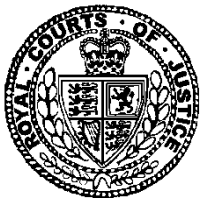

Neutral Citation Number: [2016] EWHC 724 (Ch)

Claim No. HC-2015-000522

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Date: Wednesday, 6 April 2016

Before: MR NICHOLAS LE POIDEVIN, Q.C.
(sitting as a deputy judge of the Chancery Division)

- -

Between:

IAN GRAY & ASSOCIATES LIMITED

Claimant

- and -

INVESTMENTS LIMITED
(in liquidation) **Defendant**

- -
- -

Mr Theodor van Sante (instructed by DWF LLP, solicitors)
for the Defendant and Applicant
Mr Edward Bartley Jones, Q.C. (instructed by Gardner Leader LLP, solicitors)
for the Claimant and Respondent

Hearing date: 3rd March 2016

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para. 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Nicholas Le Poidevin, Q.C. (sitting as deputy judge of the Chancery Division)

1. Between 2008 and 2010 the parties were involved together in investment arrangements designed for contributions from self-invested pension schemes. In 2010 the arrangements came to an end, apparently an abrupt end, at the instigation of the Defendant ("Investments"). The Claimant ("IGA") now sues Investments for losses said to have been caused to it by the way in which it was treated by Investments. IGA's claims, as they presently stand, are put in alternative ways according as the arrangements did or did not amount to a collective investment scheme ("a CIS") within the Financial Services and Markets Act 2000 ("FSMA"). Investments contends that the arrangements did not amount to a CIS and applies now for the striking-out of the parts of the Amended Particulars of Claim which assert that they did. If the application is successful, the action will proceed to trial on the other branch of the claims.

2. It is useful to say here that the application turns on the scope of two exceptions to the general definition of a CIS, called in argument the pensions exemption and the common accounts exemption. The investment arrangements were not a CIS if they fell within one or other of those exemptions. The application is made on the basis that the Amended Particulars of Claim disclose no reasonable grounds for bringing the relevant branch of the claims, so as to fall within CPR rule 3.4(2)(a).

Relevant history

3. I shall describe the investment arrangements in a little more detail below. The relevant history is as follows.

4. Implementation of the arrangements began in 2009 under what was called an Appointed Representative Agreement dated 4 March 2008 and entered into between IGA and Investments, by which Investments appointed IGA its representative. (There had been a previous such agreement dated 30 November 2004 but nothing turns on that.) In November 2010 solicitors instructed by Investments advised that the arrangements constituted a CIS. The arrangements were not for that reason unlawful but they would have constituted an unregulated CIS in which Investments had no wish to be involved. Accordingly, shortly thereafter and in consequence of that advice, so IGA alleges, Investments required the arrangements to be brought to an end. IGA complied and unwound the arrangements.

5. In February 2012 a letter of claim was sent to Investments on behalf of IGA. There was further correspondence and eventually a claim form was issued on 11 February 2015. The Particulars of Claim which followed the claim form were unsurprisingly premised on the footing that the investment arrangements did indeed constitute a CIS, since that was the ground on which Investments had brought them to an end. In the Particulars of Claim IGA contended, in summary, that (i) it was an implied term of the Appointed Representative Agreement that Investments would use reasonable care and skill in deciding whether to authorise IGA to conduct investment business, (ii) fees were payable under the agreement by IGA to Investments for compliance services and so it was also an implied term of the agreement that Investments would

use reasonable care and skill in providing such services, (iii) Investments owed similar duties to IGA in tort and (iv) there was a special relationship between IGA and Investments, so it was reasonable for IGA to rely on information and advice from Investments, as it did, that the investment arrangements met the regulatory requirements. Because the arrangements constituted a CIS, Investments was in breach of the duties specified in heads (i) to (iii) and had acted negligently as to head (iv). IGA claimed, and still claims, damages on a 'no transaction' basis, asserting that if Investments had not been in breach of duty the investment arrangements would not have been made. The damages fall under two heads: the first comprises various items of wasted expenditure, amounting to about £230,000, and the second is based on a claim that a number of clients left IGA in consequence of the cessation of the scheme, with a loss of an income stream put at some £920,000, though subject to various discounts.

