DRN-3965780

Financial Ombudsman Service

The complaint

Mr S complains, through a representative, that in 2011, Options UK Personal Pensions LLP ('Options', trading as Carey Pensions UK LLP at the relevant time) didn't carry out adequate due diligence on his introducer and selected investment when it accepted his self-invested personal pension ('SIPP') application and instruction to invest in Store First Limited ('Store First') storage units.

What happened – the parties

Given the various parties involved in Mr S's pension transfer and subsequent investment I've set out a summary of each below, along with a summary of some of the key events in their relationships.

Options

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

TPS Land

TPS Land was an unregulated business based in Spain. At the time of the events here, one of the directors of TPS Land was Terence Wright.

On 15 October 2010, the following was published on the FSA's website, in a section called *"Firms and individuals to avoid"*, which was described as *"a warning list of some unauthorised firms and individuals that we believe you should not deal with"*:

> ***"ALERT***
>
> *The Financial Services Authority (FSA) has today published this statement in order to warn investors against dealing with unauthorised firms.*
>
> *The purpose of this statement is to advise members of the public that an individual*
>
> ***Terence (Terry) Wright***
>
> *is not authorised under the Financial Services and Markets Act 2000 (FSMA) to carry on a regulated activity in the UK. Regulated activities include, amongst other things, advising on investments. The FSA believes that the individual may be targeting UK customers via the firm Cash In Your Pension.*
>
> *Investors should be aware that the Financial Ombudsman Service and the*

Financial Services Compensation Scheme are not available if you deal with an unauthorised company or individual.

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

Date: 15 October 2010"

We've asked Options to provide evidence of the due diligence it carried out on TPS Land on several occasions. Each time we've done so, Options has provided evidence of the due diligence it conducted on another firm which Mr Wright was also a director of, Commercial Land and Property Brokers ('CL&P'). It hasn't provided any evidence of due diligence carried out on TPS Land.

On 15 May 2012, Options conducted a World Check (a risk intelligence tool which allows subscribers to conduct background checks on businesses and individuals) on Terence Wright. The report included the following:

*"... **THE FOLLOWING INFORMATION WAS REPORTED IN ONE OR MORE OF THE SOURCES BELOW:***

[FINANCIAL SERVICES WARNING]

Appears on the UK Financial Services Authority.

...

[REPORTS]

Appears on the FSA list of unauthorised firms and individuals.

...

<u>INFORMATION SOURCES</u>:

http://www.fsa.gov.uk/pages/Doing/Regulated/Law/Alerts/unauthorised.shtml - ARCHIVE

<u>http://www.fsa.gov.uk/Pages/Doing/Regulated/Law/Alerts/Index.shtml</u> - ARCHIVE

Entered: 2011/10/24 ..."

It's unclear when Options started and stopped accepting business from TPS Land. However, Options stopped accepting business from CL&P on 25 May 2012 after it became aware CL&P was offering incentive payments to clients. I understand Options was made aware that a CL&P client had been offered an incentive payment as early as December 2011.

<u>Store First</u>

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 (often referred to as pods) and were offered a guaranteed level of income for a set period of

time. After that, they could either take whatever income the unit(s) provided or sell them (assuming there was a market for them). Mr T was a Director of Store First Limited and Harley Scott Holdings Limited, the promoter of Store First.

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

In the judgment in *Adams v Options SIPP UK LLP (formerly Options Pensions UK LLP)* [2020] EWHC 1299 (Ch), 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 judgment in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 1188 it was stated that, in February 2020, Options had said it was valuing store pods 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.

The available evidence shows the following actions were taken by Options in relation to the Store First investment at the dates mentioned. Some of these actions were taken before Options sent Mr S's money to Store First for investment in November 2011.

On **3 May 2011,** Options was contacted by a promoter of Store First, Harley Scott, about a newly launched product – Store First. Options agreed to put the investment through its review process.

Options has told us this review process was established in accordance with its obligations and FSA recommendations at the time, which required it to conduct *"due diligence into the Store First investment to assess its suitability for holding within a SIPP"*.

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

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

It also said its acceptance was subject to a member declaration and indemnity being completed and signed by each member, and the appointment of a solicitor to act for the Trustees in respect of any purchase.

On or around **24 November 2011,** Options invested £16,500 from Mr S's SIPP into Store First storage units on his instructions.

The High Court *Adams* judgment refers to an internal Options email of **20 May 2012**, relating to a conversation between Options and Store First about the level of commission that was generally paid to brokers. This said that in the case of CL&P, Store First had told Options it believed the commission to be 12%.

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

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

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

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

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

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

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

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

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

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

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 referred to a number of misleading and inaccurate statements made by Store First in its marketing material. It also made the following observation:

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

Store First was the subject of a winding up petition issued by the Business Secretary in 2017. On 30 April 2019, the courts made an order shutting down Store First and three of the related companies by consent between those four companies and the Secretary of State. The Official Receiver was appointed as liquidator. At the time, the Chief Investigator for the Insolvency Service said:

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

Following this the freehold, associated assets and goodwill of 15 storage centres were sold by the Official Receiver to a company called Store First Freeholds Limited. As I understand it, the self-storage units continued to be rented to end users and a company called Pay Store now manages the storage sites trading as Store First. 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.

What happened – Mr S's dealings with TPS Land and Options

Mr S has told us that a work colleague introduced him to TPS Land. This colleague had previously transferred their own pension to a SIPP using TPS Land's services.

Mr S has said TPS Land assured him that the Store First investment had a *"guaranteed buy-back option in place after five years"* and therefore he was convinced that *"the investment was safe"*.

Mr S's application was received by Options in September 2011 and his SIPP was established soon after. The application form, a version intended for clients establishing a SIPP without advice, was largely prepopulated, rather than handwritten. It included Mr S's personal and employment details, provided details of the personal pension scheme he intended to transfer to the SIPP and detailed the intended investment as Store First.

The final page of the application form required the applicant to make a declaration, which included, amongst other statements, the following:

> *"I agree to indemnify* [Options] *against any claim in respect of any decision made by myself or my Financial Adviser/Investment Manager or any other professional adviser I choose to appoint from time to time.*
>
> *I understand that* [Options] *are not in anyway* [sic] *able to provide me with any advice.*
>
> *I confirm that I am establishing the* [Options] *Pension Scheme on an Execution only basis."*

Mr S's application also included his authority for Options to liaise directly with TPS Land with regard to his pension transfer.

In November 2011, the proceeds from Mr S's personal pension transfer – approximately £20,000 – were deposited into his SIPP.

Mr S has explained that around the time his personal pension was transferred, he received an incentive payment of £1,500 from TPS Land. His understanding was this was *"to entice him into the scheme."* He's said he *"had no reason to believe this was out of the ordinary, untoward or indeed prohibited."*

Mr S then sent Options an *"Alternative Investment – Store First Member Declaration & Indemnity"*, which said:

> *"I,* [Mr S] *being the member of the above Scheme instruct* [Options] *to Purchase a Leasehold Storage Unit(s) in the Storefirst investment through Harley-Scott Holdings Ltd for a consideration of £17,000, on my behalf for the above Scheme.*
>
> *I am fully aware that this investment is an Alternative Investment and as such is High Risk and / or Speculative.*
>
> *I confirm that I have read and understand the documentation regarding this investment and have taken my own advice, including financial, investment and tax advice.*
>
> *I am fully aware that* [Options] *act on an Execution Only Basis and confirm that* [Options] *have provided* [no] *advice whatsoever in respect of this investment.*
>
> *I confirm that my business / occupation is <u>not</u> renting out storage units.*
>
> *Should any aspect of this investment be deemed by HMRC to provide Taxable Moveable Property and / or any tax charges be deemed by HMRC to apply in future these will be paid directly from the fund or by me as the member of the Scheme.*
>
> *I also understand and agree that, in the event of my demise, if* [Options] *is unable to sell the asset within HMRC timescales that it may be transferred to my beneficiaries through my estate and accordingly may be subject to any Inheritance Tax.*
>
> *I instruct* [Options] *to appoint the following solicitor to act on behalf of the Scheme:*
>
> [details of solicitor]

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

I confirm I am fully aware that additional costs will be incurred in this transaction including, but not limited to:

£48 CHAPs Fee;
£8 Land Registry Search Fee;
Stamp Duty Land Tax – To be advised by Solicitor at completion;
Any other taxes – To be advised by Solicitor at completion;

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

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

I agree to provide [Options] *with any further information and/or documentation they may require prior to completing the purchase of this investment*.

