DRN-3184826

The complaint

Ms S complains about Options UK Personal Pensions LLP, currently trading as Options SIPP UK LLP, (and trading as Carey Pensions UK LLP ("Carey") at the time of the relevant events) accepting an application for a Self-Invested Personal Pension ("SIPP"), and an investment in Store First, from an unregulated business called Commercial Land and Property Brokers ("CL&P").

Ms S says she has suffered a loss from the Store First investment and that Carey should compensate her for this loss. Ms S is represented by a Claims Management Company ("CMC"). In brief, the CMC says Carey had a duty to carry out due diligence on CL&P before accepting business from it and, had it done so, it ought to have been aware of various reasons not to deal with CL&P.

What happened

We issued a final decision on another complaint involving Carey's acceptance of a SIPP application and Store First investment application from CL&P in February 2021. That final decision has been published on our website under DRN5472159. I have reached my decision in this case independently. The published decision however sets out the general detail of Carey's relationship with, and due diligence on, CL&P and the general detail of Store First and Carey's due diligence on that investment, across pages 2 to 11 (up to "Mr S's dealings with CL&P and Carey"). So I will rely on that detail set out in the published decision here, rather than repeat it – I will only include the key factual background of this particular complaint here.

Ms S's dealings with CL&P and Carey

Ms S says she was advised by CL&P to switch her pension arrangements to a SIPP with Carey and invest in Store First following the switch. She also says CL&P arranged the switch to the SIPP and the Store First investment for her.

Before being contacted by CL&P Ms S had a personal pension. Following the contact by CL&P the cash value of this was switched into a SIPP with Carey, and invested in Store First. The key events which took place during Ms S's dealings with Carey were as follows:

- Ms S signs a Carey SIPP application form – 2 April 2012.
- Carey sends its welcome letter, confirming the establishment date of the SIPP – 4 April 2012.
- Ms S signs Carey's member declaration and indemnity (referred to as "the indemnity" in the published decision, using the wording quoted in full there) – 27 August 2012.
- Carey sends cash from Ms S's SIPP to Store First (around £39,000) – 26 September 2012.

Ms S has said she was paid £4,000 “cashback” by CL&P, after the Store First investment was made.

CL&P and Carey

Below is a chronological summary (set out in greater detail in the published decision) of the key events during the relationship between CL&P and Carey.

15 August 2011 - Carey begins to accept introductions from CL&P.

20 September 2011 - Carey conducted a World Check (a risk intelligence tool which allows subscribers to conduct background checks on businesses and individuals) on a Zoe Adams and a Mark Lloyd. Ms Adams and Mr Lloyd were two of the people at CL&P Carey initially had contact with. This check did not reveal any issues.

27 September 2011 - Carey asked CL&P to complete a non-regulated introducer profile.

29 September 2011 - The non-regulated introducer profile was completed by CL&P. It was completed and signed by Mr Terence Wright.

9 December 2011- Carey had a conference call with representatives of CL&P. During that call the issue was raised of consumers being offered cash incentives by CL&P to transfer or switch to a SIPP and make investments. The note of the call included the following:

> “[Carey staff member] *also raised a concern that a potential member had asked when they would receive their money from their Store First Investment,* [CL&P representatives] *confirmed that no clients or connected parties referred by CL&P receive any form of inducement for either establishing the SIPP or making the Store First Investment and that CL&P policy does not include offering inducements.*
>
> [Carey staff member] *emphasised that it is completely against all rules that clients or connected parties receive any form of inducement for making particular investments*.”

13 March 2012 - Carey’s Head of Service and Operation, said in an email to CL&P:

> *“On another matter, we need our Terms of Business for Non Regulated introducers in place between our two companies. So that our records are all straight from a Compliance aspect I attach the Terms of Business and have entered a commencement date of 15 August 2011 which is the date of your first case with us and would be grateful if you could agree and complete the terms and return.”*

The agreement was signed by CL&P on 20 March 2012. It was signed by Ms

Adams. 23 March 2012 - Carey’s compliance support said in an email to CL&P:

> “*To comply with our in house compliance procedures could you please supply the following information relating to CLP Brokers:*
>
> *A copy of the latest set of accounts*
> *A certified copy passport for each of the main directors/principals/partners of the company*”

29 March 2012 - a Team Leader at Carey sent an email to Ms Hallett, Carey's Chief Executive, with the subject – "*03-29-2012 - Storefirst Investment Query re Cash Back* [reference removed]". That email forwarded an email sent by the Team Leader to a consumer, which included the following:

> "*you mentioned in our conversation a cash back amount you are expecting in the sum of £1,800 from CL&P following completion of the Storefirst investment*"

And the text addressed to Ms Hallett by the Team Leader said, "*this is the second member this week to ask when are they getting their money*".

3 April 2012 - Carey's compliance support followed up on its 23 March 2012 email:

> "*It is now becoming urgent that we receive the outstanding documentation. You very kindly passed this on to your colleague and I would be very grateful if we could receive the documentation as a matter of urgency. Thank you in anticipation of your assistance*."

When asked, Carey said it has no record of receiving the information from CL&P.

15 May 2012 - Carey conducted a World Check on Mr Terence Wright. The report highlighted that he appeared on the FSA list of unauthorised firms and individuals.

