DRN-4055869

The complaint

Mr W complains that an unregulated business called Commercial Land and Property Brokers (CL&P) introduced him to Options UK Personal Pensions LLP, ('Options', which was trading as Carey Pensions UK LLP at the time of the relevant events) and gave him advice and made arrangements when doing so, despite not having the regulatory authorisation needed to do this. Mr W says CL&P advised him to transfer away from his Occupational Pension Scheme (OPS) which was a Defined Benefit (DB) pension, to a Self Invested Personal Pension (SIPP) with Options and invest in Store First.

A Complaints Management Company (CMC) has brought Mr W's complaint on his behalf. Mr W's CMC says he (Mr W) is an inexperienced investor, and that Options failed to carry out the appropriate checks on CL&P. The CMC says that had Options carried out appropriate due diligence on CL&P, it would've been clear that no business introduced by it (CL&P) should've been accepted, so Options is responsible for Mr W's losses.

What happened

Options

Options is a SIPP provider and administrator. At the time of the events in this complaint, Options was regulated by the Financial Services Authority (FSA), which later became the Financial Conduct Authority (FCA). Options was authorised in relation to SIPPs, to arrange (bring about) deals in investments, to deal in investments as principal, to establish, operate or wind-up a pension scheme, and to make arrangements with a view to transactions in investments.

CL&P

CL&P was an unregulated business based in Spain. At the time of the events here, one of the directors of CL&P was a Terence Wright. On 15 October 2010, the following was published on the FSA website, in a section called *"Firms and individuals to avoid"*, which was described as *"a warning list of some unauthorised firms and individuals that we believe you should not deal with."*

"The Financial Services Authority ("FSA") has today published this statement in order to warn investors against dealing with unauthorised firms.

The purpose of this statement is to advise members of the public that an individual

Terence (Terry) Wright

is not authorised under the Financial Services and Markets Act 2000 (FSMA) to carry on a regulated activity in the UK. Regulated activities include, amongst other things, advising on investments. The FSA believes that the individual may be targeting UK customers via the firm Cash In Your Pension.

Investors should be aware that the Financial Ombudsman Service and the Financial Services Compensation Scheme are not available if you deal with an unauthorised company or individual.

To find out whether a company or individual is authorised go to our Register of authorised firms and individuals at http://www.fsa.gov.uk/register/home.do*"*

CL&P and Options

Options has told us it was first approached by CL&P in 2011 and that it entered into discussions about accepting introductions from it. Options began to accept introductions from CL&P on 15 August 2011 and ended its relationship with it on 25 May 2012.

Options says it carried out some due diligence on CL&P. It says it reviewed CL&P's profile, conducted searches, reviewed its website and literature, and had conversations with CL&P's representatives over the phone.

I have set out below a summary of what I consider to be the key events and/or actions during the relationship between Options and CL&P, which I have taken from the available evidence (this includes evidence from Mr W's case file and generic submissions Options has made to us on other case files about its due diligence on, and its relationship with, CL&P).

I've not seen any evidence to show Options carried out any due diligence on CL&P before it began accepting introductions from it. Rather, as I set out below, it began to accept introductions then carried out its due diligence whilst accepting business from CL&P.

Some of what I set out below includes events which post-date Options' acceptance of Mr W's SIPP application and post-date Options sending Mr W's money to Store First for investment. But, as I set out in my findings, some of what Options found out about CL&P during the course of its relationship with it, and the action it took, is relevant in this complaint even where it does post-date Mr W's SIPP application and investment.

Summary

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

20 September 2011 - Options 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 Options initially had contact with. This check did not reveal any issues.

27 September 2011 - Options asked CL&P to complete a non-regulated introducer profile. The form itself explains its purpose as follows: *"As an FSA regulated pensions company we are required to carry out due diligence as best practice on unregulated introducer firms looking to introduce clients to us to gain some insight into the business they carry out."* Furthermore, when making this request, by email, Options' Chief Executive, Christine Hallett, explained: *"we require for our compliance process to perform due diligence on company's (sic) who we enter into a business and professional relationship with".*

29 September 2011 - The non-regulated introducer profile was completed by CL&P. It was completed and signed by Mr Wright, and confirmed the following:

- CL&P was a Spanish firm and was trading from a Spanish address.
- It used an '0845' telephone number.
- It'd been trading for two years and had two directors – Mr Wright and Lesley Wright.

- It had eight agents and promoted four investments including Store First.
- It worked with four other SIPP operators.
- Its source of business was *"referrals and web enquiries"*.
- Its sales process involved a call and follow up emails.
- It took 2-5% commission, and this was the source of its earnings.
- Its staff had been given training and it had worked with *"various compliance officers"*.

The document makes no mention of Ms Adams or Mr Lloyd. After completing the document Mr Wright was asked to make the following declaration:

> *"I declare the above is a true and accurate reflection of [name of individual or Firm] and that Options Pensions UK LLP can rely on this information.*
>
> *I/we fully indemnify Options Pensions UK LLP against any costs incurred as a result of any inaccuracies within this form.*
>
> *I/we also acknowledge and accept that Options Pensions UK will undertake any enquiries about the firm and its Directors/Partners it feels appropriate. "*

9 December 2011- Options 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:

> *"[Options 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.*
>
> *[Options 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 - Options' 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 - Options' 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 Options sent Ms Hallett an email 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 - Options' 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, Options said it had no record of receiving the information from CL&P.

15 May 2012 - Options conducted a World Check on Mr Wright. The report included:

> ***"THE FOLLOWING INFORMATION WAS REPORTED IN ONE OR MORE OF THE SOURCES BELOW***
>
> *[FINANCIAL SERVICES WARNING]*
> *Appears on the UK Financial Services*
> *Authority. [REPORTS]*
> *Appears on the FSA list of unauthorised firms and individuals,*
>
> ***<u>INFORMATION SOURCES;</u>***
>
> *http://www.fsa.gov.uk/pages/Doing/Regulated/Law/Alerts/unauthorised.shtml – ARCHIVE*
> *http://www.fsa.gov.uk/Pages/Doing/Regulated/Law/Alerts/Index.shtml – ARCHIVE*
>
> *Entered: 2011/10/24"*

25 May 2012 - Options terminated its agreement with CL&P. Options' Head of Service and Operations told it of Options' 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."*

Store First

The Store First investment took the form of one or more self-storage units, which were part of a larger storage facility in a UK location. Investors bought one or more units in the facility and were offered a guaranteed level of income for a set period of time. After that, they could either take whatever income the unit(s) provided or sell them (assuming there was a market for them).

The Store First investment was marketed as offering a guaranteed 8% return in the first two years, an indicated return of 10% in the following two years, and 12% in the next two years. It was also marketed as offering a *"guaranteed"* buy back after five years. But little of this materialised. It seems most investors received one or two years' income of 8%, but nothing beyond that. And investors have found it very difficult to sell, with those that have sold receiving a small fraction of the amount they paid for their 'pods'.

In the judgment in Adams v Options SIPP UK LLP (formerly Options Pensions UK LLP) [2020] EWHC 1229 (Ch) ('Adams v Options HC'), the judge found the value of Mr Adams' pods, acquired for around £52,000 in July 2012, to be £15,000 as of January 2017. I've also seen several results of auctions of the pods, where the sale price has been much lower than the price at which the pods were purchased.

In May 2014, the Self Storage Association of the UK (SSA UK) issued a press release (amended in January 2015), detailing the outcome of a review it had commissioned Deloitte LLP to undertake of the marketing material made available to potential investors by Store First. The release recommended that any potential investors in Store First storage units consider the following key points before taking any investment decision:

- What will the impact be on the business model if VAT is charged on the rental of storage units to customers following a review by HMRC?
- How is Store First funding guaranteed returns to investors? Is this from operating profits, the proceeds from the sale of other storage pods to investors, or a different source?
- Compare the total value being paid for all the units in a Store First self storage site against the price at which stand-alone self-storage businesses have been valued and sold at recently.
- Consider if there is a realistic re-sale opportunity for, and exit, from this investment, particularly if Store First exits the business.
- Research the performance of investments based on a similar investment model that have been offered primarily in Australia, such as Ikin Self Storage in Townsville, Queensland and Strata Self Storage in Melbourne (these schemes had failed).