I indemnify [Options] *against any and all liability arising from this investment."*

I'll call this form the 'member declaration'.

Mr S later sent an email to Options which said:

"I am writing to instruct you to proceed with the investment to purchase a Leasehold Storage Unit (s) in the Storefirst investment. However, I am changing the original amount of my investment from £17,000 as noted on the originally signed declaration to £16,500.

I understand and confirm that I accept all the terms of the original Member declaration that I signed on 05/09/2011, and understand that I am bound by the declarations made; I am only changing the amount to be invested and instruct you to proceed with the new amount stated above.

I hereby give you permission to liaise directly with TPS in respect of all matters regarding my pension arrangement"

Soon after, Options invested £16,500 in Store First on Mr S's behalf.

Mr S's complaint

On 6 June 2017, Mr S complained to Options via his representative. Briefly, he complained that Options shouldn't have allowed him to invest in Store First, which he said was unsuitable, highly speculative and unregulated. He said Options had failed to undertake proper due diligence on his investment and introducer, and should have identified that the regulator had published a warning about one of the introducer's directors. He requested that Options put him in the position he would have been in had he not transferred his pension to the SIPP.

Options issued its response to the complaint on 3 August 2017. It didn't uphold the complaint. In summary, it said:

- It provides execution-only (i.e. non-advised) SIPP administration services as explained in all the documentation provided to Mr S when he signed up to his SIPP.

- It isn't permitted to provide advice, or to comment on the suitability of a SIPP, the underlying investments or the introducer chosen by the member.

- It conducted due diligence on Store First which didn't suggest any reason not to accept the investment.

- Mr S signed documentation which made clear he was a direct client, hadn't received advice, his investment choices were his sole responsibility and suggested he seek regulated financial advice.

- Mr S elected to invest in Store First prior to Options' involvement.

- It explained the potential risks of the investment to Mr S and ensured it was suitable to be held in a SIPP.

- The incentive payment Mr S received ought to have led him to question his introducer's conduct.

- Had Mr S disclosed the incentive payment to Options, it would have refused to accept his application.

- Given the motivation of the incentive payment, it was likely Mr S would have proceeded with the investment even if Options had rejected his application.

Unhappy with Options' response, Mr S referred his complaint to the Financial Ombudsman Service on 22 September 2017.

Our Investigator's view

Mr S's complaint was considered by one of our Investigators who concluded that it had been made in time and should be upheld. In summary, the Investigator:

- Considered Mr S's complaint had been made in time and was one we can consider.

- Set out the considerations relevant to reaching their view on the merits of Mr S's complaint, including the FCA's Principles for Businesses, publications issued by the FCA (and its predecessor, the FSA), and relevant case law.

- Explained that Options wasn't responsible for advising Mr S on the suitability of the SIPP or the investments, nor was it permitted to do so. However, it had regulatory obligations to Mr S which included deciding whether to accept or reject particular referrals of business or investments.

- Said Options didn't complete the checks it ought to have done on TPS Land at the outset, and had it done so it would have discovered, amongst other things, that TPS Land's director was Mr Terence Wright, and that he was on the FSA's warning list. And this ought to have led Options to conclude it shouldn't do business with TPS Land.

- Thought Options ought to have had significant cause for concern about the Store First investment, which gave it further reason not to proceed with Mr S's application.

- Concluded that Options ought to have declined Mr S's application.

The Investigator set out how Options should put things right, by putting Mr S, as far as possible, into the position he would now be in had it not accepted his SIPP application. They said Options should calculate fair compensation by comparing Mr S's SIPP to how his previous pension would have performed had he not transferred. They also recommended Options pay Mr S £500 for the trouble and upset caused by its failings.

Options' response to the Investigator's view

Mr S accepted the Investigator's view, but Options did not. It made a number of points in response, including:

- The Ombudsman must take account of the legal and contractual context of the relationship between it and Mr S. Options acts on a strictly execution-only/non-advised basis and is member directed throughout.

- Options doesn't give advice and the Ombudsman shouldn't come to a finding that places a legal duty on it that doesn't exist.

- Only the SIPP guidance published prior to Options receiving Mr S's SIPP application form in September 2011, and his subsequent instruction to invest, was relevant. It wasn't fair or reasonable for the complaint to be considered in the context of guidance that was published after the events complained of.
- SIPP providers aren't prohibited from accepting business from unregulated introducers like TPS Land.

- The FSA Notice wasn't entered onto World Check until 24 October 2011. So, even if Options had run a World Check search in respect of Mr Wright when its relationship with TPS Land began, it wouldn't have identified the notice. Options didn't routinely check the FSA's list of unauthorised firms and individuals, nor was it under any obligation to do so.

- In any event, the 2010 FSA Notice stated only that Mr Wright wasn't regulated by the FSA – there was no reason this should necessarily have led Options to conclude at the time that it shouldn't accept introductions of customers from TPS Land.

- The criticisms made by the Investigator of Options' due diligence on Store First are unfounded – under the contract Options' obligations do not extend to assessing the underlying investment.

- The findings in respect of Store First amount to imposing an obligation on Options to undertake a qualitative assessment of the Store First investment (based on limited material), and then an obligation to pass on that assessment and those findings with what effectively amounts to a recommendation to Mr S (whether express or not) not to proceed. The Investigator's findings amount to a requirement for Options to have provided advice to Mr S.

- Options didn't cause Mr S's loss. On the material available, it's very likely he was extremely keen to proceed with the investment in order to release funds and would have found a way to invest even if Options hadn't been dealing with TPS Land or accepting Store First investments.

- Had Options rejected Mr S's application, it was likely he would have approached another SIPP provider which would have accepted this.

- Mr S must at least bear a measure of responsibility for his own actions. It would be manifestly unfair and unreasonable to hold Options responsible for Mr S's loss in full, given he chose to invest in a product that Options had told him was high-risk.

- An oral hearing is necessary to determine how Mr S came to hear about TPS Land, his understanding of the investment and the parties' respective roles, and his motivation for the transactions.

The Investigator considered Options' response but wasn't persuaded to change their opinion. As no agreement was reached, the complaint was referred for an Ombudsman's decision.

While the complaint was awaiting allocation to an Ombudsman, Options submitted that the complaint had been made out of time. It said:

- Mr S complained to Options on 6 June 2017 and Options issued its final response to his complaint on 3 August 2017.

- On 19 October 2017, the Financial Ombudsman Service notified Options that it would be investigating Mr S's complaint. The notification included a Financial Ombudsman Service complaint form, signed by Mr S on 29 June 2017.

- For Mr S's complaint to be in time, he needed to refer it to the Financial Ombudsman Service within six months of Options' final response. Therefore, he needed to refer his complaint to the Financial Ombudsman Service between 3 August 2017 and 3 February 2018.

- Based on the date Mr S signed his complaint form, he appeared to have referred his complaint to the Financial Ombudsman Service outside of this timeframe. He appeared to have referred it prior to the start of the six-month period.