25 May 2012 - Carey terminated its agreement with CL&P. Carey's Head of Service and Operation told CL&P of Carey's decision in an email to CL&P of that date:

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

In reply to this email CL&P asked:

> *"Regarding business which you have already accepted from us, will you still be processing this as the client's SIPPs have already been established?"*

28 May 2012 - Carey's Ms Hallett sent the following reply to CL&P:

> "*We will process them where we have already established the schemes, we will be writing to all clients informing them if they have received any monies then they must declare this to HMRC and their fund would also be vulnerable to a tax charge as well.*
>
> *HMRC have already asked a number of SIPP providers for lists of clients who are investing in alternatives, they will I am sure be doing some random checks and will charge people for unauthorised transactions if they have received cash sums for*

transferring their pension and making investments.

I would urge you and your agents to review your position if you are continuing this as part of your sales process, ultimately no SIPP providers will be taking the business, it is not allowable as we have explained to you previously."

Submissions made by Ms S

We asked Ms S for some further detail of her recollections. We asked the following questions, and received the replies quoted in italics:

- Were you interested in changing your pension at the time of contacting CL&P? Why? What attracted you to CL&P? What attracted you to the Store Pod investment?

  "I had no intention of changing my pension but I was cold called by CL&P and was told my pension was doing nothing where it was. They advised me if I moved my pension I would be promised 8% returns on my investment. I can't remember when I first heard about the Store Pods."

- What role did you think CL&P had in this transaction?

  "I thought they were acting as an intermediary between me and Careys."

- Did CL&P recommend any products to you? Can you recall what it said to you?

  "It was a very long time ago but I assume it was about the Store First investment. The main thing I do remember is that I was told I would get guaranteed returns and would be much better off if I did the transfer. I was also told if it didn't perform I would have the option of selling it back to them. "

- What was your understanding of the payment CL&P was offering? What did you think of this?

  "I thought it was a 'welcome bonus' and a 'thank you' for doing dealings with them."

- If you had been aware that the payment might have tax consequences, what would you have done?

  "I would've thought twice about it. I would've asked questions and it would've raised concerns. But I was not aware there would be any tax implications."

- If Carey had told you that Mr Terence Wright, a director of CL&P, was the subject of an FSA alert, what would you have done?

  "I would of never have gone ahead with it."

- Carey ended its relationship with CL&P in May 2012. If you had been made aware of this what would you have done?

  "I would have wanted to know why they terminated the contract and how I was going to undo what had already been done at that stage."

- What is your understanding of how the Store First investment works?

"I'm not entirely sure but my understanding was they would generate guaranteed returns and I could sell them back after a certain amount of time"

- Did you understand the risks associated with a high risk, speculative investment? What are they in your own words?

  "No and I still don't understand what this means today. This was never sold to me as a high risk investment as I was told the investment would bring back guaranteed returns."

- What was your understanding of the risks associated with the Store First investment? Please explain your answer fully.

  "I didn't think there were any risks involved because of the guaranteed returns and I was told I'd have the option to sell them back. I also remember seeing something online where the celebrity 'Quentin' was advertising the investment and endorsing the product, which made me further believe the investment was legitimate."

- What did you think Carey's role was at the time?

  "I didn't really know the ins and outs of it but I thought Careys role was to look after me and my investments. When I knew Careys were involved I googled them and they looked like an established, reputable company that was under the FCA so again, this made me trust what I was being told further."

- Your SIPP was set up in April 2012 and your investment in Store First was made on 26 September 2012. Were you aware that you were still free to choose whether or not to invest in Store First after the SIPP had been set up?

  "No"

- On 27 August 2012, you signed a Members Declaration & Indemnity (the indemnity) which included the following statement "I am fully aware that this investment is an Alternative Investment and as such is High Risk and / or Speculative". Did you read the indemnity before signing it? What does this indemnity mean to you in your own words?

  "I can't remember reading this and I am unsure what alternative or speculative means. At the time, I was in a very bad point in my life and was suffering badly from depression so I vulnerable." [sic]

Submissions made by Carey

The submissions made by Carey in this complaint are essentially the same as those summarised in the published decision. That summary also includes general submissions about Carey's relationship with CL&P. So I will rely here on the summary given in the published decision under "*Carey's submissions*" rather than repeat the detail.

The investigator's view

The investigator's view was that Carey, acting fairly and reasonably to meet its regulatory

obligations, should not have accepted Mr A's application from CL&P. The basis of the view was what Carey knew, or ought to have known, about CL&P at the time.

Carey's response to the investigator's view

Again, this is essentially the same as the summary in the published decision (under the same title) – so I will rely on that summary, rather than repeat the detail here.

After the published decision was issued, Carey was asked to take it into consideration, as an important representative decision, in accordance with the relevant Financial Conduct Authority (FCA) DISP Rules and Guidance (particularly DISP 1.4.1, 1.4.2 and 1.3.2A), which should be taken into account when assessing other similar complaints.

On this basis, Carey was asked to review each outstanding complaints involving CL&P and Store First – including Ms S's - and if it was not prepared to make a settlement offer taking account of the detailed reasons set out in the published decision, to explain why it was distinguishing it from the published decision. To date Carey has not carried out such a review. Ms S's complaint has therefore been passed to me for review and I'm satisfied that there is no need to wait any further before progressing this complaint.

