DRN-4492345

The complaint

Mr F 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 F says he was contacted by CL&P and, following its advice to transfer away from his existing pension to a Self-Invested Personal Pension ('SIPP') and invest in Store First, switched his pension arrangements to a SIPP with Options, and made a Store First investment. As a result, he says he has suffered the total loss of his pension provision.

A Claims Management Company ('CMC') has brought Mr F's complaint on his behalf.

What happened

<u>The relevant parties</u>

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') – I will refer to both bodies as the 'regulator'. 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*":

"ALERT

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 that it was first approached by CL&P in 2011 and 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 CL&P's website and literature and had conversations with CL&P's representatives over the telephone.

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 F'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 have 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.

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 Terence 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 had been trading for two years and had two directors – Terence Wright and Lesley Wright.
- It had eight agents, and promoted four investments – Store First, and three other unregulated investments.
- 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 Terence Wright. The report included the following:

"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,

INFORMATION SOURCES*;*

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 Operation told CL&P 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 a 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'), 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 have 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."

Summary

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 six year term with two 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.

It 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 F's dealings with CL&P and Options

In a letter received by Options on 12 March 2012, Mr F gave it permission to liaise directly with CL&P.

Mr F's Options SIPP application form contained, amongst other things, the following key information:

- He was unemployed.
- His selected retirement date was at age 60 and this would be in January 2021.
- He had a personal pension plan valued at around £35,000.
- Options noted that: *"Please Note, whilst we cannot give advice, we recommend that in these circumstances you seek appropriate advice and please provide us with a copy of the TVA's report."*
- Options also said in the application form that:

> *As you do not have a Financial Adviser, your investment choices are your sole responsibility. You will instruct us and we will act on those instructions as long as it is an accepted investment in the Carey Pension Scheme.*
>
> *Carey Pensions UK LLP and Carey Pension Trustees UK Ltd will not at any time review any aspects of your appointed Investment Manager's financial status or investment and risk strategies nor have any Involvement in your investment choices and selection, nor give advice on the suitability of your investment choices. We would always recommend Independent advice be obtained from a suitably qualified adviser."*

- Under 'Type of Investment Authorisation' the application said: *"EXECUTION ONLY Investment Manager trades on your instructions only"*
- In this section (Investments), Mr F said he wanted to use his funds to invest in Store First. The amount he wanted to invest was stated to be £32,000.
- Under 'Cancellation Rights', Mr F ticked the box which said that he wished to waive his right to cancel the SIPP within the 30 days of establishment.
- Under the 'Declaration' section of the application, amongst other things, it said;

> *"I understand that it is my sole responsibility to make decisions relating to the purchase, retention or sale of any investments held within the Carey Pension Scheme;*
> *I agree to indemnify Carey Pensions UK LLP 'The Administrator' and Carey Pension Trustees UK Ltd against any claim in respect of any decision made by myself and/or my Financial Adviser/ Investment Manager or any other professional adviser I choose to appoint from time to time;*
> *I understand that I am not permitted to be paid from the Scheme funds until my retirement or until such time of my death, or in the case of a serious health claim;*
> *I understand that Carey Pensions UK LLP and Carey Pension Trustees UK Ltd are not in anyway able to provide me with any advice;*
> *I confirm that I am establishing the Carey Pension Scheme on an Execution only basis:*
> *I confirm I understand that the value of my pension scheme can go down as well as up depending on the investment performance of the investments chosen."*

On 13 March 2012, Mr F wrote to his personal pension provider giving it authority to transfer the capital within his pension scheme to Options with 'immediate effect'. However, on 8 May 2012, Options emailed Mr F to say that as discussed in his welcome letter, which was sent to him on 13 March 2012, Options would be unable to establish his SIPP until it had received the completed declaration page, which was included in the application form. Options also noted that further to this, Mr F had not returned the Transfer Authority letter addressed to his personal pension provider which was also included in his welcome pack. Options requested that Mr F sign and return this to it so the transfer could proceed.

On 12 June 2012, Options wrote to Mr F stating the following:

"Further to correspondence sent to you on 8th May 2012 we are unable to fully establish your SIPP until we receive the completed declaration page included in the application form that you completed. Therefore in order for us to proceed please read, sign and date the page which was returned to you with the welcome pack and post it to us at the below address. I attach a blank copy of the page for your convenience in the event that you no longer have the original.

Once we receive this we will fully establish your SIPP on our system and be able to proceed."

So, whilst Mr F's Options SIPP application had been received in March 2012, Options would not proceed any further until the declaration in the application form had been fully completed and Mr F had finalised the matters it had pointed out to him.

On 21 June 2012, Mr F was sent a further email from Options confirming that his personal pension transfer had been received into his SIPP scheme account. The amount that was transferred was £40,609.53. Options noted that after deducting fees and on receipt of all relevant documents, the money that Mr F had instructed Options to invest (£32,000) would be used to purchase the Store First investment – this was done on 19 July 2012.

Options further noted in the same email that:

"Whilst writing, we feel it prudent to outline the position regarding being paid/offered incentives for transferring your pension scheme and making such an investment.

HMRC have clarified that where cash rebate arrangements are entered into, in relation to SIPP investments, (being paid an incentive for the SIPP investment) there is a potential tax charge arising on the basis that were it not for the SIPP investment, the cash rebate would not arise. In such cases anyone receiving such an incentive needs to take specialist tax advice to assess the likelihood of a tax charge arising and account for any such payment on their personal tax return.

[Options] *will not knowingly establish SIPPs where such incentives are being offered / paid."*

Mr F has confirmed to the Financial Ombudsman that whilst he was offered £1,000 to transfer by CL&P by way of 'cash back' he never received this payment. He also said if he'd known of the alert about Mr Wright he would not have gone ahead with the transfer. Mr F confirmed that he didn't fully sign the Options application until June 2012. And if at that point, he had been made aware that the relationship between CL&P and Options had ceased which was on 25 May 2012, he probably wouldn't have gone ahead with the transfer or the Store First investments.

