DRN-3151523

The complaint

Ms M complains that Carey Pensions UK LLP ('Carey') (now called Options UK Personal Pensions LLP, but I'll refer to Carey throughout for ease) shouldn't have accepted her application for a self-invested personal pension ('SIPP') and that it failed to undertake due diligence on the intended investment, causing her a financial loss. She says it should compensate her for her loss.

For simplicity, I refer to Ms M throughout, even where the submissions I'm referring to were made by her representative.

What happened

I've outlined the key parties involved in Ms M's complaint below.

Involved parties

Carey

Carey is a regulated pension provider and administrator. It's authorised to arrange deals in investments, deal in investments as principal, establish, operate or wind up a personal pension scheme and to make arrangements with a view to transactions in investments.

Firm B

As I understand it, Ms M was put in touch with someone that I'll refer to as Mr A of Firm B, which was an unregulated introducer.

Freedom Bay

This was an unregulated investment that promised high returns as well as the opportunity to stay in the resort on a luxury island. Investors owned a fractional share in a hotel suite directly from the developer, Malgretoute Hotel Development Company Ltd trading as Freedom Bay.

Freedom Bay was seemingly marketed as offering investors guaranteed 6% interest during the construction period and a guaranteed income of 8% for three years once completed. Following the guaranteed period, investors would receive 50% of the income from the suite.

The resort was still unfinished in 2019 even though the original completion date was in 2012. Investors were promised a two-year 'get-out' clause that meant they'd get a refund of the purchase price held in escrow if the resort wasn't completed within 24 months, which didn't turn out to be the case.

In or around 2017, Malgretoute Hotel Development Company Ltd went into receivership and the insolvency practitioner said there were challenges relating to the land assets, as it had only paid a deposit for the land and didn't have the ability to complete the purchase, leading to various legal proceedings.

The transaction

On 16 April 2012, Carey received Ms M's signed SIPP application form to transfer her existing pension scheme into one with Carey. The particular application form she filled out set out in a heading at the top that this was '*FOR DIRECT CLIENTS*'. And it went on to explain underneath that:

'*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…Carey are not responsible for the suitability or appropriateness of your decision to establish a SIPP*'.

Under the '*Investments*' heading of the application form, it said that as Ms M didn't have a financial adviser her investment choices were her responsibility and that it would act on these, as long as it was an accepted investment in the scheme. And that, if at any point Ms M's position changed and she appointed a financial adviser then she must let it know. And the form was blank in respect of the intended investments.

The application form set out that Ms M was self-employed, earning around £12,000 per annum. And under '*Cancellation Rights*' on the form, Ms M ticked to say that she wished to waive her 30-day SIPP cancellation right.

On 1 May 2012, Carey sent Ms M a letter confirming her SIPP had been established that same day. And, by mid-May 2012, just over £29,000 was transferred into Ms M's SIPP with Carey.

I'm aware from other complaints that investors in Freedom Bay were asked to complete a Freedom Bay reservation agreement. And it seems that Ms M would have sent Carey a completed agreement, agreeing to purchase a fractional ownership in it via her SIPP, although it seems Carey has only provided us with a blank version in respect of Ms M's complaint.

On 18 June 2012, Carey asked Ms M to confirm who she'd be making an investment with to allow it to send her the correct forms. Later that day, Ms M clarified she intended to invest £7,000 in Carbon Credits and £20,000 in Freedom Bay. But, on 19 June 2012, Carey said that it hadn't yet dealt with the type of Carbon Credits investment that Ms M had specified, although it was able to '*do*' the Freedom Bay investment. And it appears that at some point Ms M went on to clarify that she only intended to invest in Freedom Bay after all.

Ms M seemingly returned two signed Alternative Investment Instruction and Declaration forms to Carey in respect of Freedom Bay, the first dated 25 June 2012 and the second dated 30 June 2012. Most of the information at the top of both forms had been pre-typed, such as the investment name. But, on the form dated 30 June 2012, in the space next to the '*Adviser*' section Ms M had handwritten Mr A and Firm B's names. And the declaration form went on to set out, amongst other things, that:

- Ms M was fully aware Freedom Bay was an unregulated alternative investment that's considered high risk and speculative and may prove difficult to value and sell.
- She understood the Financial Services Compensation Scheme wouldn't apply.
- Carey was acting on an execution only basis and hadn't provided any advice.
- Ms M had read and understood the information provided by Freedom Bay including, but not limited to, the prospectus, brochure and application forms.
- She'd taken her own advice, including financial, investment and tax advice.
- Ms M undertook to forego the right to personal usage and that any breach of this

undertaking would result in HMRC levying tax charge penalties on her and her SIPP.
- Should the investment be subject to a tax charge within the scheme these will be paid directly from her fund or by her.
- In the event any local tax charges became due these will be paid by her SIPP
- Neither her, nor any person connected with her, has or will receive any inducement for transacting the investment, whether monetary or otherwise.
- Ms M indemnified Carey against any and all liability arising from the investment.

On 12 July 2012, £20,000 of Ms M's pension monies within the SIPP was invested in Freedom Bay.

While I haven't been sent the particular Freedom Bay purchase agreement Ms M signed, I'm aware these set out that Carey agreed to buy a Fractional Ownership Certificate entitling the SIPP member – Ms M in this case – to become a fractional owner with the benefit of certain fractional interests in the noted property, with a target completion date of around December 2013 usually being given. The schedules I've seen also set out, amongst other things, that the trustee would hold the purchase price in escrow until the property was fully constructed and equipped and/or title to it was under the control of the trustee. And that once the seller had received the purchase price the purchaser would be registered as fractional owner and would be issued with a final fractional ownership certificate evidencing their entitlement to fractional ownership interests. It said that the fractional ownership interest included the right to share in the sale proceeds of the property when/if it is sold as contemplated.

Carey doesn't appear to have gone on to receive a practical completion certificate for the fractional interest Ms M had purchased or a fractional ownership certificate. And, while Ms M was seemingly paid a return on her Freedom Bay investment until 2016, she received nothing further after that. And, in 2017, Ms M was made aware that Freedom Bay was in receivership.

<u>Ms M's complaint</u>

As mentioned above, in March 2017, the developer of Freedom Bay went into receivership and Carey appears to have given this a '*nil*' value from June 2017.

Ms M first complained, via her representatives, to Carey in November 2018 that it had failed in its due diligence obligations and had it not done so Ms M wouldn't have switched to the SIPP and invested in Freedom Bay.

Carey replied in January 2019 and, unhappy with its response, Ms M referred her complaint to our Service.

Carey has said in its responses in respect of Ms M's complaint, amongst other things, that:

- It's an execution-only SIPP provider and it acted in line with Ms M's instructions in accordance with COBS 11.12.9R in accepting her SIPP and investment applications.
- Ms M didn't tell Carey that a third-party adviser was involved. And it thinks she understood she hadn't appointed one and was not being advised given the type of SIPP application she completed for direct non-advised clients. Carey hasn't communicated with any third parties in relation to the switch, Ms M didn't indicate that any were involved and no fees were paid to any third parties.
- It provided risk warnings about the investment being high risk and/or speculative, recommended Ms M seek advice and took steps to ensure she understood her instructions were on an execution only basis. Ms M signed member declarations confirming she understood this and all documentation. It was reasonable for it to have accepted Ms M's signature.

- Carey can't comment on any interactions Ms M had with any adviser, if one existed, as it wasn't a party to these and it wasn't informed of an adviser at the time. Ms M has failed to evidence she was advised and/or that an adviser made arrangements for her, so s.27 FSMA 2000 doesn't apply. And, in any case, it's likely a court would enforce Carey's agreement with Ms M under s.28 of FSMA 2000.
- The FCA's Thematic Reviews were guidance as to best practice only, these weren't prescriptive, exhaustive or rule making. And some of the guidance was issued after the events complained of in Ms M's case.
- Carey didn't provide advice and wasn't permitted to do so. It didn't consider the suitability of the switch and underlying investment for Ms M and she had the opportunity to seek regulated advice if she'd wanted to.
- Carey doesn't accept that Freedom Bay was an unregulated collective investment scheme ('UCIS').