The release refers to a number of misleading and inaccurate statements made by Store First in its marketing material. It also makes the following observations:

> *"SSA UK's investigations indicate that these storage units are being rented to the general public at approximately £18 - £21 per square foot including insurance. Normally the rent paid by a self-storage operator would be at most half of the income per square foot earned through storage fees. Presuming the Store First sites were at industry average occupancy levels, SSA UK believe that they would have to be earning £23.95 per square foot just to pay the guaranteed rent to investors, excluding operating costs such as insurance, staff, business rates, utilities, marketing and management fees for Store First.*
>
> *Store First is obliged to pay the guaranteed returns to investors, yet there does not appear to be sufficient income from the operations of the business to fund these returns.*
>
> *The analysis SSA UK has seen indicates that the purchase price being paid per square foot by investors to Store First for these self-storage units taken together equates to a much higher value than they would be worth if the whole sites were sold as stand-alone self- storage stores.*
>
> *…a very serious question arises over how Store First is funding the guaranteed returns to existing investors, considering the absence of bank funding and the*

likely level of losses that require funding in each new store. It may yet prove to be the case that the rental returns being paid to investors are in fact being funded from the sale proceeds of new units, and not the operation of the self-storage business."

On 30 April 2019 the courts made an order shutting down Store First and three of the related companies by consent between those four companies and the Secretary of State. The Official Receiver was appointed as liquidator. At the time, the Chief Investigator for the Insolvency Service said:

> *"These four companies unscrupulously secured millions of pounds worth of investments using a variety of methods that misled investors, particularly those with pension savings.*
>
> *The court rightly recognised the sheer scale of the problem caused by Store First's sales of a flawed business model, based on misrepresentation and misleading information and has shut down these companies in recognition of the damage done to investors retirement plans."*

The available evidence shows the following actions were taken by Options in relation to the Store First investment:

3 May 2011 – Options is contacted by a promoter of Store First, Harley Scott, about a newly launched product – Store First. Options says the investment will be put through its review process. In its submissions to us Options says this review process was established in accordance with its obligations and FSA recommendations at the time, which required it to: *"conduct due diligence into the Store First investment to assess its suitability for holding within a SIPP".*

9 June 2011 – Options says it will accept the investment in its SIPP, having considered:

- the brochure
- the agreement for Grant of Sublease
- the sublease
- Companies House searches
- a Compliance review (referring to an Enhanced Support Solutions report).

Options has provided us with copies of these documents. In the letter confirming its acceptance of the investment, Options noted:

- The investor purchases a 250-year lease of a storage unit within a storage facility. The unit is then sublet to the management company, Store First, subject to an initial 6-year term with 2-year break clauses.
- The investor's interest can be sold/assigned at any time. The break clauses allow the investor to rent out the units individually without the services of the management company (but it insisted they use the management company).
- There was no apparent established market for the investment.
- The investment was potentially illiquid in that it was a direct property investment which may take time to sell. However, it could be sold providing a willing buyer can be found and was assignable so could be transferred in specie to beneficiaries.
- Options also said its acceptance was subject to a member declaration and indemnity being completed and signed by each member, and the appointment of a solicitor to act for the Trustees in respect of any purchase.

Mr W's dealings with CL&P and Options

Mr W had a final salary pension with his former employer. It seems that, in around December 2011, he was unexpectedly contacted by CL&P. Mr W says that CL&P then recommended both the transfer to the Options SIPP and subsequent Store First investment. Mr W said he received £2,000 as a cash incentive for the transfer from CL&P but that he: *"…had no reason to suspect that there was anything untoward in this respect".*

On 9 January 2012, Options received a letter from Mr W confirming that it should liaise with CL&P regarding his pension arrangements – this was signed by Mr W on 21 December 2011. At the same time (9 January 2012), Options received his SIPP application form which was dated 5 January 2012. It noted this form instructed Options to facilitate a transfer from his OPS DB pension plan to a SIPP with Options. And that he wanted to invest in the Store First investment using his transferred pension funds.

Again on 9 January 2012, Mr W received a letter from Options confirming that the establishment date for his SIPP was on that date (9 January 2012). And he was sent an Options welcome pack which included the SIPP Terms and Conditions along with the SIPP Key Features document.

Later, Options received Mr W's letter to say he had appointed an independent (regulated) financial adviser (IFA) on 7 February 2012. Mr W wrote to Options in a letter dated 19 April 2012 saying that he had received advice from the IFA and wished to proceed with the transfer of his benefits from his OPS. The IFA sent a TVAS (Transfer Value Analysis report) for Mr W on 26 April 2012 to Options. And on 24 May 2012, the IFA sent a letter to Options confirming he was no longer acting as a servicing agent for Mr W.

On 14 May 2012, £30,799.77 was transferred from Mr W's OPS DB pension to his SIPP account. Mr W then instructed Options to invest £26,500 into the Store First investment, which he later changed to £26,250. The Store First investment was completed on 13 June 2012.

On 24 May 2012, Mr W signed the Options 'Member Declaration & Indemnity' form (the 'indemnity') in relation to the Store First investment which included the following typed statements:

> *"I,* [Mr W] *being the member of the above Scheme instruct Carey Pension Trustees UK Ltd to Purchase a Leasehold Storage Unit(s) in the Store First investment through Harley-Scott Holdings Ltd for a consideration of £26,500, on my behalf for the above Scheme."*
>
> *"I am fully aware that this investment is an Alternative Investment and as such is High Risk and / or Speculative."*
>
> *"I confirm that I have read and understand the documentation regarding this investment and have taken my own advice, including financial, investment and tax advice."*
>
> *"As the Member of the Pension Scheme, I confirm that neither I nor any person connected to me is receiving a monetary or other inducement for transacting this investment."*
>
> *"I am fully aware that both [Options] and Carey Pension Trustees UK Ltd act on an Execution Only Basis and confirm that neither [Options] nor Carey Pension Trustees UK Ltd have provided any advice whatsoever in respect of this investment."*

"I confirm that my business /occupation is not renting out storage units."

"Should any aspect of this investment be deemed by HMRC to provide Taxable Moveable Property and / or any tax charges be deemed by HMRC to apply in future these will be paid directly from the fund or by me as the member of the Scheme."

"I also understand and agree that, in the event of my demise, if Carey Pension Trustees UK Ltd is unable to sell the asset within HMRC timescales that it may be transferred to my beneficiaries through my estate and accordingly may be subject to any Inheritance Tax."

"I instruct [Options] to appoint the following solicitor to act on behalf of the Scheme: [details of solicitor]"

"I confirm that I agree to [name of solicitor] fee of £400 + VAT for transacting this investment."

"I confirm I am fully aware that additional costs will be incurred in this transaction including, but not limited to:
£48 CHAPs Fee;
£8 Land Registry Search Fee;
Stamp Duty Land Tax - To be advised by Solicitor at completion; Any other taxes – To be advised by Solicitor at completion."

"I agree to [Options] Fee of £500 + VAT, amounting for transacting this investment."

"I agree that any and all fees and costs will be paid by my Scheme, or in the event of default, by me personally."

"I agree to provide Carey Pension Trustees UK Ltd with any further information and/or documentation they may require prior to completing the purchase of this investment."

"I indemnify both [Options] and Carey Pension Trustees Ltd against any and all liability arising from this investment."

On 13 June 2012 Mr W received a letter from Options confirming that £26,836 had been sent for the purchase of the Store First investment.

Mr W's complaint

In February 2016, Mr W complained about the value of his Store Pod investment to which Options responded by saying it did not carry out a formal market valuation for the 'pods'. And noted that Mr W may wish to instruct someone qualified to carry out a valuation to get a more accurate price for his pods. Mr W complained saying that he did not think Options nor Store First were doing enough to find tenants for his pods and therefore, he was unhappy about the lack of income.

Options responded to Mr W's complaint in its final response letter dated 14 April 2016. Amongst other things, it said:

"[Options] *can confirm that we conducted due diligence on Store First to ensure that the investment was suitable for holding within a UK pension scheme. This due diligence included our Investment Committee reviewing the legal paperwork, product information, company background checks* *and also an independent report from an external third party compliance entity, as a second layer review. We can confirm that the Store First Investment was suitable to be held within a SIPP."*

In a letter dated 1 May 2018, Mr W complained via the CMC. Amongst other things, he said that Options had not carried out sufficient due diligence on the introducer CL&P before agreeing to do business with it. And as a result he considered Options should be held liable for the losses he suffered. Mr W noted, in particular, that Options had not taken into account an FSA Alert about one of the directors of Options.

Our investigator noted that he was particularly concerned about the timing of Mr W's investment in Store First. By the time his investment went ahead, Option's concerns about CL&P's conduct were so serious that it had terminated its agreement with it (CL&P). Our investigator considered that the involvement of an IFA didn't negate the due diligence failings relating to the introduction of Mr W's business by CL&P. He didn't consider Mr W would have proceeded to make the Store First investment had Options come to the right conclusion about its dealings with CL&P and put a stop to things.