Mr F said that he had no real understanding of how the Store First investment worked. He said he was told by CL&P that it was 'pretty much guaranteed to give good returns'. And he says that it never really crossed his mind about transferring his pension before he was approached by the introducer (CL&P) with the promise of guaranteed high returns which enticed him to transfer his pension savings.

Mr F's complaint

As noted above, Mr F complained to Options about the transfer of his pension and the purchase in the Store First investment. He did this via a CMC on 5 October 2020.

On 20 October 2020, Options rejected Mr F's complaint on the basis that it had been referred to it too late. Amongst other things it said:

- It noted that Mr F's SIPP application was received on 12 March 2012 and the SIPP was established on the same day. But as noted above, this was not the case as Mr F had not fully completed the declaration on the SIPP application so Options rejected his application and his SIPP was not fully set up until June 2012. The letter noted that the transfer from Mr Fs' personal pension was received on 18 June 2012. And his Store First investment was made on 19 July 2012.
- Options said Mr F received an annual valuation on 15 March 2015 showing that his investment was valued at 50% less than the original value. It said this should have given him cause for concern and would have given him the opportunity to complain at that point.
- Options noted that in around mid-2020, Mr F's CMC asked for a copy of Mr F's full file which it provided to the CMC in August 2020. And the first notice it received of Mr F's complaint about Options due diligence was on 5 October 2020.
- Options said that it believed Mr F's complaint was time barred as the SIPP was established and the transfers received, and investments were placed over six years before Mr F's complaint was made. And Mr F had had notice of a substantial loss to his Storefirst investment in 2015, so Options considered he had three years from this point to complain.
- Options said these time limits are set down by the regulator's Dispute Resolution rules ('DISP') and as Mr F hadn't met the timescales that were required under these rules, his complaint had been made out of time.

The investigator's view

Our investigator considered that Mr F's complaint had been brought within the relevant time limits. Given he considered the Financial Ombudsman had the power to look at the complaint, he went on to consider its merits. And having done so, he concluded that Options had not carried out sufficient due diligence on the introducer and/or the Store First investment. As a result, in the investigator's view, Options should not have let the pension transfer and/or investment to go ahead in the first place and this would have prevented Mr F's losses. Our investigator went on to set out how Options should put matters right including asking it to pay Mr F £500 for the trouble and upset it had caused him.

Options' response to the investigator's view

Options did not accept the view. It said, in summary:

- Options maintained the matter was outside of the relevant time limits. And even if it was within the relevant time limits, the complaint should not be upheld and Options explained why.
- It is strictly an execution only service and it does not have the relevant permissions to assess the suitability of Mr F's investment choices or his decision to transfer to a SIPP. So, it can't be held liable for Mr F's losses due to the choices he made.
- Options says the investigator, has failed to take into account section 228(2) of the Financial Services Markets Act 2000 ('FSMA') and DISP 3.6.4R, or to set out whether and (if so) the basis upon which it is appropriate to depart from the relevant law. The investigator has failed to set out whether the due diligence duty which he has found to exist is one recognised by law, rather than some broader professional

standards.

- Options do not think that the investigator has approached this complaint in an impartial way.
- The 'guidance' publications referred to by the investigator issued by the FSA/FCA cannot found a claim for compensation in themselves. And none of them, even the one that was issued before Mr F's complaint was set up, do not provide 'guidance' in any meaningful sense. Further, many of the measures in the publications are directed at advisory firms rather than execution only SIPP operators.
- The Court case of Adams (full Court reference below) makes it clear that the regulatory publications cannot alter the meaning of, or the scope of the obligations imposed by the Principles for Businesses.
- Any publication issued after Mr F's SIPP/investment is irrelevant to the findings of this complaint.
- The FCA Enforcement Guides notes that 'guidance' is not binding on those to whom the FCA's rules apply.
- There has been no breach of due diligence in regard to CL&P or Storefirst.
- The regulatory regime does not prohibit firms from dealing with unregulated introducers. The case of Adams makes this clear.
- The reality is it is the poor performing investment that has caused Mr F loss and Options, as an execution only party to the transaction, is not responsible for that.
- The effect of the investigator's view is to force SIPP providers into a position of underwriting the performance of investments.
- The investigator's view concludes that Options should have checked the FSA notice (the 'FSA Notice') published on 15 October 2010 and that, if it had done, it should have refused all further customers introduced by CL&P. However the FSA Notice wasn't entered onto 'World Check' until 24 October 2011.
- Options does not routinely check the FSA's list of unauthorised firms and individuals. Nor was it under an obligation to do so.
- The FSA Notice simply stated that Mr Wright was not regulated by the FSA and referred to another business (not CL&P). So there was nothing in the FSA notice which described any criminal or civil wrongdoing.
- The Adams cases made it clear that the SIPP operators duties only extended to the contractual relationship between the parties.
- The obligations to assess the investment's suitability amounts to imposing an obligation on Options to undertake qualitative assessment of Store First investment and then to pass this information on to Mr F.
- The investigator is effectively saying that Options should have provided advice to Mr F which it did not have the authority or permission to do.
- Options did pass on risk warnings to Mr F - Options provided a general risk warning which Mr F said he'd read which stated: *"I am fully aware that this investment is an Alternative investment and as such is High Risk and/or Speculative."*
- Options did not cause Mr F's losses. It's likely if he had not proceeded with Options he would have found another SIPP provider to carry out his instructions.
- It has not been found that Mr F was 'cold called' by CL&P. It is just as likely that Mr F had contacted CL&P so that he could invest in an asset such as Store First.
- Not enough questions were asked of Mr F. The view is silent on whether or not Mr F was asked about inducement payments. If a payment was received, what did Mr F understand this payment was for.
- Even if the complaint is upheld, Option should not be held accountable for the full extent of any losses suffered given Mr F signed an indemnity and a members' declaration absolving Options of any claim for losses made by him.
- Any compensation should be based on the basis that if the Store First investments can't be removed from the SIPP, Mr F may still benefit from any future returns. So,

this should be taken into account when reaching a redress calculation.
- The £500 award for the distress and inconvenience caused to Mr F hasn't been properly justified by the investigator.
- Options requested that the Ombudsman holds an Oral Hearing in order to properly determine Mr F's complaint.