During the course of Ms M's complaint she's said, amongst other things, that:

- At the time she was trying to open a business which was delayed until mid-July 2012 and her savings were dwindling with no income coming in. So she contacted her mortgage adviser, as she was desperate for help in raising some capital and had heard she could do this by switching her pension. She was eventually put in touch with Mr A of Firm B.
- She was shown various brochures and marketing material for the Freedom Bay investment and projected returns, but wasn't allowed to keep these, other than a handwritten page with notes on. The figures provided were significantly higher than her existing scheme and the notes reflect that she was told she'd receive a significant guaranteed return on the investment.
- Mr A told her to complete the paperwork, as this would look better and give her more scope in being given the best investment. She was led to believe Mr A was a financial adviser and did what she was advised by him to do throughout the process. She didn't think to question this, as Firm B was portrayed to her as a high-end adviser and she didn't fully realise what she was signing up for.
- Mr A advised her as to the investments and in the end suggested putting a higher amount into Freedom Bay rather than Carbon Credits, the latter of which he said was taking too long to complete. Mr A made it sound like the majority of his clients were being told to invest in Freedom Bay and she had no reason to doubt what he told her.
- She trusted Mr A, as he assured her the investment was safe and she wasn't made aware of the high-risk level it carried. Had she been made aware and that it could result in her pension being completely devalued she would have reconsidered switching. At the time she was approaching 50 years old and was unemployed with no income. She was a retail client with no previous investment experience and a low risk tolerance. Her only other retirement provision – aside from state pension – was an occupational pension scheme worth around £7,500.
- She didn't receive any incentive payments or other lump sums back in respect of the switch and investment. And she didn't have any change in her circumstances following these events either.

One of our Investigators reviewed Ms M's complaint and said that it should be upheld. And while Ms M accepted our Investigator's findings, Carey responded with further comments. It said, amongst other things, that:

- Our Service hasn't set out where we have departed from the law, and why we have taken that approach. And we're holding it to a duty more extensive or onerous than that recognised by the courts.
- We haven't provided anything to evidence that Firm B was undertaking regulated activities. Ms M should prove how and to what extent it was involved in her decision

to invest in Freedom Bay. And Carey hasn't had the opportunity to address this point at an oral hearing with Ms M.

- Only the SIPP guidance published prior to receiving Ms M's SIPP application and subsequent investment instructions is relevant. Otherwise our Service would be considering Ms M's complaint with the benefit of hindsight, which no reasonable court would do. The later guidance introduced new expectations and reflects more than what the industry was already doing.
- Reference to the Reviews contravene the decision in Adams on the basis these:
  - have no bearing on the construction of the Principles as the contents of the documents cannot found a claim for compensation of itself;
  - cannot alter the meaning of, or the scope of the obligations imposed by, the Principles;
  - do not provide "*guidance*" and even if they were considered statutory guidance made under FSMA s.139A, any breach would not give rise to a claim for damages under FSMA s.138D.
- The FCA's Enforcement Guide says that "*Guidance is not binding on those to whom the FCA's rules apply. Nor are the variety of materials (such as case studies showing good or bad practice, FCA speeches and generic letters written by the FCA to Chief Executives in particular sectors) published to support the rules and guidance in the Handbook. Rather, such materials are intended to illustrate ways (but not the only ways) in which a person can comply with the relevant rules.*"
- Carey had a very limited legal obligation to undertake due diligence in respect of the investments. The judge in *Adams* refused to recognise a due diligence duty, instead concluding that obligations are framed by reference to the context of the contractual relationship.
- Our Service is imposing an obligation on it to undertake a qualitative assessment of the investments and to pass this on, effectively amounting to a recommendation to Ms M not to proceed, which overreaches its legal obligations and goes further than published regulatory material.
- Its risk warnings were self-explanatory, it couldn't have provided any clearer indication that the investments were high risk. And it's unclear why Ms M went ahead anyway in spite of the warnings if she now believes the investments were unsuitable.
- It's clear Ms M was desperate to proceed to release funds to such an extent that she changed her mind about investing in Carbon Credits too as this was 'taking too long' and would likely have gone ahead and found a way to invest even if it hadn't accepted her applications and regardless of any involvement from Firm B, as Ms M was determined and another SIPP operator could properly have dealt with the investment.
- Ms M should bear a measure of responsibility for her actions, which should be reflected in any compensation due. It would be unfair for it to be held responsible for the full losses given Ms M chose to invest in products she'd been told were high risk. And because Ms M has benefitted from investing in Freedom Bay since she was looking to raise funds and was able to do so by drawing a portion of her pension for use towards her personal objectives without having to resort to other types of lending.
- It would be unfair if Carey couldn't rely on the indemnities and declarations Ms M agreed to.
- A fair and reasonable comparator for redress would be the lower discount rates, as per DRN 2670669.
- Our Service recommended £500 compensation for distress and inconvenience but provided no evidence to support that Ms M has suffered any degree of upset.
- The implications of this outcome are serious for the execution only SIPP market.

Because no agreement could be reached the case has been passed to me for a decision.

I issued a provisional decision on Ms M's complaint and concluded that it should be upheld.

Carey didn't respond to my provisional decision. And, in respect of calculation of redress, Ms M said she's unlikely to be a taxpayer in retirement, as her only retirement provision will be her state pension.

I let Ms M know I wasn't minded to change my opinion, as it's reasonable to think she may pay some tax in retirement. I invited Ms M to provide any further comments or evidence, but she didn't respond by the deadline provided.

What I've decided – and why

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

Having done so, I remain of the view that Ms M's complaint should be upheld for the reasons previously set out in my provisional decision, which I've largely repeated below.

When deciding what's fair and reasonable in all the circumstances of this complaint, I need to take account of relevant law and regulations, regulator's rules, guidance and standards, codes of practice and, where appropriate, what I think was good industry practice at the relevant time.

While I've considered the entirety of the detailed submissions the parties have provided, my decision focuses on what I consider to be the central issues. The purpose of my decision isn't to comment on every point or question made, rather it's to set out my decision and reasons for reaching it.

Preliminary point – Carey's request for an oral hearing

For the avoidance of doubt, I've considered this point on the basis of the applicable rules and law and not on the basis of what is fair and reasonable in all the circumstances.

Carey has said an oral hearing is necessary to explore the extent of Firm B's role, Ms M's understanding, motivations for entering the transactions and the roles played by the parties.

Our Service provides a scheme under which certain disputes may be resolved quickly and with minimum formality (s.225 of FSMA). DISP 3.5.5R provides the following:

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

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

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

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

If I decide particular information is required to decide a complaint fairly, in most circumstances we are able to request this information from either party to the complaint, or even from a third party. In this case, Carey has had the opportunity to consider, and comment on, our Investigator's view. And we sought some further information from Ms M, which Carey had the opportunity to consider and comment on in response to my provisional decision.

I have carefully considered the submissions Carey has made. However, I'm satisfied that I am able to fairly determine this complaint without convening a hearing. In this case, I'm satisfied I have sufficient information to make a fair and reasonable decision. So, I don't consider a hearing is required. The key question is whether Carey should have accepted Ms M's applications at all. Ms M's understanding of matters are secondary to this. And I am, in any event, able to test this to the extent I think necessary by asking questions of Ms M by phone or in writing where I think necessary.

As I am satisfied it is not necessary for me to hold an oral hearing, I will now turn to considering the merits of Ms M's complaint.

Relevant considerations

I think the FCA's Principles for Businesses – which are set out in the FCA's Handbook – are of particular relevance. These "*are a general statement of the fundamental obligations of firms under the regulatory system*" (PRIN 1.1.2G – at the relevant date). And Principles 2, 3 and 6 provide:

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

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

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

And at paragraph 77 of BBA Ouseley J said:

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

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

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

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

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

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

On 18 May 2020, the High Court handed down its judgment in the case of *Adams v Options SIPP* [2020] EWHC 1229 (Ch). Mr Adams subsequently appealed the decision of the High Court and, on 1 April 2021, the Court of Appeal handed down its judgment in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474. I've taken account of both judgments when making this decision on Ms M's case.

