made is—
>
> (i) an authorised person;
>
> (ii) an exempt person acting in the course of a business comprising a regulated activity in relation to which he is exempt; or
>
> (iii) a person who is not unlawfully carrying on regulated activities in the United Kingdom and whose ordinary business involves him in engaging in an activity of the kind specified by any of articles 14, 21, 25, 25A, 25B, 25C,25E, 37, 39A, 40, 45, 51, 52, 53 53A, 53B, 53C and 53D (or, so far as relevant to any of those articles, article 64), or would do so apart from any exclusion from any of those articles made by this Order;
>
> (c) the introduction is made with a view to the provision of independent advice or the independent exercise of discretion in relation to investments generally or in relation to any class of investments to which the arrangements relate …."

42. "Advising on investments" is also, under article 53, a specified activity. In the version current in 2011-2012, article 53 stated:

> "Advising a person is a specified kind of activity if the advice is—

> (a) given to the person in his capacity as an investor or potential investor, or in his capacity as agent for an investor or a potential investor; and
>
> (b) advice on the merits of his doing any of the following (whether as principal or agent)—
>
> (i) buying, selling, subscribing for or underwriting a particular investment which is a security or a relevant investment, or
>
> (ii) exercising any right conferred by such an investment to buy, sell, subscribe for or underwrite such an investment."

43. Part III of the RAO, comprising articles 73-89, lists kinds of investment which are specified for the purposes of section 22 of FSMA. They include, by article 82, "Rights under a pension scheme". In 2011-2012, article 82 read:

> "(1) Rights under a stakeholder pension scheme.
>
> (2) Rights under a personal pension scheme."

44. Various definitions are to be found in article 3 of the RAO. "Buying" "includes acquiring for valuable consideration", while its counterpart, "selling":

> "in relation to any investment, includes disposing of the investment for valuable consideration, and for these purposes 'disposing' includes—
>
> (a) in the case of an investment consisting of rights under a contract—
>
> (i) surrendering, assigning or converting those rights; or
>
> (ii) assuming the corresponding liabilities under the contract;
>
> (b) in the case of an investment consisting of rights under other arrangements, assuming the corresponding liabilities under the arrangements; and
>
> (c) in the case of any other investment, issuing or creating the investment or granting the rights or interests of which it consists".

"Personal pension scheme":

> "means a scheme or arrangement which is not an occupational pension scheme or a stakeholder pension scheme and which is comprised in one or more instruments or agreements, having or capable of having effect so as to provide benefits to or in respect of people—
>
> (a) on retirement,

> (b) on having reached a particular age, or
>
> (c) on termination of service in an employment".

"Security" was defined to refer (except where the context otherwise required) to "any investment of the kind specified by any of articles 76 to 82 or, so far as relevant to any such investment, article 89".

45. I should also mention article 52 of the RAO. That provides:

> "The following are specified kinds of activity—
>
> (a) establishing, operating or winding up a stakeholder pension scheme;
>
> (b) establishing, operating or winding up a personal pension scheme."

The judgment

46. The Judge observed in paragraph 112 of his judgment that it was "common ground that the underlying investments in the store pods did not fall within the definition of relevant investments regulated by Article 25 [of the RAO], which can apply on the facts of this case only to the SIPP, and that it is the arrangements allegedly leading to the establishment of the SIPP which call to be examined".

47. The Judge noted in paragraph 113 of the judgment that articles 25(1) and 26 of the RAO "contemplate the need for a causal link between the act or acts of arranging and the transaction itself". It was submitted on behalf of Mr Adams that the requirement would be satisfied if the transaction would not have taken place "but for" the arranging, but the Judge rejected that. He concluded in paragraph 117:

> "for the arrangements to bring about the transaction there must be a direct and substantial causal connection between the arrangements and the ultimate transaction and that simply giving advice on the underlying investment and effecting an introduction are not sufficient because those acts do not necessarily result in anything further happening and the further steps which were necessary to establish a SIPP were not within the introducer's power to effect or direct".

48. Approaching matters on that basis, the Judge considered that the acts on which Mr Adams relied did not satisfy the test. As the Judge explained in paragraph 93, Mr Adams had identified these six steps as falling within article 25 of the RAO:

> "procuring the letter of authority, procuring a discharge form in respect of the Friends Life transfer, the undertaking of money-laundering investigations, the completion of the application form 'which had been delegated to CLP', the instructions to Store First to identify pods to be sold and 'the explanations that CLP were expected to provide in relation to key features and the terms of business.'"

With regard to the last three of these, the Judge rejected the proposition that the completion of the form had been "delegated to CLP" in paragraph 119, held in paragraph 120 that "The instructions provided via CLP to Store First to identify pods to be sold to [Mr Adams] were not capable of being arrangements which would lead to the establishment of the SIPP" and said in paragraph 121:

> "the scheme pursuant to which CLP were to operate and the terms of business between CLP and [Carey] meant that no explanation was to be given. Moreover, [Mr Adams'] evidence did not suggest that there was any such explanation given by CLP."

More generally, the Judge said this in paragraph 118:

> "CLP acted as a bare introducer. The acts are very different to those considered by Mr Crow QC in paragraph [42] of *In re Inertia* because (1) the acts of CLP in the present case did not necessarily result in any transaction between [Mr Adams] and [Carey], and (2) the process was out of CLP's hands to control in any event. The administrative steps relied on by [Mr Adams] are further down the chain of causation than the giving of advice, which according to PERG 2.8.6A would not itself amount to 'arranging'. Procuring the letter of authority was a mere administrative act, as was procuring a discharge form in respect of the Friends Life transfer, and the assistance in undertaking of money-laundering investigations. The completion of the application form may be said to be getting closer but it is still essentially administrative in nature, it did not require the specialist knowledge found to be key in other cases, the questions were not difficult to answer and it was intended, in any event, to be completed by a lay person on line."

49. The Judge continued in paragraph 122:

> "It is to be noted that the last step in time which was undertaken by CLP was submission of the application form on 23 February 2012. The role of CLP stopped at the point when the application form was submitted. There was not even a binding agreement at that point. There was a significant number of steps taken after that point before the transaction became irrevocable. It cannot be said that the acts of CLP were causative of the transaction, other than in the 'but for' sense. In my judgment the acts of CLP did not 'bring about' the transaction and therefore the SIPP was not entered into as a 'consequence of' CLP making arrangements within the meaning of Article 25(1). None of the six acts relied on by [Mr Adams], insofar as I accept that they took place, demonstrate that CLP 'were….able in any real sense to influence whether or not an investment was made in the company'."

50. Turning to article 25(2) of the RAO, the Judge said in paragraph 123 of the judgment that neither the amended particulars of claim nor the reply contained "specific reference to Article 25(2) or to an alternative case in which Article 26 has no relevance". He went on in paragraph 124:

> "In any event in my judgment any purported reliance on Article 25(2) does not assist [Mr Adams]. First because no acts which are said to fall within that sub-Article have been pleaded. Secondly 'arrangements' should be construed in the same way as in Article 25(1) and a mere introduction would not suffice and the steps taken 'with a view' to a transaction would have to be capable of satisfying a notional causation test. Thirdly, as a matter of fact, the steps taken by CLP are not capable of satisfying any such test. Fourth, insofar as it may be alleged that the arrangements were the arrangements between CLP and [Carey] in 2011 and 2012, which became regulated by the Terms of Business, not only is that not pleaded but in my judgment it is not capable of falling within a proper interpretation of Article 25(2) because it has no reference to [Mr Adams]."

51. As for article 53 of the RAO, the Judge rejected Mr Adams' case on this in paragraphs 125 and 126 of the judgment, in which he said:

> "125. I turn therefore to Article 53 . At trial my attention was not drawn to any reported decision on its meaning. There is no evidence that CLP provided any advice in respect of the SIPP. The evidence demonstrated that any advice which was given by CLP related to the underlying investment in store pods and not to the SIPP. The line of argument which relies on an alleged breach of Article 53 is therefore of no assistance to [Mr Adams].
>
> 126. Even if 'recommending' a specific SIPP, which in my judgment falls short of advising on the merits of a particular investment for the purposes of the Article, fell within Article 53 nevertheless in this case the evidence does not support a contention that [Mr Adams] was recommended a specific SIPP by CLP, let alone the particular SIPP that he entered into. His evidence at its highest appears in paragraph 18 of [Mr Adams'] witness statement:
>
> 'The discussion with CLP persuaded me that I should follow their advice and guidance to transfer my pension and invest it in Store Pods in accordance with their advice because I believed that, as they said, my pension would do better and it would be safely and securely held with a reputable UK based pension provider – Carey'
>
> It was a recommendation of [Carey] and not of any of their specific products. I do not accept the submission 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. If that argument were to have any substance in the instant case the evidence would have to be much stronger than that which I have just cited from [Mr Adams'] witness statement."

