DRN-3348323

The complaint

Mr F complains about Options UK Personal Pensions LLP (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). Mr F is represented and his representative says Carey didn't carry out sufficient due diligence on CL&P before accepting business from it and this has led to financial loss for Mr F.

What happened

I issued a provisional decision on 26 November 2021. In that decision I set out why I believed the complaint should be upheld. I have included the content of the provisional decision below and the provisional decision should be read in conjunction with, and forms part of, this final decision. Although Carey is now Options, I will refer to Carey throughout.

Provisional decision of 26 November 2021:

"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.

Mr F's dealings with CL&P and Carey

Mr F says he was cold-called in 2011 by CL&P. He says the CL&P representative discussed his pensions and told him that he would receive a greater retirement income if he transferred his pensions to a Carey IPP and invested in Store First. Mr F says he was told that the returns were guaranteed and there was very little risk. He says he has since discovered that the investment is unregulated. He says that he didn't want to take any risk with his pensions. He also says that he wasn't informed by CL&P about the cost of the SIPP – and believes these charges will eventually make his pension worthless.

Mr F's representative says that all the contact between Mr F and CL&P was via email and telephone call, with pre-populated documents sent to Mr F to sign. It also says that Mr F has no experience of investments and does not understand financial jargon such as 'execution only'. It says Mr F simply trusted CL&P's advice and trusted that CL&P and Carey were acting in his best interests.

Mr F says he only understands now that CL&P were not a UK regulated business and he has no 'protections'.

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

- *Mr F signs a Carey SIPP application form – 29 September 2011.*

- *Carey sends its welcome letter, confirming the establishment date of the SIPP – 3 October 2011.*
- *Carey receives transfer values of about £21,000 and £9,000 from Mr F's existing pension schemes – 10 November 2011.*
- *Mr F signs Carey's member declaration and indemnity in respect of Storefirst (referred to as 'the indemnity' in the published decision, using the wording quoted in full there) – 29 September 2011.*
- *Carey sends cash from Mr F's SIPP to Store First (about £26,000) - 30 November 2011.*
- *My understanding is that the cash was invested in Store First on or about 2 December 2011.*

There is also a copy of a letter of authority signed by Mr F, authorising Carey to deal with CL&P. This has been signed by Mr F on 29 September 2011.

Mr F has confirmed he was paid £2,000 'cashback' by CL&P, after the Store First investment was made.

CL&P and Carey

The 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 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 Terence Wright. The report highlighted that he appeared on the FSA list of unauthorized 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 Mr F

We asked Mr F for some further detail of his recollections. We asked the following questions, and received the replies quoted in italics:

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

  "I was in financial difficulty at the time. CL&P advised that I was able to gain access to some of my pension fund if I switched my pension to a Private SIPP. The money offered would help me clear some of my debts. I wasn't aware at the time that you are unable to access pension funds until a certain age. CL&P called me after I completed an online form that I filled out when making a web search about accessing money from your pension. I was told by CL&P that my pension would make a guaranteed 8% each year for the

first five years and potentially 12% after. I was also advised that store first would offer a buyback on the store pods.

I made sure Store First existed and visited the site and made sure Carey was a regulated Pension Provider."

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

  "I was told by the adviser at CL&P that they were financial advisers and brokers. I checked this on their website."

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

  "*The only product they advised me on was Store First."*
- *What was your understanding of the "incentive" payment CL&P was offering? What did you think of this?*

  "I was told that this payment was part of the pension transfer process and was not subject to UK tax, as tax had already been paid on the pension contributions."

- *If you had been aware that this "incentive" might have tax consequences, what would you have done?*

  "I would have been suspicious and would have considered not agreeing to the transfer."

- *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 not have agreed to the transfer and kept my pension in the previous pension scheme."

- *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 not have agreed to the transfer and kept my pension in the previous pension scheme."

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

  "I was advised that the SIPP owned the store pods and the SIPP would receive all rental funds into a bank account, and that fund would earn interest and provide a future pension. This turned out to be untrue. I was not advised that Store First would charge a rental fee on the Store Pods."

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

  "I wasn't aware that the SIPP was a high risk and speculative investment. No one from Carey Pensions ever advised verbally that this was the case, and CL&P as stated above, guaranteed I would earn 8% in the first five years and a buy back guarantee was in place with Store First. Both of these turned out to be false. If I was advised at the time what could and would happen over the next 10 years, I would never have agreed to the transfer."

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

  "The only risk I was advised is after 5 years if the Pods were not rented, I may not earn any pension income from them. I wasn't advised the pods could depreciate in value and I could lose all my pension investment."

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

  "I understood that Carey Pensions were the administrators of the SIPP and that they

had carried out full due diligence on the SIPP. As they were taking fees for managing the SIPP, I thought Carey had a relationship with CL&P and Store First and were satisfied that the returns being promised were obtainable. I became very concerned when Carey advised the value of the pods had decreased from approx £27000 to £4000 and it appeared there was no way I could get any funds back from the SIPP."

- *Your SIPP was set up in October 2011 and your investment in Store First was made shortly afterwards. 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 I was not aware of this"

- *I understand that 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 ownwords?*

  "*I don't remember reading the document as this was 10 years ago, however I obviously signed the document as I have a copy of it. I unfortunately at the time didn't get any advice and did not fully understand what I was signing. I understand all pensions and investments can go down as well as up, but I was not prepared for what has happened over the past 10 years. I understand the document is advising me Carey Pensions take no responsibility if the investment fails and they have not given me any financial advice. However it doesn't state that Carey Pensions take no responsibility in helping facilitate a scam by Mr Terrance Wright, due to the fact that they did not carry out proper due diligence and that their failing enabled CL&P and Store First to carry out the scam using Carey Pensions SIPP as there mechanism to do so.****"***

Submissions made by Carey

The submissions made by Carey in this complaint are essentially the same as those summarised in the published decision. That is with the further submission in Mr F's case that there was no reason for Carey not to accept the investment in GAS Verdant – and it undertook due diligence on that investment.

The summary in the published decision 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 FCA's Principles for Businesses and the regulatory publications which remind SIPP operators of their obligations and set out how they might achieve the outcomes envisaged by the Principles were relevant considerations here.*
- *Carey carried out significant due diligence, but it took a piecemeal approach, and in the meantime accepted business from CL&P. Had it carried out all its due diligence at the outset, it ought to have concluded it should not accept business from CL&P at all.*
- *Carey should have conducted background checks on the directors of CL&P at the outset, rather than on two members of CL&P's staff. Had Carey checked the directors at the outset it would have discovered that Terence Wright was subject to a warning on the FSA's website.*
- *The wording of the FSA warning about Terence Wright changed sometime between 2010 and 2013. However, the aim of the warning was clearly to highlight that this was an individual who parties ought to be wary of conducting business with, and that Terence Wright was "targeting" UK customers.*
- *It is not clear why Carey did not ask for accounts and identification documents at the*

outset, but only did this after the relationship had been ongoing for a number of months. The fact that CL&P failed to provide this information, despite reminders, was cause for concern. Had Carey asked at the outset and CL&P had failed to provide them, it should not have entered into a relationship with CL&P.