Our investigator set out the means by which Options should put matters right. He acknowledges that Mr W had previously applied to the Financial Services Compensation Scheme (FSCS) and had received £50,000 from them in compensation relating to the actions of the regulated adviser. Mr W's losses were more but the FSCS limits were capped at £50,000. Our investigator noted, however, that this matter was between Mr W and the FSCS and did not affect the compensation he could recommend Options to pay. Mr W has provided a copy of a Reassignment of Rights from the FSCS to the Financial Ombudsman.

Options disagreed with the investigator's view. In particular, it didn't think the issues surrounding Mr Wright's FSA 'Alert', meant it should not have dealt with CL&P. It noted that there was a 2013 Alert about Mr Wright issued by the regulator which was a clear warning not to deal with this individual. But it didn't think that the Alert issued by the FSA in 2010 raised the same level of concern such that it would have prevented Options from dealing with him or his businesses.

A further view was issued by another investigator. In this view the investigator drew attention to section 27 (s27) FSMA. This is because he thought CL&P had acted in contravention of the General Prohibition, and so he concluded s27 FSMA applied meaning the agreement between Mr W and Options could not be enforced by the latter. He further considered that it would not be just and equitable to allow the SIPP agreement between Mr W and Options to be enforced, or the money retained, by Options, which a court could decide due to its discretion afforded to it by s28(3) FSMA. No comments were provided by Options in response to this view.

I issued a provisional decision on 15 March 2023. I agreed with the outcome recommended by the views summarised above. But I also thought it necessary to address the issue of jurisdiction. I concluded that I thought Mr W's complaint had been brought within the relevant time limits including the six-month time limit rule and the six- and three-year time limit rules. Options disagreed. It said the matter had been brought too late by Mr W under the six-month time limit rule. Options added nothing further in regard to what I said about the merits of Mr W's complaint about its due diligence. Options asked for an oral hearing in order to properly determine whether the complaint is time-barred.

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.

Before I set out my findings in relation to Mr W's complaint, I will address the issue of jurisdiction and the request for an oral hearing raised by Options. Whilst I've taken into account the further submissions from Options, I still consider the matter is within our jurisdiction. The reasons for this was explained in my provisional decision and now form part of this decision as follows:

Why I can consider this complaint

I note in the subsequent view by our investigator he said: "I can't see that Options has consented to us considering the complaint if it was made outside the time limits. I can see that the SIPP was taken out more than six years before the complaint and therefore it's possible the complaint was made outside the time limits. But because I haven't seen anything that makes me think the consumer knew, or ought to have known, of cause for complaint more than three years before they complained, I have concluded that this complaint is inside of our jurisdiction."

Whilst I agree with our investigator that this matter is within our jurisdiction because of Mr W's complaint in 2016, which I think triggered the three-year time limit that applies to this Service, this needed further explanation. This is the reason I am issuing a provisional decision.

Under 2.8.2 of the Dispute Resolution rules (DISP), amongst other things, this says:

> *"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:*
>
> *(1) more than six months after the date on which the respondent sent the complainant its final response, redress determination or summary resolution communication; or*
>
> *(2) more than:*
>
> > *(a) six years after the event complained of; or (if later)*
> > *(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;…"*

In this case, Mr W did complain to Options in early 2016. He complained that he was not happy with the fact that his Store First pods had not had any tenants since he had owned them. He thought that Options and Store First had not done anything to get the pods earning potential income. Mr W said he wanted to make a complaint about this.

In its final response letter dated 14 April 2016, as noted above, Options referred to, amongst other things, its 'due diligence' duties. In its view, it had carried these out in relation to the Store First investment and for this and other reasons, it did not uphold Mr W's complaint.

In its final response letter, Options did provide Mr W with six-months' referral rights to our Service. I don't know whether Mr W did refer his complaint to us within this time-limit. But I do not consider the complaint about the adequacy of Options due diligence which Mr W complained about in 2018, is something he complained about in 2016. So, I do not consider the current complaint is outside of the six-month time limit part of the rules, because he brought this complaint from 2018 to us within six months of the final response letter.

However, I do think that the final response letter dated 14 April 2016 from Options, meant that Mr W was made reasonably aware of its due diligence duties as a SIPP provider. This was made clear from the passage I've quoted above.

By the time Mr W brought his complaint about the adequacy of Options due diligence both in respect of the investments and in respect of the business CL&P, which was in May 2018, this was more than six years after the establishment of his SIPP on 9 January 2012. So, I do think when he complained about Options part in setting up the SIPP and that he thought this was a result of the due diligence process being inadequate, the matter was outside of the six-year time limit rule.

But in terms of the three-year time limit rule, I think the trigger for this was when Mr W was notified in the final response letter he received from Options dated 14 April 2016. At this point, Mr W was, or should have been, reasonably aware of his cause to complain about Options in terms of its due diligence duties as a SIPP provider. However, given Mr W complained to Options on 1 May 2018, which was just over two years from the date he should have been reasonably aware of his cause to complain, I think the matter has been brought within the relevant time limits. So, I will now consider the merits of Mr W's complaint.

In response to what I set out above, Options considered the final response letter on 14 April 2016 was dealing with materially the same complaint as Mr W had raised in 2018. So, in its view Mr W should have referred his complaint to the Financial Ombudsman on or around 14 October 2016. So, Options main argument is that Mr W's first complaint from 2016 is not materially different to the one brought in 2018. However, I disagree with this. I'll explain why.

As I noted above, in 2016, Mr W's complaint was about the performance of his investment. He did not suggest that Options had done anything wrong in respect of its duties as a SIPP operator other than not helping to find tenants for his 'pods'. Mr W's point was very specific in that he didn't think Options and/ or Store First had done enough to generate rental income for his pods. This is not materially the same complaint that he made in 2018. In the latter case, he said that Options failed to carry out sufficient due diligence as it was required to do.

So, as I said above, I do not consider the complaint Mr W made on 1 May 2018 is outside of the relevant time limits including the six-month time limit rule. Options sent a final response letter to Mr W about his current 'due diligence' complaint on 20 June 2018 dealing with his concerns at this time. The Financial Ombudsman received Mr W's complaint form dated 14 July 2018 on or around 27 July 2018 – this was clearly within six months of Options relevant final response letter.

With that said, what I do think is that the 2016 final response letter acted as a trigger for the three-year time limit rule. But as Mr W brought his complaint by 2018, whilst this was outside the six-year time limit rule (as explained above), I consider he brought his complaint within three years of being made aware of a cause to complain about Options due diligence duties. However, it was Options who decided to raise this issue (due diligence of the Store First investment) in its 2016 final response – I can't see that Mr W complained about this issue at that time (2016).

For all these reasons, I'm still satisfied that the current complaint Mr W has brought to us in 2018, has been brought within the relevant time limits. Therefore, my decision on jurisdiction remains that the Financial Ombudsman Service has the power to consider it.

In terms of Options request for an oral hearing, the Financial Ombudsman provides a scheme under which certain disputes may be resolved quickly and with minimum formality (s225 FSMA). Given my statutory duty under FSMA to resolve complaints quickly and with minimum formality, I am satisfied that it would not normally be necessary for me to hold a hearing in most cases.

The key question for me to consider when deciding whether a hearing should be held is whether or not there is sufficient information and evidence for me to be able to decide the issue being determined without convening a hearing. Options has had the opportunity to consider, and comment, on my provisional decision including about the issue of jurisdiction.

I've given Options an opportunity to provide any further evidence it needs to provide. But the only evidence it has pointed to is evidence it has already provided to the Financial Ombudsman previously and has in essence, provided arguments as to why this evidence means the matter is outside of our jurisdiction. In response, I've clearly explained why I don't think this is the case and as I said, Options has had a chance to respond to my initial findings on this which have not changed. It has also had the opportunity to respond to what I said about the merits of Mr W's complaint.

So, having carefully considered the submissions Options has made about the need to hold an oral hearing, I'm satisfied that I am able to determine the issue of jurisdiction without convening a hearing. In this case, I am satisfied I have sufficient information to make a decision on this issue. Therefore, I do not consider a hearing is required.

I'll now go on to consider the merits of Mr W's complaint. Before I set out the reasoning for my decision, I consider it important for me to say that 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.

