Neutral Citation Number: [2020] EWHC 1229 (Ch)

Case No: HC- 2017-000084

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

:

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/05/2020

Before :

HIS HON JUDGE DIGHT CBE

- -

Between :

Russell David Edward Adams	**Claimant**
- and –	
Options Sipp UK LLP (formerly Carey Pensions UK LLP)	**Defendant**
- and –	
The Financial Conduct Authority	**Intervenor**

The Financial Conduct Authority

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John Virgo & Professor McMeel QC (instructed by Wixted & Co) for the claimant

Andrew Green QC & Fenner Moeran QC (instructed by Eversheds LLP) for the defendant

Andrew Henshaw QC (instructed by The Financial Conduct Authority) for the intervenor

Hearing dates: 19 to 23 March 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HON JUDGE DIGHT CBE

His Hon Judge Dight CBE :

Introduction

1. The issue at the heart of this claim is whether the defendant, a provider and administrator of self-invested pension plans (referred to and abbreviated as "SIPP(s)"), which operated on an "execution-only" basis, is liable to the claimant investor for the losses which he claims to have suffered as a result of entering into what is said to be a manifestly unsuitable underlying investment, which he instructed the defendant to hold within a SIPP "wrapper".

2. The claimant is an individual investor who claims damages, and in his claim form sought an account of profits, for (1) breach of statutory duty, (2) negligence, and (3) breach of fiduciary duty as a result of the establishment of the SIPP in or around February 2012, which he alleges to have been used as a vehicle for an unsuitable property investment using funds which had been transferred from his existing pension plan. The claim for breach of fiduciary duty was not pursued in the statements of case or at trial, nor was the claim for an account of profits and I say no more about either of those aspects of the claimant's original case.

3. The defendant carried on business as an administrator of SIPPs having been authorised for that purpose by the Financial Conduct Authority ("FCA"), the successor body to the Financial Services Authority. For the sake of consistency I refer to both bodies in this judgment by the initials of the later body, i.e. FCA, whatever the date of the relevant event. After the conclusion of these proceedings the defendant changed its name from Carey Pensions UK LLP to Options Sipp UK LLP. There are references below to the defendant's former name in the documents and citation from the evidence which should be read as a reference to the defendant. Although the defendant was authorised to establish, operate and wind up SIPPs it had no authority to carry on the regulated activity of advising in respect of them: that would be a contravention of the Act of Parliament governing such matters, which I refer to below.

4. Although it was not a party to the litigation, the FCA sought permission shortly before trial to make submissions in writing and orally at trial on questions of law concerning the issues of principle relating to the statutory regulation of SIPPs operators, and as to the proper construction of the relevant statutory provisions and related guidance. In the interests of justice, and to assist me on the questions of law, after hearing argument on the first morning of the trial from the FCA and both parties, I gave the FCA permission to make submissions (the judgment was transcribed and provided to the parties at the time), but that did not extend to putting in factual or expert opinion evidence, or making submissions in relation to the evidence, to the facts which I have to find or as to the outcome of the case. Their role in this litigation is therefore limited, but I am grateful for their written and oral submissions. The written and oral submissions of the FCA were detailed and extensive and cover many issues: I have looked carefully at them in reaching my conclusions in this case. I intend no disrespect to the FCA or their counsel in not setting those submissions out extensively below or in not referring to each aspect of them. I have focused on those issues which are necessary to determine the dispute between the parties on the pleadings in this case. Insofar as it may be said that the FCA has gone beyond what was permitted I can reassure the parties that I have reached my

conclusions on the application of the relevant principles to the facts of this case solely on the submissions made on behalf of the claimant and the defendant.

The Claim and the parties' positions

5. The claimant alleges that the defendant operated a business model pursuant to which it used an unauthorised and unregulated introducer and broker to procure individual investors to enter into SIPPS, established by the defendant, as vehicles for potentially unsuitable underlying investments, taking on the risk that the underlying investments might be unsuitable. The claimant alleges that an entity called CLP Brokers Sociedad Limitada ("CLP"), operating from a business address in Malaga, Spain, was such an unauthorised and unregulated introducer of business to the defendant and that there was a joint venture of some type between them, said to be part of their (joint) business model, pursuant to which CLP recommended an investment in store pod rentals to the claimant who then entered into an arrangement with the defendant which created a SIPP "wrapper" for the investment. This is also described in the amended particulars of claim as a "joint enterprise" or "common design". It is asserted that the defendant thereby became liable for any torts committed by CLP in respect of the recommendation and introduction having taken the risk that CLP might make unsuitable recommendations. Further, the claimant asserts that as part of their business model the defendant and CLP relied on potential investors not seeking independent financial advice before entering into an agreement with the defendant to create a SIPP wrapper for them. He says that the investment which he made via the SIPP was manifestly unsuitable as a consequence of which he made a loss which the defendant is liable for.

6. The claimant essentially pleaded three causes of action in his Amended Particulars of Claim:

   i. breach of the regulatory regime in establishing the SIPP as a result of the acts of CLP thereby rendering the SIPP unenforceable under s.27 of The Financial Services and Markets Act 2000 ("FSMA"), which the claimant identified as his primary case at trial ("the s.27 Claim");
   ii. breach of a duty under FSMA to comply with the Conduct of Business Sourcebook Rules ("COBS"), namely rule 2.1.1R, to act honestly, fairly and professionally in accordance with the best interests of the claimant ("the COBS Claim"); and
   iii. negligent investment advice provided by CLP for which the defendant is liable as a result of a joint venture, common design or agreed common business model ("the Tort Claim").

   The issues to be determined are those which arise on the statements of case. It was suggested that some of the evidence which I heard and some of the submissions which were made went beyond the pleaded issues. In the course of this judgment I aim to determine the issues raised by the statement of case in respect of the three pleaded causes of action and not to seek to resolve questions which do not assist me in reaching a conclusion in respect of those three causes of action.

7. The only relief specifically sought by the claimant in the prayer to his Amended Particulars of Claim is damages "including compensation under section 27 of [FSMA]". In effect he seeks:

i) to have the transaction reversed and to have his original fund returned with compensation equal to the returns he would have enjoyed (s.27 FSMA) and

ii) damages.

The details of the sums claimed by the claimant are set out in an Amended Schedule of Loss which was served a few days before trial.

8. The defendant denies that it is liable for the losses said to have been suffered by the claimant as a result of the investment. The defendant's general position is as follows: first, the defendant carried on the business of setting up and administering SIPPS on an "execution-only" basis; secondly it was not authorised to and did not provide advice to the claimant as to whether to establish a SIPP or to whether to enter into the underlying investment, thirdly; the contract makes clear that the underling investment is the sole responsibility of the claimant; fourth, the claimant was fully aware, before entering into the SIPP, that the underlying investment was high-risk or speculative but nevertheless decided to proceed with the transaction and caused his own loss.

9. As to the three specific causes of action the defendant says, in essence;

i) that the acts of CLP are not of a type which would trigger s.27. The defendant also says that if the court comes to the conclusion that the SIPP agreement is unenforceable pursuant to s.27 of FSMA the court should exercise its discretion under s.28(3) of FSMA to allow the agreement to be enforced and/or to allow the money paid or transferred under the agreement to be retained on the basis that it is just and equitable in all the circumstances and the defendant did not know that CLP was carrying on a prohibited regulated activity, if indeed they were.

ii) CLP did not participate in any relevant regulated business and, given the factual context, it was "honest, fair and professional" within COBS Rule 2.1.1. for the defendant to give the claimant no advice as to the appropriateness of the decision to transfer the PPP to a SIPP or as to the appropriateness of the underlying investment and it denies that it acted in breach of any of the relevant regulatory provisions. In any event the defendant denies that there was any inherent risk in transferring from a PPP to a SIPP or that the underlying investment was manifestly unsuitable;

iii) The defendant also specifically denies that it operated a business model in the course of which it sought introductions via CLP or that there was any joint enterprise or common design between the two or that CLP gave advice in respect of the SIPP to the claimant whether on its own behalf or for the defendant. It also made the point that neither the defendant nor CLP paid the other for its role in the overall process. The evidence does not support the claim that there was joint liability in tort for any losses said to have been suffered by the claimant.

Material before me

10. The court was provided with 9 volumes of documents and a core bundle. I have reminded myself of all the documents to which my attention was drawn during the course of the trial, many of which I refer to below. Equally I have re-read the daily

transcript of the evidence and the argument in the case, as a supplement to my manuscript notes, together with all the written submissions of counsel filed both before and in the course of the trial. After the completion of the trial I received and have reconsidered a number of additional authorities and several sets of further written submissions from the parties in relation to those authorities, which I have read and comment briefly on below.

11. I heard oral evidence from two witnesses of fact, the claimant and Ms Christine Hallett, and one expert who gave valuation evidence about the underlying investment, Mr John Trenor. Ms Christine Hallett was the Chief Executive Officer of the defendant from 2009, with oversight of the defendant's business. All witnesses were cross-examined by counsel for the parties, but not by the FCA. The cross-examination of Ms Hallett was considerably longer than that of the claimant. So far as the factual evidence is concerned, in reality there was no challenge on credibility, although submissions were made in closing about the reliability of Ms Hallett. However, I have come to the conclusion that each of the witnesses was honest and gave his or her best recollection of the events in respect of which they were asked questions in cross-examination and I accept the oral evidence given by both of them. I will return to Mr Trenor's evidence below.

Factual Background and my findings of fact

12. The claimant is a self-employed haulage contractor, born on 17 December 1960. He and his wife jointly owned their house in Orpington, Kent, which in 2012 had a value of about £380,000 with a mortgage of about £170,000. Their joint income was limited but he had built up a pension fund via a Personal Pension Plan ("a PPP") with FriendsLife (although he thought at one stage it was with Sun Life) with a then value of about £52,000 but had ceased making contributions to it. He said that he found himself in difficult financial circumstances. He wanted to release some funds from his pension pot. There was no detailed evidence in his witness statement, disclosure or at trial as to the full extent of his means and assets but they appeared to be relatively modest from what little I heard about them. Nor was there any evidence, save to the very limited extent that this appeared in the application form to which I refer below, that the defendant was aware of the claimant's financial situation. The key detail on which the claimant relied at trial in relation to his finances was that the size of the pension pot which he had managed to accumulate and which he transferred into the SIPP provided by the defendant was small and should therefore have triggered a realisation on the part of the defendant that the underlying investment was unsuitable. For the reasons which I give below I reject that suggestion. It was insufficient material on which the defendant could or should have formed such a view.

13. Ms Hallett told me that since it had been established in April 2009 the defendant had always carried on the business of a SIPP provider and administrator on an execution only basis: "i.e. it does not provide any advice and acts only on the express instructions of its members" i.e. the customers or clients to take out SIPPs with the defendant. Its main source of introductions was via regulated Independent Financial Advisors.

14. The defendant's relationship with CLP came to be governed by the defendant's "Terms of Business" which had effect from 15 August 2011 but were not signed until 20 March 2012. Ms Hallett's evidence was that the defendant first accepted a referral of a direct client from CLP on 15 August 2011, that it did not pay for the referral but that it had

been told by CLP that the typical commission which CLP received from the underlying investment provider was between 2% and 5% of the investment. The "Non-Regulated Introducer Profile" form completed by CLP dated 29 September 2011 confirmed the amount of commission coming from Store First in respect of the sale of the underlying investment to the investor. Ms Hallett's evidence was that the defendant's only income at the material time was derived from fees charged to its members for the services which it provided in relation to the establishment and administration of SIPPS. It is obvious from emails passing directly between CLP and the defendant in early August 2011 that the defendant knew that investors in the Store First scheme would be directed to the defendant to invest their pension funds via a SIPP to be provided by the defendant and it put in place a system for handling such investments, including the use of conveyancing solicitors to complete the acquisition of the underlying investments. Ms Hallett accepted in cross-examination that ultimately the defendant had approximately 580 clients who invested with Store First, most of whom had come via CLP who between them invested something in the order of £29million over a period of six months, which was about ten percent of the assets which were held in the defendant's pension schemes.

15. In her witness statement [paragraphs 11 and 12] Ms Hallett emphasised that "at no point did the Defendant enter into, agree or operate a joint enterprise or common design with CL&P. The Defendant did not collude with CL&P in respect of any advice (not least because the Defendant did not think that CL&P was providing any advice)." She denied that any payments were made by CLP or the defendant to each other, asserting that the relationship was an arm's length relationship. Her oral evidence and the contemporaneous documentation support what she says. She summarised this towards the end of the evidence she gave when being cross-examined to the effect that there was some type of joint enterprise, or relationship or business model:

> "A. There are three complete distinct relationships. One was with the investment company Store First and we accepted that investment. That was prior to anything else happening. Then we were approached by CL&P as an introducer, and that was another relationship. The relationship we have with our direct clients is another one. We can't comment on the relationship that is formed between CL&P and their clients, that is to do with her business model. All we have said is our SIPP is currently accepting the product that you are discussing with your client, and therefore if your client wishes, on an execution only basis, to establish a SIPP with us, then we are happy to receive that SIPP application."
>
> Q. This was all part and parcel of one streamlined piece of business—
>
> A. The streamlined piece of business to which you refer was specifically to do with the Store First investment, and what we tried to do for all of our clients in relation to that investment was to streamline it in the sense of we had a common lawyer that we used. So it was much more to do with the investment than the process with CL&P. CL&P were just receiving a client who happened to want to set up a SIPP on an execution-only basis."

I find that there was no joint enterprise or common design as pleaded by the claimant in the Amended Particulars of Claim. Not only do I accept Ms Hallett's evidence on this point but the material from which I was asked to draw an inference of a joint enterprise or common design between the defendant and the CLP was wholly insufficient to do so.

16. The defendant had a due diligence process which it undertook in respect of non-regulated introducers such as CLP. The written procedure detailing the steps to be taken by way of due diligence relating to the underlying investment made plain that the purpose of the procedure was to enable the defendant to consider it "from an HMRC rules perspective and from the Carey Pension Scheme Trust Deed and Rules." It went on to say that the defendant would not:

> "- consider the suitability, appropriateness or qualitative features of any of the products and will not enter into any discussion around these factors or recommend any of these products in any way."

At trial an attempt was made to raise an argument based on a lack of due diligence on the part of the defendant in accepting the Store First business via CLP. However, not only was it not part of the claimant's pleaded case but it ran contrary to the evidence, as the material to which I refer in this section of the judgment demonstrates, and I reject it.

17. Ms Hallett said that prior to the introduction of the claimant it had made investments in Store First for other clients and had established that it was a legitimate investment "that was capable of being held in a SIPP pursuant to HMRC guidelines". She set out the due diligence undertaken by the defendant in sub-paragraphs 23.1 to 23.4 of her witness statement:

> "23. …the Defendant had prior to receipt of the Claimant's application form already conducted a number of due diligence exercises in relation to the Store First Investments in order to establish that the investment was a legitimate investment and one that was capable of being held in a SIPP pursuant to HMRC guidelines. The Defendant's due diligence into the Store First Investment included:
>
> 23.1 obtaining a report from Enhanced Solutions with regard to the suitability of Store First as a an investment to be held within a SIPP. Enhanced Solutions is an independent company which offers various reporting and consultancy services, including impartial assessments of the appropriateness of investment strategies;
>
> 23.2 an internal review by the Defendant's compliance team at the time of legal documentation and literature relating to Store First. Template leases and sub-leases were reviewed. Significant research on Store First and the proposition was completed. Checks were conducted on the directors and

> shareholders and company accounts from 2004 to 2010 were reviewed;
>
> 23.3 obtaining and checking comprehensive company reports and accounts in respect of Store First investment and the due diligence that had been obtained and certified that the Defendant could administer investments in Store First."

The claimant submits that the defendant's own due diligence process should have revealed what the defendant considered within their process to be a number of high risks relating to CLP, an Overseas Introducer, which should have indicated that they were not an acceptable introducer for the defendant to deal with.

18. The first contact between the defendant and Store First, which appears to have led to the decision that the investment was a legitimate one having regard to HMRC guidelines, was in an email dated 3 May 2011 from Mr Chapman Clark, Network Sales Director, of Harley Scott Holdings Limited to Ms Sherri Egginton, Head of Services and Operations for the Carey Group, who put in train the process to carry out the relevant review. Among the suite of documents which were sent to the defendant at that stage was one prepared by a company called Enhance Support Solutions Ltd dated 22 March 2011 in respect of Store First's scheme which sought to "identify whether the investment is likely to be acceptable based on HMRC rules…". The document ended by stating that the process undertaken by Enhance Support Solutions "does not comment on the suitability of the investment for meeting the scheme member's investment objectives and should not be constituted (sic) as advice." To that end, under the heading "Investor protection", the author commented "[a]s the investment is unregulated, no protection is offered through the [Financial Services Compensation Scheme].." and made the additional comment "[w]here used by the SIPP/SSAS operator/trustees, a scheme member "high risk/illiquid" disclaimer could be considered." Before formalising the outcome of the review Ms Egginton set out in an email dated 10 May 2011 some preliminary concerns of the defendant regarding the proposed relationship with clients who sought a SIPP as a wrapper for the Store First investment:

> "First of all regarding direct/execution only clients – we prefer that clients are introduced through IFAs and take relevant financial advice, however, providing the client accepts and fully understands that we cannot and do not give advice then we can and do accept direct business."

