DRN-4514253

The complaint

Mr H complains that Options UK Personal Pensions LLP ("Options" - formerly Carey Pensions) accepted his investment into a self-invested personal pension (SIPP) when, he says, it shouldn't have accepted business from the business who introduced him to Options; Jackson Francis Ltd ("JF"), nor accepted the investment JF advised him to make. Mr H transferred two personal pensions into the Options SIPP in May 2012 and invested in Store First.

Mr H wants to be put back into the position he would have been in had Options not accepted his SIPP application.

The parties

Given the various parties involved in Mr H's pension transfer and subsequent investment I've set out a summary of each below.

Options

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

Jackson Francis Ltd ("JF")

JF was an unregulated business. It appears to have been involved in the promotion of Store First investments. The Companies House record indicates it was placed in liquidation on 11 September 2014. It is recorded that it previously had two Directors: Mr F (until 31 December 2011) and Mr C (from 1 January 2012).

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 ("pods") 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 scheme was promoted by a company called Harley Scott Holdings Ltd ("Harley Scott"). Mr T was a Director of Store First Limited and Harley Scott Holdings Limited.

Mr C was a Director of Harley Scott Sales and Marketing Limited from 21 April 2011.

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"), the judge found the value of Mr Adams' Store First 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 referred to a number of misleading and inaccurate statements made by Store First in its marketing material. It also made 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."

Store First was the subject of a winding up petition issued by the Business Secretary in 2017. 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."

A company called Pay Store now manages the Store First sites and rents out the storage units, trading as Store First. The freeholds of each Store First site have been sold by the Official Receiver to a company called Store First Freeholds Limited. As a result of this, investors have been offered the opportunity to transfer their investment to this company, for nil consideration.

What happened - Mr H's dealings with Jackson Francis, Store First and Options

Mr H has explained that he was 'cold-called' by a representative of JF who offered him a "*free pension review*". Mr H believed that JF was a firm of financial advisors and he understood he was being advised about transferring his pension and making the investment. He understood, based on what JF told him, that his pension monies would perform better with Store First. So, Mr H agreed to transfer out of his existing personal pension plans, open an Options SIPP and invest his funds in Store First.

In March 2012 Mr H signed an Options' SIPP application form for 'direct clients'. On page 12 of the application form Mr H signed a declaration which included, amongst other statements, the following:

"*I agree to indemnify Carey Pensions UK LLP 'The Administrator' and Carey Pension Trustees UK 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 Carey Pensions UK LLP and Carey Pensions Trustees UK Ltd are not in anyway (sic) able to provide me with advice;*"

This application form was, as I understand matters, sent to Options by JF, and Mr H also signed a letter of authority telling Options; "*I hereby give you permission to liaise with Jackson Francis Ltd in respect of my pension transfer*". The papers I've seen suggest JF also arranged for a courier to collect Mr H's identification documents from him.

JF also supplied Options with an "*Alternative Investment – Store First Member Declaration and Indemnity*" which Mr H had signed. This document had a table at the start which detailed the member's name, address, scheme name, investment name and type. In the space for 'Adviser', "*Jackson Francis*" was written. And Mr H's signature was witnessed by a member of JF's staff. The document read:

> "*I,* [Mr H] *being the member of the above Scheme instruct Carey Pension Trustees UK Ltd to Purchase a Leasehold Storage Unit(s) in the Store First investment through Harley-Scott Holdings Ltd for a consideration of £29,250 on my behalf for the above Scheme.*
>
> *I am fully aware that this investment is an Alternative Investment and as such is High Risk and / or Speculative.*
>
> *As the Member of the Pension Scheme, I confirm that neither I nor any person connected to me is receiving a monetary or other inducement for transacting this investment.*
>
> *I confirm that I have read and understand the documentation regarding this investment and have taken my own advice, including financial, investment and tax advice.*
>
> *I am fully aware that both Carey Pensions UK LLP and Carey Pension Trustees UK Ltd act on an Execution Only Basis and confirm that neither Carey Pensions UK LLP nor Carey Pension Trustees UK Ltd have provided any advice whatsoever in respect of this investment.*
>
> *I confirm that my business /occupation is <u>not</u> renting out storage units.*
>
> *Should any aspect of this investment be deemed by HMRC to provide Taxable Moveable Property and / or any tax charges be deemed by HMRC to apply in future these will be paid directly from the fund or by me as the member of the Scheme.*
>
> *I also understand and agree that, in the event of my demise, if Carey Pension Trustees UK Ltd is unable to sell the asset within HMRC timescales that it may be transferred to my beneficiaries through my estate and accordingly may be subject to any Inheritance Tax.*
>
> *I instruct Carey Pensions to appoint the following solicitor to act on behalf of the Scheme:*
>
> [details of solicitor]
>
> *I confirm that I agree to* [name of solicitor] *fee of £400 + VAT for transacting this investment.*
>
> *I confirm I am fully aware that additional costs will be incurred in this transaction including, but not limited to:*

£48 CHAPs Fee;

£8 Land Registry Search Fee;

Stamp Duty Land Tax - To be advised by Solicitor at completion;

Any other taxes - To be advised by Solicitor at completion;

I agree to Carey Pensions Fee of £500 + VAT, amounting for transacting this investment.

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

In this decision I will refer to this document as 'the indemnity'.

Mr H's SIPP was established on 30 April 2012 and shortly afterwards Options received around £33,000 from Mr H's existing pension plan providers.

In July 2012 approximately £29,250 of Mr H's funds were invested into Store First.

Options has told us that on 6 May 2015 it wrote to Mr H with his Annual Valuation and this informed him that his Store First Investment was, at that point, valued at 50% of the original purchase price.

What happened – Options, Store First Limited, and Jackson Francis

I've set out the background to Mr H's complaint and his dealings with JF, Store First and Options above. But alongside those events it's important to understand the underlying relationship between the businesses involved.

Options has said it received introductions from JF between March 2012 and September 2012 and it accepted 41 introductions from its clients in total (although in other information received by the Financial Ombudsman this figure has been given as 81). Options confirmed that all the introductions from JF were so that investments could be made in Store First. Options would seem to say in its submission to this service that, although it did monitor introductions from JF, that didn't include monitoring them so that it could identify potentially unsuitable SIPPs.

The available evidence shows the following actions were taken by Options in relation to the Store First investment and its relationship with JF, at the dates mentioned. Some of these actions were taken before Options sent Mr H's money to Store First for investment.

On **3 May 2011** Options was contacted by a promoter of Store First, Harley Scott, about a newly launched product – Store First. In the *Adams* judgment HHJ Dight described this email like so:

> "*The first contact between the defendant and Store First, which appears to have led to the decision that the investment was a legitimate one having regard to HMRC guidelines, was in an email dated 3 May 2011 from* [Mr C]*, Network Sales Director, of Harley Scott Holdings Limited …*"

Options agreed to put the investment 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 said it would 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 a report produced by Enhanced Support Solutions (ESS) about the Store First investment in March 2011).

It has provided us with copies of these documents.

In the letter confirming its acceptance of the investment, Options noted:

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

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.

