DRN-4708341

Financial Ombudsman Service

The complaint

Mr M and the estate of Miss R complain that Mattioli Woods PLC (MW) failed to carry out sufficient due diligence when accepting Miss R's application to open a Self-Invested Personal Pension (SIPP), and on her subsequent investments in Store First. The complaint says Miss R suffered a loss to her pension provision from the Store First investment and that MW should compensate Mr M, as her beneficiary, for this loss.

Miss R, who was Mr M's mother, died in 2018 before this complaint was made to MW, and Mr M is the sole executor of Miss R's estate. The complaint has been brought on Mr M's behalf by a professional representative, but for clarity I'll refer to all actions and submissions as if made by Mr M himself.

Background

There are several parties involved in the events complained about, so I will list them below:

Mattioli Woods PLC

MW is a SIPP provider and administrator, regulated by the Financial Conduct Authority (FCA). MW is authorised, in relation to SIPPs, to arrange and bring about deals in investments, deal in investments as agent and principal, and to establish, operate and wind up personal pension schemes. It's also authorised to advise on investments, pension transfers and opt outs, and P2P agreements with limitations.

MW is a member directed pension scheme provider and it acts on the instruction of its members.

City Pensions Limited was the provider and scheme administrator of the City Private Pension (CPP) branded under the trading name of City Trustees (CT). The professional trustee is City Trustees Limited (CTL). With effect from 31 October 2014, City Pensions Limited (CPL) was formally integrated with MW. From this date, MW replaced CPL as the scheme operator and administrator. CT was a trading brand of MW until 1 October 2018, but it is now fully operational as MW. Although it has undergone these changes, for ease of reference, I'll refer to the SIPP operator as MW throughout.

Blue Horizons/VARone

Blue Horizons and VARone were investment/sales agents for the Store First investment, and Mr M says Miss R told him she was one of its clients. Blue Horizons and VARone were not regulated by the FCA and not authorised to provide investment or pension advice.

Blue Horizons were named by Mr M as the entity that introduced Miss R to the Store First investment and advised her to open a SIPP with MW to facilitate the investment. For clarity, I will refer to the introducer as Blue Horizons throughout my view.

Store First

The Store First investment took the form of one or more self-storage units, which were part

of a larger storage facility in a UK location. Investors bought one or more units in the facility and (based on the information I have seen about the investment) were offered a guaranteed level of income for a set period of time. After that, they could either take whatever income the unit(s) provided, or sell them (assuming there was a market for them).

The Store First investment was marketed as offering a guaranteed 8% return in the first two years, with 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. However, apart from income of 8% for the first two years, investors didn't receive the marketed returns. In addition, investors found the investment illiquid and difficult to sell, and those who did manage to sell received very little of what they paid for it.

In May 2014, the Self Storage Association of the UK (SSA UK) issued a press release (amended in January 2015), detailing the outcome of a review it had commissioned Deloitte LLP to undertake of the marketing material made available to potential investors by Store First.

The release recommended that any potential investors in Store First storage units consider the following key points before taking any investment decision:

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

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

> *"SSA UK's investigations indicate that these storage units are being rented to the general public at approximately £18 - £21 per square foot including insurance. Normally the rent paid by a self-storage operator would be at most half of the income per square foot earned through storage fees. Presuming the Store First sites were at industry average occupancy levels, SSA UK believe that they would have to be earning £23.95 per square foot just to pay the guaranteed rent to investors, excluding operating costs such as insurance, staff, business rates, utilities, marketing and management fees for Store First.*
>
> *Furthermore, this does not factor in the losses incurred by each site as it takes some years to reach a mature occupancy level. During this time, 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*

In addition, the analysis SSA UK has seen indicates that the purchase price being paid per square foot by investors to Store First for these self-storage units taken together equates to a much higher value than they would be worth if the whole sites were sold as stand-alone self- storage stores.

… a very serious question arises over how Store First is funding the guaranteed returns to existing investors, considering the absence of bank funding and the likely level of losses that require funding in each new store. It may yet prove to be the case that the rental returns being paid to investors are in fact being funded from the sale proceeds of new units, and not the operation of the self-storage business."

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

"These four companies unscrupulously secured millions of pounds worth of investments using a variety of methods that misled investors, particularly those with pension savings.

The court rightly recognised the sheer scale of the problem caused by Store First's sales of a flawed business model, based on misrepresentation and misleading information and has shut down these companies in recognition of the damage done to investors retirement plans."

Currently a company called Pay Store (trading as Store First) manages the Store First sites and rents out the storage units. The Official Receiver sold the freeholds of each Store First site to a company called Store First Freeholds Limited. The Official Receiver and Store First Freeholds Limited agreed that the latter would accept any requests from investors to surrender their pods. Store First Freeholds Limited would cover its own costs of the surrender, but investors wouldn't receive any payment. This opportunity has not as yet been taken by Mr M and the Store Pods remain held in the SIPP.

In the judgment in *Adams v Options SIPP UK LLP (formerly Options Pensions UK LLP) [2020]* EWHC 1299 (Ch) ('*Adams v Options 2020'*), the judge found the value of Mr Adams' six pods, acquired for around £52,000 in July 2012, to be £15,000 as of January 2017. And in the judgement in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 1188 ('*Adams v Options 2021'*) it was stated that, in February 2020, Options had said it was valuing Storepods at £430 each following (then) recent sales of Store First storage units at auction and the Court used that value in assessing the redress due to Mr Adams.

What happened

In 2013 Miss R was employed, and she was a member of the Local Government Pension Scheme (LGPS), which was a Defined Benefit (DB) pension scheme.

It seems Miss R was 'cold called' by Blue Horizons in early 2013 and the Store First investment opportunity was discussed. As a result of this conversation she completed a Store First sales reservation form, dated 30 April 2013 and entered her details under the heading "*Please provide details of the individual in whose name the SIPP/SASS is set up".* An employee of Blue Horizons, who I'll refer to as Mr S, was named as the selling agent.

It seems Miss R's details were passed on to MW by VARone, as she was then called, on 9 July 2013 by MW. It is unclear what was discussed during this call, but MW followed it up with an email providing her with details of the SIPP it could provide her in order to hold the Store First investment.

On 3 October 2013 Miss R completed an application to open a SIPP with MW. She indicated she wished to transfer the cash equivalent transfer value (CETV) of her LGPS into the SIPP once it was established.

On 12 November 2013 MW opened the SIPP for Miss R. On the same day she completed a Store First Storepod reservation form. On this she indicated she wished to purchase Storepods to a value of £52,500. The agent was again named as Mr S from Blue Horizons, and she listed her MW SIPP as the proposed wrapper for the investment.

The Storepod reservation form was countersigned by Blue Horizons on 18 November 2013 and sent on to MW by VARone on 19 November 2013.

On 20 December 2013 funds totalling £78,838.78 were transferred into the MW SIPP from the LGPS. Miss R applied to withdraw 25% of her fund value as tax-free cash (TFC) and £19,709.70 was paid to her on 16 January 2014.

Miss R's application to hold Store Pods within its SIPP was approved by MW, and on 14 February 2014 £52,000 was transferred by MW to Store First to complete the purchase.

Miss R received two payments into her SIPP, both for £4,200 from Store First in May 2014 and May 2015. These represented the initial two years guaranteed 8% rental returns.

On 23 December 2015 Store First wrote to Miss R to tell her it intended to break the lease, in accordance with the contract, from 14 February 2016, and invited her to enter into a lettings agreement with Store First Management Ltd. It is not clear if Miss R returned this form.

MW continued to write to Miss R about her SIPP, but the majority of these letters went unanswered. These letters included requests for ground rent arrears and charges.

In August 2016 Miss R told MW she had been off sick from work for over a year and so was no longer being paid. She asked MW to enquire with Store First about selling the Storepods. The required forms were sent to her, along with further emails about ground rent arrears, but these were all unanswered, apart from one email sent from Miss R on 25 August 2016 asking MW to liaise with Store First to see if it could freeze the outstanding fees as she had no income to pay them with.

In May 2017 Miss R informed MW that she was in hospital and would deal with all the paperwork when she got home. Miss R did not respond to any further contact from MW until 10 February 2018 when she informed it she was still very ill and had no income to pay the outstanding fees. She again asked to sell the units, and also informed MW that her illness was considered terminal.

Sadly, Miss R died on 22 August 2018.

The complaint to MW.