19. The defendant's investment committee resolved to accept the scheme (on the basis that there did not appear to be a tax charge liability for the investment) at a meeting which is reflected in a minute dated 9 June 2011, which specifically recorded that "The Meeting did not consider the suitability of the investment for any other purpose". The formal confirmation to Store First that their scheme appeared to be an acceptable scheme for inclusion within a SIPP came in a document also dated 9 June 2011 which reflected the concerns raised by Ms Egginton in the email of 10 May commenting that

> "1. This investment is an Alternative investment and such may be high risk and/or speculative.
>
> …
>
> 7. All members should take their own tax, investment and financial advice to determine whether this is a suitable investment for them and take into consideration the overall value of the SIPP funds, the percentage of the SIPP to be invested and ongoing charges."

That document later formed the basis of an Advisor Notification Form to be signed by CLP and sent to the defendant, although a copy of it was not provided to the applicant or investor. The template version of the form contained, below the space for signature by the manager at CLP making the referral confirming that its contents had been discussed with the investor, a statement in bold capital type in the following terms:

> "This letter has been completed as part of a due diligence process which seeks to consider whether the investment is likely to be acceptable to a member directed pension scheme based on HMRC rules."
>
> The commentary provided is for information purposes only.
>
> This in no way comments on the suitability of the investment or otherwise to meet the members objectives.
>
> Should a tax charge be levied in the future the administrator, Carey Pension UK LLP and the trustee, Carey Pensions Trustees UK Ltd do not accept any liability.
>
> Advisers and their clients should seek legal advice should they consider it appropriate."

20. The Terms of Business, referred to in paragraph 16 of Ms Hallett's witness statement, were entitled "Non-regulated Introducer Agreement Terms of Business". They were intended to set out "the relationship between a non-FSA authorised introducer of business (The Business Introducer) and Carey Pensions UK LLP (The SIPP Operator)" with effect from 15 August 2011, although, as I mention above, the agreement was not signed until 20 March 2012. I find, having regard to all the documentation, including the correspondence from the FCA after their visit, and the evidence of Ms Hallett (paragraph 20 of her witness statement), that these Terms of Business reflected the discussions between the defendant and CLP and the basis of the relationship between them and their respective roles from August 2011 prior to it being signed. The applicant for a SIPP is defined in the document as the "Client". The terms and conditions contained an entire agreement clause and was expressed to supersede all previous communications. The relationship between the defendant and CLP was set out on the first page of the document (which is not divided into separately numbered clauses) under the heading "The Relationship":

> "This Agreement covers the relationship between The Business Introducer and The SIPP Operator whereby The Business Introducer may introduce clients to The SIPP Operator for the purposes of applying on an execution only basis and commencing a Carey SIPP. The agreement sets out the requirements of The SIPP Operator that (sic) to which The Business Introducer is required to adhere."

The agreement therefore creates a very clear dividing line between the roles of CLP and the defendant, CLP being an introducer and the defendant acting on an execution-only basis in setting up the SIPP. The document continues:

> "This Agreement does not create a partnership, joint venture or employment contract between The Business Introducer and The SIPP Operator. The Business Introducer is neither the agent of The SIPP Operator nor the Client."

The express terms of the relationship between the defendant and CLP was that they were operating independently of each other, in other words not in a joint venture or in accordance with a common design or business model. The document continues:

> "The SIPP Operator will communicate directly with the Client in relation to the SIPP."

Thus CLP was not to have an involvement in relation to the SIPP, after the introduction. Then,

> "The SIPP Operator reserves the right to decline any application and is not required to give any reasons for refusing any such application."

The mere introduction of the client by CLP would not lead automatically to the establishment of a SIPP, that would be entirely a matter for the discretion of the defendant.

21. On the third page of the document CLP gave an express undertaking that it would "not suggest to clients that financial advice will be given" by the defendant. In addition, the document contained very clear undertakings on the part of CLP that it would not itself give advice in relation to SIPPs:

> "The Business Introducer undertakes that they will not provide advice as defined by the Act in relation to the SIPP – for the avoidance of doubt this includes reference to advice on the selection of The SIPP Operator, contributions, transfer of benefits, taking benefits and HMRC rules;
>
> If for any reason The Business Introducer believes that any employee, representative or agent has provided advice in respect of the SIPP they will inform The SIPP Operator as soon as the breach is realised…"

22. The Terms of Business also regulated the way in which CLP was to introduce clients to the defendant:

> "The Business Introducer shall only introduce Clients to The SIPP Operator in accordance with the procedures agreed between the parties;
>
> …
>
> The Business Introducer will only use The SIPP Operator's literature in respect of Carey SIPP. No amendments will be made to this literature unless prior written consent is obtained from the SIPP Operator;
>
> The Business Introducer will issue, prior to any application being submitted to The SIPP Operator, the following documents to the Client; The SIPP Operator's:
>
> Key Features Document;
>
> Fees Schedule;
>
> Terms and Conditions;
>
> Evidence that the client has received, read and understood these documents;"

The defendant was therefore making sure that CLP acted as an introducer of business and would not become involved in providing any information to an applicant except what appeared in the defendant's own documents. It is restrictive of CLP's role, confining it to an introduction.

> "The Business Introducer will not make promises or statements on behalf of The SIPP Operator without the SIPP Operator's prior written consent;
>
> If for any reason The Business Introducer conducts or believes they may be conducting activities subject to [FSMA], they must inform The IPP Operator as soon as they become aware of a breach or potential breach…"

23. On 20 September 2011 representatives of the FCA, then known as the FSA, visited the defendant's offices to look in details at the processes which they used. The outcome of the visit is set out in a letter dated 29 September 2011, addressed to Ms Hallett. It is apparent from the contents of that letter that the FCA was aware that unregulated brokers were introducing underlying investments for SIPP wrappers to be provided by the defendant. The FCA summarised their view in the section headed "Overall":

> "We identified during the visit that the firm appear to have a number of robust processes that had been put in place or are continually being implemented to ensure that the culture and ethos that you have embedded into the Firm allows you to ensure that your [customers] are treated fairly. You were particularly

> focused on ensuring that you do not become a conduit for financial crime and that your systems and controls are appropriate for a Firm like yours. Examples on the day which highlighted this included; the due diligence you undertake in assessing if an esoteric or UCIS investment is suitable for your clients which included undertaking a 3rd party review by your compliance support Enhanced Solutions. You also appear to have conducted appropriate due diligence on those introducers who provide the firm with SIPP business to satisfy yourself that they are qualified to introduce SIPP business to the Firm. You also ensure that you have appropriate documentation completed by the clients to help you satisfy yourselves that they are aware of any potential risks with their chosen investments. In summary the Firm appeared to have adequate processes in place, and was committed to continue to review and where appropriate improve its procedures and practices to ensure they remain fit for purpose."

The letter continued:

> "Detailed Findings
>
> …
>
> Financial Crime Related – Introducers
>
> As mentioned above, you have been enhancing your procedures and the due diligence you undertake in dealing with your Introducers, to satisfy yourselves that they are authorised and appropriately qualified in referring SIPP business to the Firm. You also confirmed that you are in the process of extending the vetting you undertake of your introducers to include a Terms of Business and non-regulated introducer checklist; (for your relationships with other professional bodies such as solicitors and accountants) and that you intend to put in places [sic] processes that allow you to periodically monitor this due diligence.
>
> Recommended action
>
> The Firm should continue with its plans to introduce a Terms of Business agreement and non regulated introducer checklist to compliment the checks it currently undertakes with its regulated introducers. This should be implemented prior to accepting any business from these firms."

In my view the letter demonstrates that the FCA were fully aware that unregulated brokers, recommending underlying investments, were introducing investors to the defendant so that a SIPP could be set up on an execution-only basis. Had the FCA formed the view that this was in breach of the duties, obligations and authorisation of the defendant I am sure that they would have said so. I also note the reference to a UCIS in the letter. Although it has been mentioned in the course of submissions, the claimant has not pleaded that the SIPP was a UCIS and that some cause of action arises as a result and therefore I shall not determine therefore whether the SIPP was or involved a UCIS or whether the defendant was in breach of any obligations which it is said to have owed the claimant as a result. It seems to me that it was as a result of this review by the FCA that the defendant introduced its Terms of Business for introducers which I cited above.

24. The documents which I have been shown demonstrate that after the defendant had started to accept introductions from CLP it continued to tighten its "business acceptance policy".

25. Ms Hallett was asked questions about whether the defendant was relying on CLP to market their SIPPs but she was adamant that they were not. The defendant did not provide CLP with "any marketing material at all". Her evidence was that the defendant simply acted on the basis of introductions:

> "…we did not want our SIPPs to be marketed by anyone else. The sole purpose was introductions because they had a business model, they were attracting clients for a particular reason, and they wanted to know of SIPP providers that accepted those investments, and we were one of those SIPP providers. No way at all had we ever relied on companies, not even regulated companies, to market our product."

26. I accept her evidence that the defendant did not provide CLP with any marketing literature. Although Ms Hallett was cross-examined about this there was no positive evidence from the claimant to suggest that what she told me was in any way inaccurate, as Mr Virgo accepted when I asked about it.

27. In January 2012 the FCA exchanged correspondence with Store First and their solicitors about whether Store First was engaged in arranging (UCIS) investment deals in breach of FSMA. Store First took advice from leading counsel, whose opinion dated 22 March 2012 I have seen and read. Mr Peacock QC concluded that Store First was not carrying on the regulated activity of operating a collective investment scheme in breach of FSMA.

28. Ms Hallett said in her witness statement that the defendant did not provide advice to any of its members, including the claimant because "[i]t did not assess the suitability of the SIPP or the investment in Store First for the Claimant's individual circumstances.

[The defendant] is not qualified to, nor authorised by the FCA to, assess and advise on such suitability issues. The Defendant acted and continues to act at all times on an execution only (i.e. non-advised) basis." She expanded on this in cross-examination:

> "In terms of our assessment of it as an acceptable investment it was to converge a direct investment into a direct commercial property which would be rented out. It didn't incur a tax charge, it wasn't tangible movable property from an HMRC point of view, and that was the primary acceptance criteria at the time.
>
> So we never looked into any investment, whether regulated or unregulated, into whether it was likely to achieve the returns that were set out in any of the marketing brochures, we simply looked at: is this an acceptable investment in a SIPP from an HMRC point of view? It is likely to incur tax charges, be a tangible movable property? And that was the extent of the things we looked at that particular time."

She emphasised the point later in her evidence:

> "…we don't determine acceptance on suitability. At that point in 2011 we didn't because – and the clients were responsible for their choices. We are an execution-only SIPP provider that was determining whether an investment was acceptable within our SIPP wrapper and didn't contravene our HMRC responsibilities for the tax exemption of our SIPP. But beyond that it was the member's choice and responsibility to make sure that whatever investment they were choosing was appropriate and suitable for themselves…our due diligence at that time in 2011 was specifically around the HMRC Rules

I accept her evidence. At all material times it seems to me that the defendant was clear about the limits of its role, the role of CLP and the role of the investor. Further, it seems to me that the defendant put in place appropriate documentation to ensure that each of the three knew and understood the limits of their role in the overall process.

29. In about February 2012 the claimant made contact with CLP, having seen an advertisement on the internet. A screenshot from CLP's website which was dated 19 September 2011 referred to the investment opportunities which they could offer, and on which they appeared to pride themselves, but specifically noted that, while their products qualified for SIPPs, "[in] accordance with the Financial Services and Markets Act 2000, CLP brokers do not provide any financial advice." Thus the claimant was being alerted to the framework of the intended relationships from the very beginning.

30. The claimant explains the steps which led to his decision to move his pension fund, in paragraph 4 and following of his witness statement:

> "4. …I saw an ad saying "release some cash from your pension" (or words to that effect) and I thought that this would be helpful for me. I did not know at the time that obtaining money from my pension before age 55 was prohibited. I was led

> to CLP website which claimed I could do much better with my pension by investing with them.
>
> CLP
>
> 5. I found the website of CL&P Brokers ("CLP") whom I now know to be some sort of business based in Spain but I do not know their legal identity and did not at the time know they were based in Spain.
>
> 6. I cannot recall exactly who made the first call but I think that I filled in a form on CLP's website to ask them to call me.
>
> 7. I first spoke to CLP in February 2012 when I spoke to Ben Newman, although I think he called himself Ben Shepherd as well ("Ben")."

31. The claimant understood that he would be able to release approximately £4,000 from his pension fund. The claimant says that CLP recommended that all the funds held in the claimant's PPP should be reinvested in storage facilities, described as "store pods", at a site operated by a company called Store First Blackburn Limited, and that this be done via a SIPP to be created by the defendant. The pension fund would be used to acquire 250 year leases of 6 store pods, in respect of which a rent and service charges would have to be paid. The store pods themselves would be rented out and would generate an income for the claimant's pension fund. Between paragraphs 9 and 19 of his witness statement the claimant sets out the advice which he received from a man called Ben in relation to reinvestment in store pods and how this led to his dealings with the defendant whom he said had been recommended by Ben "as a large, reputable pension management company" (para 12). There is no evidence that CLP advised the claimant as to a particular type of SIPP offered by the defendant, whether the SIPP which he entered into or otherwise. The tenor of the evidence was that CLP recommended the defendant but did not recommend, explain or advise on any of the defendant's specific products. The claimant continued:

> "17. I always thought the (sic) Ben and CLP were advising me as they sounded knowledgeable and they were recommending that I do as they advised.
>
> 18. The discussions with CLP persuaded me that I should follow their advice and guidance to transfer my pension and invest it in Storage Pods in accordance with their advice because I believed that, as they said, my pension would do better and it would be safely and securely held with a reputable UK based pension provider – Carey."

32. At the very beginning of his cross-examination of the claimant Mr Green QC established that if the defendant had given the claimant advice about the risks involved in the underlying investment it would have made no difference to the decision which he had already made to invest in the store pods. The initial exchange was as follows:

> "Mr Green: Mr Adams, if Carey had warned you that the store pods investment was a high risk one, would you have still invested in it?
>
> Yes, yes.
>
> Q. Why?
>
> A. Because of the advice I was given by the CLP Brokers.
>
> Q. So you were happy with a high risk and speculative investment, were you?
>
> A. Yes, yes…"

The claimant knew that it was a high risk and speculative investment but nevertheless decided to proceed with it, because of the cash incentive which I refer to below.

33. The claimant explained the process which was then followed:

> "20. When I confirmed to CLP that I wanted to follow their advice I was sent out a Carey Pensions application form and letter of authority for CLP. I had not been in contact with anyone else about my pension at this stage. I also received the terms and conditions for the Carey SIPP with this bundle but I do not recall reading these."

34. After speaking to Mr Newman the claimant received what appeared to be a standard form letter from CLP's administration team enclosing various documents, including the pre-populated Carey Scheme Application Form, a letter of authority entitling the defendant to contact CLP directly in "respect of all matters regarding my pension arrangement", the Fee Schedule and the Key Features document, quoted from below, which he was advised to read and keep. The letter ended by assuring the claimant that if he had any questions regarding "the pension transfer of investment then [he should] contact [CLP] directly". The completed application form was sent on to the defendant and in a further, undated, letter written to the claimant by Mr Newman, bearing the claimant's manuscript notes, which appears to have been sent to him after he had completed the application form for the SIPP, CLP describe themselves as "your introductory agent to the SIPP and the investment product" again offering to act merely as a point of contact in the process.

35. Ms Hallett said that if, which she did not accept, CLP had provided advice to the claimant "the Defendant was not aware of this and cannot reasonably be expected to have been aware." She was pressed again, much later in her evidence about whether the defendant should have given advice:

> "A. We always recommend direct clients get advice.
>
> Q. You knew this whole piece of business is relation to Mr Adams was coming on a non-advised basis, didn't you?
>
> A. Yes.

> Q. And did you really think that a 48-year old lorry driver was in a position to make a decision as important as this about how much of his transferred money should be used to buy store pods, or weren't you interested?
>
> A. I don't think that it is my nor my company's position to assume that a 48-year old lorry driver could or couldn't do it. We are a SIPP administration company accepting execution-only, and the client – and giving information to the client so that they are well-informed and understand the decisions that they are making and recommending to them that they take advice. We have no knowledge of an individual's situation."