6. Investments served its Defence on 8 July 2015. In the Defence appeared the contention that the investment arrangements did not in fact amount to a CIS at all. That was the first time that the contention had been advanced on behalf of Investments and it no doubt came as a surprise to IGA. The Defence was followed two months later by an application, based on that contention, for the Particulars of Claim to be struck out or alternatively for summary judgment. Investments asserted that the nature of the investment arrangements was common ground, so no trial was needed to determine whether they constituted a CIS.

7. IGA responded in December 2015 by applying to amend its Particulars of Claim so as to introduce additional claims on the alternative footing that the investment arrangements did not amount to a CIS, though IGA's primary case remains that they did. Investments consented to those amendments, as it was effectively bound to do, but made it clear at the same time that though it would not be pursuing summary judgment it was not dropping its application to strike out. On 14 January 2016 Master Bowles made an order by consent giving permission to make the amendments, with certain additional directions, and at the same time directed Investments' application to be heard as an application by order.

8. It is that application which I am now determining. At the hearing, Investments was represented by Mr Theodor van Sante and IGA by Mr Edward Bartley Jones, Q.C. I am grateful to both of them for their careful submissions.

IGA's preliminary points

9. Mr Bartley Jones took some preliminary points about Investments' application.

Scope of application

10. The application as originally framed sought the striking-out of the entirety of the Particulars of Claim. When consenting to the amendments, Investments did not specify how, if at all, it was modifying its application to strike out. Read literally, therefore, the application appeared to continue to seek the striking-out of the entire Particulars of Claim, including the amendments to which Investments was consenting;

if not so read, Investments had not identified which parts it was seeking to have struck out. That omission was remedied in Investments' skeleton argument before the Master and it is not now disputed what the material parts are.

Opportunism

11. Mr Bartley Jones also complained that the application was opportunistic, because until service of the Defence Investments had not previously contended that the investment arrangements did not constitute a CIS. Had the point been sprung on IGA at trial, I can see that the objection would have had some force. But IGA has had the opportunity to amend to meet the point, which it has taken; and in the absence of any contention that Investments is estopped from raising the point it has to be determined sooner or later.

Appropriateness of application

12. Mr Bartley Jones' principal contention was that an application such as this was an inappropriate vehicle to determine the issues raised. Whatever the decision on the application, there would be a trial. The issues were of general importance and so there might well be an appeal, which would impede the trial. The application had become the equivalent of a preliminary issue and yet it was unlikely that the court would have ordered a preliminary issue in those circumstances. He reminded me that it was a common experience that preliminary issues often seemed a good idea at the time but later turned out not to be.

13. Mr van Sante drew my attention to para. 24.2.3 of *Civil Procedure 2016*, the third sub-paragraph, which comments that where an application gives rise to a short point of law or construction, the court should decide the point if it has before it all the evidence necessary for a proper determination and it is satisfied that the parties have had an adequate opportunity to address the point in argument. The particular passage in fact concerns an application for summary judgment but he submitted that it must apply equally to an application for a striking-out.