The matter has been passed to me for a final decision.

What I've decided – and why

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

Having done so, I'm upholding the complaint. I understand that Mr F is suffering from ill health. I am sorry to hear about this and I trust this final decision will bring matters to a swift conclusion once accepted by him.

Before I set out my reasoning for upholding the complaint, I would like to say I've considered everything the parties have submitted during the course of this complaint, but I've limited my findings to the areas which impact on the outcome of the case. I'll also mention at this stage that where there's a dispute about what happened and/or the evidence is incomplete and/or inconclusive, I've based my decision on the balance of probabilities.

Finally, 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.

Options' request for an oral hearing

I appreciate that given matters have now moved on, Options may no longer wish to have an oral hearing. But for completeness, I will address this point as it was made in its submissions in response to the investigator. Options say an oral hearing is necessary to explore the extent of CL&P's role, Mr F's understanding of the investment and the roles played by the parties, and Mr F's motivation for entering into the transaction.

The Ombudsman Service provides a scheme under which certain disputes may be resolved quickly and with minimum formality (section 225 of FSMA). DISP 3.5.5R provides the following: "*If the Ombudsman considers that the complaint can be fairly determined without convening a hearing, he will determine the complaint. If not, he will invite the parties to take part in a hearing. A hearing may be held by any means which the Ombudsman considers appropriate in the circumstances, including by telephone. No hearing will be held after the Ombudsman has determined the complaint*."

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

The key question for me to consider when deciding whether a hearing should be held is whether or not: "*the complaint can be fairly determined without convening a hearing*".
We do not operate in the same way as the Courts. Unlike a Court, we have the power to carry out our own investigation. And the rules (DISP 3.5.8R) mean I, as the Ombudsman determining this complaint, am able to decide the issues on which evidence is required and

how that evidence should be presented. I am not restricted to oral cross-examination to further explore or test points.

If I decide particular information is required to decide a complaint fairly, in most circumstances we are able to request this information from either party to the complaint, or even from a third party. In this case, our Investigator sought some further information from Mr F, and he referred to what he considered to be the key points in his view. Options has had the opportunity to consider, and comment, on that view. And as to the point Options made about Mr F receiving an incentive, he has confirmed he has not done so.

I have carefully considered the submissions Options has made. However, I am satisfied that I am able to fairly determine this complaint without convening a hearing. In this case, I am satisfied I have sufficient information to make a fair and reasonable decision. So, I do not consider a hearing is required.

Time-bar

Again I note matters have moved on but it hasn't consented to us considering the matter and as the complaint was made six years after the events being complained of, I will need to consider whether the matter is time-barred. In my view it is not. I'll explain why.

Under the relevant section of rule DISP 2.8.2R it says:

"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

(1) …
(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;

unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;"

The normal rule does not apply if the respondent regulated firm consents to the complaint being considered or if the delay in making the complaint was the result of exceptional circumstances. Options does not consent to the complaint being considered. And I can't see any exceptional circumstances that apply in this case to explain the reason for the delay in bringing the complaint. For ease of reference I will refer to the first part of the time bar rule as the six-year rule and the second part as the three-year rule.

The six-year rule

Mr F first complained to Options on 5 October 2020. This followed a request from his CMC for a full case file which it requested in mid-2020. It's unclear what prompted Mr F to complain at this time but Options says that in March 2015, he had a statement which showed that his investment value had fallen by half. I have not seen a copy of this statement but this is consistent with other cases. I also note that First Store was subject to winding-up proceedings in 2017. And Mr F's CMC says he was told in later statements that his First Store investment was valued at nil. Again I have not seen these statements but given the status of Store First, I think it's likely that Mr F has been told in his latest statements that his investments are now worthless. So, I think it's likely this is the reason Mr F complained when he did.

Given Mr F's SIPP was fully set up by June 2012, I think this is the event that triggered the six-year rule. So, given Mr F did not complain until the end of 2020, he has made his complaint outside of the six-year time limit. I will now consider the three-year time limit rule.

The three-year rule

Mr F complained to Options in October 2020. To recap, the three-year time limit rule says: *"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service: "…more than … three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint."*

The term *"complaint"* is in italics in the rule which means it is a defined term. Complaint is defined in the glossary to the FCA rule book as: *"any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a person about the provision of, or failure to provide, a financial service, … which: (a) alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience; and (b) relates to an activity of that respondent, or of any other respondent with whom that respondent has some connection in marketing or providing financial services or products… which comes under the jurisdiction of the Financial Ombudsman Service."*

"Cause for complaint" is not a defined term. But reading the relevant components together, to trigger the three-year clock, relevant awareness (i.e. actual awareness) or the awareness the complainant ought reasonably to have become aware, comprises of three elements:

1. awareness, broadly, that loss has been or may be suffered;
2. that this is a result of some act or omission; and
3. that act or omission was the responsibility of the respondent.