We shared a copy of the questions asked of Ms S, and the answers she provided to those questions, with Carey and invited it to make any comments on these it wanted us to take into account.

My provisional decision

In my provisional decision I concluded Ms S's complaint should be upheld. In summary I said:

- If Carey had carried out sufficient due diligence on CL&P, or acted on the information it subsequently received in a timely manner, it should not have accepted Ms S's application from CL&P.

- The fair and reasonable conclusion, based on what Carey knew or ought to have known at the time, is that it should also not have accepted Ms S's application to invest in Store First.

- It was not fair and reasonable in all the circumstances for Carey to proceed with Ms S's instructions.

- It is fair and reasonable to conclude that Carey should compensate Ms S for the loss she has suffered to her pension.

Ms S accepted my provisional decision and made no further comments on it. Carey did not accept my provisional decision. It made a number of points, including:

On the due diligence on CL&P:

- No breach can arise on Carey's part simply by virtue of its dealing with unregulated introducers. The regulatory regime has never prohibited unregulated introducers from connecting clients with SIPP providers, and neither the FSA nor the FCA have ever sought to prohibit SIPP providers from accepting business by this route.

- My decision seeks to impose new and unexpected duties of due diligence on introducers and investments. These duties are inconsistent with both the contract into which Ms S entered and with the general scheme of the COBS rules at the relevant time (which imposed no duty on Carey to assess introducers or investments).

- Given the proper scope of Carey's regulatory duties, as established in *Adams*, there can be no breach of those duties on Carey's part as a result of its decision to accept customers introduced by CL&P in the circumstances relevant to this case.

- The FSA Notice was not entered onto World Check until 24 October 2011, i.e. after Carey had carried out its checks on CL&P, after it had started accepting business from CL&P. Even if Carey had run a World Check search in respect of Mr Wright when its relationship with CL&P began, it would not have identified the notice in question.

- Carey did not routinely check the FSA's list of unauthorised firms and individuals, nor was it under any obligation to do so. Carey's use of World Check – an independent professional third party verification system – was reasonable and appropriate.

- The FSA Notice, in the form in which it had been published in 2010 and which would have existed as at the inception of Carey's relationship with CL&P, stated only that Mr Wright was not regulated by the FSA and referred only to a business named Cash In Your Pension targeting UK investors. There was nothing in the FSA Notice which described any criminal or civil wrongdoing and there was no contradiction between the FSA Notice and any statement provided by Mr Wright that he was not subject to any FSA action or censure.

- Had the FSA had significant concerns about Mr Wright, or had there been any reasonable basis for expecting regulated firms not to deal with Mr Wright/CL&P then the FSA Notice should and would have explicitly said so. It did not. If the FSA did not hold such significant concerns about Mr Wright (or was not prepared to publish them), then it cannot be fair and reasonable to find that Carey should have held any such concern, or refused point blank to have any dealings with CL&P.

On the due diligence on Store First:

- My findings amount to imposing an obligation on Carey to undertake a qualitative assessment of the Store First investment (based on limited material), and then an obligation to pass on that assessment and those findings with what effectively amounts to a recommendation to Ms S not to proceed. That significantly overreaches the actual legal obligations on Carey at the time, as found by the Court in *Adams*. It also goes significantly further than any published regulatory material. My findings amount to a requirement for Carey to have provided advice to Ms S.

On Ms S's actions:

- Ms S gave a false statement in respect of the "incentive" payment in order to ensure the investment could proceed. Had Ms S disclosed the incentive payment Carey would not have accepted the application. Whether Ms S was aware of the tax implication is irrelevant – the inducement payment was plainly illicit, and Ms S was or should have been well aware of that.

- If the clear risk warnings given to Ms S were insufficient for Ms S to decide not to proceed with her investment, then it does not understand on what basis I can

reasonably conclude that further information would have changed Ms S's decision to invest.

- Ms S claimed that she *"didn't think there were any risks involved".* This is despite the fact that she signed the member declaration that stated that the investment was "*High Risk and/or Speculative*". Ms S's statement are either contrived to be self-serving years after the facts or indicate that either Ms S did not read the clear and simple paperwork she signed, or paid no attention to it. Whichever it is, the consequences cannot reasonably nor fairly be held against Carey.

- Ms S suggests she was unsure what alternative or speculative means. Carey's warning that the investment was "High Risk" is self-explanatory and there can be no confusion in that regard. And Ms S should reasonably have read the document.

- That I have not addressed, queried or even commented on the unreliability and self-serving nature of Ms S's statements speaks volumes as to my clear failings to approach this matter in an impartial manner and in adopting a fair procedure.

On causation:

- Carey did not cause Ms S's loss. It is very likely that she was extremely keen to proceed with the investment in order to release the funds and receive the inducement payment. She would have found a way to invest even if Carey had not been dealing with CL&P or if it had not been accepting Store First investments.

- My provisional decision asserts that Carey cannot argue that another SIPP provider might legitimately have accepted Ms S's investment instruction. This implies that a SIPP provider could not properly have accepted an instruction by a customer to place funds in this perfectly legal investment, even if the customer had been sophisticated and fully informed (and indeed even if the customer had been wealthy and with a high risk appetite). This reasoning must be flawed.