On **9 January 2012** Mr F, on behalf of JF, completed Options' 'Non-regulated Introducer Profile'. An introductory paragraph at the head of the form read:

> "*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. We therefore request that you or the appropriate individual in your firm complete and sign this Profile questionnaire and our Terms of Business Agreement as part of our internal compliance requirements.*"

Mr F gave some basic company information such as its contact details (the firm's address was given as one in Liverpool), gave only his own name in the space for "Company Directors/Partners" and said the firm had been trading for less than a year. He completed the rest of the form like so:

Product Information	
What products does the firm promote/ distribute?	*Stakeholder pensions, SIPPs, Store First*
Have these products been accepted by the Carey Pension Scheme?	*Yes*
Have these products been accepted by any other SIPP providers if yes who?	*Yes*
Have any of the products been declined by any pension scheme operators?	*No*
Sales and Marketing Approach	
How do the Firm and/or agents obtain clients?	*We purchase leads from various lead generation companies*
Describe the sales process adopted by the Firm/its Agents	*Information*
Describe the average profile of the type of clients you take on, i.e. Age, Income group, Employed/self-employed/unemployed	*We have a very large profile. Average client is between 35-55, employed/self employed – pension is between £20,000 - 300,000*
How much of your business is sold through pension arrangements?	*90% Pension* *10% Non-pension*
Where commission is taken, what is the typical commission structure?	*We do not pay commission*
How else does the firm generate fees?	*From product*
Training and Information	
What training is provided to the agents within the Firm?	*None- No Agents*
Specifically what Pensions Training is delivered to the agents of the Firm?	-
How is business produced by the agents monitored?	-
Specifically, what sort of service or support does the firm look for from a SIPP provider	*Administration and to facilitate a pension transfer*
Legal and Regulatory Information	
Does the Firm work with any FSA regulated company or adviser? If yes, provide details.	*Yes*

Is the Firm a member of any Professional or Industry body? If yes, provide details.	*No*
What measures are in place to ensure the Firm engage legal advice on the activities it carries out to ensure regulated activities are not carried out?	*Disclaimers are set in place for the client to sign agreeing that no advice has been given*
Please provide details of the PII cover the Firm has in place, including the level of cover, the excess and any restrictions on cover.	*None*
Have you/or the Firm been subject to any FSA supervisory visits, thematic reviews or any other regulatory action in the last two years? If yes, what was the outcome?	*No*
Are you and/or the Firm subject to any ongoing FSA or other regulatory body review, action or censure? If so, please give details.	*No*
How does the Firm demonstrate it is treating customers fairly?	*Strict Adherence to* [illegible] *6 of* [Treating Customers Fairly] *guidelines*
Has the Firm been subject to any complaints in the last five years?	*No*
What are the Firm's business objectives for the coming 12 months?	*To grow in size*
What is the Firm looking to achieve with regards to a member directed pension scheme business?	*To help clients improve their current pension fund*
Does the Firm have a Bribery Act Policy?	*No*

By signing this form Mr F indemnified Options and also agreed to the following statement:

> "*I also acknowledge and accept that Carey Pensions UK will undertake any enquiries about the firm and its Directors/Partners it feels appropriate.*"

The 'Non-regulated Introducer Profile' appears to have been sent to Options via email on 11 January 2012 by an individual I'll refer to as Mr W.

Around this time Mr F also completed an Options form titled "Independent Financial Adviser Introducer Profile" (the IFA Profile). A handwritten note on the copy provided to us by Options reads:

> "*9/1/12 Completed in error but can be used for additional info as necessary*"

On the IFA profile Mr F gave a second address for JF, one in Manchester. He also said the firm had been incorporated since September 2011 and named Mr W as both the firm's 'Compliance Officer' and 'Money Laundering Officer'. The rest of the answers entered on the form, in summary, explained the following:

- There were no IFAs in the firm, no advice was given; clients were given information and then made their own decisions or were referred to IFAs

- JF had established 150 pensions in the last 12 months, and 90% of the firm's overall business was related to pensions

- All pension transfers were "signed off by compliance", and Mr F monitored pension transfers for JF

- A TVAS report was undertaken for all occupational transfers

- It would be the client's decision to proceed on an execution only basis

- The typical investment strategy used within a pension scheme would involve Commercial Property and Alternative Investments

- What JF wanted from Options was "*efficiency and quick turnaround times*".

Finally, in answer to the question, "*Is there a T & C in place for all advisers?*", Mr F wrote:

> "*We do not give advice, but we have disclaimers in place*".

A handwritten note undated but included with the copies of these forms provided by Options noted the Manchester address to be "*Same as other business addresses*". Whether this was noted in January 2012 or later when a second 'Non-regulated Introducer Profile' was completed (August 2012 – see below) is not clear.

Options has provided us with an undated document titled "*SIPP Guidance Notes 2012 – For Jackson Francis*". At the end of the document it reads, "*Produced by Carey Pensions as an aide memoire to non-advised introducers setting out guidelines to be followed*". I've reproduced what I consider to be the most relevant parts of this document below.

> "***Points for Jackson Francis Properties to note.***
>
> - *SIPPs can receive transfers from any approved registered pension scheme, however if it is an occupational pension then independent advice must be given to an individual by a regulated financial adviser. If the individual has already purchased an annuity then this cannot be transferred.*
>
> - *It is generally considered that any value below £25,000 would be too small to justify a SIPP due to the cost of the SIPP fees.*
>
> - *The purpose of a SIPP is to provide retirement benefits and therefore putting the whole pension into one investment is not considered sensible in most cases.*
>
> - *Alternative Investments and Unregulated Collective Investment Schemes are being investigated by the FSA who are taking a big interest in the promoters and advisers of such schemes.*

- *It would generally be considered wise for clients to receive independent advice before taking a decision to transfer their pension arrangement and Jackson Francis may want to consider aligning themselves with an IFA who could provide this for them.*

- *Generally speaking it is questionable if individuals close to retirement should consider transfer of their pension arrangements and investment into an investment that is generally considered high risk. Therefore age 55 plus would be unwise to target unless there was a substantial transfer and the individuals were considered to be sophisticated investors.*

- *Personally the ideal target for Jackson Francis would be age range 35 to 55 years where there is already a reasonably large pot in a personal pension scheme of say £50k plus.*

- *Avoid individuals on benefits and who have health problems*."

Later in **January 2012** Ms H exchanged emails with Mr W, who at this point appears to have been working for Harley Scott – using an email address ending harley-scott.co.uk – about "*pipeline cases*"; Mr W said he had "*14 cases signed up so far just awaiting transfer packs*" and undertook to send Options a weekly update on the total number of applications.

An example 'weekly update' was sent to Options by JF on 17 February 2012. It explained that five cases had been forwarded to Options in the post and provided notes on each one such as:

> "*Letter of Authority sent to provider, awaiting reply with regard to transfer paperwork*."

In **March 2012** Options raised concerns with Mr W (copying in JF to the email) about the "*lack of information provided in the Application Forms*". The email went on to say Options had received ID documents for some applicants, but no corresponding application forms. Mr F for JF undertook to rectify the problem of incomplete applications.

On **3 April 2012** Options emailed JF chasing previously requested (on 23 March 2012) "*compliance documentation*" including JF's latest set of accounts, certified passports for each Director, and a completed Terms of Business.

In **May 2012** Options spoke with a regulated financial advice firm now working with JF – Business S. Business S told Options it was involved in the process with JF by obtaining fact finds from clients, preparing TVAS and suitability reports, completing SIPP application packs, and sending documentation to clients for them to sign and confirm the transfer. Its involvement appears to have been intended for new applications going forwards.