Mr M, as executor of Miss R's estate and named beneficiary on her SIPP, contacted MW for details of the Store First investment. As a result of the communication which followed, Mr M, via his representative, made a formal complaint to MW on 11 December 2018. He said, in summary:

- MW knew that Miss R was intending to transfer the majority of her existing pension provision into the SIPP and invest the entirety of the funds in the storage pods.
- MW knew, or ought to have known about the Financial Services Authority (FSA)

alert in January 2013 headed "*Advising on pension transfers with a view to investing pension monies into unregulated products through a SIPP".*

- There was an active duty on MW to advise Miss R as to the suitability of the underlying investment.
- In order to settle the complaint, MW should pay the estate of Miss R the sum of £52,500 net.

On 8 February 2019 MW sent Mr M its final response to his complaint, which it didn't uphold. It said:

- MW had not been party to any discussions Miss R had had with VARone or Store First Ltd.
- MW did not provide Miss R with any financial advice at any point, however it did provide her with several risk warnings about the proposed investment and suggested she take financial advice before the SIPP was established or the investments made.
- The SIPP had received a total of £10,362.60 (at the date of the letter) in rental payments.
- MW informed Miss R promptly of Store First's intention to break the lease. MW acts on its members instructions, so as Miss R didn't complete any of the paperwork no action could be taken.
- MW was not aware that Miss R was suffering from any illness until she told it in August 2016, and as not aware of the seriousness of her illness until she explained it was terminal in February 2018.
- Miss R had agreed the investment prior to MW becoming involved.
- MW allowed the investment to proceed as it felt at the time that it was an acceptable asset to hold in a SIPP, but it had asked Miss R to consult a financial adviser to ensure it met her retirement needs.
- MW asked Miss R to consider the investment very carefully as it understood a large proportion of her pension fund was being placed into a single investment. Miss R re-affirmed her instruction to proceed.

As regards the terms of settlement Mr M had proposed, MW did not agree. It said that if it were to consider that Miss R had remained in the LGPS, the terms of the scheme meant an ongoing survivor pension would have been payable to a spouse. But as Miss R was single when she died, there would have been no survivor pension payable. So it didn't think that either Mr M or the estate would have received any benefit has she remained a member of the LGPS.

Mr M didn't accept MW's response to this complaint so referred it to our Service where it was considered by an Investigator. And having considered everything, the Investigator thought the complaint should be upheld. He didn't think MW had carried out sufficient due diligence on either the Store First sales agents, Blue Horizons and VARone, nor the Store First investment before allowing it to be held in its SIPP. The Investigator thought that if MW had completed a more thorough investigation of Store First and the store pod investment, it would have concluded that allowing it in its SIPP would create a high chance of consumer detriment. And having identified this risk, MW ought to have refused to accept the SIPP application and Store First investment, not put in place a process asking Miss R to sign declarations in an attempt to absolve itself of its responsibilities.

Our Investigator also didn't think MW had treated Miss R fairly when it treated her application as a 'pipeline' case. This related to a strategic decision MW took on 19 December 2013 as a result of discussions it had held with Store First, which meant MW would apply restrictive criteria on any further applications for investment in Store First. It decided that as from 1 January 2014 Store First applications would only be accepted into its SIPPs if the consumer had received advice (presumably regulated advice) and if they were investing less than 50% of their pension provision. Our Investigator felt that although she had submitted her application prior to 1 January 2014, in order to be fair to her MW ought to have explained to Miss R the changes to its acceptance criteria and the reasons for this.

Our Investigator then set out how he thought that had MW carried out sufficient due diligence on Store First it would have concluded that it was not a suitable investment to be held within its SIPPs. So he thought Miss R would have remained a member of her occupational pension scheme, and MW was responsible for redressing the loss in value to Miss R's pension provision.

Mr M, via his representative, accepted the Investigator's findings. He agreed that he thought Miss R would have not gone ahead with the investment in Store First and asked for clarification as to how the redress would be calculated. He also made clear that he, as the executor of the estate, did not wish to continue with ownership of the Storepods and would be happy to assign the rights of their ownership to MW.

MW did not agree with the Investigator's view. In summary, it said:

- It agreed MW owed Miss R a duty of care, but it did not agree with the analysis of the scope of that duty and whether it was breached.
- The scope of its duties cannot be viewed with hindsight and must be assessed against what was materially relevant at the time.
- MW had no obligation to provide Miss R advice with regard to the investment choice, nor of their suitability to her.
- MW's common law duties were purely administrative, the principle one being to check whether the investment was capable of being held in a SIPP – it was.
- The investment choice is that of the SIPP member.
- Miss R was aware that MW was not providing her any advice or taking the responsibility of ensuring the advice she received or investment strategy she followed was suitable for her personal circumstances.
- The FSA 2009 guidance did not require SIPP operators to review the suitability of all investments. It did not have the expertise nor regulatory approval to do so, and it was unrealistic to expect a SIPP operator to have undertaken this level of due diligence.
- At the time of the investment, the only obligation on SIPP operators was to ensure the investment was capable of being held in a SIPP.
- MW had no ongoing relationship with Blue Horizons.

In relation to redressing the loss to Miss R's pension provision, it said that had Miss R remained in the LGPS her pension wealth would have been largely written off upon her death in August 2018 as there was no spouse to receive the death benefits. MW also thought that any loss calculation should also take into account the level of pension benefits Miss R received from her SIPP before she died. This was her TFC of £19,709.70 plus a

net income (less costs) of £13,803.27 from the Storepods rental. And this rental income into the SIPP continues as all the pods are tenanted.

The Investigator then wrote to Mr M and MW setting out how he considered MW should calculate if there had been a loss to Miss R's pension provision, on the basis that she would have stayed in the LGPS. He thought MW should undertake a redress calculation in line with the regulator's pension review guidance (as updated by the FCA Finalised Guidance 17/9) with the assumption that Miss R would have taken her pension benefits at the point she took her TFC from her SIPP in 2014.

Mr M, via his representative, did not agree that it was likely that he would not have received any benefits from his mother's LGPS upon her death. He provided evidence from the scheme that he would have received a death benefit of £36,585.07. He went on to say that whilst he agreed that Miss R had no plans to change her pension arrangements prior to being 'cold called' in relation to the Storepods, he did not think it likely this would have remained the case indefinitely.

He explained that Miss R, having had her eyes opened to the possibility of changing her pension provision and leaving the benefits to Mr M, was highly unlikely to have remained within the LGPS indefinitely. She would most likely have reviewed her pension arrangements to maximise the benefit to Mr M and/or her estate when she took ill-health retirement at the latest.

No agreement could be reached so the complaint was referred to me for a decision.

Having considered everything that had been submitted, I thought the complaint should be upheld, but my reasoning on the merits and the redress due differed to that set out by the Investigator. So in order to allow all parties the opportunity to respond, I set out my provisional reasoning on the merits of the complaint and how I thought the redress due ought to be calculated.

Mr M, via his representative, responded to accept the provisional decision. He stressed however that he did not wish for the Storepods to remain in the SIPP, and that MW ought to be responsible for their removal.

MW did not accept the provisional findings and provided a detailed response. This included a reiteration of some points raised in earlier correspondence that I've already summarised earlier in this decision. So I've set out below a summary of what I consider to be the main new points in the response to my provisional decision. However, the list isn't exhaustive and before making this decision I carefully considered the response in full.

- This investment was the purchase of a leasehold property, which was registered at the land registry and had its own property title.
- There were two other professional parties in the transaction – a chartered surveyor (GW) and a qualified legal professional (HP).
- GW completed a valuation of the Storepods in January 2014 and found their value to be higher than the price Store First was seeking.
- No SIPP provider would require a direct investment into a leasehold property to be advised on as they are property investments.
- In leasehold property purchases SIPP providers are not expected to undertake reviews and checks on sellers as this is the role of the solicitors. There was nothing more MW could have done in this regard.

- It was irrelevant that there were newspaper articles for Mr Harvey and the failed property investment, because the Store First investment was for a leasehold where title deeds were produced, and investors were paid the guaranteed 8% for the first two years, and rent was received for the subsequent years until the sale.
- The unregulated introducers mentioned were similar to estate agents, who are also unregulated. The brochure produced was similar to that of an estate agent's brochure of a property, which would outline the premises, terms and current rent in place.
- A SIPP provider should not be held liable for rent not being paid in accordance with the lease, or if the property value falls.
- A SIPP provider should not be required to carry out due diligence on the sellers of a property asset before it can be purchased by the SIPP.
- The provisional decision was reached with the benefit of hindsight, using current rules retrospectively.
- Store pods were being widely accepted at the time by other SIPP operators, so it was incorrect to assume that another operator would not have accepted Miss R's application had MW refused it.
- HP have subsequently been found to have acted dishonestly. MW were not responsible for a bona fide leasehold property purchase, where other professional parties were advising/involved in the process.