- *Carey accepted Mr F's referral on 29 September 2011 but it wasn't until 13 March 2012 that Carey asked CL&P to complete a non-regulated introducer agreement. So Carey accepted an introduction from CL&P at a time when it didn't fully understand the service CL&P was providing.*
- *Carey became concerned that CL&P was offering 'cash back' incentives to consumers in December 2011. However Mr F's application and investment appeared to pre-date this.*
- *Carey put some reliance on the indemnity signed by Mr F. But it should not have accepted his application at all, so should not have required him to sign any documents. And asking Mr F to sign the indemnity did not mean it was fair and reasonable to proceed with Mr F's investment instructions.*

Carey's response to the investigator's view

- *In assessing the complaint, we must take into account the overarching context of the relationship that Carey has with its customers, including Mr F, being one of a self-invested personal pension scheme in which Carey acts on a strictly execution only/non-advised basis and is member-directed throughout. Carey is not permitted to, and does not, provide advice or otherwise comment on the suitability of investments or any other aspect of a customer's SIPP. Carey expressly states that all customers should seek independent financial advice from an adviser who is regulated by the Financial Conduct Authority.*
- *The fundamental consideration that underpins the view is the contention that had Carey identified that Mr Terence Wright was on the FSA's warning list and informed Mr F of this, then it should not have accepted business from CL&P, or Mr F would not have proceeded with the investment.*
- *There is a material difference between a warning detailing that you should not deal with a particular individual and a notice informing you that an individual is not a regulated individual and that the ombudsman service and FSCS would not be available to you if you chose to deal with such individual. The wording in the FCA's notice published on 15 October 2010, which was available to Carey at the time it undertook its due diligence on CL&P, does not include any such warning stating that Terence (Terry) Wright is an individual to avoid or be wary of; the Notice amounts simply to a notification that Mr Wright is not authorised to carry on regulated activities, a fact of which Carey was well aware and upon which basis it accepted referrals from CL&P. Carey reasonably considered at all times that CL&P was an unregulated introducer which was not providing advice.*
- *There is nothing in the notice published on 15 October 2010 to indicate that Terence (Terry) Wright is an individual to avoid as such, it is not fair or reasonable to state that on the basis of a notice that simply informs that Terence (Terry) Wright is not regulated by the FCA, that Carey should not have accepted this business.*
- *The fact that the FCA updated their notice in 2013 to a clear warning including an express comment that Mr Wright was an individual to avoid, a warning that would have put Carey on notice to stop accepting business from Mr Wright, is irrelevant in this case because Carey had already severed its Terms of Business some 18 months before the warning in 2013 regarding Mr Wright was published.*
- *The fact that the FSA later made express comment as to Mr Wright's conduct, but did not make any comment of a similar nature in the earlier wording plainly indicates that at the time that Carey accepted business from CL&P, the FSA did not believe Mr Wright to have been providing financial services or products without authorisation at*

that time, nor consider it necessary to express any concerns in this regard.

- *If the FSA did not consider there to be any cause for concern at the relevant time and there was no way through reasonable due diligence checks for Carey to establish any cause for concern, then plainly it is not fair or reasonable to have expected Carey to have rejected business from CL&P on this basis.*
- *COBS 11.2.19R, which deals with execution only business and was in force at the relevant time, stated as follows:*

  "Whenever there is a specific instruction from the client, the firm must execute the order following the specific instruction.

  A firm satisfies its obligation under this section to take all reasonable steps to obtain the best possible result for a client to the extent that it executes an order, or a specific aspect of an order, following specific instructions from the client relating to the order or the specific aspect of the order."

  The significance of this rule to an execution only business, such as Carey, cannot be overstated. Carey would have been in breach of COBS if it had not executed Mr F's specific instructions to make the investment.

- *Carey carried out due diligence on CL&P and Store First and provided Mr F with Member Declarations which reaffirmed his investment instructions and provided him with risk warnings about his chosen investment to enable him to make an informed decision on whether to proceed. It was Mr F's decision to proceed on an execution only basis and it made this clear to him. Mr F confirmed that he had read and understood all the documentation he had been given and this should be taken into account.*

After Carey rejected the investigator's view, it was advised that the complaint would now be reviewed by an ombudsman. Carey then provided a further submission. It said it couldn't provide a full response because in its view the investigator had not addressed its points adequately. This was particularly in respect of COBS 11.2.19, the FCA's Notice on Terence Wright, FSA guidance on the duties of SIPP operators and that Mr F was not being held responsible for any of the loss he had suffered.

The investigator addressed these points before referring the complaint to an ombudsman. After the published decision was issued, Carey was asked to take it into consideration, as an important representative decision, in accordance with the relevant 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 outstanding complaints involving CL&P and Store First – including Mr F'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. Carey declined to carry out this review at this time. Mr F'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.

What I've provisionally 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.

In considering 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, I have reached the same view in this complaint as that set out in the published decision.

In short, although there are some factual differences between this complaint and the one which

was subject to the published decision, I am satisfied the outcome detailed in the published decision is the fair and reasonable one to reach in this case, for the reasons set out in the published decision.

In my 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 am 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 Mr F's case.

I acknowledge that COBS 2.1.1R (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 did not so much represent a challenge to the grounds on which HHJ Dight had dismissed the COBS claim, but rather 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 Mr F'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 think it is also important to 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 Mr F on the suitability of its SIPP or the Store First investment for him 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 subject to the published decision, the contract between Carey and Mr F 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 Mr F losing a significant part of his pension.

In this complaint, Carey had sufficient information available to it or that which it could obtain through a reasonable level of due diligence which should have led it to reject Mr F's referral and application. So in this complaint, like the complaint subject to the published decision, it would not be fair and reasonable to say the contract meant Carey could ignore all red flags and proceed with Mr F's business regardless.

In my view, like the complaint subject to 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 Mr F'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.

Mr F's application was accepted on 3 October 2011. 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".

Carey's Chief Executive, Ms Hallett, gave evidence to the court during the Adams v Carey hearing (at Paragraph 60) which HHJ Dight summarised as follows:

"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."

The money was sent to Store First in November 2011. As the published decision sets out at this time Carey had not received a copy of CL&P's accounts or clarified the service CL&P would be providing.

So with respect to those issues, 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, it should not have accepted Mr F's application from CL&P – or, at the very least, not continued to process it.

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.

As the published decision sets out, at the time Mr F'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 CCJ's, 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, following audit.*
- *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.*

As in the complaint subject to 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 Mr F'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 Mr F'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.

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

My view on this point, in relation to this complaint, is largely the same as the view set out in the published decision. The key points here are:

- *It was not fair and reasonable for Carey to have accepted Mr F's application from CL&P in the first place. So, Mr F'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, whether or not those investments were Store First.*
- *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 Mr F's application and executing his investment instructions, Carey knew things that Mr F 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 either have stopped Mr F from proceeding any further with the Store First investment, or as a minimum, to have explained the situation to Mr F as soon as possible and let him have the opportunity of making an informed decision whether or not to proceed.

- *If it had done the latter, I am satisfied that Mr F would not have proceeded with the investment in Store First. And he would therefore not have lost his entire pension fund.*
- *Mr F has told us that had he been made aware that Carey had ended its relationship with CL&P, he would not have agreed to the transfer and retained his previous pension scheme. In my view, it is unlikely this would have led to Mr F having confidence to continue dealing with CL&P.*
- *Mr F has told us he was told by CL&P that he was "guaranteed" returns. So, when he signed the indemnity, I am not persuaded that he did so with a full understanding of what high risk meant. Instead he was assured by what he had been told by CL&P and thought that the returns were "guaranteed".*
- *The cash incentive was clearly something that appealed to Mr F. He has said he was in financial difficulty at the time and this would help clear some of his debts. However, that was with the assurance that he would achieve a return of 8% a year initially on his pension and potentially 12% thereafter. Mr F has said that he would not have proceeded with the transfer if certain matters (as discussed in this decision) had been made clear to him. Given that the cashback was £2,000, I believe it more likely that what Mr F says is correct – and he would not have proceeded with the transfer. This is notwithstanding that Carey should not, in any event, have allowed the transfer or investment.*

Is it fair to ask Carey to compensate Mr F?