- The complaint is therefore time-barred, and Options doesn't consent to the Financial Ombudsman Service considering it.

Another Investigator reviewed Options' jurisdiction objection. They confirmed that although Mr S had signed his complaint form on an earlier date, he referred his complaint to the Financial Ombudsman Service in September 2017. So, he had referred his complaint within six months of Options' final response.

The complaint has since been passed to me to decide.

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.

First, I'll address Options' request for an oral hearing.

Options' request for an oral hearing

Options says an oral hearing is necessary to explore issues such as Mr S's understanding of the investment and the roles played by the parties, and his motivation for entering into the transaction.

The Financial Ombudsman Service provides a scheme under which certain disputes may be resolved quickly and with minimum formality (section 225 of FSMA). DISP 3.5.5 R of the FCA's Dispute Resolution rules provides:

> *"If the Ombudsman considers that the complaint can be fairly determined without convening a hearing, he will determine the complaint. If not, he will invite the parties to take part in a hearing. A hearing may be held by any means which the Ombudsman considers appropriate in the circumstances, including by telephone. No hearing will be held after the Ombudsman has determined the complaint."*

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

The key question for me to consider when deciding whether a hearing should be held is whether or not *"the complaint can be fairly determined without convening a hearing"*.

We don't operate in the same way as the courts. Unlike a court, we have the power to carry out our own investigation. And the rules (DISP 3.5.8 R) mean I, as the Ombudsman determining this complaint, am able to decide the issues on which evidence is required and how that evidence should be presented. I'm not restricted to oral cross-examination to further explore or test points.

If I decide particular information is required to decide a complaint fairly, in most circumstances we're able to request this information from either party to the complaint, or even from a third party.

I've considered the submissions Options has made. However, I'm satisfied that I'm able to fairly determine this complaint without convening a hearing. In this case, I'm satisfied I have sufficient information to make a fair and reasonable decision. So, I don't consider a hearing is required. The key question is whether Options should have accepted Mr S's application at all. Mr S's understanding of matters is secondary to this.

In any event – and I make this point only for completeness – even if I were to invite the parties to participate in a hearing, that wouldn't be an opportunity for Options to cross-examine Mr S as a witness. Our hearings don't follow the same format as a court. We're inquisitorial in nature and not adversarial. And the purpose of any hearing would be solely for the Ombudsman to obtain further information from the parties that they require in order to fairly determine the complaint. The parties wouldn't usually be allowed direct questioning or cross-examination of the other party to the complaint.

As I'm satisfied it's not necessary for me to hold an oral hearing, I'll now consider Options' argument that Mr S's complaint has been made out of time.

Jurisdiction

Options has argued that Mr S has referred his complaint late and it shouldn't be considered.

We can't consider all complaints brought to this service. Before we can consider something, we need to check, by reference to the FCA's DISP rules and the legislation from which those rules are derived, whether the complaint is one we have the power to look at and whether it's a complaint we should consider.

DISP 2.8.2 R sets out that:

> *"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:*
>
> *(1) more than six months after the date on which the respondent sent the complainant its final response…"*

As our Investigator correctly set out, Mr S referred his complaint to the Financial Ombudsman Service in September 2017, which was within six months of Options' final response of August 2017. Accordingly, he referred his complaint in time in relation to DISP 2.8.2 R (1).

The fact that Mr S signed a complaint form several months before referring his complaint to the Financial Ombudsman Service – perhaps doing so at the outset of his relationship with his representative to save time later on – has no bearing on the six month time limit.

I haven't seen anything else that suggests Mr S has made his complaint outside of the time limits that apply to referring a complaint to this service.

My jurisdiction decision is therefore that Mr S's complaint isn't time-barred and can be considered by the Financial Ombudsman Service. And so, I shall now turn to my findings on the merits of Mr S's complaint.

Merits

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

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

Relevant considerations

The Principles

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

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

I have carefully considered the relevant law and what this says about the application of the FCA's Principles. In *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin) ('BBA') Ouseley J said at paragraph 162:

> *"The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirement they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules."*

And at paragraph 77 of BBA Ouseley J said:

> *"Indeed, it is my view that it would be a breach of statutory duty for the Ombudsman to reach a view on a case without taking the Principles into account in deciding what would be fair and reasonable and what redress to afford. Even if no Principles had been produced by the FSA, the FOS would find it hard to fulfil its particular statutory duty without having regard to the sort of high level Principles which find expression in the Principles, whoever formulated them. They are of the essence of what is fair and reasonable, subject to the argument about their relationship to specific rules."*

In *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878) ('BBSAL'), Berkeley Burke brought a judicial review claim challenging the decision of an Ombudsman who had upheld a consumer's complaint against it. The Ombudsman considered the FCA Principles and good industry practice at the relevant time. He concluded that it was fair and reasonable for Berkeley Burke to have undertaken due diligence in respect of the investment before allowing it into the SIPP wrapper, and that if it had done so, it would have refused to accept the investment. The Ombudsman found Berkeley Burke had therefore not complied with its regulatory obligations and had not treated its client fairly.

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

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

The BBSAL judgment also considers section 228 FSMA and the approach an Ombudsman is to take when deciding a complaint. The judgment of Jacobs J in BBSAL upheld the lawfulness of the approach taken by the Ombudsman in that complaint, which I have described above, and included the Principles and good industry practice at the relevant time as relevant considerations that were required to be taken into account.

As outlined above, Ouseley J in the BBA case held that it would be a breach of statutory duty if I were to reach a view on a complaint without taking the Principles into account in deciding what is fair and reasonable in all the circumstances of a case. And, Jacobs J adopted a similar approach to the application of the Principles in BBSAL. I'm therefore satisfied that the Principles are a relevant consideration and I will consider them in the specific circumstances of this complaint.

The *Adams* court cases and COBS 2.1.1R

On 18 May 2020, the High Court handed down its judgment in the case of *Adams v Options SIPP* [2020] EWHC 1229 (Ch). 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 UK Personal Pensions LLP* [2021] EWCA Civ 474. I've taken account of both these judgments and the judgment in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 1188 when making this decision on Mr S's case. I note the Supreme Court refused Options permission to appeal the Court of Appeal judgment.

I've considered whether *Adams* means that the Principles should not be taken into account in deciding this case. 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 the *Adams* judgments when making this decision on Mr S's case.

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

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

I note that HHJ Dight found that the factual context of a case would inform the extent of the duty imposed by COBS 2.1.1R. HHJ Dight said at para 148:

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

I note that there are significant differences between the breaches of COBS 2.1.1 R alleged by Mr Adams and the issues in Mr S's complaint. The breaches were summarised in paragraph 120 of the Court of Appeal judgment. In particular, HHJ Dight considered the contractual relationship between the parties in the context of Mr Adams' pleaded breaches of COBS 2.1.1 R that happened *after* the contract was entered into. And he wasn't asked to consider the question of due diligence *before* Options SIPP agreed to accept the storage units investment into its SIPP.

In Mr S's complaint, amongst other things, I'm considering whether Options ought to have identified that the Store First investment involved a significant risk of consumer detriment

and, if so, whether it ought to have declined to accept applications to invest in Store First *before* it received Mr S's application. And the same applied to Options deciding whether to accept introductions from TPS Land.

The facts of Mr Adams' and Mr S's cases are also different. I make that point to highlight that there are factual differences between *Adams* and Mr S's case. And I need to construe the duties Options owed to Mr S under COBS 2.1.1 R in light of the specific facts of Mr S's case.

So, I've considered COBS 2.1.1 R – alongside the remainder of the relevant considerations, and within the factual context of Mr S's case, including Options' role in the transaction.

However, I think it's 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'm 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*. 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 Options was under any obligation to advise Mr S on the SIPP and/or the underlying investment. Refusing to accept an application isn't the same as advising Mr S on the merits of the SIPP and/or the underlying investment.