And later:

> "A. The nature of the contract was direct and execution only, so we are not an advisory company, so we follow instructions and allow investment into investments we have accepted.
>
> Q. This was an investment which you had not I think independently or had independently valued, is that right?
>
> A. Correct, that is right."

I accept Ms Hallett's evidence. I find that the defendant did not know what advice, if any, CLP may have given to the claimant beyond recommending the underlying investment and recommending the defendant as a provider of SIPPs to "wrap" the investment in. If CLP in fact negligently advised the claimant as to the underlying investment there is no material on which I could conclude that the defendant knew or ought to have known that to be the case.

36. The claimant says that CLP prepared and he signed (1) what has been referred to as a letter of authority and (2) an application form, which was dated 23 February 2012. Ms Hallett told me that the application form was an active document on their website which could be completed on line by an applicant or by an introducer. I draw the inference from the claimant's evidence that the application form was completed on line by CLP and then provided to the claimant in hard copy.

37. The application form and letter of authority incorrectly stated that the claimant's existing pension fund was held by Sun Life whereas it was in fact held with FriendLife, which accounted for some delay in completion of the establishment of the SIPP. The claimant says that:

> "21. CLP sent me a covering letter with that application form which confirmed that they had pre-completed the application form so that I could just sign it. I completed those parts CLP told me to and signed the forms on 23 February 2012. I can see that the pre-completed form had a printed tick to waive my cancellation rights although I do not think I had much choice in this…"

38. The defendant rightly submits that the contract between the claimant and the defendant was contained in a number or documents relating to the establishment of the SIPP, namely an application form, the defendant's terms and conditions, a document called a "Member Declaration & Indemnity", what was referred to as a "Key Facts" document and the defendant's Scheme Rules. There is no claim by the claimant for breach of contract and, as my findings of fact show, that would be impossible on the evidence, but it is argued that the contract has a role to play in ascertaining the duties of the defendant towards the claimant.

39. The application form is headed "Carey Group" and describes itself as "The Carey Pension Scheme Application Form For Direct Clients" followed by the words in brackets "SIPP to be established on execution only". Direct clients are those who do not come via an Independent Financial Advisor ("IFA") but either come themselves to the defendant or via an introducing broker such as CLP. The heading contains a statement, which reads as follows:

> "This form should be used if you are a client establishing a SIPP without advice. You have made this decision independently and are aware of the implications of this decision."

The defendant's application form makes plain from the beginning that the defendant had not provided, and in my judgment would not be providing, advice in relation to the SIPP. The claimant accepted in cross-examination that the statements throughout the application form describing the role of the defendant as "execution only" who were not providing advice did not lack clarity. However, in re-examination he answered "no" to the question "Did you understand what execution-only meant?", which seemed to be to somewhat contradictory. My conclusion, however, in the light of the whole of the claimant's evidence about this issue, including the documents which he signed, those which he received but did not require signing, and his oral evidence, is that he understood the role which the defendant was to play in the transaction in the sense that it was "execution only", even if the claimant may not have had a precise understanding of that particular expression. He was aware that the defendant was simply providing a mechanism for a transfer of his pension funds, that they were not advising on the SIPP or on the underlying investment in store pods and that they were solely acting on the basis of his instructions given as a result of an investment decision which he had already made.

40. Returning to the application form; it contained some instructions:

> "Please read the Key Features Document, Terms & Conditions and Fee Schedules prior to completing this application form.
>
> This application form should be completed as fully as possible in CAPITALS. Boxes should be ticked."

Those instructions were followed by a statement:

> "Carey Pensions UK LLP, and Carey Pensions Trustees UK Ltd have not provided any advice and are not responsible for the

> suitability or appropriateness of your decision to establish a SIPP".

Again, it was being made clear, and I find that the claimant knew and accepted, that the defendant would not be providing advice in relation to the investment or establishment of a SIPP.

41. There then follow a series of boxes to be completed by the applicant, some of them containing choices to be made. The claimant's personal details appear in the first and second sections. Incorrect details of his PPP appeared in the sixth section which referred to a pension with Sunlife with a value of £45,000. Details of the proposed underlying investment appear in the seventh section of the form, under the following rubric:

> "7. Investments
>
> As you do not have a Financial Adviser, your Investment choices are your sole responsibility. You will instruct us and we will act on those instructions as long as it is an accepted Investment in the Carey Pension Scheme.
>
> Carey Pensions UK LLP and Carey Pension Trustees UK Ltd will not at any time review any aspects of your appointed Investment Manager's financial status or investment and risk strategies nor have any involvement in your investment choices and selection, nor give advice on the suitability of your investment choices. We would always recommend independent advice be obtained from a suitably qualified adviser.
>
> If, at any time your position changes and you appoint a Financial Adviser, you must inform us.
>
> You are responsible for the ongoing review and monitoring of the investments you have chosen – and remember – all investments can go down in value as well as up. Carey Pensions is not responsible for any investment choices or decisions."

That clause makes it perfectly clear that the defendant would not be advising on the suitability of the underlying investment, that the claimant should take his own advice, but that it was his responsibility. There then followed the contact details of Store First. Section 10 of the form set out the applicant's right to cancel the application for a SIPP within 30 days of confirmation of its establishment, subject to waiver, which was contained in succeeding few lines, against which a tick appears:

> "I wish to waive my right to cancel my SIPP within 30 days of establishment.
>
> I understand that this means that I will not be able to cancel my Carey Pension Scheme at a later date."

The claimant signed at the foot of a long declaration at section 12 of the form, which contained, among others the following statements:

> "12. Declaration
>
> …
>
> I acknowledge and accept the Terms & Conditions of the Carey Pension Scheme and agree to be bound by the Scheme Rules of the Carey Pension Scheme;
>
> I confirm that I have read and understand the relevant Key Features Documents, Terms & Conditions, and all aspects of the application form;
>
> …
>
> I undertake to pay all fees due to the Scheme Administrator and/other third parties if appropriate and for these to be deducted from the Scheme funds on the due date. I have read and understood the current Fee Schedule.
>
> …
>
> I confirm that I will instruct Carey Pensions UK LLP to make the investments as detailed in the application form;
>
> I understand that it is my sole responsibility to make decision relating to the purchase, retention or sale of any investments held within the Carey Pension Scheme;
>
> …
>
> I understand that Carey Pensions UK LLP and Carey Pension Trustees UK Ltd are not in any way able to provide me with any advice;
>
> I confirm that I am establishing the Carey Pension Scheme on an Execution only basis;
>
> I confirm I understand that the value of my pension scheme can go down as well as up depending on the investment performance of the investments chosen."

Immediately below that appeared the claimant's signature and the date of 23 February 2012. In my judgment the respective roles of the claimant and the defendant under the contract were clear: the claimant was to be responsible for his investment decisions and choices, including those relating to the underlying investment, and the defendant was to act on the claimant's instructions to set up the SIPP but would not provide advice as to suitability nor be responsible for the suitability of the SIPP. After 23 February 2012 CLP took no further steps in respect of the transaction. They submitted the application form. They had effected their introduction and their role was complete. The relationship from the point of introduction was governed by the documents which I

have set out and which identified the roles and responsibilities of the claimant and defendant.

42. The defendant received the letter of authority and the application form on 27 February 2012 and on 28 February 2012 the defendant sent the claimant an email which included, by way of attachment, a further set of the defendant's "Terms and Conditions" and a "Key Features" document. The claimant was invited to read them and keep them for future reference. He was also sent a letter in the post which again advised him to read the documents which had been sent by email. He was told that his scheme had been established with effect from 27 February 2012. It is common ground that the neither the email nor the attachments contained any investment advice.

43. The provisions of the "Terms and conditions" document, which the claimant had agreed to be bound by, reminded applicants for SIPPs, in the introductory section, that the terms and conditions, together with the application form, and other forms completed by him, comprised a legally binding agreement:

> "This document sets out the main terms and conditions of the scheme. They are subject to the provisions of the Rules. If there is any inconsistency between the detail set out in these terms and conditions and the provisions of the Rules, the Rules prevail. You can ask for a copy of the Rules.
>
> You signed the application to join the scheme, or to take benefits, confirms your agreement to these terms and conditions. These terms and conditions, together with your application form and any other forms we ask you to complete, form a legally binding agreement between you and us."

44. There are several express provisions intended to define the respective roles of the applicant and defendant, with the aim of leaving the risks relating to the underlying investment(s) with the applicant. Of particular importance in this case are the following provisions:

Clause 4, headed "Advice", which stated:

> "Nothing provided to you by us, whether verbally or in writing, should be construed as financial or investment advice as defined by the Financial Services and Markets Act 2000, unless expressly stated."

and Clause 7, headed "Transfers", which provided:

> "7.2 It is your responsibility to ensure a transfer of pension benefits is in your best interests. Consequently you should take advice from a suitably qualified financial adviser. As described in section 4, we do not provide advice. Our acceptance of a transfer is in no way an endorsement of the suitability for you of the transfer."

and clause 10, headed Scheme Investments, which provided, insofar as material:

> "10.1 You may direct us to invest amounts held for your fund…
>
> …
>
> 10.3 Subject to 10.1, the administrator will act only in accordance with directions from you in respect of investment transactions relating to your fund…
>
> 10.4 We are not responsible for the investment decisions you make."

and Clause 11, headed "Investment instructions", which contained the following provisions:

> "11.1 The trustee, as directed by us, will be involved, as outlined in this section, with the investment process. Investments are made at our discretion and we may refuse to secure or cash in or dispose of any investments for the following reasons:
>
> 11.1.1 your instructions are not confirmed to us in writing;
>
> 11.1.2 in our opinion making the proposed investment would give rise to a tax charge...
>
> 11.1.3 in our opinion the proposed investment is unlawful, impracticable, contrary to a court order or contrary to legislation;
>
> 11.1.4 there are insufficient cleared funds available within your fund;
>
> 11.1.5 in our opinion the proposed investment could expose your fund and/or the scheme to liabilities your fund may not be able to meet;
>
> 11.1.6 it is shown to our satisfaction, that you no longer have the capacity to enter into agreements or contracts…"

The provisions contained in clause 11 were plainly intended to set out the very limited circumstances in which the Trustees and the defendant were entitled to exercise their discretion not to follow an applicant's investment instructions: it limits the defendant's discretion not to follow the claimant's express instructions. On their proper construction these provisions do not to confer a positive obligation to choose particular investments or to refuse to implement investment instructions because they were of the view that the applicant had made an unsuitable choice.

45. The claimant says that he relied on the defendant "to make all the arrangements in relation to my pension and Storage Pods" but that is inconsistent with the documents which he read and signed and the evidence which gave at trial.

46. The heading to the Key Features document contained what was, in essence, a warning to the reader. The whole thrust of the document was to reinforce the message that it was the applicant who was intended to be responsible for the underlying investment. Under the heading "Aims of the Carey Pension Scheme" the applicant was told that the pension scheme was designed to enable him to:

> "Take control of your pension fund investments through wider investment choices than some other types of personal pension arrangements allow.
>
> Investment decisions can be made by you or with your adviser;"

The applicant was told that his commitments, after establishment of the SIPP, included

> "Taking responsibility for the management of the investments in your fund. You can manage them yourself or through an investment adviser."

The document contained a statement of risk factors, which included the following:

> "Risks associated with saving for retirement through a Self Invested Personal Pension (The Carey Pension Scheme SIPP) are outlined below; some of which refer to the investment performance of the funds in your scheme. Remember that you are responsible for the investment decisions, although you may delegate this to an adviser agreed with us…"

In relation to fees the applicant was asked to note that

> "The fees we charge to administer your fund are fixed, rather than being linked to the size of your fund – this means that the fees could become disproportionate to the value of your fund, for example if investment values fall and/or you only pay in small amounts."

As to the risks involved in relation to moving investments the document pointed out the following;

> "Whilst Carey Pension Scheme SIPP can accept transfers from other pension schemes, not all transfers are suitable. You are recommended to seek professional advice before proceeding with a transfer, as in some cases you could lose valuable benefits for you and your family. These benefits can include, but are not restricted to, certain rights, options or guarantees."

The respective roles of the applicant and defendant are set out in the second of the questions and answers contained in the document in the following:

> "2. Who invests in Self Invested Personal Pensions such as the Carey Pension Scheme?"
>
> Self Invested Personal Pensions are used by people who want to:

> Make investment decisions about their pension assets;
>
> Invest in a wide range of assets;
>
> Withdraw an income whilst, subject to HMRC limits, continuing to make investment decisions about the remaining pensions assets;
>
> A Self Investment Personal Pension, is unlikely to be appropriate for those who will not use the flexibility it offers, or who only have a small amount to invest because the administration fees reflect the wider investment options and flexibility that exist.
>
> In general terms, investment of less than £25,000-£50,000 into a Full SIPP won't provide the opportunity to take advantage of the investment flexibility and may mean that the fees being levied would be considered excessive in relation to the size of the fund.
>
> …You are recommended to take advice from a suitably qualified financial adviser when deciding whether the Carey Pension Scheme as a Self Invested Personal Pension, is the right option for you."

47. The Key Features document identified the risks connected with the product to which it related, namely the SIPP, as opposed to the underlying investment which the SIPP provided the wrapper for. The whole tenor of the document was that decisions relating to the underlying investment were to be made by the applicant (with or without the assistance of an advisor) rather than the defendant but it was recommended that that in making such decisions the applicant ought to take advice.

48. The defendant also sent to the claimant a hard copy letter dated 28 February 2012 in which it notified him that it had created a SIPP for him with reference number 2123. The letter again invited him to read and retain the documents which had been sent by email. It enclosed a cancellation form.

49. The claimant signed a letter authorising transfer of his PPP funds, which was received by the defendant on 6 March 2012 but there was a period of delay while, on the basis of the documents which the claimant had completed, the defendant asked Sun Life to transfer the claimant's pension funds whereas it was FriendsLife who held them.

50. In the interim period there was further direct contact between the defendant and Store First. My attention was drawn to an internal email dated 20 May 2012 between Ms Egginton and Ms Hallett of the defendant referring to a conversation with Mr Mark Talbot at Store First about the levels of commission which were generally paid to brokers, which in CLP's case he believed to be 12%. The claimant says that this email and the conversation which it referred to should have caused alarm bells to ring that this was unauthorised business, with high commission. I note that the email ended with Ms Egginton recording that Mr Talbot had "confirmed they have been liaising with FSA regarding the investment and explaining to FSA the produce and structure and FSA have not raised any concerns."

51. On 23 May 2012 the claimant signed a further form, prepared by the defendant, instructing FriendsLife to transfer his funds to the SIPP established by the defendant. This was acknowledged by the defendant in a letter of 26 May and passed on to FriendsLife, who enclosed notices which would have entitled the claimant to cancel the transfer. It advised him that he had a right to change his mind for a period of 30 days. The letter cautioned him:

> "Please note that this cannot be waived and will expire 30 days from the date of this letter. Please only sign and return this should you wish to cancel the transfer."

52. When little seemed to be happening the claimant said that he spoke to a woman called Zoe Adams at CLP in June 2012 and she in turn chased the matter up with the defendant who explained that on 1 June 2012 AXA had sent £55,766.50 to the defendant, the details of which were provided to the claimant in a letter dated 6 June.

53. The claimant says (paragraph 27 of his witness statement) that he

> "…received by email a form from Carey to instruct them to proceed with the investment of my pension money into Storage Pods on 19 June 2012 at 15:10. I did not have any other advice or guidance in relation to this and continued to proceed on the advice and recommendation CLP made…"

The document that he signed and dated 19 June 2012 and returned to the defendant by post was headed "Alternative Investment – Store First. Member Declaration & Indemnity", one of the documents which formed part of the contract between him and the defendant. It contained the claimant's written instructions (in accordance with clause 11.1.1 of the Terms and Conditions) to purchase the leasehold interests in the store pods through Harley-Scott Holdings Ltd for the sum of £52,500 "on my behalf for the above Scheme". It was signed by the claimant in two places and witnessed by a Mr Charles Hamilton. In cross-examination the claimant accepted that he had read both pages of the document before signing it. The Members Declaration & Indemnity contained a number of statements confirmed by the claimant to be true, including the following:

> "I am fully aware that this is (sic) investment is an Alternative Investment and as such is High Risk and/or Speculative.
>
> As the Member of the Pension Scheme, I confirm that neither I nor any person connected to me is receiving a monetary or other inducement for transacting this investment.
>
> I confirm that I have read and understand the documentation regarding this investment and have taken my own advice, including financial, investment and tax advice.
>
> I am fully aware that both Carey Pensions UK LLP and Carey Pensions Trustees UK Ltd act on an Execution Only Basis and confirm that neither Carey Pensions UK LLP nor Carey Pensions

> Trustees UK Ltd have provided any advice whatsoever in respect of this investment.
>
> ,,,
>
> I indemnify both Carey Pensions UK LLP and Carey Pensions Trustees Ltd against any and all liability arising from this investment…"

54. The claimant accepted in cross-examination that the underlying investment related to a significant proportion of his wealth and that it was highly important to him. He accepted that the Members Declaration & Indemnity contained his instructions to proceed with the investment whereas he could have decided not to go ahead with it:

> "Q. You could of course have decided at this point not to invest in store pods, couldn't you?
>
> Yes.
>
> Q. And you could have decided not to sign this document couldn't you?
>
> A. Yes.
>
> Q. You signed it because you wanted to proceed with the investment even knowing that it was high risk?
>
> A. Yes.
>
> Q. Your real complaint in this case is about the store pods investment, isn't it?
>
> A. Yes.
>
> Q. It was of course that investment and not the SIPP that caused your loss, wasn't it?
>
> A. Yes.
>
> Q. Of course, having set up the SIPP you could have invested in blue chip shares.
>
> I'm sorry, a nod doesn't get on to the transcript.
>
> Yes, sorry. Yes.
>
> Q. Thank you very much. So the loss was caused by what you chose to put into the SIPP wasn't it, namely, the store pods investment?
>
> A. Yes.

