Neutral Citation Number: [2020] EWHC 1673 (Ch)

Case No: HC-2017-001469

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (Ch D)

Rolls Building, Fetter Lane
London EC4A 1NL

Date: Tuesday, 30 June 2020

Before :

ADAM JOHNSON QC (SITTING AS A DEPUTY HIGH COURT JUDGE)

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Between :

The Financial Conduct Authority	**Claimant**
- and -	
(1) Avacade Limited (In Liquidation) **(trading as Avacade Investment Options)** **(2) Alexandra Associates (UK) Limited** **(trading as Avacade Future Solutions)** **(3) Craig Stanley Lummis** **(4) Lee Edward Lummis** **(5) Raymond George Fox**	**Defendants**

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Nicholas Vineall QC and **Adam Temple** for the Claimant
David Berkley QC and **Steven McGarry** (instructed by Zakery Khub Solicitors) for the Second and Fourth Defendants
The First, Third and Fifth Defendants did not appear and were not represented

Hearing dates: 21-23 January, 27-31 January, 4 and 13 February 2020
Further Written Submissions: 17 February 2020; 5 June 2020

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Approved Judgment

Covid-19 Protocol: This Judgment will be handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed to be 10.30am on Tuesday, 30 June 2020

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ADAM JOHNSON QC :

I INTRODUCTION

1. The Financial Services and Markets Act 2000 ("*FSMA*") contains a regime under which, in order for persons to conduct certain types of activity in relation to financial services, they require authorisation. Section 19 of FSMA prohibits persons who are not authorised or exempt from engaging in the stipulated activities. Such activities are said to be within the *regulated perimeter*, and breaches of the general prohibition in section 19 are therefore referred to as *perimeter breaches*. Prescribed activities for which authorisation is required are set out in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001/544 (the "*RAO*").

2. Separately, section 21 of FSMA contains restrictions on "*financial promotion*." Broadly speaking, no-one who is unauthorised can make financial promotions in relation to a prescribed investment activity unless the promotion has been approved by an authorised person. Relevant forms of investment activity are defined in a further Order, the Financial Services and Markets Act (Financial Promotions) Order 2005 (the "*FPO*").

3. Finally, section 397 of FSMA, and the later Financial Services Act 2012 ("*FSA*") section 89, contain prohibitions on the making of statements in the promotion of financial services which are false or misleading.

4. Between 2010 and 2014, the First Defendant, Avacade Ltd ("*Avacade*") provided a service under which consumers who had existing pensions were contacted by telephone and provided with a report on their present pension position, and with options as to alternatives they might pursue. A good many of them transferred their existing pension funds into self-invested personal pensions ("*SIPPs*"), and within those SIPPs purchased investments which included assets such as Melina trees in Costa Rica, teak trees in Malaysia, and bonds relating to property developments in the USA known as the InvestUS and the "*REIUSA*" bond. Many of the investments in the Melina tree, teak tree and similar products were made on an "*execution only*" basis, that is to say, without any advice from an IFA, although before investing in either of the bond products, investors were referred to an IFA, Cherish Wealth Management Ltd ("*Cherish*"). Cherish was the authorised representative of another entity, Shah Wealth Management Ltd ("*Shah*"), which was regulated by the FCA.

5. Information about clients who transferred into SIPPs, and who invested in the products made available by Avacade, is contained in an important document provided by Avacade's solicitors to the FCA in May 2015. This has become known as the "*Avacade Client Schedule*". The FCA have taken the same data and converted it into a "*Consumer Analysis Spreadsheet*". These documents contain much useful detail about Avacade's clients and their investments. They show that overall, some 1,943 clients transferred some £86m of pension funds into SIPPs, of which almost £68m was invested in products from which Avacade made commissions.

6. During the period of Avacade's activity, the Third Defendant, Mr Craig Lummis, the Fourth Defendant and Craig's son, Mr Lee Lummis, and the Fifth Defendant, Mr Raymond Fox, were all directors of Avacade (without intending any disrespect, and

simply in order to distinguish them, I will where appropriate refer to Craig and Lee Lummis below as "*Craig*" and "*Lee*" respectively.)

7. There is some uncertainty about when precisely Avacade's operations came to an end, but certainly by early 2015 the Second Defendant, Alexandra Associates ("*AA*") was in operation. By that time, there had been a falling out with Mr Fox, and he was no longer involved. Moreover, a modified business model had been developed. Although this still involved many consumers transferring their pension funds into SIPPs, there were no "*execution only*" transactions. Assets such as Melina or teak trees were not made available as investment options, and neither were the InvestUS or REIUSA bonds. Instead, a new bond was offered, this time relating to property development in Brazil, called the "*Paraíba*" bond. Before investing in the Paraíba bond, consumers were referred to a different IFA, BlackStar Wealth Management A Ltd ("*BlackStar")*, which was the appointed representative of BlackStar Wealth Management Ltd. As with Avacade, an "*AA Client Schedule*" has been produced by AA's solicitors, together with certain other schedules, but together they do not provide the same level of detail as the Avacade Client Schedule. Nonetheless they provide much useful information. Overall they show that at least 59 individuals transferred pensions worth some £4.8m into SIPPs, of which around £950,000 was invested in the Paraiba bond.

8. After exchanges of correspondence about Avacade's business model in late 2011/early 2012, and again in Spring 2013, the FCA opened up a formal investigation into Avacade's operations in June 2014, and into AA's operations in December 2014. Later, in 2016, BlackStar was also subject to an intervention by the FCA, which included a Skilled Persons Review conducted by ATEB Business Solutions Ltd ("*ATEB*"), a firm of compliance consultants. They produced a detailed report ("*the ATEB Report*").

9. It is common ground that none of the Defendants was authorised (see Part III and Part 4A of FSMA), or otherwise exempt, at the relevant times. In those circumstances, the FCA's position is that, in conducting the activities summarised above, Avacade and AA (I will refer to them together as "*the Corporate Defendants*"):

    i) committed perimeter breaches, by carrying on while unauthorised certain types of prescribed investment activity, namely (a) under RAO Art 25(2), making arrangements with a view to a person who participates in the arrangements buying or selling investments, (b) under RAO Art 53, advising on the buying or selling of investments, and (c), in the case of AA only from 6 April 2015 onwards, under RAO Art 53E, advising on the conversion or transfer of pension benefits;

    ii) infringed FSMA section 21, by engaging in financial promotion activity while unauthorised;

    iii) infringed FSMA section 397, and/or FSA section 89, by making statements to consumers which were false or misleading.

10. Section 382 of FSMA empowers the Court in certain circumstances to make restitution orders against persons who have contravened a "*relevant requirement*" under the Act, or who have been "*knowingly concerned*" in such contraventions.

Here, the FCA says that (1) Mr Craig Lummis, Mr Lee Lummis and Mr Fox (I will refer to them together as "*the Individual Defendants*") were all "*knowingly concerned*" in the contraventions by Avacade, and (2) that Mr Craig Lummis and Mr Lee Lummis were both "*knowingly concerned*" in the contraventions by AA.

11. As to the position of the Defendants:

i) Avacade is in liquidation. At an early stage in this action, Avacade's Liquidator indicated he did not intend to participate in the proceedings but would abide by any order made by the Court. Accordingly, Avacade did not appear and was not represented at the trial.

ii) As to AA, Craig Lummis and Lee Lummis, they all defended the proceedings actively and were jointly represented by solicitors and counsel (Zakery Khub, solicitors and David Berkley QC) until 10 December 2019, when they chose to dispense with the services of their advisers. That was shortly before the Pre-Trial Review.

iii) On 6 January 2020, shortly before the trial was due to begin, I heard an application for an adjournment of the trial by Craig Lummis, relying on evidence of his medical condition. That application was made on Craig's behalf by Lee Lummis. I refused the application, for the reasons given in my Judgment of 8 January 2020 (see [2020] EWHC 26 (Ch)). Although I indicated in my Judgment that steps could be taken to accommodate any special needs Craig Lummis had, in making arrangements for him to appear at trial, he did not seek to communicate any particular needs or requirements either to the FCA or to the Court, and in the event did not appear at trial and was not represented.

iv) Lee Lummis, however, did appear at trial. Initially (on Days 1 and 2) this was as a litigant in person, but subsequently (from Day 5 onwards) he was again represented by solicitors and counsel (Zakery Khub and Leading Counsel Mr David Berkley QC, together with junior counsel Mr Steven McGarry). The proceedings were effectively adjourned on Days 3 and 4 of the trial, to allow Mr Lummis' legal team to be assembled.

v) Although initially there was some uncertainty about AA's representation at trial, Mr Berkley QC, Mr McGarry and Zakery Khub were eventually able to confirm that they were instructed both on behalf of Mr Lee Lummis and AA. Accordingly, where relevant below I will refer to them as the "*Represented Defendants*".

vi) Mr Fox did not appear at trial and was not represented. No reasons were given for his non-attendance.

12. It follows that at trial, I heard submissions only on behalf of the Represented Defendants, i.e. AA and Mr Lee Lummis. That said, in terms of available defences to the FCA's main allegations, it seems to me there is no material difference between the position of the Represented Defendants and that of either Craig Lummis or Mr Fox. Indeed, Craig, Lee and AA served a joint Defence, and the Witness Statement for trial served by Craig was largely identical to that served by Lee. Mr Fox served a separate

Defence and his own Witness Statement, but in substance raised no material points beyond those affecting the Represented Defendants, and indeed accepted (Defence at para. 1.2) that his position was very largely dependent on that of Avacade. Mr Fox of course was concerned only with the Avacade, and not the AA, period of activity. There are some differences between the Individual Defendants in terms of the roles they played, which are relied on by them in response to the FCA's case that they were "*knowingly concerned*" in the relevant contraventions. Where relevant, I will draw out those differences below.

13. I will need to say more about the detail later, but the essential points made by the Defendants may be summarised as follows:

    i) As regards the *Avacade* period of activity, the Defendants contested the premise that Avacade had conducted any activity for which authorisation was required, and therefore said that it had committed no perimeter breaches. In making that case, the primary submission was that Avacade only ever provided information and options to consumers. It is therefore said to be wrong to characterise it as either making arrangements with a view to a person buying or selling investments (RAO Art 25(2)), or as giving advice on investments (RAO Art 53). To the extent necessary, in characterising Avacade's activities as falling *outside* the regulated perimeter, reliance is placed on certain exemptions contained within the RAO, namely those under RAO Art 27 ("*Enabling parties to communicate*"), Art 29 ("*Arranging deals with or through authorised persons*"), and Art 33 ("*Introducing*").

    ii) Also as regards the Avacade period, the Defendants deny that it engaged in financial promotions, or if it did, that is said to have been done using materials which were approved by authorised persons.

    iii) It is denied that Avacade made any false or misleading statements.

    iv) As regards the *AA* period of activity, similar points are made but with particular emphasis on the role played by BlackStar as an authorised person in engaging the operation of the exemption in RAO Art 33.

    v) The Individual Defendants in any event deny being *knowingly concerned* in any contraventions by either Avacade or AA. In this regard, Lee Lummis relied in particular on the exchanges of correspondence between the FCA and Avacade (or its solicitors) in late 2011/early 2012 and early 2013, which he said showed the FCA being aware of Avacade's operations but not taking any action – which Lee said reinforced the view that he cannot have been knowingly concerned in any wrongdoing.

II THE TRIAL AND THE WITNESSES

14. On behalf of the FCA, I heard live evidence at trial from the following factual witnesses:

    i) Mr Matthew Richards, an investigator in the Unauthorised Business Department ("*UBD*") of the Enforcement and Market Oversight Division of the FCA. Mr Richards was the principal investigator into the activities of

Avacade and AA. He served a lengthy and detailed statement covering the matters identified as a result of his investigations. He was cross-examined at trial, but very little of his evidence as to how Avacade and AA operated (as opposed to the proper legal characterisation of their operations) was challenged.

ii) Mr Mark Mulford, an Associate in the Investment Intermediaries Department of the FCA's Supervision Investment, Wholesale and Specialists Division ("*Supervision*"). He gave evidence about an investigation conducted by the FCA into the activities of BlackStar, the entity relied on in these proceedings as having provided advice to clients of AA. He was also cross-examined at trial, but again, little in his evidence was directly challenged.

iii) Mr Alistair MacDougall, technical manager of ATEB and one of the principal authors of the ATEB Report into the activities of BlackStar, mentioned above. He was cross-examined at trial but little in his evidence was challenged.

iv) Ms Joanna Lindsey Humphrey, who works part time as a Health Care Assistant for the National Health Service. Miss Humphrey was a customer of Avacade and gave evidence as to her experience of being contacted by Avacade and of the telephone calls which led to her transferring her pension of £18,408 into a SIPP. Audio recordings and transcripts are available of some of those calls.

15. The FCA also served factual witness statements on behalf of a number of other investors, namely Mr Shaun King, Mr Steven Kemp, Mr Barry Thompson, and Mr Marcus Lynch (all of whom invested via Avacade), and Mr Alan Bolland (who invested via AA). In the event, these individuals were not required to give live evidence and be cross-examined, in light of an agreement reached between the parties as to how the evidence should be dealt with. This was to the effect that (1) where a transcript exists of telephone calls with those witnesses, that is the best evidence of what was said to them; (2) if no transcript is available, but a script is available (I deal with the question of scripts below), it is likely that the script was followed as to any warnings or disclaimers given; and (3) as to the characterisation by a witness of any call as containing "*advice*", that characterisation is not determinative.

16. As to the Defendants, the following witnesses served witness statements and gave live factual evidence at trial:

i) Mr Lee Lummis himself, who gave evidence generally about the history of both Avacade and AA. Mr Berkley QC encouraged me to characterise Mr Lummis as a thoughtful and intelligent man, but Mr Vineall QC said he was evasive and argumentative, had put form over substance, and had shown a callous disregard for the interests of investors. In my judgment, the truth of it lies somewhere between these positions. I would say it is to Mr Lummis' credit that, alone of those formerly involved in managing Avacade and AA, he came to give evidence at trial and, before his legal team were re-instructed, sought to shoulder the burden of presenting the case by himself. He sought to defend his own position vigorously. At the same time, I thought that overall Mr Lummis had a somewhat distorted view of the issues in this case. Underlying this seemed to be his feeling that the Defendants have been treated

unfairly, principally because (as I will mention further below) the Avacade and AA models were either inspired by, or supported by, other parties who were FSA or FCA regulated, but the roles they played are not (in these proceedings at least) under close examination and scrutiny. For reasons which will be apparent from the remainder of this Judgment, I do not agree with that position. On the contrary, it seems to me entirely fair, and indeed necessary, to examine the activities of Avacade and AA through the relevant regulatory lens. Nonetheless, the sense of conviction Mr Lummis felt in his own case and in his own position was obvious. Distorted though that was, I do not think it was dishonest or motivated by callousness. I thus agree that Mr Lummis was argumentative; but I did not find him to be deliberately evasive.

ii) Mr Lee Hewitt, who between December 2011 and July 2015 was a director of Cherish, the IFA which it is said advised on the InvestUS and REIUSA products (see above).

17. In addition, and as already noted, although they did not appear at trial, witness statements had earlier been served both by Craig Lummis and by Mr Fox. The FCA's position was that it did not need to rely on any admissions made in those witness statements in order to make out its case, and so did not invite the Court to rely on them against their makers. However, the FCA proposed that insofar as the contents of those statements assisted their makers (or indeed any other Defendant), they be treated as having been adduced in evidence, subject to the proviso that the Court bears in mind, when assessing the weight to be attached to them, that the FCA had not been able to cross-examine either Craig or Mr Fox. That seems to me a perfectly fair proposal, and no objection was raised about it on behalf of the Represented Defendants, and so I propose to adopt it.

18. In addition to the factual evidence, each represented party relied on expert evidence in the fields of financial services and pensions. The FCA relied on the evidence of Mr Rory Percival, whose background includes having worked for the Financial Services Authority (and later the FCA) between 2006 and 2016, mostly as a supervisor of advisory firms. AA, Craig and Lee Lummis submitted a report from Mr Simon Fettroll, a director of Cartlidge Morland, at a firm of financial advisers, and this was relied on at trial by the Represented Defendants. The experts co-operated in producing a very helpful joint statement dated 27 November 2019. I am grateful to both experts for their evidence which showed careful consideration of the issues they were asked to address.

19. After the trial had concluded, I received further submissions in writing on behalf of the Represented Defendants as to the form of certain amendments they proposed (see below at [206] and [368]), and which in the event the FCA consented to on terms as to costs which I take to be uncontroversial. I will deal below with the particular points to which the amendments give rise. Later, after indicating to the parties that I planned to circulate a draft Judgment, the FCA drew attention to the decision of HH Judge Dight CBE in *Adams* v. *Options SIPP UK LLP* [2020] EWHC 1229 (Ch), handed down on 18 May 2020. In light of that decision, the Represented Defendants requested permission to serve further written submissions, and I acceded to that request. The FCA's position was that the *Adams* decision did not cause them to change any of the submissions they had already made.

20. Before moving on to deal with the background, I should express my gratitude to the counsel and solicitors on both sides who appeared before me at trial. As I indicated in Court, but as I think is appropriate also to record in this Judgment, I hope my admiration for Mr Vineall QC and his team will not appear diminished if I express particular thanks to the team acting for the Represented Defendants. They came on board at short notice in a complex case, but represented their clients with considerable skill and vigour, and were able to make an immediate contribution which was most impressive. Moreover, their involvement provided real assistance to the Court in isolating the key areas of dispute, in a manner which promoted the fairness and efficiency of the proceedings overall. I am most grateful to them.

III AVACADE

21. A great deal of detailed evidence was served concerning the business operations of Avacade and AA respectively, including in particular the very detailed Witness Statement of Mr Richards and the Witness Statements of Craig and Lee Lummis. In the final analysis, however, very little of the factual background was contested, and the real battleground between the parties was in the proper legal characterisation of facts which were very largely common ground.

22. In the following two sections I will seek to cover the background to, and key features of, both Avacade's and AA's business operations. The relevant history is a long one, and some detail is required.

Multiple Income Partners & Mosaic Caribe

23. Although Avacade is the First Defendant, the story begins with the Second Defendant, AA. AA was originally set up by Craig Lummis in February 2007. At the time it dealt exclusively with mortgages and life cover. Lee Lummis joined the business during 2007.

24. AA's operations were badly affected by the 2008 financial crisis. Consequently, Craig and Lee began to look for other opportunities. At the end of 2009, Craig was approached by a company called Multiple Income Partners ("*MIP*"). MIP had an investment product called *Mosaic Caribe*, or sometimes the *Cascade Investment*, and as Lee described it in his evidence, MIP were looking to "*network*" that product to IFAs. In practice this meant appointing Business Development Managers ("*BDMs*") to help them bring Mosaic Caribe to the attention of IFAs, who might then recommend it to their clients.

25. Craig Lummis was acquainted with Mr Fox. They had both previously worked for Royal London Insurance. Mr Fox had his own business at the time, RGF Associates. Craig, Lee and Mr Fox, who between them had contacts among the community of IFAs, saw an opportunity and so Avacade was incorporated with a view to becoming a BDM for the Mosaic Caribe product.

26. Craig and Lee each took a 35% shareholding in Avacade. Mr Fox took the remaining 30%. His slightly smaller shareholding reflected the fact that, at the time, he was still involved with his own company.

27. In a document headed "*DIRECTOR JOB DESCRIPTIONS – January 2010 to August 2014 Avacade Ltd*", provided to the FCA following the start of their investigations, the roles of the three Individual Defendants were described as follows:

    i) Craig Lummis – "*Managing Director*", whose responsibilities included "*performance of the company as dictated by the board's overall strategy… formulating and successfully implementing company policy… assuming full accountability to the board for all company operations*."

    ii) Lee Lummis – "*Operations Director*", whose responsibilities included defining, implementing and maintaining "… *appropriate operating standards and principles across the business to maximise synergy, sharing of best practice and commercial benefit*", as well as organising "*the operations team and [mobilising] them to achieve a common company strategy*."

    iii) Ray Fox – "*Sales Director*", whose responsibilities (among other things) were *"[t]o develop sales strategy and profit targets… Coordinate sales operations with all other departments of the company… To keep up-to-date with recent market and industry trends, competitors, and leading customer strategies.*"

28. A company organisational chart for Avacade at the date of October 2013 shows Craig Lummis at the head of the structure as Managing Director, with both Lee Lummis and Mr Fox reporting directly into him.

29. Returning to the chronology, Lee's evidence is that all the training, documents, brochures and material on the Mosaic Caribe product were supplied to Avacade by MIP. He says that MIP very much led the way. Avacade's role was to engage the interest of IFAs, for example by inviting them to training events and seminars run by the team from MIP.

30. As to the Mosaic Caribe product itself, no brochure is available, but it is described by Lee in his written evidence. He says that the Mosaic Caribe was a US-based company, whose business involved buying whole-of-life insurance policies from policyholders who were ill or terminally ill to help them fund healthcare costs. Lee says (emphasis added):

> *"These policies could then be fractionalised into multiple ownership and the ownership fraction registered with the insurance company who (sic.) regulated by the appropriate authorities in that jurisdiction. It was explained by MIP and the Mosaic (sic.) presented the policy as a safe and secure investment as investor had direct ownership of the policy. <u>It was not a fund-based life settlement product</u>."*

31. This latter point is significant. At the time there was a view among market participants that investments which involved direct ownership of assets rather than (for example) an interest in a managed fund, fell outside the regulated perimeter. This was to become a feature of Avacade's own business.

32. This early model, involving Avacade acting as a BDM for MIP, did not prove very successful for Avacade. Avacade was not able to generate much interest amongst

IFAs in the Mosaic Caribe product, especially after the failure of another (although differently structured) scheme based on life settlements, known as KeyData.

33. In any event, as I understand it, Avacade was not itself during this early period offering information about the Mosaic Caribe product to consumers who were then transferring their existing pension funds into SIPPs. Avacade's role was limited to engaging the interest of IFAs in the product. The idea of using a SIPP as a source of funds with which to acquire investments, and of engaging directly with consumers, came from another source, namely TailorMade.

TailorMade

34. TailorMade were an IFA, run by (amongst others) an individual called Rob Shaw. As Lee points out, at the time Avacade first encountered them, which seems to have been at some point in 2010, TailorMade were FCA registered and authorised. Like Craig and Ray Fox, Rob Shaw had also worked at Royal London.

35. TailorMade operated a different model to MIP. Although TailorMade itself was a "*fully FCA regulated IFA offering financial advice on pension transfers*", including the transfer of consumers' existing pension pots into SIPPs, Lee also describes TailorMade as having a "*hotel investment (Harlequin and Cyprus property scheme)*", and he says there was "*a non-regulated company offering investment (purportedly without advice) which got paid the commissions*."

36. In order to generate interest, TailorMade used the services of *introducers*. According to Lee, these were from all backgrounds and were not regulated by the FCA. The role of such introducers was not (as with MIP) to "*network*" a product to IFAs, but instead to source and introduce *consumers* to *TailorMade itself*. The model then seems to have involved such consumers taking advice on their pension arrangements from TailorMade, and if that resulted in them transferring their existing pension funds into a SIPP, then information being provided by a separate company – but still, according to Lee, linked in some way with TailorMade – about the hotel investment. That investment, if made, would generate a commission for the separate company. According to Lee's evidence, SIPP companies who "*were partnered with Tailor Made IFA included Montpelier SIPP and Guardian SIPP*."

37. This structure therefore had the following key features: (1) consumers were sourced by introducers who were themselves not FCA registered or regulated; (2) consumers were given advice about moving their existing pensions pots into SIPPs; (3) if they decided to do so, then information – but it seems not advice – was provided to those same consumers about investments; and (4) if investments were made, those responsible for providing the information about them were paid a commission.

38. The division, within this structure, between the giving of advice in relation to the pension transfer, and the fact that no advice was thought to be needed in relation to the investments themselves, seems to have reflected the same understanding referred to above, namely that where the investments took the form of a direct ownership interest in a given asset, they fell outside the regulated perimeter and so information could safely be provided about them by persons who were not authorised.

39. At trial, Lee relied on this history as part of his case. The TailorMade business model was a prototype for what eventually became Avacade's own business model. Lee says that Avacade was doing no more or less than following a structure endorsed by an FCA regulated entity, i.e. TailorMade. As he puts it in his Statement:

> *"At no point was it ever discussed that training non-regulated introducers to discuss pensions could lead to inadvertent financial advice."*

40. Lee also relies on what he says he was told at the time about the role of the SIPP administrator. As part of the training offered by TailorMade, Lee attended a session with Montpelier. He says that the role of the regulated SIPP administrator in this

training "*was described as a trustee who had the ultimate control over what types of investment were allowable within the SIPPs*."

41. During the course of 2010, TailorMade sought to persuade Avacade to become one of TailorMade's introducers – i.e., to be involved in the business of sourcing consumers to be referred to TailorMade as part of the business model described above.

Hotpods

42. It seems that Avacade management had more ambitious plans, however. They were obviously attracted by the TailorMade model, but saw that the real potential was not in effecting introductions (and earning a fee for doing so), but in earning the commissions which would come from consumers making investments, once their existing pension funds were released and made available in a SIPP.

43. Thus, during the course of 2010, while discussions were ongoing with TailorMade with a view to Avacade becoming an *introducer*, and while separately Avacade was working (unsuccessfully) as a BDM for MIP and seeking to "*network*" Mosaic Caribe to IFAs, Avacade management were looking into the development of a new investment product. This seems to have been inspired by the same idea, underlying the TailorMade business model, that investors could safely be provided by non-authorised persons with information about acquiring a direct ownership in commercial property through a SIPP.

44. The new product came to be known as Hotpods, and the commercial property in question was office space.

45. Hotpods came about through further contacts of Craig Lummis and Ray Fox. They had a connection with a property development company called Harley Scott, which was associated with two individuals, Mr Michael Talbot and Mr Toby Whittaker. Ray Fox's son, Ben Fox, worked full time for Michael Talbot selling property in Liverpool. During 2010, according to Lee's evidence, Mr Talbot secured vacant commercial space in Dylan Harvey's B1 Business Centre and this was used as the basis for the Hotpod investment. Brochures were produced by Harley Scott, although none are presently available. According to Lee, however:

> *"The Hotpod investment was an office, split into smaller spaces where customers could ultimately rent a desk. SIPP owners would own the space and rent was managed and guaranteed for two years by Dylan Harvey."*

46. In cross-examination Lee said that as far as he could recollect, the return on investment identified in relation to Hotpods was 15% per annum. He said that Guardian SIPP approved the Hotpods product for investors to hold in Guardian administered SIPPs, and Avacade took comfort from that, given what they understood about Guardian's role as a regulated SIPP trustee. As to Avacade itself, it was to earn a commission, calculated by reference to amounts actually invested in Hotpods. The agreed rate of commission was 20%. This was no doubt an attractive proposition for the management of Avacade.

Introducer for TailorMade

47. To return to the narrative, at some point in late 2010 or early 2011, Avacade decided to become an introducer for TailorMade. However, according to Lee's evidence, the management of Avacade did not rate the TailorMade hotel investment. In any event, as is clear from the narrative above, by this time they were associated with Hotpods, from which they themselves hoped to earn commissions.

48. The upshot is that although Avacade became an introducer to TailorMade, they were only an introducer for what Lee describes as "*fully advised pensions to SIPPs advice*."

49. This meant, as Lee describes it in his evidence, that consumers would be referred on to TailorMade for advice on their pension position only (including the possibility of a transfer of any existing pension funds into a SIPP), and would then be "*passed back*" to Avacade "*to make their own investment decisions on our products.*"

50. Lee summarises the position as follows:

> *"[Avacade's] business model was to source ... people who wanted a pension review by an independent financial adviser (TailorMade), who could then be introduced to the investments that we acted as introducers for.*
>
> *The majority of [Avacade's] first clients went through this TailorMade business model and received full advice on their pension transfer from TailorMade."*

New Investment Products

51. It is then clear from Lee's evidence that a concerted effort was made by Avacade during the Spring of 2011 to identify further investment products from which they could earn commissions.

Mosaic Caribe

52. One of these was Mosaic Caribe, with which they were associated already, but as a BDM for MIP. In early 2011, Avacade entered into its own direct relationship with the provider of the Mosaic Caribe product. This took the form of a "*UK Introducer Licensing Agreement*" with Mosaic Caribe of the BVI signed in about April 2011. This meant that Avacade was no longer simply a BDM for MIP, but an introducer in its own right. Clause 1.2 of that agreement provided as follows:

> *"The introducer [Avacade] is authorised to solicit and supervise the solicitation and procurement of applications for Caribe products."*

53. The agreement provided for payment of a base commission of at least 8%, plus a quarterly volume bonus.

Sustainable AgroEnergy

54. During the same period, in the Spring of 2011, agreements were also entered into with other, entirely new product providers.

55. The first of these was Sustain Investments Ltd. Avacade signed an agreement with them on 24 March 2011. Sustain's products were made available under the name, "*Sustainable AgroEnergy*". They were approved by a SIPP company called Berkeley Burke for inclusion in their SIPPs (I will come back to Berkeley Burke below). These products were based on "*green oil*" from the seeds of crops. Sustainable Agro Energy was said to have pioneered "*Jatropha*" as a source of green oil. A brochure produced in the present action states it had almost 1,250,000 hectares of land and options across Cambodia, the Philippines and Thailand. Three different types of investment were offered, namely "*Green Oil Leases*", "*Agroforestry Leases*" and the "*Capital Builder Programme*." Returns from the first two types were said to be 5% fixed for the first year, 12% fixed for the second year, and "*around 20% variable*" thereafter.

56. Under the contract with Sustain Investments, Avacade was entitled to commission of 13% on Green Oil/Agroforestry leases, and 18% on Capital Builder Leases. Those commissions subsequently increased to 15% and 20% respectively.

Ethical Forestry

57. The next agreement was with Ethical Forestry Ltd, an English company with its registered office in Bournemouth. It also operated a call centre in Bournemouth under the name, "*Richmond Solutions*." I will need to say more about Richmond Solutions below. In any event, Ethical offered a number of investment products based on Melina trees in Costa Rica. An Ethical Forestry brochure refers to a number of different options, the standard product being described under the heading "*Melina Investments*", and involving a 12-year investment in 600 trees which "*are nurtured from saplings within our nurseries and then field planted … the thinning harvests – in years 4, 8, 10 and the final harvest in year 12 – produce valuable timber which is sold to local and global timber markets on your behalf and the proceeds sent to you…*". Variants included the "*Melina Accumulator*", and the "*Income and Wealth Generator*".

58. Avacade had a contract with Ethical Forestry Limited dated 4 April 2011, under which it was entitled to commission of 15% on any sale, save where the sale resulted from business introduced from Ethical Forestry or Richmond Solutions, on which 10% would be paid.

Global Plantations

59. Yet a further new product was known as Global Plantations. Global Plantations offered investments in teak in either Malaysia or Sri Lanka. A brochure has been produced focusing on the Malaysian Plantation at Boonrich, which suggests that teak trees would be harvested at age 25. Lee in his witness statement said that the long-term nature of this investment meant it provided a different option for potential investors to the Ethical Forestry investment, which operated over a shorter term.

60. An Avacade document for Global Plantations refers to land in Sri Lanka. Avacade had a contract with Global Plantations Ltd dated 6 April 2011, under which Avacade was entitled to commission of 15% on any sale. However, emails between Avacade and Global Plantations suggest that commission was in fact paid at 20%.

61. What is clear, therefore, is that by the end of April 2011, Avacade had a stable of investment products available from which it intended to earn commissions. The main ones were the three new additions, namely Sustainable AgroEnergy, Ethical Forestry and Global Plantations. It seems that Mosaic Caribe and Hotpods were still available at this time, but the new additions became the main point of focus as time went on.

62. That is not the end of the road, however. There were yet further important developments during the course of 2011, which would influence the shape of the Avacade model, properly so-called.

Berkeley Burke SIPP

63. One of these I have mentioned briefly already. On 3 March 2011 Avacade signed an agreement with a new SIPP administrator, Berkeley Burke (the agreement was a "*Non-regulated Introducer Agreement*" and the counterparty was "*Berkeley Burke SIPP Administration Limited*"). This was the firm that had approved the Sustainable AgroEnergy products for inclusion in their SIPPS. In the event, although Avacade customers used Berkeley Burke SIPPs only a limited number of times, what is significant is that Berkeley Burke introduced yet a further innovation which was attractive to Avacade. This was that they permitted so-called "*execution only*" transactions, under which (in certain circumstances at least) they were content for consumers to transfer their existing pension funds into a SIPP and then within the SIPP to purchase investments, but without an IFA providing financial advice on the pensions transfer aspect of the arrangement, such as was happening via TailorMade.