The High Court *Adams* judgment refers to an internal Options email of **20 May 2012**, referring to a conversation between Options and Store First about the levels of commission that were generally paid to brokers. Store First had told Options it believed another (unrelated to this case) introducing broker's commission to be 12%.

An internal Options email in **June 2012** providing an "Update as of 31.5.2012" highlighted some concerns about JF. It read:

> "*Jackson Francis – no TOB – no AML certified docs – no accounts filed. Question mark over emails ...*"

The emails about which Options had questions appear to have included an email from another consumer (not Mr H) in May 2012 which, in reply to Options confirming that it would be actioning transfers from the consumer's existing pensions, read:

> "*Hi, Are you still putting my money in the store company with 10% return?*"

On **10 June 2012** Options emailed JF (copying in Mr W) chasing the signed Terms of Business. The email said:

> "*As previously requested, please could I ask for the attached Terms of Business be (sic) signed and returned as a matter of urgency for our Compliance Audit taking place this week. We require this signed document on file in order for us to be able to accept further business introduced from Jackson Francis.*"

An internal Options email dated **13 June 2012** highlighted that "*AML certified docs from the Directors and copy of accounts*" were also outstanding. The email closed:

> "*This is not the first time of requesting so they may get it all together in one bundle this time to get us off their backs!*"

An internal Options email from **24 July 2012** explained that another SIPP provider had been in touch about JF and had told Options that JF had been reported to the FSA "*for giving advice – an allegation Jackson Francis deny*". It said the other SIPP provider had ceased accepting business from JF "*until such time as they can provide confirmation from the FSA that they have a 'clean bill of health'*". The email went on, "*In light of this information we may wish to consider our position with accepting business from Jackson Francis …*"

On **1 August 2012** Options completed a company search on JF. This, alongside a 'World Check' (a risk intelligence tool which allows subscribers to conduct background checks on businesses and individuals), revealed that Mr C had been appointed a Director of JF on 1 January 2012 and had been a Director of Harley Scott Sales and Marketing Ltd since 21 April 2011. On the same date an Options internal email was sent which read:

> "*… During the course of compliance checks we ascertained that the ownership of Jackson Francis has changed. The company appears to be owned by a director/owner of Store First and there may be a potential for conflict of interest. Also as Jackson Francis are putting all clients into Store First the business may be driven solely by the investments …*
>
> *I will also be telling Jackson Francis that we will process business received with applications dated prior to 1 August but will have to suspend any further business until the revised and corrected profile completed by the new owner is received and has been accepted through our business take on process.*"

On **7 August 2012** Mr C completed and signed a 'Non-Regulated Introducer Profile'. He also signed an Options 'Non-regulated Introducer Terms of Business' agreement (the TOB). This set out the method of business or operation that would apply. Essentially it set out that Options would accept introductions on an execution-only (non- advised) basis from JF. And that Carey was entitled to refuse any business without giving reasons. The TOB included the following:

> "*Carey Pensions UK LLP will not accept Execution Only business from Introducers until a completed and signed Introducers Profile and Terms of Business are provided to them and accepted by them.*"

Under the heading "*Undertakings*" the first bullet point read:

> "*The Business Introducer undertakes that they will not provide advice as defined by the* [Financial Services and Markets Act 2000 "FSMA"] *in relation to the SIPP – for the avoidance of doubt this includes reference to advice on the selection of The SIPP Operator, contributions, transfer of benefits, taking benefits and HMRC rules; …*"

Mr C also provided a certified copy of his passport and a utility bill for the Manchester address previously given by Mr F in January 2012 as an address for JF.

15 August 2012 – a meeting between Store First and Options took place. Items on the agenda included "*Rental Income Process/Delays*", "*Sale Process/Delays*" and "*Agreed Actions*". No further details (such as minutes) of this meeting have been provided.

17 August 2012 – a member bulletin was sent to Options by an information service it subscribed to which included the following:

> "*Storefirst Limited*
>
> *We are aware of a web-based news article that mentions '*[Mr T's] *firm faces tax investigation' and goes on to reference notes made within the February 2011 accounts of Harley Scott Holdings. [The information service] has sought confirmation from* [Mr T] *on this and have been referred to [Store First's auditors] who [the information service] understands to be the Harley Scott accountants. [Store First's auditors] have supplied a letter to [the information service] to clarify the position regarding Store First, however as the letter is addressed to [the information service] we have been asked not to circulate the letter as [Store First's auditors] wish to control its distribution. [Store First's auditors] have agreed though to issue a similar letter addressed to individual SIPP operators/trustees upon request. We will leave it to our [the information service] clients to decide whether they require such a letter, however where a letter is required, the contact details for [Store First's auditors] are below and they are on notice they may receive requests from clients of [the information service]*."

17 August 2012 – Options suspended its acceptance of the investment "*because of concerns about the administration and system and controls of the investment provider*."

20 August 2012 – Store First's auditors sent a letter to Options, which included the following:

> "*We confirm that the tax enquiry referred to in the Harley Scott group of companies accounts to 28 February 2011 do not include either Group First Limited nor Store First Limited and furthermore, neither Group First Limited nor Store First Limited are currently under tax enquiry.*"

27 September 2012 – Store First provided Options with a list of "guaranteed rental" and "non- guaranteed rental" investors. Options has said it requested this list because:

> "*Following the monitoring of investors that held Store First, all of which we understood had applied for the investment as per the marketing material, the marketing material provided for a Title in a Leasehold property in the form of storage units with a 6 year leaseback and a guaranteed rental income. Despite the marketing material not providing any other option, we found that only a small proportion of Store*

First investors were receiving the rental income as expected and therefore we requested a list of all of our investors rental arrangements."

27 September 2012 – Options lifted its suspension on accepting Store First. An internal Options email of that date from Ms H, sent to the Carey Group CEO and other senior members of staff, confirms this. The email from Ms H included the following:

> "*My view is we can start again? As long as we have put the requisite processes and controls in place to be on their case should we not receive what we are expecting, also do we need to make our member declarations clearer re what option the clients have selected eg guaranteed and non-guaranteed to ensure there is no come back on us at a later date that they did not realise*."

27 September 2012 – A reply to the above email from the CEO of the wider Carey Group, which simply said "*I agree*" (to the suggestion in Ms H's email).

5 April 2013 – Options' technical review committee decides it will accept no further Store First investments. The note of this meeting refers to an FSA letter dated 11 January 2012 raising concerns about outstanding loans from Store First to Mr T. In previous submissions to us, Options has said:

> "*CPUK* [Options] *took this decision because, by April 2013, it had received a number of queries and concerns from its customers and other sources which CPUK considered had not been satisfactorily resolved by Store First. CPUK wanted to act quickly to protect its customers and therefore ceased administering investments into Store First*.

More recent events relating to Jackson Francis and its Director

In December 2015 the BBC reported that "*sales company Jackson Francis Ltd was paid through an intermediary by Store First to cold call people with "dormant pensions"*". The intermediary was Transeuro Worldwide Holdings Ltd.

In 2016 Mr C was disqualified from being a Company Director for conduct while acting for another firm – Sycamore Crown Ltd. Sycamore Crown Ltd, another introducer company which operated between 2012 and 2014, was investigated by The Insolvency Service and was found to have misled clients over their expertise, offering guaranteed levels of returns which incentivised customers to agree to pension transfers. Sycamore Crown Ltd was, as I understand matters, also funded by Transeuro and clients' funds were invested in storage units.