> Q. Your case is that the store pods investment was manifestly unsuitable?
>
> A. Yes.
>
> Q. Because it was high risk?
>
> A. Yes.
>
> Q. The sentence below the one we have just looked at or course reads as follows:
>
> "I am fully aware that this investment is an alternative investment and, as such, is high risk and/or speculative,"
>
> Do you have any particular recollection of reading that sentence?
>
> To be truthful, no.
>
> Q. But in any event you would presumably accept that this short sentence communicated to you the fact that the store pods investment was, in Carey's view, a high risk one?
>
> A. Yes.
>
> Q. And a speculative one?
>
> A. Yes.
>
> Q. On reading the sentence today, is there anything which is unclear to you?
>
> A. No, no.
>
> Q. So as at 19 June 2012, you did in fact want to put around £50,000 into a high risk and/or speculative investment?
>
> A. Yes."

55. The claimant specifically accepted that the risk warning in the Member Declaration was "sufficiently clear and prominent" notwithstanding an assertion to the contrary in the letter before action which had been drafted by his lawyers on his behalf, adding "I was told that it was a high risk and I decided to go with it." Mr Green QC commented that "in the light of [the claimant's] very candid and frank answers, this whole complaint about not having sufficient warning of the risk has simply gone." I respectfully agree. The documents and the claimant's evidence demonstrate that he had been made aware by the defendant's documents and accepted that the underlying investment was a high risk or speculative investment, that he was responsible for the choice of such an investment, and he willingly entered into the underlying investment and instructed the defendant to establish the SIPP to enable him to enter into the underlying investment. This was the point at which he could have decided not to proceed. It was his instructions

at this point, in the light of his knowledge of the risk, that caused the loss which he claims from the defendant. Perhaps the primary or even only reason why the claimant decided to take this course was because he wanted to realise (or release) some cash immediately.

56. In cross-examination the claimant also accepted that contrary to his declaration he received a payment of about £4,000 from CLP, not Store First, in return for entering into the underlying investment and that was why he had been "so keen on this investment". This was further explored with the claimant:

> "Q. The position is that in 2012 you wanted to extract from your pension pot as much money as you could, didn't you?
>
> Yes.
>
> Q. So you didn't mind that the underlying investment was high risk because you wanted to get as much money as possible out?
>
> A. Yes.
>
> Q. So you were prepared to take a chance because you knew it would enable you to get this money out?
>
> A. It wasn't so much a chance; I was told that the investment would be good. So far as I was concerned, the advice which I was receiving was adequate enough for me to carry on.
>
> Q. And of course you knew when you signed the member declaration document that you were going to receive an inducement, didn't you?
>
> A. Yes."

57. He did not accept that he had deliberately made a false statement. He accepted in re-examination that he knew that the payment might be a breach of the HMRC rules but that if he put it in his wife's account he thought it would be "okay". Ms Hallett could not help as to where the £4,000 came from, given that the whole of the claimant's pension fund from FriendsLife had been paid into the SIPP with the defendant. Nor could she help as to the amount of commission which CLP earned on the transaction.

58. In May 2012 the defendant became aware that in other cases inducements had been offered and on 25 May Ms Egginton wrote to CLP in the following terms:

> "Despite your assurances that no clients have been or will be offered inducements (monetary or otherwise) for making investments through their SIPPs with us, we have received enquiries as to when clients can expect to receive their money have today been informed by a new client that they are expecting circa £2,000 on completion of the Store First Investment purchase, which they confirmed was offered by a member of your staff.

> We have advised this client that we will not proceed with his case.
>
> In light of this, it is with regret that I have to notify you that we are terminating our Introducer Agreement with you, with immediate effect, and can no longer accept business from you."

59. The defendant said that it would continue with investments where the SIPP had already been established and would write to all their clients to inform then that if they had received a payment it would have to be declared to HMRC. When pressed in cross-examination on the defendant's decision to continue with pipe-line cases Ms Hallett said:

> "But that is why we had our processes for member declarations and make sure that ultimately the client, who came in on an execution-only basis and direct, actually had the last say. So by signing the member declaration, it was them confirming to us that they hadn't received an inducement and that they understood they still wanted to proceed. But because they had established the SIPP and our relationship was directly with the client anyway, we just followed the process through to its own natural conclusion, which was the client making their own decisions…
>
> …that is the absolute final point when the client instructs us, on an execution-only basis, to make that investment for them that they have chosen."

There is no evidence on either side to show whether the defendant wrote to the claimant about this. It was not an issue which had featured in the pleadings or witness statements prior to the trial. Ms Hallett, in an email of 28 May, urged CLP to

> "review your position if you are continuing this as part of your sales process, ultimately no SIPP providers will be taking the business, it is [not] allowable as we have explained to you previously."

60. At a meeting of the Technical Review Committee of the defendant on 5 April 2013, which was called to consider Store First's investment scheme, it was formally resolved not to carry on working with them. The claimant contends that if the defendant had undertaken this type of review or due diligence at an earlier stage then the underlying investment would not have been accepted in the first place and the claimant would not have entered into his arrangement with the defendant. One of the matters of concern raised at the meeting was loans which been made to one of the directors of the company. It was also brought to my attention that from October 2010 the FCA had published warnings about dealing with another director, Mr Terence Wright, who was not authorised under FSMA to carry out regulated activity. Ms Hallett accepted in cross-examination that no check was made to see whether his name appeared on a regulatory warning notice on the FCA's website until May 2012. The relationship between the defendant and CLP was severed on 25 May 2012. She accepted that had she been aware of such a warning in 2010 the defendant would not have dealt with CLP. However, I

accept her evidence that this was not a reason to proceed with the transaction involving the claimant in circumstances where he had already given his instructions and the process was nearing completion.

61. On 17 July 2012 the defendant notified the claimant that the sum of £53,116 had been sent to Store First in accordance with his instructions.

62. On 27 July 2012 the defendant executed a document described as a Deed of Establishment by which it appointed itself as the administrator for the SIPP ("the Scheme Administrator") and appointed Carey Pension Trustees UK Limited ("the Trustees") as the SIPP trustee. The Trustees used the agreed firm of solicitors to complete the purchase of the underlying investment but did not follow the solicitor's advice to seek a professional opinion of the value and rental income of proposed store pod leases. The Trustees entered into a contract with Store First Blackburn Limited for the purchase of a lease of 6 store pods at Unit 6, Centurion Park, Davyfield Road, Blackburn, Lancashire for a term of 250 years from 1 March 2012 for a premium of £52,500 at an initial annual rent of £175.00 which is said to have completed on 20 July 2012. Registration of the leases remained to be undertaken. On 5 October 2012 the defendant wrote to the claimant notifying him that completion had taken place. The claimant contacted the defendant to complain that he was unhappy about the amount of time that the process had taken. His complaint was dealt with via the defendant's Internal Complaints Procedure who wrote to him on 15 November partially upholding the complaint. The Trustees were registered at HM Land Registry as the sole proprietor of the leases of the claimant's store pods on the following day.

The Store Pods Investment

63. The claimant alleges that the investment in the store pods was "manifestly unsuitable as an investment of Mr Adams' pension fund" (para 19 and 23(2) of the Amended Particulars of Claim) in four specific respects:

> "19.1 Any income return is dependent on the SIPP Trustee sub-letting the individual Storage Units in an uncertain market; the SIPP Trustees are not commercial landlords and there was no obligation to seek out sub-tenants or enter into sub-letting arrangements;
>
> 19.2 The value of the investment will be eroded by the Rents and Service Charges.
>
> 19.3 The value of the investment is illiquid and there is no enforceable obligation on Store First to buy the Storage Units back after a 10 year lock-in period in any event.
>
> 19.4 The Storepods Investment was subject to market/valuation risk. In March 2015 CPUK notified Mr Adams that the value of the investment had been reduced by 50% of the purchase price i.e. from £52,626.91 to £26,250.03 said to "reflect the current market conditions for the sale of storage pods."

64. From the beginning of 2016 at the latest the claimant raised with Store First his concerns that his store pods had not been rented out and were not generating any income. Some of his store pods were rented out in the course of 2016 but generated no more than a few hundreds of pounds in rental income. There is no evidence of the market value of the leases at the date that the underlying investment was entered into. However, in March 2015 the defendant advised the claimant that the investment in the store pods had been revalued and reduced by half, but this did not play a significant role in the argument before me.

65. To enable the court to calculate the quantum of any damages or compensation payable Mr John Trenor MRICS, was appointed by the parties as a single joint expert to advise on the market value of the individual leasehold interests in the store pods, with vacant possession as at 31 January 2017. Although he is a general practice surveyor one of his areas of expertise is in valuing commercial property. He told me that had or was in the process of acting on three recent sets of instructions concerning storage pods or other storage facilities. I was satisfied that he had the appropriate expertise to provide useful expert opinion evidence to the court on the values of the store pods in this case.

66. His initial opinion is set out in a report dated 3 February 2017, and a supplemental report, which I have read. He was asked questions in cross-examination both by Mr Virgo and Mr Moeran QC in accordance with directions which had been given by Mann J which, in effect, required the parties to give Mr Trenor notice of the areas or issues on which they proposed to ask him questions.

67. Mr Trenor says in paragraph 1.02.02 of his report that he had not been provided with "a copy of signed Lease documents" for the claimant's units, and he said in cross-examination that he did not ask for a copy although he set out some of the terms of the leases in his report. At trial he was taken through some of the specific detail of the claimant's lease(s) which appeared to be substantially the same as the provisions which he had referred to in his report. He inspected, and measured the pods, and referred to comparables, which included store pods at other sites belonging to Store First. He provided a series of total and individual values which were discounted according to the rate of occupancy and rental discounts offered by the operators of the site. He subsequently undertook research into the information which he had been provided with and which informed much of his thinking in his original report and this led to him revising his evidence for trial, as I set out below.

68. When pressed for a single valuation figure Mr Trenor advised, in his supplementary report, that in his opinion the market value for the six leases for the pods as at 17 February 2017 was £15,000, based on an assumption of 60% occupancy per annum and three months discounted rent. He stated that having looked at sales on a number of different sites the most relevant comparable was a sale of a unit on the same site for £18,000 on 18 October 2016. At trial he confirmed in cross-examination that this was the closest comparable. By paragraph 8 of its Counter-schedule of loss the defendant accepted Mr Trenor's open market valuation of the store pods of £15,000 as at 17 February 2017.

69. At the trial, and after taking account of the areas on which he had been told that the parties wished to cross-examine him, Mr Trenor produced a quantity of additional material, including additional comparables, some of which he set out in a schedule, and data relating to lettings of store pods (and discounts offered as inducement where there

would otherwise be a letting void), which together affected his view of the value of the leases. He had not disclosed the additional material to the parties before going into the witness box but they had a chance to consider it over a slightly extended lunch break before asking questions.

70. It was apparent to me from his replies to the questions he was asked in cross-examination that notwithstanding the thoroughness of his two written reports Mr Trenor had undertaken some detailed research and had thought deeply and carefully about the factors which played into the figures which he arrived at in his final valuations which he explained orally at trial. He had analysed letting lengths, rent levels, discounts which have been offered, sales on this and similar sites. He made a very detailed discounted cashflow valuation. And he also undertook a valuation based on comparables. Mr Moeran QC described them as "a sales comparison and income valuation". He was cross-examined in some detail about the figures which he had arrived at on each of the two bases. His revised conclusion on a discounted cashflow analysis was that the store pod leases were worth between £7,000 and £8,000 as at January or February 2017. On the other hand the first view that he expressed at trial was that the comparables suggested a value of £12,000. He accepted that the two valuations did not "match", in his words.

71. However, in cross-examination Mr Trenor also accepted that when seeking to ascertain the market value of the leases evidence of sales in the relevant market were the "gold standard". He confirmed that the sale which he had identified in his original as the closest comparable remained the best comparison. It was at the same location, of approximately the same size and involved a transaction close the valuation date and it was not a "forced" sale. Using the same price per square foot for that sale the value of the claimant's leases was £15,000, which was the figure which Mr Trenor had come to in his supplemental report. He was unhappy about the figure as a final valuation because of the mis-match with his discounted cashflow calculation and therefore wished to temper it, arriving ultimately at a figure "in the region of £12,500". He added that "£15,000 was too broadbrush. I thought I was being too simplistic."

72. Pulling the threads of that evidence together it seems to me that the appropriate way to value the leases is as a capital asset which has a value on the open market which can be established by a comparison with other sales. That, in my judgment, is the appropriate method and accords with Mr Trenor's "gold standard". The income stream method of valuation might be a useful cross-check or the appropriate valuation basis for accounting purposes but here in my judgment the sale value on the open market is the best measure. I therefore find, having regard to Mr Trenor's careful evidence, that the market value of the leases in January 2017 was £15,000.

73. It was brought to my attention after the trial that on 30 April 2019 an order was made in Manchester District Registry that Store First Blackburn Limited be wound up in the public interest. Other companies in the group were wound up on the same basis. On 11 December 2019 the Official Receiver completed the sale of the freehold, associated assets and goodwill of the Blackburn site to a company called Store First Freeholds Limited. The day to day business at the site was intended to continue under the trading name "Store First". The effect of the sale was agreed not to have any impact on the ownership of the leasehold interests in any individual units. Nor does that event have any impact on my conclusions in this case.

Legal Framework

74. Establishing and operating a SIPP is an activity which is regulated by the statutory regime and requires authorisation from the FCA. This is an area in which the relevant provisions have been revised from time to time. I have been provided with copies of the regulatory provisions which were in force at the time of the transaction which is at the heart of this claim and my citations from the materials are from those in force at that date.

75. The Financial Services and Markets Act 2000 sets out the duties and objectives of the FCA, their rule making powers, and provides a statutory framework for the regulation of financial services in the UK. The scheme was summarised by Lord Sumption in Asset Land Investment Plc v FCA [2016] UKSC 17, a case concerned with Collective Investment Schemes, which, as I have already said, is not an issue here:

> "*The Financial Services and Markets Act 2000: the general prohibition*
>
> 73. Section 19 of the Financial Services and Markets Act 2000 substantially re-enacts section 3 of the Financial Services Act 1986. It provides that no person may carry on a "regulated activity" unless that person is authorised or exempt. This is referred to in the Act of 2000 as the "general prohibition". In the earlier Act, regulated activities had been defined in the Act itself. But in the Act of 2000, a "regulated activity" is simply defined as an "activity of a specified kind" which "relates to an investment of a specified kind" or "is carried on in relation to property of any kind": section 22. For this purpose, "specified" means specified by the Treasury by statutory instrument.
>
> 74. The relevant statutory instrument is the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544). The order identifies specified activities as including (i) activities such as promoting, advising on, managing or dealing in "investments"; and (ii) "establishing, operating or winding up a collective investment scheme": para 51(1)(a) (now renumbered as article 51ZE). Specified investments are identified in Part III of the same order. Although the Treasury is empowered to specify any assets as investments, the order in fact identifies broadly the same kinds of asset as had previously been identified in the Financial Services Act 1986. They comprise shares, bonds and other debt instruments, government and public securities, warrants and tradeable certificates for any of the foregoing, mortgages, options and futures, contracts for differences, units in a collective investment scheme, and similar financial instruments.
>
> 75. The statutory consequences of a breach of the general prohibition are severe. The infringer commits a criminal offence: section 23. Any contract made in the course of carrying on the relevant activity is unenforceable: section 26(1). And there are

> provisions for compensation and restitution in favour of the other party: section 26(2)."

