# The perils of unregulated introductions – postscript to Adams v Options SIPP after Avacade

*Introduction*

In a previous article , we discussed in detail the judgment of the Court of Appeal judgment in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474. In that case, an unregulated introducer was held to have carried out the regulated activity of making arrangements with a view to a person buying or selling investments within the meaning of art.25(2) RAO when it assisted a customer to transfer his personal pension into a SIPP so that he could invest it into an alternative investment promoted by the introducer. While that latter investment was not regulated activity, the earlier parts of the arrangements, namely the disinvestment from the existing personal pension, did engage regulated activity. This note, which assumes that the reader is familiar with *Adams*, is intended to serve as a short postscript to that article, following the Court of Appeal's recent judgment in *FCA v Avacade* [2021] EWCA Civ 1206.

*The Avacade litigation*

In *Avacade*, the Defendants purported to outline to their customers the options available to them for dealing with their pension funds. Through the use of leading questions and veiled suggestions, customers were steered to what was supposedly an independent decision to transfer their pension into a SIPP, and invest in certain alternative investments promoted by the Defendants. The lower court found that by leading customers to their promoted schemes, the Defendants had made arrangements with a view to a person buying or selling investments within art.25(2) RAO.

The essence of the first-instance judgment was that the regulated activity of making arrangements with a view to a person buying or selling securities did not require causing a transaction to be concluded; it was enough if the arrangements had the effect of contributing to, or encouraging, the conclusion of a transaction.

The Defendants appealed, challenging in part the reasoning on art.25(2) RAO.

By the time the matter came on in the Court of Appeal, the Court of Appeal had handed down its judgment in *Adams.* Seizing the opportunity, the Appellants sought to advance further grounds of appeal, on the basis that the decision in *Adams* provided further reasons for challenging the conclusions of the trial judge on art.25(2) RAO.

*The reliance on Adams in Avacade*

A hook for the Appellants' reliance on *Adams* was provided through the trial judge's analysis of the *Avacade* process by reference to four steps, namely: (1) transfer out of the consumer's existing pension; (2) transfer into the new SIPP; (3) divesting cash from within the new SIPP; and (4) purchase of one or more of the investment products promoted by Avacade. He held that step 1 did not involve regulated activity (the schemes concerned were occupational pension schemes, not personal pensions like the pension in *Adams*), whereas steps 2, 3 and 4 did, step 2, because it involved acquiring rights under a personal pension scheme, and steps 3 and 4, because even where the underlying products were not specified investments, they involved the member buying or selling rights under the SIPPs.



4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
DX: DX 303 LDE www.4pumpcourt.com

The Appellants submitted, and the FCA accepted, that the effect of the judgment of the Court of Appeal in *Adams* was that, steps 3 and 4 did not constitute the buying and selling of securities by the consumer.

However Popplewell LJ, with whom the other Lord Justices agreed, expressed serious reservations as to whether the Appellants' position and the FCA's concession were correct. He noted that in *Adams* the court's reasoning that the acquisition of an investment in a store-pod did not involve converting or disposing of rights under a personal pension scheme derived from the fact that the scheme member had had no legal ownership rights under the scheme, only gaining rights pursuant to declarations of trusts made under the scheme rules. By contrast in *Avacade* the member became a legal owner of the eventual investment (as a joint trustee) and hence the member's rights under the scheme did not remain the same at steps 3 and 4.

Popplewell LJ noted that he would not find it a surprising result if the involvement of a personal pension scheme were to bring investment in unregulated products within the scope of regulation. The designation in art.82(2) RAO of rights under a personal pension as a regulated investment, so as to provide the consumer protection inherent in the regulatory regime, reflects a policy that personal pension savings are of a kind which deserve particular protection.

However, the Court considered that the Appellants were entitled to take advantage of the FCA's concession, and so proceeded on the basis that steps 3 and 4 did not involve regulated activity and so what mattered was the earlier steps.

The essence of the Appellants' argument was as follows: first, the only regulated activity arose from step 2, i.e. the transfer into the new SIPP; second, step 2 in itself was not the objective of the arrangements, the real end being steps 3 and 4 which produced commission for them; therefore, art.25(2) was not engaged as the arrangements were, if anything, "with a view" to steps 3 and 4 which was agreed not to involve regulated activity.