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

I acknowledge that COBS 2.1.1R (*A firm must act honestly, fairly and professionally in accordance with the best interests of its client*) overlaps with certain of the Principles, and that this rule was considered by HHJ Dight in the High Court case. Mr Adams pleaded that Options owed him a duty to comply with COBS 2.1.1R, a breach of which, he argued, was actionable pursuant to section 138(D) of FSMA ('the COBS claim'). HHJ Dight rejected this claim and found that Options had complied with the best interests rule on the facts of Mr Adams' case.

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

I note that in *Adams v Options SIPP*, HHJ Dight found that the factual context of a case would inform the extent of the duty imposed by COBS 2.1.1R. HHJ Dight said at paragraph 148:

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

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

In Ms M's complaint, amongst other things, I'm considering whether Carey ought to have identified that the business introduced by Mr A and the Freedom Bay investments involved a significant risk of consumer detriment. And, if so, whether it ought to have declined to accept Ms M's applications.

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

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

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

I also want to emphasise that I don't say that Carey was under any obligation to advise Ms M on the SIPP and/or the underlying investments. Refusing to accept an application isn't the same thing as advising Ms M on the merits of the SIPP and/or the underlying investments. But I am satisfied Carey's obligations included deciding whether to accept particular investments into its SIPP and/or whether to accept introductions from particular businesses. And this is seemingly consistent with Carey's own understanding of its obligations at the relevant time. I'm aware that Carey introduced a process which was in place in respect of introducers around 2011, this included an introducer profile which said that "*As an FSA regulated pensions company we are required to carry out due diligence as best practice on unregulated introducer firms looking to introduce clients to us to gain some insight into the business they carry out*."

S.27/28 FSMA

The Court of Appeal overturned the High Court judgment in the Adams v Options SIPP case on the basis of the claim pursuant to s.27 FSMA. S.27 FSMA provides that an agreement between an authorised person and another party, which is otherwise properly made in the course of the authorised person's regulated activity, is unenforceable as against that other party if it is made *"in consequence of something said or done by another person ("the third party") in the course of a regulated activity carried on by the third party in contravention of the general prohibition*".

s.27(2) provides that the other party is entitled to recover:

> *"(a) any money or other property paid or transferred by him under the agreement; and*
>
> *(b) compensation for any loss sustained by him as a result of having parted with it*."

s.28(3) FSMA provides that:

> "*If the court is satisfied that it is just and equitable in the circumstances of the case, it may allow–*
>
> *(a) the agreement to be enforced; or*
>
> *(b) money and property paid or transferred under the agreement to be retained*."

The General Prohibition is set out in s.19 FSMA. It stipulates that:

> "*No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is –*
>
> *a) an authorised person; or*
>
> *b) an exempt person*."

In *Adams*, the Court of Appeal concluded that the unauthorised introducer of the SIPP had carried out activities in contravention of the General Prohibition, and so s.27 FSMA applied. It further concluded that it would not be just and equitable to nonetheless allow the agreement to be enforced (or the money retained) under the discretion afforded to it by s.28(3) FSMA.

At paragraph 115 of the judgment the Court set out five reasons for reaching this conclusion. The first two of these were:

> *i) A key aim of FSMA is consumer protection. It proceeds on the basis that, while consumers can to an extent be expected to bear responsibility for their own decisions, there is a need for regulation, among other things to safeguard consumers from their own folly. That much reduces the force of Mr Green's contentions that Mr Adams caused his own losses and misled Carey;*
>
> *ii) While SIPP providers were not barred from accepting introductions from unregulated sources, section 27 of FSMA was designed to throw risks associated with doing so onto the providers. Authorised persons are at risk of being unable to enforce agreements and being required to return money and other property and to pay compensation regardless of whether they had had knowledge of third parties' contraventions of the general prohibition;*

The other three reasons, in summary, were:

- The volume and nature of business being introduced by the introducer was such as to put Options on notice of the danger that the introducer was recommending clients to invest in the investments and set up Options SIPPs to that end. There was thus reason for Options to be concerned about the possibility of the introducer advising on investments within the meaning of article 53 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("the RAO").
- Options was aware that: contrary to what the introducer had previously said, it was taking high commission from the investment provider, there were indications that the introducer was offering consumers "cashback" and one of those running the introducer was subject to a FCA warning notice.
- The investment did not proceed until after the time by which Options had reasons for concern and so it was open to Options to decline the investment, or at least explore the position with Mr Adams.

The regulatory publications

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

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

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

The 2009 Thematic Review Report

The 2009 report included the following statement:

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

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

…

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

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

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

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

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

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

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

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

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

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

The later publications

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

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

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

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

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

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

- *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*

- *Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.*

- *Being able to identify irregular investments, often indicated by unusually small or large transactions; or higher risk investments such as unquoted shares which may be illiquid. This would enable the firm to seek appropriate clarification, for example from the prospective member or their adviser, if it has any concerns.*

- *Identifying instances when prospective members waive their cancellation rights and the reasons for this.*

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

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

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

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

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

*"**Due diligence***

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

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

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

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

    - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*
    - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*

- *ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified*

- *good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and*

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

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

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

- correctly establishing and understanding the nature of an investment

- ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation

- ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable)

- ensuring that an investment can be independently valued, both at point of purchase and subsequently, and

- ensuring that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc.)

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

I acknowledge that the 2009 and 2012 reports and the "*Dear CEO*" letter aren't formal guidance (whereas the 2013 finalised guidance is). However, the fact that the reports and "*Dear CEO*" letter didn't constitute formal guidance doesn't mean the importance of these should be underestimated. These provide a reminder that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it's treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications which set out the regulators' expectations of what SIPP operators should be doing also go some way to indicate what I consider amounts to good industry practice, and I'm therefore satisfied it's appropriate to take these into account.

It's relevant that when deciding what amounted to good industry practice in the BBSAL case, the Ombudsman found that "*the regulator's reports, guidance and letter go a long way to clarify what should be regarded as good practice and what should not*." And the judge in BBSAL endorsed the lawfulness of the approach taken by the Ombudsman.

At its introduction the 2009 Thematic Review Report says:

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

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

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

In Carey's submissions on other cases with our Service involving SIPP due diligence, including when making its points about regulatory publications, it has referenced the *R. (on the application of Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service* [2017]

EWHC 352 (Admin) case. While the judge in that case made some observations about the application of our statutory remit, that remit remains unchanged. And, as noted above, in considering what's fair and reasonable in all the circumstances of a case, I'm required to take into account (where appropriate) what I consider to have been good industry practice at the relevant time.

I think the Report is also directed at firms like Carey acting purely as SIPP operators, rather than just those providing advisory services. The Report says that "*We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses*…" And it's noted prior to the good practice examples quoted above that "*We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs*."

The remainder of the publications also provide a *reminder* that the Principles apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and to produce the outcomes envisaged by the Principles. In that respect, these publications also go some way to indicate what I consider amounts to good industry practice at the relevant time. I therefore remain satisfied it's appropriate to take them into account too.

I've carefully considered what Carey has said about publications published after Ms M's SIPP was set up. But, like the Ombudsman in the *BBSAL* case, I don't think the fact that some of the publications post-date the events that took place in relation to Ms M's complaint, mean that the examples of good practice they provide weren't good practice at the time of the relevant events. Although the later publications were published after the events subject to this complaint, the Principles that underpin these existed throughout, as did the obligation to act in accordance with the Principles.

It's also clear from the text of the 2009 and 2012 Thematic Review Reports (and the "*Dear CEO"* letter in 2014) that the regulator expected SIPP operators to have incorporated the recommended good practices into the conduct of their business already. So, whilst the regulators' comments suggest some industry participants' understanding of how the good practice standards shaped what was expected of SIPP operators changed over time, it's clear the standards themselves hadn't changed.

I note Carey's point that the judge in the *Adams* didn't consider the 2012 Thematic Review Report, 2013 SIPP operator guidance and 2014 "*Dear CEO*" letter to be of relevance to their consideration of Mr Adams' claim. But it doesn't follow that those publications are irrelevant to my consideration of what's fair and reasonable in the circumstances of this complaint. I'm required to take into account good industry practice at the relevant time. And, as mentioned, the publications indicate what I consider to amount to good industry practice at the relevant time.