- Had Carey informed Ms S that it would not accept business from CL&P and asked her how she wished to proceed, the available evidence indicates Ms S would have gone ahead with the investment.

- Ms S claims that she was cold called by CL&P but has not said how it got his contact details. It is likely Ms S provided her details with the purpose of being contacted by a firm such as CL&P. It is more accurate to say Ms S instigated the relationship and was not cold called. And whether Ms S instigated the relationship is a key factor in understanding Ms S's mindset in dealing with her pension and determining the actions she was likely to take.

- Ms S has not said she would not have proceeded if she had been aware of the tax consequences of the incentive payment only that she might have thought twice about it. Ms S does not say she would not have proceeded with the investment. And in any event Ms S should have questioned the legitimacy of the incentive payment. It is questionable whether she would really have given up the opportunity to obtain the incentive payment because of the FSA notice.

- Even if another provider might have reached the same conclusions as I find Carey should have, the evidence suggests that Ms S was determined to proceed with the Store First investment and another SIPP provider could properly have accepted that

investment. In those circumstances, the outcome would have been the same as it was.

On fair compensation:

- On its proper application, the contract between Ms S and Carey was effective to relieve Carey of any liability it might otherwise bear. To conclude otherwise would be to render void and unenforceable a validly concluded contract.

- Further or alternatively, acknowledging the criterion of what is "fair and reasonable", Ms S must bear a measure of responsibility for her own actions.

- My decision amounts to a finding that there was no possibility that Ms S would have proceeded with an investment in Store First, via another SIPP provider, and without the involvement of CL&P. That is not a reasonable conclusion to reach in the circumstances.

- Carey agrees that, in keeping with the Court of Appeal decision in *Adams*, Ms S should assist Carey in it taking ownership of the storage pods. However, the Provisional Decision suggests that, if the storage pods cannot be returned to Carey then they should remain in the SIPP or otherwise with Ms S and there should be no adjustment in the compensation award. To allow Ms S to retain the storage pods, whether within the SIPP or otherwise, in circumstances where the compensation awarded to her has been calculated upon the assumption that they would be returned to Carey, would give Ms S a windfall. Plainly this is not fair and reasonable.

Carey also requested an oral hearing, to test "*Ms S's understanding of and approach to this investment*".

What I've decided – oral hearing request

Carey has requested an oral hearing. It says this is necessary because Ms S's understanding of and approach to the Store First investment should be investigated and tested.

The Ombudsman Service provides a scheme under which certain disputes may be resolved quickly and with minimum formality (section 225 of the Financial Services and Markets Act 2000 (FSMA)). DISP 3.5.5R of the FCA Dispute Resolution rules provides the following:

> *"If the Ombudsman considers that the complaint can be fairly determined without convening a hearing, he will determine the complaint. If not, he will invite the parties to take part in a hearing. A hearing may be held by any means which the Ombudsman considers appropriate in the circumstances, including by telephone. No hearing will be held after the Ombudsman has determined the complaint."*

Given my statutory duty under FSMA to resolve complaints quickly and with minimum formality, I am satisfied that it would normally not be necessary for me to hold a hearing in most cases (see the Court of Appeal's decision in *R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service* [2008] EWCA Civ 642).

The key question for me to consider when deciding whether a hearing should be held is whether "*the complaint can be fairly determined without convening a hearing*".

We do not operate in the same way as the Courts. Unlike a Court, we have the power to carry out our own investigation. And the rules (DISP 3.5.8R) mean I, as the ombudsman determining this complaint, am able to decide the issues on which evidence is required and how that evidence should be presented. I am not restricted to oral cross-examination to further explore or test points.

If I decide particular information is required to decide a complaint fairly, in most circumstances we are able to request this information from either party to the complaint, or even from a third party. In this case, we have put questions to Ms S, as mentioned above. And Ms S has provided answers to the questions we put to her. Carey has had the opportunity to consider, and comment, on Ms S's answers.

I have carefully considered the submissions Carey has made. However, I think I am able to fairly determine this complaint without convening a hearing. In this case, I am satisfied I have sufficient information to make a fair and reasonable decision. So I do not consider a hearing – or any further investigation by other means – is required. A key point is my provisional finding that Carey should not have accepted Ms S's application *at all*. Ms S's understanding of and approach to the Store First investment is secondary to this. And I am, in any event, able to test this to the extent I think necessary – which I have done - by asking questions of Ms S in writing.

In any event – and I make this point only for completeness - even if I were to invite the parties to participate in a hearing, that would not be an opportunity for Carey to cross-examine Ms S as a witness. Our hearings do not follow the same format as a Court. We are inquisitorial in nature and not adversarial. And, the purpose of any hearing would be solely for the ombudsman to obtain further information from the parties that they require in order to fairly determine the complaint. The parties would not usually be allowed direct questioning or cross-examination of the other party to the complaint.

As I am satisfied it is not necessary for me to hold an oral hearing, I will now turn to reconsidering the merits of Ms S's complaint.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so, I have not been persuaded to depart from my provisional decision.

In reconsidering what is fair and reasonable in all the circumstances of this complaint, I have taken into account relevant law and regulations; regulators rules, guidance and standards; codes of practice; and where appropriate, what I consider to have been good industry practice at the relevant time. Having done so, for similar reasons as set out in the published decision I have reached the view that this complaint should be upheld.