My view on this point, in relation to this complaint, is also largely the same as the view set out in the published decision. The key points here are:

- *I do not consider the fact that Mr F signed the indemnity means that he shouldn't be compensated if it is fair to do so.*
- *Had Carey acted in accordance with its regulatory obligations and best practice, it should not have accepted Mr F's application to open a SIPP introduced from CL&P. That should have been the end of the matter – it should have told Mr F that it could not accept the business. So if that had happened, the arrangement for Mr F would not have come about in the first place, and the loss he suffered could have been avoided.*
- *Had Carey explained to Mr F why it would not accept the application from CL&P or was terminating the transaction, I find it very unlikely that Mr F would have tried to find another SIPP operator to accept the business.*
- *In any event, I don't think it's fair and reasonable to say that Carey should not compensate Mr F for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found it did. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted the application from CL&P, or would have terminated the transaction before completion.*
- *I'm satisfied that it would not be fair to say Mr F's actions mean he should bear the loss arising as a result of Carey's failings. I acknowledge Mr F was warned of the high-risk nature of Store First and declared he understood that warning. But Carey failed to act on, nor did it share, significant warning signs with Mr F so that he could make an informed decision about whether to proceed with the investment. And, in these circumstances, I am satisfied that Carey should not have asked him to sign the*

indemnity at all.

With all this in mind, I'm 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 Mr F 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 Mr F for the loss he has suffered to his 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 has led to Mr F suffering a significant loss to his pension. And my aim is therefore to return Mr F to the pension position he would now be in but for Carey's failings. When considering this I have taken into account the Court of Appeal's supplementary judgement ([2021] EWCA Civ 1188), insofar as that judgement deals with restitution/compensation.

In light of my above findings, in my view Carey should calculate fair compensation by comparing the current position to the position Mr F would be in if he had not transferred from his existing pensions. In summary, Carey should:

1. *Calculate the loss Mr F 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 Mr F's pension. If that is not possible pay compensation for the loss to Mr F 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 Mr F has suffered as a result of making the transfer*

To do this, Carey should work out the likely value of Mr F's pensions as at the date of this decision, had he left them where they were instead of transferring to the SIPP.

Carey should ask Mr F's former pension provider(s) to calculate the current notional transfer values had he not transferred his pensions. 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 notional transfer values should be compared to the transfer value of the SIPP at the date of this decision and this will show the loss Mr F 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 Mr F. 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 note that the Court of Appeal attached a value to the Store First investment. However, here, I am able to ask Carey to take ownership of the investment. And I understand Carey has been able to take ownership of the Store First investment, for a nil consideration, in other cases. So it should do that here, if possible. I am satisfied that is a fair approach in the circumstances of this case, as it allows the SIPP to close and gives Carey the option of retaining the investment or realising its

current market value.

If Carey is unable to take ownership of the Store First investment it should remain in the SIPP. I think that is fair because I think it is unlikely it will have any significant realisable value in the future. I understand Mr F has the option of returning his Store First investment to the freeholder for nil consideration. That should enable him to close his SIPP, if Carey does not take ownership of the Store First investment.

In the event the Store First investment remains in the SIPP and Mr F decides not to transfer it to the freeholder he should be aware that he 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. He should also be aware it is unlikely he will be able to make a further complaint about these costs.

3. Pay compensation to Mr F for loss he has suffered calculated in (1).

Since the loss Mr F has suffered is within his pension it is right that I try to restore the value of his 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 Mr F could claim. The notional allowance should be calculated using Mr F's marginal rate of tax.

On the other hand, Mr F may not be able to pay the compensation into a pension. If so compensation for the loss should be paid to Mr F 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 Mr F should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mr F's marginal rate of tax in retirement. For example, if Mr F 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 Mr F 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.

Mr F has been caused some distress and inconvenience by the loss of his pension benefits. This is money Mr F cannot afford to lose and its loss has undoubtedly caused him 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 Mr F has suffered.

interest

The compensation must be paid as set out above within 28 days of the date Carey receives notification of his 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 provisional decision

For the reasons given, my provisional decision is that I uphold Mr F's complaint.
Options SIPP UK LLP should calculate and pay compensation as set out above.

Responses to my provisional decision

Carey did not accept the provisional decision and made further submissions. I have considered its submissions in full but, in summary, it said:

- The provisional decision is factually incorrect in some respects and unreasonable and does not take account of the regulatory and legal regime within which Carey operated at the relevant time.
- I should take into account the legal and contractual relationship that Carey had with its members, including Mr F, being one of a self- invested personal pension scheme in which Carey acts on a strictly execution only/non-advised basis and is member-directed throughout. Carey is not permitted to, and does not, provide advice or otherwise comment on the suitability of investments or any other aspect of a customer's SIPP.
- I have failed to take account of the relevant law and regulations as required by S228(s) FSMA and DISP 3.6.4R or stated the basis on which it is appropriate to here to depart from the law. I have not said whether the due diligence duty I have referred to is recognised by law. Carey's position is that these duties would not be recognised by a Court and legal liability would not be established. Carey's position is that the ombudsman is applying duties more extensive and onerous tha the Courts and has not explained that duty with any clarity.
- Carey was permitted to deal with unregulated introducers. So it would be unfair and unreasonable, as the provisional decision does, to place any liability on Carey for any losses flowing from such an investment on an execution only basis. This is retrospectively applying new and unexpected duties on the due diligence of introducers of investments and these duties are inconsistent with the contract Mr F entered into and the COBS rules at the relevant time. The ombudsman service is seeking to *"arbitrarily reverse engineer"* an approach to hold Carey liable as it is the only regulated entity left over which the ombudsman service has control. The ombudsman service is artificially creating a position to place sole liablility on Carey and the effect is to force SIPP providers into a position of underwriting the performance of investments.
- It was established in *Adams* that there can be no breach on Carey's part because of its decision to accept customers from CL&P in the circumstances relevant to this case. The judge in Adams rejected that Carey owed duties of the kind now being relied upon by reference to any legally actionable COBS Rules. In any event the judge held due diligence had been carried out by any reasonable measure having regard to all the evidence, including the FSA notice concerning Mr Wright. The ombudsman service should give weight to these findings or explain why it can dismiss them.
- 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 and after Mr F's SIPP had been established. 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.
- In any event, 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. Even if, therefore, Carey's searches had revealed the FSA Notice there is no reason this should necessarily

have led Carey to conclude at the time that it should not accept introductions of customers from CL&P.

- 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.
- In terms of investment due diligence the provisional decision failed to take account of the very limited nature of any legal obligation on Carey to undertake due diligence in respect of the Store First investment. In Adams the High Court refused to recognise a duty of due diligence in the form set out in the provisional decision instead setting out that the obligations are framed by reference to the contrafactual relationship between the parties. This does not extend to Carey assessing the underlying investment. HHJ Dight said that Carey's due diligence was adequate. These finding were not 'disturbed' by the Court of Appeal.
- The findings in the provisional decision amounted to imposing an obligation on Carey to undertake a qualitative assessment of Store First and then to pass on that assessment to Mr F in what amounted to a recommendation. The findings in the provisional decision amount to a requirement to give advice to Mr F. That may only be a high level - by refusing the instruction and giving reasons. Carey didn't have the permissions to advise and to do so knowingly would have amounted to a criminal offence.
- The provisional decision fails to state what additional information should have been given to Mr F and fails to state what basis Mr F would not have proceeded if given this information. Mr F was given clear risk warnings and if such warnings were not sufficient then it does not understand on what basis it can be concluded that further information would have changed Mr F's decision. Mr F would have gone ahead in any event.
- In terms of causation, Carey did not cause Mr F's loss and he would have found a way to invest in Store First in any event.
- The provisional decision concludes that another SIPP provider would not have accepted the instructions but that implies a SIPP provider couldn't have accepted a legitimate instruction by a fully informed and sophisticated investor.
- Mr F was in financial difficulty and sought out CL&P so that he could access money from his pension. He was the driving force behind releasing money from his pension. Mr F was determined to proceed and another SIPP provider could have properly accepted the investment.
- Mr F has not said he wouldn't have proceeded if informed of the tax consequences of the incentive payment. Given his financial difficulty he would have likely proceeded. In any event Mr F should have questioned the legitimacy of that payment. Carey questioned Mr F's assertion that he wouldn't have proceeded if he had been informed that Mr Wright was the subject of an FSA alert.
- The questions asked of Mr F in this respect fall short of those asked Adams and this aspect should be the subject of an oral examination.
- The contract between Mr F and Carey was effective to relieve Carey of any liability and to decide otherwise would be render void a validly concluded contract. No other legally recognised duty would justify such a conclusion.
- In any event Mr F must bear an element of responsibility for his own actions and this

should be reflected in any compensation due.