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

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

I'd also add that, even if I agreed with Carey that any publications or guidance that post-dated the events subject of this complaint don't help to clarify the type of good industry practice that existed at the relevant time (which I don't), that doesn't alter my view on what I consider to have been good industry practice at the time. That's because I find that the 2009 Report together with the Principles provide a very clear indication of what Carey could and should have done to comply with its regulatory obligations that existed at the relevant time before accepting Ms M's applications.

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

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

Submissions have been made about breaches of the Principles not giving rise to any cause of action at law, and breaches of guidance not giving rise to a claim for damages under the FSMA. I've carefully considered these but, to be clear, it's not my role to determine whether something that's taken place gives rise to a right to take legal action. I'm deciding what's fair and reasonable in the circumstances of this complaint – and for all the reasons I've set out above I'm satisfied that the Principles and the publications listed above are relevant considerations to that decision.

And taking account of the factual context of this case, I think that in order for Carey to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), amongst other things it should have undertaken sufficient due diligence into Firm B/the business it was introducing and the Freedom Bay investment *before* deciding to accept Ms M's applications.

Ultimately, what I'll be looking at here is whether Carey took reasonable care, acted with due diligence and treated Ms M fairly, in accordance with her best interests. And what I think is fair and reasonable in light of that. And I think the key issue in Ms M's complaint is whether it was fair and reasonable for Carey to have accepted her SIPP application and Freedom Bay investment application in the first place. So, I need to consider whether Carey carried out appropriate due diligence checks on Firm B and the Freedom Bay investment before deciding to do so.

And the questions I need to consider include whether Carey ought to, acting fairly and reasonably to meet its regulatory obligations and good industry practice, have identified that consumers introduced by Firm B and/or investing in Freedom Bay were being put at significant risk of detriment. And, if so, whether Carey should therefore not have accepted Ms M's applications.

The contract between Carey and Ms M

Carey made some submissions about its contract with Ms M and I've carefully considered what it has said about this.

My decision is made on the understanding that Carey acted purely as a SIPP operator. I don't say Carey should (or could) have given advice to Ms M or otherwise have ensured the suitability of the SIPP or investments for her. I accept that Carey made it clear to Ms M that it wasn't giving, nor was it able to give, advice and that it played an execution-only role in her SIPP investments. And that the form Ms M signed confirmed, amongst other things, that losses arising as a result of Carey acting on her instructions were her responsibility.

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

What did Carey's obligations mean in practice?

In this case, the business Carey was conducting was its operation of SIPPs. And I remain satisfied that, to meet its regulatory obligations, when conducting its operation of SIPPs business, Carey had to decide whether to accept or reject particular investments and/or referrals of business with the Principles in mind. To be clear, I don't agree that it couldn't have rejected applications without contravening its regulatory permissions by giving investment advice.

The regulators' reports and guidance provided some examples of good practice observed by the FCA during its work with SIPP operators. This included being satisfied that an introducer is appropriate to deal with and that a particular investment is appropriate to accept. That involves conducting due diligence checks to make informed decisions about accepting business. This obligation was a continuing one.

I am satisfied that, to meet its regulatory obligations, when conducting its business, Carey was required to consider whether to accept or reject particular business, with the Principles in mind.

All in all I am satisfied that, in order to meet the appropriate standards of good industry practice and the obligations set by the regulator's rules and regulations, Carey should have carried out due diligence which was consistent with good industry practice and its regulatory obligations at the time. And in my opinion, Carey should have used the knowledge it gained from this to decide whether to accept or reject business or a particular investment.

What Carey should identified from Ms M's applications

I recognise the type of SIPP application Ms M submitted to Carey was for direct clients and that this confirmed, as set out more fully above, that she was establishing the SIPP without advice and in that case the investment choices were hers. But I don't think the steps Carey took that we've seen evidence of went far enough, or were sufficient, to meet its regulatory obligations and good industry practice in the particular circumstances of Ms M's complaint. I think Carey ought to have identified potential risks of consumer detriment associated with Ms M's business.

Ms M ticked to waive her cancellation rights on the SIPP application form and I note that the FCA's 2009 and 2013 SIPP guidance said that examples of good practice involved SIPP providers identifying instances of clients waiving their cancellation rights and the reasons for this. I can't see that Carey identified this and sought to do so in Ms M's case though, when I think it should have as good practice.

Carey was also made aware from Ms M's SIPP application form that she was self-employed, earning only £12,000 per year and that she was transferring a relatively low amount of just over £29,000 to the SIPP. So, while I appreciate it seems Ms M first sought an adviser to try to access some of her pension monies (which I'll come back to later), she didn't appear to work in finance or pensions and these details in her application form don't support that she'd be independently making the decision to switch her pension and waive her cancellation rights while understanding the implications of this.

In addition, while Ms M didn't detail the intended investments in the SIPP application form, it became clear soon after that she intended to make at least one high-risk investment in Freedom Bay that may be illiquid. And I don't think it's credible that she was independently and proactively determining to do so in order to invest these in Freedom Bay. This is consistent with Ms M's clear testimony that Mr A of Firm B advised her to do so, that she's a retail client with no previous investment experience and that at the time this made up a significant amount of her pension provision.

I've seen email correspondence between Ms M and Mr A which supports her testimony that he told her what to fill out and provided her with advice. For example, I can see that Mr A said that Ms M should '*…complete, sign and send this to Carey's, as the last piece in the jigsaw for Freedom Bay. Amount is £20,000…and the adviser is myself* [Mr A]'.

And that Mr A said to Ms M in respect of the Carbon Credits investment which didn't go ahead that '*I am officially acting as your investment adviser on this one…unlike the SIPP, which technically, if Carey ask, you set up on your own to give yourself a wider choice of investment options*…'. I think this supports that Mr A also advised Ms M on the switch and type of SIPP application to fill out, albeit unofficially if Carey asked her about this.

I appreciate Carey identified that the Freedom Bay investment was higher risk, but the examples of good practice say that doing so would enable Carey to seek appropriate clarification from the prospective member (or their adviser) if it had any concerns. And, while Carey asked for forms and declarations to be completed, including the member declaration form for example, I don't think Carey went as far as it should have in Ms M's circumstances.

The completed Freedom Bay declaration form dated 30 June 2012 ought to have given Carey further cause for concern, considering Ms M named Mr A of Firm B as her adviser in respect of the investment on it. While I've noted above that there were two completed versions of this form, I think that Carey successfully received the version dated 30 June 2012 from Ms M considering it provided our Service with this and referred to this version in its final response letter. And I think that Ms M adding this handwritten information to the form ought reasonably to have stood out to Carey, given the rest was pre-typed.

So I also think that Carey was aware or ought reasonably to have become aware of Mr A of Firm B's involvement in the business it had received from Ms M and that this was at odds with her SIPP application form, where she'd said she wasn't receiving advice and that her choices were her own. I can't see that Carey picked up on this and/or queried it with Ms M though, or that it sought to query or understand the nature of Firm B's work, the types of clients and investments it dealt with. Instead it appears to have accepted Ms M's investment application and approved it soon after.

For the reasons I've given, I think Carey ought to have had cause for concern about Ms M's business from the outset and identified a clear and obvious potential risk of consumer detriment associated with Ms M's business. And I don't think the steps Carey took that I've seen evidence of went far enough, or were sufficient, to meet its regulatory obligations and good industry practice in the particular circumstances of Ms M's complaint.

Given what Carey ought reasonably to have identified in respect of Ms M's business, I think that it should, on a fair and reasonable basis, have carried out some basic checks into Firm B. And if it had then it would have recognised that the adviser was unregulated and hadn't been authorised to advise on investments since 2006.

I also think that Carey should have conducted independent verification checks on the content of the documentation provided to check for authenticity. And if Carey had contacted Ms M to query, for example, the type of SIPP application she'd submitted, why she'd waived her cancellation rights, what her intended investments were and whether she'd had advice on any of the above then – even if Ms M initially chose not to disclose that Mr A advised her on the switch, considering what he'd told her to say and what not to in the above email – she had no reason not to disclose that she'd been advised to invest in Freedom Bay by Mr A, that she was a retail investor and that she'd seemingly been offered a cash incentive by it too. I say this because I've seen an email from Mr A to Ms M on 30 August 2012 where he said he was expecting funds from Freedom Bay that night and that he'd credit her account the next day, albeit I've proceeded on the basis that Ms M has confirmed that she didn't go on to actually receive anything from him.