I remain of the view the relevant considerations in this complaint set out in the published decision apply here – so I will refer to the published decision rather than repeat those considerations here.

I confirm I have taken account of the judgment of the High Court in the case of *Adams v Options SIPP* [2020] EWHC 1229 (Ch) and the Court of Appeal judgment in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474.

I remain of the view that neither of the judgments say anything about how the Principles apply to an ombudsman's consideration of a complaint. But, to be clear, I do not say this means *Adams* is not a relevant consideration *at all.* As noted above, I have taken account of both judgments when making this decision on Ms S's case.

I acknowledge that COBS2.1.1R (*A firm must act honestly, fairly and professionally in accordance with the best interests of its client)* was considered by HHJ Dight in the High Court case. Mr Adams pleaded that Options SIPP owed him a duty to comply with COBS 2.1.1R, a breach of which, he argued, was actionable pursuant to section 138(D) of FSMA ("the COBS claim"). HHJ Dight rejected this claim and found that Options SIPP had complied with the best interests rule on the facts of Mr Adams' case.

The Court of Appeal rejected Mr Adams' appeal against HHJ Dight's dismissal of the COBS claim on the basis that Mr Adams was seeking to advance a case that was radically different to that found in his initial pleadings. The Court found that this part of Mr Adams' appeal was an attempt to put forward an entirely new case.

I note that there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Ms S's complaint. The breaches were summarised in paragraph 120 of the Court of Appeal judgment. In particular, as HHJ Dight noted, he was not asked to consider the question of due diligence before Options SIPP agreed to accept the store pods investment into its SIPP. The facts of the case were also different.

I again emphasise that I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And, in doing that, I am required to take into account relevant considerations which include: law and regulations; regulator's rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. This is a clear and relevant point of difference between this complaint and the judgments in *Adams v Options SIPP*. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

To be clear, I have proceeded on the understanding Carey was not obliged – and not able – to give advice to Ms S on the suitability of its SIPP or the Store First investment for her personally. But I am satisfied Carey's obligations included deciding whether to accept particular investments into its SIPP and/or whether to accept introductions of business from particular businesses. As the published decision sets out, this is consistent with Carey's own understanding of its obligations at the relevant time.

I acknowledge Carey has applied to the Supreme Court for permission to appeal the Court of Appeal judgment and the outcome of that application is awaited. However, the grounds of appeal are in respect of issues not directly relevant to my determination of this case and therefore it is unnecessary to await either the consideration of the application or, if permission is granted, the Supreme Court judgment. I am satisfied it is appropriate to determine this complaint now.

Having carefully considered the relevant considerations I am satisfied that, in order to meet the appropriate standards of good industry practice and the obligations set by the regulator's rules and regulations, Carey should have carried out due diligence on CL&P to the sort of standard which was consistent with good industry practice and its regulatory obligations at the time *and* carried out due diligence on the Store First investment which was consistent with good industry practice and its regulatory obligations at the time. And Carey should have used the knowledge it gained from that due diligence to decide whether to accept or reject a referral of business or a particular investment.

I am also satisfied that, as in the complaint in the published decision, the contract between Carey and Ms S does not mean that Carey should not be held responsible for failing to comply with its regulatory obligations to carry out adequate due diligence on CL&P and the Store First investment which ultimately led to Ms S losing a significant part of her pension.

In this complaint, like the complaint in the published decision, Carey had obtained information months before it facilitated Ms S's investment which led it to reject any further referrals from CL&P and had concerns about the Store First investment before it facilitated Ms S's investment. So in this complaint, like the complaint in the published decision, it would not be fair and reasonable to say the contract meant Carey could ignore all red flags and proceed with Ms S's business regardless.

In my view, like the complaint in the published decision, had Carey done what it ought to have done here, and drawn reasonable conclusions from what it knew or ought to have known, it should not have accepted either the application for Ms S's SIPP from CL&P or the Store First investment.

Due diligence on CL&P

The published decision sets out what information Carey was privy to – or ought to have been privy to, had it carried out sufficient due diligence on CL&P.

I note Carey says it did not routinely check the FSA's "*Firms and individuals to avoid*" list. However, I remain of the view that checking the warnings posted on the FSA's website is something that Carey should have done as a matter of course before it began accepting any business from CL&P. This is consistent with good industry practice as highlighted in the 2009 thematic review report and later documents. And, I find it would have been fair and reasonable, and in accordance with its regulatory obligations, for such a check to take place *before* it entered into a relationship with CL&P.

Ms S's application was accepted in April 2012. As the published decision sets out it is fair and reasonable to say by that time Carey ought to have known that CL&P's director was Mr Terence Wright, and that he was on the FSA's "*Firms and individuals to avoid*" list, which was described on the website as "*a warning list of some unauthorised firms and individuals that we believe you should not deal with*".

I note Carey says Mr Wright's entry on the list, in the form in which it had been published in 2010 and which would have existed as at the inception of Options' relationship with CL&P, stated only that Mr Wright was not regulated by the FSA and referred only to a business named Cash In Your Pension targeting UK investors. Carey says there was nothing in the FSA Notice which described any criminal or civil wrongdoing and there was no contradiction between the FSA Notice and any statement provided by Mr Wright that he was not subject to any FSA action or censure.

