DRN-3526126

The complaint

Mr S's complaint, made through his representative, is about shares he bought through Templeton Securities Limited, at the time an appointed representative of Alexander David Securities Limited. Mr S says the shares weren't suitable for him and Templeton Securities Limited didn't act in his best interests.

What happened

I've considered Mr S's complaint before. I issued a provisional decision on 12 May 2022. I've set out again what I said about the background to Mr S's complaint and my provisional findings explaining why I thought the complaint should be upheld.

'*Mr S says he was advised by an unregulated introducer to open a self invested personal pension (SIPP) and transfer existing pensions into it. I understand the same unauthorised* [individual] *also advised Mr S to open a trading account with Templeton Securities.*

Mr S completed Templeton Securities' Private Client Portfolio Agreement and Application Booklet' on 12 May 2014. Under the heading, 'What to expect as a client of Templeton Securities', it said:

'We understand that individual client investment needs vary with differing goals and as an independent stockbroker, Templeton Securities aim is to provide the best private client investment service with clarity and vision whilst tailoring our advice to suit individual client needs.

To understand your investment requirements and to create your personal portfolio, we will need to know the details of your financial background and your plans for the future which will enable us to advise a tailored solution to suit your aims and objectives. It is therefore imperative that you fully complete this Application as failure to do so may mean that we are unable to affect a suitable portfolio or offer an appropriate service.'

And, under the heading, 'Important information regarding your application', it said that Templeton Securities was required under the Financial Services and Markets Act 2000 (FSMA) to provide suitable investment advice and services, based on the information Mr S provided about his circumstances.

Mr S filled out his personal details. In the section headed, 'Important Financial information', the form said:

'In order for us to properly assess your ability to bear investment risks in relation to the services we provide, we need to understand the composition of your assets and liabilities, and income and expenditure. We are required to take this into account when assessing the suitability of our investment management service we provide.'

Mr S was approaching his 50th birthday. He was working as a store manager, earning £21,600, and he intended to retire at 60. He held pensions with a value of £110,000.

Under ‘Preferred level of portfolio risk’ both ‘medium’ and ‘medium/high’ were ticked. Mr S’s objective was recorded as capital growth. He intended to invest for over seven years and had previous experience of investing in funds on advice.

Under ‘Acceptance Form’ it said, amongst other things
:
‘I/We wish Templeton Securities Limited (“Templeton") to advise on a portfolio of investments for me in accordance with the Terms and Conditions, a copy of which we have received and which I agree to.’

I’ve referred below to what some of those terms and conditions said.

On 13 May 2014 Mr S signed a letter authorising unnamed pension providers to release information to an unregulated company, based overseas.

Templeton Securities wrote to Mr S on 29 May 2014, welcoming him as a client and confirming he’d been classified as a retail client. The letter also said:

‘We note your interest in high risk products. Investments in smaller companies, in particular ‘Penny Shares’ and investments that are not readily realisable e.g. small unquoted companies, involve a high risk that all or part of your investment may be lost. You may also have difficulty in selling these shares at a reasonable price and in some circumstances you may not be able to sell at any price. There can be a big difference between the buying and the selling price and if they have to be sold immediately, you may get back much less than you paid for them.’

A total of £110,000 was transferred into the new account on 2 June 2014.

On 4 June 2014, Mr S emailed Templeton Securities. After giving his name and reference details the email said:

I wish to invest £46,435.50 in Eligere investments plc (ELI) gxg listed securities with a 55 pence limit for T3 settlement.
I wish to invest £46,435.50 in Emmit plc (EMT) aim listed securities with a £1.95 limit for T1 settlement.
I wish to invest £8,194.50 in HSBC (HSBC) ftfc listed at best for T3 settlement.
I wish to invest £8,194.50 in Lloyds (LLOY) ftfc listed at best for T3 settlement.
Please advise me via email when this has been transacted.

These investments were made on 4 June 2014.

On 11 September 2014 Templeton Securities wrote to Mr S. The letter, which was headed ‘Appropriateness of your Investment – Emmit’, said:

‘We are writing to draw your attention to the investment of your pension in the above type of stocks and believe that you need to consider whether or not you feel it's appropriate to invest in such high-risk investments.
We fully understand that you have purchased these 'Execution Only but wish to advise that in the provision of this execution, Templeton Securities is not required to assess the suitability of the service provided or offered and that therefore, as a client, you do not benefit from the corresponding protection of the relevant FCA [Financial Conduct Authority] Conduct of Business Rules.’*

The FCA issued a statement about the promotion of shares in Emmit on 31 October 2014. It said it had been made aware that individuals were being encouraged to transfer money from *their work pension schemes into SIPPs and use that money to buy shares in Emmit. It said some investors were being offered "cash back" on their investments in Emmit of up to 30% of the transfer value, paid by a third party, as an incentive to do this. Some investors appeared to have invested 100% of their pension assets into Emmit shares and could suffer significant financial loss if they'd done that without fully understanding what they were doing.*

Templeton Securities wrote to Mr S again on 31 October 2014, informing him of the suspension of Emmit from AIM. The FCA's statement was enclosed. I understand that the shares were delisted in May 2015. And the exchange on which the Eligere shares had been listed, GXG, closed in August 2015 which meant that those shares couldn't be traded.

Templeton Securities wrote to Mr S again on 30 October 2015, informing him of certain matters relating to Emmit, including its proposed change of name to International Water Services plc.

By September 2016, the value of the Eligere and International Water Services investments had been marked down nil.

Templeton Securities sent various documents to Mr S's representative in response to a subject access request. Mr S's representative complained to Alexander David on behalf of Mr S and others. Amongst other things, the representative said:

- *Templeton Securities owed the clients various duties, including under the regulator's Principles and the COBS (Conduct of Business Sourcebook) rules.*
- *Alexander David had failed to adequately monitor its appointed representative.*
- *The investments hadn't been allowable under the SIPP provider's terms and conditions.*
- *Templeton Securities had failed to undertake sufficient due diligence or investigation into the emailed investment instructions. It had also failed to undertake sufficient due diligence on the investments.*

Templeton Securities responded to the complaint on 10 March 2020. It made the following points, among others:

- *Templeton Securities had no contact with Mr S's adviser. It hadn't advised him itself; the transactions had been execution only. It couldn't be accountable for his actions taken in reliance on an unregulated introducer.*
- *It questioned whether Mr S had received any incentive payment.*
- *Both the Emmit and Eligere investments had been permitted by the SIPP operator at the time.*
- *Under the terms and conditions, Templeton Securities had been entitled, but not obliged, to make recommendations. The terms and conditions also allowed Templeton Securities to execute orders made on an execution only basis. The fact that Mr S elected to have an advisory relationship didn't preclude the provision of non-advised services.*
- *Clause 6.4 allowed Templeton Securities not to advise clients where it reasonably believed that advice was not expected, and that the transaction was execution only. It was also not required to ensure suitability or appropriateness in relation to non complex financial instruments such as shares.*
- *Under the terms and conditions, it had been appropriate for Templeton Securities to rely Mr S's instruction, and it couldn't be liable for his loss.*
- *The investments had been retained after purchase, indicating that neither Mr S nor the nominee had taken any steps in mitigation of his position.*

Mr S's representative referred the complaint to this service on 7 September 2020. It subsequently confirmed that Mr S had received an incentive payment of £6,500 from the introducer.