64. In execution only cases, the SIPP administrator charged a set-up fee and an annual management fee, and the introducer (such as Avacade) made money from commissions, when consumers chose to invest in their products. As Lee expressed it in cross-examination:

> *"… by introducing clients to a SIPP administrator, that gave them the opportunity to choose investments that they could then invest in. If they chose to invest in Avacade products that attracted a commission to us commercially, we'd have received a commission for that."*

65. In due course, this was to become a main feature of the Avacade model, through a relationship they developed with another SIPP administrator, Liberty SIPP, which also permitted referrals on an "*execution only*" basis.

1Stop IFA

66. A further development concerned the relationship with TailorMade. At some point, according to Lee in his evidence, the feeling developed that TailorMade had administration problems and were favouring their own cases. Consequently, Avacade management sought out other IFAs. Avacade thus began to refer cases to Walter Begley Financial Management and, in early 2011, to another IFA, 1Stop FS.

67. The new relationship with 1Stop FS was to have lasting significance, because their model of doing business again had certain novel features, which in due course Avacade was to emulate.

68. Lee in his evidence described 1Stop at the time (early 2011) as an IFA who were setting up an operation similar to TailorMade but who promised better service. The process was to produce for investors what Lee describes as an "*initial factual non-advised report*", which would "*go on to list their options which included taking advice from 1Stop*." According to Lee, they did this "*essentially to filter out clients who did not want advice or whose pension was too small*", before they signed up to their terms of business. This may have been linked to the growing prominence of the execution only model, pioneered by Berkeley Burke; but in any event, a feature of the 1Stop model was that although consumers would be given the option of taking advice on their pensions transfer, that did not have to happen in all cases. The "*initial factual non-advised report*" was used as a vehicle for determining whether they wanted advice or not. If they did, then they signed up to 1Stop's terms of business and were given advice on their pension transfer (but not, it seems, on investments); and if they did not, then another option was transfer into a SIPP on an execution only basis.

69. Under this model, therefore, the promise of a free pension report was used as a hook to engage the interest of consumers. Consumers were contacted and asked to complete a so-called Letter of Authority ("*LoA*"), which could then be sent on to their existing pension providers, for the purpose of authorising the release of the information needed to produce the report. This structure was again to become a part of the Avacade business model. In practice, because 1Stop were a small company and did not have access to a large administration team, Avacade took charge of making the initial contact with consumers and having them complete a LoA, although the LoAs were on 1Stop letterhead. They would be returned to Avacade's office, and Avacade would then correspond with the pension providers (again on 1Stop letterhead), in order to obtain the required information. As I understand Lee's evidence, however, the pensions report itself was produced by 1Stop.

70. In due course, Avacade came to offer the same service itself: an initial, "*non-advised*" report, which in fact was based on the 1Stop template. Lee in his evidence said:

> *"We were told by 1Stop FS that this report was not financial advice and this was how it was presented by them to clients."*

71. In the event, the relationship with 1Stop was relatively short lived. As Lee describes it, this was the result of 1Stop's own business plan changing. This too came to involve offering investments to consumers, via a non-regulated company, in line with the TailorMade business model. That made them much less attractive to Avacade.

Liberty SIPP

72. By mid-2011, however, Avacade was developing a new relationship with yet a further SIPP provider, Liberty SIPP. What was significant about them was that, like Berkeley Burke, they allowed "*execution only*" pension to SIPP transfers. This made access to an IFA like 1Stop less critical. In mid-2011, Liberty were looking to recruit new non-regulated introducers, like Avacade. Lee describes the position in his witness statement:

> *"Execution-only was described to be a pension transfer that does not require financial advice.*

> *Liberty SIPP was one of the only companies in the SIPP market which allowed occupational pensions to be transferred without financial advice and as they saw fit – we had no say in their processes or any other SIPP provider's processes and IFAs processes for that matter. In subsequent meetings with John Fox, when we queried why Liberty SIPP allowed occupational pensions to be transferred without financial advice, he stated that he would carry on allowing this until the FCA told him to stop at that juncture (sic.) he has not been told by the FCA that he should not do it … ."*

73. Avacade signed terms of business with Liberty SIPP in September 2011. Liberty SIPP approved the Sustainable AgroEnergy, Ethical Forestry and Global Plantations investments for inclusion in their SIPPs.

74. Also significant to Lee's position is the fact that, as it was explained to Avacade, Liberty exercised ultimate control over which investments were allowed within their SIPPs. As Lee expresses it:

> *"Liberty SIPP were regulated by the FCA and explained that they (like all SIPP administrators) decided which investments were allowable within the SIPP and that investments must pass their internal approval and due diligence process."*

The Avacade model crystallises

75. The relationship with Liberty SIPP as it developed in late 2011 represented a watershed moment in the life of Avacade as a business. This was a time of real opportunity. There were agreements in place with a number of investment providers. Avacade's management had learned valuable lessons from its previous experience dealing with TailorMade and more recently 1Stop, and plainly saw potential in a model which involved existing pension funds being transferred into a SIPP and then used to purchase the investment products from which Avacade itself would earn commissions.

76. Moreover, the "*execution only*" model was particularly attractive. As Mr Fox explained in his Witness Statement:

> *"I confirm that during the course of Avacade's operations Avacade changed its model to execution only SIPPs as the process of advice via the IFA proved very slow. By August 2011 Avacade was working with the regulated execution only SIPP Administrator Liberty."*

77. It seems to me that all this accumulated experience came together in the latter half of 2011, and crystallised into a structure that one might fairly describe as "*the Avacade model*". One of the product providers, Ethical Forestry, plainly saw potential in it as well, because they offered to help. As Craig Lummis explained in interview with the FCA:

> *"Once the guys at Ethical understood our business model -- we had a very small outbound call centre within our office which, to be honest with you, we were struggling. None of us, meaning none of the directors, had been*

> *involved in that kind of working environment before, call centre type; it seemed to be a breed amongst themselves. We run a small team of, from memory, about six people initially and we brought in a telesales manager and we didn't really get -- I won't say we didn't get on with him. We employed him but he kind of knew every trick in the book for getting round things and everything else. So at that point a proposition was put to us by Ethical Forestry that they had just moved offices. They said, 'We've got substantial capacity to be able to set up a call centre within that building' and for like a commission sacrifice they said they would set up a call centre for us, in effect."*

78. Lee Lummis summarised the position at this stage in his Witness Statement as follows:

> *"After signing the Liberty SIPP Terms of Business and Liberty promoting their execution only SIPP transfer process to introducers, we struck a deal with Ethical Forestry where they would open a call centre at their Bournemouth offices to generate letters of authority (LOA) for pension reports.*
>
> *The first LOAs started to be generated in November 2011. At this time, we had introducer agreements with IFAs, including TailorMade, 1Stop Financial Services, Generation Financial Services and the Pension Specialist. We were producing a non-advised pension report … and if the client opted for financial advice, they had a range of options available to them. If they opted for an execution only transfer, then they could choose Liberty SIPP if they wished.*
>
> *From January 2012, the call centre began to ramp up production of LOAs."*

79. I will summarise the components of the Avacade business model shortly, but before doing so it is useful to complete some further, relevant parts of the chronology, and to identify one further component of the model in its very final form (the involvement of Cherish) which is relevant to the analysis below.

FSA/FCA Correspondence

80. The Defendants rely on an exchange of correspondence with the FSA which occurred in late 2011 and early 2012. This began with a letter from Toby Good of the FSA dated 29 December 2011, in which Mr Good said that the FSA had information suggesting that Avacade might be acting in breach of sections 19 and 21 of FSMA. As regards section 19, the concern was expressed more specifically in relation to possible infringements of Art 25(2) and 53 of the RAO. The letter said:

> *"... Based on the information reported to the FSA and in our possession, it appears to the FSA that you may be advising on and arranging deals in investments. It also appears to us that any agents purporting to act on behalf of your company may also be advising on and arranging deals in investments.*

> *It also appears to the FSA that your website www.avacadeinvestments.com and any of your promotional literature in respect of the pensions and investment services you or your agents offer, may constitute financial promotions and, so far as we are aware, there is nothing to suggest that the website or any of the promotional literature have been approved by an FSA authorised person...*".

81. While the FSA reserved its right to take future action, the letter concluded as follows:

> *"To avoid any breach of FSMA, whether ongoing or future, you are strongly advised to seek legal advice on your position under FSMA and to take any necessary steps to bring your activities into line with the requirements of FSMA.*
>
> *We do not intend to pursue this matter further with your company at the current time. We will consider this matter closed with this warning letter in respect of your activities."*

82. Lee replied on 25 January 2012. That reply said that Avacade was an introducer for three investments, namely Sustainable AgroEnergy, Ethical Forestry and Global Plantations, and made the point that none of them was a collective investment scheme. This was a reference to the fact that they all involved direct ownership of assets, and so were thought to fall outside the *regulated perimeter*. As to the idea that Avacade was advising, the letter stated:

> "*Avacade do not offer pension advice of any sort. Through marketing and or data acquisition we offer clients a pension review with a qualified IFA and pass the client across. We are conduit [sic] for financial advice and offer no pension advice or solutions ourselves. Any information presented verbally or in writing to clients that may be pension related is fact based only.*
>
> *Any clients that invest in the products we offer sign terms of business and a disclaimer confirming that no financial or investment advice has been provided by Avacade Ltd."*

83. Lee's evidence is that, before sending his reply, he took legal advice from Natasha Peacock at Regulatory Legal Solicitors. They produced a report to Avacade in March 2012. Privilege has not been waived in connection with that Report and it has not been produced. As Lee accepts in his evidence, during the time it was under preparation, between January and March 2012, the Avacade business model was in any event changing " *... from only being able to introduce cases to a SIPP administrator via an IFA to an execution only option with the SIPP administrator and doing more cases ourselves rather than via Introducers*."

Sustainable AgroEnergy Fails

84. It was clear by March 2012 that the Sustainable AgroEnergy product had failed. By about that time, Avacade had been informed of certain irregularities concerning the sub-leasing of land in Cambodia. An Action Group for investors was later formed,

and eventually three directors of the companies involved were convicted of fraud. At any rate, from about March 2012 onwards this investment was no longer made available to Avacade customers.

Cherish

85. In about June 2012, Avacade entered into a relationship with a new IFA. This was Cherish, which as I have already mentioned above was the appointed representative of Shah. At the time, Mr Lee Hewitt, who gave evidence before me, was a director of, and shareholder in, both companies. His relationship with Shah went back to 2007, but he had become a member and director of Cherish in December 2011.

86. Mr Hewitt's evidence in his witness statement was that Cherish were available to provide pensions transfer advice or "*full IFA advice*", if consumers opted for it. Lee Lummis said much the same thing. By this I understood them to mean that Cherish would be available to provide advice both on pensions transfers and on investments, if the result of the inquiries made by Avacade was that that what the customer wanted – in the same way that, according to Lee's evidence, 1Stop had been available to provide advice (although on pension transfers only) if consumers opted for it.

87. Moreover, rather like the structure which had earlier operated with 1Stop, Lee's evidence is that Cherish appointed Avacade as an administration company to handle the pension information which would form part of Avacade's free pension report. Cherish rented a spare office from Avacade and had an IFA permanently based on site, called Heather Brown. In addition, they paid the salary of one of Avacade's members of staff, Charlotte France, who was sub-contracted to Cherish to assist them with administration. As 1Stop had done, Cherish also provided stationery (the LoA and covering letter) which was used to communicate with consumers' pension companies, in order to acquire the information needed for Avacade to produce a pension report.

InvestUS and REIUSA

88. There is, however, another aspect of Cherish's role which I must draw out. That is because, at the same time that Avacade took on Cherish as a new IFA, it also entered into an arrangement in relation to another investment product. Unlike the existing products (by this stage essentially Ethical Forestry and Global Plantations), this did not involve the acquisition of a direct interest in an asset by the consumer. Instead, it was a corporate bond. It therefore fell within the regulatory net, and advice was needed before a consumer could acquire it.

89. As to this bond, the Avacade client schedule in fact refers to a single product, named Re-Invest USA (or "*REIUSA*"). But there seems to have been an earlier variant of that product, known as InvestUS. No documentation is available in relation to the first variant, but a "*Memorandum of Understanding*" has been produced dated 23 April 2013, which apparently relates to the second. The "*Memorandum of Understanding*" is between Avacade and an entity referred to as "*Project Kudos*". It refers to the existing "*InvestUS product*" being replaced by a new 5 year "*US Property Bond*".

90. One of the people standing behind Project Kudos was an individual known as Steve Wright, a former policeman. As Mr Hewitt confirmed when cross-examined, Mr Wright had himself been a director of Cherish from November 2008 until November 2011, and held 100% of the issued share capital of Cherish until November 2011. There was also a related company, called Cherish Support Services Ltd, which provided support services for Shah and Cherish. Despite resigning as a director of Cherish in November 2011, Mr Wright remained as a director of Cherish Support Services. Mr Hewitt was also a director of Cherish Support Services at the time, and remained so until November 2012.

91. I will come back to the role played by Cherish below, but for now it is sufficient to draw attention to the following exchange during the course of Mr Hewitt's cross-examination, when he was asked about the coincidence of timing which led to Cherish being introduced to Avacade at the same time as the bond was made available as an investment product:

> *"Q. In terms of your introduction to Avacade in respect of the InvestUS product, were you introduced to them along with the product itself?*
>
> A. *The initial introduction was to discuss an agreement for independent financial advice which did actually coincide with the investment as well. But my introduction was on the basis that I was asked to speak to a company who were looking for an independent financial advisor as an option for clients."*

Steps in the Avacade Model

92. Against that background, I can now summarise the main steps in the Avacade business model. It seems to me this was largely in place from the second half of 2011 onwards, although Cherish played a role (and the InvestUS/REIUSA products were available) only from mid-2012 onwards. As can be seen, and as already noted, the model borrowed aspects of the models used in earlier phases, in particular by TailorMade and 1Stop. The majority of transfers on the Avacade Client Schedule occurred in the period from 19 August 2011 until late 2014.

93. (1) Initial contact: Most frequently, the process was initiated by personnel in the Ethical/Richmond Solutions call centre contacting consumers with a view to them commissioning a free pension report. According to the Avacade Client Schedule, that was so in some 1574 of the 1943 entries in the Schedule. Lee accepted in cross-examination that Richmond Solutions called consumers "*on behalf of Avacade*" and that consumers "*would believe they were getting called from Avacade.*" In other instances Avacade staff themselves made the initial contact.

94. If the consumer contacted elected to proceed, then they would be sent an LoA together with a *signature pack*. In doing so I think it clear they were acting in Avacade's name and on its behalf. The typical arrangement involved documents being provided by a courier company called "*QuickDox*", who would attend the consumer's address with materials to be signed and sent back through the same courier to Avacade's offices. The signature pack included Avacade's Terms & Conditions, which I will come back to. They are important because they contain

various exclusions and disclaimers, and in particular state that Avacade was not an IFA and was not providing advice.

95. An example is provided by the case of one consumer, Mr Thompson. On 13 September 2013 he signed an LoA, a "*Data Permissions Form*", and a further document entitled "*Introducer Details and no Advice Confirmation*." The LOA was on the letterhead of Cherish.

96. (2) Welcome Call: The next step was a so-called "*Welcome Call*", made by Avacade agents to consumers to confirm the receipt of their pensions information and, if necessary, to clarify any unclear points or obtain missing information. No recordings or transcripts are available, but a standard form script has been produced which, importantly for the Defendants' case, again states that Avacade will not provide financial advice to consumers.

97. (3) Contact with pension funds: It was then necessary for contact to be made with consumers' pension funds. This was done using a covering letter and the LoA. As noted, after about June 2012 these documents were on Cherish's stationery, but the evidence is clear that they were sent out by Avacade staff. Although Mr Hewitt originally said in his Witness Statement that Heather Brown of Cherish, and Charlotte France (seconded to Cherish by Avacade) dealt with such matters, he accepted in evidence that it was Avacade personnel who physically sent documents out. Moreover, Craig Lummis' interview included the following exchange:

> *"GAYTON: Would Cherish actually send out the letters themselves to the pension companies or would Avacade do that on their behalf?*
>
> *CL: Avacade did it.*
>
> *GAYTON: And would it be on Cherish letterheaded paper?*
>
> *CL: Cherish, yes."*

98. (4) Pre-Report Call: After a draft pension report had been produced internally by Avacade, it contacted consumers again, to ask them a series of questions about issues affecting their pension provision and retirement plans. There are no transcripts, but a call script is available. The FCA's case is that the Pre-Report Call was used by Avacade as an opportunity to ask consumers a series of leading questions, which were designed either individually or cumulatively to push consumers in the direction of choosing the option of transferring into a SIPP and of selecting one or other of the investments made available by Avacade. Thus, says the FCA, there was a particular focus on consumers being encouraged to set themselves high targets for their pension income, to take a lump-sum of tax-free cash, and to think about leaving their pension fund to dependants.

99. The Defendants' position is that such exchanges involved posing entirely legitimate questions and/or merely providing information.

100. I will come back to this issue below.

101. (5) Pension Report: The Avacade Pension Report followed the pattern established by the earlier 1Stop report. A number of versions have been disclosed, and it is clear that

the Report developed over time, from a rather rudimentary six-page document in November 2011 to a more elaborate version by 2014. All versions, however, identified a set of options from which consumers could choose. These were as follows:

> *"1. Do nothing*
>
> *2. Transfer your pension(s) into a Personal Pension*
>
> *3. Transfer your pension(s) into a Stakeholder Pension*
>
> *4. Transfer your pension(s)into a SIPP (Self Invested Personal Pension)*
>
> *Should you choose to transfer your pensions into a SIPP we can provide details on how you can do this. If you require financial advice on any of the above options we can suggest an Independent Financial Advisor who can assist you with this."*

102. (6) Report Call: The options identified in the Pension Report were then discussed in a further call with an Avacade agent, referred to as the Report Call. A script is available and a number of transcripts have also been produced. Importantly for the Defendants' case, the script required agents at the outset to say that Avacade was not regulated by the FCA and could not provide financial advice. Thus, they say, it must have been clear to consumers that they were not being given advice, but only information.

103. The FCA's case also relies on the Report Call, however. They say that the Call was intended to, and did, funnel consumers in the direction of choosing to transfer into a SIPP. They say (broadly) that this effect was achieved by focusing in the Report Call on the factors already emphasised in the Pre-Report Call (high target income; taking cash free cash immediately; ability to leave pension funds to dependants), and by emphasising the benefits of drawdown as opposed to the option of purchasing an annuity (I will say more about this below). The FCA say the script asked leading questions which were biased in favour of the SIPP option. The Report Call is a key part of the FCA's case that Avacade strayed into the realm of giving advice, and I will need to return to it below.

104. If the consumer made the decision to transfer into a SIPP, then arrangements were made for a courier to attend with forms for the consumer to sign. The forms were completed by Avacade in advance. Arrangements would also be made for the next step in the process, the "*Investment Call"*.

105. (7) Attendance by Courier: The Defendants' position is that the courier would attend only after at least 24 to 48 hours, but it is common ground that the practice was for the courier to wait for the documents to be signed immediately by the consumer and returned.

106. (8) Advice: At this stage, I should flag a more controversial point. An important part of Lee's case at trial was that many consumers *did* elect to take advice from an IFA, presumably at about this stage of the process, as one of the options mentioned in the Report Call. After about June 2012 Cherish was available for this purpose. In

cross-examination, Lee Lummis said there were many hundreds of such investors, and many of them eventually chose not to transfer into a SIPP or to invest in the Avacade products. Again, I will need to revert to this point below.

107. (9) Investment Call: Assuming, however, that the consumer's decision after the Report Call *was* to transfer into a SIPP, there then followed a further call with an Avacade agent, this time to discuss the investments which might be made with the funds transferred into the consumer's SIPP.

108. Two scripts are available: an early one from about March 2012, which focuses on the Sustainable AgroEnergy investment product; and a later one which is focused on the Global Plantations investment, and which probably dates from about October 2013. Both are reasonably explicit about the nature of the call. In the first one the agent is told to say:

> *"My role is to help you decide on the most appropriate investment products for your needs."*

109. And in the second, although the script contains much less detail, the agent is told to say:

> *"The purpose of this call is to take you through the investments we offer and arrange collection of the application forms from you."*

110. The script goes on:

> *"You wanted to achieve a yearly pension of £xxxxxx. In order to achieve that you need a fund value of £xxxxxx. As I mentioned on our last call, Avacade have a portfolio of investment products that will help you achieve this."*

111. The agent was then required to take the consumer through something called the "*investment calculator*". The script contains limited detail, but it is clear this was an important part of the process and a number of examples are available which I will come back to below.

112. If the decision was to invest in (say) Ethical Forestry, on an execution only basis, then steps would be taken after the Investment Call to supply paperwork for signature to the investor which was then returned to Avacade, who would then co-ordinate with the product provider and SIPP administrator.

113. In periods after June 2012, the investment options included the InvestUS, and later the REIUSA, bond. There was some dispute about how much information Avacade provided in relation to these bonds, but it seems clear that at least basic information was provided and that the discussion went as far as consideration of the amount that might be invested. Again, I will come back to this below. At any rate, as already mentioned, these products were not available on an execution only basis, and so a further step was required involving Cherish.

114. (10) Cherish: The role of Cherish in relation to the InvestUS and REIUSA bonds was a particular point of contention at trial. The Defendants' case is that Cherish provided independent financial advice as to the suitability of the two bonds. The FCA say they

did not, for a number of reasons, but in particular the fact that Cherish's role was limited only to discussing the bond products, and even then the evaluation was conducted on a limited basis focused on a risk assessment. Mr Hewitt was cross-examined at some length about Cherish's role and I will have to come back to it in more detail later.

Later Developments

115. On 18 January 2013, the FSA issued an Alert headed: "*Advising on pension transfers with a view to investing pension monies into unregulated products through a SIPP*." The particular concern expressed was about the conduct of some IFAs at the time in assuming that where a transfer into a SIPP was being made by a consumer with a view to investing in unregulated products, it was sufficient for advice to be given only on the suitability of the SIPP. The FSA expressed a view that that was incorrect, and that the provision of suitable advice would generally also require consideration of the proposed investments as well. Thus the Alert said: "*You cannot separate out the unregulated elements from the regulated elements*."

116. Shortly after this, on 24 January 2013, Toby Good of the FSA wrote again to Avacade. His letter said that the FSA had continued to receive reports from members of the public and financial advisers about the activities of Avacade. In summary, Mr Good's letter reiterated many of the same concerns expressed in his earlier letter of December 2011. He was particularly concerned about Avacade possibly providing advice to consumers. He referred to the Perimeter Guidance Manual, and after strongly encouraging Avacade to seek legal advice, instructed it to take all necessary steps to cease and desist (amongst other things) from either carrying out any regulated activities in breach of section 19 of FSMA, or from issuing any unapproved financial promotions in breach of section 21. Again, the FSA reserved the right to take action in the future if it considered it appropriate to do so.

117. At this point, according to Lee's evidence, Avacade instructed Mr Richard Byrne of The Byrne Practice, who was known to and had worked with Lee Hewitt of Cherish. Mr Byrne was instructed to complete a further compliance report and to reply to the FSA. Again, however, there has been no waiver of privilege in relation to Mr Byrne's report, and so it has not been produced in these proceedings. In his evidence, however, Lee relied on the fact that Mr Byrne had reviewed Avacade's scripts, pension reports, website copy, process maps, investment material and a selection of call recordings in preparing his report.

118. Mr Byrne sent a response to the FSA on behalf of Avacade on 4 March 2013. This was essentially a request for further information about, and particulars of, the concerns expressed by the FSA. The letter made the point that Avacade was determined to investigate and, if appropriate, take relevant remedial steps, but was hampered by the lack of detail in the FSA's letter, including as to any specific complaints raised by members of the public or IFAs.

119. Mr Good responded on 12 March 2013. The essential point made in his letter was that the FSA was unable to provide specific information, because details of particular complaints or sources of information received were confidential. He went on to say that Avacade should be well aware of its own activities, and that it was Avacade's responsibility to ensure that it acted in a compliant manner.

120. Mr Good wrote again on 26 April 2013. By that stage, the responsibilities of the FSA have been migrated to the FCA. Mr Good's letter raised a particular concern about possible breaches of section 21 of FSMA (financial promotions), and in light of that and the matters raised in earlier correspondence asked for detailed information to be provided by 14 May 2013 in relation to a number of matters, including *"(1) a full explanation of your clients' business … (3) a full explanation of the role of your clients' activities in respect of the SIPPs as promoted by your clients to consumers … [and] (4) details of all authorised IFA firms with whom your clients work and to whom your clients introduce consumers for the provision of financial advice and for the arrangements of investments.*"

121. In a response dated 20 May 2013, The Byrne Practice said that they had completed a desk-based review of Avacade's systems processes and scripts. As to the FCA's two letters, the approach in the response was again to ask for more particulars and information. As to the specific queries raised by the FCA, the response said that although Avacade had no desire to be obstructive, "… *it is unclear on what basis you are making requests for information and/or raising questions.*" The letter concluded by saying: "*It is our client's genuine desire to have a constructive dialogue with the FCA and in this respect we look forward to your response.*"

122. As one can see, the correspondence by this stage had reached something of a stalemate. In the event, no response was received and, as the Defendants have pointed out, they were first informed of the FCA's then ongoing investigation into the businesses of Avacade and AA only in January 2015, although in the meantime Mr Richards had been formally appointed to investigate Avacade in June 2014 and to investigate AA in December 2014.

123. I will come back to the possible implications of this below.

IV. AA

FCA Visit to Liberty SIPP

124. On or about 16 January 2014, an event of some considerable significance occurred. Liberty SIPP informed Avacade that Liberty would be suspending all transfers and investment. This followed an FCA visit to Liberty SIPP on 14 January 2014.

125. This had immediate and serious consequences. As Lee expresses it in his Witness Statement, Liberty SIPP began to close down lines of communication, not answering calls, emails or requests for information. When pressed in correspondence, the response from Liberty SIPP was that their actions were prompted by recent changes to regulatory guidelines, and the change in the FCA's stance to non-standard investments. At the time, Lee estimates that Avacade had 500 plus SIPP applications in the pipeline at various stages of transfer.

126. These events coincided with other developments in the market aimed at the regulation of non-mainstream investments. In February 2014, the first instance decision in *FCA* v. *Capital Alternatives* was handed down, which had a significant impact on business in this area. That case found that a rice farming scheme, and various carbon credit schemes, were "*collective investment schemes*" as defined in section 235 FSMA (the first instance decision was later upheld on appeal). On 28 April 2014, the FCA

published a further Alert on pension transfers into SIPPs with a view to investment into unregulated products.

127. The stress caused by the parting of the ways with Liberty SIPP had an effect on the relationship between Craig and Lee on the one hand, and Mr Fox on the other. Mr Fox resigned from Avacade in April 2014; Kerry Bell was made redundant at the same time.

128. Lee's evidence is that ultimately the decision was made that the future lay in a business model that was exclusively based on financial advice and work with IFAs. By this, I understood him to mean a model under which investors would receive advice both in relation to pension transfers and investments. In May and June 2014, Avacade wrote both to Global Plantations and Ethical Forestry to advise them that Avacade was terminating any new introductions into their schemes (although according to the Avacade Client Schedule, outstanding cases continued to be completed for some time after that.)

AA is resurrected as "*Avacade Future Solutions*"

129. For their new venture, Craig and Lee resurrected AA, the company which Craig had originally established as a mortgage business in 2007. AA had been dormant, but was still on the Register of Companies. The trading name "*Avacade Future Solutions*" was chosen following a consultation with the remaining staff. AA purchased from Avacade its list of consumers who had not yet completed a pension review and transferred their pensions.

130. A further "*DIRECTOR JOB DESCRIPTIONS*" document provided by AA to the FCA gives the following description of the roles played by Lee and Craig:

    i) Lee – is described as "*Managing Director – August 2014 to date*", whose responsibilities include *"… the performance of the company as dictated by the board's overall strategy… Formulating and successfully implementing company policy [and] … Assuming full accountability to the board for all company operations."*

    ii) Craig – is described as "*Managing Director – February 2007 to August 2014; Commercial Director – August 2014 to date*." As Managing Director, his responsibilities were the same as those that later taken on by Lee, and described above. As Commercial Director, his responsibilities were "*To identify new commercial activities and drive business growth… Drive the business forward to achieve goals… Strategically expand, preserve or improve the company's procedures, standards or policies whilst maintaining business edicts and regulatory guidelines.*"

Guinness Mahon

131. Mr Byrne was given the job of sourcing a new SIPP administrator, and in due course Guinness Mahon was identified. Although they allowed execution only transactions, unlike Liberty SIPP that was only in limited circumstances and was not their standard business model.

The Paraiba Bond

132. Craig and Lee also decided to turn to a new investment product. This was the Paraíba bond. A brochure for this product describes it in the following way:

> "*The Paraiba Projects Secured Fixed-Rate Bond was launched in September 2014 with the objective of accelerating building projects in the north east of Brazil, meeting the demand for middle-class and executive housing in the state of Paraiba…*
>
> *Over the three-year period, investors will receive annual returns of 11% of the amount invested, paid on the anniversary of the bond issue…*".

133. There was also a "*Brazil Investors Handbook*", which could be downloaded by investors who clicked on a link in an email or from the AA website, when that was launched.

134. AA entered into a contract with NE Brazil Investment Ltd on 22 January 2015. This company seems to have been associated with Paraiba Projects PLC, which issued the bond. Recital D expressed the purpose of the agreement as follows:

> *"AA conducts pension reviews for individuals. Some of those pension reviews result in an individual wishing to switch their pension. Where an individual wishes to switch their pension, AA shall, if appropriate, make that Individual aware of the Product. In addition, AA shall seek to raise cash funding for NEB product."*

135. AA was appointed "*exclusive distribution channel for the Product*" (clause 2.1), and under clause 3.1 was entitled to a Fee, defined as 20% of any monies invested by an individual. This was later increased to 25%, as Lee accepted in cross-examination.

136. By clause 4, AA undertook to:

> *"(a) use all reasonable endeavours to promote the distribution and sale of the Products;*
>
> *(b) employ a sufficient number of suitably qualified personnel to undertake the provision of pension reviews … "*

BlackStar

137. A new IFA was also identified for the new business. This was BlackStar. This in fact refers to a company called BlackStar Wealth Management A Ltd, which was the appointed representative of Blackstar Wealth Management Ltd. BlackStar was run by a Mr Alan Charlesworth. According to Lee in his evidence, in an early meeting Mr Charlesworth put himself forward as an expert on bonds, and research showed BlackStar operating as "*security trustee*" for a range of other investments. Lee in his evidence said that BlackStar agreed to approve the literature and brochure for the Paraiba bond, and to advise on the bond, as well as acting as "*security trustee*".

138. Lee's evidence was BlackStar wished to appoint AA as an introducer and to perform an administration function for BlackStar. He said the BlackStar had its own process for introducers and a "*document checklist*." As I understood it, Lee's main point was that, as with aspects of the earlier Avacade model, what became the AA model of doing business was effectively endorsed and supported by an FCA authorised entity, and that in implementing the model and supporting BlackStar, AA relied on that fact.

139. Lee in his Witness Statement referred to the expected volume of business via this model:

> *"Alan [Charlesworth] said that from his experience and existing introductions, generally he advised on average putting around 50-60% of the fund into alternative investments (such as a bond) and the remainder into a selection of regulated funds that they would select."*

140. AA entered into a contract with BlackStar dated 4 December 2014, stated to be for the purpose of AA introducing and referring clients. According to Lee's evidence, BlackStar supplied letterheads, letter content and training to Avacade. Lee said in his Witness Statement:

> *"BlackStar… advised that the way a client from X introducer ended up in X investments and a client from Y introducer ended up in Y investments was because the client came to BlackStar with existing knowledge of the investment and this is the one that was then advised by the IFA.*
>
> *I understand that a telephone call occurred between Richard Byrne and Alan Charlesworth about approving the content of this call as a financial promotion, but that Alan insisted this was unnecessary as long as it was a factual discussion that repeated the information that was contained in the brochure."*

141. In their Defence, AA, Craig and Lee said that for performing their administration role, AA received a £95 "*administration fee*", some of which was deducted by BlackStar if BlackStar made an additional telephone call to the consumer.