52. Finally on this aspect of the case, the Judge considered the significance of section 28(6) of FSMA in paragraph 130 of the judgment. He said:

> "I accept that for s.28(6) the focus has to be on the acts of which it is alleged that [Carey] had knowledge, rather than the legal consequences of them. However, as I have already found, [Carey] had erected a system or process to define and constrain the role of CLP. It was entitled to assume that the system was working. In any event, I have already held that I accept Ms Hallett's evidence on this point. She had no knowledge that CLP was carrying out acts which, on a proper analysis, fell within Articles 25 and 53. Under s.28(4) the court is to have regard to that issue but it is not determinative in considering whether it is just and equitable in all the circumstances to allow the agreement to be enforced. Undertaking the balancing exercise given my findings is more than a little artificial but it seems to me that the lack of knowledge on the part of [Carey] and the evidence given by [Mr Adams] as to his awareness that the investment was high risk and/or speculative, his assumption of the risks in the contract and his evidence of his preparedness to go through with the transaction notwithstanding his knowledge, because he wanted to release some cash from his PPP, would lead me to the conclusion that it was just and equitable to enforce the agreement. There is no reason in the circumstances why he should not take responsibility for his own decision."

Is the investment in storepods a relevant transaction?

53. Article 25(1) of the RAO provides for "[m]aking arrangements for another person … to buy, sell, subscribe for or underwrite a particular investment which is … a security [or] a relevant investment" to be a "specified kind of activity". In a similar vein, article 53 makes it a "specified kind of activity" to advise an investor or potential investor "on the merits of his … buying, selling, subscribing for, exchanging, redeeming, holding or underwriting a particular investment which is a security … or a relevant investment".

54. There is no doubt but that the storepods were not as such either a "security" or a "relevant investment". It is equally clear, however, that Mr Adams' rights under his pension with Friends Life and his SIPP with Carey were each a "security" for the purposes of the RAO. They both satisfied the RAO's definition of "personal pension scheme" and so fell within article 82 and, hence, the definition of "security", extending as it does to "any investment of the kind specified by any of articles 76 to 82".

55. Mr Gerard McMeel QC, who appeared for Mr Adams with Mr Jay Jagasia, and Mr Nicholas Vineall QC, who appeared for the FCA, both submitted that, notwithstanding the fact that the storepods were not themselves a "security" or "relevant investment", the investment in them was a relevant transaction. The argument proceeds on the following lines. Articles 25 and 53 of the RAO apply to making arrangements to "sell" and advice on "selling" a "security". "Selling" is defined to include "disposing … for valuable consideration" and "disposing" "includes … in the case of an investment consisting of rights under a contract … converting those rights". Mr Adams' SIPP "consist[ed] of rights under a contract" and, when the investment in storepods was effected, those rights were "convert[ed]", as rights related to the storepods were substituted for rights related to the cash which the SIPP had previously held. Alternatively, construing the RAO purposively, the change in rights occurring on the investment in storepods should be regarded as "disposing … for valuable consideration" within the meaning of the RAO.

56. An argument to this effect was also advanced in *Financial Conduct Authority v Avacade Ltd* [2020] EWHC 1673 (Ch), [2020] Bus LR 1897 ("*Avacade*"). Adam Johnson QC, sitting as a Deputy High Court Judge, there observed in paragraph 183 of his judgment that the approach was supported by the FCA's Perimeter Guidance Manual, PERG 12.3 of which states:

> "The terms 'bought' and 'sold' are given a wide meaning and include any acquisition or disposal for valuable consideration. The term disposal is also given a wide meaning and, in relation to an investment comprising rights under a contract, includes surrendering, assigning or converting such rights. Taking these facts into account, the circumstances in which rights under a personal pension scheme may be bought or sold include:
>
> when the member first joins the scheme and acquires all the rights that the scheme provides to its members (since he has bought those rights);
>
> …
>
> where the member or his agent instructs the operator to buy assets of any kind either from existing cash holdings or from the proceeds of selling existing assets (since, in switching the assets, the member is converting his rights from an entitlement to benefits from the performance of certain assets to an entitlement to benefits from the performance of other assets - the former rights are sold and the latter are bought) …."

57. Mr Johnson said in paragraph 185 of his judgment that he agreed with the summary in PERG 12.3 and then added:

> "Essentially the same logic underpinned the decision of the Upper Tribunal in *Burns v. Financial Conduct Authority* … , in which it determined that where a firm advises on a particular SIPP and on investments to be held within the SIPP, the advice on the investments is regulated activity *even if* the investments

> themselves are not regulated products. That is because the purchase of the investments cannot be looked at in isolation: the purchase necessarily involves the acquisition and exercise of rights within the SIPP, and therefore *the buying and selling of securities*. The two are indistinguishable: see *Burns*, para 260."

58. The Upper Tribunal (Judge Timothy Herrington, Cathy Farquharson and Sue Dale) put matters this way in paragraph 260 of *Burns v Financial Conduct Authority* [2018] UKUT 246 (TCC) ("*Burns*"):

> "In our view it is clear from our analysis of the way in which the relevant provisions of the RAO are constructed that where a firm advises on the merits of establishing a particular SIPP in circumstances where it knows that the customer's intention is that the SIPP will invest in particular assets which are not themselves specified investments for the purposes of the RAO, then advice on the merits of the underlying investments to be held within the SIPP is a component of the advice on the merits of establishing the SIPP and is therefore a regulated activity. The reason for this conclusion is that the particular investment that is being advised on includes the rights of the customer that he will acquire upon the establishment of the SIPP and, as we have found, those rights includes the right to receive benefits arising from the capital value or income derived from the particular assets to be held within the SIPP. In other words, the customer is being advised on an indivisible package of rights which includes the rights arising out of the acquisition of the particular assets to be included within the scheme."

59. Somewhat comparable remarks are to be found in *R (TenetConnect Services Ltd) v Financial Ombudsman* [2018] EWHC 459 (Admin), [2018] 1 BCLC 726 ("*TenetConnect*"), which was decided shortly before *Burns*. In *TenetConnect*, Mr Dhanda had advised Mr and Mrs Thorpe to sell some "specified investments" and to give him money from the sale to invest in a property in Goa and other sums by way of loan. Mr Dhanda having been convicted of fraud, the Thorpes sought redress from TenetConnect Services Limited, for whom Mr Dhanda had been an "appointed representative". While, however, accepting that Mr Dhanda had been undertaking a "regulated activity" when advising the Thorpes to dispose of their investments, TenetConnect disputed that he had been carrying out such an activity when advising on how the proceeds should be used.

60. Rejecting TenetConnect's contentions, Ouseley J said in paragraph 58:

> "I would have concluded, even had the Ombudsman not, that the advice to buy, to put it simply, though taken by itself and in isolation, was unregulated, was here all part and parcel of the advice to sell, and was 'regulated'. This is not a case where the advice to sell arose from the need to dispose of an underperforming or risky asset, whereafter the IFA would look for something better. It is not simply that the advice was given

> at the same time, or that the trades took place so closely in time. That helps to evidence that the advice to buy was what led to the advice to sell. The advice to sell was given so that the alternative unregulated investments could be made; they were compared, and their advantages persuaded Mr and Mrs Thorpe to accept the advice to sell. The advice, put simply was that, because they could do better in unregulated investments, they should sell the specified investments. The advice on unregulated investment justified the advice on the specified investments, and in that way, became part of the regulated advice. The Ombudsman was bound to conclude that they were part and parcel of the same advice. I conclude that the whole advice was regulated activity, and that the Ombudsman had jurisdiction."

Earlier in his judgment, Ouseley J had said in paragraph 53:

> "Of course, the FSMA draws a clear distinction between regulated and unregulated activities. But that does not answer the question of what activities amount to regulated activities where a single braided stream of advice is given to a client about regulated and unregulated investments."