That argument failed. The Court of Appeal held that the Appellants' approach "ignored both the Trial Judge's findings and the reality of the schemes" (paragraph 52). It was wrong to treat the four steps as distinct actions to be analysed in isolation, in effect compartmentalising the arrangements for the purposes of art.25(2) RAO. That had not been meant by the trial judge, who employed this four-step analysis simply as a means of analysing what he had found to be an indivisible and seamless set of arrangements. The entry into a SIPP at step 2 was a necessary and critical part because access to pension pots was the essential source of funding for the investments. As such step 2 was a specific and necessary purpose of the arrangements for the purposes of art.25(2) RAO. In this regard Popplewell LJ noted that the same point had been made forcefully in *Adams* and had underlain the rationale for finding that the unregulated introducer had contravened art.25(1) and 53 RAO in that case because although the investment in store-pods was unregulated, the introducer had encouraged Mr Adams to transfer out of his existing personal pension which was a regulated activity.

*Does art.25(2) have a causative element?*

The decision further clarifies that there is no causative element to art.25(2). The Appellants argued that there had to be a direct and instrumental causal link between the arrangements and the potential investment activity they were to bring about. They sought to draw an analogy with art.25(1), which concerns making arrangements "to buy, sell, subscribe for or underwrite" a security or a relevant investment. To that article there is an exception provided by art.26, excluding from the scope of art.25(1) "arrangements which do not or would not bring about the transaction to which the arrangements relate". On this basis, the Appellants submitted that since art.25(1) involves a causal link, and since "making arrangements" must mean the same thing in art.25(1) and 25(2), then there must be a notional causative link of "bringing about" the transactions in art.25(2) also.

The Court of Appeal decisively rejected this approach, holding that the trial judge was right to treat art.25(1) and art.25(2) as conceptually distinct. They concern two different kinds of activity, are drafted in different terms, and the



4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
DX: DX 303 LDE www.4pumpcourt.com

exception in art.26 concerns only the former. The word "arrangements" does not of itself mean two different things in both articles, but that is not the relevant question: the question is whether the arrangements in question qualify as a contravention, and there is clearly no conceptual difficulty with there being a contravention of one article but not the other. It was therefore fallacious to apply the causal requirement for art.25(1) set out in art.26 to art.25(2). There was no need for any test of causation in art.25(2) because the words "with a view to" make clear that the article is concerned with the intended purpose of the arrangements, not whether they resulted in a transaction. The intended purpose must be that a relevant transaction take place, but so long as this is the case, it is irrelevant whether the arrangements actually – or even notionally – cause such a transaction to be concluded.

As the Court colourfully put it at paragraph 48, "A person may have a relevant transaction as an end in view where the arrangements do no more than create or facilitate a situation which provides the opportunity for it to take place. That may be an intended result notwithstanding that the arranger is powerless to ensure that it takes place or even influence the decision which leads to it taking place. You cannot make the proverbial horse drink, but taking it to water involves making arrangements with a view to it drinking."

*Conclusions and key takeaways*

It is a rare thing indeed to have two important appellate decisions concerning a regulatory provision such as art.25 in a single summer. While on each occasion the conclusion was that regulated activity had taken place, there clearly remains some tension as to whether the investment stage in unregulated products is itself conceptually capable of amounting to regulated activity in isolation.

The clear message from both decisions is that a central purpose of the authorisation framework in FSMA is the protection of consumers – including from themselves – and attempts to structure introducing activities in a way which allows the introducer to steer the customer towards particular products whilst remaining outside the regulatory framework are unlikely to succeed.

A number of key takeaways seem clear enough:

- Both *Avacade* and *Adams v Options SIPP* will have to be carefully analysed in any case in which art.25(2) RAO arises for consideration.
- It is not necessarily possible to cross-apply the regulatory classification of "arrangements" from one case to another. It always depends on the exact analysis of the operation of particular schemes, products, and wrappers.
- As a general point, we are witnessing a tightening of the regulatory perimeter.

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**Authors:** James Purchas and Kajetan Wandowicz



4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
DX: DX 303 LDE www.4pumpcourt.com