The AA Model

142. The schedules produced in relation to AA show that it also received commissions on the Global Plantations, Ethical Forestry and Paraiba bond products. Thus, there seems to have been a period when AA's activities overlapped with those of Avacade, or in which AA took over responsibility for the completion of transactions which Avacade had initiated.

143. The new AA model, however, although sharing some features with the Avacade business model, had some important differences.

144. As I read the evidence, the basic components of this were common ground between the parties. In any event, I accept Mr Richards' evidence as to what the model comprised, which was not challenged.

145. (1) Initial Contact: This seems to have operated in a similar way. Consumers who expressed an interest as a result of an initial call from Avacade were provided with an LoA and Data Sharing Form for completion on BlackStar headed paper. They were also sent an AA "*signature pack*" which enclosed AA's Terms of Business and an "*Important Investment Information & Disclaimer*", in very similar terms to those earlier used by Avacade.

146. At least by mid-2015, the practice also seems to have involved clients being sent a "*BlackStar Wealth Management Client Agreement*" for signature at the same time. This included the following language:

> *"We conduct research of the whole market, the products and alternatives, and provide you with a full advice and recommendation service. In order for us to do this we must assess your suitability for particular products and services and this is achieved by you providing us with certain information about your financial and personal circumstances."*

147. Some investors were provided with the "*signature pack*" electronically, and asked to sign it electronically.

148. (2) Pre-Report Call and Pension Report: These operated in much the same way as under the Avacade Model, although with some modifications. In particular there was

a slightly more elaborate Pension Report, which included a new section called "*Your Options*." It said that with advice, five options were available: four were the same as indicated in the Avacade Report (above at [101]), and additionally there was "*Transfer to a QROPS*" (a Qualifying Recognised Overseas Pension Scheme).

149. (3) Report Call: Again this was very similar to the Avacade Model, but with some differences. One was that, as a consequence of the March 2014 budget reforms, much of the discussion around annuities and drawdowns was swept away. A second was that, as appears to be common ground between the parties, the AA model involved all consumers who wished to proceed being referred to BlackStar. Although the possibility remained for clients to opt for an execution only transaction, according to Lee's Witness Statement they could not do that via AA. If the client wished to take advice from BlackStar, which would be "*full pension and investment advice*", then Lee's evidence was that the Pension Report and "*all of the pension information*" was sent across electronically – by which I understood him to mean, sent across to BlackStar.

150. AA's agent would also complete a "*Risk Questionnaire*" during this call.

151. (4) Fact Find and Appointment Calls: These may have been two separate calls, although that is not material for present purposes. Whether they were or not, they were both conducted by AA personnel. The "*Fact Find*" was based around a Financial Questionnaire, which included questions about income, assets, liabilities and retirement planning. The Appointment Call was to set up an appointment with BlackStar. According to the script, this was said to be with "*a senior member of the IFA team, normally Ian Hillas.*"

152. Importantly, the Appointment Call script includes the following:

> *"BlackStar will also have a discussion about the Paraiba Bond which we discussed on the last call. Did you receive the brochure in the post?"*

153. This makes it clear that part of AA's role was to introduce consumers to the Paraiba bond, and the structure seems to have involved that being mentioned on one of the prior calls (either the Report Call or the Fact Find). The AA agent was invited to give a recap, which included the following:

> *"This bond is used to finance infrastructure on a residential housing site in North East Brazil. It pays 11% return every year for three years and is issued by a UK plc, Paraiba Projects. The developer is a UK developer, based in Birmingham, James Laurence developments, with a previous successful track record in Brazil. This investment is classed as high risk investment but the IFA will only recommend it as a % of your portfolio if they deem it to be suitable and in line with your risk profile … ."*

154. (5) Investment call: The FCA alleges in its Particulars of Claim that an Investment Call was made prior to any discussion with BlackStar. On the face of it, this is denied by the Defendants in their pleaded case, but Lee in his Witness Statement accepted that a call was held to provide limited information about the Paraiba bond along the lines of the information contained in the Paraiba brochure. One transcript of such a call is available which I will say more about later.

155. (6) BlackStar contact: This took the form of a telephone conversation with Ian Hillas. Although he had an FPC qualification, according to the ATEB Report Mr Hillas was not a CF30 and had never been a qualified adviser. The ATEB Report also indicates that the purpose of the call with Mr Hillas was for him to validate the information already given to AA, although the documentation inspected by ATEB (which included file notes) showed that in fact he validated the risk profile only, captured by means of the "*Risk Questionnaire*" completed by Avacade, and not the "*Fact Find*." This is consistent with Mr Hillas' call script.

156. (7) Post-BlackStar call: Although it seems to be common ground that at least on occasion there were further calls with AA personnel after the call with Mr Hillas, there is some controversy about how those calls are properly to be characterised and what the purpose of them was. The Defendants in their Defence say that "*any calls following the initial contact with BlackStar were done as part of an expected client service role*." The FCA's case is that, at least on some occasions, this call was used as an opportunity to inquire whether BlackStar had supported the allocation of funds into Paraiba that had earlier been discussed with AA, and if not, to assess whether steps might be taken to increase the recommended amount.

157. (8) BlackStar Reports: BlackStar produced a "*Financial Planning Report*" for consumers. A number of examples have been produced for consumers who were advised to invest in the Paraiba bond. The proper characterisation of the contents of such reports is a matter of some importance and controversy, and again is an issue I will need to come back to. I think it fair to say, however, that the Reports had a focus on the Paraiba bond. The main features are illustrated by the example of one consumer, Mr Bolland.

158. The Report included a section on "*objectives*". This was set out in bullet points including: "*To receive advice on the suitability of investing in Paraiba Projects plc. corporate bonds through your pension*". It then said:

> "*Paraiba Projects plc are raising capital through a corporate bond issue of £12,000,000. These funds will then be used to construct the infrastructure of a condominium development of residential property in Paraiba state in Brazil.*
>
> *You have asked me to advise you with regards to whether this is an investment, which would be appropriate for you personally and if your current pension structure could acquire such an investment.*"

159. Separately, in setting out an explanation of the Paraiba bond, the Report said:

> *"You have been introduced to Blackstar Wealth Management Ltd by Avacade Investment Solutions, after having already decided that you interested (sic.) in investing in Paraiba Projects plc. corporate bonds.*"

160. The Report contained a suggestion as to how funds might be allocated were it not for the "*secured bond*", and set out a possible portfolio, which in Mr Bolland's case would have included 11% in property and 3% in fixed interest investments. There were then sections on "*Knowledge and Experience*" and "*Tolerance and Capacity for*

Loss", followed by the proposed *actual* portfolio. In Mr Bolland's case this suggested that he invest 48% of the total available fund into the Paraiba bond, which "*is therefore more risky than if the entire amount were invested in the illustrative conventional portfolio shown earlier …".*

161. In setting out an explanation of the Paraiba bond, the Report then said:

> *"You have been introduced to Blackstar Wealth Management Ltd by Avacade Investment Solutions, after having already decided that you interested (sic.) in investing in Paraiba Projects plc. corporate bonds.*"

162. The overall recommendation then stated:

> *"A SIPP is a suitable vehicle for your current investment purposes and will also give you the maximum flexibility to shape your benefits at retirement.*
>
> *Guinness Mahon are a leading SIPP provider and I can recommend their Indigo SIPP contract as being suitable for your needs…*
>
> *I recommend that you invest £25,000 in Paraíba Projects plc corporate bonds and put the balance of your funds into a more diversified spread of regulated investment funds.*
>
> *You have stated that investing in Paraiba Projects is a major objective and that you fully understand the risks associated with this investment as outlined in the report …".*

163. One can see from this example that, consistently with what Craig and Lee had been told by Alan Charlesworth, the typical outcome involved a percentage of the investor's funds being recommended for inclusion in an alternative, or Non-Mainstream Investment ("*NMI*"), i.e., the Paraiba bond, and the remainder in a spread of other regulated investment funds.

164. As the FCA have pointed out, and as I accept, the ATEB report makes clear that the percentage of the overall fund suggested by BlackStar for investments in NMIs was the product of a calculation used by BlackStar. This was derived from scores attributed to the consumer's attitude to risk ("*ATR*"); their experience and knowledge; and their pension as a percentage of their net asset value ("*NAV*"). An example is given by ATEB of a novice investor with an ATR factor of 50% where their pension represented 60% of their NAV. This investor would be recommended to invest 40% of their pension in the alternative or NMI. For investors referred by Avacade, therefore, such an investor would be advised to invest 40% of their pension into the Paraiba Bond.

Operation of the Model

165. According to Lee's evidence, the first cases using this new model took a few weeks to come through, but when they did they came very far below the average of 50-60% of monies invested into the Paraiba bond that Alan Charlesworth had indicated was standard. As Lee put it, "*The problem for Avacade Future Solutions was that … our only source of revenue was the bond commission*." In light of this, a variation was

explored, under which the percentage of funds not recommended by BlackStar for the Paraiba bond would be invested not in a spread of other regulated funds, but instead placed with a Discretionary Fund Manager, Beaufort Securities. The background is somewhat obscure, but the idea seems to have been that that alternative structure would generate further commissions. In the event, however, there was a falling out between AA and BlackStar about the treatment of commissions under the arrangement with Beaufort, and that led to the relationship with BlackStar becoming fractured. It finally came to an end in June 2016, as a result of the intervention by the FCA which eventually resulted in the ATEB Report.

V TOTAL INVESTMENTS AND COMMISSIONS

166. Pausing there, it is convenient to record the total figures for investments and commissions, derived from the Avacade Client Schedule and the information available relating to AA. These are summarised in Appendix 6 to the FCA's Written Closing as follows:

i) *Hotpods*: consumers invested £602,470 in Hotpods product, producing commission to Avacade of £129,830.

ii) *Mosaic Caribe*: consumers invested £555,479 into Mosaic Caribe, product, producing commissions to Avacade of £35,216 (consistent with a commission rate of 6.3%, slightly lower than specified in the contract).

iii) *Sustainable AgroEnergy*: clients purchased £1,244,500 of these investments, and Avacade was paid commissions of £203,244 (an average of 16.3%).

iv) *Ethical Forestry*: consumers purchased £42,600,452 of Ethical Forestry products and Avacade was paid commissions of £5,335,260.56.

v) *Global Plantations*: consumers invested £12,327,700 in Global Plantations Products and Avacade was paid commissions of £2,579,657.50 (an average of 20.1%).

vi) *InvestUS/REIUSA*: £11,438,600 was invested in the REIUSA bond, generating £2,327,415 in commissions (an average rate of 20.3%).

vii) *Paraiba*: £905,000 was invested in the Paraiba bond, producing commissions of £226,250.

167. As to the split of commissions between Avacade and AA, according to the FCA's calculations in another document served as part of their Written Closing these were as follows:

i) Avacade received a total of £10.621m.

ii) AA received a total of £715,000, which included commissions in respect of the Paraiba bond, but also commissions in respect of the Ethical Forestry, Global Plantations and REIUSA investments, and some £85,639 from Beaufort Discretionary Fund Management.

168. None of these figures was expressly challenged, although I note that the total given for AA commissions in [167(ii)] above includes a different sum for commissions payable on the Paraiba bond (£308,862) than that at [166(vii)] above (£226,250). I also note that the figures given are, as I understand it, totals stretching back to early periods of Avacade's life, before the point at which it seems to me that the Avacade model (described above) crystallised, in the latter part of 2011. In any event, whatever the detail, the figures are obviously very large, and I am content to proceed on the basis that they are substantially correct.

169. I have mentioned above that the Sustainable AgroEnergy products failed. I note in passing here that according to a letter to investors dated 16 May 2017, the SFO has launched a criminal investigation into the Ethical investments. The English companies associated with those investments are now in liquidation or have been dissolved. As I understand it, Global Plantations has also been dissolved, although it is unclear what impact that may have on the investments it promoted. It also appears that the original InvestUS investment ran into difficulties in mid-2015, such that although interest continued to be paid, capital could not be returned, at that point at least.

VI ALLEGED PERIMETER BREACHES

(1) Regulated Activity & Other Preliminary Points

"*Buying or Selling Securities*"

170. Section 19 FSMA provides as follows:

> *"(1) No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is –*
>
> *(a) an authorised person; or*
>
> *(b) an exempt person.*
>
> *(2) The prohibition is referred to in this Act as the general prohibition."*

171. Section 22 FSMA provides that:

> *"(1) An activity is a regulated activity for the purposes of this 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…*
>
> *(5) 'Specified' means specified in an order made by the Treasury."*

172. The relevant Order specifying regulated activities is the RAO, which I have already mentioned above.

173. It follows that a perimeter breach will occur if a person carries out an activity specified in the RAO by way of business, but without authorisation.

174. I have already noted that the main activities in question here, which Avacade and AA are said by the FCA to have carried out by way of business, are (a) that in Article 25(2) of the RAO (making arrangements with a view to a person who participates in the arrangements buying or selling investments of a specified kind), and (b) that in RAO Art 53 (advising on the buying or selling of investments of a specified kind). (I will deal separately below with the specific activity described in RAO 53E (advising on pensions), which is relevant only to AA and not Avacade: see at [354]-[355]).

175. I describe later the material issues which separate the parties in relation to these two main types of activity, but first it is useful to deal with some threshold questions which were either common ground or at least not vigorously disputed.

176. To begin with, both Article 25(2) and Article 53 bite if (*inter alia*) the relevant activity (making arrangements or advising, as the case may be) is in relation to the *buying or selling of securities*.

177. Thus, Art. 25 provides relevantly as follows (emphasis added):

> '*(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…*
>
> *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) [i.e., a security] … (whether as principal or agent) is also a specified kind of activity*.'

178. And Art 53 RAO (as in force from 31 October 2004 to 16 March 2016) provides (emphasis added):

> '*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.*"

179. Did Avacade's and AA's activities involve consumers buying and selling securities? I did not detect any real disagreement between the FCA and at least the Represented Parties in relation to this issue. As I understood Craig's position on the pleadings, however, it seemed to be that the regulatory framework was not engaged, because SIPPs "*are not as a matter of fact and as a matter of law covered by any of the provisions of FSMA or RAO as alleged or at all*" (Defence at para. 18(12)). I reject that proposition. For the reasons given below, it seems to me clear that SIPPs qualify as personal pensions, and that the business models of Avacade and AA depended on consumers acquiring and exercising rights within SIPPs, and therefore *buying and selling securities*.

180. A good starting point is to note, as the FCA pointed out in their Opening, that what the clients of Avacade and AA typically did can be broken down into the following steps:

i) They transferred out of their existing pensions (which were usually occupational pension schemes, but sometimes personal pensions).

ii) They transferred into a SIPP, converting their pension pots into cash within the chosen SIPP.

iii) They chose to divest from cash within the SIPP.

iv) Having done so, they purchased one or more of the investment products promoted by Avacade.

181. In putting forward their case, the FCA relied on steps (ii), (iii) and (iv). That is because:

i) Rights under a SIPP qualify as a *security*. That follows from the extended definition of security within Art 3 RAO, which includes not only "*instruments creating or acknowledging indebtedness, including bonds*" (language which is apt to capture the InvestUS, REIUSA and Paraiba bonds), but also "*rights under a personal pension scheme*", which includes SIPPs (although not occupational pension schemes).

ii) The RAO incorporates wide definitions of "*buying*" and "*selling*" investments: "*buying"* includes "*acquiring for valuable consideration"*, and "*selling*" means:

> "*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.*"

182. Thus, a person who acquires rights under a SIPP (step 2 above), or who disposes of existing rights under a SIPP (step 3) in exchange for new ones (step 4), is involved in the buying or selling of securities, even if the new investments acquired (at step 4) involve direct ownership of assets (as with, for example, the Ethical Forestry or Global Plantations investments) and are therefore not themselves "*securities*". The same result follows, obviously, if the investment acquired at stage 4 is itself a "*security*" (e.g., a bond).

183. This approach is supported by the analysis in the FCA's Perimeter Guidance Manual ("*PERG*"). This forms part of the FCA Handbook, and sets out the FCA's view on matters relevant to the definition of the regulated perimeter.

184. PERG 12.3 reads as follows:

> *"… 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) …'*

185. I agree with the summary in PERG 12.3. Essentially the same logic underpinned the decision of the Upper Tribunal in *Burns* v. *FCA* [2018] UKUT 0248 (TCC), 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* at [260].

186. Three further points may be noted:

i) The FCA, in advancing their case, chose not to rely on step 1 above: that is because in many cases the consumers' existing pensions were occupational pensions, and therefore not securities within the definition.

ii) Although for analytical purposes it is useful to separate out the 4 steps mentioned above, in substance steps 1 and 2 were really two sides of the same coin, and steps 3 and 4 likewise. Thus, as far as the consumer was concerned,

there were really only 2 steps: (1) the decision to transfer existing pension funds into a SIPP, and (2) the decision to use those funds, once in the SIPP, to purchase investments. In what follows below, it will be convenient to refer only to Steps 1 and 2, corresponding to the description in this paragraph.

iii) There is a separate question whether, although the process can be divided up into different steps for analytical purposes, it should properly be regarded as divisible, or really as a seamless whole, even if it does have different components. This is a matter of some dispute between the parties, and a matter of some significance, as I will explain below.

"By way of business"

187. Before moving on, I should deal with two other preliminary matters. The first is whether it is proper to regard the activities of Avacade and AA as having been carried on *by way of business*. Leaving aside Art 53E RAO, the test for acting "*by way of business"* is defined in the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 ("*the Business Order*"). By Art 3 of the Business Order, a person is not be regarded as carrying on the activity under Art 25 RAO (making arrangements) or Art 53 (advising on investments) unless he "*carries on the business*" of one or more such activities.

188. Mr Berkley QC did not feel able to make any concession on these points in this case, but it seems to me that the point is beyond any serious doubt. If I conclude that Avacade or AA were making arrangements (Art 25(2)) or advising (Art 53), they were doing so for the purposes of their business: the matters relied on as constituting *making arrangements* and *advising* were obviously a part of their business model, designed to generate income in the form of commissions. The real question is whether such matters, in truth, are properly characterised as regulated activities or not.

FSMA section 23

189. The second point concerns section 23 of FSMA. This provides that a person who contravenes the general prohibition in section 19 (see above) is guilty of an offence and liable on conviction to a fine or imprisonment. But then section 23(3) states that in proceedings for an authorisation offence, it is a defence for a person "*to show that he took all reasonable precautions and exercised all due diligence to avoid committing the offence*."

190. Mr Berkley QC for the Represented Defendants sought to rely on this provision. He said that "*authorisation offence*" is defined as "*an offence under this section*" (s.23), and that arguably includes proceedings for civil liability. He submitted that it is unlikely that a statutory defence would be available solely for a criminal prosecution and not in proceedings to determine whether the general prohibition (which carries the criminal sanction) has been contravened.

191. I do not accept Mr Berkley QC's submission. The short point is that the defence is only available in "*proceedings for an authorisation offence.*" These are not such proceedings. They are not criminal proceedings, and no offence as such is alleged. Instead, they are proceedings (in effect) for declarations that there have been breaches of the general prohibition, and that because of that, civil relief in the form of an injunction under section 380 FSMA and/or a restitution order under section 382 FSMA should be granted. In *FCA v Capital Alternatives* [2018] 3 WLUK 623 at [1331-1332], HHJ McCahill QC held that section 23 does not apply to a civil claim and does not afford a defence to a claim under s.380 or s. 382. I agree with that conclusion, which seems to me unavoidable given the language of the section. As I note below, however, it also seems to me that the reasonableness or otherwise of the Defendants' behaviour, including as to any precautions taken or due diligence conducted, may be relevant to the issue of the quantum of any restitution order made: see at [471].

192. At the present stage of the analysis in these proceedings, however, the issue is simply whether acts constituting breaches of the general prohibition have occurred. I now turn to address that question, by reference to the issues of substance which separate the parties. It is convenient to deal first with Art 25(2) and its various exceptions, and then separately with Art 53 and Art 53E.

(2) RAO Art 25(2): Making arrangements

The Relevant Provisions

193. I have already referred to Art 25 above, but it is useful to set out again the key parts again. Art 25 is headed, "*Arranging deals in investments*", and Art 25(2) prescribes the following as a regulated activity requiring authorisation:

> *"(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) [i.e., a security] … (whether as principal or agent) is also a specified kind of activity."*

194. Art 25 forms part of a set of provisions, including various exceptions, which it seems to me it is useful to consider together. I will therefore set out those provisions which in one way or another are said to be relevant to this case.

195. Art 26 RAO has the heading, "*Arrangements not causing a deal*" and states:

> "*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.*"

196. Art 27 RAO is headed "*Enabling parties to communicate*", and provides:

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

197. Perhaps the two most significant exceptions relied on by the Defendants are those in Arts 29 and 30.

198. Art 29 is headed, "*Arranging deals with or through authorised persons*", and states:

> *"(1) There are excluded from articles 25(1) and (2)…arrangements made by a person ('A') who is not an authorised person for or with a view to a transaction which is or is to be entered into by a person ('the client') with or through an authorised person if—*
>
> *(a) the transaction is or is to be entered into on advice to the client by an authorised person; or*
>
> *(b) it is clear, in all the circumstances, that the client, in his capacity as an investor… is not seeking and has not sought advice from A as to the merits of the client's entering into the transaction (or, if the client has sought such*

advice, A has declined to give it but has recommended that the client seek such advice from an authorised person).

(2) But the exclusion in paragraph (1) does not apply if–

(a) the transaction relates, or would relate, to a contract of insurance; or

(b) A receives from any person other than the client any pecuniary reward or other advantage, for which he does not account to the client, arising out of his making the arrangements.

(3) This article is subject to article 4(4) and (4B)."

199. Art 33 RAO has the heading, "*Introducing*" and provides relevantly:

"*There are excluded from articles 25(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; … and

(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 …"

The rival submissions

200. The FCA's position on these provisions is straightforward: they say it is clear, looking at the Avacade business model and the AA business model, that they involved Avacade and AA respectively, *"[m]aking arrangements with a view to a person who participates in the arrangements buying [or] selling … [securities]*."

201. The Defendants disagree. They rely on a number of points, in summary as follows.

202. *First*, they challenge the central proposition that the activities of Avacade or AA involved *"[m]aking arrangements*," within the meaning of that phrase in Art 25. In making that submission at trial, the Represented Defendants relied on the guidance on Art 25 given by Mr Jonathan Crow QC (Sitting as a Deputy High Court Judge) *In re The Inertia Partnership LLP* [2007] EWHC 539 (Ch) [2007] Bus LR 879, and by Holroyde J in a later case, *Watersheds v DaCosta* [2009] EWHC 1299 (QB). Although they accept that the concept of "*making arrangements*" is wide, the Represented Defendants said that these cases recognise there are limits to its operation, and particularly that it is not apt to cover the position of someone who in substance is really no more than an introducer and provider of information, who has no real influence over the eventual outcome. They say in particular that the ultimate decision to invest, made by consumers, was too remote from what Avacade or AA did to support the view that overall those parties were involved in "*making arrangements*."

203. *Second*, they make a related point, which is that the substance of Avacade's and AA's involvement is more accurately captured by the language of Art 27, namely they were " … *merely providing means by which one party to a transaction (or potential transaction) is able to communicate with other such parties*." Consequently, the Defendants say that the activities carried on by Avacade and AA are expressly excluded from the scope of Art 25(2).

204. *Third*, the Defendants rely on the exception in Art 29, "*Arranging deals with or through authorised persons*." Here, they have to deal with a threshold difficulty, which is that as they acknowledge, the exclusion in Art 29(1) does not apply in a case where the relevant party (here Avacade or AA) receives "*from any person other than the client any pecuniary award or other advantage … arising out of his making the arrangements*." The issue here is that Avacade and AA *did* receive a pecuniary reward, in the form of commissions. But the Represented Defendants argued that the commissions were paid in respect of the investments chosen by the consumers, and were therefore a function of the investment decision (Step 2 using the terminology above at [186]), and did not arise out of any arrangements (even if there were any) which led to the decision to transfer into a SIPP (Step 1). Thus, they say, the Art 29 exception is available, at least in relation to the transfer aspect (Step 1), which can and should be divorced from the investment aspect (Step 2).

205. The Represented Defendants then argue that the Art 29 exception should be available in relation to the transfers into SIPPs because: (1) each transfer was a "*transaction with or through an authorised person*", namely the various SIPP providers, all of whom were authorised by the FCA; and (2) in all such cases, either transfer advice was given by an IFA (and so Art 29(1)(a) applies), or alternatively in the case of execution only transfers, it was clear in all the circumstances that the consumers were not seeking and had not sought advice from Avacade, who indeed were explicit at all times in saying that they did not give advice (and so Art 29(1)(b) applies).

206. *Fourth*, the Defendants rely on Art 33. This is the provision headed "*Introducing*". At trial, the Represented Defendants argued that, properly characterised, the activities undertaken by Avacade and AA involved introductions to authorised persons with a view either 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*." As to this, the Represented Defendants said that (1) Cherish and BlackStar gave "*independent advice*", and so the exclusion is engaged in those cases where they advised on the bond investments (InvestUS, REIUSA and Paraiba), and (2) in the other, execution only cases where funds were transferred into (mainly) Liberty SIPP and invested in, for example, the Ethical Forestry Product, there was an "*independent exercise of discretion*" by the SIPP provider in accepting the investments, and so the exclusion is engaged in execution only cases as well. (I should say that this latter point was not originally pleaded, but by proposed amendments formulated after the trial which the FCA consented to subject to the usual order as to costs, the Represented Defendants put it in issue. The point was argued during trial and I will therefore deal with it below).

Construction of the Relevant Provisions

207. At the heart of this part of the case is the question of the proper construction of Art 25(2) RAO and of the various exceptions thereto.

208. There is some guidance in the authorities, but this is largely concerned with Art 25, and as I understand it there has been no substantive judicial guidance given on Arts 29 or 33 in particular, which are the main exclusions relied on in this case.

209. It is helpful to start with the authorities on Art 25.

210. Central to Art 25 (both Art 25(1) and Art 25(2)) is the concept of "*making arrangements.*" In *In re The Inertia Partnership LLP* [2007] EWHC 539 (Ch), [2007] Bus LR 879, a case on Art 25(1), Mr Jonathan Crow QC (Sitting as a Deputy Judge of the High Court) thought that this wording was potentially very broad. He said at [39] (emphasis added):

> "*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 (ie 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 (ie the purchase, sale etc of the shares)*?"

211. Based on that analysis, the Learned Deputy in that case concluded that in one instance where The Inertia Partnership had merely introduced one company (Vivadi) which was seeking to raise finance to another company (Porterland) which claimed to have access to a network of potential investors, it was not "*making arrangements*" and therefore not conducting a regulated activity (see at [40]); but that in other instances where The Inertia Partnership had gone further and provided administration services (i.e., had agreed to collect in subscription monies paid by investors for shares in two further companies), it was (see at [41-42]).

212. Both Art 25(1) and Art 25(2) were considered by Holroyde J in a later case, *Watersheds v DaCosta* [2009] EWHC 1299 (QB). The context there was a claim by a company which had agreed to provide advice to the Defendant in relation to its efforts to raise finance. The agreement provided for payment of a success fee, including a minimum fee of approximately £58,000. Only limited finance was raised in the form of a bank loan, but the Claimant nonetheless claimed payment of the minimum fee. Amongst other arguments, the Defendants said that the agreement was unenforceable because it arose out of the conduct of regulated activity ("*making arrangements*" under Art 25) which the Defendant had not been authorised to carry out.

213. The argument was obviously an unattractive one, and was rejected by the Judge. On Art 25(1) he considered that the Claimant was more than a mere introducer (*cf* the

position of The Inertia Partnership in relation to Vivadi, above). That was because (see at [64]), they were "*required to use their experience and expertise to assist the company to ensure that all necessary material was provided to investors in the most attractive form … .*". Nonetheless, the Learned Judge thought that the case did *not* fall within Art 25(1): although the Claimant was more than a mere introducer and was expected positively to assist in the exercise of raising capital, still it was " *... not able in any real sense to influence whether or not an investment was made in the company*." In setting that as the yardstick for "*making arrangements*" under Art 25(1), the Judge seems to have been influenced in particular by the reasoning of Jonathan Crow QC in *In re The Inertia Partnership* when, in the course of concluding that the introduction of Porterland to Vivadi did not fall within Art 25(1), he said:

> *"Such an introduction in the circumstances is not an 'arrangement' in any meaningful sense, for two reasons: first, because it does not necessarily result in anything further happening between Vivadi and Porterland, let alone between any consumers and Vivadi or Porterland; and secondly, 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…."*

214. Holroyde J. said he was fortified in his conclusion by the following statement in the Perimeter Guidance Manual, at PERG 2.7.7BG, which states:

> *"The activity of arranging (bringing about) deals in investments is aimed at arrangements that would have the direct effect that a particular transaction is concluded (that is, arrangements that bring it about)."*

215. Mr Berkley QC placed reliance on the approach adopted by Holroyde J. He submitted that, although Holroyde J.'s analysis above was expressed in relation to Art 25(1), the same logic must apply in determining whether a party has engaged in "*making arrangements*" under Art 25(2). Like the Claimant in *Watersheds* v. *Da Costa*, Mr Berkley QC submitted that the corporate Defendants in this case were ultimately powerless to bring about any eventual outcome: that was a matter between the consumers and the SIPP providers and the investment providers, and was too remote from Avacade or AA for their actions to amount to "*making arrangements*."

216. As to Art 25(2), Holroyde J. likewise thought that the Claimant's activities did *not* fall within that Article, and so were *not* regulated activities. That was because (1) he construed that Article as not applying to activities which involved providing support or assistance to one party to a potential transaction only, as opposed to both parties, and (2) he thought that the Claimant's activities were in any event caught by the exclusion in Art 27 ("*Enabling parties to communicate*"). He said the following at [68]-[70] (emphasis added):

> *"68. In relation to article 25(2), PERG 27.7.7B, which I have quoted in part above, continues in these terms:*
>
> > *'The activity of making arrangements with a view to transactions in investments is aimed at cases where it may be said that the transaction is 'brought about' directly by the parties. <u>This is where this happens in a context set up by a third party specifically with</u>*

> *a view to the conclusion by others of transactions through the use of that third party's facilities. This will catch the activities of persons such as exchanges, clearing houses and service companies (for example, persons who provide communication facilities for the routing of orders or the negotiation of transactions). A person may be carrying on this regulated activity even if he is only providing part of the facilities necessary before a transaction is brought about.'*
>
> *69. Had it not been for that guidance, with its emphasis on the provision of facilities for others as opposed to assisting one party, I would have been inclined to think that article 25(2) did apply to Watersheds' activity in seeking to assist the company to raise equity finance. As it is, I am persuaded that it does not.*
>
> *70. Even if I am wrong about that, I accept Mr Watson-Gandy's submission that article 25(2) would in any event be excluded by article 27. By agreeing to co-ordinate discussions Watersheds were in my view merely providing the means by which the company and a potential investor would be able to communicate."*

217. In *SimplySure Ltd v Personal Touch Financial Services Ltd* [2016] EWCA Civ 461, [2016] Bus LR 1049, Art 25 was considered by the Court of Appeal. For present purposes, the key issue was whether the activity of a person who interviewed a client to complete part of a standard "*fact find*" form was a regulated activity. The Court of Appeal, affirming the decision of the first instance Judge, held that it was. Sir Stanley Burnton (who gave the only substantive judgment) stated at [26] (emphasis added):

> *"The purpose of the completion of the first part of the fact-find was for the client to buy PMI [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 … which I would approve as a correct explanation of the effect of article 25(1) and (2)."*

218. Although not directly concerned with the present provisions, it is relevant to note that in another context within FSMA Lord Sumption has recently noted that "*'Arrangements' is a broad and untechnical word*": see *FCA* v. *Asset Land* [2016] UKSC 17, [2016] Bus LR 524, at [91].

219. In *Adams* v. *Options SIPP* [2020] EWHC 1229 (Ch), the claim was by an investor who had transferred pension funds on an execution only basis into a SIPP administered by the Defendant, following contact with an unregulated introducer,

CLP. Having done so, the Claimant acquired an investment called "*store pods*" which was held within the SIPP.

220. The Claimant's primary case at trial was that the agreement entered into with the Defendant SIPP administrator was unenforceable under FSMA section 27, but in seeking to establish that proposition he argued that the actions of the introducer, CLP, infringed both Art 25 RAO and Art 53. His pleaded case on Art 25 was based on Art 25(1). That was rejected by HHJ Dight CBE. After referring to *Re Inertia Partnership, Watersheds* v. *Da Costa* and *SimplySure*, at [113] Judge Dight said that RAO Arts 25(1) and 26 "*contemplate the need for a causal link between the act or acts of arranging and the transaction itself*", and that for those purposes a simple "*but for*" analysis would not suffice; instead, the phrase "*bring about*" in Art 26 "*suggests that the arrangements have to be a positive or effective cause.*"

221. Applying that test, he went on at [118] to conclude that on the evidence, the test was not satisfied: the steps carried out by CLP (which included filling out an application form for the SIPP) did not qualify as "*arrangements*" for Art 25(1) purposes because they were essentially administrative and were too far down "*the chain of causation*."