I should also note at this point that I did set out the reasoning for my decision in my provisional decision. This reasoning now forms part of my final decision. Option's hasn't provided any further evidence and/ or submissions than it has done previously in response to the investigator's initial view, which I've taken into account along with what Mr W has provided. So, as set out in my provisional decision, the reasons for upholding this complaint are as follows:

Relevant considerations

<u>*The Principles*</u>

In my view, the FCA's Principles for Businesses (the 'Principles') are of particular relevance to my decision. The Principles, which are set out in the FCA's handbook: *"are a general statement of the fundamental obligations of firms under the regulatory system"* PRIN1.1.2G). I consider that the Principles relevant to this complaint include Principle2, 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."*

I have 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* [the Financial Ombudsman Service] *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) (‘BBSAL’), 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 of BBSAL): *“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 BBSAL judgment also considers s228 FSMA and the approach an Ombudsman is to take when deciding a complaint. The judgment of Jacobs J in BBSAL 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 Principles are a relevant consideration here and I will consider them in the specific circumstances of this complaint.

<u>The Adams Court cases</u>

I have taken account of the judgment of the High Court in Adams v Options HC and the Court of Appeal judgment in Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 474. I note the Supreme Court refused Options permission to appeal the Court of Appeal judgement. I've considered whether these judgments mean that the Principles should not be taken into account in deciding this case. And, I'm of the view they do not.

In the High Court case, HHJ Dight did not consider the application of the Principles and they did not form part of the pleadings submitted by Mr Adams. One of the main reasons why HHJ Dight found that the judgment of Jacobs J in BBSAL was not of direct relevance to the case before him was because: *"…the specific regulatory provisions which the learned judge in Berkeley Burke was asked to consider are not those which have formed the basis of the claimant's case before me."* Likewise, the Principles were not considered by the Court of Appeal. So, the judgments say nothing about the application of the FCA's Principles to the Ombudsman's consideration of a complaint.

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

Although Mr Adams' appeal of the High Court judgment was partially successful, the Court of Appeal rejected the part of Mr Adams' appeal that related to 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, in the High Court judgment, HHJ Dight found that the factual context of a case would inform the extent of the duty imposed by COBS 2.1.1R. HHJ Dight said at para 148:

> *"In my judgment in order to identify the extent of the duty imposed by Rule 2.1.1 one has to identify the relevant factual context, because it is apparent from the submissions of each of the parties that the context has an impact on the ascertainment of the extent of the duty. The key fact, perhaps composite fact, in the context is the agreement into which the parties entered, which defined their roles and functions in the transaction."*

The issues in Mr W's complaint are different from the issues as pleaded in Adams. There are also significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and from the issues here. 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 W's complaint, I'm considering whether Options ought to have identified that the introductions from CL&P involved a risk of consumer detriment and, if so, whether it ought to have ceased accepting introductions from CL&P prior to entering into a contract with Mr W.

On this point, I think it's 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 I've outlined above such as the 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. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

To be clear, I've proceeded on the understanding that Options was not obliged – and not able – to give advice to Mr W on the suitability of its SIPP or the investment for him personally. But I'm satisfied Options' obligations included deciding whether to accept particular investments into its SIPP and/or whether to accept introductions of business from particular businesses. And this is consistent with Options' own understanding of its obligations at the relevant time. As noted above, the introducer profile completed at the outset of Options' relationship with CL&P said *"As an FSA regulated pensions company we are required to carry out due diligence as best practice on unregulated introducer firms looking to introduce clients to us to gain some insight into the business they carry out."*

<u>*s27s/28 FSMA*</u>

The Court of Appeal overturned the High Court judgment on the basis of the claim pursuant to s27 FSMA. s27 FSMA provides that an agreement between an authorised person and another party, which is otherwise properly made in the course of the authorised person's regulated activity, is unenforceable as against that other party if it is made: *"…in consequence of something said or done by another person ("the third party") in the course of a regulated activity carried on by the third party in contravention of the general prohibition".*

s27(2) provides that the other party is entitled to recover:

> *(a) any money or other property paid or transferred by him under the agreement; and*
> *(b) compensation for any loss sustained by him as a result of having parted with it.*

s28(3) FSMA provides that:

> *If the court is satisfied that it is just and equitable in the circumstances of the case, it may allow –*
>
> *(a) the agreement to be enforced; or*
> *(b) money and property paid or transferred under the agreement to be retained.*

The General Prohibition is set out in s19 FSMA. It stipulates that:

> *No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is –*
>
> *a) an authorised person; or*
> *b) an exempt person.*

In Adams, the Court of Appeal concluded that the unauthorised introducer of the SIPP had carried out activities in contravention of the General Prohibition, and so s27 FSMA applied. It further concluded that it would not be just and equitable to nonetheless allow the agreement to be enforced (or the money retained) under the discretion afforded to it by s28(3) FSMA. At paragraph 115 of the judgment the Court set out five reasons for reaching this conclusion. The first two of these were:

> *"i) A key aim of FSMA is consumer protection. It proceeds on the basis that, while consumers can to an extent be expected to bear responsibility for their own decisions, there is a need for regulation, among other things to safeguard consumers from their own folly. That much reduces the force of Mr Green's contentions that Mr Adams caused his own losses and misled Carey;*

ii) While SIPP providers were not barred from accepting introductions from unregulated sources, section 27 of FSMA was designed to throw risks associated with doing so onto the providers. Authorised persons are at risk of being unable to enforce agreements and being required to return money and other property and to pay compensation regardless of whether they had had knowledge of third parties' contraventions of the general prohibition;"

The other three reasons, in summary, were:

- The volume and nature of business being introduced by the introducer was such as to put Options on notice of the danger that the introducer was recommending clients to invest in the investments and set up Options SIPPs to that end. There was thus reason for Options to be concerned about the possibility of the introducer advising on investments within the meaning of article 53 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the 'RAO').
- Options was aware that: contrary to what the introducer had previously said, it was taking high commission from the investment provider, there were indications that the introducer was offering consumers "cashback" and one of those running the introducer was subject to a FCA warning notice.
- The investment did not proceed until after the time by which Options had reasons for concern and so it was open to Options to decline the investment, or at least explore the position with Mr Adams.

<u>*The regulatory publications*</u>

The FCA (and its predecessor, the FSA) has issued a number of publications which remind SIPP operators of their obligations and which set out how they might achieve the outcomes envisaged by the Principles, namely:

- The 2009 and 2012 Thematic Review reports (the 'review' or 'reviews'.)
- The October 2013 finalised SIPP operator guidance.
- The July 2014 *"Dear CEO"* letter.

The 2009 Thematic Review

The 2009 review 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 clients 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 [treating customers fairly] *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.*
- *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.*
- *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 '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 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.*
- *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 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:*
    - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*
    - *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).

Although I've referred to selected parts of the publications, to illustrate their relevance, I have considered them in their entirety.

I acknowledge that the 2009 and 2012 reviews and the Dear CEO letter are not formal *"guidance"* (whereas the 2013 finalised guidance is). However, the fact that the reports and Dear CEO letter did not constitute formal guidance does not mean their importance should be underestimated. They provide a reminder that the Principles apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles.

In that respect the publications, which set out the regulator's expectations of what SIPP operators should be doing, also goes some way to indicate what I consider amounts to good industry practice and I'm satisfied it is appropriate to take them into account. It's relevant that when deciding what amounted to have been good industry practice in the BBSAL case, the Ombudsman found: *"the regulator's reports, guidance and letter go a long way to clarify what should be regarded as good practice and what should not."* And the judge in BBSAL endorsed the lawfulness of this approach.

Like the Ombudsman in the BBSAL case, I don't think the fact the publications, (other than the 2009 review), post-date the events that took place in relation to Mr W's complaint, mean the examples of good practice they provide were not good practice at the time of the relevant events. Although the later publications were published after the events subject to this complaint, the Principles that underpin them existed throughout, as did the obligation to act in accordance with them.

It's also clear from the text of the 2009 and 2012 reviews (and the Dear CEO letter in 2014) that the regulator expected SIPP operators to have incorporated the recommended good practices into the conduct of their business already. So, whilst the regulators' comments suggest some industry participants' understanding of how the good practice standards shaped what was expected of SIPP operators changed over time, it is clear the standards themselves had not changed.

I note that HHJ Dight in the Adams case did not consider the 2012 review, 2013 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 Options' 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.

To be clear, I don't say the Principles or the publications obliged Options to ensure the pension transfer was suitable for Mr W. It is accepted Options was not required to give advice to Mr W, and could not give advice. And I accept 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.

What did Options' obligations mean in practice?