Although these events – the BBC's report, The Insolvency Service's investigation and Mr C's disqualification – post-date the events complained about, I've included reference to them to illustrate what later became known about JF and its Director. I think they provide an indication of what could have been revealed about the nature of JF, its practices and business objectives, through checks made to establish it was an appropriate introducer to deal with and through the monitoring of the business introduced in 2012.

Mr H's complaint

Mr H complained to Options in **August 2018**, via a professional representative. The representative said, on Mr H's behalf, in summary, that Options:

- owed Mr H a duty of care and this duty of care extended to it acting in his best interests and not acting negligently.

- failed to take the actions required of it to identify unsuitable SIPPs.

- failed to gather sufficient information about Jackson Francis or the Store First investment and draw reasonable conclusions from what it did know.

- should have confirmed that Mr H had received adequate advice and risk warnings.

- should have been concerned by the accuracy and independence of the investment valuation and by the absence of a significant secondary market into which the Store First pods could be sold.

The representative said Mr H was neither a sophisticated nor a wealthy investor and could not afford to risk directing all his pension fund to a high-risk investment. It said Mr H should be returned to the position he would have been in had he not transferred away from his two existing personal pensions in 2012.

I've not seen any evidence that Options provided a substantive response to Mr H's complaint directly. Unhappy with this, Mr H brought his complaint to the Financial Ombudsman.

Options' submissions

Options told us that it considers Mr H's complaint to be time-barred. It said the SIPP was established, the transfers were received, and the investment was made more than six years before Mr H made his complaint, and he was also put on notice to raise any concerns he had about the substantial loss of the value of his investment more than three years before he complained in August 2018. It said the May 2015 Annual Valuation ought reasonably to have made him aware of his cause for complaint.

Our Investigator's view

Our Investigator considered that Mr H's complaint should be upheld. In summary, he:

- Explained his view that Mr H's complaint had been brought within the relevant time limits. He said he didn't think Mr H would have been aware, or ought to have been aware, of his complaint about the due diligence Options carried out on the introducer and investment until around the time that he did, in fact, make his complaint (August 2018). He did not agree that the 2015 Annual Valuation would have put Mr H on notice of this complaint.

- Acknowledged Options was not required, and not able, to give advice, and was not responsible for ensuring the investment was suitable for Mr H.

- Said it was Options' responsibility to conduct appropriate due diligence checks on the introducer - Jackson Francis - and the investment in Store First, and then to use the knowledge gained from its due diligence to decide whether to accept or reject Mr H's application.

- Explained that due diligence involved more than simply checking that the investment was 'SIPP-able' under HMRC rules.

- Found that Options failed to take all the actions that were required of it in order to comply with its regulatory obligations and good practice, and also failed to draw reasonable conclusions from the information it did have available about accepting the investment.

- Said the third-party report, relied on by Options, didn't amount to adequate independent due diligence on the investment, but did identify a number of issues which Options ought to have given consideration to before deciding to accept the investment.

- Said Options ought to have known that: there was no investor protection associated with this investment; it was not clear how the investment could be independently valued; and the investment was likely to be high risk as it was unregulated and, therefore, only suitable for a small part of the portfolio of an experienced investor.

- Found that it was good practice of Options to have obtained copies of Store First's marketing material, but that Options hadn't carefully considered what the material said – an investment purporting to give a high return with minimal risk, without much supporting evidence, should have given Options cause for concern.

- Said there is no evidence Options questioned Store First's claims or attempted to have these independently verified.

- Concluded that if Options had attempted to verify the claims made, it is fair to say it should 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 and that investors were being misled.

- Concluded there's insufficient evidence to demonstrate that Options carried out adequate due diligence before accepting introductions from JF.

- Acknowledged that Options was permitted to accept introductions from unregulated entities, but should have been aware of the risks of consumer detriment, which are increased in these instances.

- Said if Mr H signed the indemnity he did so without a full understanding of what high risk meant because of the 'guarantees' given by Store First, and Options ought to have had concerns in accepting Mr H's application even if he had signed an indemnity.

- Said asking Mr H to sign an indemnity absolving Options of its regulatory responsibility, and relying on this, when it ought to have known that in accepting the investment it could lead to consumer detriment, was not the fair and reasonable thing to do.

- Concluded that if Options had not accepted Mr H's application and facilitated his investment in Store First, and explained this to Mr H, he would not have gone ahead and would not have suffered the losses that he did.

- Said there's no evidence Mr H received any cash incentives for undertaking these transactions.

- Said Options had not treated Mr H fairly in accepting his application and did not comply with good industry practice, or act with due skill, care, and diligence.

Finally, our investigator set out how Options should compensate Mr H for his losses and return him to the position, so far as possible, he would now be in but for Options' failure to carry out adequate due diligence checks, and draw adequate conclusions, before accepting his SIPP application from JF. He added that Options should also pay Mr H £500 to compensate for the distress and inconvenience caused by its failings.

Mr H accepted the Investigator's view. Options did not respond.

So, as no agreement has been reached, the complaint was passed to me to review afresh and make a decision.

My provisional decision

I recently issued a provisional decision on this complaint. I concluded Mr H's complaint should be upheld. My reasoning was similar to the Investigator's, but I said more about Options' acceptance of Mr H's SIPP application from the unregulated introducer, JF.

At the same time, I set out my view that Mr H's complaint is not time barred and can be considered by the Financial Ombudsman Service. My conclusion about that remains unchanged, so I won't repeat my reasoning here.

Options didn't respond to the provisional decision. Mr H responded to say he didn't have anything further to add.

As I have not received any further submissions from either party and have not been persuaded to depart from my provisional findings, I have repeated my provisional findings below, as my final decision, and have not therefore included any further detail of them in this background summary.

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've reached the same conclusion as the Investigator did, I uphold Mr H's complaint. I'll explain why.

Relevant considerations

I'm required to determine this complaint by reference to what I consider to be fair and reasonable in all the circumstances of the case. When considering what is fair and reasonable, I am required to take into account: relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time.

With that in mind I'll start by setting out what I have identified as the relevant considerations to deciding what is fair and reasonable in this case.

The Principles

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

> "*Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.*
>
> *Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.*
>
> *Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly*."

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 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 BBSAL. So, the Principles are a relevant consideration here and I will consider them in the specific circumstances of this complaint.

The *Adams* court cases and COBS 2.1.1R

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

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 *Adams* 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 SIPP owed him a duty to comply with COBS 2.1.1R, a breach of which, he argued, was actionable pursuant to section 138(D) of FSMA ("the COBS claim"). HHJ Dight rejected this claim and found that Options SIPP had complied with the best interests rule on the facts of Mr Adams' case.

Although the Court of Appeal ultimately overturned HHJ Dight's judgment, it rejected that 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 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 facts in Mr H's case are very different from those in *Adams*. There are also significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Mr H'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 H's complaint, I am considering whether Options ought to have identified that the introductions from JF involved a risk of consumer detriment and, if so, whether it ought to have ceased accepting introductions from JF prior to entering into a contract with Mr H.

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 both Adams cases. 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 Options was not obliged – and not able – to give advice to Mr H 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.