222. The Judge then said, at [123]-[124], that the Claimant's alternative case based on Art 25(2), which had been developed only during the course of trial, was not sufficiently pleaded. But he went on (at [124]) to say that in any event:

> *" … '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."*

223. Pausing there, it seems to me that these authorities are not without difficulty. In particular, and with due respect, I find it difficult to square the conclusion in *Watersheds* v. *DaCosta*, that providing assistance to one party only does not involve "*making arrangements*" under Art 25(2), with the conclusion in *SimplySure*, that assisting one party to complete a "*fact find*" questionnaire *did* qualify as "*making arrangements*" under the same Article.

224. I also have difficulty with Mr Berkley QC's submission that the issue of what constitutes "*making arrangements*" under Art 25(2) should be approached on the same basis as under Art 25(1). There is plainly a potential overlap, but if activity falls within Art 25(2) only when the party performing it has the power to determine the overall outcome, that would seem to give Art 25(2) only a very narrow scope, and on the face of it, it seems intended to be broader in scope than Art 25(1).

225. In my view, it is also useful and appropriate to bear in mind that Art 25 is one among a group of provisions, including the exceptions in Arts 26, 27, 29 and 33, which are interlocking and are intended to operate together. It therefore seems correct to me, in this case, to seek to read them together, in a manner which is consistent.

226. Bearing those points in mind, together with the existing authorities, in my view the proper approach is as follows.

227. To begin with, there is the question of the inter-relationship of Arts 25(1) and 25(2). Insofar as they are both concerned with "*making arrangements*", what is the dividing line between them? In my view, the answer lies in the character of the "*arrangements*" in question, and their actual (or potential) causative effect. To elaborate:

i) The language of Art 26 is illuminating. This tells us what is excluded from Art 25(1): "*There are excluded from [Art 25(1)] … arrangements which do not or would not bring about the transaction to which the arrangements relate*."

ii) The language of "*bringing about*" is consistent with the overall thrust of Art 25(1), which seems directed at arrangements which are likely to have the effect of causing a deal to be concluded ("*Making arrangements for another person … to buy, sell, subscribe …* .")

iii) But Art 25(2) is broader, and seems apt to capture arrangements which, although they do not or would not necessarily "*bring about*" the transaction, in the direct sense of causing it to occur, are nonetheless performed "*with a view to*" encouraging or assisting it to happen. That is reflected in the language of the Article itself: "*Making arrangements with a view to a person … buying, selling, subscribing …* .". The phrase "*with a view to*" describes a more inchoate form of activity, which is not necessarily causative of the transaction in the sense that it brings it about, but which nonetheless helps it to happen. In my view such activities, although not within Art 25(1) (and indeed expressly excluded from it under Art 26), may nonetheless fall within Art 25(2).

iv) I do not consider that the comments on Art 25(2) made by HHJ Dight in *Adams* v. *Options SIPP* (see above at [222]) compel any different conclusion. For one thing, those comments were *obiter*. That case was really about Art 25(1): the Judge's primary finding on the Art 25(2) case was that it was not pleaded and was not available to the Claimant. For another, I do not read HHJ Dight's comments as meaning that the test under Art 25(2) is the same as that under Art 25(1): on the contrary, he expressly accepted that there is a difference between them, because while Art 25(1) requires the "*arrangements*" to be a "*positive or effective cause*" of the transaction, Art 25(2) does not – instead only a "*notional causation test*" applies, which on the facts the Judge held (again *obiter*) could not be satisfied.

v) I note that my reading is consistent with the view expressed by the FCA in PERG 5.6.2G and 5.6.4G, which were expressly approved by the Court of Appeal in the *SimplySure* case. Those comments are made in the insurance context, but provide useful guidance on the operation of Art 25 nonetheless. PERG 5.6.2G states (emphasis added):

> *"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."*

vi) And PERG 5.6.4G states:

> *"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."*

228. On this first point, I therefore conclude, contrary to Mr Berkley QC's submission, that the question of what constitutes "*making arrangements*" under Art 25(2) *does* have to be approached differently to the question of what constitutes "*making arrangements*" under Art 25(1). Given what seems to me the intended breadth of Art 25(2), and given also the conclusion expressed in *SimplySure* about the act of completing a "*fact find*" questionnaire qualifying as an "*arrangement*" under Art 25(2), I am also not persuaded that I should confine Art 25(2) only to those cases where the arrangements involve providing assistance to both parties. Art 25(2) itself speaks of *"[m]aking arrangements with a view to a person ... buying, selling, subscribing (etc.)*". Apart from other factors, the reference to "*person*" in the singular seems to me to suggest that qualifying "*arrangements*" may be directed towards assisting one party only, and the contrary view would exclude from Art 25(2) many matters of obvious interest and concern.

229. What, then, of Arts 27, 29 and 33? Art 27 is there to deal with the consequence, which flows from the above analysis, that the concept of "*making arrangements*" for the purposes of Art 25(2) is very broad. If the idea of "*making arrangements*" for the purpose of Art 25(2) is not confined to activities which "*bring about*" a transaction, then potentially the net is cast very wide, and widely enough in principle to capture means of communication. But such matters are not obviously of a type to engage this particular regulatory framework, and so it is right to exclude them. In my view Art 27 is no more complicated than that, and so I agree with the FCA's view as expressed in PERG 2.8.6A(2), as follows:

> *"Under article 27, simply providing the means by which parties to a transaction (or possible transaction) are able to communicate with each other is excluded from arrangements made with a view to persons entering into certain transactions (see PERG 2.8.6G (2)) only. This will ensure that persons such as Internet service providers or telecommunications networks are excluded if all they do is provide communication facilities (and these would otherwise be considered to be arrangements made with a view to the participants entering into transactions). If a person makes arrangements that go beyond providing the means of communication, and add value to what is provided, he will lose the benefit of this exclusion."*

230. Articles 29 and 33 are more difficult. I approach them as follows:

i) Art 29 endorses as acceptable, and therefore as falling outside the regulatory framework, certain activities which in principle would fall within Art 25(1) and/or 25(2), absent the Art 29 exclusion. But that is only if certain criteria are fulfilled, which it seems to me are designed to protect the position of investors. Thus, making arrangements for, or with a view to, a transaction which otherwise would be regulated, is deemed to fall within the exclusion (and is therefore not regulated), if (a) the transaction is "*with or through an authorised person*"; (b) the transaction is to be entered into on advice by an authorised person, or it is clear in all the circumstances that no advice is being sought from the person conducting the arranging (or if it has been, then the client has been referred on to an authorised person); and most significantly, (c) the arranger is not receiving any pecuniary reward or other advantage from any person other than the client.

ii) These conditions all operate to safeguard the position of parties who might otherwise be vulnerable to the problems which can easily arise when non-authorised persons stand to obtain a reward or pecuniary advantage from making arrangements which either bring about, or assist in bringing about, deals in investments. Consumers are protected because if any pecuniary reward or other advantage is obtained which is not accounted for to the client, then the benefit of the exclusion is lost and the activity is again regulated. Likewise, the transaction contemplated by the "*arrangements*" must be "*with or through*" an authorised person, so that the transaction framework must involve someone who is authorised and who owes regulatory obligations accordingly. And there must be advice from an authorised person or it must be "*clear in all the circumstances*" that advice is not sought from the arranger. By means of these safeguards the client is protected.

iii) It follows that in an Art 29 case, an arranger can earn a pecuniary reward only if it comes from the client or if it is accounted for to the client.

iv) As I read it, Art 33 is more generous to the unauthorised arranger, because it allows such a person to earn a pecuniary reward or advantage from someone *other than the client*, but only in much more limited circumstances. Those limited circumstances provide enhanced protection. Thus, unlike under Art 29, the "*arrangement*" in question must be of a particular type. It must be an *introduction*. Moreover, it must be an introduction to a particular type of person (an authorised person or exempt person), and crucially it must be for *a particular purpose*. That is the purpose identified in Art 33(c): the introduction must be 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 …* ".

v) This provides enhanced protection because, unlike Art 29 (which in principle can apply even if no advice is given by an authorised person), under Art 33 there must be such advice (or the independent exercise of discretion) before the exception can be engaged. That is justified, it seems to me, because of the increased risk which arises from the possibility of the arranger earning a

pecuniary reward or advantage from someone other than the client. The requirement for independent advice or the independent exercise of discretion means that, notwithstanding the financial interest of the arranger, there is a filter involving an exercise of judgment by a regulated party before the client is exposed to any risk.

vi) This reading of Art 33 is in my view consistent with the FCA's position, as expressed in PERG 8.33.5G:

> "*In the FCA's view, article 33 will apply, for example, where persons are finding potential customers for independent financial advisers, advisory stockbrokers or independent investment managers. In this case, the introducer is allowed to receive a payment for making introductions. However, it will not apply where the introductions are made either to a person whose advice or management services would not be independent (for example, a product provider such as a life office or a manager of unit trust schemes or contractual schemes) or for the purposes of execution-only dealing.*"

vii) The language of Art 33 has been the focus of some disagreement between the parties in this case. This has been expressed as a point of syntax on subparagraph (c). The FCA says that is to be read as follows:

> *"(c) The introduction is made with a view to the provision of*
>
> *[Either] independent advice or the independent exercise of discretion*
>
> *[and, in either case,]*
>
> *[either] in relation to investments generally or in relation to any class of investments to which the arrangements relate."*

viii) The alternative, contended for by the Defendants, is as follows:

> *"The introduction is made with a view to the provision of [either]*
>
> *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."*

ix) As will be clear, the difference in practical terms is in defining the scope of the type of independent advice which will engage the exception. Must it be "*independent advice*", without qualification (which the Defendants say would include advice on a narrow basis, for example in relation to one investment option only); or must it be, "*independent advice … in relation to investments generally or in relation to any class of investments to which the arrangements relate*" (which would appear to enlarge the scope of the required advice, so as to include, for example, an assessment of the suitability of any particular investment product as against other investment options)?

x) On this point, I prefer the FCA's construction. The syntax of Art 33 is a little unclear, but in my view its purpose, on the basis of my analysis above, is perfectly plain. It is designed to provide a safeguard to investors in the case where a non-authorised person may be looking to obtain a profit out of the arrangements he has put in place. In those circumstances, it seems to me natural to construe the language in a manner which affords greater, not lesser, protection to the investor. If I am wrong about the syntax, I would nonetheless hold that the phrase "*independent advice*", even taken alone, must in context require advice of a type which adequately addresses the potential risk to the consumer from the "*arrangements*" the arranger is seeking to profit from.

xi) In my view, the same general concerns must underlie the proper interpretation of the phrase in Art 33(c), " *... the independent exercise of discretion in relation to investments generally or in relation to any class of investments to which the arrangements relate*." I will address this point further below, in looking at the position of the SIPP administrators, in particular Liberty SIPP.

231. In light of the above, it seems to me that the following main questions arise. I will address them below, first in relation to the Avacade model, and secondly in relation to the AA model. Although I separate them out here for the purposes of analysis, in truth they overlap with one another, as will be apparent in what follows:

i) Did the steps undertaken by Avacade and AA involve them "*making arrangements*"?

ii) If there were arrangements, it possible to treat the SIPP transfer and the investment in each case as distinct and non-dependent transactions, with the effect that the commissions received by Avacade and AA in connection with investments *arose out of* the arrangements in relation to the investments only, and not out of Avacade or AA making arrangements in relation to the SIPP transfers? If that is correct, then are the remaining criteria in Art 29 satisfied in relation to the SIPP transfers, such that any arrangements made in relation to them fall within the Art 29 exclusion?

iii) Again, if there were arrangements, were they (1) with a view to a person who participated in them buying or selling securities (Art 25(2)), or alternatively (2) arrangements in the form of an introduction *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 (Art 33)?

Application to Avacade

Overview

232. Dealing then first with the position of Avacade, and concentrating on the Avacade Model as it seems to have operated from late 2011 onwards (see above at [92]-[114]), the following points seem to me to be significant.

233. I start with the background to, and genesis of, the Avacade model. I think the history is important:

i) It seems clear to me that Avacade's early experiences, with TailorMade in particular, had persuaded its management that the real business opportunity lay not in effecting introductions to IFAs from which they would earn a fee, but instead in making available products from which they could earn commissions.

ii) To my mind that explains Avacade's interest in the development of the Hotpods product. Whether or not Avacade's management played any active role in the development of the product or not, they were interested in it because it was an investment which they could make available through their network and from which they could potentially earn commissions.

iii) For the same reason, they were not interested simply in sourcing consumers who could be introduced to TailorMade, in order for TailorMade to advise on the pensions transfer and (it seems) for another company in some way linked to TailorMade to make a commission out of sale of their hotel investment. That explains why, when Avacade finally engaged with TailorMade in late 2010 or early 2011, it was on the basis that TailorMade would give advice on the pensions transfer aspect, but the client would then be "*passed back*" to Avacade so it could deal with the question of the investments: it was the investment aspect Avacade was interested in, and from which it would make its money. That was the real focus of attention.

234. If, as seems clear, the real prize for Avacade was an investment into one of the products from which it could earn a commission, the attraction of sourcing consumers who would agree to transfer their existing pension pots into a SIPP is again obvious: such a transfer would provide both a source of funds, and a vehicle or "*wrapper*", through which that could happen.

235. That idea seems to have been central to the TailorMade model, at least as Lee describes it in his evidence, and it seems it also came to characterise the 1Stop business model, at least from the point in time when (according to Lee) 1Stop also came to be interested in the pension transfer aspect as part of an overall process which would involve commissions being made on investments by a non-regulated company (see [71] above).

236. At any rate, looked at in this light, it again seems to me obvious that the attraction of offering an initial, "*non-advised*" pension report (the innovation which came from 1Stop) was that it carried with it the potential for a source of funds to be liberated (from an existing pension) which might then be used to invest in commission-generating investments.

237. There was a further attraction as well. Although I accept Lee's evidence that in earlier periods, Avacade's work with TailorMade had involved it routinely referring consumers to TailorMade for advice on their pension transfers, Lee's own evidence is that this changed with the advent of the 1Stop model and the pensions report, part of the purpose of which was to "*filter out clients who did not want advice or whose pension was too small*." Under this model, although clients were given the option of taking advice, it seems they were not required to.

238. When the idea of the "*initial factual non-advised report*" was added to the innovation of the execution only transfer, the core features of the Avacade model were complete. To quote again from Lee's written evidence:

> *"The first LOAs started to be generated in November 2011. At this time … We were producing a non-advised pension report … and if the client opted for financial advice, they had a range of options available to them. If they opted for an execution only transfer, then they could choose Liberty SIPP if they wished."*

239. By late 2011, the platform was set for a period of heavy activity by Avacade:

    i) It had a stable of investments available from which it could generate commissions. At this point the main investments were Ethical Forestry, Global Plantations, Sustainable AgroEnergy and Mosaic Caribe.

    ii) The idea was to offer a free pension report to consumers. They would be offered the option of taking advice, and if they wanted it then according to Lee there were agreements in place with a number of IFAs to whom clients could be referred (he mentions TailorMade, 1Stop, Generation Financial Services and the Pension Specialist). But significantly, it was an option *not* to take advice, either on the pension transfer aspect or on investments, and instead to conclude an execution only arrangement via Liberty SIPP or Berkeley Burke.

    iii) In any event, Avacade's real financial and commercial interest was in the commissions it would receive at the end of the process if investments were in fact made. That was the desired end-point and the real prize.

240. Viewed against that background, it seems to me inescapable that the structures put in place by Avacade from late 2011 onwards were both "*arrangements*", and moreover were "*arrangements with a view to a view to the consumers who participated in them buying or selling securities*" (Art 25(2)).

241. Equally, they were not in my judgment arrangements amounting to no more than an introduction with a view to the provision of independent advice or the independent exercise of discretion.

242. I express those conclusions for the following reasons.

"*Arrangements*"

243. *First*, the following steps identified at [92] to [114] above to my mind all qualify as "*arrangements*" within Art 25(2), namely:

    i) the initial contact and in particular the obtaining of an LoA, in order to facilitate the collection of information about consumers' existing pension arrangements;

    ii) the subsequent process of collecting in information from existing pension providers, and the generation of the Pension Report using that information;

iii) the telephone calls to consumers - i.e., the Welcome Call, the Pre-Report Call, and Report Call and the Investment call;

iv) the completion of application forms on behalf of consumers. Avacade asked the questions and completed the forms for both the SIPP transfer and the investments, and customers were then asked to sign where indicated;

v) the processing of application forms when completed, with Avacade acting as a hub for the collection and onward transmission of such forms both to SIPP providers and the investment providers.

244. It is possible that a number of these steps would in fact also qualify as "*arrangements*" within the narrower specification of Art 25(1), in the sense that they are sufficiently important that they serve to "*bring about*" the relevant transaction (for example, the filling out and processing of application forms). But unquestionably to my mind they all fall within what seems to me to be the much broader scope of Art 25(2), because they were all undertaken "*with a view*" to a transaction coming about (i.e., for the purpose of encouraging it or assisting it to happen, whether or not directly a cause of it happening). The preparation of the Pension Report, for example, and the discussions with consumers which both preceded and followed it, were all undertaken for the purpose of seeking to bring about a situation in which existing pension funds would be liberated and made available for the purchase of new investment products.

245. I should say that to my mind it makes no difference to this analysis that the initial calls were in many cases made by Richmond Solutions, i.e., by staff at the Ethical Forestry call centre. This is for two reasons. First, whether or not these initial steps were conducted by persons acting on Avacade's behalf, it is entirely clear that the later steps (including the later telephone calls) certainly were. Second, on the evidence it is clear that those calling from the Richmond Solutions call centre were authorised to do so on Avacade's behalf: as noted above, Lee accepted during cross-examination that Richmond Solutions called consumers "*on behalf of Avacade*" and that consumers "*would believe they were getting called from Avacade*".

246. For similar reasons, it seems to me that in periods from June 2012 onwards, it makes no difference to the analysis that contact with the pension funds was via a covering letter and LOA on Cherish letterhead. First, even if these initial steps are properly characterised as having been undertaken by Cherish, and therefore not arrangements with which Avacade was concerned, the fact remains that the later steps were certainly conducted by Avacade. Second, on proper analysis, they were not undertaken by Cherish. Both Mr Hewitt's evidence in cross-examination, and Craig Lummis' evidence in interview, was to the effect that Avacade personnel were involved in the processing of the covering letters and LoAs. And as Mr Hewitt accepted when cross-examined, the correspondence in Cherish's name was sent before consumers could be said to be clients of Cherish: that only ever happened later, if and when clients were referred to Cherish, after the Report Call. In the circumstances, it seems to me that these early steps in the process qualify as an "*arrangement*" by Avacade, irrespective of whose stationery was used.

Art 27: Means of Communication

247. *Second*, I do not think that the Art 27 exception is relevant in this case. On any view, Avacade's activities involved a great deal more than simply providing a means of communication. I am not persuaded that Holroyde J.'s *obiter* view expressed in the *Watersheds* case (see above at [216]), that in co-ordinating discussions Watersheds were merely providing a means of communication, compels any different conclusion. Whatever the position in that case, it seems to me clear that here, the activities of Avacade went well beyond the mere provision of means of communication. They were themselves integral to the overall process by which SIPP transfers took place and investments came to be made.

Art 29 Exception: Pecuniary advantage "arising out of" the arrangements

248. *Third*, I agree with the view that it is not possible, in assessing the availability of the exclusion in Art 29, to treat as distinct the pensions transfer aspect and the investment decision. Again, that seems to me to follow from an understanding of the purpose of the various steps in the chain, even back to the very initial steps. To amplify:

i) The Art 29 exclusion has no application (and therefore the arrangements in question remain a regulated activity) if the arranger (here Avacade) "*receives … any pecuniary reward or other advantage … arising out of his making the arrangements*."

ii) Although one might say, looking at the steps in the Avacade model, that there is a natural break point when the consumer decides to transfer into a SIPP (after which the focus shifts to the question of which investments will be acquired), I do not think it follows that the earlier steps prior to the SIPP transfer can be divorced from what happens later. That is for two reasons. First, structurally the transfer into a SIPP was only an intermediate step, not an end in itself. Its purpose, as I have already explained, was to liberate a source of funds to pay for possible new investments and to provide a vehicle or "*wrapper*" through which they might be acquired. Second and in any event, the evidence indicates that even in the early stages of the process, there was discussion of topics which ultimately would feed into the later decision about investments: see my summary of the Pre-Report Call, above at [98]. The two, inter-related objectives (transfer into a SIPP and the making of investments) were commingled in the same arrangements even in the early parts of the overall process.

iii) Likewise, the later steps constituting "*arrangements*" (the Investment Call in particular), would not have taken place without the SIPP transfer happening.

iv) To express it more crisply, the earlier parts of the process were designed to bring about a situation in which the later parts could happen. The SIPP transfer was not an end in itself; it was a staging post along the road to the ultimately desired outcome.

v) In those circumstances, and looking again at the language of Art 29, the question is: did Avacade's commission payments arise out of it making the arrangements it did? In my judgment, the answer is clearly yes. It earned its commissions because *all* the steps constituting the arrangements were undertaken, including those before the decision to transfer. It is just as

> meaningful to say that the commissions arose out of Avacade making those early arrangements as it is to say that they arose out of the arrangements occurring after the transfer, because without the prior steps the later ones would not have occurred; and the earlier "*arrangements*" were only in place at all in order to create a situation in which the later ones could happen. In truth, it was all one set of "*arrangements*."

249. Although they are not directly relevant, I am fortified in taking that view by a number of decisions in which the Courts have rejected attempts to divide up transactions into discrete elements, or to separate out regulated from unregulated activities when in substance they are the same thing – see for example *Walker v Inter-Alliance Group plc* [2007] EWHC 1858 (Ch), per Henderson J. at [29]; *Emptage v FSCS* [2013] EWCA Civ 729 at [15-20]; and *R (on the application of TenetConnect) v FOS* [2018] EWHC 459 (Admin) at [58-59].

250. I note in any event that, as the FCA pointed out in their Written Closing, Avacade received payments from Berkeley Burke (a SIPP provider) of £750 per client, in respect of a number of clients referred on an *execution only* basis. I think even Mr Berkley QC would be forced to accept that these are examples of a pecuniary reward or advantage "*arising out of*" the arrangements for the SIPP transfer, in a manner which excludes the operation of Art 29 on any view.

Art 33 Exception: independent advice or independent exercise of discretion

251. *Fourth*, I am satisfied that the arrangements above were not an introduction "*with a view to the provision of independent advice or the independent exercise of discretion*", etc., so as to bring them within the exclusion in Art 33.

252. The words, "*with a view to*", as I have already noted, to my mind demand an assessment of the purpose of the activities. What were they for? Or to put it another way, what end result were they intended to achieve?

253. Here, whichever one looks at it, it seems to me that the real purpose of the arrangements described was to seek to bring about a situation in which the desired investments would be made and the commissions earned. That is certainly true of the arrangements looked at as a whole, but it is also true, it seems to me, of any of the individual steps looked at alone, if the overall context is borne in mind. It seems to me correct that it should be. I proceed on the basis that the test is an objective one, and if so, it must be correct that the context in which any individual step takes place must inform its overall characterisation. Indeed, it is difficult to see how one could properly assess the true purpose of any individual step without looking at the overall matrix within which it occurs.

254. Take one of the initial steps in the process, for example, namely the collection of data from existing pension providers by means of the sending of the LoAs. What is that step "*with a view to*"? Looked at in context, and bearing in mind Avacade's own commercial interests as a business, it seems to me fair to say it is "*with a view*" to bringing about a situation in which existing pension funds are liberated and then invested in products from which Avacade might make a commission. It is true to say that that step in itself does not and could not bring about the desired overall outcome, and it is also true to say that there were many further steps to be taken and that at any

point the consumer might decide to terminate the process and therefore frustrate the desired outcome, after having taken advice or not. None of that, however, affects the answer to the question: why was the step taken? Avacade did it because it thought that collecting data on existing pension arrangements would help bring about a situation in which ultimately new investments were made and commissions paid. The data was collected "*with a view*" to that happening; or, to put another way, without the possibility of that happening as a potential (and from Avacade's point of view, desirable) outcome, it would not have had a process for the collection of data at all.

255. I think the same logic can be applied to all the other steps I have identified as "*arrangements*". They were undertaken by Avacade because it had the same overall end-point in mind. Had that not been an available end-point, the actions would not have been undertaken. Thus, it seems to me, they were all undertaken "*with a view*" to it happening. Moreover, since they all had the same overall purpose, it seems to me artificial to separate them; it is much more natural to look at them as a whole.

256. I am fortified in that view by the scale of the Avacade enterprise. There are a number of indicators.

257. For example, the Memorandum of Understanding signed with Project Kudos in relation to the REIUSA product in April 2013 said that Avacade was planning to sell £15m of that investment over the next financial year.

258. There is also the volume of calls made from the Richmond Resources Call Centre The matter was addressed by Lee Lummis in interview:

> *"GAYTON: And how many people were in that call centre at Richmond Solutions?*
>
> *LL: I think at the very peak they said there was 40 plus, I think…".*

259. In an Avacade board meeting on 11 September 2013, a target figure for the Richmond Solutions Call Centre of 700 LoAs per month was discussed. The minute reads as follows:

> *"CL & RF attended a meeting at Richmond office to discuss the strategy for increasing the current average of 700 LOAs per month."*

260. An issue developed between the parties during trial as to whether there was some form of understanding between Ethical and Avacade that, in return for Ethical making the Call Centre facility available, Avacade would ensure that the lion's share of investments by those who chose to transfer would be in Ethical Products. Although Lee in his evidence said that the high proportion of investments into Ethical came about naturally, because its promise of relatively short term returns made it attractive, it seems to me likely there was some form of loose understanding that a certain volume of business would be funnelled in the direction of Ethical. As the FCA pointed out in their Closing, when pressed Lee accepted that Ethical had said something about the desired number of investments "*preceding opening the Call Centre*", and further:

i) In interview, Craig Lummis suggested that "*If we were to give them 60% they were happy with that and that was kind of a business model that we tried to work with*", and he accepted that Avacade needed to "*hit a certain amount of pension transfers going into Ethical Forestry to keep that relationship going.*"

ii) Mr Fox referred to an informal contract: "*Any LOA from them they did not want us not to recommend their product, it had to be recommended*."

iii) Kerry Bell referred to the understanding that investments would be "*put that way*" and that "*it was known across the business that fifty percent of any investment amount would go into Ethical Forestry*."

261. The relevance of these points in the present context is in informing the proper characterisation of the "*arrangements*" which existed from late 2011 onwards. Both for Ethical and for Avacade, the structures they put in place were there to support their businesses. Those businesses made money out of selling investments, and they were interested in the number of LOAs generated not as an end in itself, but because of the relationship between that number and the ultimate conversion rate into actual investments from which they could profit. That gives one a very clear indication as to the purpose for which the LoAs were produced, and likewise data collected in and Pension Reports produced; those steps were all taken "*with a view to*" investments being acquired and therefore commissions paid.

262. What of the point made by the Defendants that certain parts of the Avacade "*arrangements*" involved the possibility (or in some instances, the requirement) for advice to be taken from an IFA, or involved the independent exercise of discretion by SIPP administrators?

263. I will deal with the AA/BlackStar period below, but in the period of Avacade's activities, these points seem to arise in the following three ways:

i) First, as already noted above, the Avacade Model, copied as it was from the 1Stop model, on the face of it gave consumers an option to take advice. This possibility was flagged in the Pension Report and discussed in the Report Call. Lee in his evidence placed some emphasis on this fact, and said that in practice many consumers (he said hundreds) in fact chose to take "*full advice*" on both pensions and investments from various IFAs (including Cherish). To illustrate this, he referred in particular to a set of spreadsheets (18 in total) which were added to the trial bundle during the course of trial. These were documents created by Cherish, showing consumers who took advice but did not invest in any of the products referred to in the Avacade Client Schedule. All the consumers listed in these spreadsheets had occupational pensions, and Cherish did not have the necessary authorisation to process the type of report needed to advise on transfer of an occupational pension (a particular form of report was required showing the relevant transfer value – a "*TVAS*" report), and so they outsourced the work to another IFA, called Portal Financial. The spreadsheets are weekly updates from 2014 showing the progress of cases referred to Portal for this purpose.

ii) Second, as already explained above, when the InvestUS and REIUSA products came to be made available by Avacade, consumers who were interested in those products were referred on to Cherish.

iii) Third, there is the point made by Mr Berkley QC in submissions, that the action of a SIPP administrator or trustee, in giving effect to a decision made by a consumer to purchase a particular investment, involves an "*independent exercise of discretion in relation to investments generally or in relation to any class of investments to which the arrangements relate*."

264. Do any of these points take the "*arrangements*" I have described out of Art 25(2) and into the body of the exclusion in Art 33?

265. I think not. Taking them in turn, I say that for the following reasons.

266. (1) Advice Option: To begin with, the point that in some (perhaps even many) cases, referrals may have been made for "*full IFA advice*", even if taken at face value, does not to my mind alter the character of the Avacade "*arrangements*" when looked at objectively, and does not demand a different answer to the question, "*What was the purpose of the arrangements*?", or "*What were they put in place with a view to achieving?"*

267. The true purpose is illustrated by the cases on the Avacade Client Schedule, and in particular by the significance in financial terms for Avacade of the commissions generated from those cases. As already noted above, total commissions generated from the cases on the Avacade Client Schedule come to around £10.6m (see above at [167]). Lee accepted in cross-examination that this represented the vast majority of Avacade's income, rather than clients referred for full IFA advice. This is borne out by the banking analysis, which shows that Avacade received just £10,859 from Cherish. Fees from "*full IFA referrals*" to Cherish were minimal.

268. Moreover, looking at the cases in the Avacade Client Schedule, and as the FCA pointed out in their submissions:

i) The vast majority of investors on the Schedule transferred their pensions on an "*execution only*" basis. Only a small number of investors (76 out of 1943) are said to have received "*Pension Advice*". The remainder received no advice at all on their pension transfer.

ii) 652 out of 1943 are said to have received "*Investment Advice*" (this appears to be a reference to the "*Attitude to Risk Report*" from Cherish on InvestUS/REIUSA only, which I will come back to below).

269. To my mind, these points illustrate very clearly the true purpose of the Avacade "*arrangements*." They were put in place with a view to encouraging a transfer of existing funds into a SIPP, to provide an available pool of funds and a vehicle for the acquisition of investments from which Avacade could earn commissions.

270. In order to achieve that overall objective, a structure was put in place which allowed for the possibility that certain consumers might wish to take advice from an IFA, but the fact that that option was made available was incidental to the true objective of the

"*arrangements*" looked at as a whole. Likewise, the fact that some (or perhaps even many) consumers may have chosen to take advice, or even (having done so) may have chosen to opt out of the structure entirely, seems to me incidental to its proper characterisation. The process allowed for some filtering or wastage. The fact remains that it was devised and put in place not in order to effect introductions to IFAs, as a means in itself of generating income (which it seems to me is the real focus of Art. 33). Instead it was put in place with a view to achieving a very different result altogether as its desired outcome and end-point.

271. (2) Cherish: Next there is the question of the referrals made to Cherish in relation to the InvestUS and REIUSA bonds. Does the fact that those referrals were made alter the true characterisation of the "*arrangements*", at least in those cases where consumers invested in the two relevant bonds?

272. I think not, for two main reasons. First, I think the same point made already above in relation to "*the arrangements*" as a whole continues to apply. They were not put in place with a view to encouraging a referral to Cherish for the purposes of it giving independent advice. They existed with a view to a different overall objective. Moreover, even if one were to carve out that part of the "*arrangements*" relating solely to the referral to Cherish (one might say, for example, that any individual steps taken to provide documentation or information to Cherish were "*arrangements with a view to the provision of independent advice*", at least when looked at in isolation), that would not mean that Avacade did not have in place other arrangements which were "*with a view to*" a different outcome. The preparation and presentation of the Pension Report, for example, would still on this analysis have been undertaken "*with a view to*" facilitating a transfer of existing pension funds into a SIPP, and the eventual acquisition of investments from which Avacade would make a commission.