However HHJ Dight referred to Carey's Chief Executive, Ms Hallett, being asked about the notice during the *Adams v Carey* hearing. The judge said (at paragraph 60):

> *"It was also brought to my attention that from October 2010 the FCA had published warnings about dealing with another director, Mr Terence Wright, who was not authorised under FSMA to carry out regulated activity. Ms Hallett accepted in cross examination that no check was made to see whether his name appeared on a regulatory warning notice on the FCA's website until May 2012. The relationship between the defendant and CLP was severed on 25 May 2012. She accepted that had she been aware of such a warning in 2010 the defendant would not have dealt with CLP."*

Carey's response to the provisional decision appears to be at odds with this testimony of its Chief Executive.

In any event, I do not accept Carey's argument that the 2010 version of the FSA alert would not necessarily have led it to conclude that it should not enter into business with CL&P. For all the reasons given in the published decision, I am of the view that the October 2010 alert was a clear indication that the regulator had serious concerns about the way Mr Terence Wright conducted his business and therefore should have put Carey on notice that it should not accept business from Mr Terence Wright.

The National Archive of the FSA website shows the description of the list on the FSA's website in August 2011 (when Carey's relationship with CL&P began) was as follows:

> ***"Firms and individuals to avoid***
>
> *We have a warning list of some unauthorised firms and individuals that we believe you should not deal with."*

The regulator therefore described those featuring on the list as "*firms and individuals that we believe you should not deal with".* I consider that this supports my view that Carey should have been particularly circumspect before it agreed to do business with any business operated by an individual who featured on that list.

The money was invested in Store First in July 2012. As the published decision sets out it is fair and reasonable to say by that time Carey knew, or ought to have known:

- That what CL&P had told it in December 2011 about cash incentives not being offered was not correct. So CL&P was acting in a way which was, to use its own words, "*completely against all rules*". And CL&P was acting without integrity as it had not told it the truth when asked about cash incentives.

- Multiple requests had been made for copies of CL&P's accounts, but CL&P was unwilling to provide this information.

So for the same reasons set out in the published decision, it is my finding that if Carey had carried out sufficient due diligence on CL&P, or acted on the information it subsequently received in a timely manner, it should not have accepted Ms S's application from CL&P – or, at the very least, not continued to process it.

I am satisfied this is not imposing "*new and unexpected duties*". On this point, Carey's response to my provisional decision appears to be at odds with Carey's own understanding of its obligations and good practice at the time, and some of its previous submissions to us. Long before the time of Ms S's application, Carey understood and accepted its obligations meant that it had a responsibility to carry out due diligence on CL&P. It had set a standard for its introducer due diligence which it thought was consistent with good (or "best") practice at the relevant time and that, in turn, was consistent with its regulatory obligations.

Investment due diligence

The published decision sets out what information Carey was privy to – or ought to have been privy to, had it carried out sufficient due diligence on Store First.

I remain of the view that, as the published decision sets out, at the time Ms S's application was accepted, Carey knew or ought to have known:

- There were factors in the report Carey obtained on Harley Scott Holdings Ltd (the promoter of Store First) which ought to have been of concern – namely the adverse comments for the previous three years, the CCJs, and the fact the business had recently changed its name.

- Dylan Harvey (one of three previous names of Harley Scott Holdings Ltd, which at the time had the web address dylanharvey.com) and one of its directors, Toby Whittaker, were the subject of a number of national press reports, online petitions and proposed legal action, as a result of a failed property investment.

- Harley Scott Holdings Ltd had recently been involved in a property investment scheme which had failed. It had also recently changed its name, and had been subject to a number of adverse comments in succession.

- Store First's marketing material set out high fixed returns, and said these were guaranteed. The material did not contain any type of risk warning, or illustrations of any other returns. No explanation of the guarantees was offered, or the basis of the projected returns – other than Store First's own confidence in its business model and the self-storage marketplace.

- The conclusion of the Enhanced Support Solutions report Carey had obtained was inconsistent with the result of Carey's own company searches. The report also makes no comment on the obvious issues with the marketing material.

- The marketing material showed there was a significant risk that potential investors were being misled.

- Store First appeared to be presenting the investment as one that was assured to provide high and rising returns, was underwritten by guarantees, and offered a high level of liquidity together with a strong prospect of a capital return - despite the fact that there was no investor protection associated with the investment and that, in Carey's own words, "*there is no apparent established market"* for the investment and *"the investment is potentially illiquid"*

- Store First had no proven track record for investors and so Carey couldn't be certain that the investment operated as claimed.

- Consumers may have been misled or did not properly understand the investment they intended to make.

And I remain of the view, by the time the money was sent to Store First, as the published decision sets out, Carey knew, or ought to have known:

- Store First was paying commission of 12% to CL&P. Payment of such a high level of commission to an unregulated business was very serious cause for concern, given how the investment was being marketed. How Store First was funding such levels of commission alongside guaranteed income payments and guaranteed buy backs called the nature of the Store First investment into serious question.

- Of at least some of the issues with Store First which were of sufficient concern for it to suspend acceptance of the investment in August.