14. I accept the submission that the passage in *Civil Procedure 2016* applies equally to an application such as this, because if the point of law or construction is decided in favour of a defendant there will be no reasonable grounds for bringing the claim within CPR rule 3.4(2)(a); but I do not consider that the court is required to divide off an issue of law or construction arising in an action merely because one of the parties applies for its separate determination. It is a matter of discretion. That said, it is true, as Mr van Sante also submitted, that such issues, if left over to trial, tend to increase the elaborateness and hence the cost of the preparation, even when they are capable of determination without further evidence. The fact that there will be a trial in any event is therefore not of itself a reason for refusing to entertain a striking-out application; indeed, if it were, no such application could be entertained unless it would potentially dispose of the whole action. If this application succeeds, it will dispose of one of the two branches of IGA's case. As to the possibility of an appeal, I accept that an appeal is a possibility, though that is true of any striking-out application. I do not consider that the issues raised on this application, though issues of law, are of obvious general

importance, as those concerned with financial services have been able to get along without a determination of them for the last thirty years, *i.e*. since the Financial Services Act 1986, containing similar provisions, was passed; and in any event, if one leaves aside regular litigants such as public bodies, a party does not more readily appeal merely because a point is of importance to others. I bear in mind also that the parties came to the hearing prepared to argue the application on its merits and the preparation would be wasted if, having heard the argument, I were to decline to decide it. (I was not asked to decide the appropriateness of the application before argument on the merits.) I am quite satisfied, in terms of the passage in *Civil Procedure 2016*, that the parties have had an adequate opportunity to address the issues. For those reasons, I reject Mr Bartley Jones' principal contention.

15. Mr Bartley Jones, however, had a related but more confined point, which was that on a striking-out application the facts should be assumed in favour of the claimant. I accept that that is so. The passage from *Civil Procedure 2016* also indicates that the court should have before it all the necessary evidence. Mr Bartley Jones said those requirements were not satisfied in the case of the common accounts exemption. I will deal with the point when I come to that exemption. He did not suggest that in the case of the pensions exemption there were material facts not already before the court.

Relevant facts

16. The facts relied on for the purposes of Investments' application were set out in Mr van Sante's skeleton argument, which I paraphrase with a few additions as follows:

    (1) IGA was at all material times an IFA specialising in pensions advice. Investments operated a 'network' for appointed representatives, by which it allowed businesses such as IGA's to operate without the need to obtain their own authorisation by the FSA. Section 19 of FSMA imposes a general prohibition against carrying on a regulated activity, which includes the operation of a CIS, unless the person so acting is an authorised person or an exempt person. Investments was an authorised person.

    (2) IGA became an appointed representative of Investments pursuant to the Appointed Representative Agreement of 2008. That made IGA an exempt person.

    (3) Under the agreement, IGA began to offer a particular set of investment arrangements to its customers. The structure was as follows:

        (a) Individual clients of IGA would transfer the whole, or some part, of their pension fund to a self-invested pension plan (a SIPP), the operator of which was MYSIPP Limited ("Limited") and the trustee of which was MYSIPP Trustees Limited ("Trustees").

        (b) The clients' funds were pooled in the hands of Trustees and that pooled fund was then transferred to Berkeley Futures Limited ("Berkeley") for investment.

(c) Berkeley as broker was to trade the pooled fund on the instructions of investment managers under consultancy with IGA, IGA having entered into discretionary fund management agreements with each of its clients.

(Mr van Sante referred to the investment arrangements as a scheme. I have eschewed the term 'scheme' for them, without prejudging anything, because the pensions exemption refers to a personal pension scheme and a CIS is of course a scheme, and to introduce the same term for a third purpose would invite confusion.) From IGA's Amended Particulars of Claim and the witness statement of Mr Andrew Shipp, of Gardner Leader, IGA's solicitors, made in opposition to Investments' application, I am satisfied that those facts are common ground.

17. The documents in evidence provide some further detail:

(1) A sponsorship agreement was entered into on 26 June 2009 between IGA and Limited in which IGA was described as sponsor. It was recited that Limited was the operator of a registered pension scheme, called MYSIPP, established by a trust deed. IGA had requested changes to the existing terms and conditions of MYSIPP, which Limited had agreed to make, so that there was a bespoke SIPP for IGA's clients. (I shall call it the bespoke SIPP rather than the confusing MYSIPP.) It is the bespoke SIPP of which Limited was the operator and Trustees the trustee.