273. Second and in any event, I do not consider that the service provided by Cherish in relation to the InvestUS or REIUSA bonds properly qualified as "*independent advice*", within the meaning of that phrase in Art 33. The issue of the role played by Cherish was a matter of particular concern for Lee at trial, and proved controversial. The critical matters, however, seem to me to be either common ground or entirely clear on the basis of Mr Hewitt's evidence:

    i) Although there was some dispute about it, the evidence in my view supports the conclusion that the InvestUS and REIUSA bond products – although not mentioned by name – did feature in the Investment Calls with consumers. One of the documents relied on by Lee himself says so in terms: this is a referral form from Avacade to Cherish, which contains a statement by consumers that they had "*been given some basic information about a property investment opportunity in the USA 'InvestUS – The Exit Strategy'…* ." The transcripts support the same conclusion, and in some cases include a suggestion as to the amount to be invested – the transcript of an Investment Call between Stuart Astell and Lesley Kruck, for example, contains a long description of the investment, and a figure for investment is proposed of "*round about a third of the pension*", i.e., £35,000. In evidence Mr Hewitt also accepted that Avacade was to discuss "*a*" property investment in the US, and would also agree the sums to be invested. This ties in with the evidence about the use of the "*investment calculator*" during the Avacade Investment Calls, which I deal with below (see at [318(v)]).

ii) It follows that consumers, when referred to Cherish, already had a particular investment in mind.

iii) Thereafter, I think it is clear on the evidence that Cherish's role was limited to consideration of the bond products only. In interview, both Craig and Lee Lummis confirmed that Cherish did not purport to comment on other products. They only discussed REIUSA (or, presumably, InvestUS, the predecessor product).

iv) Moreover, I also think it clear that Cherish's role was limited to conducting an attitude to risk assessment on behalf of the consumers referred to it, rather than providing advice on the appropriateness of the bond products as investments in a more general sense. Although not directly conceded by Lee in his evidence, this conclusion is supported by the following points (amongst others):

a) It was admitted by Mr Fox in his Defence.

b) In interview, Craig Lummis described Cherish's role as follows:

> *" .. they did a generic risk profile for that client and advised around the product of the RE Invest US. ... they didn't really have a remit on the other products…".*

c) Likewise, Ray Fox referred to an "*attitude to risk questionnaire*" from Cherish, and Kerry Bell (herself an investor as well as an Avacade employee) said that Cherish "*completed a risk profile*" on the basis that "*if I failed the risk profile I would then be declined to go forward with that product*".

d) In the referral form from Avacade to Cherish (already mentioned above at [273(i)]), the consumer asked to be considered "*with regards to my suitability to invest*" into the product, rather than for advice about the product's suitability for the consumer.

e) Mr Hewitt accepted in cross-examination that Cherish signed off on any investment into the REIUSA Bond providing the consumer had an attitude to risk above a pre-set level.

f) This is consistent with the documentation. Mr Kemp for example received a Risk Tolerance Report from Cherish, dated 21 August 2013, which stated that the advice provided was "*specifically limited to whether you are Risk Tolerant to invest into Real Estate Investment USA PLC*", and that Cherish had not undertaken a full review of Mr Kemp's financial circumstances. It contains no advice on the suitability of the bond. Although the Report does reflect the FSA's recommendation at the time that people should invest no more than 5% of their wealth in non-regulated investments, Mr Hewitt conceded during trial that the Report was sent only after the investment was made. Large parts of the Report were no more than a cut-and-paste from the Offering Memorandum for the REIUSA product.

274. Coming back to the language of RAO, Art 33, in my judgment these features of Cherish's role make it inadequate to qualify the "*arrangements*" entered into by Avacade as falling within the exception, i.e., as having been made "*with a view to the provision of independent advice …*":

i) I have already expressed my view that the phrase "*independent advice*" within Art 33, properly construed, means "*independent advice … in relation to investments generally or in relation to any class of investments to which the arrangements relate.*" Give the overall purpose of the provision when looked at in context (see above at [230(x)]), in my view it makes sense to construe the language in that way. Even if I am wrong about the structure and syntax of Art 33(c), it nonetheless seems to me that the "*independent advice*" to be provided, in order to engage the exception, was required to be of a type which adequately addressed the potential risk to the consumer from the "*arrangements*" the arranger (Avacade) was seeking to profit from.

ii) On either view of it, in my judgment the advice provided by Cherish was inadequate; it was limited in scope to an assessment of the individual consumer's attitude to risk in relation one particular product, and it did not involve any assessment of the suitability of that product in relation to other products, or consideration of other investment strategies which might be available and which did not involve investment in the InvestUS or REIUSA bonds at all. It seems to me that, in order to provide the form of protection on which availability of the exception in Art 33 depends, that is what was needed; or at any rate, something broader than the narrow and formulaic assessment, based on limited criteria, which Cherish in fact provided.

275. (3) Role of SIPP Providers: Finally under this heading I must deal with Mr Berkley QC's submission that the role played by SIPP trustees involved them engaging in an "*independent exercise of discretion in relation to investments generally or in relation to any class of investments to which the investments relate.*" This submission is relevant particularly to the execution only cases, in which on any view, there was never any "*independent advice*"; indeed, the whole point of the execution only model was that advice was not needed.

276. Mr Berkley QC's argument was effectively that the decision by a SIPP trustee to give effect to an instruction to invest in a particular product was more than an automatic, rubber-stamping exercise. Such trustees had their own discretion to exercise in determining whether to give effect to the instruction. In doing so, as authorised persons, they owed their own obligations towards consumers under the FCA's regulatory framework. Avacade's management assumed at the time that the SIPP administrators and trustees were acting as required by that framework, and indeed were entitled to do so and to take at face value the legitimacy of a structure which had the endorsement of an authorised person and which the FCA was allowing to continue.

277. In developing his submissions, Mr Berkley QC relied on *R (Berkeley Burke SIPP Administration Ltd)* v. *Financial Ombudsman Service Ltd* [2018] EWHC 2878 (Admin). In that case Jacobs J. dismissed a claim for judicial review of a decision of the Financial Ombudsman Service ("*FOS*"), in which the FOS had upheld a complaint against Berkeley Burke (the same SIPP administration company which features in this

case), on the basis that in the context of providing an execution only service, the FCA Principles binding on it as an authorised person required it to go further than simply determining whether any given investment was "*SIPPable*" (i.e., qualified for beneficial tax treatment under HMRC rules), and went as far as requiring it to "*look carefully*" at the investment it was allowing the consumer to invest in, which in practice meant it should (for example) have conducted sufficient due diligence and ensured that the investment was genuine and not a scam.

278. On the application before him Jacobs J. held that the Ombudsman's approach, which effectively involved the *execution only* terms agreed with the customer being enhanced by the operation of the FCA's Principles, did not involve any error of law. In exercising his jurisdiction to determine whether the authorised person had acted fairly and reasonably in all the circumstances, the Ombudsman was entitled to conclude that Berkeley Burke had failed to do so having regard to the Principles, notwithstanding the apparently limited scope of the agreement with the customer.

279. Mr Berkley QC says that the same logic should apply here, and that if it is right to say that the SIPP administrators and trustees were required not merely to rubber-stamp directions given to them by consumers, but instead owed broader regulatory obligations under the FCA Principles which required them to "*look carefully*" at the investments in question, that means they were required to "*undertake an independent exercise of discretion …* ", within the meaning of that term in Art. 33.

280. In my view, that is stretching the logic of the *Berkeley Burke* decision further than it can reasonably be said to go:

i) The test in Art 29 is in fact whether "*the introduction is made with a view to … the independent exercise of discretion in relation to investments generally or in relation to any class of investments to which the arrangements relate*" (my emphasis).

ii) In this case, looking at the terms of engagement of the relevant SIPP providers during the Avacade period (Berkeley Burke and Liberty SIPP), I agree with the proposition that their terms of engagement gave the SIPP *some* discretion to decline to accept investments, even if nominated by the consumer. Thus, for example, the "*Terms & Conditions of the Liberty Pension Scheme*" provide at clause 5 that " *… the Trustees are not obliged to give effect to your due exercise of an investment decision/direction.*" Certain situations are then described in which the Trustees shall cease to give effect to any investment decision or direction, including (a) mental incapacity of the person giving the direction, (b) where giving effect to the direction may in the opinion of the Trustees "*breach any applicable law, regulation or requirement*", and (c) "*the occurrence of some event or circumstance*" which makes it "*inappropriate to continue to follow your directions*."

iii) The question, though, is whether the introduction effected by Avacade was "*with a view*" to the discretion afforded by these provisions being exercised "*in relation to investments generally or in relation to any class of investments to which the arrangements relate."*

iv) I think not. That language seems to me apt to describe the situation in which, for example, an introduction is made to an independent investment manager, whose role involves exercising discretionary authority in the selection of investments, either generally or from a pre-agreed pool. It does not seem to me to contemplate the exercise of what is really a residual discretion to refuse to act on instructions. There is a form of discretion at play in such cases, but in my view it is not the type of discretion contemplated by Art. 33(c), because in substance it involves nothing more than a binary, yes/no decision by the SIPP trustee or administrator, and I do not think such a decision can properly be described as the exercise of a discretion "*in relation to investments generally or in relation to any class of investments to which the arrangements relate."*

v) Neither do I think one can sensibly say that the introductions to the SIPP administrators and or trustees in this case (even if one accepts that the arrangements in were nothing more than introductions) were undertaken "*with a view*" to the exercise of a discretion of the type mentioned, or in reality of any type. The purpose of the arrangements was certainly not to seek to introduce consumers to someone who would exercise a general discretionary power on their behalf, as investment manager or otherwise. Neither do I think it a realistic characterisation of what happened to say that the introductions were even "*with a view*" to the SIPP providers exercising a discretion in the form of a yes/no decision as to whether to accept the nominated investments or not. The purpose of the referral was in order not for the SIPP providers to make *a decision* of that type (even if it was, or should have been, part of their role): the purpose of the referral was so that a structure would be available through which investments could be made.

Application to AA

281. I must now deal with the position of AA, as it relates to Art 25(2) RAO and the exceptions thereto.

282. In many ways, this is the same as, or very similar to, the position of Avacade.

"Arrangements"

283. To begin with, and in line with the FCA's submissions, I have no doubt that at least the following steps in the AA business model described above involved the making of arrangements, for the purposes of Art 25(2):

i) The steps taken by AA to contact consumers, obtain information about their existing pensions from pension providers and produce a Pension Report.

ii) The telephone calls made to consumers by AA staff, including in particular the Pre-Report Call, the Report Call and the Investment Call.

iii) The completion by AA of the Risk Questionnaire during the Report Call, and of the Financial Questionnaire during the Fact Find Call.

iv) The production, provision and receipt of electronic documents.

284. Once again, not all of such steps would necessarily have been causative of a transaction actually being concluded, but in my judgment that is not the test under Art 25(2) (cf Art 25(1)). The point is that they did all have the effect of contributing to, or encouraging, the conclusion of a transaction.

Art 27 exception: means of communication

285. For the reasons already given above, I do not think the exception in Art 27 RAO has any relevance here. It is obvious when one considers the above steps that AA, like Avacade, was doing a great deal more than merely providing a means by which parties could communicate with each other.

Art 29 exception: pecuniary reward "arising out" of the arrangements

286. Likewise, I am not persuaded that the exception in Art 29 RAO applies. It is available only in cases where the arranger does not receive from any person other than his client *" ... any pecuniary reward or other advantage ... arising out of his making the arrangements*". Here, AA did receive a pecuniary reward or advantage. I say that for two reasons:

i) It received payment of commissions in those cases where the consumers transferred their existing pension funds into a SIPP and then invested in the Paraiba bond. For all the reasons given above, I do not think it realistic to divorce the one from the other. I therefore conclude that the commissions "*arose out*" of AA making the arrangements I have described, in the sense that they are as much attributable to the steps which preceded the transfer into a SIPP as they are to the steps occurring after.

ii) Further, as noted at [141] above, according to the Defence served by AA, Craig and Lee at paragraph 127, AA obtained a fee of £95 from BlackStar for each consumer referred. This was a further pecuniary advantage to AA arising out of the arrangements it put in place, which was permitted if the exception in Art 33 applied, but disqualified AA from relying on the exception in Art 29.

Art 33 exception: independent advice or independent exercise of discretion

287. The more substantive point concerns Art 33, and whether AA's activity can properly be characterised as amounting to no more than an introduction to an authorised person (BlackStar), " *... 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.*"

288. My conclusion is that this exception is not available in the case of AA either, just as it was not available in the case of Avacade. That is essentially for two reasons.

289. *First*, and leaving aside for the moment any question about the quality or scope of the advice to be provided, I am not persuaded that the arrangements I am concerned with, when looked at objectively, were put in place "*with a view to*" independent advice being provided. AA's business was not making money out of referring consumers to IFAs for advice, in return for payment of a fee. Their business was making money in the form of commissions, out of consumers deciding to transfer their existing pensions into SIPPs and then buying an AA-related investment – the Paraiba bond. If one asks, "*what was the purpose of the arrangements, looked at as a whole?*", I think it clear that their purpose was the furtherance of that objective. To take an example, when AA prepared a Pension Report, it was not "*with a view to*" introducing the relevant consumer to BlackStar for independent advice; it was "*with a view to*" the consumer making a SIPP transfer and investing in Paraiba.

290. To put it another way, the referral to BlackStar only took place because it carried with it the potential for investment by the consumer in the Paraiba bond. It did not have the provision of advice, or the independent exercise of discretion, by an authorised person, as its intended or desired end-point, but instead other events, namely the SIPP

transfer and the investment decision. They were the reason the arrangements were put in place.

291. I think these points are obvious from the nature of AA's business model, which in terms of its core objectives was just the same as the Avacade business model. They are well illustrated by matters summarised above at [165] above, namely the disappointment expressed by AA when the percentage of consumers' funds recommended for allocation to the Paraiba bond proved lower than expected.

292. *Second* and in any event, there is the question of the quality and scope of the advice given by BlackStar. In their Written Opening, the FCA described BlackStar as AA's "*patsy*", a phrase which Lee took great exception to. I do not agree with that description, if it is intended to convey the sense that BlackStar was not truly independent of AA, but instead in its pocket and performing a service which was no more than a sham designed to produce a pre-ordained outcome. That much seems to follow from the fact that in practice, the percentage of consumers' funds approved for investment in the Paraiba bond proved to be below that anticipated.

293. I do however think that the service performed by BlackStar was too narrowly focused and too formulaic to engage the exception in Art 33. In that sense I agree it was flawed and inadequate. I say that for the following reasons:

i) The overall structure was geared towards supporting investment in a *single* alternative investment or NMI as part of the client's pension arrangements, which in the case of AA meant the Paraiba bond.

ii) The commercial rationale was that the introducer or arranger, AA, would earn income from the payment of commissions on sales of that investment. BlackStar would not have to pay them anything unless (exceptionally) their recommendation was that the client should not invest at all in alternative investments or NMIs. This is made clear from the following description in a BlackStar document, relied on by Lee at trial:

> *"2. The prospective client has already expressed an interest in specific alternative investments that have been presented to them by the introducer before referral to Blackstar…*
>
> *…*
>
> *5. Blackstar does not usually make any payments to introducers in respect of these referrals and the introducer will receive their normal contractual payments that they had agreed with the alternative investment providers. The only exception is where the BlackStar's advice is to undertake a pension transaction that does not include alternatives and in that event a fee of £250 will be paid to the introducer."*

iii) This reflects what Lee was told when the BlackStar approach was first explained to him (see above at [140]):

> *"BlackStar… advised that the way a client from X introducer ended up in X investments and a client from Y introducer ended up in Y investments was because the client came to Blackstar with existing knowledge of the investment and this is the one that was then advised by the IFA."*

iv) Thus, the scope of the input given by BlackStar, as defined in the "*objectives*" section of the BlackStar Report, had a particular focus on the Paraiba bond: "*You have asked me to advise you with regards to whether this is an investment, which would be appropriate for you personally and if your current pension structure could acquire such an investment.*"

v) As to the former question, the BlackStar process is criticised in the ATEB Report on the basis that it was insufficiently rigorous and largely formulaic:

> *"Although the report included the NMI(s) in the recommendations section of the report, and the NMI was stated to be a recommendation in some cases, we could not see any actual rationale or justification being made in the conventional sense. The report merely listed the risk factors and hid behind the clients pre-existing, seemingly introducer led, desire to make the investment.*
>
> *A key risk factor that was stated at various points in the report was that the NMI(s) were higher risk. However… the downside risks of the NMI were explicitly stated in the report and then effectively ignored. With a couple of exceptions, the investment into the NMI took place, contrary to the impression given by the report that there were numerous risks…*
>
> *There was no evidence that the adviser challenged the client's 'desire' to invest in the NMI except in a small number of cases where an exceptional circumstance led to the adviser not enabling the NMI (because the sums involved were too low or because of a significant pre-existing NMI holding).*
>
> *The amount to be invested was largely driven by an allocation spreadsheet that was based on inappropriate and arbitrary assumptions …."*.

vi) As to the second question posed, namely whether the consumer's existing pension could acquire the investment, in the case of Paraiba the answer was again formulaic. As the FCA pointed out in their Written Closing, AA was the exclusive distributor of the Paraiba product, and they had a relationship only with Guinness Mahon, and so the consequence of BlackStar recommending that a percentage of the consumer's fund be invested in Paraiba was that there had to be a switch to the Guinness Mahon SIPP. Thus, the ATEB Report said:

> *"We have concerns around what appears to have been a default solution (used in nearly all cases reviewed) of a Guinness Mahon*

SIPP and a DFM (in addition to any NMI). Guinness Mahon appear to have been used primarily because they would accept the NMI."

vii) Moreover, it is notable that (1) again according to the ATEB Report, the Paraiba investment was only ever recommended to AA introduced clients, and not to clients derived from other introducers, and relatedly (2) whenever an AA introduced client was approved for investment in alternative investments or NMIs, the only Alternative Investment or NMI ever recommended was Paraiba.

294. I have set out above my view of the proper construction of Art 33. To my mind, the service performed by BlackStar was not adequate to engage the exception:

i) Assuming I am correct on the syntax of Art 33, it was not "*independent advice … in relation to investments generally or in relation to any class of investments to which the arrangements relate.*" It was not independent advice in relation to *investments generally* because it had a bias in favour of one particular type of investment, namely alternative investments or NMIs: that was necessary for the overall model to work. Neither was it in my view independent advice in relation to *a class of investments to which the arrangements related*: that is obvious because no attempt was made to review the overall market for alternative investments or NMIs to find the best one; instead the advice was only ever about one product, to which the client had already been introduced; and invariably, in cases where a percentage of the available funds was recommended for investment in NMIs, the investment was in Paraiba.

ii) Even if I am not correct about the question of syntax, I think the same basic problems remain, and I would still hold that the service provided by BlackStar was too narrowly focused and formulaic to qualify as appropriate "*independent advice*", within the meaning of that phrase in the exception. To my mind, that must mean advice of a scope and type which adequately addresses the risk which Arts 29 and 33, taken together, are seeking to avoid, in providing as they do a scheme for the circumstances in which arrangers and introducers can receive a pecuniary reward from someone other than their client. That is the risk that, because of the financial interest the introducer or arranger has in achieving a particular outcome, the client may make a decision which is not in fact in his or her best interests. To my mind, irrespective of the syntax, that demands a broad inquiry; or at any rate, a broader inquiry than that in fact carried out by BlackStar.

295. The evidence is clear that the risk I mention was a real one. This is apparent from the transcript of a call between one particular AA client, Mr Goddard, and an AA representative, apparently Mr Loynes. During the Investment Call, Mr Goddard said he wanted to put 100% of his pension fund into the Paraiba investment. Mr Loynes said that he would make a note for BlackStar to that effect but added:

> *"Make sure you have that conversation with them as well… The reason I'm saying that it has to be driven by yourself so if this is something that you really want to put all of your pension pot in to make sure they are fully aware of it."*

296. After Mr Goddard had spoken to BlackStar, he was contacted by another AA employee, Martin Bower. A transcript is available. It seems that Mr Bower had been provided with a draft of BlackStar's proposed report or had otherwise been provided with information about it because he said to Mr Goddard "*they've recommended … less than a quarter of your fund to go in.*" Mr Bower asked Mr Goddard if he wanted AA to go back to BlackStar and speak to them on his behalf, and Mr Goddard said he was happy with that because "*theoretically I can't lose.*" The Avacade Client Schedule shows that Mr Goddard eventually invested £33,000 in Paraiba out of his pension of £105,000, which suggests that BlackStar recommended a slightly higher allocation after AA's intervention.

297. Finally, I should say for the sake of completeness, that to the extent it is relied on in relation to the AA model in addition to the Avacade model, I reject Mr Berkley QC's argument that the relevant SIPP provider, Guinness Mahon, was involved in the independent exercise of a discretion, in the sense in which that phrase is used in Art 33. That is for the reasons already developed above at [280].

(3) RAO Art 53: Advising on Investments

The Legal Framework

298. Art 53 RAO (as in force from 31 October 2004 to 16 March 2016) provided as follows (emphasis added):

> "*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.*"

299. One can see again that, as with Art 25(2) RAO, Art 53 is only engaged where the advice given is as to the *merits* of *buying or selling securities*. In the context of this case, that means advice as to the merits of customers transferring into a SIPP, or deploying funds within a SIPP in the acquisition of new investments. For the reasons already given above, those steps all involve the *buying or selling of securities*.

300. The critical question under this heading is whether "*advice*" was given.

301. The FCA's pleaded case on this topic rests largely on the content of three of the key telephone calls made to investors, namely the Pre-Report call, the Report Call and the Investment Call. The pleaded case against Avacade is summarised in paragraph 77 of the Particulars of Claim as follows:

> *"77. The statements of Avacade's agents in telephone calls to investors amounted to advice in that:*
>
> > *77.1 They included elements of opinion and/or value judgments as to the relative merits of the options presented to investors so as to give the statements the force of recommendations.*
> >
> > *77.2 The information provided was on a selected, rather than balanced basis, so as to emphasise the benefits of a transfer to a SIPP and/or the investments promoted by Avacade. Again, this amounted to advice and/or recommendations to investors.*
> >
> > *77.3 The statements were not limited to purely factual statements, but included explicit or implicit advice and/or recommendations as to a transfer to a SIPP and/or the investments promoted by Avacade."*

302. The same assertions are then made in paragraph 144 as regards AA, based on the scripts for the equivalent calls by AA agents or employees.

303. The Defendants' pleaded cases deny the FCA's characterisation of the relevant calls in paragraph 77. In essence, the Defendants' position is that Avacade and AA were introducers only; that they did no more than provide information and options to clients; and the information provided was provided in a fair and balanced way.

304. At trial, there was a measure of agreement between the FCA and the Represented Defendants as to the nature of the exercise for the Court to conduct. It is effectively a qualitative assessment of the content of the various calls, in order to assess whether anything in them can fairly be characterised as advice.

305. More precisely, as to the nature of the legal test to be applied, again there was a measure of agreement. Both the FCA and the Represented Parties were agreed that the test is an objective one (and see in any event *Thornbridge v Barclays* [2015] EWHC 3430 (QB) at [38] per HHJ Moulder QC, as she then was); and in seeking to define the essential characteristics of "*advice*", they both directed me to PERG 8.28 and to a number of authorities in which the guidance in PERG 8.28 has effectively been endorsed.

306. The FCA's basic submission was that PERG 8.28 provides a sensible and workable distinction between mere information on the one hand, and advice on the other. At its core is the distinction in PERG 8.28.1G:

> "*In the FCA's view, advice requires an element of opinion on the part of the adviser. In effect, it is a recommendation as to a course of action. Information, on the other hand, involves statements of fact or figures.*"

307. The Represented Defendants made specific reference to PERG 8.28.4G(3):

> *"In the FCA's opinion … such information may take on the nature of advice if the circumstances in which it is provided give it the force of a recommendation. For example … (3) a person may provide information on a selected, rather than balanced, basis which would tend to influence the decision of the recipient."*

308. As to the relevant authorities, both the FCA and the Represented Defendants placed reliance on what was said by HHJ Havelock-Allan QC in *Rubenstein v HSBC* [2011] EWHC 2304 (QB); [2011] 2 CLC 459 at [79]-[85], and referred in particular to his comments in the following passage as to the distinction between giving investment advice and providing information:

> "*81… In both instances information is provided, and in both instances the client has a choice as to what he decides to do with that information. 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.*"

309. A similar approach was adopted by Teare J in *Zaki* v *Credit Suisse* [2011] EWHC 2422 (Comm), [2011] 2 CLC 523, and by Mr Tim Kerr QC sitting as a Deputy High Court Judge in *Crestsign v NatWest* [2014] EWHC 3043 (Ch).

The Defendants' Submissions

310. In making his submissions on behalf of the Represented Defendants, Mr Berkley QC emphasised the following points:

i) PERG 12.3, Question 19, makes it clear that for advice to be regulated, it needs to relate to the merits of buying or selling a *particular investment.* Of course, that is the language of Art 53 itself: " *… advice on the merits of … buying [or] selling … a particular investment which is a security.*" Mr Berkley QC submitted that the need for there to be a "*particular investment*" means in context that there must have been a particular pension scheme in existence at the time the "*advice*" was given, even if it had all the other characteristics of "*advice*" within the meaning of that phrase in RAO 53, in order for it to qualify as a regulated activity. Thus, he said, there cannot on any view have been "*advice*" in this case at least in the early stages of the Avacade model " *… involving canvassing and investment calls*", because " *the relevant SIPPs would not have been in existence at that point.*" In any event, Mr Berkley QC submitted that on analysis, the information supplied to consumers was only ever generic in nature.

ii) In developing this same theme in his post-hearing submissions, Mr Berkley QC drew attention again to the decision of HHJ Dight in *Adams* v. *Options SIPP* (already mentioned above at [219], in the context of Art 25). A further part of the Claimant's case in *Adams* was that the introducer, CLP, had provided advice within the scope of Art 53. HHJ Dight CBE rejected that

contention. At [78] Judge Dight drew a distinction between, on the one hand, CLP providing advice on the unregulated investment it was proposing (store pods), which was permissible because it fell outside the regulatory net; and on the other, advice on transferring into a SIPP, which *was* regulated, at least if a particular SIPP was recommended. He held on the facts (see at [125]) that there was "*no evidence that CLP provided any advice in respect of the SIPP*."

iii) More specifically as to the meaning of *advice*, and drawing on the reasoning of HHJ Moulder in *Thornbridge* v. *Barclays Bank* [2015] EWHC 3430 (QB), Mr Berkley QC raised three further issues, as follows: (1) the qualitative assessment may not be simply whether the relevant activity crossed the boundary between the provision of information and advice, but may also involve assessing whether the activity was not so much that of an adviser but instead of a salesperson (which was the analysis on *Thornbridge* itself); (2) in seeking to characterise the activity, it is important to consider whether the documentary framework operates so as to define the "*basis of the relationship*" between the relevant parties, and here Avacade's Terms & Conditions made clear that it was not acting as adviser; and likewise (3) "*the various disclaimers that were provided to individual consumers*" effectively underscored the same point, not only by making it clear that Avacade was not providing advice but also that it did not accept responsibility for the decisions made by consumers.

The Factual Background

311. In order to analyse this issue properly, it is necessary to say something more about the Pre-Report Call, the Report Call, and the Investment Call.

Avacade

312. An examination of the Avacade script for the Pre-Report Call shows that it was focused on a number of themes. These were important in setting the context for the later calls, because the same themes were used in the Report Call to inform discussion about consumers' choices in terms of pension provision, and then in the Investment Call in discussing the consumers' investment choices.

313. The available script shows that the themes were:

i) Age of retirement: This was developed by means of questions about the consumer's preferred retirement age, and the ability to take a personal pension from the age of 55 was emphasised.

ii) Income needed in retirement: This theme emphasised the number of pensioners reported as living in poverty and the rising cost of living. Consumers were asked: "*How much do you think you will need on a yearly basis to give you a comfortable standard of living in your retirement*?"

iii) Tax Free Cash Age: The point made here was that from the age of 55, some pensions allow members to take 25% of their total pension fund as a tax-free sum. This was followed by a question: "*Would you like to take a lump sum and if so, at what age would you like to take it*?"

iv) Invest into retirement: The theme here was that usually, once a scheme member decided to take a tax-free lump sum, he or she would have to take income under the pension scheme at the same time. But the point was made that *"[T]here are options out there that would allow you to take your lump-sum and invest the remainder, building your fund up again until you are ready to take your income*." This was followed by the question: "*Would you be interested in knowing more about this?*"

v) Control over Investments: The script reads, *"... Depending on the type of scheme you have, you could possibly be paying hundreds of pounds a year in fees for someone to invest [your money] on your behalf who may not be producing anywhere near the results it needs. Wouldn't you like more knowledge of how your money has put to work?"*

vi) Alternative Investments: This section of the script referred to the fact that pension funds were often invested in the stock market, "*which can be very hit or miss in the profits it returns*." There was then a reference back to the consumer's desired income level at retirement, and the question: "*If you want to get the income of [XXXX] you mentioned earlier, would you consider learning about alternative investments?"*

vii) Leave Pension to Whom? This theme was directed to the question of whether the consumer's pension fund might be left to his or her chosen beneficiaries on death. There was reference to the money held in a consumer's pension pot on death often being "*kept by the insurance company*". This appears to have been a reference to an annuity. It was followed by a question: "*There are options out there that would allow you to decide who gets what is left. If you had that option, who would you like to receive your remaining pension fund*?"

314. Against that background, and against the background of the Pension Report which had provided been to the consumer in the meantime, the Avacade Report Call script then covered the following points:

i) The script begins with a disclaimer: "*Avacade offer information only and do not give financial advice as we are not regulated by the FCA*."

ii) It then states: *"... There are four things you can now do with your pension fund to ensure that you get the best possible return in retirement, but before I go through these options there are a few things I need to tell you that may have an influence on your decision.*"

iii) After referring to the objectives identified in the Pre-Report Call, including the consumer's desired level of income on retirement, the script then goes on to invite a comparison between the present value of the consumer's existing pension fund and the value it would need to have in order to provide the desired level of income: *"... page 6 shows you just how much your fund needs to be to give you the income ... you said you would like.*" There is then reference to the performance in growth terms of the existing fund, followed by further question: " *... do you think that leaving it where it is, is going to achieve what you are looking for?*"

iv) The script then compares purchase of an annuity with drawdown:

a) *Purchase of an annuity*. The main points made are (1) this option offers an income for life, but (2) the income amount can be affected by a range of factors including the age and state of health of the consumer at the point when the annuity is purchased, and current annuity rates; (3) "*if you wanted to access to your tax free cash, you have to take your income at the same time, there is no option to put it off …*"; and (4) "*Your income level will also be hit by the choice of beneficiaries you have, plus if your children are over the age of 23 when you pass away, they will get nothing and any funds left in your pension fund will be kept by the insurance company.*" The question then follows: "*How does annuity sound to you?*"

b) *Drawdown*: The main points made are: (1) "*Basically you keep ownership of your pension fund and are allowed to take a percentage of the whole fund as an annual income ...*"; (2) "*Unlike an annuity, you can take your tax-free lump sum at any time after you turn 55 but you don't need to take your income at the same time…*"; and (3) "*Finally and probably one of the most attractive options is that there are no limitations on who you can leave your pension fund to when you pass away in retirement*."

v) The four available options in terms of pension provision are then discussed:

a) *Do nothing*: This is effectively discounted on the basis of the level of growth needed to the existing fund to provide the consumer's desired income level – "*Do you think this will happen based on those figures?*"

b) *Transfer into a personal pension*: On the plus side it is said that it might be possible to find a provider who charges lower fees and provides better prospects for growth than the existing company, but it is then said that regular payments will be required which in some cases can be quite high, and moreover, "*nearly all pension providers have a minimum fund requirement before they offer you the option of drawdown…*".

c) *Transfer into a Stakeholder Pension*: the script describes stakeholder pensions as offering "*a bit more flexibility*", but emphasises that stakeholder pensions do not allow drawdown. Thus, "*With a stakeholder pension, you must buy an annuity which could possibly take away the main benefits you're looking to get from your pension*."

d) At this point, the script provides: "*One point of interest, if you wanted to transfer your current fund to a Personal or Stakeholder pension, you will need professional advice, you cannot do it on your own, so you would have to pay someone like an IFA out of your own pocket to do this.*"

e) *Transfer your pension into a SIPP*: This is the fourth and final option. The point is made that for smaller pension funds the administration and

> management charges could potentially be higher than other pension options, but then the script continues: "*On the plus side is it gives you more options and control than the standard pension. You can take drawdown without any minimum fund size restrictions which would allow you leave your pension to whomever you want. You will also be able to get access to your 25% TFLS from the age of 55 without having to take your income at the same time if you didn't want to. You also have the benefit of being able to invest your pension fund in areas that have demonstrated proven returns year after year.*"

vi) The script then asks: "*They are the four options available to you, which one do you feel offers you the best chance of getting your pension fund to the size it needs to be, will let you leave your fund to [LEAVE PENSION TO WHO?], will let you take your tax-free lump sum at [TAX FREE CASH AGE] without having to take your income at the same time?*"

vii) It then says: "*IF THE CLIENT CHOOSES A SIPP – IMMEDIATE CLOSE.*" If the client chooses to do nothing, then the script offers to put them in contact with an IFA. If the client chooses to transfer to a personal pension, or a stakeholder pension, then the script suggests they will need to take advice from an IFA. If they have selected the SIPP option but are hesitant, then the script sets out more background to that option.

viii) The section of the script headed "*Step 3*" deals with next steps if the SIPP option is chosen. The text includes a description of the fees payable to the SIPP administrator, which in the available script is expressed to be Liberty. The fees are said to be a one-off set-up fee of £450, plus a fee of £60 for each transfer, and an annual fee to cover running costs of £420. The text then says that the consumer will receive "*a welcome letter from Liberty confirming the fees*, " and "*if you have any questions when you receive this letter, please give me a call and I will be pleased to go through them with you. Do you have any questions about the SIPP or the fees involved???*"

ix) Further text then states as follows:

> *"All I need to do to get your SIPP application underway is arrange for your SIPP paperwork to be brought out to you, and once we have that back in our investment agents can talk you through the investment options available to you. These will be filled in where possible for you and for safety reasons we use a courier service to get the paperwork to your door. When will be the best time to get them out to you?"*

315. As already noted above, there are two versions of the Investment Call Script. The first is undated. It has the following features:

i) It begins by saying, "*I am calling as arranged to go through our investments*" and then sets out the following disclaimer: *"…Avacade offer information only and do not give financial advice as we are not regulated by the FCA.*"

ii) Under the heading "*Process*", it states: "*Your SIPP application is well underway and it won't be long before your pension funds will be transferred into your SIPP bank account.*"

iii) Under the heading "*Overview*", it states: "*You wanted to achieve a yearly pension of £xxx. In order to achieve this you realise that you need a fund value of £xxxx. As I mentioned on our last call, Avacade have a portfolio of investment products that will help you achieve this*."

iv) There is then reference to " *... the investment calculator which shows you an example of where you could invest your funds*."