Where, Ouseley J commented in paragraph 53, the purpose of a sale is to enable a purchase, "The advice on such a sale is inextricably linked to the advice on the purchase".

61. Mr Fenner Moeran QC, who argued this part of the case for Carey, took issue with the analysis espoused by Mr McMeel and Mr Vineall. Even taking account of the wide definition of the term given in the RAO, Mr Moeran argued, the investment in storepods did not involve any "selling" of Mr Adams' rights under the SIPP. The SIPP was not an investment "consisting of rights under a contract" but, even if it were, a change in the assets comprised in the SIPP did not involve either "converting those rights" or "disposing … for valuable consideration". If, Mr Moeran said, you transfer out of a SIPP, you dispose of a security for valuable consideration and so "sell" it for RAO purposes. You also, he accepted, "sell" if you withdraw a lump sum, because you exchange rights under the SIPP for cash. In contrast, the SIPP is not disposed of or sold merely as a result of a switch in investments. Your pension rights may now be calculated by reference to the value of a different asset, but the rights themselves are unchanged. The holder of a SIPP, Mr Moeran stressed, has neither a legal nor beneficial interest in the assets it holds.

62. In support of his submissions, Mr Moeran took us to a consultation paper which HM Treasury published in 2005. At the time, article 52 of the RAO was limited to establishing, operating or winding up a "stakeholder pension scheme" but the pension regime was shortly to be liberalised in 2006 on "A Day" pursuant to the Finance Act 2004. The consultation paper concerned the regulatory implications and included this:

> "4.1 Investments currently outside of FSA regulation that would be brought within FSA regulation for the first time would be the rights that persons attain by virtue of being

> members of a personal pension scheme other than a stakeholder scheme (where the rights are already a specified investment). This would include, in particular, the right to receive sums determined by reference to the value or performance of the underlying property.
>
> 4.2 Some investments that would then be permitted under these pension schemes (for example cash and real property) are not currently regulated under FSMA. These investments would not, of themselves, be brought within the scope of FSA regulation.
>
> 4.3 But advice to contribute to a particular personal pension scheme would be advice to acquire rights under that scheme and would therefore be regulated advice. And dealing in, managing, safeguarding and administering or arranging for a person to acquire those rights would become a regulated activity.
>
> 4.4 What this would mean is that by introducing the new regulated activity, the buying or selling, or managing of real estate, for example, would not become an activity regulated by the FSA simply because the property is to be held under a personal pension scheme. So, for example, FSA regulation would not extend to any duty on the scheme operator to find tenants or collect rents in respect of a residential property.
>
> 4.5 But, subject to the results of the FSA's subsequent consultation on changes to its rulebook, FSA regulation would be likely to take in the operator's responsibility for ensuring that, for example, real estate investment (of, say, residential property), is carried out in the manner required by the instruments (or rules) governing the scheme."

63. This passage recognises, Mr Moeran submitted, that a member of a personal pension scheme may have a "right to receive sums determined by reference to the value or performance of the underlying property", but does not have any entitlement to the property itself. It can be seen, too, Mr Moeran said, that it was not intended that dealings in assets which were not themselves specified investments should become an activity regulated by the FSA simply because the assets were held under a personal pension scheme.

64. In my view, Mr Moeran is right about this. In the first place, I agree with him that Mr Adams' rights under the SIPP are not "rights under a contract". A member of the Carey pension scheme such as Mr Adams enjoys his rights pursuant to the trusts established by the declaration of trust dated 27 July 2009, which provided for the scheme to be governed by the rules in respect of it. It is true that the terms and conditions to which Mr Adams assented when he applied to join the scheme contain provisions relating to it, stating for example "You may direct us to invest amounts held for your fund". However, the terms and conditions explain that the scheme "has been established and is governed by the Rules" and that "If there is any inconsistency

between the detail set out in these terms and conditions and the provisions of the Rules, the Rules prevail". The terms and conditions sought, as they said, to "[set] out the main terms and conditions of the scheme", but someone joining the scheme essentially acquired rights under trusts governed by the scheme rules. If the terms and conditions can be said to have given a member a contractual right to direct how Carey invested, it was a right to control the way in which Carey exercised its powers under the rules. It remains the case that a member's rights under the Carey pension scheme were not fundamentally contractual.

65. In any case, I do not think a member of the Carey pension scheme "converts", "disposes of" or "sells" his rights merely by altering the underlying investments. A member of a pension scheme may, in the words of the Treasury consultation paper, have a "right to receive sums determined by reference to the value or performance of the underlying property", but he is not the property's owner. In fact, the rules governing the Carey pension scheme state in terms that "No person shall have any claim, right or interest in respect of the Fund except under the Rules". There can therefore be no question of a member acquiring different property rights as a result of a switch in investments. The rules give a member and dependants rights to certain benefits the value of which will be a function of the value of the investments, but the rights are not themselves transformed by changes in either the value or the make-up of the relevant investments. In the circumstances, the words "sell", "dispose of" and "convert" are not, in my view, apt to describe what occurs when one investment is substituted for another. A member retains his rights under the SIPP and does not "sell", "dispose of" or "convert" them.

66. It follows that I do not think PERG 12.3 is correct that rights under a personal pension scheme are bought or sold wherever "the member or his agent instructs the operator to buy assets of any kind either from existing cash holdings or from the proceeds of selling existing assets (since, in switching the assets, the member is converting his rights from an entitlement to benefits from the performance of certain assets to an entitlement to benefits from the performance of other assets - the former rights are sold and the latter are bought)". It seems to me that advice on a SIPP exchanging assets neither of which is a specified investment is not a regulated activity. As is recognised in PERG 1.3, the Perimeter Guidance Manual is not of course binding on the Courts but rather represents the FCA's views.

67. That is not to say, however, that advice on the merits of an unregulated investment will necessarily be irrelevant to whether there has been a contravention of the general prohibition in a SIPP context. In *Burns*, the Upper Tribunal referred to the possibility of a customer "being advised on an indivisible package of rights which includes the rights arising out of the acquisition of the particular assets to be included within the scheme". In a similar vein, in *TenetConnect* Ouseley J spoke of a "single braided stream of advice" being given about regulated and unregulated investments and, on the facts, of advice on unregulated investments justifying advice on specified investments and, hence, becoming part of the regulated advice.

68. I agree that advice on unregulated investments can potentially be material to whether (and, if so, what) advice is being given on specified investments. Where, as in *TenetConnect*, someone lauds an unregulated investment which could be bought only by selling a specified one, he can fairly be regarded as advising on the merits of selling the specified investment regardless of whether he voices criticisms of it. The

advice on the new investment conveys the message that the existing one would be less good. Likewise, coming closer to the facts of the present case, if a person praises an unregulated investment which would need to be acquired by means of a particular vehicle, it may very well, depending on the particular facts, be right to see him as advising that the vehicle be adopted. In short, advice on an unregulated investment is sometimes capable of involving advice on a specified one within the scope of article 53 of the RAO and so of being regulated activity.

Article 53

69. It is convenient to consider next whether CLP contravened the general prohibition by advising on investments within the meaning of article 53 of the RAO.

70. Mr McMeel submitted that the evidence showed CLP to have advised Mr Adams on the merits of three relevant transactions: the sale of his Friends Life policy, buying the Carey SIPP and investing in store pods.

71. As I understand his judgment, the Judge concluded that article 53 was of no assistance to Mr Adams for three reasons. First, he considered that "any advice which was given by CLP related to the underlying investment in store pods and not to the SIPP". Secondly, he took the view that "'recommending' a specific SIPP … falls short of advising on the merits of a particular investment". Thirdly, he drew a distinction between Carey and its products. Mr Adams' evidence indicated "a recommendation of [Carey] and not of any of their specific products".

72. With regard to the first of these points, I have already said that, in my view, advice on an unregulated investment is sometimes capable of involving advice on a specified one within the scope of article 53 of the RAO, depending on the circumstances. On the question of what constitutes "advice of the merits" for the purposes of article 53, we were referred to *Walker v Inter-Alliance Group plc* [2007] EWHC 1858 (Ch), [2007] Pens LR 347 ("*Walker*") and *Rubenstein v HSBC Bank plc* [2011] EWHC 2304 (QB), [2012] PNLR 7 ("*Rubenstein*"). In *Walker*, Henderson J had to decide whether Scottish Equitable had given "investment advice" within the meaning of paragraph 15 of part II of schedule 1 to the Financial Services Act 1986, which corresponded closely to article 53. It was in these terms:

> "Giving, or offering or agreeing to give, to persons in their capacity as investors or potential investors advice on the merits of their purchasing, selling, subscribing for or underwriting an investment, or exercising any right conferred by an investment to acquire, dispose of, underwrite or convert an investment."