(2) By clauses 2.2 and 3.5, IGA would be the fund manager for each client becoming a member of the bespoke SIPP and it would be IGA which maintained the relationship with the member.

(3) IGA used an application form for a client to become a member of the bespoke SIPP, though there is no clear term so stating and its purpose has to be inferred from the welter of detailed provisions it contains. In various places it provides for the appointment of IGA as fund manager and for Limited and Trustees to have what were effectively execution-only functions. Consistently with those provisions, as I have mentioned, there was a separate form of discretionary fund management agreement between the client and IGA.

(4) The application form provided that all funds would be transferred to Berkeley and indicated that the purpose, or a purpose, of the bespoke SIPP was to engage in trading in derivatives.

18. Under the bespoke SIPP, therefore, funds from clients of IGA were pooled in the hands of Trustees and upon transfer to Berkeley were used for trading in derivatives on instructions given by or on behalf of IGA. Mr Bartley Jones told me, without objection from Mr van Sante, that significant funds were retained on deposit against margin calls; he also told me that though each client had an individual cash account, those accounts stated only the individual client's interest in the pooled fund (with the trivial exception of moneys required for the fees of the operator and the trustee), in the form of an allocation of profits or losses in the pooled fund.

CISs generally

19. The question is whether the investment arrangements for the bespoke SIPP are or form part of a CIS.

20. The definition of a CIS is found in section 235 of FSMA. The salient parts of the section are these:

> "(1) In this Part "collective investment scheme" means any arrangements with respect to property of any description, including money, the purpose or effect of which is to enable persons taking part in the arrangements (whether by becoming owners of the property or any part of it or otherwise) to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income.
>
> (2) The arrangements must be such that the persons who are to participate ("participants") do not have day-to-day control over the management of the property, whether or not they have the right to be consulted or to give directions.
>
> (3) The arrangements must also have either or both of the following characteristics—
>
> (a) the contributions of the participants and the profits or income out of which payments are to be made to them are pooled;
> (b) the property is managed as a whole by or on behalf of the operator of the scheme."

21. "At the heart of the concept ... is the requirement for the sharing of profit or income by participants who do not have day-to-day control over the management of the property", per Arden L.J. in *F.S.A.* v. *Fradley* [2005] EWCA Civ 1183, [2006] 2 B.C.L.C. 616 at [3].

22. It was accepted by Mr van Sante that the core requirements of the section were satisfied here. Section 235(5), however, empowers The Treasury to provide by order that arrangements in specified categories or in specified circumstances do not amount to a CIS. The power was exercised in the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 (S.I. 2001 No. 1062) ("the 2001 Order"). The 2001 Order contains both the pensions exemption and the common accounts exemption. This application hangs on those exemptions and I turn to them now.

Pensions exemption

23. Article 3 of the 2001 Order provides that arrangements of the kind specified in the Schedule to it do not amount to a CIS. Para. 20(2) of the Schedule provides,

> "A personal pension scheme does not amount to a collective investment scheme".

24. The definition of "personal pension scheme" is given in article 2, as amended, of the 2001 Order:

"'personal pension scheme' means a scheme or arrangement which is not an occupational pension scheme and which is comprised in one or more instruments or agreements, having or capable of having effect so as to provide benefits to or in respect of people—
(a) on retirement,
(b) on having reached a particular age, or
(c) on termination of service in an employment".

25. It was common ground that the reference to an occupational pension scheme was not material here. The legislation gives no further assistance in determining what does and does not constitute a personal pension scheme.

26. It was also common ground that a SIPP fell within the pensions exemption. There was then a divergence. IGA's case was that there was a distinction between a SIPP and whatever it was that a SIPP chose to invest in. Investments' case was that on these facts the distinction was false and that the entirety of the arrangements, down to the placing of the funds with Berkeley and their subsequent investment at the direction of IGA , constituted a personal pension scheme.