Our investigator upheld the complaint. His findings were:

- *The SIPP provider had confirmed that the shares were permitted investments.*
- *In giving the instruction Mr S hadn't asked for advice. Templeton Securities' terms and conditions allowed it to accept the instruction on an execution only basis.*
- *The instruction used some technical terms that an inexperienced investor was unlikely to use but, bearing in mind the nature of the relationship, it wasn't cause for suspicion had it been an isolated case.*
- *But a number of very similar complaints had been referred to us. A number of accounts were opened in a relatively short period and essentially identical instructions given in relation to the same shares. At least six instructions were given on the same day as Mr S and others had been given previously. The wording was distinctive and it seems it had been given to the consumers by the introducers.*
- *Templeton Securities had discretion under the terms and conditions whether to accept instructions. It was also subject to FCA rules, including the Principles for Businesses (PRIN). These required Templeton Securities, among other things, to conduct its business with due skill, care and diligence; take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems; and pay due regard to the interests of its customers and treat them fairly. These broad principles reflect the FCA's operational objective to protect consumers.*
- *Mr S and, it seems, all the other consumers, had applied for advisory accounts then given similarly worded execution only instructions to buy the same small company shares. The consumers were generally inexperienced and of relatively limited means. The investigator thought it would've been reasonably clear there was a third party involved. There was no evidence of any other connection and no other reasonable explanation was apparent.*
- *Furthermore, the investigator though there'd have been reasonable cause to suspect the third party was unauthorised: an authorised firm would probably have arranged transactions itself and would've been unlikely to recommend that a client invest most of their pension in two high risk, small company shares.*
- *Templeton Securities should have investigated the matter further. Had it done so, it would have established that an unauthorised firm had recommended investments in shares, a regulated activity in breach of the general prohibition in section 19 of the Financial Services and Markets Act 2000 (FSMA). It could only have judged that the recommendations were highly likely to be unsuitable.*
- *Templeton Securities had said it was unaware of the unauthorised firms' activities. There is a letter of authority for an unregulated firm on the file for this complaint and similar documents are on other files, some of which were sent to us by Templeton Securities. So it ought reasonably to have known an unauthorised introducer was involved. But, even if it hadn't seen these documents, it was reasonably clear from the wider circumstances that a third party was involved and that this third party was likely to be unauthorised.*
- *Templeton Securities should've investigated the matter then exercised its discretion to decline the instruction and, in accordance with its responsibility to treat Mr S fairly and act in his interests, explained why it had done so.*
- *It's possible that Mr S would still have made the investment. He was clearly under the influence of the introducer who were probably persuasive salesmen. They might have persuaded him to switch to another provider, assuming they could find one that was willing to accept the business. Mr S had also received an incentive of £6,500,*

although it isn't entirely clear what this was for. Templeton Securities also sent him a letter in advance, referring to high risk products, and it wrote to him after the investments were made, effectively questioning whether the Emmit shares were appropriate. All of these factors would support the conclusion that he would have made the investments anyway.

- *On the other hand, Mr S wasn't an experienced investor and he didn't have much capacity for loss. He was ten years from retirement. The investigator thought that, on balance, had Mr S been given appropriate warnings that an unauthorised firm had illegally recommended high risk, potentially illiquid and clearly unsuitable investments to him, he'd have chosen not to proceed. At the very least, it was reasonable to assume he'd have sought advice from an authorised firm and any competent adviser would have recommended against proceeding in strong terms.*
- *Templeton Securities had argued that Mr S had failed to mitigate his position by selling the shares while he had the chance. The investigator didn't think that was fair. Mr S was inexperienced and had relied on a third party in making the investments, so he wasn't used to making investment decisions of this sort, and it's unlikely he was monitoring the situation that closely.*
- *An ombudsman has commented, in a recent decision in a very similar case, on whether Alexander David might be liable on the basis of sections 27 and 28 of FSMA, particularly in the light of the recent Court of Appeal judgment in Adams v Options UK Personal Pensions LLP (formerly Carey Pensions UK LLP) [2021] EWCA Civ 474.*
- *As regards section 27, Mr S and his representative had said that the introducers gave advice and, in any case, the scope of the 'arranging' activities is very broad. It was likely that the introducers advised Mr S on the merits of switching and making the investments and that the introducers arranged or made arrangements with a view to transactions in the investments.*
- *As regards section 28, Templeton Securities ought to have recognised, if it didn't already know, that a third party was behind the multiple, simultaneous and virtually identical instructions received from otherwise apparently unconnected clients and recognised that the third party was likely to be unauthorised. Appropriate enquiries would've established that and the exact nature of the introducers' activities.*
- *Templeton Securities ought to have known that it would be arranging the investments in consequence of the introducers carrying on regulated activities in contravention of the general prohibition. In Adams v Options, the judge stated, 'Amongst the factors that it may be proper to take into account is whether the provider should reasonably have known that the general prohibition was being contravened.' If Templeton Securities would've been aware of the contravention but for its own failings, then it seemed a court wouldn't allow Templeton Securities relief under section 28 and Mr S could recover his money under section 27. That said the investigator didn't think the outcome turned on the application of section 27 but on the other arguments he'd put forward.*
- *The investigator set out how Mr S should be compensated fairly. As he'd had the use of the £6,500 payment he'd received, that should be deducted from the compensation.*

Mr S's representative said he had nothing further to add. We received further comments on behalf of Alexander David/TS Capital (formerly Templeton Securities). The investigator considered those but he wasn't persuaded to change his view. I've summarised the points raised and what the investigator said in response.

- *The investigator acknowledged that two investigators had previously found in*

Alexander David's favour in 2018 and 2019. But he pointed out that, since then, other investigators had upheld similar complaints. And his findings here mirrored a recent ombudsman decision.