MW then made some points about the proposed redress calculation:

- There was evidence to show Miss R needed to take the TFC as a priority, and this appeared not to have been considered.
- There was no evidence that Miss R would have reviewed her pension other than through her interaction with MW, and any other speculation or conclusion is reached through using hindsight.
- It would be unfair to MW, and could be classed as enrichment to Mr M, if MW were required to pay redress calculated from a transfer away from Miss R's DB pension, when it is found that a transfer was wrong.
- Should the Ombudsman find that redress is due to be paid, that redress should be calculated on the basis that Miss R would have remained in her DB pension scheme, and not transferred into an unknown personal pension arrangement.
- It is unclear and has not been established what level of TFC Miss R would have been entitled to in her DB pension, and if she had remained and taken this TFC from her DB scheme (as she did from her MW SIPP) what death benefit would have remained.
- Mr M had asked MW not to make any death benefit payment to him until the complaint has been resolved, so MW could not see how the Ombudsman had concluded that Mr M would have likely taken his death benefits within two years of Miss R's death.

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.

And in doing so I have fully considered MW's submissions in response to my provisional decision. But whilst I have considered all the submissions made by both parties, I've

focussed here on the points I believe to be key to my final decision on what is fair and reasonable in the circumstances.

When considering what's fair and reasonable in the circumstances, I need to take account of relevant 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.

In light of Mr M's complaint, what I'll be looking at here is whether MW took reasonable care, acted with due diligence and treated Miss R fairly, in accordance with her best interests, and what I think's fair and reasonable in light of that. And I think the key issues in the complaint submitted by Mr M are whether MW carried out sufficient due diligence on Blue Horizons/VARone as the investment agents/introducers; whether MW carried out sufficient due diligence on the Store First investment before allowing it to be held in its SIPP; and whether it was fair and reasonable for MW to have accepted Miss R's SIPP application in the first place.

Relevant considerations

Having carefully reconsidered all of the evidence, including the submissions in response to my provisional decision, I remain of the view that the relevant considerations in this case are those that I'd previously set out in my provisional decision. As such, and while taking into account all of the submissions that have been made, I've largely repeated what I said about this point in my provisional decision.

I have carefully taken account of the relevant considerations to decide what is fair and reasonable in the circumstances of this complaint.

In my view, the FCA's Principles for Businesses are of particular relevance. 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 – at the relevant date). Principles 2, 3 and 6 provide:

> *"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've 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 requirements 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 hadn't treated its client fairly.

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

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

The BBSAL judgment also considers section 228 of the 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've 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 decision on a complaint without taking the Principles into account in deciding what's 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. I'm therefore satisfied that the Principles are a relevant consideration that I must take into account when deciding this complaint.

On 18 May 2020, the High Court handed down its judgment in the case of '*Adams v Options 2020'*. Mr Adams subsequently appealed the decision of the High Court, and, on 1 April 2021, the Court of Appeal handed down its judgment in '*Adams v Options 2021'*. I've taken account of both these judgments when making this decision on Miss R's complaint.

I note that the Principles for Businesses didn't form part of Mr Adams' pleadings in his initial case against Options SIPP. And HHJ Dight didn't consider the application of the Principles to SIPP operators in his judgment. The Court of Appeal also gave no consideration to the application of the Principles to SIPP operators. So, neither of the judgments say anything about how the Principles apply to an Ombudsman's consideration of a complaint. But to be clear, I don't say this means Adams isn't a relevant consideration at all. As noted above, I've taken account of both judgments when making this decision on Miss R's 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.

The Court of Appeal rejected Mr Adams' appeal against HHJ Dight's dismissal of the COBS claim, on the basis that Mr Adams was seeking to advance a case that was radically different to that found in his initial pleadings. The Court found that this part of Mr Adams' appeal didn't so much represent a challenge to the grounds on which HHJ Dight had dismissed the COBS claim, but rather was an attempt to put forward an entirely new case.

I note that in '*Adams v Options 2020'*, 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 paragraph 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."*

In my view there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams (summarised in paragraph 120 of the Court of Appeal judgment) and the issues in Mr M's complaint. In particular, as HHJ Dight noted, he wasn't asked to consider the question of due diligence *before* Options SIPP agreed to accept the store pods investment into its SIPP.

The facts of this case are also different, and I need to construe the duties MW owed to Miss R under COBS 2.1.1R in light of the specific facts of Miss R's case.

To confirm, I have considered COBS 2.1.1R - alongside the remainder of the relevant considerations, and within the factual context of Miss R's case, including MW's role in the transaction.

However, I think it is 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,
- regulators' rules, guidance and standards,
- codes of practice,
- and, where appropriate, what I consider to have been good industry practice at the relevant time.

This is a clear and relevant point of difference between this complaint and the judgments in *Adams* v Options SIPP. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

I also want to emphasise that I don't say that MW was under any obligation to advise Miss R on the SIPP and/or the underlying investments. Refusing to accept an application isn't the same thing as advising Miss R on the merits of the SIPP and/or the underlying investments.

Overall, and having considered closely MW's submissions both initially and in response to my provisional decision I am satisfied that COBS 2.1.1R is a relevant consideration – but that it needs to be considered alongside the remainder of the relevant considerations, and within the factual context of Miss R's case.

The regulatory publications

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

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

The 2009 Thematic Review Report

The 2009 report included the following statement:

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

It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six TCF consumer outcomes.
…
We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the members 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 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 customers' interests in this respect, with reference to Principle 3 of the Principles for Business ('a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems').

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

- *Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm's clients, and that they do not appear on the FSA website listing warning notices.*
- *Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.*
- *Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified.*
- *Being able to identify anomalous investments, e.g. unusually small or large transactions or more 'esoteric' investments such as unquoted shares, together with the intermediary that introduced the business. This would enable the firm to seek appropriate clarification, e.g. from the client or their adviser, if it is concerned about the suitability of what was recommended.*
- *Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely.*
- *Routinely identifying instances of execution-only clients who have signed disclaimers taking responsibility for their investment decisions, and gathering and analysing data regarding the aggregate volume of such business.*
- *Identifying instances of clients waiving their cancellation rights, and the reasons for this."*

The later publications

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

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

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

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

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

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

- *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary*

history; and that the firm does not appear on the FCA website listings for un-authorised business warnings.

- *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*
- *Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.*
- *Being able to identify irregular investments, often indicated by unusually small or large transactions; or higher risk investments such as unquoted shares which may be illiquid. This would enable the firm to seek appropriate clarification, for example from the prospective member or their adviser, if it has any concerns.*
- *Identifying instances when prospective members waive their cancellation rights and the reasons for this.*

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

- *conducting independent verification checks on members to ensure the information they are being supplied with, or that they are providing the firm with, is authentic and meets the firm's procedures and are not being used to launder money*
- *having clear terms of business agreements in place which govern relationships and clarify responsibilities for relationships with other professional bodies such as solicitors and accountants, and*
- *using non-regulated introducer checklists which demonstrate the SIPP operators have considered the additional risks involved in accepting business from non-regulated introducers*

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

Due diligence

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

- *ensuring that all investments permitted by the scheme are permitted by HMRC, or where a tax charge is incurred, that charge is identifiable, HMRC is informed and the tax charge paid*
- *periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme*
- *having checks which may include, but are not limited to:*
    - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*

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

- *ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified*
- *good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and*
- *ensuring these benchmarks clearly identify those instances that would lead a firm to decline the proposed business, or to undertake further investigations such as instances of potential pension liberation, investments that may breach HMRC tax-relievable investments and non-standard investments that have not been approved by the firm.*

The July 2014 *"Dear CEO"* letter provided 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 set out how a SIPP operator might meet its obligations in relation to investment due diligence. It said 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, and*
- *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've considered them in their entirety.

I acknowledge that the 2009 and 2012 reports and the *"Dear CEO"* letter aren't formal guidance (whereas the 2013 finalised guidance is). However, the fact that the reports and *"Dear CEO"* letter didn't constitute formal guidance doesn't 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 producing 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 go some way to indicate what I consider amounts to good industry practice, and I'm therefore satisfied it's appropriate to take them into account.