It follows that there was a significant risk Mr A had given Ms M advice without permission to do so – certainly on the intended investment and I think likely on the switch to the SIPP too – in breach of the general prohibition in Section 19 of FSMA, which I'll explore further below. So Carey ought to have concluded that it would not be consistent with its regulatory obligations to accept Ms M's business and proceed with her applications.

For the above reasons, Carey should neither have accepted Ms M's SIPP application nor proceeded with her application to make the investment. I think it is fair and reasonable to uphold this complaint on that basis alone. Nevertheless, I've also considered the due diligence that Carey carried out on the investment. I have taken the same approach to considering this as I did to considering the due diligence undertaken on Mr A of Firm B.

Investment due diligence

Carey has said that it conducted due diligence on the Freedom Bay investment to ensure it was capable of being held in the SIPP in accordance with HMRC regulations. And that to do so it reviewed investment information, company background checks and an independent report from a third-party compliance company.

The FCA guidance is informative (but not determinative) about the kind of steps Carey could and should have taken and the things it should have had regard to in assessing the Freedom Bay investment. As a reminder to SIPP operators, the Dear CEO letter said there were some key areas that SIPP operators should focus on and, as a reminder, set out the following:

Our review assessed due diligence processes in these five key areas:

- *correctly establishing and understanding the nature of an investment ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation*
- *ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly*

drawn-up and legally enforceable)

- *ensuring that an investment can be independently valued, both at point of purchase and subsequently, and*
- *ensuring that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc.)*

Please note that the due diligence necessary for individual investments may vary depending on the circumstances, and the five areas highlighted above are not exhaustive.

The regulators publications are not prescriptive – and what should be done is dependent on the circumstances. And what emerges from the Principles for Business, COBS 2.1.1R and the regulator's publications is that Carey needed to act in Ms M's best interests in its role as an execution only SIPP operator and act reasonably to identify and prevent consumer detriment. So, it needed to conduct sufficient due diligence on the investments and draw a justifiable conclusion with this objective in mind.

Freedom Bay

I've reviewed the documents Carey has sent us to evidence the checks it carried out on the Freedom Bay investment. The documents Carey says it reviewed did allow it to broadly understand the nature of this. But I think Carey's obligations went beyond checking that an investment existed and would not result in tax charges. And I think some of the information should have given Carey real cause for concern about the risk of consumer detriment associated with this.

A report on Freedom Bay dated August 2011 completed by a third party and provided to Carey included the following points:

- It could be a UCIS. It has seen the legal opinion obtained by the promotor and it has since been further clarified that if members retain but forego personal usage rights then the timeshare exemption will remain and it will be a collective investment scheme.
- Funds are paid to the trustee which holds funds in escrow until the property invested in has been completed.
- The fractional interest may be disposed of at any time. But the term is open ended and there is no pre-determined exit-strategy. There's no secondary market, although a sale can be facilitated by the vendor if required, subject to a buyer being found. And at year five or seven the developer can buy back the property at 90% of the average of two valuations.
- RICS valuations could be provided on request, although a charge could apply.
- The investment was capable of being held within a SIPP.
- There's no FSCS protection as the investment is unregulated.

And at the end of the report it contained a disclaimer which said the document had been completed as part of a due diligence process which seeks to identify whether the investment is likely to be acceptable based on HMRC rules.

I can also see that Carey's investment committee reviewed the Freedom Bay investment and gave its findings in its minutes dated February 2012 – a few months before Ms M's SIPP and investment application were received by it. And, amongst other things, these said that:

- Funds are paid to the trustee which holds funds in escrow until the property invested in has been completed.

- Valuations can be provided by the investment provider for a fee.
- The investment is potentially illiquid as there's no apparent established or secondary market, although the interest may be assigned or sold at any time, subject to finding a willing buyer. And the developer can exercise a buyback option at year five or seven.
- There's no FSCS protection as the investment is unregulated.

Under the question '*Based on the information provided is the proposed investment acceptable*' for the SIPP, Carey answered '*Yes…However see comments'* on the letter. And it went on say that:

- It is an alternative investment and may be high risk and/or speculative.
- Where the SIPP can't complete the purchase the agreement may be terminated and the developer has the right to retain the monies paid. So it was essential the SIPP has sufficient funds to complete from the outset and Carey will only into the agreement in that case.
- While most management costs appear to be covered, the member can be liable for exceptional items notified in writing and it's their responsibility to ensure the SIPP has sufficient funds for this.
- All members should take their own tax, investment and financial advice to determine if this is a suitable investment for them.

It seems Carey went on to conclude in the minutes that, based on the information provided, Freedom Bay appeared to be an acceptable investment as there didn't appear to be a tax charge. But it said that in order to proceed with the investment it needed a member declaration and indemnity and limitation of liability wording to be added to all contracts and agreements, for example.

Given the above and the statements Carey asked Ms M to agree to in the Alternative Investment Instruction and Declaration form (set out above), I think it's clear Carey had some concerns about Freedom Bay.

In order to correctly understand the nature of the investment, Carey should have reviewed how Freedom Bay was marketed to investors – particularly as it was proceeding on the basis that this investment was being made on a non-advised basis by Ms M. I note that Carey has provided a copy of the Freedom Bay marketing material it says it reviewed as part of its due diligence and I note that the investment committee minutes say that it considered this. So, clearly Carey thought it was important to look at this material at the time too.

The brochure provided by Carey shows that investors were offered "*3 years 8% rental guarantee. 50% of hotel occupancy income after guarantee period giving net yield of 10%.*". And it went on to say that "…*five year investment period returns are expected to be **substantial** over the medium to long-term.".*

Another brochure I've seen for Freedom Bay offered a high '*Projected annual income from 10%*' and said that ***'the IRR*** [which I understand to mean the internal rate of return] ***would be an excellent 17%***'.

Both brochures also offered investors who paid the full amount upfront (seemingly into an escrow account) a guaranteed 6% per annum during the construction period, which it said was payable by the developer.

Given the way Freedom Bay was marketed, investors were led to anticipate they would get substantial returns back of at least one-third of what they originally put down over the five-year period during which the guarantees were offered. But the above figures had no apparent basis, no detail was provided for investors to verify these and I haven't seen anything to suggest that any of Freedom Bay's other marketing material did provide this.

And I haven't seen any Freedom Bay marketing material or otherwise which shows that customers were given:

- Sufficient risk warning. While the brochures said that *"the particulars contained in this brochure are believed to be correct, but cannot be guaranteed."* this was in small writing at the very end of a 14 page document. And this suggests there were no guarantees in respect of the investment, in contradiction to what the content of the brochures stated about the guaranteed returns.
- Sufficient explanation about the comparables that the anticipated high return was likely based on, other than the investment provider's own confidence in its business model and marketplace.
- Any explanation of the guarantees offered. For example:
    - The purchase price was seemingly intended to be held in escrow by the trustee until the property was completed, when this would be released to the developer. But it's unclear how it was anticipated that the development would be funded during construction in that case. And I can't see that Carey queried this.
    - It's unclear how the developer was planning to fund the guaranteed 6% per annum during the construction period to those who had paid the full amount upfront. And the guaranteed 8% rental income for three years post completion, particularly given I can't see that this was dependent on occupancy.
- A warning that investors could be subject to local tax charges.

In respect of some of the ways given to realise the investment, based on Carey's investment committee minutes it appears to have taken some comfort from the developer having an option to buy the units back in the future. And I can see that one of the brochures said that the developer had also agreed a sponsored exit strategy for Phase 1 investors where it had, for a limited number of units, agreed to undertake to re-sell one fraction for every four new sales in subsequent phases at full price. However I can't see any information as to what, or how many, units this strategy applied to. And the buy-back and re-sale undertakings that were provided were subject to the developer being able and/or willing to do this.