- *The Principles didn't replace COBS and PRIN was primarily guidance. COBS 10 (the requirement to assess suitability) didn't apply. The investigator said, even if COBS 10 didn't apply, that didn't mean Templeton Securities had no responsibilities to its client at all. PRIN 2.1.1R was a rule not guidance and it applied to Templeton Securities.*
- *Alexander David had said the facts of the Adams v Options case were distinguishable. The investigator's understanding was that what mattered for the purposes of sections 27 and 28 of FSMA was whether Templeton Securities had carried on the regulated activity of arranging the investment in consequence of an unauthorised third party carrying on a regulated activity and whether Templeton Securities was or ought reasonably to have been aware of that. It had received a number of essentially identically worded instructions on the same day and on other days around the same time. That ought to have raised suspicions and Templeton Securities ought to have been was aware of the involvement of the unauthorised third party, whether or not it was.*
- *The investigator accepted the instruction was execution. But he didn't agree that Templeton Securities couldn't have made an error if COBS 10 didn't apply. It didn't follow that a firm owed no duty of care to its clients and PRIN applied anyway.*
- *The investigator accepted that the incentive payment would've influenced Mr S. That and other points added weight to the argument that he'd have invested anyway. We have to reach a finding on what Mr S would've done on the balance of probabilities. Either conclusion, that he wouldn't have proceeded or that he would've gone ahead anyway, inevitably involves assumption.*
- *The circumstances in this particular case weren't typical. Templeton Securities had received a number of essentially identically worded instructions from unconnected clients on the same day which wasn't something that would normally happen. The investigator's findings were largely based on that. So arguments about wider implications for all firms didn't apply.*
- *Templeton Securities' September 2014 letter had been taken into account and the ombudsman would consider it too. The investigator said it might be helpful if details as to whether any of the consumers had got in contact or sold their shares after those letters had been sent.*
- *The term 'T1 settlement' wasn't used universally by inexperienced investors. It was the fact that multiple unconnected clients provided essentially identically worded instructions to invest in the same shares on the same day that should've raised alarm bells, rather than the individual instruction itself. Mr S wouldn't have questioned the wording – he was an inexperienced investor relying on a third party and was essentially doing as he was told. An inexperienced investor wouldn't know what T1 settlement meant.*
- *The investigator hadn't said it was unsuitable for Templeton Securities to place nearly all of Mr S's pension savings in high risk funds. His point was that Templeton Securities should've investigated why it had received multiple essentially identically worded instructions on the same day from unconnected clients. Had it done so, it would've declined the instruction and explained why. That would've involved giving appropriate warnings that an unauthorised firm had illegally recommended high risk, potentially illiquid and clearly unsuitable investments.*
- *One of the regulator's strategic objectives is to protect consumers. Firms have a responsibility to protect consumers and act in clients' best interests. It wasn't the case that, where instructions are received on an execution only basis, these responsibilities don't apply.*
- *There were arguments that Mr S would've done it anyway, given the fairly*

large incentive, and that he failed to mitigate his position. But, on balance, the investigator's view on those points remained the same.

We shared Alexander David's comments and the investigator's reply with Mr S's representative. Mr S didn't want to add anything.

A number of issues have been raised on behalf of Alexander David on some of the other complaints we've dealt with. I've summarised them here:

- *Previous Financial Ombudsman Service rulings hadn't been taken into account.*
- *The FCA had conducted a thorough investigation into TS Capital/Templeton Securities in regard to Eligere and Emmit, including a full review of all telephone calls and emails. The FCA dropped its investigation as it decided there was no case to answer. No wrongdoing was found.*
- *The instruction for the transaction was accepted and undertaken on an execution only basis. Advisory services hadn't been provided as per clause 3.2 of the terms and conditions.*
- *The trade instructions came from a regulated pension provider – the SIPP provider – who was technically the account holder. The account was a trust account opened by a regulated SIPP provider. Mr S was the beneficiary with powers to undertake transactions. At the time of his instruction, it wasn't unreasonable for his instruction to be accepted and to conclude that it was an ordinary transaction(s) for investments listed on recognised exchanges.*
- *The terminology in the instruction wasn't necessarily technical for someone who had previously made any direct stock market investment. The nature of the instruction wasn't in itself, or in a series, necessarily unusual, given the account was opened with it by a regulated firm and clients could and did obtain and undertake investment research through a variety of mediums. Such as web and internet forums and tip services. At the point of the transaction Templeton Securities was unaware of any issues with the investments.*
- *It had become aware of general market concerns in September 2014. It would've been appropriate and reasonable to alert investors of suitability concerns which is exactly what the letter sent in September 2014 did. This was the date any fair and reasonable award should be calculated to as Mr S had a duty to mitigate any loss. He could've sold the shares before they were suspended, and not suffered the total loss he did.*
- *Templeton Securities wasn't aware of the payment which was clearly a pension liberation attempt. The key trigger for the 'scam' was a promise of a cashback. This was the motivation for Mr S to transfer and subsequently send specific instructions to buy the shares in question. The ability to liberate some of his pension savings prior to the date he was allowed to access his pension was the most likely reason for the investments.*
- *It wasn't accepted that relief shouldn't be provided under section 28 (3). The introduction(s) all came directly from a regulated pension provider and it was technically the account holder and Mr S a beneficiary. It wasn't unreasonable to undertake and accept the specific execution only instructions from Mr S or the other clients at that time. Or for Templeton Securities to be unaware that an unregulated entity was contravening the general prohibition at the point the instruction was received and the investment was made.*

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.

We can only consider complaints against authorised firms. We can't consider a complaint about the unauthorised introducer. I'm aware that Mr S has also made a complaint against the SIPP operator, which is a regulated entity. We haven't issued any view or a provisional or final decision in respect of that complaint. All I'm considering here is Mr S's complaint about Templeton Securities.

We can consider a complaint under our compulsory jurisdiction if it relates to an act or omission by a regulated firm in the carrying on of one or more listed activities, including regulated activities (see Dispute Resolution (DISP) 2.3.1R).

Regulated activities are specified in Part II of the Regulated Activities Order (RAO) and include advising on investments (article 53 RAO). And arranging deals in investments (article 25 RAO). So I can consider the complaint either about advice – or the omission to provide advice. Or about arranging the purchase of the shares if it was an execution only sale.

I'm required, under DISP 3.6.4R, in considering what's fair and reasonable in all the circumstances of the case, to take 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. Where the evidence is incomplete, inconclusive, or contradictory, I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of all the available evidence and the wider circumstances. I agree with the views expressed by the investigator and with the reasons he gave, although I've set out my findings in more detail.

The documentation and literature that was provided at the time the Private Client Portfolio account was opened with Templeton Securities clearly described it as providing an advisory service. But the terms and conditions said that Templeton Securities was able to accept execution only instructions in some circumstances. I've considered first whether Templeton Securities acted correctly by accepting Mr S's email of 4 June 2014 as an execution only instruction to purchase shares in Emmit plc and Eligere Investments plc.

<u>*Could Templeton Securities accept an execution only instruction from Mr S?*</u>

I've referred below to what I see as the central provisions of the terms and conditions of the agreement with Templeton Securities.

Clause 3 said:

'3. The services we will provide

3.1 If you are designated as an execution-only client or if you have not supplied us with sufficient information (either orally or in writing) about your investment objectives, financial circumstances and the degree of risk you are prepared to accept ***or when, even though you have previously supplied us with information, we may reasonably believe that you are not expecting us to advise you about the merits of a particular transaction in a "non-complex" financial instrument, then we will not make any personal or product investment recommendations*** *[my emphasis]. Nothing in our literature or in these Terms & Conditions should be treated as a solicitation or recommendation to buy, sell or maintain any product. We will action all instructions on an 'execution-only' basis. This means that we are only able to act on the instructions that you provide. We cannot give you advice about what instructions you should give us. You are responsible for the investment decisions that you make when you engage our services as an execution-only customer. We do not accept responsibility on a continuing basis for advising you on the composition of your portfolio.'*

Mr S hadn't been designated as an execution only client. And he'd supplied information about his investment objectives, financial circumstances and the degree of risk he was prepared to accept. But, as I've highlighted above, clause 3.1 provided for the situation where, even though information had been given, it might be reasonable for Templeton Securities to believe that Mr S wasn't expecting it to advise about the merits of a particular transaction in non complex financial instrument. In that scenario Templeton Securities wouldn't make any recommendations. 'Non complex' wasn't defined. But I think, taking into account what COBS 10.4.1R said (as I've set out below), investments in Emmit and Eligere shares were non complex financial instruments.