It's relevant that when deciding what amounted to have been good industry practice in the BBSAL case, the Ombudsman found 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.

I'm also satisfied that MW, at the time of the events under consideration here, thought the regulator's reports and guidance were relevant, and thought that they set out examples of

good industry practice because MW *did* carry out some due diligence on Store First. So, it clearly thought it was good practice to do so, at the very least.

Like the Ombudsman in the BBSAL case, I don't think the fact there was a publication (the "*Dear CEO"* letter) which post-dated the events that took place in relation to Mr M's complaint, mean that the examples of good practice it provided weren't good practice at the time of the relevant events. Although the later publication was published after the events subject to this complaint, the Principles that underpin it existed throughout, as did the obligation to act in accordance with the Principles.

It's 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's clear the standards themselves hadn't changed.

That doesn't mean that in considering what's fair and reasonable, I'll only consider MW's actions with these documents in mind. The reports, *"Dear CEO"* letter and guidance gave non-exhaustive examples of good practice. They didn't 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.

It's important to keep in mind the judge in *Adams v Options* didn't consider the regulatory publications in the context of considering what's fair and reasonable in all the circumstances, bearing in mind various matters including the Principles (as part of the regulator's rules) or good industry practice.

And in determining this complaint, I need to consider whether, in accepting Miss R's SIPP application, MW complied with its regulatory obligations: to act with due skill, care and diligence; to take reasonable care to organise and control its affairs responsibly and effectively; to pay due regard to the interests of its customers and treat them fairly; and to act honestly, fairly and professionally. In doing that, I'm looking to the Principles and the publications listed above to provide an indication of what MW should have done to comply with its regulatory obligations and duties.

And in doing this I am not using hindsight, or applying current rules retrospectively. I remain satisfied that MW had to comply with the regulatory obligations at the time. And these were set out in the Principles and the publications listed above.

So having done this, it's my view that in order for MW to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), amongst other things it should have undertaken sufficient due diligence into Blue Horizon/VARone/the business being introduced by Blue Horizons/VARone, and undertaken sufficient due diligence into Store First *before* deciding to accept Miss R's applications.

Ultimately, what I'll be looking at here is whether MW took reasonable care, acted with due diligence and treated Miss R fairly, in accordance with her best interests, and what I think is fair and reasonable in light of that. And I think the key issue in Mr M's complaint is whether it was fair and reasonable for MW to have accepted Miss R's SIPP application and Store First application in the first place. So, I need to consider whether MW carried out adequate due diligence checks on Blue Horizons/VARone and the Store First investment before deciding to accept Miss R's applications.

MW says it carried out due diligence on Store First before accepting it as an investment in its SIPP. And from what I've seen I accept that it undertook some checks. However, the questions I need to consider are whether MW undertook sufficient due diligence, and whether MW ought to have, in compliance with its regulatory obligations, identified that consumers investing in Store First were being put at significant risk of detriment as a result. And, if so, whether MW should therefore not have accepted Miss R's application.

Ultimately, I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And to do this I have taken into account all of the relevant considerations I've mentioned earlier in this decision. I'd also like to reassure MW that I have closely considered all the material it has sent to support its position, including that sent in response to my provisional decision, that it undertook due diligence on Miss R's proposed investment.

What did MW's obligations mean in practice?

In this case, the business MW was conducting was its operation of SIPPs. I'm satisfied that meeting its regulatory obligations when conducting this business would include deciding whether to accept or reject particular investments and/or referrals of business. The regulators' reports and guidance provided some examples of good practice observed by the FSA and FCA during their work with SIPP operators. This included being satisfied that a particular investment is appropriate to accept. That involves conducting checks – due diligence – on investments to make informed decisions about accepting business. This obligation was a continuing one.

MW should have carried out due diligence on the Store First Investment which was consistent with good industry practice and its regulatory obligations at the time. And in my opinion, MW should have used the knowledge it gained from its due diligence to decide whether to accept or reject the Store First investment.

And this obligation was a continuing one, and one that it seems MW was aware of. I say this because MW has confirmed that it [CPP] decided that due to early industry concerns a business decision was taken not to allow new investments [in Store First] from around June/July 2014. MW has been unable to tell me why CPP made this decision as the records no longer exist. However, given the timing of this decision I think it most likely that it was taken in response to the May 2014 SSA UK press release about Store First that I've mentioned above.

So, and well before the time of Miss R's application, I think that MW ought to have understood that its obligations meant that it had a responsibility to carry out appropriate checks on Blue Horizon/VARone to ensure the quality of the business they were introducing. And I think MW also ought to have understood that its obligations meant that it had a responsibility to carry out appropriate due diligence on investments, like the Store First holding, before accepting them into its SIPPs.

Investment due diligence

I think that it's fair and reasonable to expect MW to have looked carefully at the Store First investment *before* permitting it into its SIPPs. For MW to accept the Store First investment without carrying out a level of due diligence that was consistent with its regulatory obligations, while asking its customer to accept warnings absolving it of the consequences, wouldn't in my view be fair and reasonable or sufficient. And if MW didn't look at the investment in detail, and if such a detailed look would have revealed that potential investors might be being misled, or that the investment might not be secure or might be fraudulent, it

wouldn't in my view be fair or reasonable to say MW had exercised due skill, care and diligence – or treated its customer fairly – by accepting such an investment.

What did MW do?

MW has provided some information in relation to this complaint. I have also seen additional evidence of its checks on the Store First Investment on other complaints that are with this Service.

MW has shown that in January 2013 it undertook an '*Unregulated Investment Review'* of the Store First investment. It said this was completed:

> "*…as part of a review process on a proposed investment to assess its capability of being held within a SSAS or SIPP. We look to identify whether the investment is likely to be acceptable based on H M Revenue & Customs rules…"*

So this shows that MW understood that its due diligence obligations included ensuring an investment met HMRC rules. This document then described the type of property the investment contained and spelled out some more of the details including the proposed investment return, who was involved, and how the investment could be disposed of. This document was completed before the Store First investment was accepted by MW as suitable for being held within its SIPP.

MW says it also obtained copies of Store First's marketing material. It has provided us with copies of this. I think this was a reasonable step for it to take. In order to correctly understand the nature of the investment, I think it's fair and reasonable to say MW 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, such as Miss R, without regulated advice being provided. Clearly MW thought it was important to obtain this material at the time too.

MW has also provided our Service with the results of some local searches which were undertaken between November 2013 and January 2014 and MW has provided evidence that it obtained valuations of the Store Pods from a qualified surveyor in January 2014 which it says shows they were actually worth more than Store First were selling them for.

Was this sufficient due diligence in the circumstances?

Given the circumstances involved here, I don't think the above alone was reasonable or sufficient to meet MW's regulatory obligations and good industry practice. Crucially, I don't think MW took appropriate steps or drew reasonable conclusions from the information that was available to it. To be consistent with its regulatory obligations, MW should not *only* have obtained the material, but it should also have given careful consideration to it.

The marketing material included, amongst others, 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 today's 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."*

Following some pictures of various storage facilities it was marketing across the UK, the marketing material 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% respectively. In the question-and-answer section of the marketing material 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 following: "*All sales subject to contract, terms and conditions apply. 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 think this all gave an unfair and inaccurate impression to potential investors of a secure investment which would provide a good return with little risk to their capital. 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 the investment was potentially illiquid.

MW, in its response to my provisional decision, has said the brochure was similar to an estate agents brochure of a property. But as I've said, MW had distinct regulatory responsibilities, and those included to prevent consumer detriment. And I remain satisfied that MW ought to have closely considered the contents of the brochure with these obligations in mind, and so ought to have concluded that it gave an unfair and inaccurate impression of the investment.

And having considered the results of the local searches that were undertaken I can see these would have been useful to show the investment site had a viable local infrastructure, but I can't see it went very far to assist MW to understand more of the nature of the investment, and who was involved in the business and marketing, before MW decided that Store First would be acceptable to be held in its SIPPs.

I've seen no evidence that MW, or any third party on its behalf, carried out company searches on Store First and the businesses linked to it, such as its promoter, Harley Scott Holdings Ltd. Although there is nothing to suggest this promotor had any direct involvement with Miss R's specific investment they had significant links to the investment itself, company searches would have given MW a better understanding of the investment and Store First's structure and business model (including how it was being promoted). And consistent with its regulatory obligations, MW should not have only carried out the searches but also given careful consideration to what they revealed.

Had searches on Harley Scott Holdings Ltd been completed, they would have revealed it 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 searches would also have revealed County Court Judgments (CCJs) were recorded against the business and that auditors had made adverse comments in the previous three reporting years.