- In the event that the ombudsman disagrees, then Carey would accept that the correct basis for calculating compensation is as set out in the provisional decision under the headings:

  "Calculate the loss Mr (F) *has suffered as a result of making the transfer"* and *"Pay compensation to Mr* (F) *for loss he has suffered calculated in (1)"*, in accordance with the judgment of the Court of Appeal in Adams.

- It disagrees with the remainder of the methodology. Mr F should assist Carey in taking ownership of the storage pods. But the provisional decision allows as an alternative Mr F to retain the storage pods and in doing so Mr F would obtain a windfall. In such circumstances the compensation should be recalculated giving a value to the storage pods.
- The ombudsman has not provided any evidence that Mr F has suffered any upset so as to justify the payment of £500.
- The finding in the provisional decision that Carey should not have allowed Mr F to make the investment means that;
  - Carey should have obtained further information from Mr F about his financial circumstances and objectives – as a duty to refuse couldn't sensibly apply to a sophisticated investor.
  - Carey should have evaluated the Store First investment in order to assess its quality as an investment, the risks involved and the reasonableness of statements made in the marketing material.
  - Carey should have assessed the suitability of the Store First investment for Mr F and advised him about its unsuitability.
  - If Mr F nevertheless wished to proceed then it should have refused.
- Such activity on the part of Carey would be inconsistent with the terms of the contract, the relevant COBS Rules and the restrictions on Carey's permissions. No fair or reasonable reading of the Principles could require any of these actions.
- The wider consequences of the provisional decision will be very serious and the execution only SIPP market will cease to exist or contract severely. This will have a detrimental effect on consumers.
- The provisional decision will cause a real unfairness if the SIPP provider is liable for the poor investment choices of consumers - because its business is structured on the basis that it is not investigating the quality of the underlying investments other than them being capable of being held by a pension scheme. Its business is structured on the basis it is not warning clients of the suitability of the investment, and its fees and charges are based on providing an execution only service. And it would be unfair that Carey cannot rely on its indemnity that sets out it is not providing advice.
- Carey suggest that the ombudsman service has made a 'policy decision' to impose on SIPP providers all losses flowing from customers unsuccessful investments - at least where the introducer is not FCA regulated. Each case should be considered on its own facts and not pre-judged.
- Carey formally requests that an oral hearing be held. That would be to, in particular, explore Mr F's understanding of his investment and his and Carey's roles. It says the Judge in Adams was only able to reach his conclusion after hearing oral evidence. It also says that an oral hearing is needed to assess Mr F's motivation for entering into the transaction and what he would have done if given more information. Mr F should

be questioned about whether further information would have changed his decision to proceed with the investment.

Mr F's representative has also provided his comments as to Carey's submissions. It said:

- Mr F saw a google advertisement offering a way to withdraw cash from his pension. It says this advert had no mention of the transfer into a SIPP nor investment into unregulated high risk assets. Mr F did complete a short enquiry form with his contact details and was then called by an unregulated adviser to give him pension transfer and investment advice.
- In respect of Carey submissions in respect of Mr F *"not questioning the incentive like any reasonable member of the public would",* it said that Mr F works in I.T., not the financial industry. Mr F was not aware of the 'Brokers' relationship with Store First which generated huge commissions for CL&P, in effect allowing it to offer cash back incentives.
- Mr F was assured that Carey Pensions, a regulated SIPP provider, were involved, thus adding a regulatory layer to the transaction. Without Carey, C&LP could not 'scam' its clients.
- Carey infers that Mr F was determined to invest in Store First in any event. It said 'this is a myth'. Mr F only heard of Store First via C&LP. At no point did Carey contact its client to discuss the risks involved. It said it, *"was inconceivable that Carey allowed a huge volume of transfers into their SIPP and subsequent investment into the same Store First Pods, all from the same Broker introduction source, without checking the legitimacy of the process and doing sufficient due diligence on both the Introducer firm C&LP, the assets and Store First themselves."*

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.

Oral hearing

Carey has requested an oral hearing. It says this is necessary because Mr F's statements or testimony should be investigated and tested. It says this would better clarify Mr F's understanding of his investment and his and Carey's roles. Carey also submits an oral hearing is necessary to assess Mr F's motivation for entering into the transaction and what he would have done if given more information.

As a preliminary point, 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)). And, the Dispute Resolution rules found in the FCA Handbook under which we operate (the DISP rules), provide the following in relation to the resolution of complaints by the ombudsman and hearings:

DISP 3.5.5R

"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".

DISP 3.5.6R

"A party who wishes to request a hearing must do so in writing, setting out:

(1)	*the issues he wishes to raise; and*
(2)	*(if appropriate) any reasons why he considers the hearing should be in private;*
	so that the Ombudsman may consider whether:
(3)	*the issues are material;*
(4)	*a hearing should take place; and*
(5)	*any hearing should be held in public or private".*

DISP 3.5.7G

"In deciding whether there should be a hearing and, if so, whether it should be in public or private, the Ombudsman will have regard to the provisions of the European Convention on Human Rights".

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 in making my decision on a hearing request is whether or not "*the complaint can be fairly determined without convening a hearing*".

My consideration of Carey's request

In accordance with my duties under FSMA and the relevant DISP provisions as set out above, I have carefully considered Carey' request for a hearing on this complaint. And, I am satisfied that a hearing would only be required in this case if I thought the complaint couldn't be fairly determined without convening one.

Carey submits that (as discussed above) that it is necessary for an oral hearing to be held so that Mr F's understanding and motivations can be better understood. That would include his understanding of the Store First investment and of his and Carey's respective roles in the transaction. It says that the judge in *Adams v Options SIPP* was only able to determine Mr Adams' level of understanding after hearing his oral evidence.

It further submits that a fact-sensitive matter such as this should not be decided on the papers when specific and important questions need to be put to, and answered, by Mr F.

I have carefully considered the submissions Carey has made. However, I do not agree that the above means I am unable to fairly determine this complaint without convening a hearing.

As Carey will be aware, 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, if 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, I have put the relevant questions to Mr F about the Store First investment, his understanding of the transaction and the cash incentive he received. And Mr F has provided the answers to the questions we put to him.

In my provisional decision – as included above - I set out in full the answers to my questions that Mr F submitted to us.

I have carefully reviewed the answers Mr F has provided, and I am satisfied that his answers are consistent with the information he has previously provided on his complaint. I have identified no reason to make me doubt the veracity of the answers Mr F has provided to us.

Carey has identified no dispute of fact - on which this case turns – that would require me to obtain further oral evidence from Mr F. And, I cannot see how holding an oral hearing would add anything further to the evidence Mr F has already provided. I note that Carey has referred again to the case of *Adams v Options SIPP*, however I have explained in the provisional decision why I am satisfied that this case is significantly different to that of Mr Adams, and that this case is being decided on different principles.