Clause 3.1 was echoed in clause 6, headed, 'Appropriateness'.

'6.1 In providing services other than investment advice management, we may be subject to an obligation under Applicable Regulations to assess the appropriateness of the contemplated product or service for you by determining whether you have the necessary experience and knowledge in order to understand the risks involved in relation to the specific type of product or service offered or demanded. In such circumstances, where on the basis of information received we consider that the contemplated product or service is not appropriate for you, we will provide you with a warning to that effect.'

'Applicable Regulation' was defined as meaning 'FCA rules or any other rules of a relevant regulatory authority or any other rules of a relevant Market and all other applicable laws, rules and regulations as in force from time to time'.

I think that's a reference to COBS 10. I've considered that and in particular COBS 10.4 which is headed 'Assessing appropriateness: when it need not be done'. COBS 10.4.1R (1) said (at the time):

'A firm is not required to ask its client to provide information or assess appropriateness if:
(a) the service only consists of execution and/or the reception and transmission of client orders, with or without ancillary services, it relates to particular financial instruments and is provided at the initiative of the client;
(b) the client has been clearly informed (whether the warning is given in a standardised format or not) that in the provision of this service the firm is not required to assess the suitability of the instrument or service provided or offered and that therefore he does not benefit from the protection of the rules on assessing suitability; and
(c) the firm complies with its obligations in relation to conflicts of interest.'

The particular financial instruments, referred to in subsection (a), are set out in COBS 10.4.1R (2) and include shares admitted to trading on a regulated market (for example, AIM).

I think (a) is satisfied. I haven't seen anything to suggest there was any conflict of interest as mentioned in (c). But I don't think (b) was met. Templeton Securities has pointed to its terms and conditions (see, for example, clause 6.4 mentioned below). But, while a warning in standardised form was permitted, I think (b) requires a warning to be given at the time of the particular service. It says, 'in the provision of ***this*** *[my emphasis] service'. That means a specific warning (albeit that in might be in a standardised format) has to be given at the time. And that's consistent with Templeton Securities' own terms and conditions – see clause 6.4 which says:*

'Please note, however, that we will not advise you about the merits of a particular transaction if we reasonably believe that, when you give the order for that transaction, you are not expecting such advice and are dealing on an execution-only basis. Where the transaction relates to noncomplex financial instruments such as shares, bonds and UCITS, we will inform you ***at the time*** *[my emphasis] that we will execute your order on that basis and we*

will not be required to ensure that the transaction is suitable or appropriate for you. Please note therefore, that you will not benefit from the protection of the relevant FCA Rules requiring us to assess the suitability or appropriateness of the transaction for you.'

I haven't seen that Templeton Securities gave Mr S the requisite warning at the time.

That said, I don't think much turns on that. I don't think a failure to give a warning at the time (as required by COBS 10.4.1R and Templeton's own terms and conditions) means that Templeton Securities couldn't accept an execution only instruction from Mr S. I think the more important question is whether, as clause 6.4 (and clause 3.1) required, Templeton Securities reasonably believed that Mr S wasn't expecting advice and was dealing on an execution only basis.

I note here what our investigator said about the email of 4 June 2014 and its wording. I agree the wording was, in some respects, technical. I don't think anyone without some financial services experience, including in securities transactions, would be familiar with or understood how a request to purchase shares with a '55 pence limit for T3 settlement' or a '£1.95 limit for T1 settlement' would operate. Nor do I think a novice equities investor such as Mr S – I note that on his application form Mr S ticked that he was a novice (less than one year's experience) in equities investment (and the same for fixed interest and alternative assets - would've necessarily understood what an AIM or GXG listed security was and how that differed from a stock that was listed on, for example, the London Stock Exchange. Mr S also indicated he was an intermediate investor in funds and that he had some advisory broking investment experience, although I'm not sure how credible the latter was.

But, in any event, I don't think the wording of the email on its own meant that Templeton Securities should've queried Mr S's instruction. If anything, it might reinforce Templeton Securities' belief that he wasn't expecting advice. It might appear he'd taken advice from another party. On the face of it, it appeared to be a valid instruction. It was clear and specific. It looked like Mr S had made a settled decision to invest in Emmit and Eligere. I don't think there's anything in his email which suggests he was expecting Templeton Securities to give him any advice about the transactions. I think the indication is that he'd made a decision to invest and he expected Templeton Securities to simply comply with his instruction and go ahead and make the purchases.

And clause 4.9, about 'Specific client instruction', said:

'4.9.1 Where you give us a specific instruction as to the execution of an order, we will execute the order in accordance with those specific instructions. Where your instructions relate to only part of the order, we will continue to apply our order execution policy to those aspects of the order not covered by your specific instructions.

4.9.2 You should be aware that providing specific instructions to us in relation to the execution of a particular order may prevent us from taking the steps set out in our order execution policy to obtain the best possible result in respect of the elements covered by those instructions. We reserve the right to refuse specific instructions from you regarding the execution of your order, where in our opinion such instructions are not practicable or may be contrary to your best interests.'

I don't overlook what the investigator said about the other similar emails and which I've referred to below. But, just looking at Mr S's email for the time being and in more or less isolation, I don't think Templeton Securities acted incorrectly in treating it as an execution only instruction.

That meant, and in accordance with clause 3.1 (see the penultimate sentence I've quoted *from that provision above), Templeton Securities didn't accept responsibility for the investment decisions which Mr S had made when he'd engaged Templeton Securities as an execution only customer.*

But I don't think that's the end of the matter. I've gone on to consider if Templeton Securities should've accepted Mr S's instruction.

<u>Should Templeton Securities have accepted Mr S's execution only instruction?</u>

As I've gone on to explain, I think there were wider factors which should've led Templeton Securities to question or look more closely at Mr S's instruction and whether it should comply with it.

I'd reiterate (as set out above) that I'm required to decide what's fair and reasonable in all the circumstances of a case. Templeton Securities received a significant number of requests to open this type of advisory account with it, all within a relatively short period. And, very shortly after the accounts were opened, emailed instructions with almost identical wording were sent to Templeton Securities instructing investment in the one or two particular and niche shares.

By the time Templeton Securities received Mr S's instruction, it had already received a significant number of very similar instructions. I think it had received six or so on 21 May 2014 and a further three the following day. And Mr S's email was one of several similar if not identical emails received on 4 June 2014. All were instructions to invest in Emmit and/or Eligere shares, with near identical wording and sent to the same person at Templeton Securities (who I understand held the CF30 function with Alexander David at that time). And in all cases it was very shortly after the accounts with Templeton Securities had been opened.