Overall, I'm satisfied that COBS 2.1.1 R is a relevant consideration – but that it needs to be considered alongside the remainder of the relevant considerations, and within the factual context of Mr S's case.

Regulatory publications

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

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

I've considered the relevance of these publications. And I've set out material parts of the publications here, although I've considered them in their entirety.

<u>*The 2009 thematic review report*</u>

The 2009 report included the following statement:

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

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

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

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

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

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

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

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

- *Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely.*

- *Routinely identifying instances of execution-only clients who have signed disclaimers taking responsibility for their investment decisions, and gathering and analysing data regarding the aggregate volume of such business.*

- *Identifying instances of clients waiving their cancellation rights, and the reasons for this."*

<u>The later publications</u>

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

> *"This guide, originally published in September 2009, has been updated to give firms further guidance to help meet the regulatory requirements. These are not new or amended requirements, but a reminder of regulatory responsibilities that became a requirement in April 2007.*
>
> *All firms, regardless of whether they do or do not provide advice must meet Principle 6 and treat customers fairly. COBS 3.2.3(2) is clear that a member of a pension scheme is a "client" for SIPP operators and so is a customer under Principle 6. It is a SIPP operator's responsibility to assess its business with reference to our six TCF consumer outcomes: …"*

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

> ***"Relationships between firms that advise and introduce prospective members and SIPP operators***
>
> *Examples of good practice we observed during our work with SIPP operators include the following:*
>
> - *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for unauthorised business warnings.*
>
> - *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*
>
> - *Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.*
>
> - *Being able to identify irregular investments, often indicated by unusually small or large transactions; or higher risk investments such as unquoted shares which may be illiquid. This would enable the firm to seek appropriate clarification, for example from the prospective member or their adviser, if it has any concerns.*
>
> - *Identifying instances when prospective members waive their cancellation rights and the reasons for this.*

- *Although the members' advisers are responsible for the SIPP investment advice given, as a SIPP operator the firm has a responsibility for the quality of the SIPP business it administers.*

Examples of good practice we have identified include:

- *conducting independent verification checks on members to ensure the information they are being supplied with, or that they are providing the firm with, is authentic and meets the firm's procedures and are not being used to launder money*

- *having clear terms of business agreements in place which govern relationships and clarify responsibilities for relationships with other professional bodies such as solicitors and accountants, and*

- *using non-regulated introducer checklists which demonstrate the SIPP operators have considered the additional risks involved in accepting business from nonregulated introducers"*

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

> ***"Due diligence***
>
> *Principle 2 of the FCA's Principles for Businesses requires all firms to conduct their business with due skill, care and diligence. All firms should ensure that they conduct and retain appropriate and sufficient due diligence (for example, checking and monitoring introducers as well as assessing that investments are appropriate for personal pension schemes) to help them justify their business decisions. In doing this SIPP operators should consider:*
>
> - *ensuring that all investments permitted by the scheme are permitted by HMRC, or where a tax charge is incurred, that charge is identifiable, HMRC is informed and the tax charge paid*
>
> - *periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme*
>
> - *having checks which may include, but are not limited to:*
>
>   - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*
>
>   - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*
>
> - *ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified*
>
> - *good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and*

- *ensuring these benchmarks clearly identify those instances that would lead a firm to decline the proposed business, or to undertake further investigations such as instances of potential pension liberation, investments that may breach HMRC tax relievable investments and non-standard investments that have not been approved by the firm"*

The July 2014 *"Dear CEO"* letter provides a further reminder that the Principles apply and an indication of the FCA's expectations about the kinds of practical steps a SIPP operator might reasonably take to achieve the outcomes envisaged by the Principles.

The *"Dear CEO"* letter also sets out how a SIPP operator might meet its obligations in relation to investment due diligence. It says those obligations could be met by:

- *"correctly establishing and understanding the nature of an investment*
- *ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation*
- *ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable)*
- *ensuring that an investment can be independently valued, both at point of purchase and subsequently*
- *ensuring that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc)"*

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

I acknowledge that the 2009 and 2012 reports and the *"Dear CEO"* letter 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 produce the outcomes envisaged by the Principles. In that respect the publications, which set out the regulator's expectations of what SIPP operators should be doing, also 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 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.

The introduction to the 2009 thematic review report says:

> *"In this report, we describe the findings of this thematic review, and make clear what we expect of SIPP operator firms in the areas we reviewed. It also provides examples of good practices we found."*

And, as referenced above, the report goes on to provide *"…examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms."*

So, I'm satisfied that the 2009 report is a *reminder* that the Principles apply and it gives an indication of the kinds of things a SIPP operator might do to ensure it's treating its customers fairly and producing the outcomes envisaged by the Principles. The report set out the regulator's expectations of what SIPP operators should be doing and therefore indicates what I consider amounts to good industry practice at the relevant time. So, I'm satisfied it's relevant and therefore appropriate to take it into account.

Options has argued that many of the matters which the report invites firms to consider are directed at firms providing advisory services. But to be clear, I think the report is also directed at firms like Options acting purely as SIPP operators. The report says that *"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses…"* And it's noted prior to the good practice examples quoted above that *"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."*

The remainder of the publications also 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's treating its customers fairly and producing the outcomes envisaged by the Principles. In that respect, these publications also go some way to indicate what I consider amounts to good industry practice at the relevant time. I therefore remain satisfied it's appropriate to take them into account too.

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

It's also clear from the text of the 2009 and 2012 thematic review 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 regulator's 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 had not changed.

I note that HHJ Dight in the *Adams* case didn't consider the 2012 thematic review report, 2013 SIPP operator guidance, and 2014 *"Dear CEO"* letter to be of relevance to his consideration of Mr Adams' claim. But it doesn't follow that those publications are irrelevant to my consideration of what is fair and reasonable in the circumstances of this complaint. I'm required to take into account good industry practice at the relevant time. And, as mentioned, the publications indicate what I consider amounts to good industry practice at the relevant time.

That doesn't mean that, in considering what is fair and reasonable, I'll only consider Options' actions with these documents in mind. The reports, *"Dear CEO"* letter and guidance gave non-exhaustive examples of good industry practice. They did not say the suggestions given were the limit of what a SIPP operator should do. As the annex to the *"Dear CEO"* letter notes, what should be done to meet regulatory obligations will depend on the circumstances.

What did Options' obligations mean in practice?

To be clear, I don't say the Principles or the publications obliged Options to ensure the transactions were suitable for Mr S. It's accepted Options wasn't required to give advice to Mr S, and couldn't give advice. And I accept the publications don't alter the meaning of, or the scope of, the Principles. But, as I've said above, they're evidence of what I consider to have been good industry practice at the relevant time, which would bring about the outcomes envisaged by the Principles. As Options has noted from the FCA's Enforcement Guide, publications of this type *"illustrate ways (but not the only ways) in which a person can comply with the relevant rules"*. And so, it's fair and reasonable for me to take them into account when deciding this complaint.

Options has argued that any publications or guidance that post-dated the events subject of this complaint don't help to clarify the type of good industry practice that existed at the relevant time. But that doesn't alter my view on what I consider to have been good industry practice at the time. That's because I find that the 2009 report together with the Principles provide a very clear indication of what Options could and should have done to comply with its regulatory obligations that existed at the relevant time before accepting Mr S's application.

It's important to keep in mind that the judge in the High Court *Adams* judgment 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 Mr S's application to establish a SIPP and to invest in Store First, Options 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 Options should have done to comply with its regulatory obligations and duties.

Taking account of the factual context of this case, it's my view that in order for Options to meet its regulatory obligations, (under the Principles and COBS 2.1.1 R), amongst other things, it should have undertaken sufficient due diligence on TPS Land/the business TPS Land was introducing and the Store First investment *before* deciding to accept Mr S's application and proceeding with his transfer and investment instructions.

