DRN-3202342

The complaint

Mr H complains about Options UK Personal Pensions LLP, (trading as Carey Pensions UK LLP [Carey] at the time of the relevant events) accepting an application for a Self-Invested Personal Pension (SIPP), and an investment in Store First and Gas Verdant, from an unregulated business called Commercial Land and Property Brokers (CL&P). For simplicity, I have referred to Options UK Personal Pensions LLP as 'Carey' throughout this decision. Mr H's representative says that Carey showed no consideration for FSA Principles of business and did not treat him fairly. Mr H's representative says Carey had a duty to carry out due diligence on CL&P before accepting business from it and, had it done so, it ought to have been aware of various reasons not to deal with CL&P.

What happened

I issued a provisional decision on 18 November 2021. In the provisional decision I set out why I was minded to uphold the complaint and make an award.

I have not received any further submissions from

Options. Mr H has accepted the provisional decision.

I have repeated here the material findings I reached in my provisional decision. Much of the comment will be the same.

We issued a final decision on another complaint involving Carey's acceptance of a SIPP application and Store First investment application from CL&P in February 2021. That final decision has been published on our website under DRN5472159. And a copy was sent to the parties when the provisional decision was issued.
I have reached my decision in this case independently. The published decision however sets out the general detail of Carey's relationship with, and due diligence on, CL&P and the general detail of Store First and Carey's due diligence on that investment, across pages 2 to 11 (up to "Mr S's dealings with CL&P and Carey"). So I will rely on that detail set out in the published decision here, rather than repeat it – I will only include the key factual background of this particular complaint here.

Mr H's dealings with CL&P and Carey

Mr H says he was advised by CL&P to switch his pension arrangements to a SIPP with Carey and invest in unregulated investments following the switch. He also says CL&P arranged the switch to the SIPP and the investments for him. Mr H says he was told he would have a much better pension if he switched to the SIPP.

Mr H's representative says that all the contact between Mr H and CL&P was via email and telephone call, with pre-populated documents sent to Mr H to sign. It also says that Mr H has no experience of investments and does not understand financial jargon such as 'execution only'. It says Mr H simply trusted CL&P's advice and trusted that CL&P and Carey were acting in his best interests.

Mr H says he only understands now that CL&P were not a UK regulated business and he has no 'protections'.

Before being contacted by CL&P Mr H had two personal pensions. Following the contact by CL&P the cash value of these pensions was switched into a SIPP with Carey, and invested in Store First and Gas Verdant. The key events which took place during Mr H's dealings with Carey were as follows:

- Mr H signs a Carey SIPP application form – 16 February 2012.
- Carey sends its welcome letter, confirming the establishment date of the SIPP – 21 February 2012.
- Carey confirms a transfer amount of about £52,000 has been received from Phoenix Life – 27 June 2012 (Carey has said this was received on 26 June 2012).
- Carey confirms a transfer amount of about £18,000 has been received from Standard Life – 13 July 2012 (Carey has said this was received on 12 July 2012).
- Mr H signs Carey's member declaration and indemnity in respect of Storefirst (referred to as 'the indemnity' in the published decision, using the wording quoted in full there) – 24 July 2012.
- Carey sends cash from Mr H's SIPP to Store First (£27,000) and Gas Verdant (£40,000)
- My understanding is that the cash was invested in Store First on 30 August 2012 and Gas Verdant on 11 October 2012.

There is also a copy of a letter of authority signed by Mr H, authorising Carey to deal with CL&P. This has a 'date stamp' of 21 February 2012.

Mr H has confirmed he was paid £4,000 'cashback' by CL&P, after the Store First and Gas Verdant investments were made.

CL&P and Carey

The below is a chronological summary (set out in greater detail in the published decision) of the key events during the relationship between CL&P and Carey.

15 August 2011 - Carey begins to accept introductions from CL&P.

20 September 2011 - Carey conducted a World Check (a risk intelligence tool which allows subscribers to conduct background checks on businesses and individuals) on a Zoe Adams and a Mark Lloyd. Ms Adams and Mr Lloyd were two of the people at CL&P Carey initially had contact with. This check did not reveal any issues.