It is also relevant to the assessment as to whether a hearing is held is my finding (which I acknowledge Carey disputes) that Carey should not have accepted Mr F's application regardless of his intentions and that it would not be reasonable to accept that any other SIPP provider would have accepted Mr F's application. Even if Mr F's legitimate answers to the questions put to him were deemed questionable (which I do not believe they are), the complaint outcome is not entirely predicated on Mr F's intentions or his understanding of his and Carey's role. Carey shouldn't have accepted the application in the first place so Mr F's intentions or understanding would not have affected his application or investment – his application wouldn't have been accepted and his investment wouldn't have been made.

I would also like to draw Carey's attention to the DISP rules which set out the resolution of complaints by the Ombudsman and evidence:

DISP 3.5.8R provides:

"The Ombudsman may give directions as to:

> *(1) the issues on which evidence is required;*
>
> *(2) the extent to which evidence should be oral or written; and*
>
> *(3) the way in which evidence should be presented."*

This means 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 points or to test the veracity of information that has been provided to me. Following my enquiries, I am satisfied that the evidence obtained from Mr F is sufficient to enable me to fairly determine his complaint.

Finally, for the avoidance of doubt, I want to emphasise that even if I were to invite the parties to participate in a hearing, Carey would not usually have the opportunity to cross-examine Mr F 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. To this end, usually each party would be given an opportunity to make their case and may be allowed to put forward questions for the ombudsman to ask the other party. However, parties would not usually be allowed direct questioning or cross-examination of the other party to the complaint.

Both parties have been given ample opportunity to make representations and set out

their positions. And bearing that in mind and having taken all of Carey's evidence and arguments into account, I am satisfied that I am able to fairly determine Mr F's complaint without convening a hearing.

I referred in my provisional decision to the published decision that set out the FCA's Principles for Businesses and the relevant regulatory publications. But I will now set out those considerations in greater detail, given Carey's response to my provisional decision.

The Principles

The FCA's Principles for Businesses are of particular relevance to my decision. The Principles for Businesses, which are set out in the FCA's handbook "*are a general statement of the fundamental obligations of firms under the regulatory system"* (PRIN 1.1.2G). And, I consider that the Principles relevant to this complaint include Principles 2, 3 and 6 which say:

"Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.

Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.

Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly."

Carey has made reference to the law and suggested that I am departing from it or applying obligations that go beyond it. When reaching my provisional decision I carefully considered the relevant law and what this says about the application of the FCA's Principles.

In *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin) ("BBA") Ouseley J said at paragraph 162:

"The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The Specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirement they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules."

And at paragraph 77 of BBA Ouseley J said:

"Indeed, it is my view that it would be a breach of statutory duty for the Ombudsman to reach a view on a case without taking the Principles into account in deciding what would be fair and reasonable and what redress to afford. Even if no Principles had been produced by the FSA, the FOS would find it hard to fulfil its particular statutory duty without having regard to the sort of high level Principles which find expression in the Principles, whoever formulated them. They are of the essence of what is fair and reasonable, subject to the argument about their relationship to specific rules."

In (*R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878), Berkeley Burke brought a judicial review claim challenging the decision of an ombudsman who had upheld a consumer's complaint against it. The ombudsman considered the FCA Principles and good industry practice at the relevant time. He concluded that it was fair and reasonable for Berkeley Burke to have undertaken due

diligence in respect of the investment before allowing it into the SIPP wrapper, and that if it had done so, it would have refused to accept the investment. The ombudsman found Berkeley Burke had therefore not complied with its regulatory obligations and had not treated its client fairly.

Jacobs J, having set out some paragraphs of BBA including paragraph 162 set out above, said (at paragraph 104):

"These passages explain the overarching nature of the Principles. As the FCA correctly submitted in their written argument, the role of the Principles is not merely to cater for new or unforeseen circumstances. The judgment in BBA shows that they are, and indeed were always intended to be, of general application. The aim of the Principles- based regulation described by Ouseley J. was precisely not to attempt to formulate a code covering all possible circumstances, but instead to impose general duties such as those set out in Principles 2 and 6."

The BBA judgment also considers section 228 of Financial Services & Markets Act 2000 ("FSMA") and the approach an ombudsman is to take when deciding a complaint. The judgment of Jacobs J in the Berkeley Burke case upheld the lawfulness of the approach taken by the ombudsman in that complaint, which I have described above, and included the Principles and good industry practice at the relevant time as relevant considerations that were required to be taken into account.

As outlined above, Ouseley J in the BBA case held that it would be a breach of statutory duty if I were to reach a view on a complaint without taking the Principles into account in deciding what is fair and reasonable in all the circumstances of a case. And, Jacobs J adopted a similar approach to the application of the Principles in Berkeley Burke. So the application of the Principles has been considered by the Courts and the Financial Ombudsman applying such Principles to its considering of cases – and in the case of Berkeley Burke to an analogous case as considered here – was found to be correct and they are a relevant consideration here. I considered them in the specific circumstances of this complaint. I am not 'departing from the law' in doing so.

Regulatory publications

As the ombudsman did in the published decision I also considered the regulatory publications before reaching my provisional decision. The FCA (and its predecessor, the FSA) has issued a number of publications which remind SIPP operators of their obligations and set out how they might achieve the outcomes envisaged by the Principles:

- The 2009 and 2012 thematic review reports.
- The October 2013 finalised SIPP operator guidance.
- The July 2014 *"Dear CEO"* letter.

I have set out below what I consider to be the key parts of the publications (although I have considered them in their entirety).

The 2009 Thematic Review Report

The 2009 report included the following statement:

"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses ('a firm must pay due regard to the interests of its customers and treat them fairly') insofar as they are obliged to ensure the fair treatment of their customers. COBS 3.2.3(2) states that a member of a

pension scheme is a 'client' for COBS purposes, and 'Customer' in terms of Principle 6 includes clients.

It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six TCF consumer outcomes.

We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the member to confirm the position, or by contacting the firm giving advice and asking for clarification. Moreover, while they are not responsible for the advice, there is a reputational risk to SIPP operators that facilitate the SIPPs that are unsuitable or detrimental to clients.

Of particular concern were firms whose systems and controls were weak and inadequate to the extent that they had not identified obvious potential instances of poor advice and/or potential financial crime. Depending on the facts and circumstances of individual cases, we may take enforcement action against SIPP operators who do not safeguard their clients' interests in this respect, with reference to Principle 3 of the Principles for Business ('a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems').
The following are examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms:

• Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm's clients, and that they do not appear on the FSA website listing warning notices.

• Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.

• Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified.

• Being able to identify anomalous investments, e.g. unusually small or large transactions or more 'esoteric' investments such as unquoted shares, together with the intermediary that introduced the business. This would enable the firm to seek appropriate clarification, e.g. from the client or their adviser, if it is concerned about the suitability of what was recommended. (my emphasis)

• Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely.

• Routinely identifying instances of execution-only clients who have signed disclaimers taking responsibility for their investment decisions, and gathering and analysing data regarding the aggregate volume of such business. (my emphasis)

• Identifying instances of clients waiving their cancellation rights, and the reasons for this."

The later publications

In the October 2013 finalised SIPP operator guidance, the FCA states:

"This guide, originally published in September 2009, has been updated to give firms further guidance to help meet the regulatory requirements. These are not new or amended requirements, but a reminder of regulatory responsibilities that became a requirement in April 2007.

All firms, regardless of whether they do or do not provide advice must meet Principle 6 and treat customers fairly. COBS 3.2.3(2) is clear that a member of a pension scheme is a "client" for SIPP operators and so is a customer under Principle 6. It is a SIPP operator's responsibility to assess its business with reference to our six TCF consumer outcomes." The October 2013 finalised SIPP operator guidance also set out the following:

"Relationships between firms that advise and introduce prospective members and SIPP operators

Examples of good practice we observed during our work with SIPP operators include the following:

• Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for un-authorised business warnings.

• Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.

• Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.