316. The other example of the script is headed "*Pre-Investment Hand Script*." It dates from March 2012. The following points are worth noting:

i) It also states at the beginning: "*Your SIPP application is well under way and it won't be long before your pension funds will be transferred into your SIPP bank account*."

ii) But the agent is told to say: "*My role is to help you decide on the most appropriate investment products for your needs*."

iii) It goes on: "*We have a portfolio of alternative investments that are not linked to the stock market so avoid the ups and downs that you have been familiar with since you started your pension ... I would now like to ask you a few questions to enable me to build an investment calculator which will show you how we can achieve the pension income you're looking for in retirement.*"

iv) A number of investment products are then mentioned, namely: (1) Sustainable AgroEnergy (green oil), (2) Ethical Forestry (Melina trees), (3) Global Plantations (teak trees).

v) It concludes: "*Okay what I am going to do now is prepare an investment calculator for you which will give you some ideas where to invest your pension. I will send this out to you with a copy of the relevant investments. Do you prefer email*?"

317. A number of copies of the investment calculator document have been produced, including one from Mr Kemp, suggesting a total investment amount of £228,010 into three investments, yielding total income of £780,046 (minus fees); and a further one for Ms Humphrey suggesting an "*investable amount*" of £15,837 which, invested into Ethical Forestry's 12 year investment, would generate a "*Total Cash Return*" of £36,300.

318. A number of transcripts of Investment Calls have been produced and are illuminating. To take an example, an undated transcript of a call between Mr Astell (of Avacade) and a Ms Kruck (a consumer) contains some important features:

i) Mr Astell says, " ... *what I've come up with is looking at three different types of investments for you*."

ii) He summarises the consumer's objectives: "*You would ideally like to retire at 60 with an income of about £24,000, so what we have to do then is to get this £102,000 or £103,000 up to a value of £510,638, and we've got 18 years to do that, because you're only a youngster at the minute, growth rate of 9.31% okay?*"

iii) The first investment is Melina trees. After discussing a number of features, Mr Astell says: "*Okay, just to give you an idea, I've looked to kind of split this up, almost into thirds if you like. So with regard to the Melina plantation, which is run by ethical forestry, if we put £37,333 into that, that would actually buy you 800 trees*." He projects a return from this investment of about £133,000.

iv) He then discusses the teak (Global Plantations) investment, and says: "*So again, from this point of view I was, I've worked this out to put £27,350 into this area*." After some further discussion, he asks: "*Does that sound alright as well?*", and the answer is: "*Yes, that one sounds good*."

v) Mr Astell then turns to the " … *five-year property bond*." After a lengthy discussion, including reference to the need for the consumer to be referred to Cherish "*who would run through about 20, 25 questions with regard to risk assessment*", he says: *"... I'm looking again at around about a third, so £35,000 into that area would give you an annual payment for each of your five years of £5250, and then a return at the end of the day, at the end of the five years of your original £35,000 ... '*.

319. Those are the various calls, but before turning to look at AA, it is relevant to note Avacade's Terms of Business.

320. I have been referred to two versions. In the case of Mr Thompson, he signed an early version on 13 September 2013 which included the following (emphasis added):

> *"Avacade is an alternative investment distribution company formed in January 2010 with the aim of becoming a market leader in the UK alternative investment market. Avacade specialise in promoting a range of investment products designed to provide exceptional financial returns.*
>
> *We take a creative look at new investments, steering away from under-performing traditional assets such as equities, and identifying the investment opportunities of the future. Only those that offer security, quality and excellent returns on investment make it into our portfolio.*
>
> *Many of our clients choose to invest in our products through a Self-Invested Personal Pension (SIPP) following completion of an Avacade Free Pension Summary. This is completed in house by our team and consists of a pension summary together with up to date relevant pension market information which you may find useful. <u>This does not constitute financial advice or a recommendation in any way</u>.*
>
> *<u>We recommend our clients to seek financial advice and we can refer clients to an Independent Financial Advisor (IFA) who can offer this. Please note</u>*

Avacade act as an introducer only to the IFAs and are not associated to the advice given…. "

321. The terms go on as follows (emphasis added):

> *"Avacade is not regulated by the Financial Services Authority (FSA). We provide an information only service with regards to our investment products and do not offer Financial Advice. We recommend that our clients always speak to an IFA before completing a pension transfer or investment.*
>
> *As we are not regulated by the FSA the investment products we distribute are not covered by the Financial Services Compensation Scheme (FSCS)."*

322. It seems that in around late 2013, a longer version of the Terms of Business came into circulation. The following points are relevant:

i) Clause 2.1, which stated that Avacade would provide the services of:

> "*a) The compilation of a fact-based pension review.*
>
> *b) The distribution of unregulated investment products.*"

ii) Clause 2.2:

> "*2.2 The provision of these Services may include some or all of the following activities:*
>
> *a) If requested by You AL* [i.e. Avacade] *will assist you in the completion of any forms, authorities, requests or consents. AL shall make no additional charge for these activities but will not preform (sic.) them unless specifically requested by You to do so.*
>
> *b) If you wish to transfer your pension AL will introduce you to a pension provider, you are under no obligation to utilise any provider that AL introduces you to but the provider(s) that AL will introduce you to will be familiar to AL.*"

iii) Clause 2.3 stated (again, with emphasis added):

> "*For the avoidance of doubt:*
>
> *a) AL does not provide any form of financial advice, should You require financial advice, you should speak to your solicitor, independent financial advisor and/or accountant (whichever is appropriate).*
>
> *b) AL is not regulated by the FCA and the investments distributed by AL are not eligible for compensation under the FSCS (Financial Services Compensation Scheme).*
>
> *c) AL strongly recommends that all clients consult with an investment professional (solicitor, independent financial advisor and/or*

> *accountant) prior to making any decision to establish a new pension, transfer an existing pension, or investing in unregulated investment products.*"

323. Accompanying these longer Terms of Business was an "*Important Investment Information & Disclaimer*", containing a large number of disclaimers to the effect that Avacade was not regulated by the FCA; that "*information provided is purely for informational purposes*"; that in entering into any investment the consumer was not relying on advice from Avacade; that Avacade recommended financial advice be taken before investing; and that the investments "*could be considered high risk speculative investments."*

AA

324. The position of AA is similar, but not identical.

325. It seems that a Welcome Call and a Pre-Report Call took place in the same way as with Avacade, but the FCA has not been provided with any scripts or transcripts.

326. After the Pension Report was provided, there was a Report Call. A script is available. As already noted above, this had less emphasis on annuities, in light of the changes brought into effect in April 2015. In other ways, however, the overall approach was much the same as under the Avacade model.

327. Thus, the script began with a disclaimer: " *... Avacade offer information only and do not give financial advice as we are not regulated by the FCA*."

328. The script then moved on to familiar themes. There was an initial discussion of the need to have a pension fund large enough to meet the investor's objectives as to income. This was followed by a comment that traditional pension schemes give investors little control over where their funds are invested, and the discussion then moved into the topic of alternative investments: "*Many alternative investments have a successful proven history and are seen as an attractive option away from the instability of the stock market.*"

329. After mentioning stock market volatility, the script then moved onto the available options. Options 1 to 4 remained the same as under the Avacade script:

    i) *Do nothing*: The text drew a distinction between existing pensions which were underperforming and performing. As to the former, the question was posed: "*Is this really a viable option for you?*" For a performing pension, the script said: " *... what you need to bear in mind is that where your money is currently invested is a notoriously volatile environment*."

    ii) *Transfer to personal pension scheme*: The script said, " *... you would still be leaving your funds invested in and around the stock market, with limited input as to where your money goes. Plus you would pay an IFA to set this up for you which is usually around 5% of your pension. So how does this option sound?*"

    iii) *Transfer to a stakeholder pension*: Amongst other things the script said, " *... the growth potential is severely limited. Going back to what your fund needs to do, is a low growth environment where you want your money?"*

iv) *Transfer into a SIPP:* The script mentioned the benefits of control over investments and flexibility. It said, "*You have direct control over how much and where your pension fund is invested, allowing you to look at options that for many, many years have shown predictable and stable returns. It will also allow you to continue investing into retirement, meaning you can keep topping your fund up, negating the cost of living increases and making sure that there is still money left to pass on to your loved ones after you have passed away. As pension growth is one of your major objectives, how does that sound?*"

330. A new, fifth option was then mentioned, which was to transfer the pension to a Qualifying Recognised Overseas Pension Scheme. As I understand it, there are no recorded instances of AA clients transferring into a QROPS.

331. The client was then asked which option was preferred, and if the preference expressed was for a SIPP, then further information was to be provided, including the suggestion that a SIPP allows investors to choose "*alternative investments, products not normally allowed in standard pensions*." The script continued: "*We are bringing a number of new investments to market which work great within a SIPP. The first is a property bond investment that offers a fixed return of 11% per annum over its 3 year term with your investment back at the end of that term.*"

332. The available script contains reference to the possibility of an execution only SIPP transfer to a Guinness Mahon SIPP, but it is common ground that that was not part of the AA model. Under the heading, "*Report Call – Step 3*", however, which was "*IFA APPOINTMENT BOOKING*", it says: "*Your SIPP will be set up by Indigo SIPP and they are backed by a company called Guinness Mahon which is part of the PAN Group, a very well respected and award winning corporation.*"

333. Thereafter, as noted above, the further steps in the AA process included a Fact Find Call and an Appointment Call. The script for the latter said: "*BlackStar will also have a discussion about the Paraiba bond which we discussed on the last call.*" The recap to be provided in relation to the bond said: "*The developer is a UK developer, based in Birmingham, James Laurence developments, with a previous successful track record in Brazil.*"

334. As to the AA Investment Call, no script is available, but I have already mentioned above (see at [295]) the transcript of an Investment Call between AA (Mr Loynes) and Mr Goddard, which resulted in Mr Goddard wishing to put 100% of his pension pot into Paraiba. The transcript of the call shows Mr Loynes setting out the "*pros and cons*" of the Paraiba bond. He pointed to the fact that the bond would be regarded as a high risk product, but then referred to the "*advantages*" of it, which included the fact that it paid fixed contractual interest and was "*highly unlikely*" to fail.

335. I do not understand the Avacade *investment calculator* to have been used by AA. It seems that instead, as mentioned above, the percentage of the available funds to be allocated to the Paraiba bond was determined by BlackStar using their own formula.

336. Finally, AA's Terms of Business, provided as part of the client signature pack, contained the following provisions at clause 2 (emphasis added):

"2.1 AA provides the Services which comprise the compilation of a fact based pension review and referrals for financial services to nominated independent financial advisors (IFA).

2.2 The provision of these Services may include some or all of the following activities:

(a) If requested by you AA will assist you in the completion of any forms, authorities, requests or consents…

(b) If you wish to transfer your pension AA will introduce you to either an IFA or a pension provider…

2.3 For the avoidance of any doubt:

(a) AA does not provide any form of financial advice. Should you require financial advice, you should speak to your solicitor, independent financial advisor and/or accountant (whichever is appropriate).

(b) AA is not regulated by the FCA and the investments distributed by AA are not eligible for compensation under the FSCS (Financial Services Compensation Scheme).

(c) AA strongly recommends that all clients consult with an investment professional (solicitor, independent financial advisor and/or accountant) prior to making any decision to establish a new pension, transferring existing pension, or investing in an unregulated investment product."

Discussion & Conclusions

Overview

337. Looking first at the position of *Avacade*, it seems to me that the process reflected in the Pre-Report Call, the Report Call, and the Investment Call, certainly went somewhere beyond the mere provision of information.

338. The process involved the identification, by reference to a number of predetermined themes, of the customer's objectives. It is entirely obvious, I think, that the themes in the Pre-Report Call, which were then developed in the Report Call, were identified with a view to engaging interest in the idea of a transfer into a SIPP, accompanied by the acquisition of investments which, over time, might generate an enhanced pension fund.

339. The process then involved discussion of the various options (annuity versus drawdown, and the four main options in relation to the existing pension fund) by reference to the consumer's stated objectives. The conclusion of the whole process, as the narrative above makes clear, was the identification in the Investment Call of various investment options and a proposed split of the transferred fund between different investment products by reference to the "*investment calculator*."

340. I find it impossible to resist the conclusion that this process involved the expression of opinions or recommendations at the very least at two stages: first, at the conclusion of

the Report Call, where consumers would have been left with the impression in light of the build-up that the opinion of the Avacade agent was that the option of transferring into a SIPP was the best course to take; and second, at the conclusion of the Investment Call, in particular in light of the "*investment calculator*" and the suggested division of investments by the agent, which in my view carried with it the implication – in light of everything that had gone before – that "*we think this is the best thing for you to do*."

341. It seems to me that the process, at the very least at these two points, involved just the kind of comment or value judgment on the relevance of the information supplied which HHJ Havelock-Allen had in mind in *Rubenstein v HSBC*; or alternatively, the information supplied was "*itself the product of a process of selection involving a value judgment*", so that it would tend to influence the decision of the recipient.

342. In my judgment, such matters take this case beyond that examined by HHJ Dight CBE in *Adams* v. *Options SIPP*: the evidence there was that no advice had been given in respect of the SIPP transfer, as opposed to the proposed investment (see at [125]-[126]). In the present case, the evidence is to the contrary: there was advice on the SIPP transfer, as well as on the investments.

343. Turning then to the position of *AA*, I think the position is similar, but not identical.

344. I reach the same conclusion that advice was given in the Report Call, essentially for the same reasons given above. The consumer was exposed to a funnelling process which, by means of development of a series of themes and through the asking of strategically placed questions, drew him or her into thinking that a SIPP was the best of the available options to take.

345. As to the Investment Call, I think there is little doubt that the exchanges between Mr Loynes and Mr Goddard summarised above involved stepping over the boundary between information and advice. I say that given the character of the exchanges, and even though Mr Loynes seems not to have had recourse to the investment calculator. As to whether this was a more widespread phenomenon, I think the evidence is unclear, in the absence of a script. Mr Richards refers only to this transcript in describing the AA Investment Call. In those circumstances, although I am prepared to conclude that advice was given in this particular instance, I am not persuaded that the evidence enables me to go further than that, and to say that it was routinely given at the Investment Call stage.

346. Nonetheless, looking at the issue in the round, my conclusion is that on the face of it, there is a strong argument for saying that both Avacade and AA gave advice, in the respects I have identified. Two questions remain, however: is that conclusion affected by the context, including the Terms of Business and the disclaimers; and was the advice given as to the merits of "*buying [or] selling a <u>particular investment</u> which is a security*"?

Terms of Business & Disclaimers

347. As to the first point, it seems to me that the question is really whether, in context, one should regard the messages contained in the various calls as part of Avacade's sales pitch, rather than as part of an exercise in the giving of advice. It was in this context

that Mr Berkley QC relied on the decision of HHJ Moulder QC (as she then was) in *Thornbridge v Barclays* [2015] EWHC 3430 (QB). The Claimant in that case had entered into an interest rate swap with Barclays Bank, and claimed he had been advised to do so, and that in advising him the bank had acted in breach of "*Hedley Byrne advisory and information duties*" (see at [18]). Among the issues for determination, HHJ Moulder identified the following factual issue at [23(i)]: "*Did Barclays give advice in relation to the swap? Did the bank recommend an unsuitable product?*" She also identified the following legal issue at [24(i)]: "*If Barclays gave advice, did it assume an advisory relationship giving rise to a duty of care in that regard?*"

348. HHJ Moulder rejected the claim. At [70], in a passage relied on by Mr Berkley QC, she said the following:

> *" … I bear in mind the dicta of Gloster J in Springwell cited above that the giving of advice is not sufficient to establish a duty of care. The court has to decide whether the 'advice' went beyond the 'normal recommendations given in the daily interactions between an institutions salesforce and a purchaser of its products.'. Mr Burgess is a salesman. His job is to sell derivatives and he makes his money by selling derivatives. He does not make money by providing advice in return for a fee. It is an integral part of the sales process in my view that he should have a dialogue with the customer and in the course of that dialogue may express opinions to the customer but those expressions of opinion have to be viewed in the context of the entire dealing. This expression of opinion is in my view the expression of a salesman selling his product not an adviser providing advice … ."*

349. Likewise here, Mr Berkley QC invites the conclusion that the expressions of opinion by the Avacade and AA agents were merely the expressions of a salesman selling his product. His argument is reinforced by the context: the Terms & Conditions and the various disclaimers made it clear that Avacade and AA were not taking on an advisory role; that makes it even clearer that the opinions given were part of a sales pitch, and not advice, when properly examined. The basis of the parties' relationship was expressly and clearly that neither Avacade nor and AA were giving advice; they said many times that that was not their role, and gave other warnings consistent with the idea that they were assuming no responsibility for any opinions or views that might be expressed.

350. I take a different view:

i) It seems to me that focusing on whether Avacade or AA had an advisory role or merely a sales function involves something of a misdirection in the true nature of the relevant inquiry. I am not enquiring into whether Avacade's assigned function or AA's assigned function was to provide advice. I am enquiring into whether, whatever their assigned function was, they did *in fact* provide advice in a manner falling within the scope of RAO Art 53.

ii) To put it differently, it does not seem to me to be determinative of the question I have to answer that neither Avacade nor AA assumed an advisory role or

obligation, whether contractually or by assuming a duty at common law to take appropriate care in making statements to their clients. That however was the question addressed by HHJ Moulder QC at paragraph 70 of her judgment in *Thornbridge*. The context is clear from the quotation set out above. But the question whether advice has been given which is actionable because there is a duty of care is different to the question whether something which can fairly be described as advice has been given in fact. As I read HHJ Moulder's judgment, she recognises that distinction, because before the text quoted above she said that the relevant Barclays employee had clearly expressed an opinion, but then went on to address what to her was the separate legal question whether the opinion amounted " *... to a recommendation in the sense of attracting a duty of care which could attach to an advisory relationship.*" It was in that context that the employee's role, and the nature of the relationship between the parties, was relevant, and indeed determinative. The result was that although the employee had in fact expressed an opinion which might in one sense qualify as advice, it was not actionable because Barclays had not been engaged as adviser and had not assumed any responsibility to advise.

iii) I agree that one might say the same here. Neither Avacade nor AA were engaged as an adviser; and they made clear they were not assuming any responsibility to advise. Such matters, informed as they obviously are by the Terms & Conditions, and the disclaimers, would be highly material if this were a claim for breach of a contractual or common law duty brought by an investor. But it is not. No question of breach of duty arises. No-one is saying that there was a duty to advise, or any assumption of responsibility, or that advice was given which was negligent.

iv) Instead, the question is a more straightforward and narrower one. It is simply whether exchanges with consumers took place which, on their proper construction, can be said to qualify as "*advice*" within the scope of the restriction on Art 53 RAO. Although the nature or basis of the relationship between the parties is relevant to that question (the answer would be very straightforward if there were an advisory relationship), it seems to me it is not and should not be determinative. Activity corresponding to advice which in truth falls within the perimeter of regulated activity defined by Art 53 can no doubt occur in unexpected places, including in the context of relationships which the parties have chosen to characterise as non-advisory, or which might accurately be described for other purposes as not engaging any common law duty of care.

v) To my mind, however, neither point is the same as the question whether advice has been given which qualifies as a regulated activity for the purposes of FSMA. That is a matter of assessing whether the test in RAO 53 is met, and that involves looking at the substance and not the form of what has happened, in light of the language in the Order.

vi) To put it another way, there is every reason to suppose that Art 53 is there to ensure not only that someone seeking to act as an investment adviser is properly authorised, but also to ensure that where a *salesman* expresses views which in substance are really advice about the merits of buying or selling particular investments, steps can be taken by the Regulator.

vii) The real question is therefore whether something which can fairly be described as having the quality and character of advice on the merits of buying or selling securities has been given. In my view, the answer to that question in this case is yes.

viii) For all those reasons, therefore, I reject Mr Berkley QC's argument on this point.

"Particular Investment"

351. Finally, as to whether the advice was in relation to a particular investment, as noted Mr Berkley QC sought to rely on PERG 12.3. He referred me to the following passage, in the answer to Q19 (my emphasis in answer below):

> *"Q19. For advice to be regulated, it needs to relate to the merits of buying or selling a particular investment. When do rights under a personal pension scheme become 'particular' rights and so particular investments?*
>
> *It is the rights under a personal pension scheme that must be a particular investment. This means that the rights must arise under a particular personal pension scheme. So, provided the rights on which advice is given relate to rights conferred, or to be conferred, by a particular scheme, they will be particular rights and advice on the merits of buying or selling them is likely to be regulated. This is the case, whatever the nature of the rights or of the underlying assets or prospective underlying assets. Conversely, if there is no particular personal pension scheme, there cannot be any particular rights... A person may be asked to advise a client on the merits of his acquiring a commercial property for holding it under a SIPP in circumstances where the client has an existing SIPP of which the adviser may or may not be aware. Provided the adviser has not been asked to, and it is reasonable for him to believe that he would not be expected to, advise his client on the merits of his holding the property under the particular SIPP, the advice may remain generic as respects rights under a personal pension scheme and so would not be subject to regulation."*

352. Based on this, Mr Berkley QC's argument was that so far as the early stages of the Avacade and AA models were concerned, involving what he called canvassing and investment calls, the relevant SIPPs would not have been in existence at that point. Mr Berkley QC referred again to *Adams* v. *Options SIPP*, in which HHJ Dight CBE on the facts concluded that even if there had been a recommendation in respect of the SIPP, it had in substance been no more than a recommendation of the Defendant SIPP provider, and not of any of their specific products (see at [126]). Mr Berkley QC also submitted that any "*advice*" given was generic only.

353. I cannot agree with these submissions:

i) As I read the answer to Q19 above, it is not necessary for a SIPP actually to be in existence at the time the advice is given for it to qualify as a regulated activity: in other words, in my view, the advice can so qualify even if it is advice about setting up a SIPP, provided a particular SIPP is in mind. Hence

the words underlined above: "*rights conferred, or to be conferred, by a particular scheme.*"

ii) In my judgment, both under the Avacade and AA models, the position as regards a particular SIPP being in mind had crystallised sufficiently by, at the latest, the time of the Report Call, and most likely even before that. As to Avacade, it worked with only a limited number of SIPP providers who had approved its products for inclusion in their SIPPs. The default choice from late 2011 was Liberty SIPP which administered the Liberty Pension Scheme. That the overall Avacade structure was geared towards particular SIPP products is apparent from the fact that the SIPP fee arrangements were discussed on the Report Call (see above at [314(viii)]), and (as a next step) completed application forms were despatched to the consumer for signature. By the time of the Investment Call, the consumer's SIPP application was "*well underway*" (see at [315(ii)] and [316(i)] above), and advice on the investment products was given with a view to them being acquired within the SIPP.

iii) The position with AA is also straightforward: they had in mind only Guinness Mahon (Indigo SIPP), as the script for the Report Call makes clear.

(4) Art 53E RAO: Advising on Pensions

354. Finally, for completeness, I should mention Art 53E RAO, which came into force on 6 April 2015. This sets out a new regulated activity of advising on the conversion or transfer of pension benefits. It creates a regulated activity where advice is given to a member of a pension scheme on the merits of them transferring their pension, where that member has "*subsisting rights in respect of any safeguarded benefits*".

355. For the purposes of this action, it was accepted that this provision could only ever be relevant to a relatively small number of consumers who transferred out of defined benefit pension schemes following contact by AA (it has no relevance to the actions of Avacade), and that it would only have significance if I determined the Art 53 point against the FCA. Since I have resolved it in the FCA's favour, I need say nothing further about Art 53E.

VII FINANCIAL PROMOTIONS

Preliminary Points

356. In addition to the general prohibition, s.21 FSMA contains a restriction on the making of financial promotions:

> "*(1) A person ('A') must not, in the course of business, communicate an invitation or inducement to engage in investment activity.*
>
> *(2) But subsection (1) does not apply if–*
>
> *(a) A is an authorised person; or*
>
> *(b) the content of the communication is approved for the purposes of this section by an authorised person.*

> *…*
>
> *(8) 'Engaging in investment activity' means –*
>
> *(a) entering or offering to enter into an agreement the making or performance of which by either party constitutes a controlled activity; or*
>
> *(b) exercising any rights conferred by a controlled investment to acquire, dispose of, underwrite or convert a controlled investment…*"

357. Some preliminary points are necessary before considering the parties' positions.

358. *First*, there was some discussion at the trial before me as to the precise type of "*investment activity*" in issue here: i.e., what form of "*investment activity*" did the FCA say that Avacade and AA had promoted? As can be seen from s.21(8) above, activity will only qualify as "*engaging in investment activity*" if (broadly) it involves entering into or offering to enter into certain types of contract which involve a "*controlled activity*", or exercising certain rights conferred by a "*controlled investment*." "*Controlled activities*" and "*controlled investments*" for the purpose of s.21 FSMA are defined by the FPO (see above at [2]). As I understood the FCA's position, it relies on the "*controlled activities*" in Schedule 1, para. 3 of the FPO, namely, "*Buying [or] selling … securities …*". In other words, this part of the FCA's case relies on the same analysis already explained above in relation to (1) the transfer of existing pension funds into a SIPP, and (2) the deployment of funds within the SIPP in the acquisition of investments.

359. *Second*, there was agreement between the FCA and the Represented Defendants as to the proper approach to the interpretation of the phrase, "*communicate an invitation or inducement*" in section 21. Although the word "*invitation*" suggests that passive involvement in a relevant activity might be caught, it was common ground that something active is needed, involving persuasion or incitement. Both the FCA and the Represented Defendants referred me to PERG 8. PERG 8.4.3G states:

> "The *FCA* recognises that the matter cannot be without doubt. However, it is the FCA view that the context in which the expressions 'invitation' or 'inducement' are used clearly suggests that the purpose of section 21 is to regulate communications which have a promotional element. This is because they are used as restrictions on the making of financial promotions which are intended to have a similar effect to restrictions on advertising and unsolicited personal communications in earlier legislation. Such communications may be distinguished from those which seek merely to inform or educate about the mechanics or risks of investment…".

360. And PERG 8.4.4G states:

> *"The FCA considers that it is appropriate to apply an objective test to decide whether a communication is an invitation or an inducement. In the FCA's view, the essential elements of an invitation or an inducement under section 21 are that it must both have the purpose or intent of leading a person to engage in investment activity or to engage in claims management activity, and be promotional in nature. So it must seek, on its face, to*

> *persuade or incite the recipient to engage in investment activity or to engage in claims management activity. The objective test may be summarised as follows. Would a reasonable observer, taking account of all the circumstances at the time the communication was made:*
>
> *(1) consider that the* communicator *intended the communication to persuade or incite the recipient to engage in investment activity or to engage in claims management activity, or that that was its purpose; and*
>
> *(2) regard the communication as seeking to persuade or incite the recipient to engage in investment activity.*
>
> *It follows that a communication which does not have any element of persuasion or incitement will not be an invitation or inducement under section 21."*

361. These provisions seem to me to reflect the proper construction of section 21, and I propose therefore to adopt the approach they set out.

362. *Third*, in addition to the exception to section 21(1) which applies by virtue of section 21(2) (i.e., when the content of the relevant communication has been approved by an authorised person), the FPO contains certain other exceptions, including Art 15(1). This provides that if the requirements set out in Art 15(2) are met, then the financial promotion restriction section 21 is disapplied in the case of:

> *"… any communication which is made with a view to or for the purposes of introducing the recipient to –*
>
> *(a) an authorised person who carries on the controlled activity to which the communication relates ....*

363. The requirements in Art 15(2) (so far as relevant) are that:

> *"(a) […];*
>
> *(b) A [the person effecting the introduction] does not receive from any person other than the recipient any pecuniary reward or other advantage arising out of his making the introduction; and*
>
> *(c) it is clear in all the circumstances that the recipient, in his capacity as an investor, is not seeking and has not sought advice from A as to the merits of the recipient engaging in investment activity (or, if the client has sought such advice, A has declined to give it, but has recommended that the recipient seek such advice from an authorised person)."*

The Parties' Submissions

364. Against the background, it is possible to summarise the parties' respective positions under this heading.

365. As to the FCA:

i) Their case is focused on (1) Avacade's website; (2) AA's website; (3) the "*Brazil Investors Handbook*", which could be accessed via the AA website; and (4) "*each and every Report Call and Investment Call*." There is no evidence to suggest that any of (1) to (4) was ever approved by an authorised person, so as to engage the exception in section 21(2).

ii) The FCA say that (1) to (4) above were obviously promotional in nature, in the sense of being designed to persuade or incite consumers to transfer their existing pension funds into a SIPP and within the SIPP to acquire investments.

iii) The FCA say that that conclusion is clear not only from the content of (1) to (4) above, but also from the overall context: Avacade was in substance a sales operation; the agreements it entered into with product providers such as Ethical talked expressly of it promoting the relevant products; and consequently any suggestion that it was merely providing information is unsustainable.

366. The Defendants' position overall is that they only ever provided information and options to investors, and did not engage in promotion, save to the extent of making available materials which were approved by authorised persons.

367. To similar effect, the more detailed points made at trial on behalf of the Represented Defendants were as follows:

i) Starting with the Paraiba investment, which is a bond and therefore obviously a "*security*" , Mr Berkley QC relied on the fact that the Paraiba brochure, and the related Offering Memorandum, had both been approved by BlackStar, an authorised person. He accepted that the "*Brazil Investors Handbook*" had not been so approved, but said that its focus was really on providing general background about Brazil, and so it was not in any meaningful sense a financial promotion.

ii) While thus accepting that there may have been some element of promotion (albeit approved by an authorised person) in relation to the Paraiba bond, Mr Berkley QC maintained the position that in other cases there had been nothing more than the provision of information.

iii) But he also said that even if he was wrong about that, and if there had been some element of promotion in relation to those investments other than bonds which involved direct ownership of assets (such as Ethical Forestry or Global Plantations), that did not matter. Such promotion would still not be caught by section 21. That is because (1) the promotion had to be, on the FCA's case, in relation to the buying or selling *of securities*; (2) the investments other than bonds are not themselves securities, and so the promotion of such investments does not engage section 21; (3) it follows that any promotion, in order to be caught, would need to be in relation to the acquisition or exercise of rights within a SIPP; and (4) even if Avacade had promoted sale of the investments, it had not promoted the acquisition or exercise of rights within any SIPP.