In this case, the business Options was conducting was its operation of SIPPs. I'm satisfied that meeting its regulatory obligations when conducting this business would include deciding whether to accept or reject particular investments and/or referrals of business. The regulatory publications provided some examples of good industry practice observed by the

FSA and FCA during their work with SIPP operators including being satisfied that a particular introducer is appropriate to deal with. As noted above, it's clear from Options' non-regulated introducer profile, that it understood and accepted its obligations meant that it had a responsibility to carry out due diligence on CL&P.

I'm satisfied that, to meet its regulatory obligations, when conducting its business, Options was required to consider whether to accept or reject particular referrals of business, with the Principles in mind. This seems consistent with Options' own understanding. I note in submissions on other complaints Options has told us that 'adherence to TCF' is something it had in mind when considering its approach to introducer due diligence i.e. the question of whether it should accept business from a particular introducer.

All in all, I'm satisfied that in order to meet the appropriate standards of good industry practice and the obligations set by the regulator's rules and regulations, Options should have carried out due diligence on CL&P which was consistent with good industry practice and its regulatory obligations at the time. And in my opinion, Options should have used the knowledge it gained from its due diligence to decide whether to accept or reject a referral of business or particular investment.

Due diligence on CL&P

The actions Options took – which were carried out after its relationship with CL&P began, rather than before it accepted business from CL&P – are set out in detail in the background sections above. So I will not repeat them here. However, I would note at this point that the actions Options took, in addition to being taken after Options began accepting business from CL&P, appear to have been taken on a reactive, piecemeal, basis.

In addition, the available evidence shows Options did not meet its own standards when carrying out due diligence on CL&P. From late 2011, in accordance with its own standards (as submitted to us), it should have carried out company checks on CL&P, reviewed CL&P's accounts, and checked *"sanctions lists*". As I set out above, these standards appear to be consistent with good industry practice and Options' regulatory obligations at the relevant time (although it is not clear what a check of sanctions list would encompass). However, Options did not - in practice - act in a way which was consistent with good industry practice and its regulatory obligations at the relevant time. I explain this in more detail below.

The FSA list

CL&P was an unregulated business, based in Spain, and was proposing to deal with the pensions of UK consumers. Options ought to have known the FSA kept a list of Alerts, relating to unregulated businesses, which were often based overseas. Options has not explained what a search/check of 'sanctions lists' entailed. But I think a check of such lists should have included the FSA's list of Alerts. In any event, 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 proceeding with accepting business from CL&P, whether it considered the FSA's list of alerts to be a sanctions list or not.

At the relevant time, the FSA's list featured warnings (Alerts) about unauthorised individuals and businesses. And, in my view, checking the warnings posted on the FSA's website is something that Options should have done as a matter of course before it began accepting any business from CL&P. This is consistent with good industry practice as highlighted in the 2009 review and later documents. And, I find it would have been fair and reasonable, and in accordance with its regulatory obligations, for such a check to take place before it entered into a relationship with CL&P.

As part of its independent checks Options used a risk intelligence tool called World Check. I understand this is a tool which is internationally recognised and commonly used by businesses to carry out background searches. And, I assume, its use was part of what Options describes as searches when explaining the due diligence standards it introduced in late 2011, (which, in my view, if they had been implemented effectively, were consistent with good industry practice and in compliance with Options' regulatory obligations).

However, although Options used the tool here, it failed to run checks on the appropriate persons at CL&P. On 20 September 2011 it ran checks on a Ms Adams and a Mr Lloyd. But, I understand that these individuals were only employees of CL&P and neither controlled nor managed CL&P. So, the fact that the checks run on these individuals did not raise any issues is of little, if any, value. It does not mean that Options had met its regulatory obligations here. In my view, as a first step, Options ought to have carried out sufficient due diligence so as to properly establish who the directors or individuals who controlled CL&P were. Only then would it be able to run checks on the appropriate persons.

As part of its due diligence process, Options required CL&P to fill out a *"non-regulated introducer profile"* questionnaire. CL&P completed the questionnaire on 29 September 2011. The profile named the two directors of CL&P, one of which was Mr Wright. The profile made no mention of Ms Adams or Mr Lloyd. So, at this point, Options was aware Mr Wright was one of the directors of CL&P.

I note that the profile CL&P completed asked the question: "*Are you and/or the Firm subject to any on-going FSA or other regulatory body review, action or censure."* And, Mr Wright answered *"No"* to this question. However, it was not sufficient, in my view, to simply ask the introducer a general question. Rather, I think Options, acting fairly, with due regard to Mr W's interests, should have carried out its own check on Mr Wright. And that appears to have been Options' view too. Its comments suggest it understood it was good practice, consistent with its regulatory obligations, to make its own independent checks. So, it ought to have undertaken a check on Mr Wright before it began accepting introductions from CL&P.

Had Options checked the FSA's list in August 2011, it would have discovered that Mr Wright was the subject of an FSA Alert which I have set out in full above. If Options had acted in accordance with its regulatory obligations and good industry practice at the relevant time it ought to have undertaken sufficient enquiries on CL&P to understand who its directors were, and checked the FSA's Alert 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 Mr Wright was on the FSA warning (Alert) list.

Cash incentives

In November 2011, which was before Mr W's SIPP was established, Options became aware that *"a potential member had asked when they would receive their money from their Store First Investment".* And it says the general risk of introducers offering cash incentives had been flagged to it by a trade body. Such payments are against the rules covering pensions and can attract a substantial tax charge from HMRC.

Options spoke to CL&P in a conference call on 9 December 2011. Options has told us that in that call CL&P: *"…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."* And an Options staff member was said to have: *"emphasised that it is completely against all rules that clients or connected parties receive any form of inducement for making particular investments."*

I'm not persuaded it was reasonable for Options to rely on what CL&P said when it clearly had information to show the position was contrary to that being set out to it by CL&P during the call. Options was aware cash incentives had been offered – discussing this was the purpose of the call with CL&P. In the circumstances, I do not think it was fair and reasonable for Options to proceed based solely on a denial of this by CL&P. Options should, at the very least, have taken independent steps to check things for itself – it could, for example, have contacted the consumers it had received applications for before the date of the call, to ask them about cash incentives.

Accounts

Based on the available evidence, it appears a request for CL&P's accounts was not made by Options until 23 March 2012. It's not clear why the request was made at this time. But it seems CL&P did not respond as the request was repeated, as urgent, on 3 April 2012. CL&P replied to Options to say the information would be in the post the next day. However, when asked, Options has told us it has no record of receiving the information and that this was another likely factor in its eventual decision to end its relationship with CL&P. In my opinion, it is fair and reasonable that Options should have met its own standards, set in late 2011, and should have checked CL&P's accounts at the outset before accepting any business from it.

This is a step it should reasonably have taken, to meet its regulatory obligations. Taking all of the above into consideration – individually and cumulatively – I think in the circumstances it is fair and reasonable for me to conclude that Options failed to conduct sufficient due diligence on CL&P before accepting business from it. And, in light of the Principles and FSA/FCA regulatory publications I have quoted above, this means Options did not comply with its regulatory obligations or with good industry practice at the relevant time.

If Options had completed sufficient due diligence, what ought it reasonably to have concluded?

In my opinion, I think Mr Wright's appearance on the FSA's list ought to have highlighted to Options that the regulator was concerned enough about Mr Wright's activities to warn consumers about him. And I think in the circumstances it is fair and reasonable to conclude that the warning was aimed at protecting consumers from detriment in their dealings with him.

With this in mind, I think the Alert should have acted as a significant reason for Options to be concerned about any business Mr Wright was involved in – not just 'Cash In Your Pension'. The warning mentioned that Mr Wright was involved in the area of pensions – which is the same business area that CL&P was active in. And the warning said that Mr Wright was not authorised and may be *"targeting UK customers"* in connection with investment business conducted through an unregulated company, Cash In Your Pension.

I also think the presence of Mr 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 Options – it should have given rise to significant concern about Mr Wright's conduct and integrity. I note that Options ended its relationship with CL&P shortly after completing the check on Mr Wright. I'm satisfied, on balance, that this check was a factor in its decision to end the relationship.