Investments' submissions

27. Mr van Sante contended that the pensions exemption would be meaningless if IGA were right. The scheme of the 2001 Order assumed that the exemptions were needed, *i.e.* that the arrangements described in it were capable of constituting CISs but for the exemptions. On IGA's construction, he said, that would not be so. If the pensions exemption did not include the mechanism for investment, a personal pension scheme could never amount to a CIS in the first place: there would be no participation in profits or income within section 235(1) because there would be no profits or income, the participants would not have lost day-to-day control within section 235(2), there would be no pooling of profits or income within section 235(3)(a) because again there would be no profits or income and there would be no management within section 235(3)(b). Hence a construction of the pensions exemption was required which embraced the investment mechanism, for only then did the exemption have a function.

28. Mr van Sante drew attention to guidance in *The Perimeter Guidance Manual* of the Financial Conduct Authority ("*PERG*"). Chapter 12 gives guidance for persons running or advising on personal pension schemes, in question-and-answer form. Question 14 and the answer to it read (with omissions),

"I intend to operate a personal pension scheme under which members will acquire benefits derived from the management of a pool of assets. Will the scheme become a collective investment scheme ...?
No. *Personal pension schemes* ... are specifically exempted from being *collective investment schemes*. ... However, where a personal pension scheme invests in a pooled investment vehicle of some kind, that vehicle may itself be a *collective investment scheme* ... unless another exemption applies to it."

29. Investments therefore said that the investment mechanism of the bespoke SIPP was included in the pensions scheme exemption. IGA's contention, that the exemption applied only up to the pooling of assets, so that thereafter the arrangements amounted

to a CIS, was inconsistent with *Russell-Cooke* v. *Elliott* [2001] All ER (D) 197 (Jul). *Russell-Cooke* was a decision on the 1986 Act but the definition in it of a CIS was the same as in FSMA. In that case, a firm of solicitors received funds from clients, placed them in its client accounts and then made loans to borrowers, for short-term interest only, secured against immovable property. The loans fell into three categories: (i) some were provided by aggregating funds of more than one client, (ii) some by using the funds of a single client when the client had chosen the loan, advancing his funds for the purpose, and (iii) some by using the funds of a single client when the solicitors had chosen the loan. Laddie J. had previously decided that there were as many investment schemes as loans and the question then arose which of them were CISs. It was contended that in answering that question it was necessary to look at two stages, the first when a client's funds were pooled with others in client account and the second when (if at all) they were aggregated for a particular loan. Laddie J. held (at [17]-[18]) that the two-stage approach was impermissible. The statutory definition of CISs was arrangements having "the purpose or effect" of enabling persons to participate in certain types of investment. The arrangements included the preparatory steps as much as the actual investment. Hence loans in category (iii), and not only loans in category (i), were CISs, for the clients' money could have been aggregated with funds from others, even if in the event it was not. Laddie's J.'s rejection of the two-stage approach was followed in *Brown* v. *InnovatorOne plc* [2012] EWHC 1321 (Comm), [2012] All ER (D) 273 (May) at [1173]-[1174]. Here, therefore, said Mr van Sante, the arrangements material for the pensions exemption did not stop short at the pooling of assets.

IGA's submissions

30. Mr Bartley Jones submitted that the pensions exemption could not extend beyond the transfer of funds to Berkeley for the purpose of investing at IGA's direction; thereafter there was a classic investment scheme. The pensions exemption did not say, "Arrangements entered into by a personal pension scheme do not amount to a collective investment scheme". The line was crossed when a pension scheme made an investment into something which would otherwise be a CIS.