These requirements are reflected in the definition of 'complaint' in the FCA handbook:

"…any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, <u>a person about the provision of, or failure to provide, a financial service</u>,… which: … (b) <u>relates to an activity of that respondent</u>, or of any other respondent with whom that respondent has some connection in marketing or providing financial services or products or claims management services, which comes under the jurisdiction of the Financial Ombudsman Service." (My emphasis added).

Further, the complainant must have more than a broad awareness that something isn't right. As per the definition of complaint and when read against the rule, a complainant's relevant awareness must include dissatisfaction about the provision of or failure to provide a financial service, which relates to an activity of 'that respondent' or any other respondent that has some connection 'in marketing or providing financial services or products or claims management services, which comes under the jurisdiction of the Financial Ombudsman.

For the three-year time to start running, the complainant must also have awareness, or ought reasonably to have been aware, that the problem may be attributable to a potential act or omission on the part of the respondent firm which in this case is Options.

The three-year rule – my findings

In this case Options argues that Mr F should have become aware that something had gone wrong with his investments in March 2015 when he received his statement from Options. I think, on balance, this is a correct assessment. Anyone seeing that their investment had fallen by such a significant amount would have cause to concern. I think this is particularly the case here when Mr F had been given the impression by the unregulated introducer, CL&P that the investment was guaranteed to return at a much better rate than his previous pension plan. But on its own I don't think this was enough to make Mr F aware he had cause for complaint about the SIPP operator, Options.

This is because, as I've already indicated it was the unregulated introducer, who had made the statements about the potential for a better performance of his pension than where he previously was. Mr F will also have been aware that it was the unregulated introducer who recommended the investments and advised him to open the Options SIPP. It was the unregulated introducer who gave Mr F the idea to open the SIPP and also was the party that said that the investment was 'guaranteed' to do well or at least, better than his personal pension. So, I think when his investment began to fall so dramatically, it's more likely than not that Mr F would have associated this problem with the unregulated introducer, rather than Options who went to some lengths to let Mr F know via his declaration that that it was acting on an execution only basis and had not provided any advice on the investment itself.

Before Mr F complained, I can't see that there was anything that would necessarily mean he had relevant awareness of cause for complaint about Options. There was nothing to say at that point that it had to carry out due diligence on the introducer and/or the investments that it (the unregulated introducer) had advised him on. Further, I don't think Mr F ought to have realised that Options as a regulated business might also have been expected to undertake due diligence in respect of the SIPP advice he received about opening the SIPP and/or purchasing the investments.

There was nothing that I can see that would have indicated to Mr F that due diligence had been or should have been made by Options on CL&P. It is implausible that he would not have complained to Options if he had known, or even thought, it was also supposed to check CL&P to ensure that it was an appropriate business to do business with or that the investment it was recommending may not be appropriate to hold in a SIPP wrapper.

Even if Mr F had, in 2015, carried out some level of research, for example, online (or otherwise) appropriate for a lay consumer who had experienced the problem he had experience, I think it's unlikely he would reasonably have acquired enough understanding of the role and obligations of the SIPP provider to think that it was responsible for the problems he was now facing.

In the period up to the time of publicity surrounding the unsuccessful judicial review challenge in *Berkeley Burke SIPP Administration Ltd v Financial Ombudsman Service* [2018] EWHC 2878 (Admin) which was published on 30 October 2018, although there had been some build up in the amount of information about SIPP complaints, the industry maintained that its obligations were very limited. But from the judicial review decision it could be seen that this was not the only view and that there was also a reasonable body of opinion that SIPP providers did have responsibilities that meant they could in some circumstances be held responsible for problem investments in SIPPs (notwithstanding comments from Berkeley Burke about appeals etc).

So, in my view, if Mr F had carried out some reasonable enquiries in or around the end of 2018, he ought to have known that he had a complaint about Options and its due diligence duties. At that point, as I understand it from the submissions his CMC has made, his investment had suffered a dramatic loss to the point whereby in 2020, it was valued at nil.

But before the Berkeley Burke decision, I don't think there would have been sufficient information available to Mr F to make the connection of his losses with the duties that

Options would have been under to carry out due diligence on those it accepted business from even if he carried out some research into the role of Options as a SIPP operator.

Mr F did understand he had a loss but as I said, he and any reasonable consumer, would have thought that any problem was connected with the acts of the introducer who advised him about the investments and the transfer of the SIPP. But as the losses continued particularly once Store First was put into liquidation in 2017, if Mr F had carried out some reasonable enquiries at around the end of 2018, following the Berkeley Burke judicial decision, I think there would have been sufficient information to make him reasonably aware that he had cause to complain about the acts or omissions of Options in relation to its due diligence duties in respect of CL&P.

So, based on what I've said above, I think the earliest he would have made that connection between the losses he made via First Store investment would have been in late 2018 and allowing time to notice the change in the landscape following the judicial review decision, and work out the implications of this decision, I think the three-year time limit would have begun in early 2019 for anyone in Mr F's position. As Mr F sought advice in August 2020 and complained to Options in October 2020, I consider he made his complaint within the three-year time limit rule. And therefore, given all that I've said above the Financial Ombudsman does have the power to consider this complaint.

I will now consider the merits of Mr F's complaint.

Relevant considerations

The Principles

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). And I consider Principle 2, 3 and 6 are particularly relevant to this complaint 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 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 section 228 of 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.

The Adams Court cases

I have taken account of the judgment of the High Court in *Adams v Options SIPP* [2020] EWHC 1229 (Ch) and the Court of Appeal judgment in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474. I note the Supreme Court refused Options permission to appeal the Court of Appeal judgement. There is an ongoing judicial review but this does not affect Mr F's complaint as his SIPP was set up after May 2012.