27 September 2011 - Carey asked CL&P to complete a non-regulated introducer

profile. 29 September 2011 - The non-regulated introducer profile was completed by

CL&P.

It was completed and signed by Terence Wright.

9 December 2011- Carey had a conference call with representatives of CL&P. During that call the issue was raised of consumers being offered cash incentives by CL&P to transfer or switch to a SIPP and make investments. The note of the call included the following:

"[Carey staff member] *also raised a concern that a potential member had asked when they would receive their money from their Store First Investment,* [CL&P

representatives] *confirmed that no clients or connected parties referred by CL&P receive any form of inducement for either establishing the SIPP or making the Store First Investment and that CL&P policy does not include offering inducements.* [Carey staff member] *emphasised that it is completely against all rules that clients or connected parties receive any form of inducement for making particular investments*."

13 March 2012 - Carey's Head of Service and Operation, said in an email to CL&P:

"On another matter, we need our Terms of Business for Non Regulated introducers in place between our two companies. So that our records are all straight from a Compliance aspect I attach the Terms of Business and have entered a commencement date of 15 August 2011 which is the date of your first case with us and would be grateful if you could agree and complete the terms and return."

The agreement was signed by CL&P on 20 March 2012. It was signed by Ms

Adams. 23 March 2012 - Carey's compliance support said in an email to

CL&P:

"*To comply with our in house compliance procedures could you please supply the following information relating to CLP Brokers:*

A copy of the latest set of accounts

A certified copy passport for each of the main directors/principals/partners of the company"

29 March 2012 - a Team Leader at Carey sent an email to Ms Hallett, Carey's Chief Executive, with the subject – "*03-29-2012 - Storefirst Investment Query re Cash Back* [reference removed]". That email forwarded an email sent by the Team Leader to a consumer, which included the following:

"*you mentioned in our conversation a cash back amount you are expecting in the sum of £1,800 from CL&P following completion of the Storefirst investment*"

And the text addressed to Ms Hallett by the Team Leader said "*this is the second member this week to ask when are they getting their money*".

3 April 2012 - Carey's compliance support followed up on its 23 March 2012 email:

"*It is now becoming urgent that we receive the outstanding documentation. You very kindly passed this on to your colleague and I would be very grateful if we could receive the documentation as a matter of urgency Thank you in anticipation of your assistance*."

When asked, Carey said it has no record of receiving the information from CL&P.

15 May 2012 - Carey conducted a World Check on Terence Wright. The report highlighted that he appeared on the FSA list of unauthorised firms and individuals.

25 May 2012 - Carey terminated its agreement with CL&P. Carey's Head of Service and Operation told CL&P of Carey's decision in an email to CL&P of that date:

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

We have advised this client that we will not proceed with this case.

In light of this, it is with regret that I have to notify you that we are terminating our Introducer Agreement with you, with immediate effect, and can no longer accept business from you."

In reply to this email CL&P asked, *"Regarding business which you have already accepted from us, will you still be processing this as the client's SIPPs have already been established?"*

28 May 2012 - Carey's Ms Hallett sent the following reply to CL&P:

"*We will process them where we have already established the schemes, we will be writing to all clients informing them if they have received any monies then they must declare this to HMRC and their fund would also be vulnerable to a tax charge as well.*

HMRC have already asked a number of SIPP providers for lists of clients who are investing in alternatives, they will I am sure be doing some random checks and will charge people for unauthorised transactions if they have received cash sums for transferring their pension and making investments.

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

Submissions made by Mr H

We asked Mr H for some further detail of his recollections. We asked the following questions, and received the replies quoted in italics:

- Were you interested in changing your pension at the time of being contacted by CL&P? Why? What attracted you to CL&P? What attracted you to the Store Pod investment?

  "I had no interest in moving my pension at all and never really thought about it. I was then cold called by CL&P who offered me a cash incentive to move my pension away into something that was guaranteed to bring me back great returns (I can't remember the percentage). I asked if I would ever suffer a loss but they reassured me that I wouldn't as the investment was guaranteed to bring me such great returns I wouldn't notice the fee for the investment.."