73. Henderson J said this in paragraph 30 of his judgment about the scope of "investment advice":

> "The prohibition of the giving of investment advice does not extend to the giving of purely factual information. However, it can often be difficult to say where the dividing line falls. This difficulty is recognised in Scottish Equitable's Compliance Manual, where some examples are given in both the 1995 and the 1999 versions by way of guidance. Thus the provision of

> purely factual information about a transfer value, the differences between with-profits and unit-linked policies, the shareholdings of a fund, or the investment strategy of a fund would all be acceptable; but on the other hand advice whether to effect a transfer, whether with-profits or unit-linked would be better for an investor, whether to switch to a particular fund, or whether a fund is low or high risk would all constitute investment advice. [Mr Walker's] expert witness on liability, Mr Patrick Storey, agreed that these were good examples. I also agree, and would add that any element of comparison or evaluation or persuasion is likely to cross the dividing line. However, the provision of purely factual information does not become objectionable merely because it feeds into the client's own decision-making process and is taken into account by him. It is obvious that any informed decision making requires the provision of accurate information and will be based upon it."

74. *Walker* was one of the cases cited in *Rubenstein*, where Judge Havelock-Allan QC considered the meaning of "advice". He said this on the subject:

> "81. … The key to the giving of advice is that the information is either accompanied by a comment or value judgment on the relevance of that information to the client's investment decision, or is itself the product of a process of selection involving a value judgment so that the information will tend to influence the decision of the recipient. In both these scenarios the information acquires the character of a recommendation.
>
> 82. To attempt any greater definition of the giving of advice in an investment context would be unwise and is probably impossible. I suggest, however, that the starting point of any inquiry as to whether what was said by an IFA in a particular situation did or did not amount to advice is to look at the inquiry to which he was responding. If a client asks for a recommendation, any response is likely to be regarded as advice unless there is an express disclaimer to the effect that advice is not being given. On the other hand, if a client makes a purely factual inquiry such as 'What corporate bonds are currently yielding X%?' or 'How does this structured product work?', it is not difficult to conclude that a reply which simply provides the relevant information is no more than that."

An appeal from Judge Havelock-Allan QC's decision was successful, but not on a ground relevant to the observations I have quoted.

75. It is plainly the case that the simple giving of information without any comment will not normally amount to "advice". On the other hand, I agree with Judge Havelock-Allan QC that the provision of information which "is itself the product of a process of selection involving a value judgment so that the information will tend to influence the decision of the recipient" is capable of constituting "advice". I also agree with Henderson J that "any element of comparison or evaluation or persuasion is likely to

cross the dividing line". I would add that "advice on the merits" need not include or be accompanied by information about the relevant transaction. A communication to the effect that the recipient ought, say, to buy a specific investment can amount to "advice on the merits" without elaboration on the features or advantages of the investment.

76. Turning to when advice relates to a "particular investment" under article 53 of the RAO, generic advice is not covered. Thus, a recommendation to invest in European equities, say, would not fall within article 53. However, I do not think advice necessarily has to apply to just one product or asset for article 53 to be in point. For example, advice to buy shares in BP would be in respect of a "particular investment" (or, perhaps more accurately, a number of "particular investments") even though more than one class of BP shares was listed. Section 6 of the Interpretation Act 1978, of course, states that, unless the contrary appears, "words in the singular include the plural" in any statute.

77. In this connection, it is relevant to note several passages from the FCA's Perimeter Guidance Manual:

i) PERG 4.6.6G, which concerns mortgages, states:

> "Advice relates to a particular contract if it recommends that a person should take out a mortgage with ABC Building Society without (expressly or by implication) specifying any particular ABC Building Society mortgage because it is advice on the merits of specific identifiable mortgages and compared to all others. The advice is essentially saying that there is a feature of each individual ABC Building Society mortgage that makes it better than a mortgage from any other lender. Advice may be regulated even though it relates to more than one possible mortgage. Advice also relates to a particular contract if it recommends that a person should not take out a mortgage with ABC Building Society";

ii) PERG 5.8.5G states that "I recommend you take the ABC Insurers motor insurance policy" is regulated under article 53 of the RAO "even … if ABC Insurers has many different motor insurance policies";

iii) PERG 5.8.14G reads:

> "Generally speaking, advice on the merits of using a particular insurance undertaking, broker or adviser in their capacity as such, does not amount to advice for the purpose of article 53(1). It is not advice on the merits of buying or selling a particular contract of insurance (unless, in the circumstances, the advice amounts to an implied recommendation of a particular policy)."

78. For my part, I can well see that advice on the merits of using a particular insurance broker or adviser will not normally involve even an implied recommendation of a particular policy or policies and so will not be encompassed by article 53. As,

however, I have indicated, it seems to me that the Perimeter Guidance Manual is right that advice does not have to concern only a single type of insurance policy or mortgage for article 53 of the RAO to be applicable. Advice can relate to a number of "particular investments".

79. In the present case, there is, I think, no dispute but that CLP encouraged Mr Adams to invest in storepods. In so doing, it also, as it seems to me, encouraged him to sell his Friends Life policy and to transfer the proceeds into a Carey SIPP. Thus, Mr Adams explained in his witness statement that "Ben" had told him that he "could unlock some pension money if [he] moved [his] pension … and reinvested it with StoreFirst by buying Storage Pods", that he could "transfer [his Friends Life pension] into a pension that would perform better and allow [him] to invest in better investments", that Store First would sell him storage pods "through [his] pension if it were in a SIPP", that Carey was "a large, reputable pension management company", that his pension "would do better and it would be safely and securely held with a reputable UK based pension provider" and that his pension "would be held with reputable UK pension provider". While CLP was commending the ultimate investment in storepods, which were not a regulated investment, it was also encouraging Mr Adams to achieve that end by transferring out of the Friends Life policy and buying a Carey SIPP, both of which were regulated. In the circumstances, I cannot agree with the Judge that any advice from CLP related exclusively to the storepods.

80. I also part company with the Judge on whether "'recommending' a specific SIPP … falls short of advising on the merits of a particular investment". To the contrary, I cannot think of any reason why a recommendation of a specific SIPP should not constitute "advice on the merits" of a "particular investment". The extent to which the recommendation had been coupled with information about the SIPP would be immaterial.

81. I differ from the Judge, too, in relation to the distinction he drew between Carey and its products. As I have mentioned, the Judge took Mr Adams' evidence to indicate "a recommendation of [Carey] and not of any of their specific products", adding that he did "not accept the submission that steering an investor in the direction of a specific SIPP provider amounts to a recommendation of a specific SIPP". However, it seems to me that "steering an investor in the direction of a specific SIPP provider" is certainly capable of being advice on the merits of a "particular investment" or "particular investments". As already indicated, I do not think advice need relate to a single product or asset to relate to a "particular" investment or investments. Moreover, Carey did not offer a wide range of SIPPs. While it marketed two species of SIPP (the "Full SIPP" and the "Restricted Investment SIPP"), the documentation we have seen indicates one overarching pension scheme, and in any event only the "Full SIPP" could be used for the purpose for which Carey was being recommended, namely, investment in storepods. In the circumstances, it seems to me plain that the advice as to Carey was sufficiently specific for it to relate to a "particular investment" within the meaning of article 53 of the RAO.

82. In short, CLP's recommendation that Mr Adams invest in storepods carried with it advice that he transfer out of his Friends Life policy and put the money into a Carey SIPP. Investment in storepods may have been the ultimate objective, but it was to be gained by transferring out of the Friends Life policy and into a Carey SIPP. CLP thus proposed that Mr Adams undertake those transactions too and, in so doing, gave

"advice on the merits" of selling a "particular investment which is a security" (viz. the Friends Life policy) and buying another "particular investment which is a security" (viz. a Carey SIPP). Although, therefore, the advice to invest in storepods was not of itself covered by article 53 of the RAO, CLP nonetheless gave Mr Adams advice within the scope of article 53 and so acted in contravention of the general prohibition.