368. Mr Berkley QC said that in any event he could rely on the exception in FPO para. 15(1), at least in relation to transfers into SIPPs. He said that the requirements of

para. 15(2) were met in relation to that aspect, including that in para. 15(2)(a) (no pecuniary reward or other advantage). In making that point he relied on the same analysis mentioned above in relation to RAO Art 29, namely that one must divorce the question of the transfer into a SIPP from the question of the decision to acquire investments. Since no commissions had been paid in relation to the SIPP transfers, only in relation to the purchase of investment products, the exception in principle could apply to the former (even if not the latter). (I should mention that this argument based on Art 15 of the FPO was not originally pleaded, but it was argued, and by amendments formulated after trial which the FCA consented to (subject to the usual order as to costs), the Represented Defendants put it in play, both as regards as Avacade and AA. I will therefore deal with it below).

Discussion & Conclusions

369. I note Mr Berkley QC's point that both the "*Paraiba Brochure*" and the accompanying Offering Memorandum were approved by BlackStar, but these are not part of the FCA's complaint. That relates only to the communications identified above, and as to those I have no real doubt that (1) Avacade's website; (2) AA's website; (3) the "*Brazil Investors Handbook*", which could be accessed via the AA website; and (4) the Report and Investment Calls, all contained content that was promotional in the sense of being intended to persuade or incite. On examination, it also seems to me clear that they were intended to promote investment activity, i.e., the sale and purchase of securities (in context, the acquisition and exercise of rights under a SIPP).

370. Mr Richards gives evidence in his statement about the websites, and exhibits a number of "*website captures*". Some extracts give a sufficient flavour.

371. As to the Avacade website:

i) This said on its homepage that:

> *"All Avacade Investment products have been subject to vigorous due diligence before being accepted into our portfolio. Whilst risk and reward are often correlated we seek to protect our clients' interests by only offering investments that have a secure legal title, a clear exit strategy and are SIPP approved."*

ii) It also stated that Avacade was *"… promoting and distributing investments*", and that the investments available through Avacade had a positive environmental and social impact.

iii) It said: "*All of Avacade Investments products are SIPP approved, allowing our products to be accessed by a much wider audience*."

iv) The website included individual pages on each of the investments, and client testimonials.

v) It also included a page on SIPPs, including statements such as: "*The main way in which SIPPs are superior to personal and stakeholder plans is in their investment choice.*"

372. As to the AA website:

i) For periods from at least August 2015 onwards, its stated under the heading "*Investment Options*":

> *"Avacade Future Solutions offers a series of mini-bond investments, accessed through either a Self-Invested Personal Pension (SIPP) or as a cash investment."*

ii) It included wording in the following (or substantially the following) terms:

> *"… Our live opportunity is the Paraiba Projects Mini Bond – a UK owned, three-year investment, offering annual returns of 11% per annum, plus a full return on your capital upon completion …*
>
> *As an Avacade client, you gain priority access to our investment opportunities…*
>
> *Paraiba Key Statistics:*
>
> *> A 3 year secured fixed rate bond issued by a UK based plc*
>
> *> 11% per annum returns paid annually, with return of capital on completion*
>
> *> The bonds issued will be used to finance the development of a 350 acre residential housing project in Brazil which is to be completed by a UK-based property developer*
>
> *> The investment is asset-backed with land title security equal to 125% of the value of the bonds issued, and has been verified by independent security trustees*
>
> *> Over 1/3 of the plots are already sold to the local Brazilian market and infrastructure development is well underway on the site*
>
> *> An FCA registered UK-based Independent Security Trustee acts as guardian for the investor*
>
> *> A minimum investment amount of just £3000 is required."*

iii) On a page called, "*Our Offer*", it described the basic business model (collection of information about existing pensions; pension report; discussion with account manager; referral to an IFA "*who can advise you on next steps*.")

373. These are just some extracts, but nonetheless the characterisation is plain. I do not think it is possible to characterise them otherwise than as promotional, and moreover as seeking to promote the buying or selling of securities. That is because, whichever investments are being referred to, and whether they themselves qualify as securities or not, the overall picture seeks to encourage investment by means of a transfer into a SIPP. Looked at in terms of the business models of both Avacade and AA, that is not at all surprising. Consistent with that, the form of remuneration for Avacade agents

included commission for "*SIPP sales*" and "*Investment sales*", with uplifts for high "*conversion*" rates. There are many other indicators, including the contract with Ethical Forestry which at clause 2.01 provided that Avacade was to " ... *maintain adequate contacts and sales personnel and to develop and promote the sale of the Products actively*."

374. For similar reasons, I cannot agree with the submission that the Brazil Investors Handbook only related generally to Brazil, and was not sufficiently specific to qualify as an invitation or inducement to the buying or selling of securities (i.e., in context, interests in a SIPP):

i) Although it is true that the Handbook (which was available via the AA website from August 2015 onwards) contained general information about Brazil, it also contained a page headed "*Paraíba in action*", which included the following text:

> *"The Paraiba Projects Mini Bond is a three year investment offering returns of 11% per annum, plus full return of your capital upon completion. The bonds will be issued to finance the development of a 366 acre residential housing project in Brazil which is to be completed by a UK-based property developer. The development is certified, with 30% of the 1427 plots already sold."*

ii) The Handbook contains no specific reference to pensions or to the possibility of a transfer into a SIPP, but to the extent it was available on the AA website (see above), the "*sell*" overall was obviously that the Bond was available via a SIPP or as a cash investment.

375. I have commented on the Report Call and the Investment Call above, both in relation to Avacade and AA. For the reasons already given there, it seems to me there was a substantial element of salesmanship involved both in the structure and content of these calls. It is entirely fair, I think, to characterise them as involving an invitation or inducement both to transfer existing pension funds into a SIPP and to use those funds to acquire investments.

376. I do not consider that these conclusions are affected by Mr Berkley QC's argument that there can have been no relevant promotion of the asset-based investments (the Ethical Forestry and other tree-based products in particular), because these are not themselves securities. Consistent with the analysis above at [179]-[185], it seems to me clear that in structural terms, the acquisition of investments using funds within a SIPP must itself involve the buying or selling of securities. A transfer into a SIPP (Step 1) involves the acquisition of new rights, and therefore the buying or selling of securities; and likewise the acquisition of investments within the SIPP (Step 2) involves the exercise of rights (or the relinquishment of one set of rights in return for new ones), and therefore the buying or selling of securities. The purchase of the investments does not stand alone; it is indivisible from what has to happen within the SIPP to allow the purchase to occur. This structure was a critical part of both the Avacade and AA business models, and is reflected in the materials above which I have already determined are promotional in nature.

377. To put it another way, when Avacade sought to promote, say, the sale of an Ethical Forestry Product, its basic pitch was to promote that sale through the medium of a SIPP. Its whole infrastructure was geared around identifying consumers with pension pots that might be transferred into a SIPP, thus providing an available fund from which the investments could be acquired. When Avacade promoted sale of an investment, it was also promoting the acquisition of, and the subsequent exercise of, the rights the SIPP conferred.

378. Finally under this heading, there is the question of reliance on the exception in para. 15(1) of the FPO. Again, I am afraid I am unpersuaded by Mr Berkley QC's argument:

i) I do not find the language of para. 15(1) entirely straightforward, but what is straightforward in this case is the question to which Mr Berkley QC's submission gives rise: can one construe Avacade's actions as promoting an *introduction* to a SIPP provider (an authorised person), which can fairly be separated from the later decision by the investor to purchase investments within the SIPP, in consequence of which commissions are paid? Thus, can it fairly be said that the payment of the commission does not *arise out of* the introduction to the SIPP provider, but only out of the purchase of the investment?

ii) This is essentially the same issue addressed above in the context of Art 29 RAO. For the reasons already given at [248], in my view the answer to both questions in the preceding sub-paragraph is no. That is essentially because the SIPP transfer and the acquisition of the investment are in substance one continuous transaction and cannot be separated out. The SIPP transfer takes place in order to provide a pool of funds with which investments can be acquired and a vehicle through which the acquisition can be effected; and the acquisition of the investments only takes place because it has been preceded by the transfer. That being so, it is just as meaningful to say that the payment of the commission arises out of the introduction to the SIPP provider as it is to say it arises out of any of the other steps in the overall process. Without the introduction, there would be no commission, and the introduction is effected in order to allow the commission to be paid.

VIII FALSE OR MISLEADING STATEMENTS

The Relevant Provisions

379. In addition to the prohibition on financial promotions, the FCA relies on prohibitions against statements made in the promotion of financial services which are false and/or misleading.

380. Prior to 31 March 2013, this prohibition was set out in s.397 FSMA:

> "*(1) This subsection applies to a person who–*
>
> *(a) makes a statement, promise or forecast which he knows to be misleading, false or deceptive in a material particular;*

(b) dishonestly conceals any material facts whether in connection with a statement, promise or forecast made by him or otherwise; or

(c) recklessly makes (dishonestly or otherwise) a statement, promise or forecast which is misleading, false or deceptive in a material particular.

(2) A person to whom subsection (1) applies is guilty of an offence if he makes the statement, promise or forecast or conceals the facts for the purpose of inducing, or is reckless as to whether it may induce, another person (whether or not the person to whom the statement, promise or forecast is made)–

(a) to enter or offer to enter into, or to refrain from entering or offering to enter into, a relevant agreement; or

(b) to exercise, or refrain from exercising, any rights conferred by a relevant investment.…

(9) 'Relevant agreement' means an agreement–

(a) the entering into or performance of which by either party constitutes an activity of a specified kind or one which falls within a specified class of activity; and

(b) which relates to a relevant investment.

(10) 'Relevant investment' means an investment of a specified kind or one which falls within a prescribed class of investment."

381. By the Financial Services and Markets Act 2000 (Misleading Statements and Practices) Order 2001, relevant agreements and specified investments are defined by reference to the FPO and therefore include the "*controlled activities*" already referred to above at [359], i.e. "*Buying [or] selling … securities*", which in context means the transfer of existing pension funds into a SIPP and the deployment of funds in the acquisition of investments.

382. Since 1 April 2013, s.397 FSMA has been replaced by s.89 of the Financial Services Act 2012 ("*FSA 2012*"):

"*(1) Subsection (2) applies to a person ('P') who—*

(a) makes a statement which P knows to be false or misleading in a material respect,

(b) makes a statement which is false or misleading in a material respect, being reckless as to whether it is, or

(c) dishonestly conceals any material facts whether in connection with a statement made by P or otherwise.

(2) P commits an offence if P makes the statement or conceals the facts with the intention of inducing, or is reckless as to whether making it or

concealing them may induce, another person (whether or not the person to whom the statement is made)—

(a) to enter into or offer to enter into, or to refrain from entering or offering to enter into, a relevant agreement, or

(b) to exercise, or refrain from exercising, any rights conferred by a relevant investment."

383. By s.93 FSA 2012, relevant agreements and investments are again defined by reference to an order made by the Treasury, which was provided in the Financial Services Act 2012 (Misleading Statements and Impressions) Order 2013. This, again, cross-refers to controlled activities and controlled investments in the FPO.

384. The FSA's pleaded case is that Avacade breached both s.397 FSMA and s.89 FSA 2012 during the course of its operating existence, and that AA breached s.89 FSA, in both cases by making false or misleading statements knowingly or recklessly. There is substantial overlap in the statements relied on: the 3 relied on in relation to AA are a subset of the 8 relied on in relation to Avacade. It will therefore be convenient to analyse them together below.

385. Before doing so, however, I should make some observations about the proper approach to be applied in conducting the analysis.

The Proper Approach

Some issues

386. A number of points are in the mix.

387. One important point, emphasised by Mr McGarry during his submissions and accepted by Mr Vineall QC, is that the FCA have advanced no case based on alleged concealment of facts or information (FSMA s. 397(1)(b) and FSA s. 89(1)(c)). Thus, what is required is proof of some positive statement, not an alleged omission.

388. A second point concerns the proper technique for the allocation of legal responsibility for statements made to consumers. That point arises in particular as regards statements made by Avacade's employees. As already noted above, they operated by means of a series of scripts. Who is legally responsible for statements made by such employees if they go *off script*? Yet a further point is that the FCA's case is obviously dependent on a finding of knowledge or recklessness. That begs the question: whose state of mind is relevant for the purposes of that test?

The FCA's suggested framework

389. In his oral closing statement, Mr Vineall QC proposed a checklist of six questions, designed to address these and other issues, as follows:

i) Were the statements relied on by the FCA in fact made, and if so by whom?

ii) Assuming they were made, by whom in the legal sense were those statements made, and more particularly, were they made by Avacade or AA? Where

statements made by employees are concerned, in cases where they may be said to have gone off script, both parties submitted that this gave rise to an issue of vicarious liability.

iii) Were the statements in fact false or misleading or deceptive in a material particular? There was expert evidence from both the FCA and from the Defendants on this topic, and the experts were very largely agreed on most points, as I shall explain below.

iv) Did Avacade or AA make the relevant statements either knowing them to be false or misleading or were they reckless as to that? Advancing his submissions on this point, Mr Vineall QC said that, because the state of mind was that of a company, the proper approach was to look to the states of mind of those controlling it, which in the case of Avacade he submitted meant Craig Lummis, Lee Lummis and Mr Fox, and in the case of AA meant Craig Lummis and Lee Lummis.

v) Were the statements made either for the purpose of inducing, or recklessly as to whether they might induce, consumers to enter into *relevant agreements* or to exercise rights under a *relevant investment*?

vi) Were such agreements or investments as were in question here in fact *relevant agreements* or *relevant investments*, within the meaning of those phrases in s.397 FSMA and s. 89 FSA 2012?

390. As I understood it, the Represented Defendants were also content with this overall framework. Moreover, the parties were agreed:

i) That as to any question of vicarious liability, the proper approach to apply was the close connection test approved in *Mohamud* v. *WM Morrison Supermarkets plc* [2016] UKSC 11. I was referred by Mr McGarry in particular to the following passage from the speech of Lord Nicholls in *Dubai Aluminium Co Ltd* v. *Salaam* [2002] UKHL 48, at [23], which was referred to and apparently affirmed by the Supreme Court in *Mohamud*:

> *"If, then, authority is not the touchstone, what is?… Perhaps the best general answer is that the wrongful conduct must be so closely connected with the acts the partner or employee was authorised to do that, for the purposes of the liability of the firm or the employer to third parties, the wrongful act <u>may fairly and properly be regarded</u> as done by the partner while acting in the ordinary course of the firm's business or the employee's employment … . (emphasis in original)"*

ii) That in assessing recklessness, the proper approach was that applied by HHJ McCahill QC in *FCA* v. *Capital Alternatives* at [368], namely that knowledge includes wilful blindness and recklessness should be construed consistently with *R v G* [2004] 1 AC 1034 at [41]:

> "*A person acts recklessly … with respect to—(i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is*

> *aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk.*"

391. I should also say that:

i) such agreements or investments as are in question here are in my view *relevant agreements* or *relevant investments* (see Mr Vineall QC's Question (vi) above) within the meaning of those phrases in s.397 FSMA and s. 89 FSA 2012 - see the reasoning above at [358]; and

ii) given my conclusions already expressed above in relation to the promotional nature of the calls made to consumers by Avacade and AA staff, it seems to me the answer to Mr Vineall QC's Question (v) above is also obviously yes in relation to the statements relied on.

Determining knowledge or recklessness

392. As to the remaining questions, I also see the overall logic of Mr Vineall QC's framework, but it seems to me it has consequences for my approach to this part of the case which it is appropriate to flag now, before looking at the individual complaints relied on.

393. My point is essentially about the interrelationship between, on the one hand (1) the question of Avacade and AA being vicariously liable for statements made by employees who go *off script*, and on the other, (2) the question of whose state of mind is relevant in the context of determining knowledge or recklessness.

394. As to point (1), vicarious liability, having looked carefully at the statements by employees relied on by the FCA in their pleaded case and in the evidence of Mr Richards, it seems to me that in the vast majority of cases (if not in all of them), the statements made by employees represent an elaboration on, or amplification of, themes which appear from the scripts. That is natural enough. It is no doubt difficult and rather artificial to follow a script slavishly. It is to be expected that employees would extemporise with their own additions and language, and that statements will have been made which to that extent are *off script*. Equally, it seems to me that such statements are statements for which Avacade and AA could in principle be regarded as vicariously liable under normal principles, if a case were advanced that they were made wrongfully by the employees concerned. I say that because none of statements relied on seem to me to go *so far off script* that it would be wrong in principle to regard them as having been made while acting in the ordinary course of the employee's employment. They were all part of the overall sales and promotional role which to my mind was the principal role performed by those who engaged by telephone with consumers.

395. To give an example, the FCA's case is that the Avacade Report Call script contained the following language concerning the risk arising from stock-market volatility:

> *"Discuss these figures [of investment returns in the pension reports] – focus on stock market volatility – lack of control – danger of huge sudden market reductions caused by external influences (BP oil spill, 9/11, etc.)."*

396. Assuming that the Avacade Report Call Script did contain this language, one can see in the transcript of the call with one Avacade customer, Mr Thomson, how that same theme came to be developed by Avacade's agent or employee:

> *" … we are talking about worse case scenario, but let's just say for instance, you know, the stock market was to crash … well you do have that risk unfortunately, you may not be paid out … ."*

397. That statement was criticised, on the footing that it suggests the possibility of a complete loss, which could not be true for any individual investing through a personal pension, which would typically be invested in 100 or more individual shareholdings. Assuming that is so, what is important for present purposes is that the statement goes further than the script, which is directed at volatility risk and not at the risk of a complete loss. I think it correct to say, though, that applying the test in *Mohamud*, this is in principle the sort of statement which one might expect Avacade to be vicariously liable for, if making it amounted to a legal wrong. Although off script, it is not so far off script as to fall outside the ordinary course of employment. On the contrary, it is a good example of an employee extemporising on one of the themes he has been told about, but perhaps rather over egging the pudding.

398. The difficulty I have, though, is in characterising the statement as wrongful. That is because of the way the FCA puts its case, which in determining whether any given statement *was* wrongful (i.e., known to be false or misleading or made recklessly) directs attention not to the state of mind of the Avacade employees who actually spoke to consumers, but instead to the states of mind of those who were said to be Avacade's controlling mind and will – i.e., its directors.

399. In my view, the consequence is that where an employee has extemporised and has gone beyond the confines of the script, as in the above example, the FCA's case on knowledge or recklessness cannot be made out. That is not because the statements cannot be in law be attributed to Avacade, but because of the way the case is put. It has not been pleaded or argued that any of Avacade's employees themselves had a dishonest or reckless state of mind, and that their dishonesty or recklessness is to be attributed to Avacade and AA; instead it is said that *Avacade and AA* had the relevant states of mind, thanks to the actions of their directors. Knowledge or recklessness is asserted on a top-down, rather than a bottom up, basis.

400. That being so, I am not satisfied that Avacade (through its directors) can be said to have had the requisite state of mind (knowledge or recklessness) in relation to statements made by employees which go beyond the confines of the scripts. They did not know about them when they were made, and so cannot have done so.

401. In expressing that conclusion, I bear in mind the evidence that Avacade (and I assume also AA) had a call monitoring system, under which calls were reviewed and feedback given, and any problematic calls identified. What is not at all clear to me on the evidence, however, is that the particular instances relevant here (including the one mentioned immediately above) were reviewed at the time, and elevated to a level which involved them being seen and effectively approved by the Avacade or AA directors.

402. I think the result is that, properly understood, this part of the FCA's case has to be looked at with the approved scripts as the primary focus. The substance of what is alleged is that the directors of Avacade and AA, at the time they authorised statements to be made to consumers along the lines contained in the scripts, knew that such statements were misleading, false or deceptive, or were reckless as to whether that was the case.

403. Before coming to the specific points, I should say that I have no difficulty with the concept that each of the directors of Avacade (Craig, Lee and Mr Fox), and each of the two directors of AA (Craig and Lee) should be equated with the directing mind and will of those two companies. In other words, I think the knowledge of the directors – either individually or collectively – can be attributed to the companies for the purposes of s.397 FSMA and s. 89 FSA 2012. I have already referred above to the descriptions given to the FCA of the roles played by the Individual Defendants (see [27] and [130]). I analyse the broader picture below (see at [462]-[468]), in the context of addressing the question whether they were "*knowingly concerned*" in any infringements by Avacade and AA. These were both small companies run in each case by a tight group of senior people, who shared information regularly and operated together. In my view, the Individual Defendants were each of them sufficiently senior and influential for their respective states of mind to be attributable either to Avacade or AA.

404. As to whether the directors had knowledge of the call scripts, the evidence is that within Avacade they were primarily Mr Fox's responsibility, but Craig also said in interview that all three key individuals were aware of what was happening in relation to them. Lee accepted in interview that during the AA period, he reviewed call scripts prepared by Martin Bower, who by then was sales director, including from the point of view of ensuring their compatibility with AA's IT systems. He must have been aware of what they contained.

The Complaints

405. Against the background of those general points, I come on to the particular complaints relied on by the FCA. A number of the originally pleaded points were abandoned during trial. Those that remain to be dealt with are as follows.

406. (1) Non-increase in income in DB pension schemes. This complaint is made in relation to Avacade only. The allegation in POC para. 83.2 is that Avacade was in breach:

> "*By stating to investors in defined benefit pension schemes that their income would not increase, when in fact defined benefit schemes usually include index linked increases.*"

407. I reject this complaint. That is essentially because I am not persuaded that the requirement of knowledge or recklessness on the part of the Individual Defendants is sufficiently made out.

408. Mr Richards in his evidence, in support of the contention that the statement was made, concedes that it was *not* in the Avacade call scripts, but refers to some instances in the transcripts. The FCA's Written Closing relies on two extracts, the first from a call to

Mr Frater who was told: "*£1,218… you'd get this every day until the day you passed away…*"; and the second from a call to Ms Kruck who was told: " … *at 65 you are going to have an income of three thousand eight hundred and twenty eight pounds a year that's basically set in stone the only difference that would happen is if Aon's pension scheme went bankrupt…*".

409. I am prepared to accept that *some* consumers with defined benefit schemes were told that there would be no increase in income, and that that was wrong in the sense (agreed between the experts) that income from a defined benefit scheme is usually index-linked. But I am not persuaded that I have been shown a sufficiently clear pattern of such references for me to be able to conclude that they fell within the scope of the statements which the directors of Avacade had approved (as opposed to the elaboration on approved themes by Avacade's employees), and in respect of which it can therefore be shown that some or all of those directors had the required state of mind.

410. (2) Linkage of tax-free cash and taking an income. The allegation in POC para. 83.3 is in relation to Avacade only, and is that it was in breach:

> "*By stating to investors that they would have to, or would usually have to, start taking an income from their pension schemes if they were to release tax free cash from those schemes. Since 2005 it has been possible to release tax free cash without taking any income at the same time.*"

411. The source for this *was* the scripts. The following appears in the script for the Pre-Report Call:

> *"Usually, once you have taken your tax free lump sum, you have to take your income at the same time and this could possibly greatly reduce the amount you get from your pension as an income."*

412. Statements to similar effect appear in certain of the transcripts, as identified in the FCA's Written Closing.

413. I likewise reject this complaint. Although it is clear that Avacade had authorised the making of statements along the lines of that relied on, I am not persuaded that a sufficiently clear case has been made out that such statements were in fact misleading.

414. The experts are agreed that the statement was in fact *accurate* in relation to Defined Benefit Schemes: they do not permit a lump sum to be taken separately from income benefits. There was some disagreement between them (although in truth not much) about the position of Defined Contribution Schemes. The Defendants' expert, Mr Fettroll, said the statement was also true for "*a significant number of DC pension schemes.*" The evidence of the FCA's expert, Mr Percival, was that it was "*likely that many DC pension schemes, particularly older ones that pre-dated 2006, did not have the option to take the tax free lump sum and not take an income*." But he thought that even in such cases, one option would be for the investor to switch to a new DC scheme, which allowed one to take a tax-free lump sum without taking income.

415. In light of Mr Percival's evidence, I think that if the approved statement had been to the effect that taking a tax-free lump sum would *always* trigger the need to take

income, rather than *usually*, it would have been misleading. But the language of the approved statement is more qualified. It is only that the one *usually* follows from the other. I am not satisfied, on the basis of the evidence, and in particular the expert evidence, that a sufficiently clear case has been made out that that was misleading. I think Mr McGarry was right to point out that the position is more nuanced, and the evidence rather too equivocal on this point.

416. I do not think that overall view is changed by the fact that, in one of the transcripts, namely that relating to Mr Thompson, the point was put more bluntly by Avacade's employee, Mr Penn, when he said: "*Okay, so with the annuity option, if you took your tax free cash and then they would just force you to take your income at the same time…*". It seems to me that that goes further than the authorised script, and so even though it was inaccurate and misleading, I am not able to link it with a relevant state of mind on the part of anyone corresponding to the controlling mind and will of Avacade. Mr Penn was not such a person, and I have not been invited to make any findings about his state of mind.

417. (3) Linkage of personal pensions and annuities vs SIPPs and drawdown. POC para. 83.4 alleges a breach by Avacade:

> "*By explicitly, alternatively implicitly, linking personal pensions with annuities, and linking SIPPs with drawdown plans. Pension funds invested in personal pensions were at all material times available to be transferred into drawdown, and SIPPs could be used to purchase annuities.*"

418. The FCA also relies on the same point as against AA (POC para. 147.1).

419. The FCA says that the linkage alleged is made plain by the Avacade Report Call script (see above), which in describing the four available options pushes the customer in the direction of choosing transfer into a SIPP by (1) emphasising the benefits of drawdown versus taking an annuity, and then (2) linking drawdown with SIPPs. It is said the linkage is made plain by that part of the script which reads as follows:

> "*One of the main things that will have a major influence on which option will achieve what you're looking for, is on the way you decide to turn your pension fund into a pension income… .*"

420. Again, I do not consider this complaint to be made out. My principal difficulty is in identifying the particular *statement* relied on, remembering that both FSMA s. 387 and in FSA 2012 s. 89 are engaged only where a "*statement*" is made. The complaint here, however, is not in relation to a *statement* as such, but rather more in relation to the impression sought to be created during the Report Call. I accept that in principle a statement, for the purposes of the section, may be made implicitly as well as explicitly; but here I am not persuaded that the language set out immediately above is sufficiently clear as to amount to an *explicit* statement that there is a necessary link between personal pensions and annuities and between drawdown and SIPPs.

421. Neither do I consider that a sufficiently clear *implicit* statement emerges from consideration of the other parts of the Report Call script. Although I agree that the objective sought to be advanced by the script was to funnel consumers in the direction of choosing a SIPP, and that it was weighted in favour of achieving that objective, I

do not read it as implying a necessary linkage between personal pensions and annuities and drawdown plans and SIPPs. Indeed, as Mr McGarry pointed out, the section on personal pensions was somewhat ambiguous:

> *" … nearly all pension providers have a minimum fund requirement before they offer you the option of drawdown which means you may be forced to buy an annuity which may take away some of the benefits you're looking to achieve."*

422. I do not understand that wording to be inaccurate or misleading (at any rate, no complaint has been made about it). Although it is true that the impression it creates is that the drawdown option may be subject to greater restrictions in the case of a typical personal pension (as opposed to a SIPP), on its face it expressly acknowledges that drawdown may well be an option under such schemes if the relevant requirements are met.

423. That being so, I do not think it correct to read the Report Call script as making a necessary link between personal pensions and annuities, and between drawdown and SIPPs. At any rate, I cannot detect a sufficiently clear *statement* (whether explicit or implicit) to that effect.

424. (4) Requirement for paid advice. The allegation is that Avacade (POC para. 83.5) misled investors:

> "*By stating that investors would have to obtain advice from an independent financial advisor and pay for the same in order to transfer their pensions into personal pension schemes other than SIPPs, whereas it was stated that advice was not necessary for a transfer into a SIPP. Advice was not required for either type of transfer at the relevant time.*"

425. I am satisfied that statements to this effect were made by Avacade employees, and were sanctioned by the Call Scripts. I have already noted above that the Avacade Report Call Script contained the following statement:

> *"One point of interest, if you wanted to transfer your current funds into a personal or stakeholder pension, you will need professional advice, you cannot do it on your own, so you would have to pay someone like an IFA out of your own pocket to do this."*

426. A similar point was reiterated later in the script:

> *"IF THE CLIENT CHOOSES A PERSONAL PENSION*
>
> *To transfer into a new personal pension would need the input of an IFA…*
>
> *…*
>
> *IF THE CLIENT CHOOSES A STAKEHOLDER PENSION*
>
> *To transfer into a stakeholder pension would need the input of an IFA … ."*

427. As the FCA pointed out in their Written Closing, there are a number of examples in the call transcripts of statements being made to investors in line with the direction in the scripts.

428. The experts are essentially agreed that such statements, if made to investors, were false and misleading. Mr Percival summarises the position as follows:

> *"PPs and SIPPs are fundamentally the same in terms of what options are available other than SIPPs having much wider investment options. The same options around switching are available and there is no requirement for advice in either scenario. The only scenario where advice is mandated is, from April 2015, for a pension transfer from safeguarded benefits valued at £30,000 or more and then the advice requirement applies irrespective of whether the transfer is to a PP or a SIPP. There was no advice requirement prior to April 2015."*

429. I understood Mr Fettroll in his evidence to be in agreement with that basic proposition.

430. In light of that, I have no hesitation in concluding that the statements corresponding to that relied on by the FCA were made and were false and misleading. Given that such statements were authorised by (at least) the Report Call script, I conclude also that the directors of Avacade would have been aware of them, and that their states of mind are relevant to determining the state of Avacade's knowledge. Further, given both that the true position (that there was no advice requirement) must have been easily ascertainable, and that no other satisfactory explanation has been put forward by any of the Individual Defendants, I also conclude that the statements were made recklessly.