Options says it's being held liable because it's the only regulated entity over which the Financial Ombudsman Service has jurisdiction. But ultimately, what I'll be looking at here is whether Options took reasonable care, acted with due diligence and treated Mr S fairly, in accordance with his best interests. And what I think is fair and reasonable in light of that. And I think the key issue in Mr S's complaint is whether it was fair and reasonable for Options to have accepted Mr S's SIPP application and his investment instruction in the first place. So, I need to consider whether Options carried out appropriate due diligence checks on TPS Land and the Store First investment, before deciding to accept Mr S's application and invest his pension monies in this way.

And the questions I need to consider include whether Options ought to, acting fairly and reasonably to meet its regulatory obligations and good industry practice, have identified that consumers introduced by TPS Land and/or investing in Store First were being put at significant risk of detriment. And, if so, whether Options should therefore not have accepted Mr S's application for the Options SIPP and/or the investment.

The contract between Options and Mr S

Options has made submissions about its contracts with consumers like Mr S and I've carefully considered everything Options has said about this.

I acknowledge that Options says that, at the time of the transaction, there was nothing in the regulator's rules preventing SIPP providers accepting business from execution-only customers or high-risk business.

For clarity, my decision is made on the understanding that Options acted purely as a SIPP operator. I don't say Options should (or could) have given advice to Mr S or otherwise have ensured the suitability of the SIPP or the investment for him. I accept that Options made it clear to Mr S that it wasn't giving, nor was it able to give, advice and that it played an execution-only role in his SIPP investments. And that forms, which it appears Mr S signed, confirmed, amongst other things, that losses arising as a result of Options acting on his instructions were his responsibility.

I've not overlooked or discounted the basis on which Options was appointed. And my decision on what's fair and reasonable in the circumstances of Mr S's case is made with all of this in mind. So, I've proceeded on the understanding that Options wasn't obliged – and wasn't able – to give advice to Mr S on the suitability of the SIPP or the investment.

Options' due diligence on TPS Land and its decision to accept Mr S's application from TPS Land

At the relevant time, the FSA list featured warnings ('alerts') about unauthorised individuals and businesses. If Options had acted in accordance with its regulatory obligations and good industry practice at the relevant time it ought to have undertaken sufficient enquiries on TPS Land to understand who its directors were, and checked the FSA's warning list as part of its due diligence on TPS Land. Had it carried out these checks before accepting business from TPS Land it would have discovered that TPS Land's director Terence Wright was on the FSA warning list.

It wouldn't be sufficient, in my view, to simply ask the introducer if the regulator had raised concerns about its business practices. Rather I think Options, acting fairly, with due regard to Mr S's interests, ought to have carried out its own check on Mr Wright. And that appears to have been Options' view too. Its comments suggest it understood it was good practice, consistent with its regulatory obligations, to make its own independent checks. So, it ought to have undertaken a check on Mr Wright before it began accepting introductions from TPS Land.

In the event, Options didn't check the FSA's list. It used the World Check service. And it didn't check Mr Wright until 15 May 2012.

I note that Options says the FSA notice relating to Mr Wright wasn't entered onto World Check (the checking service it used) until 24 October 2011. And so, if it had run a check on Mr Wright at the outset, this wouldn't have revealed his entry on the FSA's warning list. Options also says that it was under no obligation to check the FSA's list itself.

TPS Land was an unregulated business, based in Spain, and was proposing to deal with the pensions of UK consumers. Options ought to have known the FSA kept a list of alerts, relating to unregulated businesses, which were often based overseas. As a SIPP operator considering accepting business from an unregulated overseas firm, it should have been mindful of the FSA's list of alerts, and in compliance with its regulatory obligations, checking the warnings posted on the FSA's website is something that Options should have done as a matter of course. I consider this amounts to good industry practice and, in my view, it would have been fair and reasonable, and in accordance with Options' regulatory

obligations, for such a check to take place before it entered into a relationship with TPS Land.

Further, the obligation to undertake due diligence is an ongoing one. Information available about individuals and investments changes over time, so such checks should have been conducted on a regular basis.

So, if I accept that use of the World Check service to check Mr Wright at the outset wouldn't have revealed his entry on the list, this doesn't change my view. Options should have checked the FSA's list. The fact that Options chose to use a tool and the tool may have missed something doesn't mean it shouldn't be held responsible – for the reasons given, it should have checked the list itself. To my mind, the fact Options decided to delegate responsibility for undertaking the necessary checks to the World Check tool – when the relevant FSA warning wasn't entered onto that tool until some time after it appeared on the FSA list, meaning that even if Options had entered the right name (which it didn't), it wouldn't have picked up the warning in any event – is irrelevant to my finding that Options failed to undertake sufficient due diligence on TPS Land and missed that Mr Wright was subject to an FSA alert.

Had Options ascertained who the directors of TPS Land were at the outset of the relationship with TPS Land and checked the FSA's list then (or at least at the point it did become aware Mr Wright was a director of TPS Land), it would have discovered that Mr Wright was the subject of the FSA alert I've quoted above.

So, I find that if Options had acted in accordance with its regulatory obligations and good industry practice at the relevant time it ought to have undertaken sufficient enquiries on TPS Land to understand who its directors were, and checked the FSA's warning list as part of its due diligence on TPS Land. Had it carried out these checks before accepting business from TPS Land it would have discovered that TPS Land's director Terence Wright was on the FSA warning list.

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

In a complaint with similar circumstances to Mr S's, Options previously said:

> *"...the FSA Notice, in the form in which it had been published in 2010 and which would have existed as at the inception of Options' relationship with TPS Land, stated only that Mr Wright was not regulated by the FSA and referred only to a business named Cash In Your Pension targeting UK investors. There was nothing in the FSA Notice which described any criminal or civil wrongdoing and there was no contradiction between the FSA Notice and any statement provided by Mr Wright that they were not subject to any FSA action or censure. Even if, therefore, Options' searches had revealed the FSA Notice there is no reason this should necessarily have led Options to conclude at the time that it should not accept introductions of customers from TPS Land."*

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

With this in mind, I think the warning should have acted as a significant reason for Options to be concerned about any business Mr Wright was involved in – not just Cash In Your

Pension. The warning mentioned that Mr Wright was involved in the area of pensions – which is the same business area that TPS Land was active in. And the warning said that Mr Wright wasn't authorised and may be *"targeting UK customers"* in connection with investment business conducted through an unregulated company, Cash In Your Pension.

I also think the presence of Mr Wright on the list, after he had answered *"no"* to a question asking him if he was subject to any FSA action or censure when completing an Options introducer profile for CL&P, should immediately have raised a red flag to Options – it should have given rise to significant concern about Mr Wright's conduct and integrity.

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

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

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

So, in my opinion, TPS Land's director Terence Wright's presence on the FSA warning list should have led Options to conclude that it shouldn't do business with TPS Land. That is my view and I note it's a view which was held by Ms H when she gave evidence to the court during the *Adams* hearing. This was summarised at paragraph 60 of the High Court judgment as follows:

> *"It was also brought to my attention that from October 2010 the FCA had published warnings about dealing with another director, Mr Terence Wright, who was not authorised under FSMA to carry out regulated activity.* [Ms H] *accepted in cross-examination that no check was made to see whether his name appeared on a regulatory warning notice on the FCA's website until May 2012. The relationship between the defendant and CLP was severed on 25 May 2012. She accepted that had she been aware of such a warning in 2010 the defendant would not have dealt with CLP."*

So, Ms H told the court that had she been aware of the warning in 2010, Options wouldn't have dealt with CL&P, and it follows that it wouldn't have dealt with TPS Land either given Mr Wright was also the director of that firm. Such a conclusion was the proper one it ought to have reached bearing in mind Options' responsibilities under the Principles.