I think this is the sort of important information MW could have obtained had it conducted sufficient due diligence to meet its regulatory requirements. And it is reasonable in my view to conclude that this information, had it been obtained, ought to have prompted MW to have conducted some further basic searches, given there were factors 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.

A simple internet search at the time of the events (i.e. in January 2013 when the investment review was carried out) would have revealed that Dylan Harvey and one of its directors, Toby Whittaker, were the subject of a number of national press reports, online petitions and proposed legal action, as a result of a failed property investment. 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.

To be clear, I am not saying that MW are, or would be at fault because the rental income was not what was illustrated in the brochure, or because the Store Pods lost value. I am saying that MW had regulatory obligations:

- to act with due skill, care and diligence;
- to take reasonable care to organise and control its affairs responsibly and effectively;
- to pay due regard to the interests of its customers and treat them fairly; and
- to act honestly, fairly and professionally.

And in order to meet those regulatory obligations MW needed to conduct due diligence on the proposed investment, and this included making checks on the seller of the investment. So I remain satisfied that the fact that there were recent negative reports and proposed legal action against the director of one of the investment promotors, and that there were recent CCJs, ought to have been discovered by MW, and it ought to have taken this information seriously.

Given the circumstances involved here, I don't think what MW did was reasonable or sufficient to meet its regulatory obligations. Crucially, I don't think MW took appropriate steps or drew reasonable conclusions from the information that was available to it before accepting Miss R's application. And I remain of this opinion having carefully considered MW's response to my provisional decision.

<u>If MW had completed sufficient due diligence on Store First, what ought it reasonably to have concluded?</u>

As set out above, if MW had undertaken due diligence in line with its obligations, under the circumstances I think it ought to have become aware that:

- The trading history of Store First's marketing partner was a cause for concern.
- The marketing material being provided to prospective investors, such as Miss R, by Store First appeared to be unfairly 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.
- Store First had little proven track record for investors.
- Store First was being sold and marketed by an unregulated business.

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 there were aspects of the press reports which I think ought to have given MW cause for concern. And I think the information that Store First's marketing partner company 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 MW significant cause for concern. Particularly when it considered the marketing material for Store First.

As I've said above, in my view there were a number of things about the marketing material which ought to have given MW 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 by the marketing material. Store First appeared to be presenting the investment as one that was assured to provide high and rising returns, whilst being underwritten by guarantees, and offering 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 the investment was potentially illiquid.

Store First had little proven track record for investors at the time, so under the circumstances I think it was particularly important that MW undertook sufficient due diligence. MW couldn't be certain that the investment operated as claimed, and MW should also have been concerned about a guarantee offered by a new business with little track record (and promoted by a business with a questionable one).

I think, in light of this, MW 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 these were concerns MW ought to have identified at the time.

I think all of this should have been considered alongside the fact the investment was being sold and marketed by an unregulated business. MW has said that the firms marketing the Store Pods investment were no different to estate agents, who are themselves not regulated. But I think this was very different. MW needed to ensure the Store Pods were suitable to be held within its SIPP as an investment within its client's pension fund. And being the operator of the SIPP, as I've said above, means MW had distinct regulatory obligations to treat its customers fairly and prevent consumer detriment. In my opinion MW ought, acting fairly and reasonably and in line with its obligations, to have concluded there was an obvious risk of consumer detriment, and so the Store First investment ought not to have been accepted by MW as suitable for its SIPP.

From the evidence I've seen I think the information Store First was publishing *before* Miss R's MW monies were invested with it, including marketing material available through its website, gave rise to a significant risk that potential investors were being misled by Store First. And I think that MW ought to have identified this *before* permitting the Store First investment into its SIPPs. This is a clear point of concern, which I think MW ought reasonably to have identified *before* it accepted Miss R's application to invest in Store First.

In my opinion, the issues I've identified above should have, when considered objectively, put MW on notice that there was a significant risk of consumer detriment. And, without more evidence to ensure the investment was an appropriate one to permit within its SIPPs, I'm satisfied that MW shouldn't have accepted the Store First investment.

In my opinion it's fair and reasonable to say that MW ought to have concluded there was an obvious risk of consumer detriment here. All in all, I am satisfied that MW ought to have had significant concerns about the Store First investment from the beginning. And I think such concerns ought to have been a red flag for MW when it was considering whether to accept the Store First investments into its SIPPs. Such concerns emphasise the importance of sufficient due diligence being undertaken *before* investments are accepted and *before* SIPP investors monies are invested.

Had MW done what it ought to have done, and drawn reasonable conclusions from what it knew or ought to have known, I think that it ought to have concluded there was a significant risk of consumer detriment if it accepted the Store First investment into its SIPPs and that the Store First investment wasn't acceptable for its SIPPs.

As such, and based on the available evidence, I don't think MW undertook appropriate steps or drew reasonable conclusions from the information that I'm satisfied would have been available to it, had it undertaken adequate due diligence into the Store First investment *before* it accepted that investment into its SIPPs. I don't think MW met its regulatory obligations and, in accepting Miss R's application to invest in Store First, it allowed Miss R's funds to be put at significant risk.

I don't say MW should have identified all the issues the SSA UK press release set out or to have foreseen the issues which later came to light with Store First. I only say that, based on the information available to MW at the relevant time, it should have drawn a similar overall conclusion – that there was a significant risk that potential investors were being misled. I'm satisfied, on a fair and reasonable basis, that a significant risk of consumer detriment ought to have been apparent from the information available to MW at the time. And I do think that appropriate checks would have revealed issues which were, in and of themselves, sufficient basis for MW to have declined to accept the Store First investment in its SIPPs *before* Miss R invested in it. And it's the failure of MW's due diligence that's resulted in Miss R being treated unfairly and unreasonably.

There’s a difference between accepting or rejecting a particular investment for a SIPP and advising on its suitability for the individual investor. I accept that in this case MW wasn’t expected to give advice to Miss R on the suitability of the SIPP and/or Store First investment for her personally. To be clear, I’m not making a finding that MW should have assessed the suitability of the SIPP or Store First investment for Miss R. And I’m also not saying that MW shouldn’t have allowed the Store First investment into its SIPPs because it was high risk. My finding isn’t that MW should have concluded that Miss R wasn’t a candidate for high-risk investments or that an investment in Store First was unsuitable for Miss R. Instead, it’s my fair and reasonable opinion that there were things MW knew or ought to have known about the Store First investment and how it was being marketed which ought to have led MW to conclude it wouldn’t be consistent with its regulatory obligations or good practice to allow it into its SIPPs. And that MW failed to act with due skill, organise and control its affairs responsibly, or treat Miss R fairly by accepting the Store First investments into her SIPP.

I think the fair and reasonable conclusion based on the evidence available is that MW shouldn’t have accepted Miss R’s application to invest in Store First. In my opinion, it ought to have concluded that it would not be consistent with its obligations to do so. To my mind, MW didn’t meet its regulatory obligations or good industry practice at the relevant time and allowed Miss R to be put at significant risk of detriment as a result.

Acting fairly and reasonably to investors (including Miss R), MW should have concluded that it wouldn’t permit the Store First investment to be held in its SIPPs *at all*. And I’m satisfied that Miss R’s pension monies were only transferred to MW so as to effect the Store First investment. So, I think it’s more likely than not that if MW hadn’t permitted the Store First investment to be held in its SIPPs at all, that Miss R’s pension monies wouldn’t have been transferred to MW. Further, that Miss R wouldn’t then have suffered the losses she’s suffered as a result of transferring to MW and investing in Store First.

And it follows that Miss R’s application for a SIPP to invest in Store First ought to have been refused. I think it was clear from the outset that Miss R would be investing significant sums in Store First. I say this as the evidence shows Miss R was introduced to MW by VARone specifically for her to open a MW SIPP in order to invest in Store First. And the intended investments had been discussed by MW and Miss R prior to her submitting the application.

So in summary, by the time Miss R submitted her application to MW to open a SIPP, had MW complied with its regulatory requirements to conduct sufficient due diligence on Store First, it ought to have come to the conclusion that Store First was not a suitable investment to be held in its SIPP. So it should not have accepted her application at all.

But in addition to my conclusions above, it is clear that only about one month after Miss R’s MW SIPP was established, and prior to MW accepting her application for the Store First investment, MW had significant concerns about the Store First investments, and whether they should be accepted into its SIPPs at all without restriction. MW hasn’t said anything further about this in response to my provisional decision, so, while taking into account all of the submissions that have been made, I’ve largely repeated what I said about this point in my provisional decision.