Sections 27/28 of FSMA

The Court of Appeal overturned the High Court judgment on the basis of the claim pursuant to section 27 of FSMA. Section 27 of 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*'.

Section 27(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.'

Section 28(3) of 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 section 19 of 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 section 27 of 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 section 28(3) of 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.*

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 receiving high commission from the investment provider, there were indications that the introducer was offering consumers 'cashback' and one of those running the introducer was subject to a FCA warning notice.

- The investment did not proceed until after the time by which Options had reasons for concern and so it was open to Options to decline the investment, or at least explore the position with Mr Adams, but it did not do so.

I shall address later in this decision how I consider S27 FSMA to be an additional and alternative ground upon which this complaint should be upheld. But before that, I'll address below what due diligence I think Options ought to have undertaken, what it ought to have concluded from what it knew, or ought to have known, about JF and what this should have meant for Mr H's proposed pension transfer and investment.

Regulatory publications

The FCA (and its predecessor, the FSA) has issued a number of publications which remind SIPP operators of their obligations and set out how they might achieve the outcomes envisaged by the Principles, 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 customers and treat them fairly') insofar as they are obliged to ensure the fair treatment of their customers. COBS 3.2.3(2) states that a member of a pension scheme is a 'client' for COBS purposes, and 'Customer' in terms of Principle 6 includes clients.*

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

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

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

The following are examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms:

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

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

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

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

- *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.*"

<u>The later publications</u>

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 nonregulated 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 for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and 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 H'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 H. It is accepted Options was not required to give advice to Mr H, 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.

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 Jackson Francis. The introductory paragraph at the head of the form read:

> "*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. We therefore request that you or the appropriate individual in your firm complete and sign this Profile questionnaire and our Terms of Business Agreement as part of our internal compliance requirements*."

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 JF and the Store First investment 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.

Should Options have accepted business from Jackson Francis?

Although Options has said it undertook due diligence on JF and that it had no reason not to accept introductions from JF in 2012, at the time of Mr H's investment, I have not seen any evidence that Options undertook sufficient due diligence on JF or that it drew reasonable conclusions from the information it did have available to it. JF was an unregulated, small business with a limited track record – confirmed to Options by JF as "*less than a year*". Yet I have not seen evidence that it undertook the checks Options itself had identified should be carried out.

Options asked JF to complete a 'Non-Regulated Introducer Profile' in or around January 2012, but I can't see that Options then used the answers given on that form, or on the erroneously completed additional 'IFA Profile', to make any further enquiries about JF. I have not seen that it undertook any further checks into JF's Directors or sought separate information about its operation. It seems to have simply started accepting introductions from JF before satisfying itself that doing so would be in keeping with its responsibility to treat customers fairly. But there were a number of further enquiries that I think should have been made about JF, and the information that I'm satisfied those further enquiries would have revealed, ought to have caused Options to be concerned about doing business with JF.

Identifying connected parties

On the 'Non-Regulated Introducer Profile' completed by Mr F, he gave his own name in the space for "Company Directors/Partners". Mr F was indeed a Director of JF but according to the Companies House Register he resigned from this role on 31 December 2011, just three months after the business was incorporated, and *before* he completed the 'Non-Regulated Introducer Profile' and 'IFA Profile' for Options. Mr C became the sole Director of JF on 1 January 2012.

Mr C was closely connected to the Store First investment (HHJ Dight in *Adams* described Mr C as "*Network Sales Director, of Harley Scott Holdings Limited*"), and this was information I think Options knew in January 2012 because it was Mr C who'd first approached Options about Store First; he was the author of the email I've referred to above in the background, sent to Options on 3 May 2011, which led to Options agreeing to accept the Store First investment.

When Options received the 'Non-Regulated Introducer Profile' on 11 January 2012 I acknowledge that this detail about the change in Directorship hadn't yet been updated on the Companies House Register – the filings notifying of Mr C's appointment were not made until 31 January 2012. So, that connection between JF and Store First might not have been immediately apparent to anyone simply looking at the entry for Jackson Francis Limited on or around 11 January 2012 (when Options received the completed forms). However, had Options checked Mr F's entry, which I think would have been a reasonable thing to do, they'd have been able to see that he held another Directorship for a business I'll call Business U and his co-Director in that business, since its incorporation in February 2011, was Mr C. So, Mr F's business connections led back to Store First's promoter. I think this is something Options ought to have picked up on.

The other piece of information, indicating a connection between the introducer and the investment, which would have been knowable from a check of the Jackson Francis Limited entry on the Companies House Register in January 2012, and also from Mr F's entry, is that JF and Mr F used an address, in Manchester, that had also been used by Harley Scott Holdings Limited, the Store First promoter. Mr F also gave this Manchester address on some of the forms he completed for Options. I've noted above that within the papers provided by Options there is a handwritten note about the Manchester address which reads "*Same as other business addresses*". It's possible that this wasn't noted until August 2012 when Mr C provided a second 'Non-Regulated Introducer Profile', but I see no reason why this shouldn't have been noted during due diligence checks and queried in January 2012 before Options started to accept JF's introductions.

A further connection with the Store First investment was also ascertainable from the information initially supplied by Mr F to Options in January 2012. On the 'IFA Profile' that he completed, Mr F told Options that JF's 'Compliance Officer' and 'Money Laundering Officer' was a 'Mr W'. It was Mr W who sent Options the completed 'Non-Regulated Introducer Profile' for JF on 11 January 2012 using a personal email address. But by 24 January 2012 Mr W was communicating with Options' CEO, Ms H, about "*pipeline cases*" using an email address that strongly indicates Mr W was also working for Harley Scott.

So, shortly after receiving the 'Non-Regulated Introducer Profile' from Mr F in January 2012 I think Options ought to have been aware that JF was closely linked to Harley Scott, and by extension, to Store First, through several connections. And I think, acting fairly and reasonably and adhering to its obligation to treat customers fairly, Options ought to have been concerned that these connections between the parties involved meant a significant conflict of interests existed. JF was so closely connected to the promotor of Store First, Harley Scott, that the risk it too would promote the investment and encourage consumers to transfer their pensions into this investment should have been obvious. Particularly when the business introduced by JF was *exclusively* destined for investment in Store First.

When Options did, belatedly, spot that JF was "*owned by a director/owner of Store First*" (Mr C) in August 2012, it realised that there may be a conflict here and that the business introduced by JF "*may be driven solely by the investments*". But that's a realisation that should, I think, have dawned on Options much earlier and caused it to think twice about accepting introductions from JF long before it received and accepted Mr H's application in April 2012.

Commission

Another issue that I think Options should, acting fairly and reasonably, have made further enquiries about at the outset of its relationship with JF relates to JF's source of funding. The 'Non-Regulated Introducer Profile' completed by Mr F included the following questions:

> "*Where commission is taken, what is the typical commission structure?*"
>
> "*How else does the firm generate fees?*"

The respective answers given were:

> "*We do not pay commission*"
>
> "*From product*"

I don't think Options ought to have accepted these answers as sufficient. The very purpose of this 'questionnaire' was to provide Options with "*insight*" into JF, but these two answers are, at best, incomplete. The first is answering a different question to that asked (not, what does JF get paid, but what does JF pay), and the second provides no detail at all. And so, I think Options ought to have asked more about JF's funding. Had it done so I think it more likely than not Options would have discovered that JF was receiving, as Options later, in May 2012, discovered another introducing broker was receiving, a high level of commission from Store First.