76. Thus there is what is described as a general prohibition contained in s.19 that

> "No person may carry on a regulated activity in the United Kingdom…unless he is – (a) an authorised person; or (b) an exempt person."

As Lord Sumption says [75] breach of the general prohibition is a criminal offence (cf s.23 of FSMA). An activity is a "regulated activity" for the purposes of FSMA, by virtue of section 22 of the Act, if it is

> "…an activity of a specified kind which is carried on by way of business and
>
> relates to an investment of a specified kind; or
>
> in the case of an activity of a kind which is also specified for the purposes of this paragraphs, is carried on in relation to property of any kind."

77. The definition of regulated activities is supplemented by a list at Schedule 2 to FSMA. The list in Schedule 2 is itself supplemented by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("the RAO") made pursuant to FSMA. A SIPP is an investment in respect of which the activities of advising and arranging, in general terms, are regulated. The defendant is an authorised person entitled to carry on a regulated activity. CLP was not. The two regulated activities which feature in the claimant's pleaded case are those defined in Articles 25 and 53 of the RAO (paragraph 26 of the Amended Particulars of Claim).

78. Unregulated introducers such as CLP are entitled to make introductions to authorised SIPP providers who operate an execution-only business, although they are, of course, not entitled to give advice on the SIPP. That is consistent with the outcome of the review which the FCA undertook in relation the defendant's business which I refer to above. That does not mean that an introducer could not give advice in relation to the underlying investment, but it may not give advice in respect of the SIPP itself, although it is entitled, having recommended and advised on the underlying investment, to introduce the client to a SIPP provider.

79. What is known as Perimeter Guidance ("PERG") is also issued by the FCA to

> "give guidance about the circumstances in which authorisation is required, or exempt person status is available, including guidance on the activities which are regulated under the Act and the exclusions which are available".

Various extracts from PERG are referred to below.

The Claims

<u>The s.27 Claim</u>

80. The claimant asserts that because of the role of CLP at a time when it is said that CLP was carrying on the regulated activities of "advising on investments" within Article 53 of the RAO and "arranging investments" within 25 of the RAO the investment agreement (i.e. the SIPP) is unenforceable pursuant to s.27 of FSMA and the claimant is entitled to recover his investment and be paid compensation for any loss suffered by him as a result of having parted with the original fund (s.27(2)). The claimant says that he was advised by CLP to invest his funds in store pods and to do so via a SIPP to be established by the defendant and that he has, in effect, lost his original pension fund because his investment is worthless or worth far less than the sum which he paid for it.

81. s.27 provides as follows:

> "S.27(1) An agreement made by an authorised person ("the provider") –
>
> in the course of carrying on a regulated activity (not in contravention of the general prohibition), but
>
> in consequence of something said or done by another person ("the third party") in the course of a regulated activity carried on by the third party in contravention of the general prohibition,
>
> is unenforceable against the other party."

82. On the facts of this case the agreement within s.27 is the contract between the claimant and the defendant pursuant to which the SIPP was set up by the defendant as "the provider" in the course of carrying out the regulated activity of establishing the SIPP. The "third party" is CLP. The claimant says, in the words of s.27, that the SIPP was necessarily entered into as a "consequence of something said or done" by CLP in the course of two regulated activities "carried on by [CLP] in contravention of the general prohibition", the two activities of advising on investments and arranging investments, namely the SIPP. The two regulated activities are defined in articles 53 (advising) and 25 (arranging) of the RAOs. Therefore he submits, the contract is unenforceable and he is entitled to recover his losses.

83. Article 53, headed "Advising on investments", provides:

> "Advising a person is a specified kind of activity if the advice is –
>
> given to the person in his capacity as an investor or potential investor, or in his capacity as agent for an investor or a potential investor; and
>
> advice on the merits of his doing any of the following (whether as principal or agent) –
>
> buying, selling, subscribing for or underwriting a particular investment which is a security…"

84. Article 25, headed "Arranging deals in investments", provides:

> "(1) Making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite a particular investment which is –
>
> a security,
>
> …is a specified kind of activity.
>
> Making arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting investments falling within paragraph (1)(a)..(whether as principal or agent) is also a specified kind of activity."

85. Establishing a SIPP is a specified kind of activity (Article 52), however, certain arrangements are excluded from the Article 25(1) definition, by virtue of Article 26, which is headed "26. Arrangements not causing a deal":

> "There are excluded from Article 25(1)…arrangements which do not or would not bring about the transaction to which the arrangements relate."

Article 26 does not provide an exclusion in respect of acts falling within Article 25(2).

86. The claimant says that the acts of CLP readily fall within the activities defined in both Article 53 and Article 25, which are to be construed broadly, and are not to be excluded by virtue of Article 26. They rely on the decision of Mr Jonathan Crow QC, sitting as a Deputy Judge of this Division, in Re The Inertia Partnership LLP [2007] BCC 656, which concerned a petition by the FCA to wind up a limited liability partnership on the grounds that it had been carrying on investment business without being authorised or exempt. The learned Deputy Judge made an order that the defendant be wound up. In the course of his judgment Mr Crow QC considered the meaning of Article 25:

> "38. There is apparently no guidance on the scope of RAO articles 25 or 26, either from previous case-law or from any statutory or non-statutory source. The court must accordingly interpret the words used in these articles by reference to first principles. The ultimate objective is plainly to identify 'the objective of' the legislation, interpreting the words of the RAO by reference to the context in which they are used"
>
> The critical words in article 25 are these: "making arrangements for' another person.. to buy, sell [or] subscribe for shares. The exception under article 26 applies to "arrangements which do not or would not bring about the transaction to which the arrangements relate". In my judgment, the correct analysis of these provisions is as follows:
>
> 39.1. The word 'arrangements' is, depending on the context, capable of having an extremely wide meaning, embracing matters which do not give rise to legally enforceable rights.

> 39.2.In articles 25 and 26, the word 'arrangements' is used in contradistinction to the word 'transaction'..
>
> 39.3. In article 26, the word 'transaction' is plainly a reference to the purchase, sale etc of shares contemplated by article 25
>
> 39.4. As such, a person may make 'arrangements' within article 25 even if his actions do not involve or' facilitate the execution of each step necessary for" entering into and completing the transaction (i.e. the purchase, sale etc of the shares)
>
> 39.5. The availability of the exception in article 26 is essentially a question of fact. As a matter of causation, did the arrangements bring about the transaction (i.e. the purchase, sale etc of the shares)?"

The judge then turned to look at the specific examples of what were said to be breaches of the general prohibition, recognising that whether there had been a breach was fact specific, bearing in mind his interpretation of the articles.

> "40. Dealing first with Vivadi, as already noted, there is no evidence to suggest that TIP took any part in arranging the sale of its shares, beyond having introduced the company to Porterland.. That introduction is in my judgment too nebulous and too remote an act to fall within the concept of 'making arrangements' within RAO article 25 Such an introduction in these circumstances is not an 'arrangement' in any meaningful sense, for two reasons: first, because it does not necessarily result in anything further happening as between Vivadi and Porterland, let alone between any consumers and Vivadi or Porterland; and secondly, because any further steps that might be taken following the introduction were not within TIP's power to effect or to direct.. As such, the introduction did not involve TIP in any violation of the general prohibition under FSMA s .19.
>
> Turning next to Plasma, the position is different TIP entered into an express agreement pursuant to which it provided administration services designed to facilitate the sale of Plasmas shares…"

87. The claimant also referred me to Watersheds Ltd v DaCosta [2009] EWHC 1299 (QB), a decision which Mr Virgo later described as not very reliable, in which Holroyde J considered whether an agreement was unenforceable because of the carrying on of an unauthorised within Article 25. He referred to and agreed with paragraph 39 of the judgment in Re Inertia Partnership LLP before concluding on the facts that there had been no contravention:

> "64. … As I indicated in argument, I regard the facts of this case as clearly distinguishable from the facts in Re Inertia Partnership, because here there is more than a bare introduction to a third party. Watersheds were required to use their experience

> and expertise to assist the company to ensure that all necessary material was provided to investors in the most attractive form so as to assist or promote a successful outcome to any meeting. Nevertheless, in my judgment, what was contemplated by the terms of engagement involved Watersheds at most trying to effect introductions and to assist the company in meeting potential investors in order that the company could try to reach agreement with those potential investors as to a transaction. I accept the submission that Watersheds were not able in any real sense to influence whether or not an investment was made in the company. I conclude that Watersheds were not undertaking activity which was of a kind specified by article 25(1). "
>
> I am fortified in that conclusion by the guidance given in the Financial Services Authority's Perimeter Guidance Manual, paragraph PERG 2.7.7B of which states in this regard:
>
> "The activity of arranging (bringing about) deals in investments is aimed at arrangements that would have the direct effect that a particular transaction is concluded (that is, arrangements that bring it about)."

88. In closing the claimant submitted that DaCosta was "implicitly overruled or disapproved" by the Court of Appeal in a decision which I have referred to as SimplySure, to which I will now turn.

89. The claimant says that the defendant delegated part of the "arrangement" of the SIPP including the provision of an explanation of the defendant's product to the claimant. They rely on the judgment of Stanley Burnton LJ in Personal Touch Financial Services Ltd v SimplySure Limited [2016] EWCA Civ 461. In that case the defendant was a medical insurance provider and the claimant was an agent appointed to sell the defendant's product. The defendant had terminated the agency agreement when it found that unauthorised advisers had been completing some of the forms required to be submitted by potential clients. The first question addressed by Burnton LJ in his judgment was whether the completion of the forms by unauthorised persons contravened the general prohibition. His Lordship held that it was in contravention, as he explained in the following passage:

> "(1) Did SimplySure act in breach of the general prohibition?
>
> In my judgment, the Judge correctly found that the completion of the first part of the fact-finds (i.e., the questions above the rubric) by employees or agents of SimplySure who were not authorised by PTFS was in breach of the general prohibition. The purpose of the completion of the first part of the fact-find was for the client to buy PMI, and arranging for an unauthorised person to visit or to interview the client was an arrangement within Article 25(1) of the Order, and indeed also within Article 25(2) since it was an arrangement with a view to the client, who participates in the interview, buying PMI. The wording and therefore scope of Article 25 is deliberately wide. I am

> encouraged in this conclusion by the consideration that SimplySure put the unauthorised person in a position in which he could advise the client. Furthermore, the questions above the rubric were not limited to the name and address of the client and his or her date of birth: the answer to the question as to whether any existing PMI cover was "Moratorium/Full Medical/Switch" required a degree of specialist knowledge. My conclusion is consistent with the FSA Guidance in PERG 5.6.2 and PERG 5.6.4, cited above, which I would approve as a correct explanation of the effect of Article 25(1) and (2)."

90. In Asset Land Lord Sumption also looked at the meaning of the word "arrangements" in the context of s.235 FSMA.

91. In respect of Article 26 the claimant says that it only provides an exclusion in respect of Article 25(1), direct establishment of the SIPP, but that the claimant is entitled in any event to succeed in respect of Article 25(2), which is broader than 25(1) arguing that the six acts which the claimant relies on as part of the arrangements were plainly "arrangements with a view to" establishment of a SIPP within Article 25(2).

92. However, the claimant submits that the s.26 exclusion only applies if the six acts "do not or would not bring about the transaction to which [they] relate" but on the facts the six acts did bring about the SIPP, as they were intended to, because of the way that the process of the whole transaction was designed.

93. The claimant says that the six steps in the arrangements which fall within Article 25 in this case are procuring the letter of authority, procuring a discharge form in respect of the FriendsLife transfer, the undertaking of money-laundering investigations, the completion of the application form "which had been delegated to CLP", the instructions to Store First to identify pods to be sold and "the explanations that CLP were expected to provide in relation to key features and the terms of business."

94. As to Article 53, advising, it was submitted that the evidence showed that the claimant was advised by CLP that it would be safer for his pension fund to be put into a SIPP, that he was advised on the merits of a SIPP, which brought the acts of CLP within those covered by Article 53, thereby triggering s.27.

95. The defendant submits, in respect of Article 25 that CLP were not "arranging deals in investments" within Article 25(1), in that it was not "making arrangements for [the claimant] to buy…[a SIPP]…". The defendant submits, in reliance on In re Inertia at [40], that the mere act of introducing is not sufficient, because it does not necessarily result in any further causal steps being taken in the establishment of a SIPP and what followed in the instance case after the introduction of the claimant by CLP to the defendant was not in any event within the introducer's power to effect or direct. The regulatory scheme recognises that there may be unregulated introducers and it would be surprising if this mere act of introduction was within Article 25 and triggered s.27 rendering potentially every transaction entered into as a result of the introduction unenforceable. They rely on Article 26, and the words used in the exclusion of arrangements which "do not bring about" the transaction to which the arrangements relate as support for their argument. In other words there has to be a sufficient causal link between the "arrangements" and the "transaction". The need for a sufficient causal

link is supported by paragraphs [40] to [42] of In re Inertia. My attention was drawn to the specific scenarios considered in paragraphs [41] and [42] of the judgment, part of which I have already cited above:

> "41. Turning next to Plasma, the position is different. TIP entered into an express agreement pursuant to which it provided administration services designed to facilitate the sale of Plasmas shares. Mr Shears main defence is that the brokers entered into binding agreements with consumers in the course of their telephone conversations, and that TIP did nothing more than provide the necessary paper work after the contract had already been made. This argument raises two questions. First, is it right as a matter of fact? Secondly, if so, does it save TIP from the reach of article 25?
>
> 41.1. As to the first question, the position is slightly obscure, not least because none of the forms submitted to TIP by investors in Plasma have been adduced in evidence. There are numerous forms in relation to Police 5, but none in relation to Plasma. In the absence of any documentary evidence to the contrary, I can only assume that, in relation to Plasma, TIP sent out Forms B, attached to the Plasma Agreement. Nevertheless, on the balance of probabilities, I am satisfied that the brokers did not enter into binding contracts with consumers over the phone, for a number of reasons, First, Form B is described in Schedule 1 to the Plasma Agreement as: 'Application and registration details'. The use of the word 'application' is inconsistent with a situation in which an investor is already bound to purchase a specified number of shares. Secondly, the money paid by consumers to TIP is described in clause 5.1 of the Plasma Agreement as 'application moneys' Again, the same point can be made, Thirdly, in the course of his interview, Mr Shears referred to the 'application forms' in relation to Plasma, which again implies that no previous binding agreement to subscribe for shares had been made. Finally, it is highly likely that the matter was handled by the boiler rooms in the same way as in relation to Police 5, where the evidence is much clearer, as will emerge.
>
> 41.2. But, even if they had entered into any such binding contracts, would it have made any difference? In my judgment, it would not. Even then, the sale and purchase of shares would still need to be completed. In particular, the investors would need to pay, and the company would need to receive the funds, TIP provided the necessary administrative services in that regard. Those services 'brought about' the transaction (a sale and purchase of shares), even if there was a pre-existing contract in place, because without the services provided by TIP such contracts would not have been completed..
>
> 42. For these reasons, TIP was in my judgment acting in breach of' RAO article 25 in relation to Plasma. The position in relation

> to Police 5 is clearer still The Application Forms are conclusive that the consumer was applying for shares, and that s/he might receive less than s/he applied for, or none at all. There was plainly no pre-existing contract concluded between the broker and the consumer over the phone There is also some evidence to show that consumers who failed to send off cheques after they had spoken with brokers over the phone were not pursued: that is again inconsistent with any suggestion that the brokers were making binding contracts with consumers. As such, in sending out the Application Forms, collecting the cheques and paying the money to Police 5, TIP was not merely providing completion services, but was making arrangements for the company to enter into agreements with investors. For these reasons, there was in my judgment a breach of' RAO article 25 in relation to Police 5."

96. I was asked to note that the DaCosta case concerned acts which might be said to have gone beyond simply effecting an introduction but the learned judge nevertheless held that the line had not been crossed and the activities did not fall within Article 25.

97. The defendant also relied on the FCA guidance in respect of Articles 25 and 26 to be found in PERG in support of the submission that there has to be a sufficient causal connection between the acts of the introducer and the formation of the agreement which it is sought to impugn:

> "PERG 2.7.7B"
>
> "The activity of arranging (bringing about) deals in investments is aimed at arrangements that would have the direct effect that a particular transaction is concluded (that is, arrangements that bring it about)".
>
> which was approved by Holroyde J in the DaCosta case at [65].
>
> PERG 2.8.6A
>
> "(1) Under article 26, arrangements that do not or would not bring about the transaction to which they relate are excluded from the arranging activities that relate to a particular transaction…only. A person will bring about a transaction or a contract or plan variation only if his involvement in the chain of events leading to a transaction or contract or plan variation is of sufficient importance that, without that involvement, it would not take place. This will require something more than the mere giving of advice…"

98. The claimant describes the defendant's position on Article 26 as "completely unreal; it entails an artificial and artificially narrow construction of article 26 – and is inconsistent with the judgment of Stanley Burnton LJ in SimplySure Limited". The defendant submits that what caused the Court of Appeal to find that there had been a contravention

in SimplySure was that the party said to have been carrying on the regulated activity had specialist knowledge and had been put in a position by the other party where they could advise the potential investor. I was asked to note that the Court of Appeal did not appear to have been referred to either Inertia or DaCosta.