To date we've received over 20 complaints against Templeton Securities about very similar transactions that all happened at around the same time. From what I've seen, in all cases emails with the same or very similar investment instructions were sent to the same person at Templeton Securities. And these are only the cases where investors have complained and the matter has been referred to us. It may be that there are other instances of which I'm not aware and where no complaint has been made and referred to us.

Templeton Securities' primary duty was to implement its client's instructions. But that duty wasn't unqualified. First, Templeton Securities had a broad contractual discretion whether to accept any order or instruction from Mr S. Clause 3.7 said:

'We may, at our discretion, decline to accept any order or instruction from you or instigate certain conditions prior to proceeding with your order.'

Secondly, Templeton Securities, as a regulated firm and in accordance with its own terms and conditions, had an obligation to comply with the FCA's rules. Clause 2.2 said:

'These Terms and Conditions and all transactions are subject to Applicable Regulations. The term 'Applicable Regulations' means:

a. the rules of the Financial Conduct Authority ("FCA") including the Handbook issued by the FCA ("FCA Rules") or any other rules of a relevant regulatory authority;
b. the rules of a relevant stock or investment exchange; and
c. all other applicable laws, rules and regulations as in force from time to time.

This means that:

(i) if there is any conflict between these Terms and Conditions and any Applicable Regulations, the latter will prevail;
(ii) nothing in these Terms and Conditions shall exclude or restrict any obligation which we have to you under any Applicable Regulations;
(iii) we may take or omit to take any action we consider necessary to ensure compliance with any Applicable Regulations; and
(iv) such actions that we take or omit to take for the purposes of compliance with any Applicable Regulations shall not render us or any of our directors, officers, employees or agents liable to you.'

The duty to comply with the FCA's rules was recognised in the terms and conditions as an overriding duty that prevailed over anything to the contrary in those terms. And that Templeton Securities could take, or omit to take, any action it considered necessary (such as not complying with a client's instruction) to ensure compliance with its regulatory obligations.

The FCA is responsible for consumer protection which it seeks to achieve through the application of its Rules, including its Principles for Business (PRIN). Templeton Securities was providing regulated financial services and was bound by these Principles and Rules (for example COBS) and as set out in the terms and conditions.

In deciding what is fair and reasonable, I've thought about the Principles. I've borne in mind what the courts have said (see, for example, Ouseley J's comments in British Bankers Association v The Financial Services & Anor [2011] EWHC 999 (Admin)) about how the Principles operate in deciding whether Templeton Securities complied with them, taking into account what I've said above about the wider circumstances and in the context of the instruction Mr S gave on 4 June 2014. I think Principles 2, 3 and 6 are particularly relevant here. They 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.'

Here Templeton Securities had received a significant number of emails previously and several emails on the same day as Mr S's; all the emails were sent to the same person; there was a pattern of remarkably similarly worded execution only instructions from different clients with SIPP accounts. All wanted Templeton Securities to process purchases in the same niche shares, traded on non mainstream markets.

I think in these circumstances a stockbroker ought reasonably to have been alerted to the possibility that something unusual might be going on. In my view, the circumstances ought to have been a trigger for Templeton Securities to intervene in the normal processing of the transactions and take a closer look behind them. If it had done so, it would have identified that the instructions were coming from ordinary retail customers who:

- *had all recently opened advisory accounts and yet within a short period of time from opening were all sending execution only instructions to make their first investment;*
- *were investing the majority of the money in their SIPP in these same niche*

shares presenting significant risks which weren't the type of investments that would normally be expected to form the significant part of anyone's pension provision;

- *had sent almost identically worded instructions to invest in the same niche share(s), suggesting these retail consumers may be being systematically advised by someone to buy these shares and on how to go about it.*

And that was in the context that:

- *Only an FCA authorised firm was lawfully able to give investment advice. And a regulated firm giving investment advice would usually arrange the transactions themselves so as to charge dealing commission. It raised the possibility of serious malpractice if an unauthorised person was giving investment advice in breach of section 19 of FSMA.*
- *The number of grouped instructions to purchase niche shares, specifying particular days for settlement at particular prices, was highly unusual for seemingly unconnected retail customers. Including settlement details in their instructions was not only unusual but served no obvious purpose from a pension investor's point of view.*
- *The possibility that the advice to buy the shares was coming from an unauthorized person was increased by the riskiness of concentrating pension funds in the shares of one or two small, obscure companies: a FCA authorised firm would have regulatory obligations not to give unsuitable investment advice, and would be unlikely to find such shares a suitable pension investment for many (if any) of their clients, let alone a string of clients, and all at around the same time.*

In my view, the circumstances surrounding the receipt of Mr S's instruction ought reasonably to have caused Templeton Securities to take a closer look at the transaction.

Had it done so and looked at the information it already had available through the account opening documentation, it would've seen that, at the time Mr S's account with Templeton Securities was opened, he was single, coming up to his 50th birthday and employed, earning £21,600 pa. He owned his own property worth £165,000 subject to a mortgage of £65,000. Aside from some cash (£1,000) he had no savings or other assets, aside from his pension plans which were worth £110,000. So Mr S's income was relatively modest and his house (which was subject to a mortgage) and his pension plans were his only assets. He'd indicated a medium or medium/high attitude to risk. But I don't think Mr S had much capacity for loss yet he apparently wanted to invest his the bulk of his only pension provision in two niche shares which weren't traded on mainstream markets and when he had limited experience of investing in equities.

I understand that Templeton Securities has said that the unregulated firm wasn't known to it. And it didn't have any discussions or agreement with it or any arrangement of any kind for the introduction of business or otherwise. I haven't looked at the complaint on the basis that Templeton Securities had any link with whoever advised Mr S to transfer his pension plans to a SIPP and then invest in Emmit and Eligere. I've considered the complaint from the perspective of what Templeton Securities should've done when it received Mr S's instruction to invest in Emmit and Eligere.

I think, if Templeton Securities had looked into things further, it would've discovered, relatively easily, that in Mr S's (and others') case, an unregulated firm, was the common denominator and that the many and similarly worded instructions had come from that firm.

Giving investment advice and arranging deals in investments are regulated activities.

Section 19 of FSMA) – the general prohibition – says that no person may carry on a regulated activity in the UK, or purport to do so unless they are an authorised person. But I don't see that Mr S (or other ordinary retail clients) would've been aware of the general prohibition or that the business he was dealing with wasn't an authorised firm and the significance of that. I don't doubt that Mr S (and others) would simply have trusted the unregulated firm and assumed that its adviser was acting lawfully and in his best interests. But knowing that an unregulated firm was involved ought to have rung alarm bells with Templeton Securities – it seemed an unauthorised person was advising Mr S (and others) to invest in niche, high risk shares.

I think Templeton Securities would've been able to identify from a fairly cursory look at the information it held about Mr S's circumstances, that the investment advice he'd received – to invest a very substantial sum (£92,871), representing the bulk of his only pension fund in two niche, high risk shares – was wholly unsuitable for him. Ant that he wasn't, for his own particular reasons, instructing an unsuitable order, given that so many other, relatively new (and advisory) and inexperienced clients were giving virtually identical instructions in similar circumstances. I think Templeton Securities ought to have realised that it was likely that a third party was behind all the highly similar and somewhat unusual instructions. At that point I think Templeton Securities should've exercised its discretion to decline to accept the instruction.