Taking all of the above into consideration – individually and cumulatively – I think in the circumstances it's fair and reasonable for me to conclude that Options ought reasonably to have concluded, had it complied with its regulatory obligations which required it to conduct sufficient due diligence on TPS Land before accepting business from it, that it should *not*

accept business from TPS Land. If Options had carried out proper introducer due diligence it ought to have concluded that it shouldn't accept business from TPS Land. I therefore conclude that it's fair and reasonable in the circumstances to say that Options shouldn't have accepted Mr S's application from TPS Land in September 2011.

Options due diligence on the Store First investment

I'm satisfied that, to meet its regulatory obligations when conducting its business, Options was required to consider whether to accept or reject a particular investment, with the Principles in mind.

I think that it's fair and reasonable to expect Options to have looked carefully at the Store First investment *before* permitting it into its SIPPs. To be clear, for Options 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 Options 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 Options had exercised due skill, care and diligence – or treated its customer fairly – by accepting such an investment.

The actions Options took in considering whether to permit the Store First investment into its SIPPs are set out in detail in the background section above, so I won't repeat them here.

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

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

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

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

Consistent with its regulatory obligations, Options should not only have obtained the material but should also have given careful consideration to it. The marketing material obtained by Options at the relevant time included the following prominent statements:

> *"You will receive guaranteed returns from a 6 year lease already in place upon completion, making this a high yielding, hassle-free investment which has been specifically designed to meet the needs of todays* [sic] *astute investor."*
>
> *"You will receive a 6 year lease in place upon completion. The lease produces an excellent return of 8% (guaranteed for the first 2 years) rising to over 12% in years 5 and 6. The lease contains upward-only rental reviews and break clauses for both parties every two years."*
>
> *"Guaranteed exit route option."*

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

> *"What rental income can I expect?*
>
> *Storepod rental starts at £17 per Sq/Ft per annum. The 6 year tenancy/lease in place on your Storepod has fixed upwards only rental reviews and break clauses (for both parties) every 2 years. This produces an 8% yield on your investment within the first two years, this then is predicted to rise to over 10% return in years 3&4 and then surpass 12% return in years 5&6.*
>
> *Can I easily re-sell my Storepod?*
>
> *Yes. You can re-sell your Storepod at any time and selling your Storepod couldn't be simpler. Store First Ltd can market your Storepod upon your request. We believe that because Storepods are so competitively priced when new, they will make a very attractive sale proposition in the future. We also expect that many tenants will wish to purchase the Storepod they are using. For example, other self storage PLCs usually achieve rent of between £20.00 - £25.00 per square foot. Our Storepods are costed at a rent of only £17.00 per square foot; once higher rents are achieved the capital value of the Storepod will increase.*
>
> *Guaranteed exit route?*
>
> *In year 5, investors have the option to enter the guaranteed buy-back scheme. In this scheme, Store First Management Ltd will guarantee to buy the Storepod back off the investor for the original price paid within the next 5 years. This is a unique offer in the market place and we are happy to be able to offer this exit route to our investors. Most investors are driven to keep the property investment they have purchased and carry on receiving the rental yield produced for years to come, this means only a very limited number of Storepods per centre will ever come onto the resale market, this creates a high sale value and demand for the future".*

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

I note Options considered a report by Enhance Support Solutions. In my view this was of limited value. It was brief and based only on some of the material Options had regard to i.e.

the marketing material and lease documents. As a result, I think Options should have found it difficult to reconcile the view reached by Enhance Support Solutions with the information available to Options. The report said:

> *"The following parties are involved in this investment: Seller of the sub-lease: Store First Limited UK Promoter: Harley Scott Holdings Limited No adverse history has been found affecting these parties. A CCJ was issued against the promoter of the scheme however we understand this arose from a disputed invoice which is in the course of being settled. This is* [sic] *any event does not directly impact on the investment".*

This conclusion is inconsistent with the result of Options' own company searches, which reported the adverse comments for the previous three years, the CCJs, and that the business had recently changed its name. The report also makes no comment on the obvious issues with the marketing material. So, I don't think Options should have taken any comfort from the Enhance Support Solution report or attached any significant weight to it.

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

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

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

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

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

I think, in light of this, Options should have been concerned that consumers may have been misled or didn't 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.

From the evidence I've seen, I think the information Store First was publishing *before* Mr S's Options 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 Options ought to have identified this *before* permitting the Store First

investment into its SIPPs. This is a clear point of concern, which I think Options ought reasonably to have identified *before* it accepted Mr S's application to invest in Store First.

In my opinion, the issues I've identified above should have, when considered objectively, put Options on notice from the beginning 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 Options shouldn't have accepted the Store First investment.

Had Options 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.

Therefore, based on the available evidence, I don't think Options 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 Options met its regulatory obligations and, in accepting Mr S's instruction to invest in Store First, allowed his funds to be put at significant risk.

To be clear, I don't say Options should have identified all the issues the SSA UK press release set out or should have foreseen the issues which later came to light with Store First. I only say that, based on the information available to Options 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 Options at the time. And I do think that appropriate checks would have revealed issues which were, in and of themselves, sufficient basis for Options to have declined to accept the Store First investment in its SIPPs *before* Mr S invested in it. And it's the failure of Options' due diligence that's resulted in Mr S 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 Options wasn't expected to, nor was it able to, give advice to Mr S on the suitability of the SIPP and/or Store First investment for him personally. To be clear, I'm not making a finding that Options should have assessed the suitability of the Store First investment for Mr S. I accept Options had no obligation to give advice to Mr S, or to ensure otherwise the suitability of an investment for him.

And I'm also not saying that Options shouldn't have allowed the Store First investment into its SIPPs because it was high risk. My finding isn't that Options should have concluded that Mr S wasn't a candidate for high-risk investments or that an investment in Store First was unsuitable for Mr S. Instead, it's my fair and reasonable opinion that there were things Options knew or ought to have known about the Store First investment and how it was being marketed which ought to have led Options to conclude it wouldn't be consistent with its regulatory obligations or good practice to allow it into its SIPPs. And that Options failed to act with due skill, to organise and control its affairs responsibly, and to treat Mr S fairly by accepting the Store First investment into his SIPP.

Acting fairly and reasonably to investors (including Mr S), Options 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 it's more likely than not that Mr S's pension monies were only transferred to Options so as to enable the Store First investment. So, I think it's likely that if Options hadn't permitted the Store First investment to be held in its SIPPs at all, Mr S's pension monies wouldn't have been transferred to Options. And further, that Mr S wouldn't then have

suffered the losses he's suffered as a result of transferring to Options and investing in Store First.

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

Options has said that it was Mr S's decision to proceed on an execution-only basis and it made this clear to him. On similar cases, Options has also made the point that COBS 11.2.19 R obliged it to execute investment instructions. It has effectively said that once the SIPP has been established, it's required to execute the specific instructions of its client. Before considering this point, I think it's important for me to reiterate that, it wasn't fair and reasonable for Options to have accepted Mr S's SIPP application from TPS Land in the first place. So, in my opinion, the SIPP shouldn't have been established and the opportunity to execute investment instructions or to proceed in reliance on an indemnity shouldn't have arisen at all.

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

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

Therefore, I don't think Options' argument on this point is relevant to its obligations under the Principles to decide whether or not to accept an application to open a SIPP in the first place or to execute the instruction to make the investment, i.e. to proceed with the application.

Was it fair and reasonable in all the circumstances for Options to proceed with Mr S's application?

For the reasons given above, I think Options shouldn't have accepted Mr S's business from TPS Land and I also think it shouldn't have accepted the Store First investment into his SIPP. So, things shouldn't have got beyond that.