Options ought to have been concerned that the commission JF was receiving from Store First, which was perhaps as high as 12%, would incentivise JF to put its own interests ahead of the interests of consumers, including Mr H. And, of course, commission at this level would have been very likely to motivate JF to encourage consumers to proceed with transferring their pension, through a positive recommendation. Options should therefore have been alive to the risk that, to achieve its commission, JF would stray into the activity of advising consumers to transfer their pension funds into a SIPP and invest in Store First, despite not being qualified or regulated to do so. This risk ought to have been obvious from the outset, particularly when JF's commission is considered alongside the connections Options ought to have identified as existing between the parties and giving rise to a potential conflict of interests.

Another point to make about the level of commission Options knew, from May 2012, Store First to be paying at least one introducer is that this information ought, in my view, to have prompted Options to ask how Store First was funding such levels of commission alongside guaranteed income payments and buy backs. The lack of clarity around how this was to be achieved should have raised questions about the Store First investment and its promotion to pension holders by an unregulated business. I'll say more about what Options ought to have concluded about the Store First investment below.

Accounts and other compliance documentation

As part of its "*compliance procedures*" I note that Options made repeated requests for JF's accounts. It seems to have initially requested these on 23 March 2012, and chased JF for these on 3 April 2012. But, by 13 June 2012, these remained outstanding. Indeed, I've seen no evidence to suggest that these were ever forthcoming. Nevertheless, Options started accepting introductions from JF having not received the accounts – seemingly in breach of its own procedures.

JF's reluctance to provide this basic information should have been a further factor which ought to have led Options to question whether it should enter or continue a relationship with JF. Particularly when the answers Mr F had given on the 'Non-Regulated Introducer Profile' had been insufficient to establish how JF was funded. Options was missing information which might be critical to the decision about whether to enter into business with JF, such as, for example, information about the volume of business it was doing, its resources to carry on that business, and the sources of those resources.

The failure of JF to submit its accounts to Options for scrutiny also calls into question JF's ability to organise its affairs and calls into question the competence and motivations of JF. It is notable that Options accepted and set up Mr H's SIPP when it was still waiting for this information from JF.

In addition to JF's "*latest set of accounts*", Options had also asked JF for "*A certified passport copy for each of the main directors/principles*" on 23 March 2012. But I've seen no evidence that Options ever received any identity documentation for Mr F, and it seems Mr C's certified passport wasn't received until August 2012, long after Options had started accepting business from JF.

Acting fairly and reasonably, I think Options should have met its own standards and should have checked JF's accounts, and its director's passport/identity, at the outset before accepting any business from it. Instead, Options seems not to have considered "*the additional risks involved in accepting business from non-regulated introducers*", and simply proceeded without more than an inadequately completed 'Non-Regulated Introducer Profile' from JF's departing Director.

I say inadequately completed because in addition to the incomplete answers given in relation to JF's funding (noted above), I consider that Mr F's answers to the following were also incomplete or lacked sufficient detail:

> "*Have these products been accepted by any other SIPP providers if yes who? Yes*"
>
> "*Describe the sales process adopted by the Firm/its Agents Information*"
>
> "*Does the Firm work with any FSA regulated company or adviser? If yes, provide details. Yes*"

With these answers Mr F provided no detail about which other SIPP providers were accepting the Store First investment, no detail of the sales process it would adopt and no details of any "*FSA regulated company or adviser*" JF purported to work with. I note that it wasn't until May 2012 that Options had any details of Business S's involvement and even then, its involvement (with preparing TVAS and suitability reports, completing SIPP application packs, and sending documentation to clients for them to sign and confirm the transfer) appears to have been intended for new applications going forwards.

Overall, I don't think Options' systems and controls were robust enough and they didn't gather sufficient information about JF to "*safeguard their clients' interests*".

Terms of Business

Another important piece of documentation that Options asked JF to complete was a "*Terms of Business form*". Again, this is something that Options asked for early in the relationship with JF (March 2012), but which Options was still chasing in June 2012. Options appears to have understood the importance of JF agreeing to the TOB – it was through this document that JF would undertake to Options not to provide advice as defined by FSMA. Options even said to JF in its email of 10 June 2012:

> "*We require this signed document on file in order for us to be able to accept further business introduced from Jackson Francis*."

And yet, Options accepted business from JF between February 2012 and August 2012 without this TOB being in place.

I think that going ahead with accepting business when JF had not yet complied with Options' own requirements and not yet agreed to the TOB, was unreasonable of Options. JF's failure to return this important document, alongside its failure to provide the compliance documentation I've mentioned above, ought to have caused Options to be concerned about the integrity of JF. JF was either a business that couldn't keep on top of its important administration tasks or it was avoiding making the undertakings within this document, or both. And this, along with the other issues I've highlighted above, should have caused Options to think twice about accepting JF's business; consider that JF posed a risk of causing consumer detriment; and decline to accept its business.

SIPP Guidance Notes

As noted in the background above, Options appears to have produced some internal guidance notes for JF to refer to when introducing SIPP applicants to Options. And I think it's fair to assume that these guidelines were produced by Options in an effort to ensure the quality of the SIPP business it administered.

The document explained, amongst other things, that "*putting the whole pension into one investment is not considered sensible in most cases*", and that the "*ideal target … would be age range 35 to 55 years where there is already a reasonably large pot in a personal pension scheme of say £50k plus*". It also contained a word of caution about the FSA's interest in alternative investments and their promoters, and it said:

> "*It would generally be considered wise for clients to receive independent advice before taking a decision to transfer their pension arrangement*"

However, Options accepted Mr H's application apparently without concern that it didn't follow its own guidelines in several ways – Mr H's total pension transfer was significantly less than £50,000 and it was exclusively invested in an investment which was described by Options' own indemnity as alternative and high risk or speculative. Options had also seen no evidence that Mr H had received independent advice from someone qualified and regulated to give pension transfers advice. I think accepting Mr H's application when it didn't meet

Options' own guidelines in these ways was not the fair and reasonable thing for Options to do in the circumstances.

The activities that JF undertook

Advice

Options has told us that "*Jackson Francis weren't advisers, they didn't recommend investments*". Indeed, JF told Options "*We do not give advice*" and said the sales process adopted by the firm consisted of "*Information*" (no further detail of the sales process was given). But I don't think that's an accurate reflection of the part JF played in Mr H's decision to transfer his pensions to an Options SIPP and invest in Store First. I think the evidence demonstrates that JF proactively contacted Mr H and positively recommended/advised him that the Store First investment would be a more lucrative pension investment than his existing arrangements. I think it more likely than not JF provided advice to Mr H on the merits of transferring his pensions to the SIPP and investing in Store First.

I think that if Options had made any further enquiries in January 2012, as it should have done, about how JF was operating, it would have identified, as another SIPP operator suspected and told Options in July 2012, that JF was advising clients.

Mr H considered himself to have been "*advised*" by JF at the time – the indemnity he signed included the following statement which, in the absence of any other firm and in the context of other statements about Options within the same indemnity, can only relate to JF:

> *"I confirm that I have read and understand the documentation regarding this investment and have taken my own advice, including financial, investment and tax advice."*

So, I think if Options had asked Mr H or customers like him about their experience of JF, early in 2012, they'd have described JF as giving them advice.