431. I therefore uphold the FCA's complaint on this ground.

432. <u>(5) Personal Pensions and equities vs alternative investments</u>. Two statements continue to be relied upon which it is said were designed to diminish the attractiveness of stock market investments, and to make the products offered by Avacade look more stable and attractive:

i) At POC para. 83.7:

> "*By explicitly, alternatively implicitly, suggesting that equities were more volatile and/or more risky than the investments promoted by Avacade.*"

ii) At POC para. 83.8:

> "*By stating that investments in equities stood to lose the investor's money 'instantly', given that any broad range of investments in equities could be expected, at worst, to lose some value but not all value as suggested by Avacade.*"

433. The FCA also relies on the same statements as against AA (POC para. 147.3 and para. 147.4).

434. It is appropriate to take these statements in turn.

435. First, as to that at POC para. 83.7 and para. 147.3:

i) As I read the experts' reports, they are agreed that a distinction must be drawn between volatility and risk. Volatility represents one possible measure of risk, but risk as properly understood is a broader concept which involves looking at wider considerations that volatility alone.

ii) As I read the call script references relied on by the FCA, they are in relation to volatility, not risk more generally. The references are all taken from the later AA Report Call script, but it seems to me right to conclude (as the FCA invite me to) that the Avacade Report Call script must have been amended over time to include the same or similar references. The sections relied on are as follows:

> "*Discuss these figures [of investment returns in the pension reports] - focus on stock market volatility - lack of control - danger of huge sudden market reductions caused by external influences (BP oil spill, 9/11, etc.)*"
>
> (For consumers whose current pension schemes were performing reasonably): "*What you need to bear in mind is that where your money is currently invested is a notoriously volatile environment and whilst recent figures may show sufficient growth, pension funds are very vulnerable to market disruptions and it's not unknown for millions to be wiped off their value over night. Are you comfortable leaving your pension fund in such unstable investments?*"
>
> (Referring to personal pensions): "…*you would still be leaving your funds invested in and around the stock market…*' .
>
> (Referring to SIPPs): "*The big benefit that SIPPs offer is that investment flexibility and choice I mentioned earlier. You have direct control over how much and where your pension fund is invested, allowing you to look at options that for many, many years have shown predictable and stable returns.*"

iii) Mr Richards' witness statement sets out a number of examples of statements being made to investors in a manner consistent with the script – for example Mr Butler, an Avacade customer, who was told that his existing pension fund was invested in a "*volatile market*", but that transferring into a SIPP would enable him to "*look at the alternatives, so something with consistency, stability, something that can perhaps grow at the required growth that you need it to … .*"

iv) Notwithstanding the distinction between volatility and risk, the experts were also agreed that the two concepts are often (wrongly) considered as synonymous. This led Mr Percival, the FCA's expert, to say the following, in a passage which Mr Fettroll, the Defendants' expert, expressly agreed with:

> *"Volatility is commonly considered synonymous with risk (unfortunately, even within the financial services industry) and hence it is very likely that this association would also be made by the average non-expert investor. Even though potentially technically accurate, it is nevertheless misleading to refer to the Avacade investments as less volatile than equities without context or explanation of the meaning of volatility as the investor is very likely to understand this as being less risky which is not the case."*

v) Mr Fettroll also largely agreed with Mr Percival's view that overall, the Avacade (and as I read it, also the AA) investments were in fact riskier than equities. Mr Percival said as follows:

> *"It is clear that the Avacade investments were more risky than equities … The Avacade investments were (a) a single asset class (and hence not diversified in terms of asset classes), (b) a single investment (and hence not diversified in terms of individual assets or provider), (c) illiquid, (d) subject to greater governance risks and (e) not covered by the FSCS. Where investors largely, or wholly, invested in Avacade, then this also presented concentration risk (i.e. having all of your eggs in one basket)."*

vi) What this point boils down to, therefore, is that in focusing on volatility as a feature of equities, in contrast to the stable returns said to be offered by Avacade's and AA's investments, the Report Call scripts were apt to mislead. That is because consumers were unlikely to appreciate the difference between volatility and risk, and were therefore likely to interpret what they were being told as meaning that leaving their pension funds where they were was riskier than moving them into new investments, whereas the opposite was true.

vii) I agree with that point. I think it was misleading for the scripts to focus on one narrow measure of risk when a more balanced presentation would have given a different impression of the relative merits (in overall risk terms) of the options presented.

viii) Moreover in my judgment, it is fair to say both that relevant *statements* were made (see above: it seems to me clear that investors were expressly told that their present arrangements were more volatile than the available alternative of acquiring new investments via a SIPP), and also that such statements were sanctioned by the Report Call scripts and that therefore the states of mind of the Avacade and AA directors are relevant.

ix) I further conclude that the relevant statements must have been made at least recklessly. I arrive at that conclusion having regard to the test approved by HHJ McCahill in *FCA* v. *Capital Alternatives* (see above at [390(ii)]). On the facts, the potential for confusion between volatility and risk more generally must have been clear. Given the potential for confusion, the significance of the issue to investors, and the financial interest Avacade and AA themselves had in the decisions to be made by investors, it seems to me it was unreasonable for the directors to take the risk of such confusion being perpetuated by putting scripts into circulation which did not sufficiently

clearly explain the concept of volatility. That was particularly so given that both the Avacade and AA models involved investors receiving either no, or very limited, financial advice.

x) I therefore conclude that the FCA's complaint under this head is made out.

436. Next, there is the complaint made POC para. 83.8 and para. 147.4. I have dealt with the substance of this already above. The gravamen of the complaint is that statements were made to investors that by investing in equities they stood to lose all their money "*instantly*."

437. It is clear that such statements were made. I have referred already above to what Mr Thompson was told. In cross-examining Mr Fettroll, Mr Vineall QC drew attention to two further instances where consumers had been told they were at risk of losing their money instantly, both involving the same Avacade employee, Mr Reece Archer. I am also satisfied that, to the extent they gave the impression that investors would be left with nothing at all, these statements were misleading: the experts are agreed that market volatility can certainly result on the valuation of pension funds fluctuating, sometimes very significantly, but given the structure of most funds, the likelihood of any given pension pot being immediately and permanently reduced to nil is very limited.

438. Such statements do not feature in the Call scripts, however. Moreover, in the circumstances I am not persuaded that a sufficiently clear pattern has been shown for me to conclude that they must have been authorised by the Avacade and/or AA directors at some stage (as opposed to being an addition or amplification of an approved script made by an employee). Thus, although I accept that such statements were made and that they were misleading, I cannot conclude that they were made with the requisite state of mind on the part of those persons whose states of mind are said to be relevant. I therefore reject the FCA's complaint on this ground.

439. (6) Statements on the investments offered by Avacade. The FCA says that Avacade was in breach -

i) At POC para. 83.9:

> "*By suggesting that the investments promoted by Avacade had a 'proven track record' and were 'relatively low risk'. All of the relevant investments were high risk, without any or any substantial track record of producing returns to investors.*"

ii) At POC para. 83.11:

> "*By referring to the investment providers as sustainable and reputable companies when, at least in the case of Sustainable Energy the company was not sustainable or reputable. In the case of Ethical Forestry investments, the relevant companies were not sustainable.*"

440. With one exception, the individual statements relied on by the FCA as justifying these summaries, as set out in their Written Closing at paragraph 449, all seem to me to be statements concerning the *investments* offered by Avacade rather than statements

concerning the *investment providers* themselves. The one exception is a statement in a call to a Mr Belfon, referred to also in Mr Richards' Witness Statement, where he was told that the investment providers were "*sustainable reputable companies*." That seems to me to go further than the statements endorsed by the approved scripts, which were concerned with investments rather than the investment providers. I infer that the statement made to Mr Belfon was in the nature of an amplification or development of the approved script, made by an individual employee, and that therefore no liability can attach to it because no case is advanced that any individual employee or agent made false or misleading statements knowingly or recklessly.

441. I therefore focus on the remaining statements, and the summary contained in POC paragraph 83.9. In closing the case for the FCA, Mr Vineall QC focused in particular on the statement that the investments were low risk, which he said was especially egregious and indeed unforgivable. As I understand it, his criticisms were directed particularly to the "*tree-based*" products, i.e. Ethical and Global Plantations.

442. I am satisfied both that statements to that effect were made, and that they derived from an approved script or scripts. I say that for the following reasons:

i) Although Mr McGarry sought to argue that the statements were generic, and were intended to relate (for example) to tree investments generally, rather than to the particular investments offered by Avacade, this seems to me unsustainable. Although it is true that the statements relied on were expressed generally, it is obvious in context that they were designed to set the scene for a discussion of the particular investments offered by Avacade, which were put forward as investments *of the type* described. For example, Ms Green was told was told by Darren Loynes, an Avacade employee (emphasis added):

> *" ... [w]hen you actually have a look at assets, such as property and timber, which I'll talk to you about in a minute, they've actually got a long history of providing regular and predictable returns, which has been very well-documented and actually outside the FCA, that's considered to be very reliable and low risk."*

ii) As to the question of the statements being authorised, i.e., known of and approved by the directors, although it is true to say that the Avacade Report Call script makes no specific reference to "*low risk*" (the version relied on refers only to their being " *... investment opportunities out there that have for the last 40 years shown consistent returns ..."*), Mr Vineall QC drew attention to the following extracts from the transcripts, all of which have a remarkable similarity (the emphasis is mine in each case) -

a) Reece Archer to Mr Belfon:

> " *… all the investments I'm going to talk to you about today, okay, they've got a long history of providing regular and predictable returns. They've all been well documented and outside the FCA, they are considered very reliable and low risk …*"

And later in the same call:

"*the reasons why I've picked them out is that timber is the best long-term investment there is, it's the only low-risk high-return asset there is …* ".

b) Stuart Astell of Avacade to Ms Kruck:

"Now in general, assets such as property and timber have got a long history of providing regular and predictable returns, and they've all been well documented, so outside of the FCA these types of investments are considered very reliable and low-risk of course."

c) Ashleigh Whittle to Mr McGrath:

"… the Financial Conduct Authority do class all unregulated investments as high risk investments. I do need to make you aware of that… However, with timber, outside of what the Financial Conduct Authority say, it's very, very well documented and there's lots of information available that shows that timber is in fact the best low risk, high return investment that's currently available. The track record is second to none. For many, many years now it's provided a very, very consistent return over many, many years - much more consistent than the stock market based investments. But I do just need to make you aware of the classification of the Financial Conduct Authority.'

d) "*Sam*" to "*John*" (probably Mr Steeley) (relating to Ethical Forestry):

"This type of asset is not regulated by the FCA, so it's basically not in the powers of the FCA it's not regulated it's called unregulated. Automatically the FCA as being a high risk investment, but that's purely because they can't look at it. If we look outside the FCA, it is a low risk high return investment".

e) Conrad Penn to Mr Thomson:

" … the products that we actually promote are one, HMRC approved but also as well as SIPP approved. They have a long history of providing regular and predictable returns. And outside the FCA, Barry, these are actually considered very reliable and very low risk investments … "

And later in the same call:

"So, very, very low risk investments. Okay? Outside of the FCA. Very good growth on them. Very, you know, highly demandable products."

f) And one can add as a further example the exchange between Darren Loynes and Ms Green above, where Mr Loynes said:

> *" ... [w]hen you actually have a look at assets, such as property and timber, which I'll talk to you about in a minute, they've actually got a long history of providing regular and predictable returns, which has been very well-documented and actually outside the FCA, that's considered to be very reliable and low risk."*

iii) Looking at these examples together, I think Mr Vineall QC is correct to say that the similarities in the language, in calls involving six different Avacade employees or agents, are too striking to be a matter of coincidence. The formula "*outside the FCA they are considered low risk*" (or words to that effect) is common to all of them. It seems an entirely fair, and indeed ineluctable inference, that the formula comes from a script, and was approved.

443. It is common ground between the experts that the Avacade investments were not low risk, and could not fairly be described as such. The Defendants' expert, Mr Fettroll, said in his Report at paragraph 7.89:

> *"If the statements referred to in paragraph 83.9 of the Particulars of Claim with regards to the investments being relatively low risk were stated, then it is my opinion that this would be misleading and would materially influence an investor into choosing the investment."*

444. I have already accepted that the statements were made, and I accept Mr Fettrol's evidence that they were misleading. In my view, that was clearly so. For all the reasons given by Mr Percival (see above), it is clear that they were not low risk. They were certainly higher risk than equities. As also noted above, Mr Fettrol effectively agreed with Mr Percival's view of the overall risks (see [435(v)]). Mr Fettrol said in his Report at paragraph 7.70: "*Stating that alternative investments are low (or lower) risk could be correct for certain alternative investments, but I do not think this is the case here, for the investments promoted by Avacade*." Even Lee, when pressed in cross-examination, said he did not consider the Ethical investments to be low risk (although he did not go as far as accepting they were high risk).

445. I also think the statements were made at least recklessly. As to this, it is puzzling that they came to be made at all, but an explanation of sorts was given by Lee Lummis during the course of his cross-examination. Lee said, when asked about the Ethical investments:

> *"By definition with it not being covered by the FSCS, it would be deemed to be high risk. But from a conceptual point of view of purchasing trees that would then grow in a stable environment, given the projections, that would put forward what happened to timber prices, then it could be – it could be from a conceptual point of view. It seemed to be less risky than, you know, maybe investing in commodities that could go up or down to Bitcoin or anything like that."*

446. This explanation seems to reflect that in the transcript references above. The logic seems to have been that the standard designation of the investments as high risk could effectively be ignored, because it arose automatically as a result of them being unregulated and without reference to their underlying characteristics. Looking at

those characteristics (as described by Lee), they justified the conclusion that the investments were low (or lower) risk than some other possible investments, because they were less likely to fluctuate in value.

447. To my mind, however, this exhibits just the same vice already mentioned above, i.e. a focus on price volatility without reference to an appropriate overall assessment of risks to the investors. In authorising such statements by means of the Call Scripts, I think that the directors of Avacade were at least reckless. Their broad justification for the Avacade business model is that it involved them giving only *information* to investors, from which investors themselves could make a choice; but in describing the Avacade investments as "*low risk*" they were giving incomplete or partial information in the expectation that investors would act on it. In my opinion, it was reckless to allow a statement to be made in that form: the risk of it being inadequate must have been obvious, and in the circumstances I have no hesitation in saying that was an unreasonable risk to take.

IX S. 382 FSMA: "*KNOWINGLY CONCERNED*"

448. S.382 FSMA provides jurisdiction to the Court to make restitution orders against a party that has acted in contravention of "*relevant requirements"* in FSMA and against parties "*knowingly concerned*" in such contraventions:

> "*(1) The court may, on the application of the appropriate regulator or the Secretary of State, make an order under subsection (2) if it is satisfied that a person has contravened a relevant requirement, or been knowingly concerned in the contravention of such a requirement, and–*
>
> *(a) that profits have accrued to him as a result of the contravention; or*
>
> *(b) that one or more persons have suffered loss or been otherwise adversely affected as a result of the contravention.*
>
> *(2) The court may order the person concerned to pay to the regulator concerned such sum as appears to the court to be just having regard–*
>
> *(a) in a case within paragraph (a) of subsection (1), to the profits appearing to the court to have accrued;*
>
> *(b) in a case within paragraph (b) of that subsection, to the extent of the loss or other adverse effect;*
>
> *(c) in a case within both of those paragraphs, to the profits appearing to the court to have accrued and to the extent of the loss or other adverse effect.*"

"Relevant Requirements"

449. As to the meaning of "*Relevant requirements*", these are defined by s.382(9) FSMA:

> *"(9) 'Relevant requirement'–*
>
> *(a) in relation to an application by the appropriate regulator, means a requirement–*
>
> *(i) which is imposed by or under this Act…*
>
> *[(iv) which is imposed by Part 7 of the Financial Services Act 2012 (offences relating to financial services) and whose contravention constitutes an offence under that Part;] '*

It follows that the meaning of "*relevant requirements*" is a broad one. In *FCA v Capital Alternatives* [2018] 3 WLUK 623, HHJ McCahill QC considered the position at [789-796]. As pointed out by the FCA, the Judge cited with apparent approval passages from the *Encyclopaedia of Financial Services* (loose leaf), to the effect that s. 382 is intended to apply to "*any breach of the regulatory regime*" including prohibitions, whether they amount to criminal offences or regulatory infractions (see paras 2A-009; 2A-976 of the *Encyclopaedia*).

450. On that basis, the following matters relied on in this case are all "*relevant requirements"* for the purpose of s.382: contraventions of s.19 FSMA (the general prohibition against carrying on regulated activities without being authorised or exempt); s.21 FSMA (restrictions on financial promotions); and s.397 FSMA.

451. Further, s.89 FSA 2012 falls within Part 7 of the FSA 2012 such that, with effect from 1 April 2014 it is a "*relevant requirement*". The FCA accepts that there is a gap of a year, between 1 April 2013 and 1 April 2014 during which contraventions of s. 89 FSA 2012 were not "*relevant requirements*."

452. I did not understand any of the propositions above to be disputed by the Defendants, or at any rate by the Represented Defendants. In any event, it seems to me that they are correct and so I will adopt them.

"Knowingly concerned"

453. The more controversial question goes to the issue of "*knowing concern*." Here again, however, there seemed to me to be a broad measure of agreement between the FCA and at least the Represented Parties as to the correct test to be applied.

454. Both the FCA and the Represented Defendants referred me again to the decision of HHJ McCahill in *FCA v Capital Alternatives* [2018] 3 WLUK 623, where he reviewed the relevant authorities and gave useful guidance at [797]-[810]. He said:

> *"797. S.382 FSMA gives the Court jurisdiction to grant restitution orders against those 'knowingly concerned' in a contravention of a 'relevant requirement', in addition to the primary contraveners.*

798. In SIB v Pantell (No.2) [1993] Ch 256 at 264D-E, at first instance, Browne- Wilkinson VC stated of 'knowingly concerned':

> *'The most obvious example of a person 'knowingly concerned' in a contravention will be a person who is the moving light behind a company which is carrying on investment business in an unlawful manner. Professor Gower in his report, which was the basis on which the Act was introduced, specifically pointed out the mischief of directors hiding behind the corporate veil of companies... If, as is often the case, the company is not worth powder and shot, it is obviously just to enable the Court, as part of the statutory remedy of quasi-rescission, to order the individual who is running that company in an unlawful manner to recoup those who have paid money to the company under an unlawful transaction.'*

799. The learned Judge there identified the most obvious example of a person who is 'knowingly concerned' in a contravention, namely the 'moving light' behind a company which has contravened a relevant requirement, but, in my judgment, the matter is not limited to those who are the moving lights behind the contravening entity. Each case must be considered on its own unique facts.

800. In the Court of Appeal in the same case and the same report (at 283G), Steyn LJ held that proof of actual knowledge is essential but not enough. Mere passive knowledge is not sufficient and actual 'involvement in the contravention must be established'.

801. The concept of 'involvement' is a broad one, covering those who pull the strings at a directorial and/or managerial level (this would include the 'moving lights' in the contravening entity) and could, in an appropriate case, include those who are involved at a lower level, depending on their knowledge and participation in the contravention.

802. In SIB v Scandex Capital Management [1998] 1 WLR 712, the Court of Appeal, at 720F-H, confirmed that the relevant knowledge is knowledge of the facts on which the contravention depends, and that it is immaterial as to whether or not the individual knows that such facts constitute a relevant contravention. This is because the individual is presumed to know what the law is, and ignorance of the law is no defence.

803. To the same effect, in FSA v Fradley [2004] EWHC 3008 (Ch); [2005] 1 BCLC 479 at [38-40], the Deputy Judge held that:

> *'it is merely necessary for the FSA to establish that [the Defendant] was concerned in the operation of the scheme and knew of the elements ... that made the scheme a collective investment scheme... .'"*

> *804. None of the authorities relies on the formal position of whether an individual is a de jure director or not, or even whether the individual might be said to be a de facto or shadow director of the contravening entity …*
>
> *805. Batts Combe Quarry Limited v. Ford [1943] Ch 51 is authority … for the proposition that the word 'concerned' has a broad meaning …*
>
> *806. Putting it slightly differently, the word 'concerned' can cover a great many activities, including those that are behind the scenes. Therefore, it can capture both 'front office' and 'back office' functions performed with the necessary knowledge, because, in a sales operation, both parts of the business are required for sales to be effected."*

455. I will adopt that summary of the legal position, which was not in dispute between the parties before me, and which in any event strikes me as entirely correct.

The Parties' Submissions

456. The position of the FCA is simple: they say it is obvious in light of the evidence, in particular of the roles the Individual Defendants played, that they were "*knowingly concerned*" in contraventions of the regulatory framework by Avacade and (in the cases of Craig and Lee), AA.

457. All three of the Individual Defendants, Craig, Lee and Mr Fox, deny being "*knowingly concerned*" in contraventions by Avacade. Craig and Lee rely on the same denial in connection with the activities of AA (Mr Fox of course was not involved in AA's business, and so no restitution order is sought against him in relation to it.)

458. Craig and Lee in their evidence adopt the same basic formulation. They each say:

> *"I further deny that I was knowingly concerned in any activities of the first and or second defendant which contravened any relevant regulatory provisions or requirements."*

459. This seems to me to chime with two particular submissions made by Mr Berkley QC at trial on Lee's behalf, both of which were essentially to the effect that Lee did not actually realise at the time that he was doing anything wrong:

i) First, Mr Berkley QC sought to rely on the course of the correspondence with the FSA, and later the FCA, which I have described above, i.e. the warning letters sent by Mr Good in late 2011, and then again in the Spring of 2013, but which (said Mr Berkley QC) were not followed up. As I understood it, the point here was that these two chains of correspondence effectively encouraged Lee in the belief that there was nothing objectionable about Avacade's activities. Had there been anything obviously objectionable, the FCA would have pressed harder and intervened much sooner. I think this point was also allied to, and perhaps underpinned by, certain points made by Lee himself, both in his evidence and in presenting some of his own arguments, to the effect that the Avacade model (as it came to be) was either inspired by, or involved active cooperation from, third parties (IFAs and SIPP providers) who were

FSA and FCA regulated, and Avacade relied on their behaviour as demonstrating what was acceptable from a regulatory point of view or not (see above at [39], [40], [72], [74] and [138] for some examples). Neither did the FSA or FCA intervene to stop what such third parties were doing, at least not until very late in the day. Mr Berkley QC submitted that: "*The relative inactivity of the FCA is relevant to the issue of knowing concern and also to the lack of clarity in the [FCA's] case relating to the alleged regulated activities*."

ii) Second, Mr Berkley QC relied on FSMA section 23, which as noted above provides: *"[i]n proceedings for an authorisation offence [i.e., an offence under section 23] 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*." Mr Berkley QC said that even if not directly engaged because these were civil not criminal proceedings, nonetheless the same or similar considerations ought to inform the view of whether Lee was ever "*knowingly concerned*" in regulatory infringements by Avacade. In developing this point, Mr Berkley QC said it was clear from Lee's evidence that he placed significant reliance on the due diligence carried out in respect of the investment products made available by Avacade. He said that not only was due diligence carried out, but also the relevant companies utilised compliance managers and the services of professional advisers, and the risks associated with the investment products were emphasised in the company materials provided to customers. Another strand of this same argument may be the point developed by both Craig and Lee in their evidence, namely that the directors of Avacade were careful and took legal advice at two points at least, namely in early 2012 from Natasha Peacock (see [83] above), following Mr Good's initial letter in late 2011; and then later in Spring 2013, from The Byrne Partnership, following Mr Good's further letters in January and April 2013 (see [117] above). I will assume that in principle, the same point may be available to the extent that AA took legal advice from Mr Byrne during the course of its new business model being set up.

460. As regards Lee in particular, Mr Berkley QC drew attention to the fact that he was junior in age to either Craig or Mr Fox, who were the individuals in the Avacade business with a background in financial services. The implication was that Lee could be expected to have placed reliance on them given their seniority.

461. As to Mr Fox, in summary he relies on what he says was his limited role in Avacade, reflected in his limited shareholding:

> *"My appointment as sales director of Avacade does not make me knowingly concerned in the contraventions alleged against Avacade given the actual role and activity of the Third and Fourth Defendants, as directors and 70% shareholders, had effective control of Avacade."*

Discussion & Conclusions

General

462. I have no real hesitation in concluding that all three Individual Defendants were "*knowingly concerned*" in the infringement of "*relevant requirements*" by Avacade, and that Craig and Lee were both "*knowingly concerned*" in the infringement of "*relevant requirements*" by AA.

463. As to Avacade:

i) All three were directors of, and senior managers in, the business, effectively from its inception: see the summary of their roles at [27] above.

ii) The background is also relevant, by which I mean the history which led to the development of the Avacade model, which operated from late 2011 onwards. All three Individual Defendants were involved in that journey, and all contributed in their different ways to the development of the model. They all saw the model as it developed, and must therefore have known about its key features.

iii) That is consistent with consideration of the more detailed evidence. Although they were assigned different roles, it is clear that the three Individual Defendants worked together as a closely knit group. As the FCA pointed out in their Closing, Craig in interview described them as being equal in terms of business decisions; and Lee said that decisions were made "*on a joint basis*" and that they were a "*close knit team*." Mr Fox referred to strategies and targets being determined jointly and well as the call structures used by Avacade. Thus, as already mentioned with regard to the call scripts, although these fell primarily within Mr Fox's domain as sales director and he would have signed off on them, Craig in interview said that " *... you know, we'd have been, both myself and Lee would have been fully aware of it ...* ."

iv) As to each of them being "*concerned*", in the sense of being involved in the actual operation of the Avacade model, the evidence in my view is overwhelmingly clear. I will not mention them all, but Mr Richards in his evidence gives numerous examples of the Individual Defendants (either individually or together) exercising management responsibility in relation to matters which formed part of the Avacade model. This suggests to me that they were relatively "*hands on*", which is just what one would expect in the case of a small or medium sized business like Avacade. Such matters included (for example) attending meetings with SIPP providers; dealing with IFAs; attending the Richmond Solutions Call Centre; and taking trips to see the Ethical Forestry plantations in Costa Rica and the Global Forestry plantation in Malaysia. To similar effect, the evidence is that Craig specifically signed a non-disclosure agreement with 1Stop and signed the contracts relating to the REIUSA bond; that Lee signed agreements with both Ethical Forestry and Global Plantations in April 2011; and that Mr Fox signed off on the various call scripts.

464. Another strong indicator of persons being "*knowingly concerned*" is financial remuneration for their involvement in a business. Again, Mr Richards gives evidence about this. He says, and I accept, that a review of the bank account statements for Avacade and AA shows the Individual Defendants receiving the following sums:

i) Craig Lummis: £2,550,019.

ii) Lee Lummis: £2,553,360.

iii) Ray Fox: £1,714,226.

465. In his Defence, Mr Fox effectively admitted the FCA's pleaded case on remuneration. Craig and Lee neither admitted nor denied the sums they received, and said in response to a Part 18 Request for Information that they would require time themselves to search and locate some "*8 years of bank records*."

466. In the circumstances, and while accepting there may be some debate around the precise sums received, I am prepared to accept and hold that the Individual Defendants did receive substantial sums, in the region of those identified in Mr Richards' evidence. For present purposes, it seems to me that conclusion is again consistent with an overall finding that they were each "*knowingly concerned*" in the activities of Avacade which amount to the infringement of "*relevant requirements*."

467. In my view, the same logic applies, and the same conclusions may be drawn, as regards the involvement of Craig and Lee in the business of AA:

i) They each gave evidence that they were involved in the development of what became the AA business model, described above at [124]-[141].

ii) They each held senior management positions in AA, as to which see the descriptions of their respective roles set out above at [130].

iii) They are father and son, and so one would naturally expect there to be close communication between them, and for them jointly to participate in making important decisions, to include setting strategy and entering into any major contracts.

iv) As to evidence of the individual contributions, Mr Richards in his witness statement refers (for example) to the fact that Craig's printed signature appears on the relevant client signature pack; and he refers to the fact that Lee signed a contract with BlackStar and a contract with NE Brazil Investments (in relation to Paraiba).

v) The points made above as regards remuneration apply with equal force.

468. In short, it seems to me that the evidence of knowing involvement in what Avacade and AA were doing – i.e., knowledge of the business models of the two companies, and active involvement of the relevant Defendants in the operation of those models – is overwhelmingly clear.

Specific Points

469. What of the specific points relied on by Mr Fox, and by Mr Berkley QC?

470. As to Mr Fox, I am unimpressed by his point that he was only a minority (30%) shareholder in Avacade and the sales director.

i) As to the question of his shareholding, the issue I have to address is not about who had ultimate shareholder control, but who was "*knowingly concerned*" in Avacade's activities. I see no inconsistency in the idea that someone with only a 30% shareholding in a business may nonetheless be "*knowingly concerned*" in its operations, and thus in any infringements of "*relevant requirements*" arising from such operations. What are required are knowledge and involvement, and obviously one may have knowledge and be involved to the required extent even as a minority shareholder. Based on the evidence above, I think that Mr Fox did have the required knowledge and was sufficiently involved.

ii) As to his point about being sales director, that may be true, but (a) there is no doubt that his regular interactions with Craig and Lee would have made him aware of, and involved in, other aspects of Avacade's operations, and (b) I think it clear in any event that the sales function was at the core of Avacade's operations. Its whole model was built around using the structures it put in place in order to deliver sales of investments and therefore commissions. I do not think it assists Mr Fox to say he was merely the sales director, when in financial and business terms, sales were what Avacade was all about, and all other aspects of its infrastructure were really about supporting the sales function.

471. As to the points made by Mr Berkley QC, summarised at [459] above, and indeed the related points made by Lee and indeed Craig in their evidence, I am afraid they all seem to me to be based on the same misconception:

i) At heart, they all seem to me to involve the same proclamation of innocence. That is to say, they all involve Craig and Lee saying effectively: well all we were doing was following the market model; in doing so we followed the example set by third parties who were themselves approved; we engaged with the FSA/FCA in correspondence and expressed a willingness to talk to them but they did not follow up; we took seriously what we were told, and in light of the FSA/FCA's interventions we took legal advice; consequently, we tried our very best and acted honestly and reasonably and thought at all times that we were on the right side of the line.

ii) None of those points, however, are relevant to any stage of the present inquiry. That involves establishing whether infringements have taken place (see above), and assessing whether the Individual Defendants were "*knowingly concerned*" in such infringements.

iii) No part of that process, as it seems to me, involves assessing whether the Defendants knew that what they were doing actually amounted to an infringement. It only involves assessing whether the Defendants were knowingly involved in the acts which, as matters have now turned out, have been held to amount to infringements. What the Defendants knew or suspected at the time about such matters amounting to infringements is, in my view, immaterial: see the references above to *SIB* v. *Scandex Capital Management* [1998] 1 WLR 712 at 720F-H, cited in *Capital Alternatives* at [802]. Relevant knowledge for the purpose of whether someone is "*knowingly concerned*" is knowledge of the facts on which the contravention depends, and

it is immaterial whether or not the individual knows that such facts constitute a relevant contravention.

iv) The same applies to any question of what the FCA did or did not do. If the matters alleged amount to infringements, then they were always infringements, irrespective of what the FCA may or may not have done about it at the time. Likewise, the question of the Individual Defendants' knowing involvement in the matters which constitute infringements is unaffected by any question of what the FCA knew or did.

v) The short point is that, as far as I can see, Craig and Lee have never seriously sought to deny knowing involvement in the facts on which the various contraventions depend, only knowledge that they actually gave rise to contraventions. That is insufficient.

vi) That logic, it seems to me, applies in relation to all the points summarised above. Specifically as to the points raised by Mr Berkley QC, neither (a) the correspondence conducted with the FSA/FCA, nor (b) any due diligence (including the taking of legal advice) which may have been done, to my mind is relevant to the issue whether Craig and Lee were knowingly concerned in performing acts which, as matters have turned out, have been held to amount to contraventions.

vii) Such matters might be said to be relevant to a separate, and later, inquiry, which is the inquiry as to the quantum of any restitution order or orders which may be made. I say that because the authorities indicate that the discretion given by FSMA s.382 is a wide one. Although under the section itself the court is expressly required to consider any losses suffered by investors and profits made by the infringers, it may also take into account other matters which bear on the justness of an order, and should balance the interests of the investors against the culpability of the contravener: see *FSA* v. *Shepherd* [2009] Lloyd's Rep. FC 361 (Jules Sher sitting as a Deputy Judge) at [35]-[36], as later approved in *FSA* v. *Anderson* [2010] EWHC 1547 (Ch) (Vos J. as he then was). I have not been directly addressed on the issue of the quantum of any restitution order or orders, however, which the parties are agreed is not a matter for this Judgment. Beyond flagging the point, therefore, I shall say no more about it.

472. For the sake of completeness, I should add that in the case of Lee, the conclusions above are not in my view affected by Mr Berkley QC's submission that he was junior in age to Craig and Mr Fox. That is true, but he was still an integral part of the structure of both Avacade and AA, and was involved not only in their operation but also in their development. He was therefore *knowingly concerned* in their activities.

X CONCLUSION AND DISPOSAL

473. In summary I conclude as follows:

i) With regard to Avacade:

a) The *perimeter breaches* alleged by the FCA, together with the breaches of FSMA section 21, FSMA section 397 and FSA section 89, are made out to the extent identified in this Judgment.

b) By reason of those contraventions, consumers transferred very substantial sums into SIPPs, and very substantial sums into investments from which Avacade made commissions. Although the final figures may need to be worked out, I am prepared to proceed on the basis that consumers transferred sums in the region of £86.977m into SIPPs, and that sums in the region of £68m were transferred into the various investments, from which Avacade earned commissions in the region of £10.6m.

c) The Individual Defendants were all "*knowingly concerned*" in the relevant infringements, and benefited in the sense that they were paid monies in the region of the amounts mentioned at [464] above. (In saying that I note that those sums are said by Mr Richards in his evidence to be gross figures, and that some limited payments were made *to* Avacade by the Individual Defendants. I also note that in his oral evidence Lee Lummis referred to a tax scheme involving investments in gold, but the point was undeveloped and I was not addressed on the relevance of it in submissions. If such points are said to be material to the extent of the benefits actually received by the Individual Defendants, I will need to hear further submissions on them).

ii) With regard to AA:

a) The *perimeter breaches* alleged by the FCA, together with the breaches of FSMA section 21, and FSA section 89, are made out to the extent identified in this Judgment.

b) By reason of those contraventions, consumers transferred very substantial sums into SIPPs, and very substantial sums into investments from which Avacade made commissions. Although the final figures may need to be worked out, I am prepared to proceed on the basis that consumers transferred sums in the region of £4.837m into SIPPs during the main period of AA's activity, and that sums in the region of £905,000 were transferred into the Paraiba bond, from which Avacade earned commissions of at least £226,250. I am also prepared to proceed on the basis that AA received commissions from other investments, as referred to at [167(ii)] above.

c) Craig and Lee Lummis were both "*knowingly concerned*" in the relevant infringements.

474. I will need to hear from counsel in relation to the appropriate orders flowing from this judgment, and in relation to other consequential matters.