And, to be clear, even if I thought Options had undertaken adequate due diligence on TPS Land, and acted appropriately in accepting Mr S's business initially from TPS Land (which, as I've explained, I don't), I'd still consider it fair and reasonable to uphold Mr S's complaint on the basis that Options didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr S fairly, by accepting the Store First investment into his SIPP.

I make this point here to emphasise that while I've concluded *both* that Options shouldn't have accepted Mr S's business from the introducer *and* also that it shouldn't have accepted his instruction to invest in Store First, if I had only reached the conclusions I've set out above

on one of those aspects and not also gone on to reach findings on the other aspect for completeness, I'd still consider it fair and reasonable in all the circumstances to uphold this complaint. That's because Options didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr S fairly by accepting his business from TPS Land. And because, separately, Options also didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr S fairly, by accepting the Store First investment into his SIPP. And to my mind, Options didn't meet its regulatory obligations or good industry practice at the relevant times and allowed Mr S to be put at significant risk of detriment as a result.

Further, in my view it's fair and reasonable to say that just having Mr S sign declarations, wasn't an effective way for Options to meet its regulatory obligations to treat him fairly, given the concerns Options ought to have had about the business being introduced by TPS Land, and about the Store First investment.

Options knew Mr S had signed forms intended to acknowledge, amongst other things, his awareness of some of the risks involved with investing and to indemnify Options against losses that arose from acting on his instructions. And, in my opinion, relying on the contents of such forms when Options knew, or ought to have known, that both the type of business it was receiving from TPS Land and 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, I think the fair and reasonable thing for Options to do would have been to decline to accept Mr S's business from TPS Land and to refuse to accept the Store First investment into his SIPP.

The Principles exist to ensure regulated firms treat their clients fairly. And I don't think the paperwork Mr S signed meant that Options could ignore its duty to treat him fairly. To be clear, I'm satisfied that indemnities contained within the contractual documents don't absolve, nor do they attempt to absolve, Options of its regulatory obligations to treat customers fairly when deciding whether to accept or reject investments or business.

So, I'm satisfied that Mr S's SIPP shouldn't have been established and his SIPP monies shouldn't have been invested in the Store First holding. And that the opportunity for Options to execute the investment instruction to invest Mr S's monies in Store First or to proceed in reliance on an indemnity and/or risk disclaimers shouldn't have arisen at all.

I'm of the view that it wasn't fair and reasonable in all the circumstances for Options to accept Mr S's business from TPS Land or for it to accept his instruction to invest in Store First.

Is it fair to ask Options to pay Mr S compensation in the circumstances?

The involvement of other parties

In this decision I'm considering Mr S's complaint about Options. But I accept other parties were involved in the transactions complained about, including TPS Land.

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 3.7.2 R).

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

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

I accept that other parties, including TPS Land, might have some responsibility for initiating the course of action that led to the loss. However, I'm satisfied that it's also the case that if Options had complied with its own distinct regulatory obligations as a SIPP operator, the arrangement for Mr S wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

I want to make clear that I've taken everything Options has said into consideration. And it's my view that it's appropriate and fair in the circumstances for Options to compensate Mr S to the full extent of the financial losses he's suffered due to Options' failings. And, having carefully considered everything, I don't think that it would be appropriate or fair in the circumstances to reduce the compensation amount that Options is liable to pay to Mr S.

Mr S taking responsibility for his own investment decisions

In reaching my conclusions in this case I've thought about section 5(2)(d) of FSMA (now section 1C). This section requires the FCA, in securing an appropriate degree of protection for consumers, to have regard to, amongst other things, the general principle that consumers should take responsibility for their own investment decisions.

I've considered this point carefully and I'm satisfied that it wouldn't be fair or reasonable to say Mr S's actions mean he should bear the loss arising as a result of Options' failings.

In my view, if Options had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted Mr S's business from TPS Land or accepted his application to invest in Store First at all. That should have been the end of the matter – if either of those things had happened, I'm satisfied the arrangement for Mr S wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

As I've made clear, Options needed to carry out appropriate initial and ongoing due diligence on TPS Land and on the Store First investment and reach the right conclusions. I think it failed to do this. And just having Mr S sign forms containing declarations and indemnities wasn't an effective way of Options meeting its obligations, or of escaping liability where it failed to meet its obligations.

I've carefully considered what Options has said about Mr S being aware of the risks – that he signed documents confirming the investment was high risk. As I explain below, I don't agree that the evidence we've seen to date supports the contention that it's more likely than not that Mr S understood the Store First investment was high risk. But, in any eventuality, this is a secondary point because, as mentioned above, if Options had acted in accordance with its regulatory obligations and good industry practice, I'm satisfied the arrangement for Mr S wouldn't have come about in the first place.

So, overall, I'm satisfied that in the circumstances, for all the reasons given, it's fair and reasonable to say Options should compensate Mr S for the loss he's suffered. I don't think it would be fair to say in the circumstances that Mr S should suffer the loss because he ultimately instructed the transactions to be executed.

Had Options declined Mr S's business from TPS Land, would the transactions complained about still have been effected elsewhere?

Options has argued that it didn't cause the loss because it's very likely that Mr S was extremely keen to proceed with the investment to release funds and would have found a way to invest even if Options hadn't been dealing with TPS Land or hadn't been accepting Store First investments. It says that if it had refused to process applications like Mr S's for any reason, the client would have likely made the same investments via a different SIPP provider. So, would have suffered the same loss.

However, Options has provided no evidence to support an argument that Mr S wanted to open a SIPP and invest his SIPP monies in Store First no matter what.

I've thought carefully about what Mr S would likely have done if Options had told him it was rejecting his business. Mr S has said TPS Land convinced him that *"the investment was safe"* given the buyback option. Therefore, I think if Options had rejected the application and explained the reasons for doing so to Mr S, this would have raised alarms that the investment may not be as secure as he initially thought.

I don't think it's fair and reasonable to say that Options shouldn't compensate Mr S for the loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found Options did. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted Mr S's business from TPS Land or permitted the Store First investment into its SIPPs.

In the circumstances, I'm satisfied it's fair and reasonable to conclude that if Options had refused to accept Mr S's application from TPS Land and/or hadn't permitted the Store First investment in its SIPPs, the transactions wouldn't still have gone ahead, and Mr S would have retained his monies in his previous scheme.

And had Options explained to Mr S why it refused to accept his application from TPS Land and/or hadn't permitted the Store First investment in its SIPPs, I think it's very unlikely Mr S would have tried to find another SIPP operator to accept the business.

At paragraph 32 of the High Court *Adams* judgment, HHJ Dight found that Mr Adams would have proceeded with the transaction regardless:

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

Options says clients understood the investments were high risk. But Mr S has explained that he thought *"the investment was safe"* as he had the protection of the buyback clause.

I've carefully considered what Options has said about Mr S being aware of the risks – that Options provided him with numerous risk warnings regarding his chosen investment, including the warnings in the member declaration he signed, and these warnings were very clear regarding what the investment was and that it was high risk.

But I think the information Mr S likely received at the start regarding the Store First investment presented it, in detail, as providing high returns with little to no risk.

Overall, I don't agree the contents of the forms support the contention that Mr S understood the investments were high risk. I'm not persuaded that Mr S, an individual with limited investment experience, proceeded to invest his pension in the knowledge that the investment he was making was high risk.

I’m also not persuaded that Mr S was determined to move forward with the transaction in order to take advantage of the cash incentive. While Mr S received an incentive payment from TPS Land, he’s also said that he believed his pension would be safe, and I’ve not seen any evidence to suggest he had an overriding need for the cash which would have outweighed other considerations – such as the tax implications or the potential impact on his pension of taking this sum.