Article 25

83. It is Mr Adams' case that CLP also contravened the general prohibition by "making arrangements" for him to sell his Friends Life policy and to place the money in a Carey SIPP.

84. Article 25(1) of the RAO provides for "[m]aking arrangements for another person … to buy, sell, subscribe for or underwrite a particular investment which is", among other things, "a security", but article 26 excludes from article 25(1) "arrangements which do not or would not bring about the transaction to which the arrangements relate". It can be seen from paragraph 117 of his judgment (quoted in paragraph 47 above) that the Judge took this to mean that "there must be a direct and substantial causal connection between the arrangements and the ultimate investment" and that article 25(1) does not apply to conduct which does "not necessarily result" in the relevant transaction being effected.

85. The Judge's approach was derived in part from the decision of Jonathan Crow QC, sitting as a Deputy High Court Judge, in *In re The Inertia Partnership LLP* [2007] EWHC 502 (Ch), [2007] Bus LR 879 ("*Inertia*"). That case involved a petition to wind up a limited liability partnership ("TIP") on the basis that it had contravened the general prohibition by "Arranging deals in investments" within article 25 of the RAO. TIP had introduced companies referred to as "Vivadi", "Plasma" and "Police 5" to a Seychelles company referred to as "Porterland" with a view to the latter assisting the companies in raising capital.

86. In the course of his judgment, Mr Crow said this about articles 25 and 26 in paragraph 39:

> "The critical words in article 25 are these: 'making arrangements for another person … to buy, sell [or] subscribe for' shares. The exception under article 26 applies to 'arrangements which do not or would not bring about the transaction to which the arrangements relate'. In my judgment, the correct analysis of these provisions is as follows: (1) the word 'arrangements' is, depending on the context, capable of having an extremely wide meaning, embracing matters which do not give rise to legally enforceable rights; (2) in articles 25 and 26, the word 'arrangements' is used in contradistinction to the word 'transaction'; (3) in article 26, the word 'transaction' is plainly a reference to the purchase, sale etc of shares contemplated by article 25; (4) as such, a person may make 'arrangements' within article 25 even if his actions do not involve or facilitate the execution of each step necessary for entering into and completing the transaction (i e the purchase, sale etc of the shares); (5) the availability of the exception in

> article 26 is essentially a question of fact: as a matter of causation, did the arrangements bring about the transaction (i e the purchase, sale etc of the shares)?"

87. On the facts, Mr Crow concluded that TIP had breached the general prohibition as regards Plasma and Police 5. TIP had "provided administration services designed to facilitate the sale of Plasma's shares" which had "brought about" share sales (see paragraphs 41-41.2 of the judgment). TIP had also "made arrangements for [Police 5] to enter into agreements with investors" (see paragraph 42 of the judgment).

88. As regards Vivadi, however, the position was different. Mr Crow said this in paragraph 40 of his judgment:

> "Dealing first with Vivadi, … there is no evidence to suggest that TIP took any part in arranging the sale of its shares, beyond having introduced the company to Porterland. That introduction is in my judgment too nebulous and too remote an act to fall within the concept of 'making arrangements' within article 25 of the 2001 Order. Such an introduction in these circumstances is not an 'arrangement' in any meaningful sense, for two reasons: first, because it does not necessarily result in anything further happening as between Vivadi and Porterland, let alone between any consumers and Vivadi or Porterland; and secondly, because any further steps that might be taken following the introduction were not within TIP's power to effect or to direct. As such, the introduction did not involve TIP in any violation of the general prohibition under section 19 of the 2000 Act."

89. Mr Crow's references to Vivadi's introduction to Porterland falling outside article 25 of the RAO because it did "not necessarily result in anything further happening as between Vivadi and Porterland, let alone between any consumers and Vivadi or Porterland", and "any further steps that might be taken following the introduction were not within TIP's power to effect or to direct" find an echo in paragraph 117 of the judgment now under appeal before us.

90. Article 25 of the RAO was also considered in *SimplySure Ltd v Personal Touch Financial Services Ltd* [2016] EWCA Civ 461, [2016] Bus LR 1049. In that case, PTFS had appointed SimplySure to act as its representative for the purpose of selling private medical insurance. PTFS terminated the agreement when it learned that advisers whom it had not authorised were filling in parts of a "fact-find" in which information provided by a potential client was entered to enable insurance advice to be given. Sir Stanley Burnton, with whom McFarlane and Gloster LJJ agreed, held that the general prohibition had been contravened. He said this in paragraph 26:

> "In my judgment, the judge correctly found that the completion of the first part of the fact-finds (ie the questions above the rubric) by employees or agents of SimplySure who were not authorised by PTFS was in breach of the general prohibition. The purpose of the completion of the first part of the fact-find was for the client to buy PMI [i.e. private medical insurance],

> and arranging for an unauthorised person to visit or to interview the client was an arrangement within article 25(1) of the Order, and indeed also within article 25(2) since it was an arrangement with a view to the client, who participates in the interview, buying PMI. The wording and therefore scope of article 25 are deliberately wide. I am encouraged in this conclusion by the consideration that SimplySure put the unauthorised person in a position in which he could advise the client. Furthermore, the questions above the rubric were not limited to the name and address of the client and his or her date of birth: the answer to the question as to whether any existing PMI cover was 'Moratorium/Full Medical/Switch' required a degree of specialist knowledge. My conclusion is consistent with the FSA Guidance in PERG 5.6.2 and PERG 5.6.4, cited above, which I would approve as a correct explanation of the effect of article 25(1) and (2). Furthermore, since article 25(2) was applicable, it is unnecessary to consider the effect of article 26, which applies to article 25(1) alone."

91. The passages from the FCA's Perimeter Guidance Manual which Sir Stanley Burnton approved were and are in the following terms:

PERG 5.6.2

> "The activity in article 25(1) is carried on only if the arrangements bring about, or would bring about, the transaction to which the arrangement relates. This is because of the exclusion in article 26 of the Regulated Activities Order (Arrangements not causing a deal). Article 26 excludes from article 25(1) arrangements which do not bring about or would not bring about the transaction to which the arrangements relate. In the FCA's view, a person would bring about a contract of insurance if his involvement in the chain of events leading to the contract of insurance were important enough that, without it, there would be no policy. Examples of this type of activity would include negotiating the terms of the contract of insurance on behalf of the customer with the insurance undertaking and vice versa, or assisting in the completion of a proposal form and sending it to the insurance undertaking. Other examples include where an insurance undertaking enters into a contract of insurance as principal or an intermediary enters into a contract of insurance as agent."

PERG 5.6.4

> "Article 25(2) may, for instance, include activities of persons who help potential policyholders fill in or check application forms in the context of ongoing arrangements between these persons and insurance undertakings. A further example of this activity would be a person introducing customers to an intermediary either for advice or to help arrange an insurance

> policy. The introduction might be oral or written. By contrast, the FCA considers that a mere passive display of literature advertising insurance (for example, leaving leaflets advertising insurance in a dentist's or vet's waiting room and doing no more) would not amount to the article 25(2) activity."

92. It is also worth mentioning in this context a passage from *Financial Conduct Authority v Asset LI Inc* [2016] UKSC 17, [2016] Bus LR 524. At paragraph 91, Lord Sumption said that the word "arrangements" as used in the definition of "collective investment scheme" given in section 235 of FSMA is "a broad and untechnical word".

93. Article 26 of the RAO is plainly intended to limit the application of article 25(1) by imposing a causal requirement. It is less clear quite what that requirement is.

94. The words "bring about" and the article's heading ("Arrangements not causing a deal") would of themselves be consistent with the application of a "but for" test of causation. However, no counsel argued for that before us and they were right not to do so. As was pointed out by Mr Andrew Green QC, appearing for Carey, Mr Adams would not have transferred his pension from Friends Life, put the money into a Carey SIPP or invested in storepods "but for" the initial CLP advertisement to which Mr Adams responded, yet article 26 cannot have been intended to extend to such an advertisement. Similarly eschewing a "but for" criterion, Mr Vineall observed that it could potentially catch too little as well as too much, positing a case in which something happened as a result of the efforts of multiple people and it could not be said that it would not have occurred "but for" the role of any specific individual.