Against that background, I don't think Templeton Securities met its obligations under Principles 2, 3 and 6. If it had conducted its business with skill care and diligence and taken reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems, it should've identified the high number of execution only requests from relatively new advisory clients. And that there were striking and unusual similarities in those requests. I think that should've led Templeton Securities to take a closer look at the instructions.

If it had done so, Templeton Securities would've discovered that Mr S (and others) were being advised by an unregulated adviser who was assisting them in making high risk and unsuitable investments. Given the clear risk of consumer detriment, Templeton Securities, and acting in Mr S's best interests, should've exercised its discretion and declined to accept his instruction.

Templeton Securities did write to Mr S about his investment in Emmit shares and the fact that it was high risk in September 2014. Templeton Securities has said, that at the time of the share purchases, there was no indication that a third party was involved. And that only came to light when the FCA issued its warning. But that wasn't until October 2014 so something else must have prompted Templeton Securities to write. It's told us that it wrote to customers following a review carried out by its compliance officer because of the number of transactions in Emmit and the rumours that were circulating around the market about people investing in it.

If Templeton Securities did write to some customers and for the reasons given, I think that supports what I've said – that Templeton Securities should've realised from the volume of similar, if not identical, business that it was receiving that something unusual and untoward might be going on and which required further investigation.

Principle 3 requires a firm to take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems. I think Templeton Securities should've had systems and controls in place which, in the circumstances I've set out above, would've meant a pattern was spotted at a very early stage.

Templeton Securities should've exercised its discretion under clause 3.7 to decline to carry *out Mr S's instruction to purchase the Emmit and Eligere shares. It should've realised that there was a real risk of consumer detriment. It was in a position to prevent the purchase of the shares. Instead it facilitated Mr S's investments. I think Templeton Securities failed in its regulatory obligations by acting on Mr S's instruction.*

<u>What would Mr S have done if Templeton Securities had declined to carry out his instruction?</u>

I think a refusal and an explanation from Templeton Securities as to why it wasn't prepared to carry out Mr S's instruction would've carried weight. And given him pause for thought about whether investing in Emmit and Eligere Investments was really a good idea.

Depending on how Templeton Securities might have put things to Mr S and what may have been said about the dangers of accepting advice from an unauthorised person and the high risk nature of the investments, Mr S may have decided immediately that he didn't want anything further to do with the unregulated firm.

I recognise he may have been dealing with the unregulated adviser for some time and presumably trusted them. And as the investigator noted, they were probably persuasive. But, in my view, an indication from Templeton Securities, a regulated firm, that what Mr S was being told to do by someone who wasn't authorised to give financial advice anyway, is likely to have caused Mr S to think again about the wisdom of investing as had been suggested. Mr S was investing very substantial sums in the two shares - £46,435.50 in each Emmit and Eligere. I think he's likely to have been very concerned if he'd realised the true nature of the investments and the degree of risk involved for the bulk of his pension savings. I think, in that scenario, Mr S would've asked Templeton Securities for advice as to how to invest instead and in line with his attitude to risk and circumstances.

If Mr S had still wanted to proceed as planned then, as he'd already transferred funds to Templeton Securities and if it had declined to purchase the shares, he'd have needed to have found another broker, asked the SIPP provider to get the money back from Templeton Securities and then transfer it into the new account. I think that would've caused practical difficulties for Mr S and is likely to have been enough to have made him think again.

Mr S did get an incentive payment in return for investing. It was £6,500 which is a substantial amount. There's no suggestion that it came from or via Templeton Securities or that it had any knowledge of the payment. I recognise that would've been a motivating factor for Mr S to proceed with the investments anyway, and even if Templeton Securities had intervened and declined to process his instruction. Mr S may have wanted to have overcome any difficulties in order to enable the share purchases to proceed so that he'd still get the payment.

The payment was large. But that presumably reflected the fact that the amounts invested were commensurately substantial. Mr S was investing almost £93,000 in Emmit and Eligere. That represented the bulk – almost 85% - of his total pension savings. Although the prospect of the payment was no doubt very attractive and I'm sure Mr S would've welcomed the money, I can't see that he'd have been prepared to risk getting £93,000 just to secure a payment of £6,500. I think, had Templeton Securities explained to him that it wasn't prepared to process his instruction and why, that would've made Mr S aware that placing his faith in an unregulated firm and risking most of his accumulated pension provision wasn't prudent. I don't think he'd have proceeded, even though that meant giving up the incentive payment he'd been promised.

<u>Templeton Securities' letter of 11 September 2014</u>

Templeton Securities wrote to Mr S about his investment in Emmit shares and the fact that it *was high risk. Templeton Securities argues, as that letter was sent before the Emmit shares were suspended, Mr S could've tried to mitigate his position by selling the shares. I understand that a sale then may have still represented a loss for Mr S but he'd have avoided the total loss of his investment which it seems he now faces.*

Selling would've crystallised a loss. And I don't know if Mr S would've been able to sell and, if so, at what price. A sudden and large volume of sell instructions might not have been possible for the market to accommodate and is likely to have impacted adversely on the share price – I bear in mind that Templeton Securities appears to have written to other investors at about the same time.

More importantly, I don't think the letter was sufficient to prompt investors to act. It was relatively brief. It did draw to Mr S's attention the high risk nature of the investment. And that Templeton Securities hadn't assessed suitability. But the letter didn't indicate there were any particular problems with the investment. I don't think the wording was sufficiently strong or specific such as ought to have prompted Mr S to act. Further the letter only referred to Emmit – Eligere wasn't mentioned. I don't think the letter meant that Mr S should've acted to mitigate his losses. Or that his losses should be limited to what they'd have been if he'd sold his Emmit shares on receipt of that letter.

Templeton Securities also wrote to Mr S on 31 October 2014. But that more or less coincided with the suspension of Emmit from AIM. So by then it wasn't open to Mr S to try to sell the shares.

There's also the welcome letter sent to Mr S on 29 May 2014. It referred, in particular, to 'Penny Shares' and investments in small unquoted companies. Both Emmit and Eligere were public limited companies and their shares were traded on recognised (albeit non mainstream) markets. I don't think Mr S would've realised the warnings given in that letter might apply to the investments he went on to make in Emmit and Eligere.

<u>Sections 27 and 28 of FSMA</u>

The investigator considered the application of sections 27 and 28 of FSMA and bearing in mind the findings in the Court of Appeal case of Adams v Options UK Personal Pensions LLP (formerly Carey Pensions UK LLP) [2021] EWCA Civ 474. I agree with the investigator's conclusions.

In summary, section 27 may apply where an authorised person (here Templeton Securities) makes an agreement with another person (Mr S) in the course of carrying out a regulated activity, which was a consequence of something said or done by a third party (here the unregulated firm) acting in breach of the general prohibition (section 19 of FSMA). Section 27 provides that an agreement to which it applies is unenforceable against the other party and sets out what the other party can recover. Section 28 provides the court with the discretion to allow an agreement to which section 27 applies to be in any event enforced, if it considers it is just and equitable to do so.

