The "Single Braided Stream of Advice": The English Court of Appeal on Investment Advice, Arranging Investments, and Dealings with Unregulated Intermediaries

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The Court of Appeal in England and Wales has handed down a major ruling on the meaning of advising on investments, arranging investments and the consequences of dealing through unauthorised intermediaries under the UK Financial Services and Markets Act 2000 (FSMA), in ***Adams v Options Personal Pensions UK LLP (Financial Conduct Authority intervening)*** [2021] EWCA Civ 474. The decision will be of interest to banking and financial services lawyers everywhere. In so doing they reversed the controversial decision of ***HHJ Dight CBE in Adams v Options SIPP UK LLP*** [2020] EWHC 1229 (Ch).

The context was a paradigm pension scam. Mr Adams, a road haulage driver, was persuaded by an offshore and unregulated intermediary (CLP) to transfer his personal pension with Friends Life, to a self-invested personal pension (SIPP) with the respondent, Options, formerly known as Carey. CLP also recommended he invest the cash proceeds of the transfer in an unregulated, commercial property "store pods" scheme, consisting of a number of disused shipping containers on an industrial park in Blackburn, Lancashire. Some 580 of Carey's clients were in the same boat, having made the same investments, nearly all introduced by CLP.

Accordingly the first basis of claim was that Mr Adams was entitled to reverse his investments under the statutory restitutionary mechanism in sections 27 and 20 of FSMA. Whilst the judge had rejected this claim, the Court of Appeal considered it was plainly made out. Section 27 put the risk of entering into agreements with investors introduced by unregulated firms squarely on Carey as an authorised person under FSMA. If the intermediary engaged in FSMA regulated activities such as advising on, or arranging investments, the resulting agreement was presumptively unenforceable. Store pods are a paradigm pension scam asset, alongside the exotic variants on the unregulated collective investment scheme which have proliferated in recent years. But as they are notionally real property, they are not directly regulated by the Financial Conduct Authority (FCA). Carey did manage to persuade the court that advice by an unregulated intermediary to use cash in a regulated SIPP to buy such an asset did not come within the regulated perimeter, and that the FCA's guidance that it did (PERG 12.3) was wrong. But that was a Pyrrhic victory given the Court of Appeal's broad approach to investment advice.

This part of the case focussed on what went on between Mr Adams and CLP. The Court approved earlier statements on what constitutes investment advice. First, Henderson J's view in ***Walker v Inter-Alliance Group plc*** [2007] EWHC 1858 (Ch), [2007] Pens LR 347 that "any element of comparison or evaluation or persuasion is likely to cross the dividing line" from information to advice Secondly, HHJ Havelock-Allan QC's statement in ***Rubenstein v HSBC Bank plc*** [2011] EWHC 2304 (QB), [2012] PNLR 7 that 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. Most importantly, here the proper characterisation of the facts was that CLP had made three recommendations: (a) sell the Friends Life pension; (b) buy the Carey SIPP; and (c) buy store pods. Whilst the third was an unregulated product, it was inextricably linked with the first two elements of the advice. Newey and Andrews LJJ both specifically approved in ***R (TenetConnect Services Ltd) v Financial Ombudsman*** [2018] EWHC 459 (Admin), [2018] 1 BCLC 726, where Ouseley J spoke of a "single braided stream of advice" being given about regulated and unregulated investments, with the former being part and parcel of the latter, and therefore the advice on unregulated investments becoming part of the regulated advice within article 53 of the Regulated Activities Order. Andrews LJ stressed the need for realism in such assessments. A similar approach was adopted to arranging investments, with CLP's role in pre-populating the SIPP application form and involvement with money laundering procedures being sufficient to fall within article 25(1) of the Regulated Activities Order.

Carey therefore had to pray in aid the discretion in section 28 of FSMA to nevertheless enforce its agreement with Mr Adams because it was just and equitable to do so. This part of the case also involved consideration of the relationship between Carey and CLP. The Court refused to exercise that power. First and foremost, it was an issue of investor protection, intended to safeguard consumers from their own folly. Even though Mr Adams had received a small circular payment or "kickback" from CLP, and concealed that from Carey, the legislation threw the risk of dealings through unauthorised firms on the authorised person. Secondly, it weighed in the balance the scale of Carey's dealings with CLP and the modest size

of the pensions transferred. Thirdly, whilst the Court of Appeal did not consider it fair to revisit the question of whether Carey, through its CEO, had actual knowledge of CLP's breaches of the section 19 FSMA regulatory perimeter, Carey nevertheless had sufficient constructive knowledge to have set alarm bells ringing. Prior to the store pods investment, Carey knew that (a) other customers introduced by CLP were receiving circular payments, (b) CLP had misled it over the level of commission paid to it by the operator of the store pods scheme, and (c) most strikingly, the principal individual behind CLP was on an FCA public regulatory warning notice, stating that he was not authorised under FSMA, and that he may be "targeting UK customers via the firm Cash In Your Pension".

Whilst providing clarity on the section 27 issue, the Court of Appeal in Adams put off for another day the issue of the personal duties of pension providers under the rule in COBS 2.1.1R, being the duty "to act honestly, fairly and professionally in accordance with the best interests of its client". Having allowed the appeal on section 27 it was strictly unnecessary to consider the duties issue, and the court was clearly concerned that the case on appeal represented a development of the claimant's case, and that the duties alleged were not fully particularised. This may come as a disappointment to many observers. The dismissal of the claim by the trial judge cannot be relied on, because the Court of Appeal, in refusing to accede to the FCA's invitation to provide guidance on COBS 2.1.1R, expressly said that was more appropriately addressed in a case where the issues are live. Such future cases will inevitably draw heavily on the FCA's general guidance to SIPP operators and its intervention on this appeal. We also have the benefit of the careful judgment of Jacobs J in ***Berkeley Burke SIPP Administration Ltd v Financial Ombudsman Service*** [2018] EWHC 2878 (Admin), [2019] Bus LR 437 on the standards to be expected of pension providers, including duties (a) to identify the investments as a high-risk, speculative and non-standard investment, (b) to consider whether it was appropriate for a pension scheme, and (c) to ensure the investment was capable of being independently valued both at point of purchase and subsequently.

To conclude, this is another welcome sign of the English judiciary renewed willingness to give teeth to statutory measures for consumer protection, and it sits alongside ***First Tower Trustees Ltd v CDS (Superstores International) Ltd*** [2018] EWCA Civ 1396, [2019] 1 WLR 637. Whilst the Court dutifully recorded Carey's boilerplate disclaimers and warnings, the emphasis was very much on giving effect to investor protection measure, and there is no hint of the primacy of contract reasoning which had infected the first instance judgment. Indeed Andrews LJ cautioned that "the basis on which [firms] contract with their clients will only go so far to protect them from liability."

Gerard acted for the appellant investor.

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Gerard McMeel is a leading commercial, banking and financial services lawyer, both as an academic and a practitioner, with over two decades experience of trial work, appellate advocacy, urgent commercial applications and advisory work. He was appointed Queen's Counsel in March 2020. Gerard practises in all areas of commercial dispute resolution, with a particular focus on banking and financial services litigation. Gerard's commercial practice regularly includes advising on the meaning and effect of contractual provisions and boilerplate clauses, where he is the author of a leading text. He has expertise in commercial fraud, and a particular interest in unjust enrichment and restitution. His financial services practice includes: investor claims; commercial disputes involving financial firms and intermediaries; collective investment schemes; judicial review of the statutory bodies; and authorisation, regulatory and disciplinary matters under the Financial Services and Markets Act 2000.

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