- What role did you think CL&P had in this transaction?

  "I thought they were acting on behalf of Careys."

- Did CL&P recommend any products to you? Can you recall what it said to you?

  "I remember them talking about Australian farm land but not about the store pods. They showed me diagrams of where my plots would be."

- What was your understanding of the "incentive" payment CL&P was offering? What did you think of this?

  "I thought it was because I transferred across to Careys so thought of it as a 'welcome bonus '."

- If you had been aware that this "incentive" might have tax consequences, what would you have done?

"They didn't say anything like this to me and I would never of thought about tax consequences as I thought the incentive was like a welcome bonus/because I'd moved my money across.."

- If Carey had told you that Mr Terence Wright, a director of CL&P, was the subject of an FSA alert, what would you have done?

  "I would have never gone through with the transfer."

- Carey ended its relationship with CL&P in May 2012. If you had been made aware of this what would you have done?

  "I would have stopped it all because it would make me feel worried why they have terminated the contract."

- What is your understanding of how the Store First investment works?

  "Nothing was explained to me and all I knew was that I had invested my money into it and it would guarantee me high returns."

- Did you understand the risks associated with a high risk, speculative investment? What are they in your own words?

  "If I thought it was high risk I would never had invested it (sic) *High risk was never mentioned I was led to believe that the investments were a win-win and guaranteed to generate high returns."*

- What was your understanding of the risks associated with the Store First investment? Please explain your answer fully.

  "I thought there were little or no risks because of the guaranteed returns and they kept reiterating the fact that I would be making a lot of money.."

- What did you think Carey's role was at the time?

  "I thought CL&P and Careys were a part of the same company and they were looking after my investment."

  Your SIPP was set up and your investments made shortly after with the Store First investment completed on 28 August 2012 and the GAS Verdant investment completed on 11 October 2012. Were you aware that you were still free to choose whether or not to invest in Store First after the SIPP had been set up?

  "No"

- 24 July 2012, you signed Members Declarations & Indemnity for each investment (the indemnities) which included the following statement, *"I am fully aware that this investment is an Alternative Investment and as such is High Risk and / or Speculative"*. Did you read the indemnity before signing it? What does this indemnity mean to you in your own words?

"I don't remember reading the statement. I remember being told to just sign all these forms and send them back to them and they reassured me they'd done everything else for me. I don't understand what the statement means."

Submissions made by Carey

The submissions made by Carey in this complaint are essentially the same as those summarised in the published decision. That is with the further submission in Mr H's case that there was no reason for Carey not to accept the investment in GAS Verdant – and it undertook due diligence on that investment.

The summary in the published decision also includes general submissions about Carey's relationship with CL&P. So I will rely here on the summary given in the published decision under "*Carey's submissions*" rather than repeat the detail.

The investigator's view

- The FCA's Principles for Businesses and the regulatory publications which remind SIPP operators of their obligations and set out how they might achieve the outcomes envisaged by the Principles were relevant considerations here.

- Carey carried out significant due diligence, but it took a piecemeal approach, and in the meantime accepted business from CL&P. Had it carried out all its due diligence at the outset, it ought to have concluded it should not accept business from CL&P at all.

- Carey should have conducted background checks on the directors of CL&P at the outset, rather than on two members of CL&P's staff. Had Carey checked the directors at the outset it would have discovered that Terence Wright was subject to a warning on the FSA's website.

- Carey's concerns were such that it actually stopped doing business with CL&P once it became aware of the warnings and incentives issue. Had it completed the relevant checks before accepting business from CL&P it ought to have concluded that it shouldn't enter into a relationship with it.

- It is not clear why Carey did not ask for accounts and identification documents at the outset, but only did this after the relationship had been ongoing for a number of months. The fact that CL&P failed to provide this information, despite reminders, was cause for concern. Had Carey asked at the outset and CL&P had failed to provide them, it should not have entered into a relationship with CL&P.