Options has told us that the wording in the 2013 warning, if it had been published at the time of it accepting business from CL&P, would have been sufficient to stop it doing business with Mr Wright/CL&P. It said: *"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, <u>a warning</u>*

that would have put Options Pensions on notice to stop accepting business from Mr Wright." (my emphasis)

Options says, in its representations in this complaint relating to the FSA's list, that the 2010 warning would not have led it to the same conclusion. It says: *"…the Notice (the alert) amounts simply to a notification that Mr Wright is not authorised to carry on regulated activities, a fact of which Options was well aware and upon which basis it accepted referrals from CL&P."* But this seems to be at odds with the action it took in 2012, based on the 2010 warning. And I note Options' Chief Executive, Ms Hallett, gave evidence to the court during the High Court Adams v Options hearing, which is summarised at Paragraph 60 of the judgment 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".*

This, in my view, is inconsistent with Options' representations to us on this complaint. In any event, although in its representations on this complaint Options has said it believes the 2010 Alert was less significant than the 2013 one, by comparing the wording of the two, I think the October 2010 Alert was a clear indication that the regulator had serious concerns about the way Mr Wright conducted his business and therefore, should have put Options on notice that it should not accept business from him. I accept that the 2013 Alert provides strong advice to only deal with financial firms authorised by the FCA. However, I do not agree with Options' characterisation of the 2010 Alert and I'm surprised that Options suggests that the regulator does not detail any concern about Mr Wright in the 2010 Alert.

A publication headed ***"ALERT"*** in bold is clearly not routine and unimportant. It's clear from the wording itself that the FSA was warning investors against dealing with unauthorised firms and specifically named Mr Wright. He was involved in *"targeting"* (to use the FSA's phrase) UK based pension investors – which should have been of particular concern to a SIPP operator considering accepting business from him. The Alert also provided links to:

- A list of unauthorised firms.
- A press release about unauthorised firms targeting UK investors.
- A document telling investors about the tactics adopted by unauthorised firms targeting UK investors.
- A document explaining share scams.

In my opinion, it is fair and reasonable to conclude that the Alert was more than a mere statement of fact that an unauthorised firm could not carry out regulated activities. It was a clear warning – an Alert - relating specifically to Mr Wright, providing links to guidance on consumer protection and warnings about scams.

So, in my view, CL&P's director Mr Wright's presence on the FSA warning list should have led Options to conclude it should not do business with CL&P. That is my view and I note it is a view which was held by Ms Hallett when she gave evidence to the court during the Adams v Options HC hearing. Ms Hallett told the court that if she had been aware of the warning in 2010 Options would not have dealt with CL&P. Such a conclusion was the proper one it ought to have reached bearing in mind Options' responsibilities under the Principles.

In addition, as I set out above, on the issue of cash incentives, I do not think it was fair and reasonable for Options to simply rely on a denial by CL&P in circumstances where it seems it was aware cash incentives were being offered. I think Options should have taken steps to independently check the position, and it is fair and reasonable to conclude that prompt action would have inevitably led Options to discover that cash incentive payments were being widely offered by CL&P at that time, and that what CL&P had told Options was incorrect. It follows that Options ought to have concluded – as it belatedly did when the issue of cash incentives came to light again in 2012 - that it could not rely on what CL&P was telling it and it would not be consistent with its regulatory obligations to deal with any further business from CL&P.

If Options had acted with a reasonable amount of diligence it would have discovered that CL&P was acting in a way which was, to use its own words, *"completely against all rules"*. And it would have known that CL&P was acting without integrity – it had not told it the truth when asked about cash incentives. In my view, the only fair and reasonable thing it could do would have been to decide not to accept any further business from CL&P and not to proceed with any applications which had not completed. So, Options should have taken action on the issue of cash incentives – which would ultimately have led to it ending it relationship with CL&P - before it sent Mr W's money for investment in Store First.

Further, I think if checks on CL&P's accounts had been attempted earlier, the fact that it was unwilling to provide this information should have raised a red flag, as it apparently eventually did. This reluctance to provide basic information should have been another factor which ought to have led Options to question whether it should enter into or continue a relationship with CL&P. And, it would have meant Options should never have entered into a relationship with CL&P at all.

Taking all of the above into consideration, I think in the circumstances it's fair and reasonable for me to conclude that Options ought reasonably to have concluded, had it complied with its regulatory obligations, which required it to conduct sufficient due diligence on CL&P before accepting business from it, that it should not accept business from CL&P. If Options had carried out proper introducer due diligence it ought to have concluded it should not accept business from CL&P. I therefore consider that it is fair and reasonable in the circumstances to say that Options should not have accepted Mr W's application from CL&P.

Investment due diligence

As I've explained above, Options should neither have accepted Mr W's introduction from CL&P nor proceeded with his application to make the Store First investment. I think it is fair and reasonable to uphold this complaint on that basis alone.

Did Options act fairly and reasonably in proceeding with Mr W's instructions?

COBS 11.2.19R

I note that Options has made the point that COBS 11.2.19R obliged it to execute investment instructions. It effectively says that once the SIPP has been established, it is required to execute the specific instructions of its client. Before considering this point, I think it is important for me to reiterate that, it was not fair and reasonable for Options to have accepted Mr W's application from CL&P in the first place. So, in my opinion, Mr W'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.

In any event, Options' argument about having to execute the transaction as a result of COBS 11.2.19R was considered and rejected by the judge in BBSAL. In that case Jacobs J said:

> *"The heading to COBS 11.2.1R shows that it is concerned with the manner in which orders are to be executed: i.e. on terms most favourable to the client. This is consistent with the heading to COBS 11.2 as a whole, namely: "Best execution". The text of COBS 11.2.1R is to the same effect. The expression "when executing orders" indicates that it is looking at the moment when the firm comes to execute the order, and the way in which the firm must then conduct itself. It is concerned with the "mechanics" of execution; a conclusion reached, albeit in a different context, in Bailey & Anr v Barclays Bank [2014] EWHC 2882 (QB), paras [34] – [35]. It is not addressing an anterior question, namely whether a particular order should be executed at all. I agree with the FCA's submission that COBS 11.2 is a section of the Handbook concerned with the method of execution of client orders, and is designed to achieve a high quality of execution. It presupposes that there is an order being executed, and refers to the factors that must be taken into account when deciding how best to execute the order. It has nothing to do with the question of whether or not the order should be accepted in the first place."*

So, I don't think that Options' argument on this point is relevant to its obligations under the Principles to decide whether to accept an application to open a SIPP. Or to execute the instruction to make the Store First investment i.e. to proceed with the application.

The indemnity

The indemnity sought to confirm that Mr W was aware the investment was high risk, had taken his own advice, and would not hold Options responsible for any liability resulting from the investment. The FSA's 2009 review said that SIPP operators should, as an example of good practice, be: *"Routinely identifying instances of execution-only clients who have signed disclaimers taking responsibility for investment decisions and gathering and analysing data regarding the aggregate volume of such business."* With this in mind, I think Options ought to have been cautious about accepting Mr W's application even though he had signed an indemnity.

There was an IFA involved in this process. But it's clear based on the timelines of events, that it was the result of CL&P that Mr W was introduced to Options and that the Store First investment was its recommendation. The SIPP was established before the IFA became involved. And the Options SIPP application form was also completed before the IFA's involvement. In his application Mr W clearly said he wanted to transfer his OPS and invest in the Store First investment. On all the evidence, I consider, on balance, this is the reason why Mr W proceeded with the SIPP. So, I think very little comfort could be taken by Options from the statement in the indemnity saying that Mr W had taken his own advice on these matters.

Options had to act in a way that was consistent with the regulatory obligations that I've set out in this decision. In my view, Options was not treating Mr W fairly by asking him to sign an indemnity absolving Options of all responsibility, and relying on such an indemnity, when it ought to have known that Mr W's dealings with CL&P were putting him at significant risk.

Summary of my findings on due diligence

In summary, Options did not comply with good industry practice, act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr W fairly by accepting his application from CL&P, in the light of what it knew or ought to have known about CL&P and the Store First investment before Mr W's application was received, and by proceeding in the light of what it knew or ought to have known about CL&P and the Store First investment by the time the investment was made. For all the reasons given, I am satisfied that this is the fair and reasonable conclusion to reach.

For the avoidance of doubt, I'm not making a finding that Options should have assessed the suitability of the investment or the SIPP for Mr W. I accept Options had no obligation to give advice to him, or otherwise ensure the suitability of a pension product or investment. My finding is not that Options should have concluded that the investment or SIPP was not suitable for Mr W. Rather, Options was able to accept or reject applications for business and I say that it should have rejected Mr W's application for a SIPP introduced by CL&P.

s27 and s28 FSMA

As set out in the relevant considerations section above, I have also considered the application of s27 and s28 FSMA. And I have set out the key sections of s27 and s28 above, considering them carefully, in full. In my view I need to apply a four-stage test to determine whether s27 applies and whether a court would exercise its discretion under s28, as follows:

1. Whether an unauthorised third-party was involved;
2. Whether there is evidence that the third-party acted in breach of the General Prohibition in relation to the particular transaction and, if so;
3. Whether the customer entered into an agreement with an authorised firm in consequence of something said or done by the unauthorised third-party in the course of its activities that contravened the General Prohibition; and
4. Whether it is just and equitable for the agreement between the customer and the authorised firm to be enforced in any event.