On that point, I note that the start of construction had clearly already been delayed given that, while one of the brochures said this would begin in Q2 of 2011 with an estimated completed date of late 2012, the other brochure I've seen said construction would commence in Q4 of 2011 with an estimated completion date of late 2013, with investors still being offered the opportunity to invest in Phase 1 of the development. While it seems Carey was provided with the developer's accounts as part of a Freedom Bay branded due diligence pack, this was only for years 2009 and 2010. And these appear to reflect that while the developer owned significant land and equipment, it had little cash and no revenue or income, with significant expenses and a large net income loss. But I can't see that Carey questioned this any further alongside the undertakings and guarantees that had been provided.

Looking at all of the above I think there were significant warning signs and risks associated with the Freedom Bay investment, namely:

- The high projected returns should have been questioned. I don't expect Carey to have been able to say the investment would have been successful. But such high projected returns without any apparent basis should have given Carey cause to

question its credibility.
- There was no investor protection associated with this investment. It was illiquid and may prove difficult to sell.
- One of its main marketing points was the timeshare aspect, that customers could choose to stay in the hotel room or rent it out. Yet Carey appears to have determined that there was a resulting risk of a HMRC tax charge such that customers, like Ms M, needed to forego this right when investing via a SIPP. So, Carey should have been concerned that consumers may have been misled or did not properly understand the investment in relation to the SIPP – only one of the brochures I've seen set out that personal usage just was for non-SIPP purchasers.
- Carey knew or ought reasonably to have known that Ms M wasn't receiving regulated advice about the investment and it was probable that Firm B, an unregulated firm, was involved in advising and making arrangements for this high risk, unregulated investment.
- Carey has provided some land registry information in respect of Freedom Bay, but I can't see that this evidences full title. And, as set out by the insolvency practitioner, Freedom Bay had only paid a deposit for the land and didn't have the ability to complete the purchase. Given it had only paid the deposit for the land, Freedom Bay seemingly didn't have and therefore wouldn't have been able to evidence full title. And it's unclear how it was anticipated that Freedom Bay would also complete the intended building works for the hotel suites/villas in that case.
- Considering Carey mentioned inducements in the Freedom Bay declaration, this leads to me think Carey might have had concerns that customers might be being offered this in respect of Freedom Bay.

Knowing all this and in light of Carey's obligations as set out above – which I've said went beyond checking that an investment existed and would not result in tax charges – I don't think it was fair or reasonable for Carey to have accepted the Freedom Bay investment into Ms M's SIPP. Following the due diligence Carey says it conducted, it should have concluded that there was a clear and obvious risk of consumer detriment. And, without more evidence to ensure the investment was an appropriate one to permit within its SIPPs, I'm satisfied that Carey shouldn't have accepted the Freedom Bay investment and declined to accept it into Ms M's SIPP.

Did Carey act fairly and reasonably in proceeding with Ms M's instructions?

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

COBS 11.2.19R

I note that Carey has made the point that COBS 11.2.19R obliged it to execute investment instructions. It effectively says that once the SIPP has been established, it is required to execute the specific instructions of its client.

Before considering this point, I think it is important for me to reiterate that, it was not fair and reasonable for Carey to have accepted Ms M's application in the first place. So in my opinion, Ms M's SIPP should not have been established and the opportunity to execute investment instructions or proceed in reliance on an indemnity should not have arisen at all.

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

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

I therefore don't think that Carey's argument on this point is relevant to its obligations under the Principles to decide whether or not to accept an application to open a SIPP or to execute the instruction to make the Freedom Bay investment i.e. to proceed with the application.

The indemnity

The indemnity sought to confirm that Ms M was aware the investment was high risk, had taken her own advice, would not hold Carey responsible for any liability resulting from the investment and that Ms M wasn't receiving an inducement.

The FSA's 2009 report said that SIPP operators should, as an example of good practice, be:

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

With this in mind, I think Carey ought to have been cautious about accepting Ms M's applications even though she had signed an indemnity. There was no evidence of any other regulated party (other than Carey) being involved in this transaction. In these circumstances I think very little comfort could have been taken from the declaration stating that Ms M had taken her own advice and understood the investment risks.

Carey had to act in a way that was consistent with the regulatory obligations that I've set out in this decision. In my view, Carey was not treating Ms M fairly by asking her to sign an indemnity absolving Carey of all responsibility, and relying on such an indemnity, when it ought to have known that Ms M's dealings with Firm B were putting her at significant risk.

Summary of my findings on due diligence

In summary, Carey did not comply with good industry practice, act with due skill, care and diligence, organise and control its affairs responsibly, or treat Ms M fairly by accepting her application in the light of the circumstances I've explained surrounding its involvement, and considering what Carey knew or ought to have known about the investment before Ms M's application to invest in this was received, by proceeding in the light of what it knew or ought to have known about Firm B and the investment by the time these were made. For all the reasons given, I am satisfied that, in my opinion, this is the fair and reasonable conclusion to reach.

For the avoidance of doubt, I'm not making a finding that Carey should have assessed the suitability of the investment or the SIPP for Ms M. I accept Carey had no obligation to give advice to Ms M, or to otherwise ensure the suitability of a pension product or investment for her. My finding is not that Carey should have concluded that the investment and SIPP was not suitable for Ms M.

Rather, Carey was able to accept or reject applications for business and I say that it should have rejected Ms M's application for a SIPP, and failing that, for the reasons I set out above, it should not have accepted her request to invest in Freedom Bay.

s.27 and s.28 FSMA

As set out in the relevant considerations section above, I have also considered the application of s.27 and s.28 FSMA.

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

1. Whether an unauthorised third-party was involved;
2. Whether there is evidence that the third-party acted in breach of the General Prohibition in relation to the particular transaction and, if so;
3. Whether the customer entered into an agreement with an authorised firm in consequence of something said or done by the unauthorised third-party in the course of its activities that contravened the General Prohibition; and
4. Whether it is just and equitable for the agreement between the customer and the authorised firm to be enforced in any event.

Was an unauthorised third-party involved?

There is no dispute that Firm B was an unauthorised third party.

Is there evidence Firm B acted in breach of the General Prohibition?

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

> *53. Advising a person is a specified kind of activity if the advice is—*
>
> > *(a) given to the person in his capacity as an investor or potential investor, or in his capacity as agent for an investor or a potential investor; and*
> >
> > *(b) advice on the merits of his doing any of the following (whether as principal or agent)—*
> >
> > > *(i) buying, selling, subscribing for or underwriting a particular investment which is a security or a relevant investment, or*
> > >
> > > *(ii) exercising any right conferred by such an investment to buy, sell, subscribe for or underwrite such an investment.*

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

> *25. (1) Making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite a particular investment which is—*
>
> (a) *a security,*
>
> (b) *a relevant investment, or*
>
> (c) *an investment of the kind specified by article 86, or article 89 so far as relevant to that article, is a specified kind of activity.*
>
> *(2) Making arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting investments falling within paragraph (1)(a), (b) or (c) (whether as principal or agent) is also a specified kind of activity.*

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

I have considered these in turn.

Advice

I think the following part of the Court of Appeal's judgment in the Adams case is of particular relevance here:

Paragraph 82:

> *"In short, CLP's recommendation that Mr Adams invest in storepods carried with it advice that he transfer out of his Friends Life policy and put the money into a Carey SIPP. Investment in storepods may have been the ultimate objective, but it was to be gained by transferring out of the Friends Life policy and into a Carey SIPP. CLP thus proposed that Mr Adams undertake those transactions too and, in so doing, gave "advice on the merits" of selling a "particular investment which is a security" (viz. the Friends Life policy) and buying another "particular investment which is a security" (viz. a Carey SIPP). Although, therefore, the advice to invest in storepods was not of itself covered by article 53 of the RAO, CLP nonetheless gave Mr Adams advice within the scope of article 53 and so acted in contravention of the general prohibition."*

Ms M's evidence is that Firm B advised her to switch out of her existing personal pension into the Carey SIPP and to invest in Freedom Bay. I think that evidence is plausible, and credible. And, as I've already pointed out above, it is supported by other evidence from the time. In addition, I've seen an email from Mr A dated 20 July 2012 where he said to Ms M that '*I think we'll just put the £27k all in to Freedom Bay…it's a good investment, and the carbon credit investment it taking an age to sort out*'.