I've considered whether these judgments mean that the Principles should not be taken into account in deciding this case. And I am 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) of 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 F'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 in Mr F's complaint. The breaches were summarised in paragraph 120 of the Court of Appeal judgment. In particular, HHJ Dight considered the contractual relationship between the parties in the context of Mr Adams' pleaded breaches of COBS 2.1.1R that happened after the contract was entered into. In Mr F's complaint, I am considering whether 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 F.

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

To be clear, I have proceeded on the understanding that Options was not obliged – and not able – to give advice to Mr F on the suitability of its SIPP or the Store First investment for him personally. But I am satisfied 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.*"

S27/28 FSMA

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 'cash back' 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.

The regulatory publications

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 October 2013 finalised SIPP operator guidance.
- The July 2014 *"Dear CEO"* letter.

The 2009 Thematic Review Report

The 2009 report included the following statement:

"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses ('a firm must pay due regard to the interests of its 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 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 FCA states:

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

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

The October 2013 finalised SIPP operator guidance also set out the following:

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

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

- *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for unauthorised 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 October 2013 finalised SIPP operator guidance said:

“Due diligence

Principle 2 of the FCA’s Principles for Businesses requires all firms to conduct their business with due skill, care and diligence. All firms should ensure that they conduct and retain appropriate and sufficient due diligence (for example, checking and monitoring introducers *as well as assessing that investments are appropriate for personal pension schemes) to help them justify their business decisions. In doing this SIPP operators should consider:*

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

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

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

    - *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 reports 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 regulators expectations of what SIPP operators should be doing, also goes some way to indicate what I consider amounts to good industry practice and I am, therefore, satisfied it is appropriate to take them into account.

It is relevant that when deciding what amounted to have been good industry practice in the BBSAL case, the Ombudsman found that *“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 the approach taken by the Ombudsman.

Like the Ombudsman in the BBSAL case, I do not think the fact the publications, (other than the 2009 Thematic Review Report), post-date the events that took place in relation to Mr F’s complaint, mean that 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 the Principles.

It is also clear from the text of the 2009 and 2012 reports (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 thematic review, 2013 SIPP operator guidance and 2014 *“Dear CEO”* letter to be of relevance to his consideration of Mr Adams’ claim. But it does not follow that those publications are irrelevant to my consideration of what is fair and reasonable in the circumstances of this complaint. I am required to take into account good industry practice at the relevant time. And, as mentioned, the publications indicate what I consider amounts to good industry practice at the relevant time.

That doesn’t mean that, in considering what is fair and reasonable, I will only consider 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 do not say the Principles or the publications obliged Options to ensure the pension transfer was suitable for Mr F. It is accepted Options was not required to give advice to Mr F 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 am 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 is 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 am 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 am satisfied that, in order to meet the appropriate standards of good industry practice and the obligations set by the regulator's rules and regulations, 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 lists"* 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

At the relevant time, the FSA list featured warnings ('alerts') about unauthorised individuals and businesses. 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 warning list as part of its due diligence on CL&P. Had it carried out these checks before accepting business from CL&P it would have discovered that CL&P's director Terence Wright was on the FSA warning list.

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. 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*." 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 F'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.

In the event, Options did not check the FSA's list. It used the World Check service. And it did not check Mr Wright until 15 May 2012. It only ran checks on a Ms Adams and a Mr Lloyd, around a month into its relationship with CL&P (on 20 September 2011). I understand that these individuals were only employees of CL&P and neither controlled nor managed CL&P.

I note that, in submissions on other complaints, in relation to the warning, Options says the FSA notice relating to Mr Wright was not entered onto World Check (the checking service it used) until 24 October 2011 - after it had carried out its checks on Ms Adams and Mr Lloyd and after it had started accepting business from CL&P. And so, if it had run a check on Mr Wright at the outset, this would not have revealed his entry on the FSA's warning list. In the same submissions Options says that it was under no obligation to check the FSA's list itself.

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, checking the warnings posted on the FSA's website is something that Options should have done as a matter of course. I consider this amounts to good industry practice and, in my view, 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.

So, if I accept that use of the World Check service to check Mr Wright at the outset would not have revealed his entry on the list, this does not change my view. Options should have checked the FSA's list. The fact that Options chose to use a tool and the tool may have missed something doesn't mean it shouldn't be held responsible – for the reasons given, it should have checked the list itself.

To my mind, the fact that Options decided to delegate responsibility for undertaking the necessary checks to the World Check tool. And the relevant FSA warning had not been entered onto that tool until some considerable time after the warning appeared on the FSA list and therefore, even if it had entered the right name (which it didn't), it would not have picked up the warning in any event, is irrelevant to my finding that Options failed to undertake sufficient due diligence on CL&P and missed the fact that Mr Wright was subject to an FSA alert.

Had Options ascertained who the directors of CL&P were at the outset of the relationship with CL&P and checked the FSA's list then (or at least at the point it did become aware Mr Wright was a director of CL&P), it would have discovered that Mr Wright was the subject of the following alert:

"ALERT

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"

Cash incentives

On 9 December 2011, before it received Mr F's application and/or his money for investment in Store First, 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.

Further, whilst Options received Mr F's application in March 2012, due to him not completing the form correctly, the application wasn't finalised and accepted until much later. The SIPP was not finalised until June 2012. Options had emailed Mr F on 12 June saying that it had been unable to fully establish his SIPP until it received the completed declaration page included in the application. It said once it received this it could fully establish the SIPP on its system. And it was only on 21 June 2012 that Options confirmed to Mr F that his personal pension transfer had been received into the SIPP scheme bank account. The amount being £40,609.53 - £32,000 of which had been invested in the Store First investments in July 2012.

As noted above, prior to this, on 25 May 2012, Options had made the decision to terminate its agreement with CL&P, with the Options' Head of Service and Operations telling CL&P of its (Options') decision to do so in an email that said:

"*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."