• Being able to identify irregular investments, often indicated by unusually small or large transactions; or higher risk investments such as unquoted shares which may be illiquid. This would enable the firm to seek appropriate clarification, for example from the prospective member or their adviser, if it has any concerns. (my emphasis)

• Identifying instances when prospective members waive their cancellation rights and the reasons for this.

Although the members' advisers are responsible for the SIPP investment advice given, as a SIPP operator the firm has a responsibility for the quality of the SIPP business it administers. Examples of good practice we have identified include:

• conducting independent verification checks on members to ensure the information they are being supplied with, or that they are providing the firm with, is authentic and meets the firm's procedures and are not being used to launder money

• having clear terms of business agreements in place which govern relationships and clarify responsibilities for relationships with other professional bodies such as solicitors and accountants, and

• using non-regulated introducer checklists which demonstrate the SIPP operators have considered the additional risks involved in accepting business from non- regulated introducers

In relation to due diligence the October 2013 finalised SIPP operator guidance said:

"Due diligence

Principle 2 of the FCA's Principles for Businesses requires all firms to conduct their business with due skill, care and diligence. All firms should ensure that they conduct and retain appropriate and sufficient due diligence (for example, checking and monitoring introducers as well as assessing that investments are appropriate for personal pension

schemes) to help them justify their business decisions. In doing this SIPP operators should consider:

• ensuring that all investments permitted by the scheme are permitted by HMRC, or where a tax charge is incurred, that charge is identifiable, HMRC is informed and the tax charge paid

• periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme

• having checks which may include, but are not limited to:

o *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*

o *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*

• ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified

• good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and

• ensuring these benchmarks clearly identify those instances that would lead a firm to decline the proposed business, or to undertake further investigations such as instances of potential pension liberation, investments that may breach HMRC tax- relievable investments and non-standard investments that have not been approved by the firm"

The July 2014 *"Dear CEO"* letter provides a further reminder that the Principles apply and an indication of the FCA's expectations about the kinds of practical steps a SIPP operator might reasonably take to achieve the outcomes envisaged by the Principles.

The *"Dear CEO"* letter also sets out how a SIPP operator might meet its obligations in relation to investment due diligence. It says those obligations could be met by:

- *Correctly establishing and understanding the nature of an investment*
- *Ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation*
- *Ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable)*
- *Ensuring that an investment can be independently valued, both at point of purchase and subsequently*
- *Ensuring that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc)*

I acknowledge that the 2009 report (and the 2012 report and the *"Dear CEO"* letter) are not formal guidance (whereas the 2013 finalised guidance is). However, I am of the view the fact that the reports and *"Dear CEO"* letter did not constitute formal (i.e. statutory) guidance does not mean their importance or relevance should be underestimated.

The publications provide a *reminder* that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and to produce the outcomes envisaged by the Principles. In that respect, these publications also go some way to indicate what I consider amounts to good industry practice at the relevant time. I am therefore satisfied it is appropriate to take them into account.

I do not think the fact that some of the later publications (i.e. those other than the 2009 Thematic Review Report), post-date the events that are the subject of this complaint mean that the examples of good industry practice they provide were not good practice at the time of the relevant events. It is clear from the text of the 2009 and 2012 reports, (and the "Dear CEO" letter published in 2014), that the regulator expected SIPP operators to have incorporated the recommended good industry practices into the conduct of their business already. So, whilst the regulators' comments suggest some industry participants' understanding of how the standards shaped what was expected of SIPP operators changed over time, it is clear the standards themselves had not changed.

Some of the later publications were published after the events subject to this complaint, but the Principles that underpin them existed throughout, as did the obligation to act in accordance with those Principles. I note that HHJ Dight in the Adams case did not consider the 2012 thematic review, 2013 SIPP operator guidance and 2014 *"Dear CEO"* letter to be of relevance to his consideration of Mr Adams' claim. But it does not follow that those publications are irrelevant to my consideration of what is fair and reasonable in the circumstances of this complaint. I am required to take into account good industry practice at the relevant time. And, as mentioned, the publications indicate what I consider amounts to good industry practice at the relevant time.

That doesn't mean that in considering what is fair and reasonable, I will only consider Carey's actions with these documents in mind. The reports, Dear CEO letter and guidance gave non-exhaustive examples of good industry practice. They did not say the suggestions given were the limit of what a SIPP operator should do. As the annex to the *"Dear CEO"* letter notes, what should be done to meet regulatory obligations will depend on the circumstances.

The publications do not alter the meaning of, or the scope of, the Principles. But they are evidence of what I consider to have been good industry practice at the relevant time, which would bring about the outcomes envisaged by the Principles.

It also may be true that the publications, like the Principles, are not a basis on which legal action can be taken. But, as noted above, I am dealing with a complaint, not a cause of action, and what I am seeking to identify here is what is relevant to my consideration of what is fair and reasonable in the circumstances of this complaint.

I would also add, that even if I took the view that any publications or guidance that post-dated the events subject of this complaint do not help to clarify the type of good industry practice that existed at the relevant time (which I don't), that does not alter my view on what I consider to have been good industry practice at the time. That is because I find that the 2009 report together with the Principles provide a very clear indication of what Carey could and should have done to comply with its regulatory obligations that existed at the relevant time before accepting any introduction from CL&P and/or accepting Mr F's application and then allowing the investment into Store First.

Ultimately, in determining this complaint, I need to consider whether Carey complied with its regulatory obligations at the relevant time as set out by the Principles to act with due skill, care and diligence, to take reasonable care to organise its business affairs responsibly and effectively, to pay due regards to the interests of its customers, to treat them fairly, and to act honestly, fairly and professionally. And, in doing that, I'm looking to the Principles and the publications listed above to provide an indication of what Carey could have done to comply with its regulatory obligations.

My consideration of the further submissions in response to my provisional decision

Carey has submitted that it was not incorrect for it to accept introductions from unregulated introducers.

I did recognise in my provisional decision that Carey had submitted it was a *"self- invested personal pension scheme in which Carey acts on a strictly execution only/non-advised basis and is member-directed throughout."* And that it had submitted that it was *"not permitted to, and does not, provide advice or otherwise comment on the suitability of investments or any other aspect of a customer's SIPP"*. I set out in the provisional decision that I accepted Carey couldn't advise Mr F on the suitability of the SIPP and investment for his personal circumstances and objectives.

My finding was not, as Carey submits, that it needed to make any assesment of such suitability for Mr F and I disagree that my findings amount to such. To reiterate, my finding was that Carey had, as I will go on to discuss, overarching reponsibilities under the Principles – which were set out in the published decision I referenced – which included paying due regard to the interests of its customers; here Mr F.

I am satisfied Carey's regulatory obligations could have been met in the way I describe without providing Mr F with advice – none of this amounts to a consideration of the suitability of an investment in Store First for Mr F personally. These are general considerations. Therefore Carey would not need to, as it says, gain information about Mr F's, *"financial experience, financial situation, investment objectives and attitude to risk."*

I also considered the contractual relationship between Mr F and Carey, as did the published decsion I referenced.

I set out:

"I am also satisfied that, as in the complaint subject to the published decision, the contract between Carey and Mr F 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 Mr F losing a significant part of his pension.

In this complaint, Carey had sufficient information available to it or that which it could obtain through a reasonable level of due diligence which should have led it to reject Mr F's referral and application. So in this complaint, like the complaint subject to the published decision, it would not be fair and reasonable to say the contract meant Carey could ignore all red flags and proceed with Mr F's business regardless."

Carey has referred to its contractual relationship with Mr F and the basis on which I arrive at my decision which it says is at odds with the law. It also refers to 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*.