As set out above, I don't think it's credible that Ms M was independently and proactively determining to switch to a SIPP to invest in Freedom Bay, without a positive recommendation from Firm B which, she says, gave her various assurances about the risks involved. In support of this Ms M provided a handwritten document that she's said was put together by Mr A at the time, which I can see notes Freedom Bay as only having a risk rating of five or six, seemingly out of ten, when Carey identified it to be high risk and likely to be illiquid.

To confirm, I am satisfied Firm B advised Ms M to switch out of her existing pension into the Carey SIPP to invest in Freedom Bay – and so it undertook the regulated activity defined at article 53 of the RAO.

Making arrangements

I think the following parts of the Court of Appeal's judgement in the *Adams* case are of particular relevance here:

Paragraph 99:

> "*…..The fact remains that CLP "pre-completed the application form so that* [Mr Adams] *could just sign it" (to quote Mr Adams' witness statement). It also told Mr Adams of documents he would need to supply for anti-money laundering purposes and explained that the "completed forms and [his] anti money laundering documents will be collected by courier and taken to Carey Pensions UK". "Arrangements" being a "broad and untechnical word" in article 25 of the RAO as well as section 235 of FSMA, it is apt to describe what CLP did."*

Paragraph 100

> *"I consider, too, that the steps which CLP took can fairly be said to have been such as to "bring about" the transfers from Friends Life and into the Carey SIPP. Contrary to the Judge's understanding, it does not matter that CLP's acts "did not necessarily result in any transaction between* [Mr Adams] *and* [Carey]*" or that "the process was out of CLP's hands to control in any event". Nor is it determinative whether steps can be termed "administrative".*
>
> *CLP's "procuring the letter of authority", role in relation to anti-money laundering requirements and (especially) completion of the Carey application form were much more closely related to the relevant transactions than, say, the advertisement which originally prompted Mr Adams to contact CLP. It is to be remembered that CLP filled in sections of the application form dealing with "Personal Details", "Occupation & Eligibility", "Transfers", "Investments" and "Nomination Of Beneficiaries". In my view, what CLP did was thus significantly instrumental in the material transfers. In other words, there was, in my view, sufficient causal potency to satisfy the requirements of article 26 of the RAO."*

As explained above, there's evidence Mr A of Firm B asked Ms M to complete, sign and send relevant forms in respect of the switch and investment to Carey. I've also seen emails between Mr A and Ms M where she forwarded the email Carey sent her on 19 June 2012 asking further information about the investments and he responded letting Ms M know what information she needed to provide it with.

So the steps which Firm B took can fairly be said to have been such as to "*bring about*" the switch from Ms M's existing personal pension into the Carey SIPP and her investment into Freedom Bay – they had sufficient causal potency to satisfy the requirements of article 26 of the RAO.

I am therefore satisfied Firm B carried out regulated activities, and therefore breached the General Prohibition. And any one regulated activity is sufficient for these purposes so this test would be met if Firm B had only undertaken arranging (which, for the reasons I have set out, I do not think is the case).

Did Ms M enter into an agreement with Carey in consequence of Firm B's actions?

I am satisfied the SIPP was opened in consequence of the advice given, and arrangements made, by Firm B.

While Ms M has recognised she was in difficult circumstances and she'd heard she might be able to raise capital by switching her pension, she's also said she was approaching 50 years of age, with no previous investment experience and a low risk tolerance and that this made up the majority of her pension provision. And that if she'd been made aware of the high-risk level that it carried and that it could result in her pension being completely devalued then she would have reconsidered switching.

So I am satisfied that if Firm B hadn't advised Ms M to switch her existing personal pension to a SIPP with Carey in order to invest in Freedom Bay, and then made the arrangements for that to happen, then Ms M would not have entered into an agreement with Carey.

Would the courts conclude it is just and equitable for the agreement between Ms M and Carey to be enforced in any event?

Having carefully considered this, I am satisfied a court would not conclude that it is just and equitable for the agreement between Ms M and Carey to be enforced in any event. I think very similar reasons to those mentioned by the Court of Appeal in the *Adams* case apply here:

- A key aim of FSMA is consumer protection. It proceeds on the basis that, while consumers can to an extent be expected to bear responsibility for their own decisions, there is a need for regulation, among other things to safeguard consumers from their own folly.
- While SIPP providers were not barred from accepting introductions from unregulated sources, s.27 of FSMA was designed to throw risks associated with doing so onto the providers. Authorised persons are at risk of being unable to enforce agreements and being required to return money and other property and to pay compensation regardless of whether they had had knowledge of third parties' contraventions of the general prohibition.
- As set out above Carey was aware, or ought reasonably to have become aware that:
    - Firm B was stepping far beyond the role of an introducer from the outset in Ms M's case.
    - Firm B was seemingly offering cash incentives to consumers and therefore acting "completely against all rules".
- The investment did not proceed until these things were known or ought to have been known to Carey and so it was – or should have been – open to it to decline the investment.

So I am satisfied s.27 FSMA offers a further and alternative basis on which it would be fair and reasonable to conclude Ms M's complaint should be upheld. I have therefore gone on to consider the question of fair compensation.

Is it fair to ask Carey to compensate Ms M?

In deciding whether Carey is responsible for any losses that Ms M has suffered on her investments I need to look at what would have happened if Carey had done what it should have done i.e. had not accepted Ms M's applications in the first place.

When considering this I have taken into account the Court of Appeal's supplementary judgment in Adams ([2021] EWCA Civ 1188), insofar as that judgment deals with restitution/compensation.

I am required to make the decision I consider to be fair and reasonable in all the circumstances of the case and I do not consider the fact that Ms M signed the indemnity means that she shouldn't be compensated if it is fair and reasonable to do so.

In deciding whether Carey is responsible for any losses that Ms M has suffered on the investments in her SIPP I need to look at what would have happened if Carey had done what it should have done i.e. not accepted her applications.

Had Carey acted fairly and reasonably it should have concluded that it should not accept Ms M's applications. That should have been the end of the matter – it should have told Ms M that it could not accept the business. And I am satisfied, if that had happened, the arrangement for Ms M would not have come about in the first place, and the loss she suffered could have been avoided.

Had Carey explained to Ms M even in general terms why it would not accept the applications from Firm B and to invest in Freedom Bay or that it was terminating the transaction, I find it very unlikely for reasons already given above that Ms M would have tried to find another SIPP operator to accept the business.

So I'm satisfied that Ms M would not have continued with the SIPP, had it not been for Carey's failings and would likely have remained in her existing scheme. And, whilst I accept Firm B is responsible for initiating the course of action that led to Ms M's loss, I consider that Carey failed unreasonably to put a stop to that course of action when it had the opportunity and obligation to do so.

I have considered paragraph 154 of the *Adams v Options* High Court judgment, which says:

> "*The investment here was acknowledged by the claimant to be high risk and/or speculative. He accepted responsibility for evaluating that risk and for deciding to proceed in knowledge of the risk. A duty to act honestly, fairly and professionally in the best interests of the client, who is to take responsibility for his own decisions, cannot be construed in my judgment as meaning that the terms of the contract should be overlooked, that the client is not to be treated as able to reach and take responsibility for his own decisions and that his instructions are not to be followed."*

For all the reasons I've set out, I'm satisfied that it would not be fair to say Ms M's actions mean she should bear the loss arising as a result of Carey's failings. I do not say Carey should not have accepted the application because the investment was high risk. I acknowledge Ms M was warned of the high risk by Carey and declared she understood that warning.

But, as I set out above, Carey did not share significant warning signs with her in respect of Firm B, her applications and the investments so that she could make an informed decision about whether to proceed or not. In any event, Carey should not have asked her to sign the indemnity at all as the application should never have been accepted or alternatively the transaction should have been terminated at a much earlier stage in the process.

Furthermore, as set out above, I am satisfied there is a legal basis on which Ms M is entitled to compensation, by virtue of s.27 FSMA.