On the latter point, Carey suspended acceptance of new investments in Store First in August 2012. It has not confirmed the date at which this suspension was placed. But it has provided details of an internal meeting, which took place on 15 August 2012, at which concerns about Store First were discussed. And it has provided a copy of an internal email dated 17 August 2012 which says new investments in Store First had been suspended. So it seems likely the decision to suspend new investments in Store First was taken during or shortly after the 15 August 2012 meeting, and that Ms S's investment therefore post-dates the suspension. If that is the case it is not clear why Carey went ahead and sent the money to Store First from Mr S's SIPP.

In any event, it is clear from the available evidence that by the date on which Carey sent cash from Ms S's SIPP to Store First Carey had the concerns that led to the suspension of the acceptance of new investments in Store First. As set out in the published decision the issues related to "*Rental Income Process/Delays*", "*Sale Process/Delays*", a tax investigation and that *"the marketing material provided for …. a guaranteed rental income"* but "*only a small proportion of Store First investors were receiving the rental income as expected".*

As in the complaint in the published decision, I think all of the points listed above should have been considered alongside the fact the investment was being sold by an unregulated business, which was clearly targeting pension investors. I think it is fair and reasonable to find that Carey ought to have concluded there was an obvious risk of consumer detriment here.

So, given the circumstances at the time of Ms S's application, I think the fair and reasonable conclusion, based on what Carey knew or ought to have known at the time, is that Carey should not have accepted Ms S's application to invest in Store First. In my opinion, it ought to have concluded that it would not be consistent with its regulatory obligations, or best practice, to do so.

To confirm, I am satisfied the finding Carey should not have accepted Ms S's application to invest in Store First does not amount to a requirement for Carey to give advice on the suitability of the investment in Store First for Ms S. On this point, I note Carey's response to my provisional decision appears to be at odds with its own understanding of its obligations and/or good practice at the time. It was clearly of the view it had to undertake some due diligence into the Store First investment, and to make a decision on whether or not to allow the investment in its SIPP. As the published decision highlights, Carey's own Terms and Conditions explained that investments would be made at its discretion and gave several examples of where it might conclude it should not proceed with an investment.

Was it fair and reasonable in all the circumstances for Carey to proceed with Ms S's instructions?

I remain of the overall view I reached in my provisional decision, which is largely the same as the view set out in the published decision. However, I should emphasise that the primary points are:

- It was not fair and reasonable for Carey to have accepted Ms S's application from CL&P in the first place. So, Ms S's SIPP should not have been established and the opportunity to execute investment instructions or proceed in reliance on an indemnity should not have arisen at all. This, in my view, is the primary point.

- The Principles exist to ensure regulated firms treat their clients fairly. I consider there is a significant imbalance of knowledge between the parties which creates unfairness in the circumstances of this case. At the time of receiving Ms S's application and executing her investment instructions, Carey knew things that Ms S did not.

- Carey was required by its regulatory obligations to ensure that it treated its customers fairly. In the circumstances, I am satisfied that this would have required Carey to have stopped Ms S from proceeding with her application to invest in Store First.

The application should simply have been rejected by Carey – and there should therefore have been no option for Ms S to proceed insistently. She should simply not have been able to proceed.

For completeness, I confirm my view remains that if Carey had explained the situation to Ms S and let her have the opportunity of making an informed decision whether or not to proceed it is unlikely Ms S would have proceeded with the investment in Store First. But, as mentioned, my primary point is Ms S should simply not have been able to proceed.

Is it fair to ask Carey to compensate Ms S?

My view on this point, in relation to this complaint, is also largely the same as the view set out in the published decision.

I note Carey says that, on its proper application, the contract between Ms S and Carey was effective to relieve Carey of any liability it might otherwise bear. But, in my view, the contract between Carey and Ms S does not mean that Carey should not be held responsible for failing to comply with its regulatory obligations to carry out adequate due diligence on CL&P and the Store First investment which ultimately led to Ms S losing a significant part of her pension. This is especially true when Carey had obtained information months before it facilitated Ms S's investment which led it to reject any further referrals from CL&P and had concerns about the Store First investment before it facilitated Ms S's investment.

Again, there is a primary point, which is that had Carey acted in accordance with its regulatory obligations and best practice, it should not have accepted Ms S's application to open a SIPP introduced from CL&P *at all*. That should have been the end of the matter – it should have told Ms S that it could not accept the business. So if that had happened, the arrangement for Ms S would not have come about in the first place, and the loss she suffered could have been avoided.

For completeness, I confirm my view also remains:

- I do not consider the fact that Ms S signed the indemnity means that she shouldn't be compensated if it is fair to do so.

- Had Carey explained to Ms S why it would not accept the application from CL&P or was terminating the transaction, I find it unlikely that Ms S would have tried to find another SIPP operator to accept the business.

- In any event, it is not fair and reasonable to say that Carey should not compensate Ms S for her loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found it did.

- I am satisfied that it would not be fair to say Ms S's actions mean she should bear the loss arising as a result of Carey's failings. I acknowledge Ms S was warned of the high-risk nature of Store First and declared she understood that warning. I also acknowledge Ms S did not inform Carey about the incentive payment. But Carey

failed to act on significant warning signs. Carey should simply not have accepted Ms S's application at all. I do not think it would be fair to make any reduction to the compensation because of Ms S's actions. The starting point has to be that if Carey had acted fairly and reasonably the application simply would not have been accepted.