It's possible that the lure of around £1,500 would have caused Mr S to transfer whatever Options did, but I think that’s unlikely. I think Mr S decided to accept the incentive payment as he was persuaded by TPS Land his pension would perform better with the investment it was promoting. If he’d understood the circumstances giving rise to a significant risk of detriment, I don’t think he’d have exposed his pension fund to this risk just to receive the capital sum. On balance, I’m satisfied that Mr S wasn’t so eager to complete the transaction in order to receive the cash incentive that he’d have gone ahead if Options had declined the application and explained the reasons for doing so.

Having carefully considered all the circumstances, I’m satisfied it’s fair and reasonable to conclude that if Options had refused to accept Mr S’s application from TPS Land and/or to permit the Store First investment in its SIPPs, the transactions this complaint concerns wouldn’t still have gone ahead.

In conclusion

Taking everything into consideration, I think that in the circumstances of this case it’s fair and reasonable for me to conclude that Options should have decided not to accept business from TPS Land and/or to accept the Store First investment to be held in its SIPPs *before* it had received Mr S’s application from TPS Land. I conclude that if Options hadn’t accepted Mr S’s introduction from TPS Land and/or the Store First investment to be held in its SIPPs, Mr S wouldn’t have established an Options SIPP, transferred his existing personal pension into it or invested in Store First.

For the reasons I’ve set out, I also think it’s fair and reasonable to direct Options to compensate Mr S for the loss he’s suffered as a result of Options accepting Mr S’s business from TPS Land and permitting him to invest his SIPP monies in Store First. I say this having given careful consideration to the *Adams* judgments but also bearing in mind that my role is to reach a decision that’s fair and reasonable in the circumstances of the case having taken account of all relevant considerations.

Overall, I think it’s fair and reasonable to direct Options to pay Mr S compensation in the circumstances. While I accept that other parties might have some responsibility for initiating the course of action that’s led to the loss, I consider that Options failed to comply with its own regulatory obligations and didn’t put a stop to the transactions proceeding by declining to accept Mr S’s application when it had opportunities to do so. And I’m satisfied that Mr S wouldn’t have established the Options SIPP, transferred monies in from his personal pension, or invested in Store First if it hadn’t been for Options’ failings.

In my view, in considering what fair compensation looks like in this case, it’s reasonable to make an award against Options that requires it to compensate Mr S for the full measure of his loss.

Putting things right

I consider that Options failed to comply with its own regulatory obligations and didn’t put a stop to the transactions. My aim in awarding fair compensation is to put Mr S back into the position he would likely have been in had it not been for Options’ failings. Had Options acted

appropriately, I think it's *most likely* that Mr S would have remained a member of the pension plan he transferred into the SIPP.

In light of the above, Options should:

- Obtain the notional transfer value of Mr S's previous pension plan.
- Obtain the actual transfer value of the SIPP, including any outstanding charges.
- Take ownership of the Store First investment if possible.
- Pay an amount into the SIPP so as to increase the transfer value to equal the notional value established. This payment should take account of any available tax relief and the effect of charges.
- If Mr S has paid any fees or charges from funds outside of his pension arrangements, Options should also refund these to him. Interest at a rate of 8% simple per year from date of payment to date of refund should be added to this.
- Pay Mr S £500 to compensate him for the trouble and upset caused by Options' failings.

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

Take ownership of the Store First investment if possible

In order for the SIPP to be closed and further SIPP fees to be prevented, the Store First investment needs to be removed from the SIPP. To do this, Options should calculate an amount it's willing to accept for the Store First investment and pay that sum into the SIPP and take ownership of the Store First investment. Any sums paid into the SIPP to purchase the Store First investment will then make up part of the current actual value of the SIPP.

If Options is unable to purchase the Store First investment, the actual value should be assumed to be nil for the purposes of the redress calculation. To be clear, this would include a nil value being given for the purposes of ascertaining the current value of the SIPP.

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

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

Options argues that if the Store First investment remains in the SIPP or otherwise with Mr S with no adjustment in the redress, this would give him an unfair windfall. Though I think it's unlikely, it's possible that the Store First investment may have some realisable value in the future. So, in this instance, for any investments assumed to be nil value, Options may ask Mr S to provide an undertaking to account to it for a sum equivalent to the net amount of any

payment the SIPP may receive from the investment in the future. That undertaking should allow for the effect of any tax and charges on the amount Mr S may receive from the investment and any eventual sums he would be able to access. Options should meet any costs in drawing up the undertaking. Options should only benefit from the undertaking once Mr S has been fully compensated for his loss (to be clear, this includes any loss that's in excess of our award limit).

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

Options should first contact the provider of the plan which was transferred into the SIPP and ask it to provide a notional value for the policy as at the date of calculation. For the purposes of the notional calculation the provider should be told to assume no monies would've been transferred away from the plan, and the monies in the policy would have remained invested in an identical manner to that which existed prior to the actual transfer.

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

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 have enjoyed is allowed for.

Account should also be taken of the payment of around £1,500 Mr S says he received as a result of these transactions. This can be taken into account in the calculation by way of treating it as an income withdrawal paid at the outset.

If there are any difficulties in obtaining a notional valuation from the previous provider, then Options should instead arrive at a notional valuation by assuming the monies would have enjoyed a return in line with the FTSE UK Private Investors Income Total Return Index (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.

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

Pay an amount into the SIPP so that the transfer value is increased by the loss calculated above.

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

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

Interest

The compensation resulting from this loss assessment must be paid to Mr S or into the SIPP within 28 days of the date Options receives notification of his acceptance of my final decision. The calculation should be carried out as at the date of my final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation is not paid within 28 days.

Pay Mr S £500 for the trouble and upset he's suffered

In addition to the financial loss suffered as a result of the problems with the SIPP, I think it's fair and reasonable to say that the loss of a significant portion of the sum invested has caused Mr S worry and upset. Especially as the loss has occurred as Mr S approaches retirement, meaning his pension provision will naturally be of concern. Options should pay him £500 to compensate him for this.

Assignment of rights

If Options believes other parties to be wholly or partly responsible for the loss, it's free to pursue those other parties. So, compensation payable to Mr S can be contingent on the assignment by him to Options of any rights of action he may have against other parties in relation to the transfer to the SIPP and the investment if Options requests this. The assignment should be given in terms that ensure any amount recovered by Options up to the balance due to Mr S is paid to him. Options should only benefit from the assignment once Mr S has been fully compensated for his loss (to be clear, this includes any loss that's in excess of our award limit). Options should cover the reasonable cost of drawing up, and Mr S's taking advice on and approving, any assignment required.

Award limit

Where I uphold a complaint, I can award fair compensation of up to £150,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £150,000, I may recommend that the business pays the balance.

I don't know what award the above calculation might produce. So, while I acknowledge that the value of Mr S's original investment fell well within our award limit, and the compensation may be nowhere near £150,000, for completeness I have included information below about what ought to happen if fair compensation amounts to more than our award limit.

Determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. Options UK Personal Pensions LLP must pay the amount produced by that calculation up to the maximum of £150,000 (including distress and/or inconvenience but excluding costs) plus any interest and costs set out above.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I also recommend Options UK Personal Pensions LLP pays Mr S the balance plus any interest on the balance as set out above.

The recommendation isn't part of my determination or award. Options UK Personal Pensions LLP doesn't have to do what I recommend. It's unlikely that Mr S will be able to accept my final decision and go to court to ask for the balance. Mr S may want to get independent legal advice before deciding whether to accept my final decision.

My jurisdiction decision

My decision is that this complaint was made in time and can be considered by the Financial Ombudsman Service.

My final decision

My final decision is that I uphold this complaint. To put things right, Options UK Personal Pensions LLP must calculate and pay Mr S the award set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 14 January 2025.

Alex Salton
Ombudsman