99. They submit that Article 25(2) is not in play here and that the claimant only sought to develop a case on it at trial in relation to issues which had not specifically been pleaded but that in any event the claimant's case on this point fails for the same reason as in respect of Article 25(1) in that the word arrangements cannot properly be construed to cover a mere introduction.

100. As to Article 53, "advising", the defendant submits that:

i) there was no advice on the merits of the SIPP – there is no evidence that specific advice was given to the claimant in respect of the SIPP, only that it should be used as a vehicle for the underlying investment;

ii) a recommendation that the claimant take out "a" SIPP is not advice on the merits of this SIPP. To fall within Article 53 the advice must focus on the merits of the specific investment which is under consideration. They rely on PERG 12.3 "Rights under a personal pension scheme", the answer to question 19:

> "Q19. For advice to be regulated, it needs to relate to the merits of buying or selling a particular investment. When do rights under a personal pension scheme become "particular" rights and so particular investments?
>
> It is the rights under a personal pension scheme that must be a particular investment. This means that the rights must arise under a particular personal pension scheme. So, provided the rights on which advice is given relate to rights conferred, or to be conferred, by a particular scheme, they will be particular rights and advice on the merits of buying or selling them is likely to be regulated. This is the case, whatever the nature of the rights or of the underlying assets or prospect underlying assets. Conversely if there is no particular personal pension scheme, there cannot be any particular rights."

iii) advice which the claimant alleges in his witness statement to have received was to use the defendant. There is no evidence as to advice which he was given in respect of a particular product;

.

101. Alternatively the defendant submits that should be no relief (cf s.28(3)). Having regard to its Terms of Business with Non-Regulated Introducers, the defendant reasonably believed that CLP were not conducting regulated business given that they had expressly agreed not to do so and did not know that they were purportedly doing so (cf.s28(6)). The defendant asserts that if section 27 does apply to the transfer of the claimant's former pension funds to the SIPP then in all the circumstances it would be just and

equitable to enforce the agreement and not to reverse it or order the payment of compensation.

102. The FCA appeared to submit that in construing Article 25 the judges in Inertia and DaCosta had interpreted the word "arrangements" too narrowly and that the expression "making arrangements for another person…to buy…a particular investment" used ordinary English words which did not require glossing. They relied on the decision of the Supreme Court in Financial Conduct Authority (formerly Financial Services Authority) v Asset LI Inc [2016] UKSC 17 at [91] where Lord Sumption, with whom three of the other four Justices agreed, provided a definition of "arrangements" for the purposes of s.235(1) of FSMA:

> "Section 235(1): "arrangements"
>
> 91. A collective investment scheme means, as section 235(1) provides, "arrangements" of the prescribed description. Subsections (1) to (4) all describe the characteristics that the relevant "arrangements" must have if the resultant scheme is to qualify as a collective investment scheme. "Arrangements" is a broad and untechnical word. It comprises not only contractual or other legally binding arrangements, but any understanding shared between the parties to the transaction about how the scheme would operate, whether legally binding or not. It also includes consequences which necessarily follow from that understanding, or from the commercial context in which it was made. In these respects, the definition is concerned with substance and not with form. It is, however, important to emphasise that it is concerned with what the arrangements were and not with what was done thereafter. Of course, what was done thereafter may throw light on what was originally understood. It may for example serve to show that some record of the understanding was a sham. It may found an argument that the arrangements originally made were later modified. But it must be possible to determine whether arrangements amount to a collective investment scheme as soon as those arrangements have been made. Whether the scheme is a collective investment scheme depends on what was objectively intended at that time, and not on what later happened, if different."

103. They also submit that in approving PERG 5.6.2 and 5.6.4 the Court of Appeal in SimplySure accepted that completion of the first part of a fact-find by unauthorised agents amounted to an "arrangement" within the meaning of Article 25(1) and 25(2) as did "assisting in the completion of a proposal form [for a contract of insurance] and sending it to the insurance undertaking" (an example given in PERG 5.6.4). They also argue that for Article 26 not to apply there need only be "a" causal link.

104. In respect of Article 25(2) the FCA submits that ongoing arrangements to provide introductions would suffice and that insofar as DaCosta decided that mere introductions were not covered by Article 25(2) it was decided without reference to other relevant provisions to be found in the RAO, including Article 33.

105. As to Article 53 the FCA argues that advice on the merits of using a particular investment company is contemplated by PERG 5.8.14 as being an implied recommendation of a particular investment and therefore within RAO 53 because the effect of it is to steer the client towards a particular investment.

106. The causation test under section 27 required by the words ""in consequence of something said or done by another person" would be satisfied where an investment is made as a result of advice given by an unauthorised person, whether or not the authorised firm is aware of the advice having been given.

Conclusion on the s.27 Claim

107. As I read the claimant's statements of case the claim based on s.27 of FSMA was a secondary case but at trial it assumed primary importance, which is why I have put it first in the order of claims to be determined.

108. For the claimant to succeed under s.27 he must establish that the SIPP agreement was made (or established by the defendant, for the claimant) "in consequence of something said or done by [CLP] in the course of a regulated activity carried on by [CLP] in contravention of the general prohibition". The two activities relied on are "arranging" (Article 25) and "advising" (Article 53). The first issue therefore to consider is whether CLP was arranging a deal in investments or with a view to a deal for the purposes of Article 25 of the RAO in breach of the general prohibition.

109. The claimant appeared to argue that the key date to consider whether there was a contravention was 23 February 2012 when the claimant's application form was sent to the defendant or possibly 27 but it seems to me that cannot be right. The defendant says that the court should look at the whole transaction.

110. I should mention that after the trial the claimant's advisers drew my attention to the decision of Ouseley J in Tenetconnect Services Limited v Financial Ombusdman [2018] EWHC 459 (Admin) but having looked at that decision it does not assist me either in construing s.27 or analysing the factual material to ascertain whether the acts of CLP fell within s.27.

111. There was no contact in respect of this transaction between the claimant and the defendant or between CLP and the defendant prior to the defendant accepting the application and there was no commitment on either side (i.e. the claimant and the defendant) to continue with the SIPP until much later down the line. The claimant's instructions to the defendant to proceed with the investment were not given until he submitted the Member's Declaration around 19 June 2012, and the underlying investment was not made until July. There was no potential loss until the claimant provided his instructions to the defendant via the Member's Declaration. Until that point it was open to the claimant to change his mind and from that point the defendant could only refuse to act on very limited grounds. In looking at the causal link between the acts which the claimant submits were the "arrangements" within Article 25 and the investment, that timeline and the respective acts or steps taken by CLP and the defendant are highly material. In my judgment the key date is at the point that the claimant gave his instructions.

112. It is common ground that the underlying investments in the store pods did not fall within the definition of relevant investments regulated by Article 25, which can apply on the facts of this case only to the SIPP, and that it is the arrangements allegedly leading to the establishment of the SIPP which call to be examined.

113. Articles 25(1) and 26 contemplate the need for a causal link between the act or acts of arranging and the transaction itself. In his closing submissions Professor McMeel QC argued that the court should conclude that the appropriate causal link would be established if the well-known common law "but for" test were satisfied: "It is a 'but for' test. It's a very limited test". The FCA appears to suggest the same. I do not agree. The relevant words of Article 26 are "bring about". That phrase, in ordinary English, suggests that the arrangements have to be a positive or effective cause, not merely a set of circumstances which may be no more than the context of the transaction which eventuates.

114. Moreover, the passages from the Inertia case which I have cited above show that the "but for" test is not sufficient. In considering the meaning of "arrangements" in article 25 Mr Crow was plainly drawing a distinction between arrangements which, if all went as planned, were intended to result in a transaction, as in paragraphs [41] and [42], which would amount to a contravention of the general prohibition, and an arrangement which amounted to no more than a bare referral, as in paragraph [40], and was not.

115. Similarly, Holroyde J in DaCosta at [61] held that the acts complained of "were not able in any real sense to influence whether or not an investment was made in the company", which seems to me to be another way of putting the test which was considered by Mr Crow QC.

116. On the facts SimplySure is different to the present case. There the acts of the agent, with specialist knowledge, were key to the impugned transaction(s) which took place directly as a result. In my view that case is not authority for the proposition that a mere introduction would suffice. Nor, in my judgment, is there any inconsistency between that case and the two High Court decisions in Inertia and DaCosta. Each depended on its own facts.

117. I have also had regard to the guidance in PERG 2.7.7B but I accept the defendant's submissions that for the arrangements to bring about the transaction there must be a direct and substantial causal connection between the arrangements and the ultimate transaction and that simply giving advice on the underlying investment and effecting an introduction are not sufficient because those acts do not necessarily result in anything further happening and the further steps which were necessary to establish a SIPP were not within the introducer's power to effect or direct.

118. The six steps relied on by the claimant do not satisfy the test. CLP acted as a bare introducer. The acts are very different to those considered by Mr Crow QC in paragraph [42] of In re Inertia because (1) the acts of CLP in the present case did not necessarily result in any transaction between the claimant and the defendant, and (2) the process was out of CLP's hands to control in any event. The administrative steps relied on by the claimant are further down the chain of causation than the giving of advice, which according to PERG 2.8.6A would not itself amount to "arranging". Procuring the letter of authority was a mere administrative act, as was procuring a discharge form in respect of the FriendsLife transfer, and the assistance in undertaking of money-laundering

investigations. The completion of the application form may be said to be getting closer but it is still essentially administrative in nature, it did not require the specialist knowledge found to be key in other cases, the questions were not difficult to answer and it was intended, in any event, to be completed by a lay person on line.

119. Insofar as the claimant suggests that the completion of the form had been "delegated to CLP", that is inconsistent with the evidence and I reject it.

120. The instructions provided via CLP to Store First to identify pods to be sold to the claimant were not capable of being arrangements which would lead to the establishment of the SIPP.

121. Finally the claimant relies on "the explanations that CLP were expected to provide in relation to key features and the terms of business" but the scheme pursuant to which CLP were to operate and the terms of business between CLP and the defendant meant that no explanation was to be given. Moreover, the claimant's evidence did not suggest that there was any such explanation given by CLP.

122. It is to be noted that the last step in time which was undertaken by CLP was submission of the application form on 23 February 2012. The role of CLP stopped at the point when the application form was submitted. There was not even a binding agreement at that point. There was a significant number of steps taken after that point before the transaction became irrevocable. It cannot be said that the acts of CLP were causative of the transaction, other than in the "but for" sense. In my judgment the acts of CLP did not "bring about" the transaction and therefore the SIPP was not entered into as a "consequence of" CLP making arrangements within the meaning of Article 25(1). None of the six acts relied on by the claimant, insofar as I accept that they took place, demonstrate that CLP "were….able in any real sense to influence whether or not an investment was made in the company".

123. In the Amended Particulars of Claim there is no specific reference to Article 25(2). Indeed the only reference to Article 25 is to be found in paragraph 26 which, insofar as material, says:

> "In making the Investment Recommendations and Investment Arrangements CLP Brokers was carrying on or purporting to carry on the regulated activities of advising on investment within Article 53 of the RAO and arranging investments within Article 25 of the RAO".

In his Reply the claimant pleaded, at paragraph 22.1:

> "It is averred that the arrangements were expressly intended to and did bring about the establishment of the SIPP and the investment in the Storepods. The disapplication provided by RAO Article 26 is not applicable."

There is no specific reference to Article 25(2) or to an alternative case in which Article 26 has no relevance. See also paragraph 32.4 of the Reply.

124. In any event in my judgment any purported reliance on Article 25(2) does not assist the claimant. First because no acts which are said to fall within that sub-Article have been pleaded. Secondly "arrangements" should be construed in the same way as in Article 25(1) and a mere introduction would not suffice and the steps taken "with a view" to a transaction would have to be capable of satisfying a notional causation test. Thirdly, as a matter of fact, the steps taken by CLP are not capable of satisfying any such test. Fourth, insofar as it may be alleged that the arrangements were the arrangements between CLP and the defendant in 2011 and 2012, which became regulated by the Terms of Business, not only is that not pleaded but in my judgment it is not capable of falling within a proper interpretation of Article 25(2) because it has no reference to the claimant.

125. I turn therefore to Article 53. At trial my attention was not drawn to any reported decision on its meaning. There is no evidence that CLP provided any advice in respect of the SIPP. The evidence demonstrated that any advice which was given by CLP related to the underlying investment in store pods and not to the SIPP. The line of argument which relies on an alleged breach of Article 53 is therefore of no assistance to the claimant.

126. Even if "recommending" a specific SIPP, which in my judgment falls short of advising on the merits of a particular investment for the purposes of the Article, fell within Article 53 nevertheless in this case the evidence does not support a contention that the claimant was recommended a specific SIPP by CLP, let alone the particular SIPP that he entered into. His evidence at its highest appears in paragraph 18 of the claimant's witness statement:

> "The discussion with CLP persuaded me that I should follow their advice and guidance to transfer my pension and invest it in Store Pods in accordance with their advice because I believed that, as they said, my pension would do better and it would be safely and securely held with a reputable UK based pension provider - Carey"

It was a recommendation of the defendant and not of any of their specific products. I do not accept the submission that steering an investor in the direction of a specific SIPP provider amounts to a recommendation of a specific SIPP or "advising" in the sense contemplated by Article 53. If that argument were to have any substance in the instant case the evidence would have to be much stronger than that which I have just cited from the claimant's witness statement.

127. The relief which is available in respect of an agreement which is rendered unenforceable under subsection 27(1) is to be found in subsection 27(2):

> "(2) The other party is entitled to recover –
>
> any money or other property paid or transferred by him under the agreement; and
>
> compensation for any loss sustained by him as a result of having parted with it."

The amount of compensation, in default of agreement, is to be determined by the court (s.28(2)). If the conclusion reached on the proper application of s.27 is that the SIPP is unenforceable and prima facie the relief provided by subsection (2) falls to be granted nevertheless the court may allow the SIPP to be enforced if the criteria set out in s.28 of FSMA are satisfied. Section 28 provides:

> "(1) This section applies to an agreement which is unenforceable because of section…27.
>
> …
>
> (3) If the court is satisfied that it is just and equitable in the circumstances of the case, it may allow –
>
> (a) the agreement to be enforced; or
>
> (b) money and property paid or transferred under the agreement to be retained.
>
> (4) In considering whether to allow the agreement to be enforced or (as the case may be) the money or property paid or transferred under the agreement to be retained the court must –
>
> …
>
> if the case arises as a result of section 27, have regard to the issue mentioned in subsection (6).
>
> …
>
> (6) The issue is whether the provider knew that the third party was (in carrying on the regulated activity) contravening the general prohibition.
>
> …
>
> (8) If property transferred under the agreement had passed to a third party, a reference in section…27 or this section to that property is to be read as a reference to its value at the time of its transfer under the agreement."

That looks to the value of the fund going into the SIPP.

128. The defendant submits that it did not know that CLP was carrying on regulated activity in contravention of the general prohibition and therefore the court should exercise its discretion in favour of the defendant, that it would be unjust and inequitable to allow recovery where under the contract between them the role of the defendant is execution only, and I should bear in mind that the claimant was warned and took the risk of a speculative investment with his eyes open

129. The claimant says that the defendant knew that CLP was carrying on the regulated activity of arranging and that it was likely that the claimant would have been advised by CLP about the SIPP. They say that it is sufficient that the defendant knew that CLP was assisting in the completion of the paperwork even if it did not appreciate the legal consequences. It was submitted that the defendant is to be taken to have known that the CLP was carrying on a regulated activity if it knew the relevant facts, even if it did not know what the legal consequences were. The claimant relies on a decision of the Court of Appeal predating FSMA, Securities and Investment Board v Scandex Capital Management A/S [1998] 1 All ER 514, in which it was held that the second defendant, managing director of the first defendant, was "knowingly concerned" in the carrying on of investment business in contravention of the then regulatory regime because he knew all the relevant facts even though he mistakenly believed that the first defendant was authorised. The claimant submitted that it must have been obvious that the claimant was being given advice as to the SIPP because the use of a SIPP was the method which it was being suggested by CLP that he use to make the underlying investment through.