95. On the other hand, it was common ground before us that arrangements can "bring about" a transaction for the purposes of article 26 even though they "do not necessarily result in anything further happening". Mr Green's position was that the Judge's reference in paragraph 117 of his judgment to acts "not necessarily result[ing] in anything further happening" and further steps being needed which were "not within an introducer's power to effect or direct" were not intended to provide a causation test additional to that found earlier in paragraph 117 ("direct and substantial causal connection"). Be that as it may, there is no such requirement. That arrangements must be such as to "bring about" a transaction does not mean that they must "necessarily result" in the transaction taking place, and article 25(1) cannot have been intended to be subject to a limitation of that kind. While such language may have been appropriate in the particular context in which Mr Crow used it in *Inertia*, it does not afford a test of wider application.

96. Mr Green doubted whether there is much to be gained from trying to paraphrase the words used in article 26: "bring about". Mr Vineall, too, was wary of moving away from "bring about", but suggested that article 26 carries an idea of causal potency. With regard to the Judge's reference to a "direct and substantial causal connection", he queried whether "substantial" is all that helpful and whether the word "direct" is apt. There might, he submitted, be arrangements which contribute to a transaction in an important and substantial way, and so ought to satisfy article 26, which nevertheless lack a "direct" connection to the transaction.

97. I agree that it is important to focus on the words "bring about". However, I would add that, as used in article 26, those words imply, in Mr Vineall's phrase, "causal

potency". For arrangements to "bring about" a transaction for the purposes of article 26, they must play a role of significance. Whether or not arrangements "bring about" a transaction is not to be judged simply on a "but for" basis, but neither is a "direct" connection inevitably required.

98. Did then CLP make "arrangements" for Mr Adams to transfer his Friends Life pension and to put the proceeds into a Carey SIPP which were such as to "bring about" those transactions? Although Mr Adams had framed his case somewhat more narrowly in his particulars of claim, at trial he relied on the six steps to which I have referred in paragraph 48 above. As regards the last of these ("the explanations that CLP were expected to provide in relation to key features and the terms of business"), the Judge said that Mr Adams' evidence "did not suggest that there was any such explanation given by CLP". I am doubtful, too, as to whether the second and fifth steps ("procuring a discharge form in respect of the Friends Life transfer" and "the instructions to Store First to identify pods to be sold") can advance Mr Adams' case when (a) CLP having misidentified Mr Adams' existing pension provider, the discharge form with which it was involved was addressed to the wrong company and (b) the relevant transactions are the transfers out of Friends Life and into a Carey SIPP, not the investment in storepods. That leaves "procuring the letter of authority" (i.e. the letter authorising Carey to liaise with CLP), "the undertaking of money-laundering investigations" and "the completion of the application form".

99. Article 26 of the RAO apart, it seems to me that these three steps did involve CLP making "arrangements" for Mr Adams to transfer out of the Friends Life policy and, more clearly, to put the money into a Carey SIPP. It is true that the Judge found that completion of the application form had not been "delegated to CLP", but that does not matter. The fact remains that CLP "pre-completed the application form so that [Mr Adams] could just sign it" (to quote Mr Adams' witness statement). It also told Mr Adams of documents he would need to supply for anti-money laundering purposes and explained that the "completed forms and [his] anti money laundering documents will be collected by courier and taken to Carey Pensions UK". "Arrangements" being a "broad and untechnical word" in article 25 of the RAO as well as section 235 of FSMA, it is apt to describe what CLP did.

100. I consider, too, that the steps which CLP took can fairly be said to have been such as to "bring about" the transfers from Friends Life and into the Carey SIPP. Contrary to the Judge's understanding, it does not matter that CLP's acts "did not necessarily result in any transaction between [Mr Adams] and [Carey]" or that "the process was out of CLP's hands to control in any event". Nor is it determinative whether steps can be termed "administrative". CLP's "procuring the letter of authority", role in relation to anti-money laundering requirements and (especially) completion of the Carey application form were much more closely related to the relevant transactions than, say, the advertisement which originally prompted Mr Adams to contact CLP. It is to be remembered that CLP filled in sections of the application form dealing with "Personal Details", "Occupation & Eligibility", "Transfers", "Investments" and "Nomination Of Beneficiaries". In my view, what CLP did was thus significantly instrumental in the material transfers. In other words, there was, in my view, sufficient causal potency to satisfy the requirements of article 26 of the RAO.

101. In the circumstances, I consider that CLP contravened the general prohibition by "[a]rranging deals in investments" within article 25(1) of the RAO as well as by "[a]dvising on investments" within article 53.

102. Mr Adams further relied on article 25(2) of the RAO. In the light of my conclusion on article 25(1), however, I do not need to address article 25(2).

"In consequence of"

103. For section 27 of FSMA to apply, an agreement must have been made by an authorised person (here, Carey) "in consequence of" a contravention of the general prohibition by a third party (here, CLP).

104. I have already said that I consider that the transfers out of Friends Life and into a Carey SIPP were brought about by arrangements undertaken by CLP. I likewise consider that the transactions were "in consequence of" CLP's "[a]rranging deals in investments" within article 25(1) of the RAO.

105. The position is even clearer in relation to the "[a]dvising on investments" within article 53 of the RAO. The advice which CLP gave plainly played a crucial part in Mr Adams deciding to transfer from Friends Life and to Carey.

Section 28

106. It follows from what I have said so far that section 27 of FSMA is applicable and, hence, that Mr Adams is entitled to recover money and other property transferred under his agreement with Carey unless the Court exercises its powers under section 28(3) of FSMA. As mentioned earlier, section 28(3) empowers the Court to allow an agreement to which section 27 applies to be enforced or money and property transferred under the agreement to be retained "[i]f the court is satisfied that it is just and equitable in the circumstances of the case". In considering whether to take such a course in a case arising under section 27, the Court is required by section 28(4)(b) and (6) to have regard to "whether the provider knew that the third party was (in carrying on the regulated activity) contravening the general prohibition".

107. The Judge referred in paragraph 130 of his judgment to considerations which, had the point mattered, would have led him to the conclusion that it was just and equitable to enforce Carey's agreement with Mr Adams. However, the Judge noted that the findings he had made rendered his undertaking of the balancing exercise "more than a little artificial" and Mr Green rightly accepted that, if section 28(3) of FSMA proved to matter, we would need to exercise the discretion afresh. As Mr Green accepted, the Judge's analysis could be of little significance when it had been informed by his (on this hypothesis erroneous) rejection of Mr Adams' contentions as regards articles 25 and 53 of the RAO.

108. The parties differed as to whether the provider must have actual knowledge of the third party's contravention of the general prohibition for section 28(6) of FSMA to apply. The issue identified in section 28(6) is "whether the provider knew that the third party was (in carrying on the regulated activity) contravening the general prohibition". Mr Green argued that the "knew" connotes actual knowledge. Mr McMeel submitted that constructive knowledge suffices: in other words, that it is

enough that the provider ought reasonably to have appreciated that the general prohibition was being breached.

109. On this point, I agree with Mr Green. Section 28(6) of FSMA directs the Court to consider what the provider "knew", not what he knew *or should have known*. Further, section 28(5), which is applicable in a two-party situation, instructs the Court to have regard to "whether the person carrying on the regulated activity concerned reasonably believed that he was not contravening the general prohibition by making the agreement". In that context, therefore, Parliament has expressly referred to a belief's reasonableness. The fact that there is nothing comparable in section 28(6) tends to confirm that the subsection is concerned with actual knowledge, not what a provider might reasonably have known.

110. I also agree with Mr Green that we must proceed on the basis that Carey did not have actual knowledge of CLP's breaches of the general prohibition. Mr McMeel pointed to factors from which Mrs Hallett might have inferred breaches, but, as Mr Green stressed, it was not put to her in terms in cross-examination that she was aware of any contravention of the general prohibition on CLP's part and she nowhere said that she knew of one. When she was asked about, for example, whether it was "obvious that [CLP] would be encouraging necessarily a purchase of the store pods and encouraging the use of the pension fund to achieve that purchase", Mrs Hallett accepted that that was "logical" but reiterated that she did not know what CLP's sales activity was. While it is not always the case that a point must be put to a relevant witness if the cross-examiner is to pursue it (see e.g. *Chen v Ng* [2017] UKPC 27, at paragraphs 52-56), it seems to me that it needed to be suggested to Mrs Hallett that she knew of CLP's contraventions if Mr Adams wished so to contend. It would not be fair for us to conclude that Mrs Hallett (or anyone else at Carey) had accepted introductions from CLP despite having actual knowledge of criminal conduct on CLP's part when that was not raised squarely with her in cross-examination (compare e.g. *Browne v Dunn* (1893) 6 R 67 and *Markem Corpn v Zipher* [2005] RPC 31).