So, with these concerns in mind, which were sufficient enough for Options to cut ties with the introducer, I consider it was not fair nor reasonable for Options to continue to process Mr F's application knowing that it had cut ties with CL&P and the reasons why it had done so. It clearly had concerns over CL&P's integrity and no longer wanted to accept business from it.

Options had, in fact, not proceeded with a client's case as a result of its findings about inducements being offered by CL&P to clients and I see no reason why it could not have done the same in Mr F's case given his SIPP application had not been completed. But it still proceeded with Mr F's transfer despite knowing these facts before the SIPP had been fully established and before the transfer of his pension funds had been received from his previous pension provider.

Mr F has said that if he had known of the situation with Options no longer wanting to do business with CL&P due to its concerns, he would not have proceeded. He confirmed he had been offered £1,000 to transfer but had not received this cash from CL&P or any other party. So, as I've said, in the circumstances I do not think it was fair and reasonable for Options to proceed with Mr F's application.

Accounts

Based on the available evidence, it appears a request for CL&P's accounts was not made by Options 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 warning 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 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, a warning 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."*

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 alerts, 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.

Options adds that the 2010 alert does not detail any concern by the regulator about Mr Wright. 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 warning 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 opinion, CL&P's director Terence 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 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 not correct.

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 (that is to say the investment had not been made).

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 F's money for investment in Store First. Or in his case, set up the SIPP in the first place.

Finally, I think if checks on CL&P's accounts had been attempted earlier, the fact that CL&P were 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 a further factor which ought to have led Options to question whether it should enter into, or to continue with 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 – individually and cumulatively – I think in the circumstances it is 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 that it should not accept business from CL&P. I therefore conclude that it is fair and reasonable in the circumstances to say that Options should not have accepted Mr F's application from CL&P.

Furthermore, had Options complied with its regulatory obligations - which required it to consider and act on information received about the conduct of CL&P before continuing to accept business from it – it should, in any event, have concluded it should not proceed with Mr F's application, given everything I say above about the issue of cash incentives.

Investment due diligence

As I've explained above, Options should neither have accepted Mr F'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. Nevertheless, given the submissions that Options has previously made about its due diligence on Store First, and the regulatory obligations and good industry practice I have set out above, I've also considered the due diligence that Options carried out on the investment. I have taken the same approach to considering this as I did to considering the due diligence undertaken on CL&P.

The actions Options took are set out in detail in the background sections above, so I will not repeat them here. I think some of the actions Options took were in-line with good practice at the relevant time when carrying out its due diligence on Store First. However, I think Options failed to take *all* the actions that were required of it in order to comply with its regulatory obligations and good practice. And, based on what it knew, it failed to draw a reasonable conclusion on accepting the investment. I do not think Options' actions went far enough, and I think it ought to have carried out further enquiries in the light of what was revealed by the due diligence it did carry out.

I note the company searches were carried out using a service called Company Searches. This was good practice but consistent with its regulatory obligations, Options should not only have carried out the searches but also given careful consideration to what they revealed.

The searches were carried out on the promoter of Store First, Harley Scott Holdings Ltd, not Store First itself – perhaps because at that point Store First was just being established. The result of the searches reported that Harley Scott Holdings Ltd had a website address *"dylanharvey.com",* and had changed its name three times having previously been called Dylan Harvey Group Ltd, Dylan Harvey Ltd and Grangemate Ltd. The report also said County Court Judgments ("CCJs") were recorded against the business and that auditors had made adverse comments in the previous three reporting years.

It's not clear what consideration Options gave to this report, after it obtained it. But, in my view, it would have been fair and reasonable for it to have conducted some further basic searches, given there were factors in the report which ought to have been of concern – namely the adverse comments for the previous three years, the CCJs, and the fact the business had recently changed its name.

Had such basic searches been completed I think it likely they would have revealed that, at the time, Dylan Harvey and one of its directors, Toby Whittaker, were the subject of a national press reports, online petitions and proposed legal action, as a result of a failed property investment. It was reported that hundreds of investors had invested money in a scheme to develop flats, but the flats had not been built and the investors had been unable to recover their money. Those investors were behind the online petitions and proposed legal action.

Options says it obtained copies of Store First's marketing material. It has provided us with copies of this. Again, I accept that potentially this was good practice. In order to correctly understand the nature of the investment, I think it's fair and reasonable to say Options should have reviewed how Store First was marketed to investors – particularly as it was proceeding on the basis that these investments were being made by consumers without regulated advice being provided. Clearly Options thought it was important to look at this material at the time too.

But, again, consistent with its regulatory obligations, Options should not only have obtained the material but should have given careful consideration to it.

The marketing material included the following prominent statements:

"You will receive guaranteed returns from a 6 year lease already in place upon completion, making this a high yielding, hassle-free investment which has been specifically designed to meet the needs of todays astute investor."

“You will receive a 6 year lease in place upon completion. The lease produces an excellent return of 8% (guaranteed for the first 2 years) rising to over 12% in years 5 and 6. The lease contains upward-only rental reviews and break clauses for both parties every two years.”

“Guaranteed exit route option.”

It then goes on to set out in a table the returns payable in years 1&2, 3&4 and 5&6 at 8%, 10% and 12%. In the question and answer section the following is included:

“What rental income can I expect?

Storepod rental starts at £17 per Sq/Ft per annum. The 6 year tenancy/lease in place on your Storepod has fixed upwards only rental reviews and break clauses (for both parties) every 2 years. This produces an 8% yield on your investment within the first two years, this then is predicted to rise to over 10% return in years 3&4 and then surpass 12% return in years 5&6.

Can I easily re-sell my Storepod?