MW has provided me with a copy of an internal email chain, dated 19 December 2013. This was from MW’s Business Development Manager team head (EC) and is worded as follows:

> *“We have been in lengthy dialogue with Store First about creating a high volume strategic partnership. As part of our due diligence we asked for lots of information about advice processes, client money and the second hand market for these commercial storage pods. After reviewing the Store First response to these and after*

*a discussion with their CEO yesterday we have agreed to **NOT** to pursue this any further.*

I am aware we have a number of these cases in the pipeline and I wanted to clarify what I have agreed with [x] this morning.

All cases in pipeline can be processed without the 50% min non standard rule applying.

Any cases received from the 1st January must be advised and are subject to the 50% min non standard rule."

This email shows that there had been a high-level discussion with Store First and as part of MW's due diligence into their relationship, it had asked lots of questions. Store First's responses appear to have led MW to conclude that it shouldn't establish the sought high volume strategic partnership with it. It also appears that some restrictions on Store First and the type of business MW was willing to accept were brought in by MW at that time. MW has told me there is no record of the reasons the above decision was made as the original business, CTL, no longer exists, so I can't say for certain why this was decided. But it is clear that there was high-level concern about the Store First investment itself and/or the manner in which it was being sold, to such an extent that MW decided not to enter into the discussed relationship and to change its acceptance criteria, and would only accept Store First investment if clients had been both advised, and were investing less than 50% of their funds in Store First.

This restriction was specific to Store First – not across the board. I think it likely that MW had identified there was a risk of consumer detriment from the Store First investment, and it was putting restrictions in place to try and mitigate that risk.

Miss R's application form was dated 3 October 2013, and the SIPP was established on 12 November 2013. The strategic decision to limit the types of Store First applications was made on 19 December 2013, and, as I've said, it is likely this decision was to reduce the risk of consumer detriment caused by the Store First investment. So I think it is clear that MW was aware there was a risk of consumer detriment from investment in Store First by clients like Miss R.

I don't think that processing the subsequent Store First investment simply because it was already in the pipeline was treating Miss R fairly under the circumstances, especially as she did not meet the minimum criteria MW itself had decided were necessary.

I have seen that Miss R's application for the Store First investment to be held in her SIPP was considered by MW's Business Development Manager on 3 January 2014. This review, on a form titled '*OVER 50% NON-STANDARD INVESTMENT AUTHORISATION"* documented that Miss R's application was 'direct' i.e. non-advised, and she was applying to invest 65.9% of her pension fund in Store First. That an investment application required sign-off at a high level within MW shows MW was aware of the risk of consumer detriment in investing such a high percentage of a pension fund in one non-standard investment. And given what MW had decided in December 2013, this was especially so given the proposed investment in Miss R's case was Store First.

So this review occurred after the 1 January 2014 cut-off point identified by MW in December 2013. And it was not signed off by EC, who was the person responsible for directing the change in acceptance criteria, until 7 January 2014.

Just prior to this sign-off, MW wrote a letter to Miss R on 6 January 2014 titled:

"CITY PRIVATE PENSION – [xxx] NON-STANDARD INVESTMENT"

It began with the following paragraphs:

> *"With reference to the proposal to invest £52,500 in Store First Storage Pod, we must make you aware that investing the vast majority of your pension fund in one investment may not be appropriate. The main aim of a pension fund is to provide benefits on retirement, and putting all of the funds in 'one basket' is an extremely high-risk approach which could result in you not achieving your retirement aims.*
>
> *Non-standard investments (incudes unregulated and esoteric investments) are generally characterised by having a higher degree of volatility, potentially being more illiquid, or both and are therefore usually regarded as speculative investments. This means that, in practice, they are rarely regarded as suitable for more than a small share of an investor's portfolio."*

MW then invited Miss R to sign a pre-populated declaration that she had read and understood the points it had made and that she was going against its guidance. This tick-box form and the pre-populated confirmation letter were signed and dated by Miss R on 8 January 2014.

Following receipt of these signed indemnity documents from Miss R, her Store First investment application was initially signed off by the '*technical team*' on 15 January 2014 and final sign-off was given by the '*compliance team*' on 22 January 2014. This was over three weeks after the 1 January 2014 cut off date for the changes in MW's acceptance criteria for the Store First investment, acceptance criteria that Miss R did not meet.

So, MW had identified risks with Store First, and put in place some measures to help mitigate that risk before Miss R's investment application had been considered or approved, but it did not apply these measures to Miss R's application. And I do not consider it to be fair or reasonable to say that MW should have no responsibility for Miss R's losses because she signed the documents she did. I say this because I don't think it should have got to that point. As I've said above, Miss R's application should not have been accepted in the first place.

As I've said before, it is clear that the risk MW had identified and communicated in its internal emails dated 19 December 2013, was connected to the investment in Store First. And it was known by MW when the SIPP was established, that Miss R wished to invest in Store First. And MW also knew, when it went through the review and approval process for the proposed investment that she did not meet the minimum requirements (<50% value and having received advice), yet Miss R's application was approved.

In my opinion, once the facts were known to MW it was fair and reasonable for it to have either refused to permit the application, or to have explained the minimum requirements it had put in place to Miss R as soon as possible. In either event this would have put a stop to the application as Miss R had not received advice. And even though Miss R had submitted her application just prior to the changes being put in place, it hadn't been processed or approved. So in order to treat Miss R fairly MW ought to have refused the investment application as Miss R did not meet the required criteria.

As I've said above, looking beyond MW's initial due diligence, which, for the reasons I have set out ought to, had it been conducted to a level reflective of its regulatory obligations, have led to MW concluding the Store First investment was not suitable for its SIPP, the available evidence shows that MW was aware of other causes for concern in relation to Store First before it accepted Miss R's Store First investment application. MW has been unable to say what these concerns were, but it has said it was Store First's

unsatisfactory answers to its questions, namely, about its "*advice processes, client money and the second hand market for these commercial storage pods.*"

It is, in my view, most likely that the answers, or the absence of answers Store First provided gave MW cause for concern. This concern was sufficiently significant for a strategic decision by its Operations Director to be made "*with immediate effect*" to make changes to its acceptance criteria for the Store First investment.

All in all, I remain satisfied that MW ought to have had a significant cause for concern about the nature of the Store First investment from the beginning, had it conducted sufficient due diligence. And I think these concerns, in themselves, should have led it to conclude that it would not accept Store First investments to be held within its SIPPs. In addition, by the time Miss R's application to invest in Store First was processed, MW had become sufficiently concerned with the Store First investment that it had put in place restrictive criteria on the type of applications it accepted. And Miss R's application for the investment did not meet these criteria, but MW still allowed it to proceed.

Given all of the circumstances at the time of Miss R's application, and what MW knew, and what it ought to have known about Store First, I think a fair and reasonable conclusion is that MW should not have accepted Miss R's application for a SIPP to invest in Store First. In my opinion, it ought to have concluded that it would not be consistent with its regulatory obligations to do so.

Due diligence on Blue Horizons and/or VARone.

In light of my conclusions about MW's regulatory obligations to carry out sufficient due diligence on the Store First investment, and given my finding that in the circumstances of this complaint MW failed to comply with these obligations, I've not considered MW's obligations in respect of carrying out sufficient due diligence on the businesses that introduced Miss R to MW and I make no finding on this issue. It's my view that had MW complied with its obligations to carry out sufficient due diligence checks on Store First, then this arrangement wouldn't have come about in the first place.

Was it fair and reasonable in all the circumstances for MW to proceed with Miss R's application?

For the reasons given above, I think MW shouldn't have been accepting the Store First investment into its SIPPs by the time it received Miss R's application. So things shouldn't have got beyond that. And, as I've explained above, I'm satisfied that Miss R's monies were only transferred to MW so as to effect the Store First investment.

Further, in my view it's fair and reasonable to say that just having Miss R sign declarations, wasn't an effective way for MW to meet its regulatory obligations to treat her fairly, given the concerns MW ought to have had about the Store First investment.

MW knew that Miss R had signed forms intended to acknowledge, amongst other things, her awareness of some of the risks involved with investing and to indemnify MW against losses that arose from acting on her instructions. And, in my opinion, relying on the contents of such forms when MW knew, or ought to have known, that allowing the Store First investment to be held within its SIPPs would put investors at significant risk, wasn't the fair and reasonable thing to do. Having identified the risks I've mentioned above, it's my view that the fair and reasonable thing for MW to do would have been to decline to accept Miss R's applications.