111. However, the fact that Carey must be taken not to have had actual knowledge of CLP's contraventions of the general prohibition by no means dictates the conclusion that the section 28(3) discretion must be exercised in its favour. Where a provider actually knew that the general prohibition was being breached, that must weigh heavily against use of the power conferred by section 28(3) of FSMA. If, on the other hand, a provider lacked such knowledge, it may still be appropriate to deny relief under section 28(3). In *Helden v Strathmore Ltd* [2010] EWHC 2012 (Ch), [2011] Bus LR 59, I said in paragraph 98 that, "[w]hile … a person's failure to satisfy the requirements of section 28(5) will be 'a weighty factor against the grant of relief', the fact that section 28(5) is satisfied will not necessarily mean that relief should be granted". Likewise, meeting the requirements of section 28(6) will not necessarily mean that relief should be granted. Amongst the factors that it may be proper to take into account is whether the provider should reasonably have known that the general prohibition was being contravened.

112. Mr Green argued that relief should be granted under section 28(3) of FSMA in the present case for the following reasons:

    i) Carey did not know that CLP was contravening the general prohibition;

ii) Carey had established a proper system and controls;

iii) Carey did not itself commit any breach of duty;

iv) Mr Adams's losses were not caused by Carey but rather by Mr Adams himself; and

v) Mr Adams deliberately misled Carey by confirming in the member declaration and indemnity that "neither [he] nor any person connected to [him] is receiving a monetary or other inducement for transacting this investment".

113. In support of these submissions, Mr Green noted that the Judge found that Carey "put in place appropriate documentation to ensure that each of the three [i.e. Carey, CLP and an investor] knew and understood the limits of their role in the overall process" (paragraph 28 of the judgment) and that "the loss was caused by [Mr Adams'] decision, knowing that the underlying investment was high risk and or speculative nevertheless to proceed with it because he wanted the 'cash-back' which he had been offered by CLP" (paragraph 171). Mr Green also relied on a letter which the FCA wrote to Carey on 29 September 2011 following a visit to the firm. The letter summarised the FCA's overall comments in these terms:

> "We identified during the visit that the firm appear to have a number of robust processes that had been put in place or are continually being implemented to ensure the culture and ethos that you have embedded into the Firm allows you to ensure that your customer's are treated fairly. You were particularly focused on ensuring you do not become a conduit for financial crime and that your systems and controls are appropriate for a Firm like yours. Examples identified on the day which highlighted this included: the due diligence you undertake in assessing if an esoteric or UCIS investment is suitable for your clients which included a 3rd party review by your compliance support Enhanced Solutions. You also appear to have conducted appropriate due diligence on those introducers who provide the firm with SIPP business to satisfy yourself they are qualified to introduce SIPP business to the Firm. You also ensure you have appropriate documentation completed by the clients to help you satisfy yourselves that they are aware of any potential risks with their chosen investment. In summary, the Firm appeared to have adequate processes in place, and was committed to continue to review and where appropriate improve its procedures and practices to ensure they remain fit for purpose."

Among the FCA's more detailed observations were these:

> "**Financial Crime Related – Introducers**
>
> As mentioned above, you have been enhancing your procedures and the due diligence you undertake in dealing with your introducers, to satisfy yourselves that they are authorised and

> appropriately qualified in referring SIPP business to the Firm. You also confirmed that you are in the process of extending the vetting you undertake of your introducers to include a Terms of Business and non regulated introducer checklist; (for your relationships with other professional bodies such as solicitors and accountants) and that you intend to put in places processes that allow you to periodically monitor this due diligence.
>
> **Recommended Action**
>
> The Firm should continue with its plans to introduce a Terms of Business agreement and non regulated introducer checklist to compliment the checks it currently undertakes with its regulated introducers. This should be implemented prior to accepting any business from these firms. You should also review these processes periodically, to ensure they remain fit for purpose."

114. The Judge took this letter to demonstrate that "the FCA were fully aware that unregulated brokers, recommending underlying investments, were introducing investors to [Carey] so that a SIPP could be set up on an execution-only basis" (see paragraph 23 of the judgment). Mr McMeel submitted that this mischaracterises the letter, and I agree. After all, the letter spoke of conducting due diligence to ensure introducers "are qualified to introduce SIPP business" and I would read the reference to a "non regulated introducer checklist" as relating to "professional bodies such as solicitors and accountants", not entirely unregulated entities such as CLP. Even so, it remains the case that, as Mr Green emphasised, the FCA was positive about Carey's processes and that notwithstanding the fact that it was Mrs Hallett's evidence that Carey had given the FCA "a sample of all the different introducers".

115. On balance, however, I none the less take the view that we should not exercise the discretion conferred by section 28(3) of FSMA. My reasons include these:

i) A key aim of FSMA is consumer protection. It proceeds on the basis that, while consumers can to an extent be expected to bear responsibility for their own decisions, there is a need for regulation, among other things to safeguard consumers from their own folly. That much reduces the force of Mr Green's contentions that Mr Adams caused his own losses and misled Carey;

ii) While SIPP providers were not barred from accepting introductions from unregulated sources, section 27 of FSMA was designed to throw risks associated with doing so onto the providers. Authorised persons are at risk of being unable to enforce agreements and being required to return money and other property and to pay compensation regardless of whether they had had knowledge of third parties' contraventions of the general prohibition;

iii) Over a period of only about six months, some 580 of Carey's clients invested in storepods, despite their being high risk and non-standard investments, and most of those clients came via CLP. On average, moreover, no more than about £50,000 was being invested, possibly suggesting clients who were not rich or financially sophisticated, especially given the warning in the Key

Features document that, "In general terms, investment of less than £25,000-£50,000 into a Full SIPP won't provide the opportunity to take advantage of the investment flexibility and may mean that the fees being levied would be considered excessive in relation to the size of the fund". These matters were, as it seems to me, such as to put Carey on notice of the danger that CLP was recommending clients to invest in storepods and to set up Carey SIPPs to that end. After all, it is hard to suppose that 580 people would spontaneously decide to invest in Blackburn storepods. There was thus reason for Carey to be concerned about the possibility of CLP advising on investments within the meaning of article 53 of the RAO, albeit that it is to be assumed that it did not in fact appreciate that the general prohibition was being contravened;

iv) Come May 2012, Carey learned that, contrary to what CLP had said in the "Non-Regulated Introducer Profile", it was receiving commissions of about 12% from Store First, that clients were making enquiries as to when they would receive their money and that the FCA had posted a notice warning that one of those running CLP was not authorised under FSMA and that he might be "targeting UK customers via the firm Cash In Your Pension". These matters should have rung alarm bells with Carey, and they did: it terminated its relationship with CLP. Yet it still allowed "pipeline" clients who had been introduced by CLP, such as Mr Adams, to proceed with investments in storepods;

v) It seems that it was not until 26 May 2012, the day after Carey notified CLP of its termination of their relationship, that Carey requested the transfer of the Friends Life pension, the proceeds were not received until somewhat later and the investment in storepods did not proceed until well into July 2012. It was open to Carey to decline to continue to permit Mr Adams (and other clients) to invest in storepods or at least to explore the position with him, but it did not do so notwithstanding the reasons for concern that it by then had.

116. In all the circumstances, I do not consider it just and equitable to grant relief under section 28(3) of FSMA.

Conclusion

117. In my view, the Section 27 Claim succeeds.

The COBS Claim

118. What is now section 137A of FSMA empowers the FCA to make rules applying to authorised persons. One such rule is COBS 2.1.1R, termed "The client's best interests rule", which provides:

> "A firm must act honestly, fairly and professionally in accordance with the best interests of its client."

COBS 2.1.1R implements article 19(1) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments ("MiFID I").

119. Under what is now section 138D of FSMA, contravention by an authorised person of a rule made by the FCA is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty. In the present case, Mr Adams claims that Carey is liable to him pursuant to section 138D because it contravened COBS 2.1.1R.