So I am satisfied in the circumstances, for all the reasons given, that it is fair and reasonable to conclude that Carey should compensate Ms M for the loss she has suffered. I am not asking Carey to account for loss that goes beyond the consequences of its failings. I am satisfied those failings have caused the full extent of the loss in question. That other parties might also be responsible for that same loss is a distinct matter, which I am not able to determine. However, that fact should not impact on Ms M's right to fair compensation from Carey for the full amount of his loss.

Carey has argued that Ms M would have invested regardless of its involvement due to her circumstances. But I'm not persuaded by this. I don't think there is any persuasive evidence that Ms M would have gone ahead with the transfer if Carey had refused her application and explained why this was the case. As I've said above, I recognise Ms M said she was experiencing hard times and there was seemingly the possibility of an incentive payment, but I'm not persuaded that if she'd understood the risks that she would have risked the majority of her pension provision at the time in the circumstances. And, in any case, I think it's fair to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted Ms M's business from Firm B or permitted the Freedom Bay investment into its SIPPs.

Putting things right

My aim is to return Ms M to the position she would now be in but for what I consider to be Carey's due diligence failings.

In light of the above, I think that Carey should calculate fair compensation by comparing the current position to the position Ms M would be in if she hadn't transferred from her existing pension plan.

We haven't received anything to suggest this was anything other than a defined contribution plan without any guarantees attached. So I've proceeded on the basis that there were no such guarantees. Neither Ms M nor Carey disputed this, despite being given the opportunity to do so by the deadline for responding to the provisional decision and being made aware that it won't be possible for us to amend this once a final decision has been issued.

Carey has said that a fair and reasonable comparator for redress would be the lower discount rates, as per DRN 2670669. But I'm considering the circumstances individual to Ms M's complaint. And I note that the above decision Carey has mentioned referenced discount rates because the complaint involved a pension transfer of a defined benefit occupational pension scheme, rather than a personal pension as in Ms M's case.

In summary, Carey should:

1. Obtain the current notional value, as at the date of this decision, of Ms M's previous pension plan, if this hadn't been transferred to the Carey SIPP.

2. Obtain the actual current value of Ms M's Carey SIPP, as at the date of this decision, less any outstanding charges.

3. Deduct the sum arrived at in step 2) from the sum arrived at in step 1).

4. Pay a commercial value to buy any illiquid investments (or treat them as having a zero value).

5. Pay an amount into Ms M's Carey SIPP, so that the transfer value of this is increased by an amount equal to the loss calculated in step 3). This payment should take account of any available tax relief and the effect of charges. The payment should also take account of interest as set out below.

6. Pay Ms M £500 for the distress and inconvenience the problems with her pension have caused her.

I've explained how Carey should carry out the calculation, set out in steps 1 - 6 above, in further detail below:

1. Obtain the current notional value, as at the date of this decision, of Ms M's previous pension plan, if it hadn't been transferred to the Carey SIPP.

   Carey should ask the operator of Ms M's previous pension plan to calculate the current notional value this, as at the date of this decision, had she not transferred into the SIPP. Carey must also ask the same operator to make a notional allowance in the calculations, so as to allow for any additional sums Ms M contributed to, or withdrawn from, her Carey SIPP since the outset. To be clear this doesn't include SIPP charges or fees paid to third parties like an adviser.

   Any notional contributions or notional withdrawals to be allowed for in the calculations should be deemed to have occurred on the date on which monies were actually credited to, or withdrawn from, the Carey SIPP by Ms M.

   If there are any difficulties in obtaining a notional valuation from the operator of Ms M's previous pension plan, Carey should instead calculate a notional valuation by ascertaining what the monies transferred away from this would now be worth, as at the date of this decision, had these achieved a return from the date of transfer equivalent to the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index).

   I'm satisfied that's a reasonable proxy for the type of return that could have been achieved over the period in question. And, again, there should be a notional allowance in this calculation for any additional sums Ms M contributed to, or withdrawn from, her Carey since outset.

2. Obtain the actual current value of Ms M's Carey SIPP, as at the date of this decision, less any outstanding charges.

   This should be the current value as at the date of this decision.

3. Deduct the sum arrived at in step 2) from the sum arrived at in step 1).

   The total sum calculated in step 1) minus the sum arrived at in step 2), is the loss to Ms M's pension provisions.

4. Pay a commercial value to buy Ms M's share in any investments that cannot currently be redeemed.

   I'm satisfied that Ms M's Carey SIPP only still exists because of the illiquid investments that are held within it. And that but for these investments Ms M's monies could have been transferred away from Carey. In order for the SIPP to be closed and further SIPP fees to be prevented, any remaining investments need to be removed from the SIPP.

To do this Carey should reach an amount it's willing to accept as a commercial value for the investments, and pay this sum into the SIPP and take ownership of the relevant investments.

If Carey is unwilling or unable to purchase the investments, then the actual value of any investments it doesn't purchase should be assumed to be nil for the purposes of the redress calculation. To be clear, this would include their being given a nil value for the purposes of ascertaining the current value of Ms M's SIPP in step 2).

If Carey doesn't purchase the investments, it may ask Ms M to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from these investments. That undertaking should allow for the effect of any tax and charges on the amount Ms M may receive from the investments, and any eventual sums she would be able to access from the SIPP. Carey will need to meet any costs in drawing up the undertaking.

5. Pay an amount into Ms M's Carey SIPP, so that the transfer value of this is increased by an amount equal to the loss calculated in step 3). This payment should take account of any available tax relief and the effect of charges. The payment should also take account of interest as set out below.

   The amount paid should allow for the effect of charges and any available tax relief. Compensation shouldn't be paid into a pension plan if it would conflict with any existing protections or allowances.

   If Carey is unable to pay the compensation into Ms M's SIPP, or if doing so would give rise to protection or allowance issues, it should instead pay that amount direct to her. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore, the compensation should be reduced to notionally allow for any income tax that would otherwise have been paid.

   The notional allowance should be calculated using Ms M's actual or expected marginal rate of tax in retirement at her selected retirement age.

   It's reasonable to assume that Ms M is likely to be a basic rate taxpayer at her selected retirement age, so the reduction would equal 20%. However, if Ms M would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

   Both parties were given the opportunity to dispute this assumption in response to my provisional decision and were made aware that it won't be possible for us to amend this assumption once a final decision has been issued.

   Carey didn't respond. And I appreciate Ms M said she's unlikely to be a taxpayer in retirement, as her state pension will be her only retirement provision. However, I'm not minded to change my position, as it's reasonable to think Ms M may pay some tax in retirement. State pension is a taxable income and goes towards the annual personal allowance. We haven't seen anything to suggest Ms M isn't entitled to state pension, full or otherwise. And Ms M's comments don't appear to take into account that any redress payable by Carey will be paid into her SIPP where possible, meaning she will have a personal pension provision in addition to her state pension, upon which she may have to pay tax on any benefits she takes.

6. Pay Ms M £500 for the distress and inconvenience the problems with her pension have caused her.

   In addition to the financial loss that Ms M has suffered as a result of the problems with her pension, I think that the loss suffered to Ms M's pension provision has caused her distress. She's explained that she's been very upset at having lost this and not having had this recently available for her to access when she's needed to due to her current circumstances. Ms M lost a significant proportion of her pension provision when she was in her mid-50's and I think it's unlikely she can afford such a loss, so I think this is likely to have caused her worry. And I think that it's fair for Carey to compensate her for this as well.

SIPP fees

If the investment/s can't be removed from the SIPP, and because of this it can't be closed after compensation has been paid, then it wouldn't be fair for Ms M to have to pay annual SIPP fees to keep the SIPP open. So, if the SIPP needs to be kept open only because of the illiquid investments and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.

Interest

The compensation resulting from this loss assessment must be paid to Ms M or into her SIPP within 28 days of the date Carey receives notification of Ms M's acceptance of my final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation isn't paid within 28 days.

My final decision

For the reasons given, it's my final decision that this complaint is upheld and Options UK Personal Pensions LLP must calculate and pay fair compensation to Ms M as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms M to accept or reject my decision before 29 May 2024.

Holly Jackson
Ombudsman