Was an unauthorised third-party involved?

There is no dispute CL&P was an unauthorised third party.

Is there evidence CL&P acted in breach of the General Prohibition?

Under Article 53 of the RAO (as set out in the version that was current at the relevant time) the following are regulated activities:

> *Advising a person is a specified kind of activity if the advice is -*
>
> *(a) given to the person in his capacity as an investor or potential investor, or in his capacity as agent for an investor or a potential investor; and*
>
> *(b) advice on the merits of his doing any of the following (whether as principal or agent)— (i)buying, selling, subscribing for or underwriting a particular investment which is a security or a relevant investment, or (ii)exercising any right conferred by such an investment to buy, sell, subscribe for or underwrite such an investment.*

Under Article 25 of the RAO (as set out in the version that was current at the relevant time) the following are regulated activities:

> *(1) Making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite a particular investment which is—*
>
> *(a) a security,*
> *(b) a relevant investment, or*

(c) an investment of the kind specified by article 86, or article 89 so far as relevant to that article, is a specified kind of activity.

(2) Making arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting investments falling within paragraph (1)(a), (b) or (c) (whether as principal or agent) is also a specified kind of activity

There is an exclusion under Article 26 of the RAO: *"arrangements which do not or would not bring about the transaction to which the arrangements relate."*

I've considered these in turn.

Advice

I think the following part of the Court of Appeal's judgment in the Adams case is of particular relevance here.

Paragraph 82: *"In short, CLP's recommendation that Mr Adams invest in storepods carried with it advice that he transfer out of his Friends Life policy and put the money into a Carey SIPP. Investment in storepods may have been the ultimate objective, but it was to be gained by transferring out of the Friends Life policy and into a Carey SIPP. CLP thus proposed that Mr Adams undertake those transactions too and, in so doing, gave "advice on the merits" of selling a "particular investment which is a security" (viz. the Friends Life policy) and buying another "particular investment which is a security" (viz. a Carey SIPP). Although, therefore the advice to invest in storepods was not of itself covered by article 53 of the RAO, CLP nonetheless gave Mr Adams advice within the scope of article 53 and so acted in contravention of the general prohibition."*

Here, Mr W was contacted by CL&P and his evidence is that CL&P advised him to transfer out of his existing DB pension (OPS), into the Options SIPP and invest in Store First. I think that evidence is plausible, and credible. I do not think Mr W thought of taking this course of action of his own volition, or would have done so without a positive recommendation from CL&P. I also note it was CL&P which contacted Mr W – he did not find CL&P in the course of looking for alternative pension options. In my view, I'm satisfied CL&P advised Mr W to transfer out of his existing pension and transfer into the Options SIPP – and so it undertook the regulated activity defined at Article 53 of the RAO.

Further, even if Mr W had been provided with regulated advice, which was the case here subsequent to CL&P's introduction, Options was instructed to deal directly with CL&P and the application form it received. So, I think the advice he received to transfer from his SIPP and invest in the Store First investment came from CL&P. And, it was clear that CL&P was the material party that was inducing Mr W to transfer and then invest in unregulated investments. The same concerns about CL&P's involvement and likely consumer detriment should have remained and led Options to decline the application.

Making arrangements

I think the following parts of the Court of Appeal's judgement in the Adams case are of particular relevance here.

Paragraph 99: *"The fact remains that CLP "pre-completed the application form so that [Mr Adams] could just sign it" (to quote Mr Adams' witness statement). It also told Mr Adams of documents he would need to supply for anti-money laundering purposes and explained that the "completed forms and [his] anti money laundering documents will be collected by courier* *and taken to Carey Pensions UK". "Arrangements" being a "broad and untechnical word" in article 25 of the RAO as well as section 235 of FSMA, it is apt to describe what CLP did."*

Paragraph 100:

> *"I consider, too, that the steps which CLP took can fairly be said to have been such as to "bring about" the transfers from Friends Life and into the Carey SIPP. Contrary to the Judge's understanding, it does not matter that CLP's acts "did not necessarily result in any transaction between [Mr Adams] and [Carey]" or that "the process was out of CLP's hands to control in any event". Nor is it determinative whether steps can be termed "administrative".*
>
> *"CLP's "procuring the letter of authority", role in relation to anti-money laundering requirements and (especially) completion of the Carey application form were much more closely related to the relevant transactions than, say, the advertisement which originally prompted Mr Adams to contact CLP. It is to be remembered that CLP filled in sections of the application form dealing with "Personal Details", "Occupation & Eligibility", "Transfers", "Investments" and "Nomination Of Beneficiaries". In my view, what CLP did was thus significantly instrumental in the material transfers. In other words, there was, in my view, sufficient causal potency to satisfy the requirements of article 26 of the RAO."*

In Mr W's case, at the outset he gave Options *"permission to liaise directly with CLP Brokers in respect of all matters regarding my pension arrangement."* And it seems the application form was pre-populated by CL&P albeit there were some handwritten notes that could have been written by Mr W. All in all, I consider the steps which CL&P took can fairly be said to have been such as to 'bring about' the transfer from Mr W's DB pension into the Options SIPP – they had sufficient causal potency to satisfy the requirements of Article 26 of the RAO.

In summary, I'm satisfied CL&P carried out regulated activities, and therefore breached the General Prohibition. And any one regulated activity is sufficient for these purposes so this test would be met if CL&P had only undertaken arranging (which, for the reasons I have set out, I do not think is the case).

Did Mr W enter into an agreement with Options in consequence of CL&P's actions?

I am satisfied the SIPP was opened in consequence of the advice given, and arrangements made, by CL&P. If CL&P had not contacted Mr W, advised him to transfer his DB pension to a SIPP with Options in order to invest in Store First, and then made the arrangements for that to happen I am satisfied he would not have entered into an agreement with Options.

Whilst I know Mr W had received advice from an IFA, the driving force behind his decision to transfer and to invest in Store First was, in my view, CL&P. Mr W only received advice from the IFA after already approaching Options about the SIPP and Store First investment. The application for the SIPP was completed on 9 January 2012 and this was its establishment date. It was only after this point that the IFA was consulted by Mr W which enabled him to make the transfer from his OPS. Mr W has made a successful claim against the IFA. But that does not prevent other parties being held responsible for their failings. And, it's my view, that if Options had carried out sufficient due diligence on CL&P before accepting Mr W's application for a SIPP, I consider his losses would have been avoided.

Would the courts conclude it is just and equitable for the agreement between Mr W and Options to be enforced in any event?

Having carefully considered this, I’m satisfied a Court would not conclude it is just and equitable for the agreement between Mr W and Options to be enforced in any event. I think very similar reasons to those mentioned by the Court of Appeal in the Adams case apply here:

- A key aim of FSMA is consumer protection. It proceeds on the basis that, while consumers can to an extent be expected to bear responsibility for their own decisions, there is a need for regulation, among other things to safeguard consumers from their ‘own folly’.
- While SIPP providers were not barred from accepting introductions from unregulated sources, s27 FSMA was designed to throw risks associated with doing so onto the providers. Authorised persons are at risk of being unable to enforce agreements and being required to return money and other property and to pay compensation regardless of whether they had had knowledge of third parties’ contraventions of the General Prohibition.
- As set out above Options was aware, or ought to have been aware:

    - Mr Wright featured on the FSA’s list of Alerts about unauthorised individuals and businesses
    - It had not been privy to CL&P’s company accounts.
    - CL&P was offering cash incentives to consumers and therefore acting *“completely against all rules”.*

The investment did not proceed until these things were known or ought to have been known to Options and so it was – or should have been – open to it to decline the investment. So, I’m satisfied s27 FSMA offers a further and alternative basis on which it would be fair and reasonable to conclude Mr W’s complaint should be upheld. I have, therefore, gone on to consider the question of fair compensation.

Is it fair to ask Options to compensate Mr W?

In deciding whether Options is responsible for any losses that Mr W has suffered on his Store First investment, I need to look at what would have happened if Options had done what it should have done i.e. had not accepted Mr W’ SIPP application in the first place. When considering this I have taken into account the Court of Appeal’s supplementary judgment in Adams ([2021] EWCA Civ 1188), insofar as that judgment deals with restitution/compensation.