- Carey accepted Mr H's referral on 21 February 2012 but it wasn't until 13 March 2012 that Carey asked CL&P to complete a non-regulator introducer agreement. So Carey accepted an introduction from CL&P at a time when it didn't fully understand the service CL&P was providing.

- Carey was concerned CL&P was offering 'cash back' incentives to consumers in December 2011. But it accepted Mr H's referral in February 2012. Carey had been aware that incentives were being offered by CL&P

before it passed Mr H's money for investment. This ought to have raised serious questions about the conduct of CL&P and the quality of the business it was bringing about. If CL&P was offering consumer's incentives that called into question its integrity.

- Carey put some reliance on the indemnity signed by Mr H. But it should not have accepted his application at all, so should not have required him to sign any documents. And asking Mr H to sign the indemnity did not mean it was fair and reasonable to proceed with Mr H's investment instructions.

Carey's response to the investigator's view

- In assessing the complaint, we must take into account the overarching context of the relationship that Carey has with its customers, including Mr H, being one of a self- invested personal pension scheme in which Carey acts on a strictly execution only/non-advised basis and is member-directed throughout. Carey is not permitted to, and does not, provide advice or otherwise comment on the suitability of investments or any other aspect of a customer's SIPP. Carey expressly states that all customers should seek independent financial advice from an adviser who is regulated by the Financial Conduct Authority.

- The fundamental consideration that underpins the view is the contention that had Carey identified that Mr Terence Wright was on the FSA's warning list and informed Mr H of this, then it should not have accepted business from CL&P, or Mr H would not have proceeded with the investment.

- There is a material difference between a warning detailing that you should not deal with a particular individual and a notice informing you that an individual is not a regulated individual and that the ombudsman service and FSCS would not be available to you if you chose to deal with such individual. The wording in the FCA's notice published on 15 October 2010, which was available to Carey at the time it undertook its due diligence on CL&P, does not include any such warning stating that Terence (Terry) Wright is an individual to avoid or be wary of; the Notice amounts simply to a notification that Mr Wright is not authorised to carry on regulated activities, a fact of which Carey was well aware and upon which basis it accepted referrals from CL&P. Carey reasonably considered at all times that CL&P was an unregulated introducer which was not providing advice.

- There is nothing in the notice published on 15 October 2010 to indicate that Terence (Terry) Wright is an individual to avoid as such, it is not fair or reasonable to state that on the basis of a notice that simply informs that Terence (Terry) Wright is not regulated by the FCA, that Carey should not have accepted this business.

- The fact that the FCA updated their notice in 2013 to a clear warning including an express comment that Mr Wright was an individual to avoid, a warning that would have put Carey on notice to stop accepting business from Mr Wright, is irrelevant in this case because Carey had already severed its Terms of Business some 18 months before the warning in 2013 regarding Mr Wright was published.

- The fact that the FSA later made express comment as to Mr Wright's

conduct, but did not make any comment of a similar nature in the earlier wording plainly indicates that at the time that Carey accepted business from CL&P, the FSA did not believe Mr Wright to have been providing financial services or products without authorisation at that time, nor consider it necessary to express any concerns in this regard.

- If the FSA did not consider there to be any cause for concern at the relevant time and there was no way through reasonable due diligence checks for Carey to establish any cause for concern, then plainly it is not fair or reasonable to have expected Carey to have rejected business from CL&P on this basis.

- COBS 11.2.19R, which deals with execution only business and was in force at the relevant time, stated as follows:

  "Whenever there is a specific instruction from the client, the firm must execute the order following the specific instruction.

  A firm satisfies its obligation under this section to take all reasonable steps to obtain the best possible result for a client to the extent that it executes an order, or a specific aspect of an order, following specific instructions from the client relating to the order or the specific aspect of the order."

  The significance of this rule to an execution only business, such as Carey, cannot be overstated. Carey would have been in breach of COBS if it had not executed Mr H's specific instructions to make the investment.