31. It was not his submission that a pension scheme itself ever became a CIS. But if a pension scheme invested in, say, a unit trust – a classic CIS – then the unit trust did not cease to be a CIS merely because one of its investors was a pension scheme. Nor could the unit trust be partly a CIS and partly not: it was clear from another point decided in *Russell-Cooke* (at [27]) and in *Fradley* on appeal (at [46]) that such a hybrid did not exist. A unit trust would still be a CIS even if it was open only to investment from personal pension schemes. His submissions did not reimport the two-stage test disapproved in *Russell-Cooke* and *InnovatorOne*, because those decisions were based on looking at the purpose for which funds were pooled or managed.

32. In answer to Mr van Sante's point that the pensions exemption must have been meant to extend to arrangements which would otherwise have constituted a CIS, he contended that a pension scheme could be a CIS without the exemption even though it did not make an investment. What mattered was the collection of funds and their

pooling from which profit was expected. He cited *F.S.A.* v. *Fradley* at first instance [2004] EWHC 3008 (Ch), [2005] 1 B.C.L.C. 479 and in the Court of Appeal (reference above). In *Fradley*, the arrangements under scrutiny were described as investing in horse-racing. Members put up an initial sum and then paid a monthly subscription, in return for which they seem to have received tips and to have had the optional services of an agent to place bets. No property was acquired in the course of operating the scheme, not even choses in action, since the betting contracts were void under the Gaming Act 1845; but it was held both at first instance and on appeal (at [21]-[22] and [33] respectively) that section 235 of FSMA did not require there to be any acquisition of property over and above the members' contributions. So the absence of an investment did not prevent the arrangements from constituting a CIS.

Decision

33. I have not found the pensions exemption easy to construe. It is easy to infer that the pensions exemption is predicated on a decision, or an assumption, that so far as they would otherwise constitute CISs personal pension schemes are adequately regulated by the pensions legislation. That, however, does not take one very far in resolving the issue arising on this application. Neither counsel advanced a purposive construction in the sense of pointing to a gap in regulation if one construction were adopted or a duplication of it if the other were adopted. It is therefore necessary to base a coherent construction on other material.

34. The scope of the pensions exemption depends in my view on answering the question whether the investment arrangements are or are not to be treated as forming part of a personal pension scheme in the shape of the bespoke SIPP. For that reason, I consider that Mr Bartley Jones begged the question when saying that there was a distinction between a SIPP and whatever it was that a SIPP chose to invest in. I accept, indeed it was uncontroversial, that if a pension fund acquires an interest in, say, a unit trust, the unit trust was a CIS beforehand and does not cease to be a CIS merely because it now has a pension fund amongst its unitholders. That is acknowledged in the extract from *PERG* which I have quoted. Conversely, the pension fund does not itself become a CIS merely by virtue of having acquired such an interest. That, however, is not this case.

35. The arrangements here were such that the bespoke SIPP acquired rights in derivatives by way of investment effected by Berkeley on directions given by or on behalf of IGA. But for the pensions exemption, the pooling in the hands of Trustees for the purpose of investment – or, more accurately in terms of the statutory language, for the purpose of participating in or receiving profits or income – would, as Mr Bartley Jones submitted and as Mr van Sante accepted, have itself caused the arrangements to amount to a CIS. That, however, goes to satisfying the core requirements of a CIS and not to the scope of the pensions exemption. I do not consider that the rejection of the two-stage test in *Russell-Cooke* and *InnovatorOne* assists Mr van Sante's submissions, because they are decisions on the wording of section 235(1) or its predecessor that arrangements may constitute a CIS if they have a particular purpose ("purpose *or* effect"), whatever happens in fact; and it does not follow that the same approach is required when ascertaining the scope of any of the exemptions. But I do

consider that Mr van Sante is correct in saying, for the reasons he gave, that the pensions exemption would have no function unless it covered such pooling and investment as happened here. Pension schemes have to invest to provide pensions. If there is more than one participant in the pension scheme, there is necessarily a pooling of funds as a preliminary to investment. The fact that the actual investment was directed by IGA rather than Limited as operator or Trustees as trustee seems to me irrelevant. The decision in *Fradley*, on which Mr Bartley Jones relied, shows that there can be a CIS without any actual investment (on somewhat special facts); but it does not show how the pensions exemption would have a function if the pooling and subsequent investment carried out for the bespoke SIPP fell outside it.