I’m required to make the decision I consider to be fair and reasonable in all the circumstances of the case. And I do not consider the fact that Mr W signed the indemnity means that he shouldn’t be compensated if it is fair and reasonable to do so. In deciding whether Options is responsible for any losses that Mr W has suffered on the investments in his SIPP, I need to look at what would have happened if Options had done what it should have done i.e. not accepted Mr W’s application.

Had Options acted fairly and reasonably it should have concluded that it should not accept Mr W’s application to open a SIPP. That should have been the end of the matter – it should have told Mr W that it could not accept the business. And I am satisfied, if that had happened, the arrangement for him would not have come about in the first place, and the loss he suffered could have been avoided.

The financial loss has flowed from Mr W transferring out of his existing DB pension (OPS) and into a SIPP. For the reasons I set out below I am satisfied that, had the SIPP application not been accepted, the loss would not have been suffered. I would reach a similar conclusion if Options had terminated the transaction at a later stage once it was in possession of certain facts that meant there was a significant chance Mr W could suffer financial detriment.

Had Options explained to Mr W why it would not accept the application from CL&P or was terminating the transaction, I find it very unlikely that he would have tried to find another SIPP operator to accept the business. So, I'm satisfied that Mr W would not have continued with the SIPP, had it not been for Options' failings, and would have remained in his existing scheme. And, whilst I accept that CL&P is responsible for initiating the course of action that has led to his loss, I consider that Options failed unreasonably to put a stop to that course of action when it had the opportunity and obligation to do so.

I have considered paragraph 154 of the Adams v Options High Court judgment, which says:

> *"The investment here was acknowledged by the claimant to be high risk and/or speculative. He accepted responsibility for evaluating that risk and for deciding to proceed in knowledge of the risk. A duty to act honestly, fairly and professionally in the best interests of the client, who is to take responsibility for his own decisions, cannot be construed in my judgment as meaning that the terms of the contract should be overlooked, that the client is not to be treated as able to reach and take responsibility for his own decisions and that his instructions are not to be followed."*

For all these reasons, I'm satisfied it would not be fair to say Mr W's actions mean he should bear the loss arising as a result of Options' failings. I do not say Options should not have accepted the application because the investment was high risk. I acknowledge Mr W was warned of the high risk and declared he understood that warning. But, as I set out above, Options did not share significant warning signs with him so that he could make an informed decision about whether to proceed or not.

In any event, Options should not have asked him to sign the indemnity at all as the application should never have been accepted. Or alternatively the transaction should have been terminated at a much earlier stage in the process. Furthermore, despite what Options says, I'm satisfied there is a legal basis on which Mr W is entitled to compensation by virtue of s27 FSMA.

So, I consider it is fair and reasonable to conclude that Options should compensate Mr W for the loss he has suffered. I'm not asking Options to account for loss that goes beyond the consequences of its failings. I am satisfied those failings have caused the full extent of the loss in question. That other parties might also be responsible for that same loss is a distinct matter, which I am not able to determine. However, that fact should not impact on Mr W's right to fair compensation from Options for the full amount of his loss.

Options has said it is evident that Mr W wished to transfer his pension, whether through Options or another provider and would therefore have suffered the same loss as he did even if it had rejected his application. But I have seen no evidence to show that Mr W would have proceeded even if Options had rejected his application. He was contacted by CL&P, which was consistent with its business model with other clients and encouraging them to consider transferring out of their pensions. I've seen nothing to suggest Mr W was looking to make a transfer prior to that contact.

Furthermore, I do not think it would be fair to say Mr W should not be compensated based on speculation that another SIPP operator might have made the same mistakes as Options. For similar reasons, I am not persuaded Mr W should not be compensated by Options, or his compensation should be reduced. I know Mr W had made a claim in respect of the FSCS for which he was awarded its limit of £50,000 due to the conduct of the IFA but this agreement is between Mr W and the FSCS. He will have to account to it in terms of the agreement it has with him. As noted above, the Financial Ombudsman has proceeded as Mr W has provided the Reassignment of Rights from the FSCS.

In terms of the complaint against Options my conclusion is that if it had acted fairly and reasonably to meet its regulatory obligations and good industry practice, the SIPP application would not have proceeded at all. So, no transfer request or Store First investment would have been made. I'm therefore satisfied that Options' failure to comply with its regulatory obligations and industry best practice at the relevant time, has led to Mr W suffering a significant loss to his pension. And my aim is to return him to the pension position he would now be in but for Options' failings.

Putting things right

In light of my above, I am recommending that Options calculate fair compensation by comparing the current position to the position Mr W would be in if he had not transferred from his OPS Defined Benefit pension. In summary, Options should:

1. Calculate the loss Mr W has suffered as a result of making the transfer. Pay compensation for the loss into his pension. If that is not possible pay compensation for the loss to Mr W direct. In either case the payment should take into account necessary adjustments set out below.
2. Take ownership of any investment which can't be surrendered, if possible.
3. Options should pay Mr W £500 for the distress and inconvenience the avoidable problems with his pension will have caused him. I know it has said it disagrees with this amount following the investigator's recommendation, but I would say this fairly and reasonably reflects the level of distress and inconvenience caused from Mr W suffering a significant loss, and disruption to, his retirement planning.

I'll explain how Options should carry out the calculation set out at 1-2 above in further detail below:

1. *Calculate the loss Mr W has suffered as a result of making the transfer*

On 2 August 2022, the FCA launched a consultation on new DB transfer redress guidance and set out its proposals in a consultation document - https://www.fca.org.uk/publication/consultation/cp22-15.pdf

In this consultation, the FCA said that it considers that the current redress methodology in Finalised Guidance (FG) 17/9 remains appropriate and fundamental changes are not necessary. However, its review has identified some areas where the FCA considers it could improve or clarify the methodology to ensure it continues to provide appropriate redress.

A policy statement was published on 28 November 2022 which set out the new rules and guidance-https://www.fca.org.uk/publication/policy/ps22-13.pdf. The new rules will come into effect on 1 April 2023.

The FCA has said that it expects firms to continue to calculate and offer compensation to their customers using the existing guidance in FG 17/9 for the time being. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with the new rules and guidance.

We've previously asked Mr W whether he preferred any redress to be calculated now in line with current guidance or wait for the new guidance /rules to come into effect. He has chosen not to wait for any new guidance to come into effect to settle his complaint. I am satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr W.

A fair and reasonable outcome would be for the business to put Mr W, as far as possible, into the position he would now be in but for the transfer to the Options SIPP. I consider he would have remained in the occupational scheme. Options must therefore undertake a redress calculation in line with the regulator's pension review guidance as updated by the Financial Conduct Authority in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

This calculation should be carried out as at the date of my final decision and using the most recent financial assumptions at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr W's acceptance of the decision.

Options may wish to contact the Department for Work and Pensions (DWP) to obtain Mr W's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P). These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on Mr W's SERPS/S2P entitlement.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr W's pension plan. 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 a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr W as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. The notional allowance should be calculated using Mr W's marginal rate of tax in retirement. For example, if Mr W 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 W would have been able to take a tax-free lump sum of 25%, the notional allowance should be applied to 75% of the total amount.

Account should also be taken of the cash back payment paid out to Mr W. This can be taken into account in the calculation on the basis of it having been paid at the outset.

The compensation amount must where possible be paid to Mr W within 90 days of the date Options receives notification of his acceptance of my final decision. Further 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 for any time, in excess of 90 days, that it takes Options to pay Mr W.

Income tax may be payable on any interest paid. If Options deducts income tax from the interest, it should tell Mr W how much has been taken off. Options should give Mr W a tax deduction certificate in respect of interest if he asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above – and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply.

If the complaint hasn't been settled in full and final settlement by the time any new guidance or rules come into effect, I'd expect Options to carry out a calculation in line with the updated rules and/or guidance in any event.

2. *Take ownership of any investments which can't be surrendered, if possible*

I understand Options has been able to take ownership of the Store First investment, for a nil consideration, in other cases. It should do that here, if possible. If Options 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 W has the option of returning his Store First investment to the freeholder for nil consideration. That should enable him to close his SIPP if Options does not take ownership of the Store First investment.

In the event the Store First investment remains in the SIPP and Mr W 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.

My final decision

For all these reasons, it is my final decision that Mr W's complaint is upheld and that Options UK Personal Pensions LLP should calculate and pay him the redress as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 27 April 2023.

Yolande Mcleod
Ombudsman