The Principles exist to ensure regulated firms treat their clients fairly. And I don't think the paperwork Miss R signed meant that MW could ignore its duty to treat her fairly. To be clear,

I'm satisfied that indemnities contained within the contractual documents don't absolve MW of its regulatory obligations to treat customers fairly when deciding whether to accept or reject investments or business.

So, I'm satisfied that Miss R's MW SIPP shouldn't have been established and her monies shouldn't have been invested in the Store First holdings. And that the opportunity for MW to execute investment instructions to invest Miss R's monies in Store First or proceed in reliance on an indemnity and/or risk disclaimers shouldn't have arisen at all. I'm firmly of the view that it wasn't fair and reasonable in all the circumstances for MW to accept Miss R's applications.

The involvement of other parties

In this decision I'm considering Miss R's complaint about MW. However, I accept that other parties were involved in the transactions complained about – including Blue Horizons and/or VARone. And I am not discounting the parts played by the chartered surveyor (GW) and a qualified legal professional (HP).

The DISP rules set out that when an Ombudsman's determination includes a money award, then that money award may be such amount as the Ombudsman considers to be fair compensation for financial loss, whether or not a Court would award compensation (DISP 3.7.2R).

In my opinion it's fair and reasonable in the circumstances of this case to hold MW accountable for its own failure to comply with its regulatory obligations, good industry practice and to treat Miss R fairly.

The starting point therefore, is that it would be fair to require MW to pay Mr M compensation for the loss Miss R suffered as a result of its failings. I've carefully considered if there's any reason why it wouldn't be fair to ask MW to compensate Mr M for Miss R's loss.

I accept that other parties, including Blue Horizons and/or VARone, might have some responsibility for initiating the course of action that led to Miss R's loss. However, I'm satisfied that it's also the case that if MW had complied with its own distinct regulatory obligations as a SIPP operator, the arrangement for Miss R wouldn't have come about in the first place, and the loss she's suffered could have been avoided. And I make this finding having also considered the involvement of GW and HP.

I've taken everything MW has said into consideration, both in its initial submissions and in its response to my provisional decision. And having done so, I am satisfied that it's appropriate and fair in the circumstances for MW to compensate Mr M to the full extent of the financial losses Miss R suffered due to MW's failings. I do not think that it would be appropriate or fair in the circumstances to reduce the compensation amount that MW is liable to pay to Mr M.

To be clear, I'm not making a finding that MW should have assessed the suitability of the SIPP or the Store First holdings for Miss R. Rather, I'm looking at MW's separate role and responsibilities – and for the reasons I've explained, I think it failed in meeting those responsibilities.

Miss R taking responsibility for her own investment decisions

I've considered this point carefully and I'm satisfied that it wouldn't be fair or reasonable to say Miss R's actions means her pension fund should bear the loss arising as a result of MW's failings.

In my view, if MW had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted Miss R's application to invest in Store First *at all*. That should have been the end of the matter – if that had happened, I'm satisfied the arrangement for Miss R wouldn't have come about in the first place, and the loss her pension fund has suffered could have been avoided.

MW needed to carry out appropriate initial and ongoing due diligence on the Store First investment and reach the right conclusions. I think it failed to do this. And just having Miss R sign forms containing declarations wasn't an effective way of MW meeting its obligations, or of escaping liability where it failed to meet its obligations.

I've no reason to doubt Mr M when he says that Miss R didn't understand the risks involved in the Store First investment. And I wouldn't consider it fair or reasonable for MW to have concluded that Miss R had received an explanation of the risks involved with the overall proposition, given what MW knew, or ought to have known, about Store First's business and marketing model by the time it received her application.

Miss R used the services of MW - a regulated personal pension provider, who had regulatory obligations to check and confirm that any proposed investment was suitable to be held in its SIPP. And I don't think it would be fair or reasonable to say in the circumstances that Miss R's pension fund should suffer the loss because she ultimately instructed the transaction be effected.

<u>Is it fair to ask MW to pay Mr M compensation in the circumstances?</u>

I acknowledge that in some of the forms Miss R signed and/or received there was reference to her having the opportunity of seeking independent financial advice. And that Miss R also signed on 8 January 2014, forms containing disclaimers that explained she would be liable for losses arising from instructions she gave. But I don't think that it would be fair or reasonable to simply say that MW should have no responsibility for the losses to Miss R's pension funds because she signed the documents she did. As I've highlighted earlier, MW's regulatory obligations meant that it needed to consider whether it was acting fairly in accepting Miss R's application for a SIPP to invest in Store First. This is different from providing investment advice. MW needed to consider whether, in all the circumstances, accepting the application was consistent with those regulatory obligations.

MW needed to carry out appropriate due diligence on Store First and reach an appropriate conclusion as to whether or not to permit the investment in line with its regulatory obligations. And I think it failed to do this. Just confirming that the investment was 'SIPP able' under HMRC rules, obtaining a valuation, reviewing the sales brochure, ensuring local infrastructure was in place, and having Miss R sign forms containing declarations wasn't an effective way of MW meeting its obligations, or of escaping liability where it failed to meet those obligations.

So overall, I remain satisfied that in the circumstances, for all the reasons given, it's fair to say MW should redress any loss Mr M has suffered in his position as the beneficiary of Miss R's pension fund.

<u>Had MW declined Miss R's business, would the transactions complained about still have been effected elsewhere?</u>

From the correspondence I've seen, I'm satisfied that Miss R's pension monies were only transferred to MW to make the Store First investment and that MW was aware of this. MW has argued that another SIPP operator would've accepted Miss R's application had it declined it and she had gone elsewhere without obtaining advice. But as I've said above, I

don't think she would have. But I also don't think it's fair and reasonable to say that MW shouldn't compensate Mr M for the losses to Miss R's pension fund on the basis of speculation that another SIPP operator would've made the same mistakes that I've found MW did.

MW has reiterated its point that there were other SIPP operators at that time which were accepting the Store First investment into their SIPPs. But I am considering a complaint about what MW did, not what other SIPP operators may have done. SIPP operators were regulated, and the regulator required them to act in accordance with its rules and the Principles. So, whilst taking into account MW's submissions on this point, I'm satisfied that it's fair to assume that had Miss R gone to another provider, that SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted her application for a SIPP to invest in Store First in such circumstances.

In *Adams v Options SIPP*, the judge found that Mr Adams would have proceeded with the transaction regardless. HHJ Dight says (at paragraph 32):

> *"The Claimant knew that it was a high risk and speculative investment but nevertheless decided to proceed with it, because of the cash incentive."*

It appears Miss R understood that her pension monies were being moved into a pension arrangement with guaranteed returns which would provide better provision in her retirement than her DB scheme. I've also not seen any evidence to show Miss R was paid a cash incentive. It therefore cannot be said she was incentivised to enter into the transaction. And, on balance, I'm satisfied that Miss R, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for herself.

So, in my opinion, this case is very different from that of Mr Adams. And having carefully considered all of the circumstances, I'm satisfied it's fair and reasonable to conclude that if MW had refused to accept Miss R's application, the transactions this complaint concerns would not have still gone ahead.

<u>What would Miss R have done had MW refused her SIPP application?</u>

I acknowledge that Miss R received a little under £20,000 as TFC as a result of the transfer into the MW SIPP. But from the evidence I have seen I don't think this was a priority for her at the time or that she needed the money urgently. MW has pointed to evidence that it says shows that Miss R *did* need the TFC urgently. But even if this is the case, as I go on to explain below, I think Miss R would have been able to access this TFC anyway, without the need to open a MW SIPP and invest in Store First.

As I've said above, had MW refused Miss R's SIPP application I do not think she would have gone on to invest in Store First with another SIPP operator. But, having taken into account Miss R's significant health issues both at the time of the advice, and in the months following it, I do think it likely that she would have reviewed the benefits her DB pension would have provided. I can see that the transfer process into the MW SIPP made her aware that her son, Mr M, as her pension beneficiary, may be considerably better off in the event of her death if she transferred the value of her DB pension into a personal pension arrangement. Indeed, Mr M has, through his representative, said Miss R said to him many times both before and after she became aware of the problems with the Store Pods, that she was pleased that she had arranged her pension in this way so that Mr M would benefit after her death. And I think it likely that she would have become aware of this as part of the application process, so *before* the time that MW ought to have refused to accept her application.