130. I accept that for s.28(6) the focus has to be on the acts of which it is alleged that the defendant had knowledge, rather than the legal consequences of them. However, as I have already found, the defendant had erected a system or process to define and constrain the role of CLP. It was entitled to assume that the system was working. In any event, I have already held that I accept Ms Hallett's evidence on this point. She had no knowledge that CLP was carrying out acts which, on a proper analysis, fell within Articles 25 and 53. Under s.28(4) the court is to have regard to that issue but it is not determinative in considering whether it is just and equitable in all the circumstances to allow the agreement to be enforced. Undertaking the balancing exercise given my findings is more than a little artificial but it seems to me that the lack of knowledge on the part of the defendant and the evidence given by the claimant as to his awareness that the investment was high risk and/or speculative, his assumption of the risks in the contract and his evidence of his preparedness to go through with the transaction notwithstanding his knowledge, because he wanted to release some cash from his PPP, would lead me to the conclusion that it was just and equitable to enforce the agreement. There is no reason in the circumstances why he should not take responsibility for his own decision.

The COBS Claim

131. The claimant's secondary case is the COBS claim. He alleges that he was owed a duty by the defendant to comply with one of the COBS rules, breach of which is actionable pursuant to section 138(D) of FSMA. He relies on COBS Rule 2.1.1 to act "honestly, fairly and professionally in accordance with the best interests of [the claimant]". Section 138D of FSMA provides, insofar as material:

> "(2) A contravention by an unauthorised person of a rule made by the FCA is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty."
>
> If rules made by the FCA so provide, subsection (2) does not apply to a contravention of a specified provision of the rules."

132. By s.137A of FSMA the FCA may make rules which apply to authorised persons such as the defendant. The COBS Rules, formally the Conduct of Business Sourcebook Rules, were made by the FCA pursuant to s.137A. The defendant falls within the definition of firms to which some of the rules in COBS applies, although it is not subject to all the Rules. COBS 1.1.1R provides:

> "This sourcebook applies to a firm with respect to the following activities carried on from an establishment maintained by it, or its appointed representative, in the United Kingdom:
>
> …
>
> designated investment business;
>
> and activities connected with them."

"Designated investment business" includes "establishing, operating or winding up a personal pension scheme" (RAO 52(b)), which includes SIPPs. The defendant and its SIPP are therefore within the scope of COBS. There are different types of Rules within COBS. Some of them are of rules of general application to all firms carrying on designated business, but there are certain of the Rules which only apply to execution-only SIPP providers and some which do not apply to execution-only SIPP providers. It is common ground that Rule 2.1.1 applies to the defendant.

133. It also became common ground at trial that Rule 2.2.1(1)(b) does not apply to the defendant. That provision is headed "Information disclosure before providing services" and required a firm to which it applied to provide information to a client about

> "designated investments and proposed investment strategies; including appropriate guidance on and warnings of the risks associated with investments in those designated investments or in respect of particular investment strategies."

That obligation had no application to the defendant which was only required, as an execution-only SIPP provider, to give information to the client about the firm and its services and its costs and charges.

134. It seems to me that the division of obligations imposed by the rules, in the sense that only some apply to specific operators, reflects the position that, as in this case, the provider of the SIPP is operating on an execution-only basis where the client chooses the underlying investment himself without advice from the SIPP provider.

135. Although an alleged breach of Rule 2.2.1 was originally also relied on by the claimant in paragraph 24 of the Amended Particulars of Claim his counsel rightly abandoned his case based on that provision in the course of his opening, agreeing that I need no longer trouble about the allegation.

136. There are other examples of Rules which have no application to the defendant, such as COBS 9, which imposes obligations to provide advice on suitability where the authorised firm makes a personal recommendation relating to investments or manages investments involving the exercise of a discretion, which plainly has no application

where the authorised firm operates an execution-only basis cf City Index Ltd v Balducci [2011] EWHC 2562 (Ch), per Proudman J at [30] and Bank Leumi (UK) Plc v Wachner [2011] EWHC 656 (Comm), per Flaux J at [306]:

> "Third in the regulatory context, it is important to have well in mind that the relationship between BLUK and Ms Wachner was an execution only one (as indeed was the corresponding relationship between BLUSA and Ms Wachner governed by BLUK's Terms of Business which made clear that in the absence of a specific agreement, there was no duty to advise on the merits or suitability of any investments and Ms Wachner would be relying on her own judgment in all trading decisions. I consider those Terms and the nature of the relationship wholly inconsistent with BLUK being under any obligation under COBS 9."

137. Similarly, COBS 10.2, imposes an obligation on certain authorised firms to assess the appropriateness of the service or product for the client, bearing in mind his knowledge and experience and understanding of the related risks. However, it is plain from COBS 10.1 that an execution-only SIPP is not within the specified categories of authorised firms which have to comply with 10.2.

138. Rule 2.1.1, which is relied on by the claimant and is agreed to apply to the defendant in the course of the transaction in this case, is the first rule in a section headed "Acting honestly, fairly and professionally". Rule 2.1.1, known as "The client's best interests rule" provides:

> "(1) A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interest rule)."
>
> (2) This rule applies in relation to designated investment business carried on:
>
> (a) for a retail client…"

As I have already said, for the purposes of this Rule the defendant is a retail client and the setting up of the SIPP is designated investment business.

Rule 2.1.2 prohibits the exclusion of liability in relation to designated business:

> "A firm must not, in any communication relating to designated investment business seek to:
>
> exclude or restrict; or
>
> rely on any exclusion or restriction of;

any duty or liability it may have to a client under the regulatory system.

139. The claimant says that COBS Rule 2.1.1 required the defendant to put in place systems to "ensure that unsuitable investments of this kind are not posted within a SIPP wrapper and they are not introduced by unsuitable introducers" like CLP. The claimant

submitted that the arrangements in place between the defendant and CLP were plainly unsuitable and, in the Amended Particulars of Claim, it is alleged that in breach of COBS rule 2.1.1R the defendant failed to act "fairly, professionally and in the best interests" of the claimant in the following ways:

i) establishing an unsuitable SIPP, which cannot be a reference to the allegedly unsuitable underlying investment;

ii) "administering the SIPP in relation to an unsuitable investment"; in other words agreeing to take the allegedly unsuitable store pod investment into the SIPP;

iii) "failing to implement the guidance and/or have any or any adequate regard to the expectations communicated by the FCA in [what has been referred to as "the thematic review"] and in its Retail Conduct Risk Outlook 2011". Paragraph 23(3) of the Amended Particulars of Claim contained further specific examples of the alleged breaches of these two documents:

a) dealing with/via a non-authorised intermediary which was participating in the regulated activity of "advising" on investments within Article 53 and "arranging" investments within Article 25 of the RAO;

b) failing to comply with the guidance contained in the 2009 Report to confirm that the claimant had received advice in respect of the proposed SIPP and the underlying investment in store pods;

c) failing to monitor the nature of the investments being recommended by CLP;

d) failing to spot the unusual nature of the underlying investment in time to prevent the claimant from entering into it;

e) failing to request from CLP a copy of the "suitability reports provided" to the claimant;

f) failing to identify that execution-only clients of CLP routinely signed disclaimers taking responsibility for their investment decisions;

g) failing to identify why the application form signed by the claimant recorded that he had waived his cancellation rights.

140. In his skeleton argument for trial the claimant submitted that pursuant to the duties imposed by COBS Rules 2.1.1 the defendant was required to take "responsibility for the quality of the SIPP business which it was to administer if the store pods investment proceeded. [The defendant] cannot absolve itself of this responsibility, and was required to have procedures and controls in place which would enable it to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs." In closing it was submitted that the defendant should have refused to accept the underlying investment, as they did later in respect of similar proposed investments introduced by CLP.

141. The defendant submits that:

i) in accordance with the contract with the claimant, the scope of the duties which the claimant was owed was limited and the obligations arising under COBS 2.1.1 have to be read in that light. In accordance with the contract the claimant established and administered the SIPP on an execution basis only and provided no advice to the claimant as to whether to establish the SIPP or as to the underlying investment. The defendant says that the claimant is wrong insofar as he asserts that Rules 2.1.1 of COBS require the defendant to give advice about the underlying investment if the contract between the claimant and defendant specifically provides that the defendant is not to give such advice.

ii) if the defendant had been under a duty to act in the way suggested by the claimant then it would have had to do something for which it did not have authorisation, namely advise on investments, in breach of the general prohibition;

iii) the fact that some of the COBS Rules imposing obligations of the sort contended for by the claimant have no application to the defendant or the type of business which it operated at the time is a key guide in construing Rule 2.1.1. The defendant denies Rule 2.1.1 is intended to give rise to a duty to advise. Rules 9.2 and 10.2 contain express obligations in certain circumstances to provide advice as to suitability (COBS 9.2) and appropriateness (COBS 10.2) and therefore Rule 2.1.1 cannot be properly construed as imposing those or similar obligations in circumstances where those two Rules do not apply. They add that there are other obligations imposed by various COBS Rules (namely Rules 14 and 19.1.2) which expressly do not apply to execution-only SIPP providers which demonstrate how limited the nature of the duties imposed on execution-only SIPP providers are intended to be;

iv) the fact that the defendant is not authorised to advise on investments is a guide to the construction of Rule 2.1.1 in the context;

v) the limited role (and duty) contended for by the defendant is consistent with the aim of protecting consumers by not allowing certain firms to provide advice;

vi) in construing the provision the court should also have regard to the degree of protection intended by the regulatory objective to be found in section 5(2)(d) of FSMA, namely "the general principle that consumers should take responsibility for their decisions."

142. In respect of the specific allegations which the claimant pleaded in paragraph 23 of the Amended Particulars of Claim as breaches of COBS Rule 2.1.1 the defendant submits that there was nothing unsuitable about the SIPP itself and that the claimant's argument is simply unsustainable and the contention that the underlying store pods investment was manifestly unsuitable is also unsustainable. While there is no doubt that it was high risk commercial property investment (as to which he was warned), it was not a scam, and it did not have any information (nor was it obliged to seek any) concerning the claimant and his circumstances, including his risk appetite, to determine whether it

was unsuitable for him. In any event there is nothing inherently unsuitable about a high risk investment. As to the third category of breach relied on by the claimant the defendant says that the 2009 report known as the "thematic review" is irrelevant, it was not guidance, but a report, there is no regulatory obligation to comply with its suggestions and it is not a document which can be an aid to construction of FSMA or COBS. In any event there is no basis upon which it could properly be argued that a cause of action arises under s.138D of FSMA, or otherwise, for failing to follow recommendations in a report.

143. The defendant says that in the circumstances it was honest, fair and professional for the defendant not to advise the claimant as to his decision to transfer his pension funds into the SIPP or as to the underlying investment.

144. The FCA agrees that the function of the firm, as determined by the contract with an investor, will govern what is required to comply with COBS Rule 2.1.1 but they point to the fact that firms cannot exclude or restrict their duties under COBS (cf Rule 2.1.2) and do not accept that the obligations arising under Rule 2.1.1 must be limited by the contract. They say that the Bank Leumi decision is irrelevant, arguing that it is not authority for the proposition that the contract can override the rules.

145. As to the relevance of COBS 9 and 10 in construing Rule 2.1.1 the FCA says that the presence or absence of specific rules does not prevent Rule 2.1.1 from imposing duties which are not otherwise the subject of specific regulation (cf R (British Bankers Association) v Financial Services Authority [2011] EWHC 999 (Admin) at [161, 162]. In any event COBS 9 and 10 concern the duties owed to a particular client unlike the generic and high level duties imposed by Rule 2.1.1.

146. The FCA submits that Rule 2.1.1 imposes an obligation to undertake an assessment in respect of both the proposed introducer and the proposed investment and may refuse to proceed with the investment in an appropriate case, without having to give advice to the investor himself. As of potential relevance to the proper construction of the Rule they refer me to the decision of the Court of Appeal in Ehrentreu v IG Index Limited [2018] EWCA Civ 79 at [16], per Flaux LJ concerning what was s.5, now s.1C of FSMA headed "The consumer protection objective", subparagraph (2)(d) of which was relied on by the defendant in the course of their submissions;

> "Like the judge I regard section 5 of the Financial Services and Markets Act 2000 as of some assistance in considering the purpose of COBS 2.1.1R. That provides:
>
> "(1) The protection of consumers objective is: securing the appropriate degree of protection for consumers.
>
> (2) In considering what degree of protection may be appropriate, the Authority must have regard to—
>
> (a) the differing degrees of risk involved in different kinds of investment or other transaction;

> (b) the differing degrees of experience and expertise that different consumers may have in relation to different kinds of regulated activity;
>
> (c) the needs that consumers may have for advice and accurate information; and
>
> (d) the general principle that consumers should take responsibility for their decisions."

147. The FCA identified a number of duties which in its view were imposed on SIPP operators generally on a proper construction of Rule 2.1.1, some of which they accept are of no application in the present case. They say that there is a duty to ensure that the proposed underlying investment is not part of a fraud or scam. Further, the FCA disagrees with the defendant and submits that Rule 2.1.1 "does include a duty not to accept into a SIPP an investment of a kind that is inappropriate for any SIPP investment, or for any SIPP investment by a retail customer who is not known to have received independent regulated advice about the investment." They say to act otherwise would be not to act in the client's best interests in accordance with the Rule. For those reasons, they say, the fact that COBS 9 and 10 do not apply does not mean that the SIPP operator owes no duties in respect of the "nature of the underlying investments they accept into a SIPP."

Conclusion on the COBS Claim

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.

149. I also view the "The consumer protection objective" as relevant in ascertaining the duty, even though the section of FSMA which contains it is aimed at the FCA itself. The provision requires the FCA, in securing an appropriate degree of protection for consumers to have regard to, among other things, "the general principle that consumers should take responsibility for their decisions". In this case those decisions, as between the claimant and defendant, are set out in the documents which comprise the contract between them.

150. Therefore I agree with the submission that in ascertaining the scope of the obligations imposed on the defendant by COBS, and in construing those obligations, one has to start by considering the contract between the claimant and the defendant. It is, to my mind, obvious that this is the correct starting point because it is common ground that not every COBS obligation, as can be seen above, applies to every authorised firm or every regulated activity. Nor was any provision drawn to my attention at trial to demonstrate that, so far as the COBS duties which I am considering are concerned, the regulatory regime is intended to take precedence over the contractual terms or, insofar as material, that the contractual relationship(s), duties and obligations between the claimant and the defendant are unenforceable.

151. After the trial my attention was drawn to the decision of Mr Hochhauser QC in Parmar v Barclays Bank Plc [2018] EWHC 1027 (Ch) at, in particular, [133] in support of the proposition that the duty under COBS Rule 2.1.1 cannot be modified by, among other things, an agreement, the inference being that the contract does not have the relevance which the defendant ascribes to it and cannot exclude duties which would otherwise arise. However, one has to look at the whole paragraph to see exactly what it was that Mr Hochhauser held at [133] :

> "This matter is governed by COBS 2.1.2, and I accept [the] submission that its provisions go further than section 3 of UCTA, in that they prevent a party creating an artificial basis for the relationship, if the reality is different. Thus if a Bank employee is in fact giving advice, having a disclaimer or statement which in effect states that he is not to be regarded as an advisor, with the effect that COBS 9 does not apply, is void…"

152. However, the facts in the instant case are entirely different. It is not being suggested that in some way the contract did not reflect the reality of the situation or the roles which were to be ascribed to the parties to the contract. Insofar as it may be alleged that the contract was artificial and the facts on the ground were different I reject that argument on the facts. The argument before me turns not on whether the duties can be excluded but what those duties are having regard to the relevant factual context, which includes the terms of the contract.

153. In the case before me there is a very plain inconsistency between the contract which was entered into between it and the claimant and the duties which the claimant now suggests that the defendant owed to him. The essence of the contract, which I have already found the claimant to have entered into knowingly and willingly, was that the role of the defendant was execution-only and that the claimant was to be responsible for his own investment decisions. In my judgment the obligations imposed by COBS Rule 2.1.1 have to be read in that light. The contract here expressly provides, in a number of places, that the defendant is not advising on the SIPP. Moreover, the defendant is not authorised to advise on the SIPP. In my judgment Rule 2.1.1 cannot be construed as imposing an obligation to advise which would not only be unlawful but which the parties had specifically agreed in their contract not to impose on the defendant.

154. At a higher level of abstraction, which it is not necessary for me to determine given my other conclusions, the claimant asserts that Rule 2.1.1 imposes a duty to refuse to accept high-risk investments into an execution-only SIPP. It seems to me that consideration of such a question has to be made in the light of the particular facts. In my judgment a proper analysis of the contract in the present case and the effect which that has on the interpretation of the rules does not lead to the conclusion that the defendant was obliged to refuse to accept the underlying investment in this case. The investment here was acknowledged by the claimant to be high risk and/or speculative. He accepted responsibility for evaluating that risk and for deciding to proceed in knowledge of the risk. A duty to act honestly, fairly and professionally in the best interests of the client, who is to take responsibility for his own decisions, cannot be construed in my judgment as meaning that the terms of the contract should be overlooked, that the client is not to be treated as able to reach and take responsibility for his own decisions and that his instructions are not to be followed.