JF appears to have suggested to Options that it would be sending Options a "*pipeline*" of cases, with some regularity (promising a weekly update on the total number of applications). Options should have been aware that it is not usual for pension transfers to happen without the consumer receiving advice or a recommendation. And, as it was clearly anticipated that all consumers would be transferring to an Options SIPP and then investing in Store First, Options should have been thinking about how that pipeline could be achieved without those consumers being advised to take this course of action. It was not at all clear how JF would be bringing these applications about without conducting any regulated activities.

The information JF provided on the 'Non-Regulated Introducer Profile' in answer to the question, "*What measures are in place to ensure the Firm engage legal advice on the activities it carries out to ensure regulated activities are not carried out?*" should also, I think, have given Options cause for concern. In answer to this question JF did not explain how it would ensure it did not carry out regulated activities but rather explained what defence it would use if accused of such – a disclaimer signed by the client. I don't think Options ought to have been satisfied with this response.

The FSA had set out in 2009 that good practice of a SIPP operator would include "*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*". But I've seen no evidence that the routine use of such a disclaimer caused

Options the concern it should have done bearing in mind the esoteric nature of the investment it was intended JF's clients would be putting their pensions into.

Acting fairly and reasonably, and bearing in mind its regulatory obligations and good industry practice, I think Options should have identified the risk that JF, an unregulated business, would be giving consumers advice, particularly given the connections JF had with the investment and the apparent conflict of interests. And having identified this obvious risk, Options should have rejected JF's business, including Mr H's application.

Arranging

Options has not provided us with any contemporaneous evidence in this case – only a letter detailing why it believes the complaint to be time-barred. However, from the evidence Mr H has provided and from what I've seen in other, similar, cases involving introductions to Options by JF, I think it's more likely than not that once Mr H had made the decision to transfer his pensions JF remained involved in the arrangements which led to the opening of the SIPP and the investment in Store First. It was JF's usual practice to communicate directly with consumers' existing pension plan providers to obtain transfer values and details of the plans. JF would then provide Options with a "*transfer pack*" and ensure the consumer had signed the indemnity.

It's clear from the emails JF sent Options about "*pipeline cases*" that it was involved generally in sending letters of authority to consumers' existing pension providers and receiving transfer paperwork to send on to Options. And when Options raised the issue of application forms lacking information, JF undertook to rectify that.

So, I'm satisfied JF was involved in arranging the transfer out of Mr H's existing pension to the SIPP, the setting up of the SIPP and in arranging the Store First investment.

I think Options ought to have been aware of this. The extent of JF's involvement was clear from its actions and communications with Options, and its involvement in other applications of the same nature.

Regulated activities in the UK

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

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

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

> (1) *Making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite a particular investment which is—*
>
> > (a) *a security,*
> >
> > (b) *a relevant investment, or*
> >
> > (c) *an investment of the kind specified by article 86, or article 89 so far as relevant to that article, is a specified kind of activity.*
>
> (2) *Making arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting investments falling within paragraph (1)(a), (b) or (c) (whether as principal or agent) is also a specified kind of activity*

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

Rights under a personal pension scheme are a security.

As set out above, I'm satisfied JF gave advice and made arrangements. The activities it undertook clearly meet the above definitions. The arrangements it made brought about the transactions (the transfer out of Mr H's existing pensions into the SIPP, and the making of the Store First investment). The arrangements had that direct effect. And advice was given on the merits of transferring out of Mr H's existing schemes to the SIPP in order to invest in Store First.

So, I'm satisfied the activities undertaken by JF in the UK in this case were regulated activities. JF therefore carried out regulated activities without authorisation. And I think the fact JF was carrying out regulated activities without authorisation was enough reason, in itself, for Options to have concluded that it shouldn't accept applications from JF.

This was a significant '*red flag*'. The fact JF was carrying out regulated activities without authorisation calls into question its integrity, motivation and competency. I think the only fair and reasonable conclusion Options could reach in these circumstances was that it should not accept business from JF. And I think this alone is sufficient reason to conclude it is fair and reasonable to uphold Mr H's complaint.

Should Options have accepted the Store First investment into its SIPPs?

As I've explained above, Options should neither have accepted Mr H's introduction from JF 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 JF.

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, Mr T, were the subject of 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 in 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.

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 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 JF.

In conclusion

Taking all of the above into consideration – individually and cumulatively – I think in the circumstances it's fair and reasonable for me to conclude that Options ought reasonably to have concluded, had it complied with its regulatory obligations which required it to conduct sufficient due diligence on the Store First investment and on JF and draw fair and reasonable conclusions from what it discovered, that it shouldn't accept business from JF, including Mr H's application. I therefore conclude that it's fair and reasonable in the circumstances to say Options shouldn't have accepted Mr H's application from JF.

Was it fair and reasonable to proceed with Mr H's instructions?

In my view, for the reasons given, Options simply should've refused to accept Mr H's application. So, things shouldn't have got beyond that. However, for completeness, I've considered whether it was fair and reasonable for Options to proceed with Mr H's application.

I acknowledge Mr H was asked to sign the indemnity and Options would have put some reliance on that and the declaration within the application form. I note the indemnity document gives warnings about the speculative or high-risk nature of the Store First investment. And both documents sought to confirm that Mr H wouldn't hold Options responsible for any losses resulting from the investment. However, I don't think these documents demonstrate Options acted fairly and reasonably by proceeding with Mr H's instructions.

Asking Mr H to sign indemnities absolving Options of all its responsibilities when it ought to have known that Mr H's dealings with JF were putting him at significant risk of detriment was not the fair and reasonable thing to do, and was not an effective way for Options to meet its regulatory obligations in the circumstances. So, it was not fair and reasonable to proceed, on the basis of this. I make this point only for completeness – the primary point is Mr H should simply not have been able to proceed, he should not have got to the stage of signing declarations as the business shouldn't have come about at all. His application should simply not have been accepted.

Furthermore, as set out above (and I detail below), I am satisfied section 27 of FSMA offers a further and alternative basis on which it would be fair and reasonable to conclude Mr H's complaint should be upheld.

Sections 27 and section 28 of FSMA

Options has said restitution under section 27 of FSMA could not be available, because the case-specific factors relied upon by the Court of Appeal in *Adams* for refusing section 28 relief in that case are absent on the facts of this case. On the basis of the evidence before me, I disagree that section 27 would not apply here.

I have set out the key sections of section 27 and section 28 above and have considered them carefully, in full. In my view I need to apply a four-stage test to determine whether section 27 applies and whether a court would exercise its discretion under section 28, 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 actions 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.

Test 1 is clearly satisfied here – JF was an unauthorised third party. Test 2 is also satisfied – for the reasons I have set out above, I am satisfied JF carried out activities in breach of the general prohibition – and any one regulated activity is sufficient for these purposes so this test would be met if JF had only undertaken arranging (which, for the reasons I have set out, I do not think is the case). Test 3 is satisfied too – the SIPP was opened in consequence of the advice given, and arrangements made, by JF. That brings me to the final test, 4. Having carefully considered this, I am satisfied a court would not conclude it is just and equitable for the agreement between Mr H 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.

- For all the reasons set out above, Options should have concluded JF was giving advice, or have suspected it was, and giving advice to consumers who were not necessarily financially sophisticated.