In terms of Carey's statements about the applicability of the Adams judgements, I would reiterate that, as discussed in the published decision and my provisional decision, the facts in Mr F's case are very different from those in Mr Adams cases. There are also significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and from the issues in Mr F's complaint. The breaches were summarised in paragraph 120 of the Court of Appeal judgment. In particular, HHJ Dight considered the contractual relationship between the parties in the context of Mr Adams' pleaded breaches of COBS 2.1.1R that happened after the contract was entered into. In Mr F's complaint, I am considering whether Carey ought to have identified that the introductions from CL&P involved a risk of consumer detriment and, if so, whether it ought to have accepted the introduction from CL&P and therefore Mr F's application prior to entering into a contract with Mr F.

I recognise that Carey could accept introductions from unregulated introducers. What I set out in the provisional decision was that, in the specific circumstances of his introduction, taking into account the investment to be made and the introducer itself, that Carey was not acting appropriately in accepting the application from Mr F and facilitating the investment. It was fair and reasonable, bearing in mind the particular facts of this case, to make the finding that Carey should not have accepted Mr F's application.

Due diligence on CL&P

As set out above, Carey has made further submissions about CL&P, its due diligence on that business and its obligations in that respect. It has highlighted that the FSA Notice as to Mr Wright was not entered onto 'World Check' until 24 October 2011, after Carey had received Mr F's application and Carey had stared accepting business from CL&P. So if Carey had run a World Check at the inception of its relationship with CL&P, it would not have identified the Notice. It says that Carey was under no obligation check the FSA's list of unauthorised firms or individuals and did not routinely do so.

Carey says that, in any event, the FSA Notice in the form it was published in 2010 and existed at the outset of Carey's relationship with CL&P only stated that Mr Wright was not regulated by the FSA. It did not set out there was any criminal or civil wronging. If there was any reason not to do business with Mr Wright then the FSA Notice would have said so.

I have carefully revisited introducer due diligence, in light of Carey's response to my provisional decision. However, I remain of the same view as that set out in the provisional decision. As my provisional decision forms part of this decision (and this matter was addressed in the published decision), I will not repeat the full detail of my reasoning here. In summary, I said Carey failed to conduct sufficient due diligence on CL&P before accepting business from it and failed to draw fair and reasonable conclusions from what it did know

about CL&P and the investment itself. It ought reasonably to have concluded that it should *not* accept Mr F's application, because:

- In accordance with its own standards (as submitted to us), Carey should have carried out company checks on CL&P, reviewed CL&P's accounts, and checked "*sanctions lists*". These standards appear to be consistent with good industry practice and Carey's regulatory obligations at the relevant time.

- Carey ought to have known the FSA kept a list of alerts, relating to unregulated businesses, which were often based overseas. As a SIPP operator considering accepting business from an unregulated overseas firm, it should have been mindful of the FSA's list of alerts and it ought to have checked this list before proceeding with accepting business from CL&P.

- Carey ought to have undertaken sufficient enquiries into CL&P to understand who its directors were, and checked the FSA's warning list as part of its due diligence on CL&P. Had it carried out these checks before accepting business from CL&P it would have discovered that CL&P's director was Mr Terence Wright, and that he was on the FSA warning list.

- It is fair and reasonable to conclude that the FSA warning was a clear warning – an *alert* - relating specifically to Mr Terence Wright, providing links to guidance on consumer protection and warnings about scams.

- CL&P's director Mr Terence Wright's presence on the FSA warning list should have led Carey to conclude it should not do business with CL&P. I note this is a view which was held by Ms Hallett when she gave evidence to the court during the *Adams v Carey* hearing. Such a conclusion was the proper one it ought to have reached bearing in mind Carey's responsibilities under the Principles.

- The evidence clearly shows that Carey should have been aware, before it accepted Mr F's application and before it sent Mr F's money to Store First, that CL&P was not a business it should accept his application from, given what it knew and what evidence was available to it at the time.

- It appears a request for CL&P's accounts was not made until 23 March 2012. Carey has told us it has no record of receiving the information and that this was a likely factor in its eventual decision to end its relationship with CL&P.

- It is fair and reasonable that Carey should have checked CL&P's accounts at the outset before accepting any business from it. If checks on CL&P's accounts had been attempted earlier, the fact that CL&P was unwilling to provide this information should have raised a red flag. And, if not receiving the accounts when requested was, (as Carey has submitted), a factor in ending its relationship with CL&P, it is fair and reasonable to conclude that if the accounts had been requested at the outset and CL&P had failed to provide them, it is unlikely Carey would have accepted any introductions from CL&P at all.

In relation to the FSA warning or Notice, Carey says the Notice was not entered onto World Check (the checking service it used) until 24 October 2011 - after Carey had carried out its checks on CL&P's other representatives and after it had started accepting business from CL&P. And so, if it had run a check on Mr Terence Wright at the outset, this would not have revealed his entry on the FSA's warning list. Carey adds that it was under no obligation to check the list itself. It also says that the Notice, in the form in which it had been published in 2010, stated only that Mr Terence Wright was not regulated by the FSA and referred only to a business named 'Cash In Your Pension'. And it points out there was no contradiction between the FSA notice and any statement provided by Mr Terence Wright that he was not subject to any FSA action or censure.

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 operated by an individual who featured on that list.

I also remain of the view that the presence of Mr Terence Wright on the list, after he had answered "no" to a question asking him if he was subject to any FSA action or censure, should immediately have raised a red flag to Carey. I think there is a contradiction between Mr Terence Wright's answer to Carey and his presence on the list. A censure is an expression of severe disapproval, and I think the FSA adding Mr Terence Wright to its list was exactly that. His being added to the list is also clearly action by the FSA. So Mr Terence Wright's answer to Carey was not consistent with the facts.

I remain of the view that Carey, as a regulated SIPP operator, ought to have known the FSA kept a list of alerts, relating to unregulated businesses, which were often based overseas. As a SIPP operator considering accepting business from an unregulated overseas firm, it should have been mindful of the FSA's list of alerts and, in compliance with its regulatory obligations, it ought to have checked this list before accepting business from CL&P.

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. I consider this amounts to good industry practice and, I remain of the opinion 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.

If I accepted that use of the World Check service to check Mr Terence Wright at the outset would not have revealed his entry on the list, this does not change my view. Carey should have checked the FSA's list. The fact that Carey chose to use a tool and the tool may have missed something doesn't mean it shouldn't be held responsible – for the reasons given, it should have checked the list itself. To my mind, the fact Carey now say that the tool they used wouldn't have picked up the warning in any event is irrelevant to my finding that Carey failed to undertake sufficient due diligence on CL&P and missed the fact that Mr Terence Wright was subject to an FSA alert.

I would again highlight that Carey's Chief Executive, Ms Hallett, gave evidence to the court during the *Adams v Options* hearing (at Paragraph 60) which HHJ Dight summarised as follows:

"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 completely 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 my provisional decision, I remain 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.

I am satisfied that the due diligence requirements that I set out above, and in my provisional decision, is the level of due diligence it is reasonable to conclude Carey was required to conduct on CL&P given its regulatory obligations, and in all the circumstances here.

I note that Carey has referenced that its business model is based on its view that its responsibilities were limited when accepting introductions such as Mr F's – it seems to set out that this was limited to only checking whether an investment could be held in a SIPP in these circumstances and not the kind of due diligence I set out. I am, however, satisfied that Carey did have a duty to carry out the kind of due diligence that I discussed in my provisional decision and in this decision, to meet its regulatory obligations. Carey itself seems to have been of this view at the time of the events in question – which appears at odds with the submissions it makes now.

I would also highlight that an ombudsman's approach in assessing in the circumstances of a specific case, the due diligence carried out by a SIPP provider taking into account the overarching Principles, was accepted by the Court in Berkely Burke - as set out earlier in this decision.

Due diligence on Store First

In the provisional decision I set out what Carey should have known about Store First and I referenced the published decision which set out further detail. I summed up the situation by saying:

"As in the complaint subject to 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 Mr F'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 Mr F'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."