With all this in mind, I remain of the opinion that it is fair and reasonable in all the circumstances of this case to find that Carey is unable to rely on the indemnity that Ms S signed in order to avoid liability for the regulatory failings it has made in this case. So I am satisfied that it is fair and reasonable to conclude that Carey should compensate Ms S for the loss she has suffered to her pension.

Putting things right

I am satisfied that Carey's failure to comply with its regulatory obligations and industry best practice at the relevant time have led to Ms S suffering a significant loss to her pension. And my aim is therefore to return Ms S to the pension position she would now be in but for Carey's failings. When considering this I have taken into account the Court of Appeal's supplementary judgment ([2021] EWCA Civ 1188), insofar as that judgement deals with restitution/compensation.

In light of the above, Carey should calculate fair compensation by comparing the current position to the position Ms S would be in if she had not transferred from her existing pension. In summary, Carey should:

1. Calculate the loss Ms S has suffered as a result of making the transfer.

2. Take ownership of the Store First investment if possible.

3. Pay compensation for the loss into Ms S's pension. If that is not possible pay compensation for the loss to Ms S direct. In either case the payment should take into account necessary adjustments set out below.

4. Pay £500 for the trouble and upset caused.

I'll explain how Carey should carry out the calculation set out at 1-3 above in further detail below:

1. Calculate the loss Ms S has suffered as a result of making the transfer

To do this, Carey should work out the likely value of Ms S's pension as at the date of this decision, had she left the pension where it was instead of switching to the SIPP.

Carey should ask Ms S's former pension provider to calculate the current notional transfer value had he not switched her pension. If there are any difficulties in obtaining a notional valuation then the FTSE UK Private Investors Income Total Return index should be used to calculate the value. That is likely to be a reasonable proxy for the type of return that could have been achieved if suitable funds had been chosen.

The total notional transfer value should be compared to the transfer value of the SIPP at the date of this decision and this will show the loss Ms S has suffered. The Store First investment should be assumed to have no value. Account should however be taken of the cash back payment paid out to Ms S. This can be taken into account in the calculation on the

basis of it having been paid at the outset i.e. the same approach can be taken as was taken by the Court of Appeal in its supplementary judgement.

2. Take ownership of the Store First investment

I understand Carey has been able to take ownership of the Store First investment, for a nil consideration, in other cases. It should do that here, if possible.

If Carey is unable to take ownership of the Store First investment it should remain in the SIPP. I remain of the view that is fair because first of all I understand Carey can take ownership of the investment, if it wishes to. And in any event because I think it is unlikely it will have any significant realisable value in the future. I also understand Ms S has the option of returning her Store First investment to the freeholder for nil consideration, and I think Ms S should be free to take that option, if Carey does not want to take ownership of the investment. That should enable Ms S to close her SIPP, if Carey does not take ownership of the Store First investment.

In the event the Store First investment remains in the SIPP and Ms S decides not to transfer it to the freeholder she should be aware that she will be liable for all future costs associated with the investment such as the ongoing SIPP fees, business rates, ground rent and any other charges. She should also be aware it is unlikely she will be able to make a further complaint about these costs.

3. Pay compensation to Ms S for loss she has suffered calculated in (1).

Since the loss Ms S has suffered is within her pension it is right that I try to restore the value of her pension provision if that is possible. So if possible, the compensation for the loss should be paid into the pension. The compensation shouldn't be paid into the pension if it would conflict with any existing protection or allowance. Payment into the pension should allow for the effect of charges and any available tax relief. This may mean the compensation should be increased to cover the charges and reduced to notionally allow for the income tax relief Ms S could claim. The notional allowance should be calculated using Ms S's marginal rate of tax.

On the other hand, Ms S may not be able to pay the compensation into a pension. If so compensation for the loss should be paid to Ms S direct. But had it been possible to pay the compensation into the pension, it would have provided a taxable income. Therefore, the compensation for the loss paid to Ms S should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Ms S's marginal rate of tax in retirement. For example, if Ms S is likely to be a basic rate taxpayer in retirement, the notional allowance would equate to a reduction in the total amount equivalent to the current basic rate of tax. However, if Ms S would have been able to take a tax free lump sum, the notional allowance should be applied to 75% of the total amount.

4. Pay £500 for the trouble and upset caused.

The initial letter of complaint to Carey signed by Ms S said she had been caused worry and distress by the significant loss of her pension funds. I have no reason to doubt this. It is naturally worrying to lose pension benefits. This is money Ms S cannot afford to lose and I accept its loss has undoubtedly caused her upset. I note the Court of Appeal did not find compensation should be paid for non-financial loss. But my role here is to determine what, in my view, is fair compensation in the particular circumstances of this case. And I consider that a payment of £500 is fair to compensate for the upset Ms S has suffered.

interest

The compensation must be paid as set out above within 28 days of the date Carey receives notification of Ms S's acceptance of my final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation is not paid within 28 days.

My final decision

For the reasons given, my decision is that I uphold Ms S's complaint. Options UK Personal Pensions LLP should calculate and pay compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms S to accept or reject my decision before 26 April 2022.

Philip Roberts
Ombudsman