120. Mr Adams identified the breaches of COBS 2.1.1R that he alleged in paragraph 23 of his particulars of claim. In summary, they were these:

    i) Establishing for Mr Adams a SIPP that was "manifestly unsuitable as a means of making pension provision for [him]" since "[t]he transfer value … was very modest and not of a size sufficient or appropriate to support the establishment and annual running costs of the SIPP";

    ii) Administering the SIPP in reference to an investment that was "manifestly unsuitable as an investment of Mr Adams' pension fund" having regard to the need to sub-let the storepods, the impact of rents and service charges, illiquidity and "market/valuation risk";

    iii) "Failing to implement the guidance and/or have any or any adequate regard to the expectations communicated by the FCA in its SIPP thematic review report September 2009".

121. The Judge rejected each of these allegations. Among other things, he said:

    i) "There was nothing identified at trial to demonstrate that the SIPP itself, as opposed to the store pod investment, was unsuitable" (paragraph 157 of the judgment);

    ii) There was no expert evidence about the extent of the inherent risks involved in the underlying investment and no sufficient analysis of the alleged risks to sustain an argument that the investment was manifestly unsuitable. The particular features said to make the investment manifestly unsuitable were "factors which it would not be a surprise to see when the underlying investment is in real property, of whatever nature, which it is intended to let" and, while the investment was high risk and speculative, that was "entirely different to saying that it was manifestly unsuitable for [Mr Adams]" (paragraph 158). Moreover, "to ascertain the suitability or otherwise of the investment for [Mr Adams] himself [Carey] would have had to make detailed enquiries about [his] financial circumstances and … take advice on the value of the investment, evaluate the risks inherent in and lastly make a judgment call on the question of whether those risks were appropriate for [Mr Adams] in the light of the information which they had obtained about his financial situation and appetite for risk", and "[t]hat was not the role which the parties had agreed in the contract that [Carey] would have" (paragraph 159). In any event, there was "no causal link between this alleged breach of duty and the losses which [Mr Adams] is alleged to have sustained", Mr Adams having been "warned that the underlying investment was high risk and or speculative and proceeded with it in any event" (paragraph 160);

iii) The 2009 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" (paragraph 162).

122. The Judge concluded in paragraph 164 of his judgment:

> "[Mr Adams] accepted that he had been warned, more than once, that the underlying investment was high risk and speculative before committing himself to the SIPP. He understood, as I have found, the limited role which [Carey] was to perform and he agreed to contract with them on that basis. Thus in my view [Carey] complied with the best interests rule. It was not part of their duty, in my view, to refuse to accept this particular underlying investment at the stage when [Mr Adams] asked to include it within a SIPP. He also accepted that he nevertheless went ahead with the investment because he wanted to extract cash from his pension fund. There is no basis on which, even if there had been a breach of duty by [Carey], that I could have come to the conclusion that it was causative of loss, [Mr Adams] did not suffer loss as a result of the alleged contravention of the rule but because of his motivation in entering into the transaction."

123. Mr Adams' case now, on appeal, is that COBS 2.1.1R gave rise to a "product due diligence duty", an "intermediary due diligence duty", a "non-allowable investments duty", a "non-standard investments duty", a "proper custody duty", a "valuation duty" and a "financial crime duty" and that Carey breached these duties. In his oral submissions, Mr McMeel maintained that Carey had failed in its duties in particular by:

i) Dealing with an unregulated intermediary;

ii) Admitting into Mr Adams' SIPP an asset that could not realistically be valued; and

iii) Proceeding with the investment in storepods as a "pipeline" case notwithstanding the matters of which it had learned by the end of May 2012.

124. As Mr Green pointed out, the way in which Mr Adams is seeking to put his case in relation to COBS 2.1.1R bears little relation to his particulars of claim. While the FCA suggested at the trial that COBS 2.1.1R could include duties approximating to at least some of those for which Mr Adams is now contending, it recognised that several of them were not applicable to the present case and cited them rather "as illustrations of the scope of the COBS 2.1.1R duty in the specific context of SIPP operation" and, more importantly, the duties did not feature in the particulars of claim. Nor was it alleged in the particulars of claim that Carey had breached COBS 2.1.1R simply by dealing with an unregulated intermediary, by admitting an asset that that could not be valued or by reason of what Carey learned in May 2012.

125. In short, Mr Adams is seeking to advance a case radically different to that found in his pleadings and which Carey could be expected to have met at trial. His arguments

represent not so much a challenge to the grounds on which the Judge dismissed the COBS Claim as an attempt to put forward a new case.

126. Mr Green argued that there is no justification for Mr Adams being permitted at this stage to advance a fundamentally different and new case, particularly since it would necessitate further factual and expert evidence. I agree. It follows that the appeal in respect of the COBS Claim must fail. I would add that Mr Adams might anyway have struggled to overcome the Judge's finding that any breach of duty was not causative of loss.

127. Mr Vineall said that the FCA and others would find it helpful if we felt able to comment on the implications of COBS 2.1.1R. It seems to me, however, that they would be more appropriately addressed in a case where the issues are live.

Conclusion

128. While I would not accept Mr Adams' challenge to the Judge's dismissal of the COBS Claim, I would allow the appeal in respect of the Section 27 Claim. The Section 27 Claim is, in my view, well-founded.

129. We were not addressed on quite what order should be made in the event of the appeal succeeding and, more specifically, on the precise financial implications. I would hope that counsel can agree an appropriate order between themselves. If not, they should submit brief written submissions on the points in issue.

Lady Justice Rose:

130. I agree.

Lady Justice Andrews:

131. I have had the advantage of seeing in draft the judgment of My Lord, Newey LJ, with which I too respectfully agree. As the unhappy history of the transfers of small personal pensions into SIPPs holding high risk investments related in that judgment illustrates, the liberalisation of the pension regime in 2006 brought with it fresh opportunities for unscrupulous entities to target the gullible, the greedy or the desperate. There is nothing to prevent a regulated SIPP provider such as Carey from accepting instructions from clients recommended to it by an unregulated person, and from doing so on an "execution only" basis. But the basis on which they contract with their clients will only go so far to protect them from liability. If they accept business from the likes of CLP, they run the risk of being exposed to liability under s.27 of the FSMA.

132. I agree, for the reasons explained in paragraphs 64-66, that the rights of a person to participate in the proceeds of an investment or group of investments held in a SIPP are not disposed of for valuable consideration or converted (or otherwise altered) just because the underlying investments change, for example, from cash to storepods. That is so whether the SIPP has a trust structure, as this one did, or is contract-based.

133. However, when considering whether Article 25(1) or Article 53 of the RAO has been contravened in a given case it is of crucial importance to stand back and consider the behaviour of the unregulated entity holistically. Otherwise there is a danger that the

safeguards of those provisions will not operate as they were designed to. In the present case, for example, CLP were telling clients that it would be financially advantageous for them to "unfreeze" their regulated personal pensions (by selling them) and investing in the ostensibly far more lucrative storepods via the fiscally advantageous "wrapper" of a Carey SIPP. As Mr Adams' evidence demonstrated, it was a critical feature of the CLP sales pitch that the replacement pension would be held by a reputable UK based pension provider, namely, Carey. The sale of the Friends Life pension and the setting up of the Carey SIPP were crucial links in the chain.

134. The argument that no advice was provided on a regulated investment because CLP did not extol the merits of a Carey SIPP as compared with a SIPP provided by some other equally reputable UK provider looks at the matter through far too narrow a prism. As Ouseley J so aptly put it in *TenetConnect* there was a "single braided stream of advice about regulated and unregulated investments". That is why what My Lord has said in paragraphs 67 and 68, is so important. The Judge was wrong to compartmentalise the advice given by CLP in the way that he did, and in my judgment the reason that he fell into that error was that he failed to stand back and look at what Mr Adams was told in a realistic and common sense manner. Once that exercise is undertaken, as demonstrated by the analysis in paragraph 79, it is obvious that the advice could not sensibly be regarded as relating exclusively to the storepods and that it fell within the scope of article 53.

135. As for article 25, the question whether there has been a "making of arrangements" is quintessentially one of fact and degree, but again I would stress the importance of a holistic assessment of the behaviour of the unregulated entity. On the facts of this case, I agree with My Lord that the steps which CLP took could fairly be said to have been such as to "bring about" the transfer of the funds from Friends Life and into the Carey SIPP.

136. I therefore agree that the claim under Section 27 was well-founded, that the Court should not exercise its discretion to grant relief under Section 28 for the reasons given by My Lord, and that the appeal should be allowed on that basis.