- As set out above, Options was aware, or ought to have been aware that:

    - There were connections between JF and Store First which gave rise to a clear conflict of interests.

    - Another unregulated introducer was being paid a high level of commission by Store First and it was likely JF took a high level of commission from Store First too, which it may not have disclosed.

    - JF had failed to provide its company accounts and other compliance documents despite repeated requests for copies of them by Options.

    - Options accepted business from JF despite not having a Terms of Business in place and despite the business in this case not complying with Options own SIPP Guidance Notes.

    - There was no evidence to show a proper advice process had been followed and consumers such as Mr H were therefore unable to make a fully informed decision about the transfer to the SIPP and investment.

- The investment didn't proceed until long after all these things were known, or ought to have been known, to Options and so it was open to it to decline the investment, or at least explore the position with the consumer.

So, whilst I appreciate that some of the additional reasons the Court of Appeal gave for not exercising its discretion under section 28(3) may not be present in this case, I don't think it likely, given Mr H's position and the process which led to the transfer of his pension that a Court would seek to exercise that discretion and enforce the contract in these circumstances.

My final decision is that the complaint should be upheld. I have therefore gone on to consider the question of fair compensation.

Is it fair to require Options to compensate Mr H?

Options might say that it did not cause Mr H's loss because it is very likely that he was extremely keen to proceed with the investment and would have found a way to invest even if Options had not been dealing with JF or if it had not been accepting Store First investments. I don't agree.

I have seen no evidence to show that Mr H would have proceeded even if Options had rejected his application. I've seen nothing to suggest he was looking to make a transfer prior to JF contacting him, or that he was keen to proceed with the transfer to release funds.

I have not seen anything that makes me think Mr H would have sought out another SIPP provider if Options had declined the application, or terminated the application, and explained why. In any event, I think any SIPP provider acting fairly and reasonably should have reached the conclusion it should not deal with JF. I do not think it would be fair to say Mr H should not be compensated based on speculation that another SIPP operator might have made the same mistakes as I've found Options did.

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

Fair compensation

I consider that Options failed to comply with its own regulatory obligations and didn't put a stop to the transactions that are the subject of this complaint. My aim in awarding fair compensation is to put Mr H back into the position he would likely have been in had it not been for Options' failings. Had Options acted appropriately, I think it's more likely than not that Mr H would have remained a member of the two pension schemes he transferred into the SIPP.

When considering this I've taken into account the Court of Appeal's supplementary judgment in Adams ([2021] EWCA Civ 1188), insofar as that judgment deals with restitution/ compensation. But ultimately, it's for me to decide what is fair and reasonable in all the circumstances.

Putting things right

I think Mr H would have remained with his previous pension providers however I cannot be certain that a value will be obtainable for what the previous policies would have been worth. I am satisfied what I have set out below is fair and reasonable, taking this into account and given what I understand of Mr H's circumstances and objectives when he invested.

In light of the above, Options should:

- Obtain the actual transfer value of Mr H's SIPP, including any outstanding charges.
- Pay a commercial value to buy any illiquid investments (or treat them as having a zero value).
- Undertake a loss calculation as set out below and pay any redress owing in line with the steps set out below.
- If Mr H has paid any fees or charges from funds outside of his pension arrangements, Options should also refund these to Mr H. Interest at a rate of 8% simple per year from date of payment to date of refund should be added to this.
- Pay to Mr H £500 to compensate him for the distress and inconvenience he's been caused by Options' failings.

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

I've set out how Options should go about calculating compensation in more detail below.

Treatment of any illiquid assets held in the SIPP

The SIPP only exists because of the investments made in 2012. In order for the SIPP to be closed and further SIPP fees to be prevented, any remaining Store First investments need to be removed from Mr H's SIPP. To do this, Options should calculate an amount it's willing to accept for Mr H's Store First investments and pay that sum into Mr H's SIPP and take ownership of the Store First investments. Any sums paid into the SIPP to purchase the Store First investments will then make up part of the current actual value of the SIPP.

If Options is unable, or if there are any difficulties in buying Mr H's illiquid investment/s, it should give the holding/s a nil value for the purposes of calculating compensation. To be clear, this would include their being given a nil value for the purposes of ascertaining the current value of Mr H's SIPP. In this instance Options may ask Mr H to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the relevant holding/s. That undertaking should allow for the effect of any tax and charges on the amount Mr H may receive from the investment/s and any eventual sums he would be able to access from the SIPP. Options will have to meet the cost of drawing up any such undertaking.

I think that is fair because I think it's unlikely the Store First investments will have any significant realisable value in the future. Further, I understand Mr H has the option of returning his Store First investments to the freeholder for nil consideration. And that should enable Mr H to close his SIPP if Options is unable to take ownership of his Store First investments.

Calculate the loss Mr H has suffered as a result of making the transfer

Options should first contact the providers of the plans which were transferred into the SIPP and ask them to provide a notional value for the policies as at the date of calculation. For the purposes of the notional calculation the providers should be told to assume no monies would have been transferred away from the plans, and the monies in the defined contribution policies would have remained invested in an identical manner to that which existed prior to the actual transfer.

Any contributions or withdrawals Mr H has made will need to be taken into account whether the notional value is established by the ceding scheme providers or calculated as set out below.

Any withdrawal out of the SIPP, including any PCLS or pension income that has been paid to him, should be deducted at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. To be clear this doesn't include SIPP charges, property charges or any fees paid to the introducer. The same applies for any contributions made, these should be added to the notional calculation from the date they were actually paid, so any growth they would have enjoyed is allowed for.

If there are any difficulties in obtaining notional valuations from the previous providers, then Options should instead arrive at a notional valuation by assuming the monies would have enjoyed a return in line with the FTSE UK Private Investors Income **Total Return** Index. The FTSE UK Private Investors Income Total Return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. That is a reasonable proxy for the type of return that could have been achieved over the period in question.

The notional value of Mr H's previous pension plans if monies hadn't been transferred (established in line with the above) less the current value of the SIPP (as at date of calculation) is Mr H's loss.

Interest must be added to the compensation amount at the rate of 8% per year simple from the date of this final decision to the date of settlement if the compensation is not paid within 28 days.

Pay an amount into Mr H's SIPP so that the transfer value is increased by the loss calculated above

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr H's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr H as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

SIPP fees

If the illiquid investment(s) can't be removed from the SIPP or if Options does not take ownership of the investment(s), and it continues to be held in Mr H's SIPP, there will be ongoing fees in relation to the administration of that SIPP. Mr H would not be responsible for those fees if Options had not accepted the transfer of his pensions into the SIPP. So, I think it is fair and reasonable for Options to waive any SIPP fees until such a time as Mr H can dispose of the investment(s) and close the SIPP.

However, in the event the Store First investments remain in the SIPP only because Mr H has decided not to transfer them to the freeholder, Mr H 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's unlikely he will be able to make a further complaint about these costs.

Pay Mr H £500 for the distress and inconvenience caused by Options' failure to act fairly and reasonably

I think it's fair to say what's happened here has caused Mr H some distress and inconvenience. He will clearly have been worried that his retirement provision will have been reduced. So, I consider that a payment of £500 is appropriate to compensate him for that upset.

My final decision

For the reasons given, my final decision is that I uphold this complaint. To put things right I require that Options UK Personal Pensions LLP must calculate and pay Mr H the award set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 11 January 2024.

Beth Wilcox
Ombudsman