So I do think it likely, given that she was unmarried, and especially given her health problems, that had MW refused her SIPP application like I believe it ought to have, Miss R would have sought pension advice from a regulated and authorised pensions adviser in order to maximise the benefits which would be payable to her son on her death. I say this because I think it most likely that Miss R, having gone through the process of thinking about transferring her pension benefits, and having become aware of the improved death benefits available from a personal pension arrangement when compared to her DB scheme, would have wanted to ensure the best outcome for her sole beneficiary.

I think it most likely that Miss R would have, following her application to open a MW SIPP (which as I've said, MW ought to have refused), sought pension planning advice from an authorised and regulated business. And given her personal circumstances I think it likely that she would have proceeded to transfer the value of her LGPS into a personal pension plan (PPP). And it is likely she would have named Mr M as the sole beneficiary of the associated death benefits.

So, overall, I do think it's fair and reasonable to direct MW to redress any losses to Miss R's pension provision associated with the Store First investment. I consider that MW failed to comply with its own regulatory obligations and didn't, when it had the opportunity to do so, decline Miss R's application. And I'm satisfied that Miss R wouldn't have established the MW SIPP, transferred the value of her DB scheme into a MW SIPP, or invested in Store First, if it hadn't been for MW's failings.

MW, in response to my provisional decision, said that it would be wrong for it to be required to calculate compensation on the basis that Miss R would have likely transferred into a PPP, when I had said it was wrong for MW to have accepted the transfer. But to be clear, I am not saying that it was wrong or inappropriate for Miss R to transfer her benefits away from her DB scheme – I am saying it was wrong for MW to have accepted her application for a SIPP in the knowledge that she was intending to invest in Store First.

MW didn't have to carry out an assessment of Miss R's needs and circumstances in order to meet its regulatory requirements, but it did have to treat her fairly and act in accordance with the Principles. I'm satisfied that in the circumstances, and for all the reasons given, it's fair and reasonable to conclude that MW should compensate Mr M, as the beneficiary of Miss R's pension provision, for the loss he's suffered. And I remain satisfied that this loss should be calculated on the basis that Miss R's pension provision, on the date of her death, would have most likely have been in a PPP.

In conclusion

Taking all of the above into consideration, and having reconsidered my findings in the light of both parties submissions in response to my provisional decision, I remain satisfied that in the circumstances of this case it's fair and reasonable for me to conclude that MW shouldn't have accepted Miss R's application to open a SIPP. And had it not done so, it is more likely that not that Miss R would have transferred the value of her LGPS into a PPP. For the reasons I've set out, I also think it's fair to direct MW to compensate Mr M, in his position as beneficiary, for the loss of value to Miss R's pension fund.

I say this having given careful consideration to the *Adams v Options* judgments, but also whilst bearing in mind that my role is to reach a decision that's fair and reasonable in the circumstances of this case, having taken account of all relevant considerations.

Putting things right

As Miss R has died, and as Mr M is named on her MW SIPP as her sole beneficiary, the value of the SIPP (if any) would ordinarily be passed to him. But as I've set out above, I don't think she ought to have been able to open the MW SIPP at all.

My aim in awarding fair compensation is to put Mr M back into the position he would likely have been in had it not been for MW's failings. I consider that MW failed to comply with its own regulatory obligations and didn't put a stop to the transactions set out above. Had MW acted appropriately, I think it's *most likely* that Miss R wouldn't have invested in the manner she did.

I take the view that Miss R would have invested differently. Given her circumstances I think it likely she would have transferred the value of her LGPS into a PPP. I can't state definitively which provider would have been used, or into what holdings, and in what proportions the monies would have been invested. So, it's not possible to say *precisely* what Miss R would have done or when, but I'm satisfied that what I've set out below is fair and reasonable under the circumstances.

In light of the above, MW should:

- Use the transfer value of Miss R's LGPS which was used in the transfer into the MW SIPP, as the notional transfer value into a PPP.
- Calculate the growth this value would have achieved, minus the TFC Miss R took, using the benchmark set out below. This is value A.
- Obtain the actual transfer value of Miss R's SIPP, including any outstanding charges.
- If Mr M is unable to transfer the ownership of the Store Pods to Store First Freeholds Limited, MW should pay a commercial value to buy the Store Pods (or treat them as having a nil value).
- Pay an amount to Mr M, as the beneficiary of Miss R's pension, to reflect the difference in the calculated notional value (value A) and the actual value of the SIPP, plus interest.

I've set out the above compensation calculation in more detail below.

Treatment of the illiquid assets held within the SIPP

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 the SIPP. To do this, MW should calculate an amount it's willing to accept for the Store First investments and pay that sum into the 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 MW is unable to purchase the Store First investments, the actual value of any Store First investments it doesn't purchase should be assumed to be nil for the purposes of the redress calculation. To be clear, this would include their being given a nil value for the purposes of ascertaining the current value of the SIPP.

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 M has the option of returning the Store First investments to Store First Freeholds Limited for nil consideration. And that should enable Mr M to close the SIPP if MW is unable to take ownership of the

Store First investments.

In the event the Store First investments remain in the SIPP, as MW is unable to purchase them and Mr M decides not to transfer them to the freeholder, Mr M 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. Mr M should also be aware it's unlikely he will be able to make a further complaint about these costs.

Calculate the loss Miss R's pension has suffered as a result of making the investment.

The TFC that Miss R received should be allowed for in this redress calculation to avoid Mr M being overcompensated. So MW should arrive at a notional valuation by assuming the value transferred from Miss R's LGPS, minus the TFC she received, would have enjoyed a return in line with the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return index). That is a reasonable proxy for the type of return that could have been achieved over the period in question.

I am unable to say with any certainty when Miss R would have opened a new PPP, but I think it is a fair assumption that she would have likely sought pension transfer advice promptly once MW had refused her SIPP application. And having done so, it is reasonable to conclude a new PPP would have been established and funds transferred within approximately two months, so by 12 January 2014. Accordingly, this should be used as the start date for this part of the calculation. Any calculated return on these funds should be capped at the date of Miss R's death, 22 August 2018.

Any contributions or withdrawals Miss R made will need to be considered. Any withdrawal out of the SIPP should be deducted at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. 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've enjoyed is allowed for.

The notional value of Miss R's PPP at the date of her death, less the current value of the SIPP (as at date of my final decision) is Mr M's loss.

If the calculation above identifies a loss, a payment should be made as a lump sum to Mr M to redress this loss. HMRC tax rules mean that death benefits taken by a beneficiary from a PPP, where the plan holder died before reaching the age of 75, are free of any tax liability. As I have said, my aim in awarding fair compensation is to put Mr M back into the position he would likely have been in had it not been for MW's failings. And that position is that he would have most likely been the beneficiary of a PPP held by Miss R at the time of her death. I see no reason why Mr M, as the sole beneficiary of Miss R's pension, would not have taken the benefits within two years of the notification of her death, so there would have been no tax liability incurred. It is immaterial that he has asked MW to delay the payment of his death benefits from the MW SIPP pending the outcome of this complaint, as I am satisfied that the MW SIPP should not have been opened at all. So it is my determination that there be no notional deduction to reflect tax on this compensation.

Interest

The compensation resulting from this loss calculation must be paid to Mr M within 28 days of the date MW receives notification of his acceptance of my decision. The calculation should be carried out as at the date of my decision. But this compensation is to redress monies which Mr M ought to have had at an earlier date. It is to reflect the benefits he would have received as the beneficiary of Miss R's pension, and so it is money that he has not had the use of. Because of this interest should be added.

I am unable to say precisely how long it would have taken for Mr M to receive the benefits from Miss R's PPP following her death, but it is reasonable to take into account some time for the trustees of a pension plan to be notified of a plan holder's death, and for them to make a determination as to who would receive the death benefits. But I've not seen anything which would suggest this would have been in any way complex or time-consuming, so I'm satisfied it is fair and reasonable in the circumstances to say Mr M would probably have received the death benefits as a lump sum within 28 days of Miss R's death.

So, I think it is fair to direct that interest must be added to the compensation amount at the rate of 8% per year simple from 19 September 2018 to the date of settlement. If MW considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr M how much it's taken off. It should also give Mr M a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

My final decision

For all the reasons above, my final decision is that this complaint is upheld, and Mattioli Woods PLC must calculate and pay fair compensation to Mr M as set out above

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M and the estate of Miss R to accept or reject my decision before 23 April 2024.

Chris Riggs
Ombudsman