36. Hence in my judgment the investment arrangements are to be treated as forming part of the bespoke SIPP for the purpose of the pensions exemption. That is, the investment arrangements do not amount to or form part of a CIS.

37. That is enough to determine Investments' application but I will now consider the alternative contention that the common accounts exemption applies.

Common accounts exemption

38. Para. 6 of the Schedule to the 2001 Order reads,

> "Arrangements do not amount to a collective investment scheme if—
> (a) they are arrangements under which the rights or interests of participants are rights to or interests in money held in a common account; and
> (b) that money is held in the account on the understanding that an amount representing the contribution of each participant is to be applied—
> (i) in making payments to him;
> (ii) in satisfaction of sums owed by him; or
> (iii) in the acquisition of property for him or the provision of services to him."

39. There is a helpful exposition of this exemption in *Russell-Cooke* when Laddie J. considered the predecessor of para. 6, which was in almost identical terms. He said,

> "34. ... What [the exemption] is directed to is excluding from the regulatory regime which applies to CISs the funds which exist in nearly all solicitors' clients' accounts and are waiting there to be used exclusively for each client in relation to his instructions. For example, solicitors having a conveyancing practice normally hold in clients' account on a temporary basis sums from different clients for purchase of homes for each of them. This paragraph is designed to ensure that such temporary co-residence does not fall within the CIS provisions. To achieve this the paragraph provides that the money is held in the account;
>
> "...on the understanding that an amount representing the contribution of each participant is to be applied in making payments to him or in satisfaction of sums owed by him or in the acquisition of property or the provision of services for him".
>
> 35. All the work in this provision is done by the words "to him", "by him" and "for him". In this legislation the distinction between the singular and the plural is important. A distinction must be drawn between sums held in a common account to be used for making payments on behalf of "them" – that is to say, all the persons whose money is

> in the account – and sums held for making payments on behalf of "him", that is to say the individual. In the former case, the account is common both as to what it contains and as to what it will be used for. In the latter, it is only common in the first sense. The co-residence in the account of sums from different individuals may be an administrative convenience, but it does not mean that those individuals are clubbing together to make a common investment. It is only common investments with which these statutory provisions are concerned. ...."

40. Those paragraphs were quoted and followed in *Fradley* at first instance at [30], there being no appeal on that point. The second of them was also quoted with approval in *InnovatorOne*, where Hamblen J. said, at [1177], that "the common accounts exclusion relates to circumstances in which money in the account is held on the understanding that an amount representing the contribution of each participant is to be applied only for the benefit of that participant, as opposed to being applied for the collective benefit of more than one participant".

Investments' submissions

41. Mr van Sante drew attention to various provisions of the documents in evidence to establish that the pooled funds were used for individual acquisitions:

(1) The sponsorship agreement between IGA and Limited, to which I have already referred, provided in clauses 2.4 and 2.5 that each month IGA would provide to Limited the value of what was called the Fund Manager account held for each member of the bespoke SIPP and that IGA would be responsible for reporting to the member on the performance of the account.

(2) The discretionary fund management agreement between the client and IGA referred (under the heading "Record of Holdings") to "your SIPP" and, after mentioning contract notes, said, "You are the beneficial owner".

(3) A compliance visit report, prepared by a Mr Kline of Financial Investments after a visit on 22 October 2010, mentioned (at para. 2.1.2) that "Clients are able to view on line their own portfolios", which were updated monthly.

(4) A key features document from Limited, describing the bespoke SIPP, told clients or potential clients that they could log on to a website "to view the latest value of your MYSIPP plan", that details would be available of transactions undertaken by fund managers or financial advisers "on your behalf" and that there was a wide range of investments into which funds "in your Plan" could be applied (under the respective headings "How do I receive communications from MYSIPP?", "6. Statements and documentation" and "7. Investments").