It is fair and reasonable to decide that there were things Carey knew or ought to have known about the Store First investment which ought to have led Carey to conclude it would not be consistent with its regulatory obligations or good practice to allow it into Mr F's SIPP. Or to at

the very least have had significant concerns about the investment – which it ought to have considered *alongside what it knew*, or ought to have known, about CL&P.

I am satisfied that Carey ought to have had significant cause for concern about the nature of the Store First investment from the beginning. And I think these concerns, in themselves, should have at the very least led it to be very cautious about accepting Store First and to think very carefully about the basis on which it should be accepted, mindful of its obligation to prevent consumer detriment. Given the circumstances at the time of Mr F's application, I think the only fair and reasonable conclusion, based on what Carey knew or ought to have known at the time, is that Carey should not have accepted Mr F'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.

This is not, as Carey says, assessing the suitability of the investment for Mr F's particular circumstances. And it was not required to undertake that, or then make some form of recommendation to Mr F. It is something that Carey should have taken account of, in addition to the introducing business, in deciding whether to accept the application and investment as part of its regulatory responsibilities. This appears consistent with Carey's own view at the time and it did, belatedly, conclude it should not accept Store First investments.

Carey's submissions as to causation

Carey says it did not cause Mr F's loss and he would have found a way to invest in Store First in any event. It says that my provisional decision concluding that another SIPP provider would not have accepted the instructions, implies a SIPP provider couldn't have accepted a legitimate instruction by a fully informed and sophisticated investor. Carey also says that Mr F was in financial difficulty and sought out CL&P so that he could access money from his pension. It says he was the driving force behind releasing money from his pension and he was determined to proceed and another SIPP provider could have properly accepted the investment. In addition it says Mr F has not said he wouldn't have proceeded if informed of the tax consequences of the incentive payment. And it also says that, given his financial difficulty, he would have likely proceeded. In any event Mr F should have questioned the legitimacy of that payment. Carey questioned Mr F's assertion that he wouldn't have proceeded if informed that Mr Wright was the subject of an FSA alert.

I did consider in my provisional decision whether it would be fair to say Mr F's actions mean he should bear the loss arising as a result of Carey's failings. And I remain of the view that it would not be fair to say that. It does not follow that it is fair and reasonable to say Mr F is responsible for the loss he has suffered simply because he ultimately made the decision to invest in Store First.

In the circumstances of this particular case, Carey was aware of important facts which it failed to disclose to Mr F when it should have been clear to Carey that there was a serious risk of consumer detriment. And, for all the reasons I have given, I am satisfied Mr F would not have made the same investment decision had he been aware of those facts. This is, in any event, a secondary point, as the key point is that I do not think that, if complying with its regulatory obligations and good industry practice, Carey should have accepted Mr F's application *at all,* and he would hence have been unable to enact his decision to transfer his pension into a SIPP and make the investment in Store First. There should have been no 'contract' between them as Carey seeks to argue.

Similarly, in terms of the indemnity Mr F signed and Carey refers to, notwithstanding that Mr F has said that he didn't understand the nature of the document he was signing, had Carey acted in accordance with its regulatory obligations and best practice, it is fair and reasonable

to conclude that in the circumstances it should not have accepted Mr F's application from CL&P to open a SIPP. This means it should never have asked Mr F to sign the indemnity.

As I set out in the provisional decision, I don't think it's fair and reasonable to say that Carey should not compensate Mr F for his loss on the basis that another SIPP operator would have made the same mistakes as I've found it did. I said that it was not fair and reasonable to suggest when considering whether Mr F should be compensated, that another SIPP operator would have accepted Mr F's introduction and investment.

Mr F has said that he was in need of the 'incentive payment'. But he has also said that, even so, he would not have proceeded if he had known that Mr Wright was on an FSA warning list. That is not an unreasonable statement given the potential consequences to his pension. I see no reason to disbelieve Mr F when he makes that statement. Had he known about the warning then I think it is more likely that Mr F would not have proceeded with the application and investment. But in any event, as already discussed, Mr F's intentions do not alter the fact that Carey should not have accepted the application and investment at all.
Carey asserts that Mr F should have questioned the incentive payment but that assumes Mr F should have been aware of pension legislation which prohibits such payments. Mr F had no particular level of financial or pension knowledge and it would not have been unreasonable for him to think, as he says, that this payment was a result of the pension transfer process. I have not seen evidence that he should have thought otherwise.

I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted the application from CL&P, or would have terminated the transaction before completion.

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 Mr S signed in order to avoid liability for the regulatory failings it has made in this case. And, I remain satisfied, for all the reasons given here and in my provisional decision, that it is fair and reasonable to conclude that Carey should compensate Mr S for the loss he has suffered to his pension.

Other matters

I have noted Carey's concerns about a 'policy decision' being taken as to SIPP provider's liability in these types of cases. I would confirm that I have reached my findings based on the circumstances and facts of this case and made it clear on what basis I have done so.

Putting things right

I set out how Mr F should be compensated in my provisional decision. I have taken into account Carey's comments in reply to my provisional decision. I would reiterate that Carey should take ownership of the Store First investment if possible – and it has been able to do so in other cases. And if that is not possible, Mr F should be able to return the investment to the freeholder for nil consideration. If he does not do so then Mr F will face the costs of retaining the investment. So, I remain persuaded that this a fair approach in the circumstances. I will repeat the detail here, as set out in my provisional decision.

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

In light of my above findings, in my view Carey should calculate fair compensation by

comparing the current position to the position Mr F would be in if he had not transferred from his existing pensions. In summary, Carey should:

1. Calculate the loss Mr F 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 Mr F's pension. If that is not possible pay compensation for the loss to Mr F 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 Mr F has suffered as a result of making the transfer

To do this, Carey should work out the likely value of Mr F's pensions as at the date of this decision, had he left them where they were instead of transferring to the SIPP.

Carey should ask Mr F's former pension provider(s) to calculate the current notional transfer values had he not transferred his pensions. 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 notional transfer values should be compared to the transfer value of the SIPP at the date of this decision and this will show the loss Mr F 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 Mr F. 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 note that the Court of Appeal attached a value to the Store First investment. However, here, I am able to ask Carey to take ownership of the investment. And I understand Carey has been able to take ownership of the Store First investment, for a nil consideration, in other cases. So it should do that here, if possible. I am satisfied that is a fair approach in the circumstances of this case, as it allows the SIPP to close and gives Carey the option of retaining the investment or realising its current market value.

If Carey is unable to take ownership of the Store First investment it should remain in the SIPP. I think that is fair because I think it is unlikely it will have any significant realisable value in the future. I understand Mr F has the option of returning his Store First investment to the freeholder for nil consideration. That should enable him to close his SIPP, if Carey does not take ownership of the Store First investment.

In the event the Store First investment remains in the SIPP and Mr F decides not to transfer it to the freeholder he should be aware that he 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. He should also be aware it is unlikely he will be able to make a further complaint about these costs.

3. Pay compensation to Mr F for loss he has suffered calculated in (1).

Since the loss Mr F has suffered is within his pension it is right that I try to restore the value of his 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 Mr F could claim. The notional allowance should be calculated using Mr F's marginal rate of tax.

On the other hand, Mr F may not be able to pay the compensation into a pension. If so compensation for the loss should be paid to Mr F 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 Mr F should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mr F's marginal rate of tax in retirement. For example, if Mr F 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 Mr F 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.

Whilst Carey has disputed this, I am persuaded that Mr F has been caused some distress and inconvenience by the loss of his pension benefits. It is likely that he has lost all his pension and that would have been naturally upsetting for him. 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 Mr F has suffered.

interest

The compensation must be paid as set out above within 28 days of the date Carey receives notification of his 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

I uphold the complaint and order Options UK Personal Pensions LLP to calculate and pay compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 25 April 2022.
David Bird
Ombudsman