Yes. You can re-sell your Storepod at any time and selling your Storepod couldn’t be simpler. Store First Ltd can market your Storepod upon your request. We believe that because Storepods are so competitively priced when new, they will make a very attractive sale proposition in the future. We also expect that many tenants will wish to purchase the Storepod they are using. For example, other self storage PLCs usually achieve rent of between £20.00 - £25.00 per square foot. Our Storepods are costed at a rent of only £17.00 per square foot; once higher rents are achieved the capital value of the Storepod will increase.

Guaranteed exit route?

In year 5, investors have the option to enter the guaranteed buy-back scheme. In this scheme, Store First Management Ltd will guarantee to buy the Storepod back off the investor for the original price paid within the next 5 years. This is a unique offer in the market place and we are happy to be able to offer this exit route to our investors.

Most investors are driven to keep the property investment they have purchased and carry on receiving the rental yield produced for years to come, this means only a very limited number of Storepods per centre will ever come onto the resale market, this creates a high sale value and demand for the future”.

The material says the “*figures shown are for illustration purposes*”. But it does not contain any type of risk warning, or illustrations of any other returns. No explanation of the guarantees was offered, or the basis of the projected returns – other than Store First’s own confidence in its business model and the self-storage marketplace.

I note Options considered a report by Enhanced Support Solutions (‘ESS’). In my view this was of limited value. It was cursory and based only on some of the material Options had regard to i.e. the marketing material and lease documents. As a result, I think Options should have found it difficult to reconcile the view reached by ESS with the information available to it. The report said:

“The following parties are involved in this investment: Seller of the sub-lease: Store First Limited

UK Promoter: Harley Scott Holdings Limited

No adverse history has been found affecting these parties. A CCJ was issued against the promoter of the scheme however we understand this arose from a disputed invoice which is in the course of being settled. This is any event does not directly impact on the investment".

This conclusion is inconsistent with the result of Options' own company searches. The report also makes no comment on the obvious issues with the marketing material. So, I don't think Options could have taken any comfort from the ESS report or attached any significant weight to it.

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

The failure of the previous scheme which Dylan Harley/Harley Scott Holdings had been involved in may have been entirely down to market forces. But I think the fact that the company which had approached Options about Store First – and on which Options had conducted searches – had recently been involved in a property investment scheme which had failed, had recently changed its name, and had been subject to a number of adverse comments in succession, following audit, ought to have given Options significant cause for concern. Particularly when it considered the marketing material for Store First.

In my view there were a number of things about the marketing material which ought to have given Options significant cause for concern and to have led it to have drawn similar conclusions to those later drawn by SSA UK (on the basis of a report by Deloitte LLP) and the Insolvency Service. Namely, that there was a significant risk that potential investors were being misled.

I think, as it had regard to this material, Options could not overlook the fact that Store First appeared to be presenting the investment as one that was assured to provide high and rising returns, was underwritten by guarantees, and offered a high level of liquidity together with a strong prospect of a capital return - despite the fact that there was no investor protection associated with the investment and that, in Options' own words, there was no apparent established market for the investment and the investment was potentially illiquid.

Store First had no proven track record for investors and so Options couldn't be certain that the investment operated as claimed. Options should also have been concerned about a guarantee offered by a new business with no track record (and promoted by a business with a questionable one).

I think, in light of this, Options should have been concerned that consumers may have been misled or did not properly understand the investment they intended to make. Consumers could easily have been given the impression, from the marketing material, that they were assured of high returns with little or no risk and would easily be able to sell their investment when they wished to. Such an impression was clearly misleading.

I also think all of this should have been considered alongside the fact the investment was being sold by an unregulated business, which was clearly targeting pension investors. In my opinion it is fair and reasonable that Options ought to have concluded there was an obvious risk of consumer detriment.

All in all, I am satisfied that Options ought to have had a significant cause for concern about the nature of the Store First investment from the beginning. And I think these concerns, in themselves, should have at the very least led it to be very cautious about accepting Store First and to think very carefully about the basis on which it should be accepted, mindful of its obligation to prevent consumer detriment. So this should have been at the forefront of its mind when considering whether to accept applications from CL&P.

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

Options has said that it was reasonable to proceed in the light of the indemnity, and that it was obliged to proceed in accordance with COBS 11.2.19R.

COBS 11.2.19R

I note that Options has not specifically made the point about COBS 11.2.19R which it has said on other occasions meant it was obliged it to execute investment instructions made by clients who completed its SIPP applications.

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.'

I therefore don't think that Options' could have decided whether or not to accept an application to open a SIPP in the first place and/or to execute the instruction to make the Store First investment i.e. to proceed with the application.

The declaration

I have not seen a copy of the 'indemnity' that other clients of Options had signed when dealing with introductions from CL&P. But Options did have a declaration in the SIPP application which effectively confirmed that Mr F 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 report 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 F's application even though he had signed the declaration after he was prompted to when he failed to do so the first time. Whilst I have not seen a signed copy, given Options would not go ahead without Mr F signing its declaration in its application form, parts of which I've quoted above, I think it's more likely than not that he did sign the declaration as part of his application. There was no evidence of any other regulated party (other than Options) being involved in this transaction. In these circumstances I think very little comfort could have been taken from the declaration stating that Mr F had taken his own advice and understood the risks (in relation to the investment).