He withdrew reliance on a further document, a key features document from IGA dealing with its discretionary fund management service, when Mr Bartley Jones said that it had been prepared as a draft only. That document, however, referred to the client's attitude to risk and Mr Bartley Jones confirmed on enquiry from me that different clients had different risk ratings.

42. As against that evidence, Mr Shipp's witness statement merely said, at para. 27,

> "However, it is clear:-
>
> (1) that the money in the fund transferred to Berkeley was being held for collective investment through derivative trading and was not for return to any individual participant as such. The way that the funds were held by Berkeley was in no way akin to what might be regarded as, say, a solicitors' client account ...".

Mr van Sante submitted that that general assertion was inadequate to show that Investments' case on the facts was arguably wrong.

IGA's submissions

43. It was in connexion with the common accounts exemption that Mr Bartley Jones told me that the individual cash accounts for clients stated only the individual clients' interests in the pooled fund, the pooled fund itself always being in Berkeley's hands. It was that account on which one had to focus. That pooled fund, he said, was held for collective investment.

44. He also drew attention to a retail client agreement between Trustees and Berkeley, which provided in clause 1.3, "We [*sc*. Berkeley] act as principal and not as agent on your behalf". Quite what that meant in context was not clear, not least because the same clause went on to say, "You [*sc*. Trustees] act as principal and not as agent (or trustee) on behalf of someone else". On enquiry from me, it appeared that it was uncertain on the evidence in whose name or names the derivative contracts were made; it was also uncertain how individual trades were allocated between the participants and whether that was done in advance or afterwards.

Decision

45. In my judgment the availability of the common accounts exemption depends on the answer to the question whether the pooled fund in Berkeley's hands was used to enter into derivative contracts for the participants as a whole or for individual participants. Mr van Sante accepted in reply that that was so.

46. Mr Bartley Jones' submission that the pooled fund in Berkeley's hands was used for collective investment merely asserted the answer without support. The same is true of Mr Shipp in his witness statement. By contrast, the provisions that Mr van Sante relied on from the documents in evidence do in my view suggest that the pooled funds were used for individual acquisitions. In addition, it is not easy to see how differing attitudes to risk between one participant and another can have been accommodated if contracts were entered into for the participants as a whole.

47. Nonetheless, that may not have been impossible; and the documentary provisions are in general terms and are not unambiguous. Moreover, Mr Bartley Jones drew my attention to para. 14.5 of Investments' Defence, which stated only that "as, despite the pooling of funds, each investor had access to its own portfolio to which losses or gains were attributed to the particular investor, this was a common account which did

not amount to a collective investment scheme". I think he was right in saying that neither there nor elsewhere does the Defence plead that derivative contracts were entered into for individual participants, so it is unsurprising that the evidence does not fully deal with the point. The underlying facts must be easily ascertainable, though there may be room for argument as to how they should be characterised, but they are not before the court.

48. It would be wrong to determine a striking-out application in the absence of the full facts. Accordingly, had the common accounts exemption been the sole ground of Investments' application I should have declined to strike out any part of the Amended Particulars of Claim.

Disposition

49. In view of my decision on the pensions exemption, however, the application succeeds. I will make an order striking out the paragraphs identified by Mr van Sante.

50. The parties, having seen a draft of this judgment, have agreed the terms of an order to give effect to it. I will make an order embodying those terms and there need be no attendance when the judgment is handed down.

51. Mr Bartley Jones has applied in writing for permission to appeal. Enquiries indicate that neither party wishes to make oral submissions on the point. I agree with Mr Bartley Jones' submission that different minds could reasonably take different views as to the construction of the pensions exemption and hence that an appeal would have a real prospect of success. I therefore grant IGA permission to appeal. The order I will make will include that permission and give the particulars required by rule 40.2(4) of the C.P.R.