Given the facts of Mr S's complaint and the surrounding circumstances as I've set out above, I think it's most likely the unregulated firm was in breach of the general prohibition by arranging deals in and advising on investments – articles 25 and 53 of the RAO. Or, as the investigator suggested, making arrangements with a view to transactions in investments (article 25(2) of the RAO). And I think the advice and the unregulated firm's actions in providing Mr S with a draft purchase instruction clearly played a crucial part in him buying the shares. As I've explained, I think it's unlikely that so many ordinary retail clients would suddenly all unilaterally decide to invest in these little known niche shares at around the same time. I think a court would find that section 27 applies, and Mr S can (subject to section

28), recover the monies he invested through his agreement with Templeton Securities when it accepted his instructions to purchase the shares and the investment losses he sustained.

I also agree with the view reached by the investigator about section 28 – that the court wouldn't exercise its discretion to allow the agreement to be enforced. I think the overriding question is set out in section 28 (3) – that is whether it would be 'just and equitable in the circumstances of the case' to allow enforcement of the agreement or retention of the price paid. The significance of sections 28 (4) and (6) is to require the court to 'have regard' to whether the firm knew the third party was breaching the general prohibition.

But, as the Court of Appeal emphasised, '…meeting the requirements of section 28 (6) will not necessarily mean that relief should be granted.' So, whilst it has to be taken into account, that factor isn't necessarily determinative. And the question of whether the firm should reasonably have known the general prohibition was being breached is something that it 'may be proper to take into account', but again it isn't a determinative test, just a potentially relevant circumstance in some cases.

I think, in deciding section 28 (3) and what was 'just and equitable' in Mr S's case, the court would, as it did in Adams v Options, look at all the circumstances in the round. For the reasons I've set out, I think Templeton Securities ignored several red flags that should've reasonably alerted it that there was a strong possibility that its clients were being put in harm's way and that they'd been given the same unsuitable advice by the same unregulated source. As I've said, I don't think Templeton Securities acted reasonably in ignoring those signals of potential wrongdoing. And I think, whilst the court would take into account Templeton Securities may not have had actual knowledge of the breach, looking at the circumstances in the round, had it acted reasonably – rather than ignore those clear warnings – it would've discovered the breach on making reasonable enquiries around it. Taking all this into account, I don't think a court would find it was just and equitable to allow Templeton Securities relief under section 28. And so I think Mr S could recover his money under section 27.

In reaching my conclusions I've borne in mind that Templeton Securities wasn't the only business involved. I accept that the unregulated firm played a central role – it was behind the transfer to the SIPP, the setting up of Mr S's account with Templeton Securities and his instruction to invest in Emmit and Eligere. I have no power to investigate a complaint against an unregulated firm. But Templeton Securities was a regulated firm and bound by the regulator's Rules and Principles. I think, for the reasons I've explained, that Templeton Securities failed to meet its regulatory obligations to Mr S.

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Templeton Securities should've realised there was a clear possibility of detriment to Mr S and acted to prevent that. In my view, Mr S's losses flow from Templeton Securities' failings and so it's fair and reasonable that Templeton Securities should redress Mr S for those losses. If Templeton Securities considers that some other party is responsible, in whole or in part for Mr S's losses, I don't think Mr S, if his losses are met in full by Templeton Securities, would decline to assign any rights he might have against any other party to Templeton Securities/Alexander David.

<u>Other issues</u>

As I've said above, I'm aware that in connection with other complaints, further points have been raised on behalf of Alexander David. So, for completeness I've considered them here.

I'm unsure as to what previous 'rulings' made by this service are referred to. No final decision issued by an ombudsman has been cited. The reference may be to views issued by one of our adjudicators or investigators. As I've said, the investigator was referred to two *views issued some time ago. The adjudicator's/investigator's role is to try to resolve cases on an informal basis on the facts as they understand them. If the complaint can't be settled and is then referred to an ombudsman, it is considered afresh. I'm not bound by what an adjudicator or investigator may have proposed. Or indeed another ombudsman's decision, although we do aim for consistency and so we'd want to ensure the similar cases are approached in the same way and that outcomes are consistent, even though the underlying facts in a particular case might different conclusions are drawn. I'm deciding Mr S's complaint on the basis of what I consider is fair and reasonable in all the circumstances of his complaint.*

We've previously and in connection with other complaints, asked Alexander David to provide further details about the investigation carried out by the FCA. It sent a copy of a letter that the FCA had sent to Alexander David dated 12 November 2014. The letter said the FCA had appointed investigators "…to conduct an investigation into whether offences under section 89 of the Financial Services Act 2012; and or behaviour amounting to market abuse as defined in section 118 of the Financial Services and Markets Act 2000 ("FSMA") may have occurred." The letter went on to request various records relating to trades in Emmit plc, along with other trading records from certain account holders and account documentation from certain SIPP providers.

We contacted Alexander David to say that it appeared that the FCA was investigating a different matter. And we explained that we were investigating the specific complaint made by the consumer concerned and whether Templeton Securities had met its obligations in its dealings with that consumer. We explained that we'd consider any further evidence or arguments about this issue if it could provide more details. But no further evidence or arguments have been provided. So I'm not satisfied that any investigation undertaken by the FCA is relevant here.

I accept that Templeton Securities undertook the instruction for the transactions on an execution only basis. However I don't think Templeton Securities' wider obligations were diluted because the regulated SIPP provider was technically the account owner. This wasn't unusual and the instruction to invest came directly from Mr S.

I accept that the terminology in the instruction may not necessarily have been technical for someone who had previously made direct stock market investment. And that investors can obtain tips or undertake their own research from a variety of mediums. So a firm might receive a number of orders for a particular investment at around the same time. But the situation here was that a series of emails were all sent to the same specific person, with near identical technical wording, giving very specific instructions to invest in particular niche shares. I think this suggested there was likely to be a single source behind the instructions. And that clients were being systematically advised by a third party to buy these shares and on how to go about it.

It seems to be accepted that Mr S was the victim of some kind of scam, undertaken by unregulated entities. For the reasons I've explained, I think the series of emails should've alerted Templeton Securities to the fact that something unusual might be going on, and ought to have been a trigger for it to intervene in the normal processing of Mr S's instruction and take a closer look behind it. And, having done so, it would've identified the role of the unregulated firm(s).