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 F fairly by asking him to sign a declaration absolving Options of all responsibility, and relying on such a declaration, when it ought to have known that Mr F'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 F 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 F'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, in my opinion, 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 F. I accept Options had no obligation to give advice to Mr F, or otherwise ensure the suitability of a pension product or investment for him. My finding is not that Options should have concluded that the investment or SIPP was not suitable for Mr F. Rather, Options was able to accept or reject applications for business and I say that it should have rejected Mr F's application for a SIPP introduced by CL&P, and failing that, for the reasons I set out above, it should not have accepted his request to invest in Store First.

s27 and s28 FSMA

As set out in the relevant considerations section above, I have also considered the application of s27 and s28 FSMA. I have set out the key sections of s27 and s28 above and have considered 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 were 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 *"arrangements which do not or would not bring about the transaction to which the arrangements relate"*

I have 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 F was contacted by CL&P and his evidence is that CL&P advised him to transfer out of his existing personal pension, into the Options SIPP and invest in Store First. I think that evidence is plausible, and credible. I do not think Mr F thought of taking this course of action of his own volition or would have done so without a positive recommendation from CL&P which, he says, gave him various assurances about the risks involved and 'guaranteed' higher performance returns. I also note it was CL&P which contacted Mr F – he did not find CL&P in the course of looking for alternative pension options.

To confirm, I am satisfied CL&P advised Mr F 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.

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 F's case, at the outset he gave Options permission to liaise directly with CL&P Brokers in respect of all matters regarding his pension arrangements. And it seems the application form was pre-populated by CL&P.

So the steps which CL&P took can fairly be said to have been such as to *"bring about"* the transfer from Mr F's existing personal pension into the Options SIPP – they had sufficient causal potency to satisfy the requirements of article 26 of the RAO.

I am therefore 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 F 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 F, advised him to transfer his existing personal 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 Mr F would not have entered into an agreement with Options.

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

Having carefully considered this, I am satisfied a Court would *not* conclude it is just and equitable for the agreement between Mr F 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, 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.
- 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 am satisfied s27 FSMA offers a further and alternative basis on which it would be fair and reasonable to conclude Mr F'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 F?

In deciding whether Options is responsible for any losses that Mr F 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 F' 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 am 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 F signed the declaration 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 F 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 F's application.

Had Options acted fairly and reasonably it should have concluded that it should not accept Mr F's application to open a SIPP. That should have been the end of the matter – it should have told him that it could not accept the business. And I am satisfied, if that had happened, the arrangement for Mr F would not have come about in the first place, and the loss he suffered could have been avoided. The financial loss has flowed from Mr F transferring out of his existing pension 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 F could suffer financial detriment.

Had Options explained to Mr F why it would not accept the application from CL&P or was terminating the transaction, I find it very unlikely that he would have tried to find another SIPP operator to accept the business.

So I'm satisfied that Mr F 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 the reasons I've set out, I'm satisfied that it would not be fair to say Mr F's actions mean he should bear the loss arising as a result of Options' failings. I do not say Options should not have accepted the application because the investment was high risk. I acknowledge Mr F 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.

Furthermore, as set out above, I am satisfied there is a legal basis on which Mr F is entitled to compensation, by virtue of s27 FSMA.

So, I am satisfied in the circumstances, for all the reasons given, that it is fair and reasonable to conclude that Options should compensate Mr F for the loss he has suffered. I am 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 F's right to fair compensation from Options for the full amount of his loss.

Putting things right

My aim is to return Mr F to the position he would now be in but for what I consider to be Options' failure to carry out adequate due diligence checks before accepting Mr F's SIPP application from CL&P or for not terminating the transaction before completion.

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

1. Calculate the loss Mr F has suffered as a result of making the transfer.
2. Take ownership of the Store First investment if possible.
3. Pay compensation for the loss into Mr F's pension. If that is not possible pay compensation for the loss to Mr F direct. In either case the payment should take into account necessary adjustments set out below.
4. Pay £500 for the distress and inconvenience caused.

I'll explain how Options should carry out the calculation set out in steps 1-4 below:

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

To do this, Options should work out the likely value of Mr F's pension as at the date of this decision, had he left it where it was instead of transferring to the SIPP. Options should ask Mr F's former pension provider to calculate the current notional transfer value had he not transferred his pension. If there are any difficulties in obtaining a notional valuation then the FTSE UK Private Investors Income ***Total Return*** index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) should be used to calculate the value. That is likely to be a reasonable proxy for the type of return that could have been achieved if suitable funds had been chosen.

The notional transfer value should be compared to the transfer value of the SIPP at the date of this decision and this will show the loss Mr F has suffered. The Store First investment should be assumed to have no value.

2. *Take ownership of the Store First investments*

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 F has the option of returning his Store First investment to the freeholder for nil consideration. That should enable him to close his SIPP, if Options does not take ownership of the Store First investment.

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

3. *Pay compensation to Mr F for loss he has suffered calculated in step 1 above.*

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

On the other hand, Mr F may not be able to pay the compensation into a pension. If so compensation for the loss should be paid to Mr F direct. But had it been possible to pay the compensation into the pension, it would have provided a taxable income. Therefore, the compensation for the loss paid to Mr F should be reduced to notionally allow for any income tax that would otherwise have been paid. If Mr F has remaining tax-free cash entitlement, 25% of the loss would be tax-free and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%**.** So making a notional reduction of 15% overall from the loss adequately reflects this.

4. *Pay £500 for the distress and inconvenience caused.*

Mr F has been caused considerable distress and inconvenience by the total loss of his pension benefits. This is money Mr F cannot afford to lose and its loss has caused him distress and inconvenience. I consider that a payment of £500 is appropriate to compensate for that.

interest

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

Income tax may be payable on any interest paid. If Options deducts income tax from the interest, it should tell Mr F how much has been taken off. And Options should also then give Mr F a tax deduction certificate in respect of interest if Mr F asks for one.

My final decision

For the reasons given, my decision is that I uphold Mr F’s complaint. Options UK Personal Pensions LLP must calculate and pay compensation as set out above under ‘Putting things right’.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr F to accept or reject my decision before 8 January 2024.

Yolande Mcleod
Ombudsman