155. My attention was drawn after the trial to a decision of Jacobs J in Berkeley Burke SIPP Administration Ltd v Financial Ombudsman Services Ltd [2018] EWHC 2878 (Admin) in which the claimant, a SIPP provider and administrator, sought to challenge by way of judicial review a decision of the Ombudsman that it had not acted fairly and reasonably in all the circumstances in its dealings with an investor who had, the judge found, invested in a scheme that was a scam and a fraud. The conclusion of the ombudsman was, the judge held, a subjective matter for him but the meaning of the relevant principles of law according to which the ombudsman directed himself was a matter for the court. I have read that decision carefully but it seems to me that it is not of direct relevance to the case before me. First, it is a judicial review challenge to an ombudsman's decision. Secondly, the facts are very different to the facts before me, the scheme having been found in that case to have been a fraudulent scam. Thirdly, the pleaded case before me is different: I do not have to determine the question of due diligence prior to the defendant agreeing initially to accept investments in store pods into their SIPP. Fourth, had I done so I would have concluded, as the evidence set out and analysed by me in some detail above shows, that the defendant undertook proper due diligence and behaved appropriately in the best interests of their clients in that respect. Fifth, the specific regulatory provisions which the learned judge in Berkeley Burke was asked to consider are not those which have formed the basis of the claimant's case before me.

156. I turn therefore to the specific particulars pleaded in paragraph 23 of the Amended Particulars of Claim of the failure of the defendant to "act fairly, professionally and in the best interests of Mr Adams". That pleading contains a reference to part only of the Rule, which I remind myself is too "act honestly, fairly and professionally in accordance with the best interests of the client". I note that that is no evidence and no submission to the effect that the defendant did not act honestly. Nor, despite the suggestion in closing submissions, is there any pleaded case to the effect that the underlying investment was a fraud or a scam. The question therefore is whether the specific allegations relied on by the claimant demonstrate that, in the circumstances, the defendant failed to act fairly and professionally in accordance with the best interests of the claimant in the respects alleged.

157. The allegation that the SIPP itself was in some way an "unsuitable SIPP", as alleged in paragraph 23(1) of the Amended Particulars of Claim is unsustainable. There was nothing identified at trial to demonstrate that the SIPP itself, as opposed to the store pod investment, was unsuitable. Nor does the claimant complain, as I understand his evidence, that the SIPP itself was unsuitable. Nor was there a duty on the defendant, for the reasons which I have given, to consider the suitability or appropriateness of a SIPP or the underlying investment. The contract between them makes that clear. Any warnings given by the defendant were sufficient to comply with any duty which the defendant may have had. There is no material before me on which I could come to the conclusion that the SIPP itself, as opposed to the underlying investment, was in any way unsuitable.

158. The essence of the second particular breach of the Rule relied on by the claimant appears to be the agreement to take into the wrapper what is said to be a manifestly unsuitable underlying investment, that is unsuitable for the claimant. In paragraph 19 of the Amended Particulars of Claim the claimant sets out the four respects in which he alleges that the store pods investment was manifestly unsuitable, namely, (1) that the

income of the investment is dependent on the trustees letting the store pods in an uncertain market, (2) the value of the investment would be eroded by the rent and service charges payable under the leases, (3) the investment is illiquid, and (4) there was an inherent risk in the market for store pods. The expert in this case was instructed to assist with quantum and therefore provided the valuation evidence, which I refer to above, about the market and income stream capitalisation figures which he calculated in respect of the leases at the relevant date. There is no expert evidence about the extent of the inherent risks involved in the underlying investment. Nor has there been a sufficient analysis of the alleged risks to sustain an argument that this investment was manifestly unsuitable. It is not in dispute that the investment was high risk and speculative, as the claimant repeatedly accepted in evidence, but that is entirely different to saying that it was manifestly unsuitable for him. The four factors identified in paragraph 19 of the Amended Particulars of Claim, insofar as they are distinct from each other rather than overlapping, are factors which it would not be a surprise to see when the underlying investment is in real property, of whatever nature, which it is intended to let. Both the capital value and the income stream will be driven by the market. Often the greater the risk in the market the greater the chance that both the value and the income will increase, or reduce, as the case may be, by a significant margin. That does not of itself render the investment manifestly unsuitable of itself.

159. Moreover, to ascertain the suitability or otherwise of the investment for the claimant himself the defendant would have had to make detailed enquiries about the claimant's financial circumstances and, in my view, take advice on the value of the investment, evaluate the risks inherent in and lastly make a judgment call on the question of whether those risks were appropriate for the claimant in the light of the information which they had obtained about his financial situation and appetite for risk. That was not the role which the parties had agreed in the contract that the defendant would have. COBS Rule 2.1.1 cannot, in my view, be interpreted as requiring the defendant to take those steps.

160. In any event, as the defendant rightly submitted, the claimant was warned that the underlying investment was high risk and or speculative and proceeded with it in any event. His evidence demonstrated that he would have proceeded with the underlying investment because he was keen to extract some cash from his existing pension fund. It therefore also follows that there is no causal link between this alleged breach of duty and the losses which the claimant is alleged to have sustained.

161. The third way in which the claimant puts his case under Rule 2.1.1 is in reliance on the views expressed by the FCA in the thematic review. In December 2008 the FCA undertook a review of SIPP operators to ascertain whether the guidance and rules promulgated by the FCA were being complied with. The results of the review were contained in a report known as "Self-invested Personal Pensions (SIPP) operators – a report on the findings of a thematic review" published in 2009. The claimant relies on the following passage from the review, at paragraph 2.3:

> "…We encountered a relatively widespread view among small SIPP operators that they bear little or no responsibility for the quality of the SIPP business that they administer, as this is the responsibility of client's advisers. As a result, some SIPP operators have not been taking basic measures such as checking, on an ongoing basis, that advisers who introduce clients to them are FSA authorised and have the appropriate permissions…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 as unsuitable SIPPs…The following are examples of measures that SIPP operators should consider, taken from examples of good practice that we observed and suggestions we have made to firms: …Routinely recording and reviewing the type (ie 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…"

162. The FCA has the power under s.139A FSMA to give "guidance consisting of such information and advice as it considers appropriate" concerning the operation of parts of FSMA or rules made by the FCA among other things. There is no express provision in FSMA which provides a right to an investor to make a claim based on an alleged breach of the guidance issued by the FCA from time to time. This is in direct contrast to the specific right contained in section 138D(2) to seek damages for breach of rules made by the FCA, such as the COBS Rules. The Thematic Review cannot properly be described as a set of rules or even guidance and in my judgment cannot give rise to a claim for failing to follow the suggestions which it makes. Nor in my judgment is it a proper aid to statutory construction of the COBS Rules which must be construed in accordance with the usual principles of construction.

163. The claimant also relies on reviews, guidance and alerts which were published by the FCA in 2013, 2014, 2016 and 2017, after the events relevant to his claim in this case, and it seems to me that they can therefore have no direct bearing on the matters which I have to decide.

164. The claimant accepted that he had been warned, more than once, that the underlying investment was high risks and speculative before committing himself to the SIPP. He understood, as I have found, the limited role which the defendant was to perform and he agreed to contract with them on that basis. Thus in my view the defendant complied with the best interests rule. It was not part of their duty, in my view, to refuse to accept this particular underlying investment at the stage when the claimant asked to include it within a SIPP. He also accepted that he nevertheless went ahead with the investment because he wanted to extract cash from his pension fund. There is no basis on which, even if there had been a breach of duty by the defendant, that I could have come to the conclusion that it was causative of loss, the claimant did not suffer loss as a result of the alleged contravention of the rule but because of his motivation in entering into the transaction.

The Tort Claim

165. The claimant asserts an alternative freestanding case in tort. By his Amended Particulars of Claim the claimant seeks damages arising from what are described as negligent investment recommendations made by CLP as part of a "common design" shared with the defendant as a result of which it became liable for the negligence of CLP, also referred to as "Joint tortfeasor liability". The claimant says that CLP was negligent in advising him to move from the relative safety of a fund held by FriendsLife to an unsuitable investment in store pods. The claimant alleges that the defendant is liable for the shortcomings of CLP because of the joint venture or common design which they shared and that I should infer such an agreement from the evidence.

166. The defendant submits that the claimant fails, as a matter of fact, in establishing any one of the three criteria for joint liability as a tortfeasor identified by Lord Sumption in Sea Shepherd UK v Fish & Fish Ltd [2015] AC 1229 at [37]. Although Lord Sumption dissented as to the result in that case there is no doubt that his statement of the following legal principles reflects the true state of the law:

> "The legal elements of liability as a joint tortfeasor must necessarily be formulated in general terms because it is based on concepts whose exact ambit is sensitive to the facts. The classic statements are those of Scrutton LJ in *The Koursk* [1924] P 140, 156 and Mustill LJ in *Unilever Plc v Gillette (UK) Ltd* [1989] RPC 583, 608-609. In *The Koursk*, Scrutton LJ, adopting the definition in *Clerk and Lindsell on Torts*, said that
>
> "'Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design' … 'but mere similarity of design on the part of independent actors, causing independent damage, is not enough; there must be concerted action to a common end'."
>
> Expanding on this formulation in *Gillette*, Lord Mustill observed that the test was
>
> "… whether … (a) there was a common design between [the primary and secondary parties] to do acts which … amounted to infringements, and (b) [the secondary party] has acted in furtherance of that design. I use the words 'common design' because they are readily to hand but there are other expressions in the cases, such as 'concerted action' or 'agreed on common action' which will serve just as well. The words are not to be construed as if they form part of a statute. They all convey the same idea. This idea does not, as it seems to me, call for any finding that the secondary party has explicitly mapped out a plan with the primary offender. Their tacit agreement will be sufficient. Nor, as it seems to me, is there any need for a common design to infringe. It is enough if the parties combine to secure the doing of acts which in the event prove to be infringements."

> The effect of these statements is that the defendant will be liable as a joint tortfeasor if (i) he has assisted the commission of the tort by another person, (ii) pursuant to a common design with that person, (iii) to do an act which is, or turns out to be, tortious."

167. The claimant submits that the relevant threshold for establishing joint liability is low and relies in support of that contention on passages in the judgments of two of the Justices who were in the majority in the Sea Shepherd case, Lord Toulson at [27] and Lord Neuberger at [66].

168. In respect of the type of acts which might found joint liability the claimant also relies on the decision of Evans-Lombe J in Investors Compensation Scheme v West Bromwich Building Society [1999] Ll.R 496 in which a number of mortgagors (whose claims were assigned to the claimant) asserted that the defendant was liable for the acts of an IFA who had promoted equity release schemes to the mortgagors. The judge found that the IFA had been negligent and made misrepresentations and that the defendant was jointly liable to the claimant in tort. My attention was drawn to the passage at page 541 where the learned Judge held as follows:

> "In the absence of contrary evidence it seems to me, that I am entitled to proceed on the basis that the [defendant] was aware of the advertising and promotional material being circulated by [the IFA] and that respondents to that material were being visited by [the IFA's] salesmen. Mr Fisher accepted that such visits were envisaged when the enterprise was being planned. [The defendant] must have been aware that a significant part of [the IFA's] income was derived from commission on sums derived from [the defendant's] advances invested through the agency of [the IFA]. [The defendant] must also have been aware, therefore, that there was an incentive on [the IFA] to persuade borrowers to borrow more than their needs might strictly require even if they may not have known the precise terms upon which [the IFA's] salesmen were remunerated or the extent of the commission they were getting from bond providers…
>
> In my judgment there is ample evidence to raise a prima facie case that [the defendant] was in enquiry that [the IFA] were "miss-selling" their Home Income Plans to the public…so as to fix [the defendant] in the absence of any evidence pointing the other way, with constructive notice of the misrepresentations and undue influence of which I have found that the [IFA] was guilty."

Conclusion on the Tort Claim

169. I ask myself whether the defendant assisted in the commission of the tort by CLP, namely negligent misstatement of the Hedley Byrne & Heller type. There is no allegation of professional negligence because there is no suggestion that CLP were instructed to advise.

170. The Sea Shepherd is the test which I have to apply. The passage in the decision of Evans-Lombe J relates to constructive notice and is no assistance in the instant case in analysing whether the defendant is to be held responsible for any tort committed by CLP. Mere facilitation of the tort will not suffice to impose joint liability, the three elements of the Sea Shepherd test have to be satisfied. I can deal with the three tests very shortly, given my findings of fact above:

    i) my findings of fact are entirely inconsistent with a conclusion that the defendant assisted in the commission of a tort by CLP. Their roles were separate. The defendant was not aware of any advice being given about the underlying investment. They did nothing to facilitate the given of any such advice;

    ii) there was no common design;

    iii) I am not satisfied that there was a (tortious) negligent misstatement because of the limited nature of the claimant's evidence on the point. There was undoubtedly a recommendation but that is not the same.

171. In any event, the loss was caused by the claimant's decision, knowing that the underlying investment was high risk and or speculative nevertheless to proceed with it because he wanted the "cash-back" which he had been offered by CLP.

Compensation/damages

172. The claimant set out the damages which he hoped to recover in his Amended Schedule of Loss:

    i) capital losses, said to be the difference between the value of the claimant's PPP at the date of transfer and the valuation at the date of trial, which takes account of both the alleged drop in value of the underlying investment in the store pods and the costs and expenses incurred in respect of the transfer and of the SIPP. At the date of the Amended Schedule of Loss this was pleaded at the difference between £55,766.50 (being the sum transferred from the PPP) and £26,250.03 (being the sum contained in the defendant's annual valuation of the SIPP fund at 26 February 2016) subject to a further reduction to take account of the evidence of the claimant's expert, leading to a loss of approximately £40,000; and

    ii) loss of investment opportunity, said to be calculated on the basis that the claimant would have left his PPP with AXA which would have had a value of £66,353.91 at the date of the Amended Schedule of Loss (giving rise to an additional loss of £10,587.41), or alternatively calculated as the sum by which a one-year fixed rate bond would have increased in the relevant period (giving rise to an alternative additional loss of £4,933.81).

173. It was agreed that credit should be given for the sum of £91.77 in respect of income received by the claimant into his SIPP and for the sum of £4,000 which he received via his wife's bank account as a cash-back inducement for entering into the investment in store pods.

174. The defendant submits that the correct measure of the claimant's total loss, including loss of investment opportunity, would be the difference between:

    i) what the claimant's pension fund would currently be worth but for the transfer into the SIPP and

    ii) what the pension fund is in fact worth at the same point in time.

175. Had the claimant been entitled to damages for his losses then in my view they would have been assessed according to usual common law principles. In Rubenstein v HSBC Bank Plc [2011] EWHC 2304 His Hon Judge Havelock-Allan QC, sitting as a judge of the High Court, considered the measure of damages which could be awarded for breaches of COBS. His decision was approved by the Court of Appeal ([2012] EWCA Civ 1184), although the point was obiter. The learned Judge appeared to accept the agreed position of counsel that the approach to causation and quantification of damages should be the same as at common law for breach of contract or tort at paragraph [117].

176. In my judgment the claimant would have been entitled, on the common law basis, in principle to the difference between the value, at the appropriate point, of the cash fund which he transferred and value of the leases as ascertained by reference to the expert evidence of Mr Trenor, and interest. In my view the assessment would be undertaken as if this had been a claim for damages for negligent professional advice (from a valuer, solicitor or other advisor prior to entry into a property transaction) which a client relied on in making an investment decision in real property. There is no basis for calculating the award as if it were in some way to reflect an intended guarantee of the investment.

Conclusion

177. For the above reasons I have come to the conclusion that the claim fails on each of the three heads pursuant to which it was made and I would therefore dismiss it.

178. I had intended to hand down this judgment in the presence of the parties and deal with ancillary matters but the current public health situation has meant that the judgment will be handed down in the absence of the parties and a copy will be sent to them by email. I understand that a form of order dealing with the substantive issues in the case is in the process of being agreed.

179. In respect of ancillary matters, costs and permission to appeal, I have agreed to deal with them on paper following further written submissions in accordance with a timetable which has been discussed with the parties.

180. Finally I would like to add something which I would have said in open court had this judgment been handed down in the presence of the parties. I wish to apologise unreservedly to all the parties and the representatives for my delay in finalising this judgment. I recognise the anxiety and uncertainty which it will have caused to all those involved and I am sincerely sorry for that. It is something which I deeply regret.