The letter sent by Templeton Securities to Mr S in September 2014 was headed "Appropriateness of your Investment – Emmit". So it wasn't concerned with his Eligere investment. For the reasons I've set out, I don't think the content of the letter was such that Mr S ought to have sold the shares (in Emmit or Eligere) or that he acted unreasonably by not selling them. So I'm not persuaded it would be fair to say that compensation should be *calculated on the basis that Mr S should've sold his shares following receipt of the September 2014 letter.*

I accept the payment of £6,500 may not have been known to Templeton Securities when it processed the instruction. I don't think this was a pension liberation attempt as such, but I accept that sort of cash sum was attractive and would've been a motivating factor for Mr S. But, if Templeton Securities had intervened in the processing, and said it wouldn't process his instruction, Mr S would've had to reconsider. I think it's likely, if Templeton Securities had intervened and explained to Mr S that it wasn't prepared to process his instruction and why, that Mr S would've lost trust in the unregulated firm(s) who were driving the transactions. And, if he'd still wanted to proceed, he'd have needed to overcome practical difficulties. He'd already opened his account with Templeton Securities and money had been transferred into it. He'd have needed to get that money back and transfer it to a new dealing account with another firm in order to buy the shares.

The account opening documentation showed Mr S was a 'novice' investor in equities. It also said his preferred level of risk was medium or medium/high. I don't think that's consistent with investing almost all of his not insubstantial pension fund in high risk, niche, shares. I think that represented a higher degree of risk than he'd said he was prepared to accept. There was a significant risk of loss of the entire amount invested, almost £93,000. Relative to that and proportionately, the incentive payment of £6,500 was modest. Added to that were the practical difficulties I've referred to in buying the shares if Templeton Securities had declined the instruction. Overall and on balance, I think it's unlikely that Mr S would've invested in Emmit and Eligere had it not been for Templeton Securities' failings.'

Responses to my provisional decision

TS Capital Limited (formerly Templeton Securities Limited) responded and reiterated the points made in response to other complaints and as set out above. Amongst other things, TS Capital pointed to the payment of £6,500 Mr S had received. TS Capital said the payment was unknown to it, was clearly a pension liberation attempt and what had been said on behalf of Mr S about it was inconsistent with the known facts and the FCA's October 2014 alert.

We asked Mr S's representative for some further information about the payment Mr S had received. The representative told us that Mr S had said that it was the unregulated introducer who'd first raised the possibility of an upfront payment with Mr S. It had been described to him as a way to release money from his 'frozen pension' by investing in shares. Mr S's representative also told us that Mr S estimated that about £1,000 of the payment was used to clear a credit card debt with the remainder spent on general living expenses.

Mr S's representative added that Mr S's main motivating in transferring his pension and investing as he did was to maximise the growth of his pension fund, based on advice he'd received from the unregulated introducer. Mr S considered the incentive payment was not much compared to the value of his pension and its importance to him in retirement as his only private pension provision. If he'd been properly advised and/or warned that he potentially stood to lose the entirety of his pension fund, he wouldn't have proceeded with the transfer or made the subsequent investments.

What I've decided – and why

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

Having done so, I'm not minded to depart from my provisional decision to uphold Mr S's complaint. I've set out in full above the findings I made in my provisional decision and those form part of this decision.

I've considered what TS Capital has said in response to my provisional decision. But the points made aren't new and I've thought about them earlier. Again I'm not persuaded that a different outcome should prevail.

About the incentive payment, Mr S has said it was raised by the unregulated introducer and I accept that Templeton Securities may not have known about it when Mr S's instruction was processed. I don't think it was a pension liberation attempt as such but that sort of cash sum was attractive and I accept it would've been a motivating factor for Mr S. The payment was substantial. But that reflected the large amounts that Mr S was investing. He's been clear that he wouldn't have gone ahead if he'd have known he was risking almost all of his entire and only pension provision, aside from his state entitlement.

Although he's said he used some of the payment to discharge a credit card debt, it doesn't seem he had any particularly pressing need for the money, the bulk of which appears to have been spent on general living expenses. So I'm inclined to accept that, properly advised about the investments (Templeton Securities wasn't responsible for the transfer), Mr S wouldn't have gone ahead just to secure the incentive payment. But, as he's had the use and benefit of the money, it should be taken into account in the redress.

For the reasons I've given I'm upholding Mr S's complaint. I've repeated below what I said in my provisional decision about how Mr S should be redressed.

Putting things right

In assessing what would be fair compensation, my aim is to put Mr S as close as possible to the position he'd probably now be in if Templeton Securities hadn't accepted his instruction to purchase the Emmit and Eligere shares. I think Mr S would've invested differently. It's not possible to say *precisely* what he'd have done, but I'm satisfied what I've set out below is fair and reasonable, given Mr S's circumstances and objectives when he invested.

To compensate Mr S fairly Alexander David Securities Limited must:

- Compare the performance of Mr S's investment with that of the benchmark shown below. If the *fair value* is greater than the *actual value*, there is a loss and compensation is payable. If the *actual value* is greater than the *fair value*, no compensation is payable.

Alexander David Securities Limited should also pay any interest set out below.

If there is a loss, it should be paid into Mr S's pension plan, to increase its value by the amount of the compensation and any interest. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If Alexander David Securities Limited is unable to pay the compensation into Mr S's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would've provided a taxable income. Therefore the compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid. The *notional* allowance should be calculated using Mr S's actual or expected marginal rate of tax at his selected retirement age.

For example, if Mr S is likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. However, if he would've been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation.

In addition, Alexander David Securities Limited should pay Mr S £300 for distress and inconvenience caused.

Details of the calculation should be must be provided to Mr S in a clear, simple format. Income tax may be payable on any interest paid. If Alexander David Securities Limited considers it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr S how has been taken off. And give him a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

investment name	status	Benchmark	from ("start date")	to ("end date")	additional interest
Emmit and Eligere shares, less the £6,500 incentive payment split equally, so £3,250 from each	still exists	FTSE UK Private Investors Income Total Return Index	date of investment	date of settlement	not applicable

Actual value

This means the actual amount payable from the investment at the end date.

If, at the end date, the investment is illiquid (meaning it cannot be readily sold on the open market), it may be difficult to find the *actual value* of the investment. So, the *actual value* should be assumed to be nil to arrive at fair compensation. Alexander David Securities Limited should take ownership of the illiquid investment by paying a commercial value acceptable to the pension provider. This amount should be deducted from the compensation and the balance paid as above.

If Alexander David Securities Limited is unable to purchase the investment the *actual value* should be assumed to be nil for the purpose of calculation. Alexander David Securities Limited may wish to require that Mr S provides an undertaking to pay Alexander David Securities Limited any amount he may receive from the investment in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Alexander David Securities Limited will need to meet any costs in drawing up the undertaking.

Fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

Why is this remedy suitable?

I've chosen this method of compensation because:

- Mr S wanted capital growth and was willing to accept some investment risk.
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.
- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr S's circumstances and risk attitude.

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £160,000 (where, as in this case, the act or omissions was before 1 April 2019 and the complaint was referred to us on or after 1 April 2020), plus any interest and/or costs/ interest on costs that I think are appropriate. If I think that fair compensation may be more than £160,000, I may recommend that the business pays the balance.

Provisional decision and award: I uphold the complaint. I think that fair compensation should be calculated as set out above. My provisional decision is that Alexander David Securities Limited should pay Mr S the amount produced by that calculation – up to a maximum of £160,000.

My final decision

I uphold the complaint. Alexander David Securities Limited must redress Mr S as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 8 July 2022.

Lesley Stead
Ombudsman