- The relevant considerations quoted by the investigator include announcements made by the FSA/FCA after Mr H transferred his pension and made the investments. It does not agree that the FCA's expectations did not change over time. It is its opinion that they *have* changed over time. The complaint should not be considered with the benefit of hindsight or in the context of guidance or warnings published after the event. In any event, the FCA/FSA publications are guidance only and do not set out steps that Carey has to take. There is no specific regulation or legal basis to find Carey liable.

- The investigator did not set out what specific regulation or legal basis he had applied to say that Carey was liable. The investigator should set out duty of care Carey owed Mr H.

- Mr H received an 'inducement payment'. The impact of this has not been taken fully into account. Neither has Mr H's motivation and financial position at the time. He also signed a declaration setting out he had not received any such payment. Carey considers this could be criminal conduct.

- The investigator has not explained why he considers Mr H is not responsible for any of the losses he has suffered. Carey is not the sole cause (if any) of Mr H's losses. Mr H did not disclose the inducement payment. If Carey had been aware of the inducement payment then it would not have accepted the investment. Given the likely motivation and inducement payment, Mr H would have likely suffered the losses in any event. By the time of SIPP application, Mr H had already decided he wished to invest in Store First and GAS Verdant. If Carey had refused his

application then Mr H would have made the same investment via a different SIPP provider.

- Has the ombudsman service considered holding an oral hearing and if not, why?

- It is not reasonable to suggest that the individuals who signed the non- regulated introducer agreement has any bearing on whether Carey should have accepted introductions from CL&P.
- Carey carried out due diligence on Store First and GAS Verdant and provided Mr H with Member Declarations which reaffirmed his investment instructions and provided him with risk warnings about his chosen investment to enable him to make an informed decision on whether to proceed. It was Mr H's decision to proceed on an execution only basis and it made this clear to him. Mr H confirmed that he had read and understood all the documentation he had been given and this should be taken into account.

- There was no reason for Carey to have refused to accept business from CL&P.
- The £500 proposed for the upset caused has not been justified.

After the published decision was issued, Carey was asked to take it into consideration, as an important representative decision, in accordance with the relevant Financial Conduct Authority (FCA) DISP Rules and Guidance (particularly DISP 1.4.1, 1.4.2 and 1.3.2A), which should be taken into account when assessing other similar complaints.

On this basis, Carey was asked to review outstanding complaints involving CL&P and Store First – including Mr H's - and if it was not prepared to make a settlement offer taking account of the detailed reasons set out in the published decision, to explain why it was distinguishing it from the published decision. Carey declined to carry out this review at this time. Mr H's complaint has therefore been passed to me for review and I'm satisfied that there is no need to wait any further before progressing this complaint.

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.

oral hearing

Options has asked if we have considered holding an oral hearing. Our rules allow for the possibility of an oral hearing (at DISP 3.5.5R):

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.

Carey hasn't requested a hearing in this complaint as such, but I'm aware it has suggested there should be a hearing because of the significance of the issues and to allow it to better understand the investigators reasoning (in other cases). I've therefore thought about this carefully and in the specific circumstances of this complaint I'm satisfied I can fairly determine the matter without a hearing. In particular, I note:

- The Financial Ombudsman Service was set up as an informal dispute resolution forum and this complaint falls squarely within the jurisdiction of the ombudsman service. While I accept that the complaint is significant to both parties that is very often the case and that point alone cannot be the test for whether or not an oral hearing needs to be convened in order to fairly determine the case. There is nothing in the particular circumstances of this case that has persuaded me that it cannot be fairly determined without a hearing.
- Carey clearly believes the ombudsman service has misunderstood the applicable law and regulation and it has set out its position clearly in writing.

- Both parties have been given ample opportunity to make representations and set out their positions.

- The Court of Appeal has adopted a very flexible approach to what's fair in this context (*R on the application of Heather Moor & Edgecomb Ltd v Financial Ombudsman Service [2008] EWCA Civ 642*).
- After carefully taking account of all the available evidence, I'm satisfied I can fairly determine Mr H's complaint without convening a hearing.

- In considering what is fair and reasonable in all the circumstances of this complaint, I have taken into account relevant law and regulations; regulators rules, guidance and standards; codes of practice; and where appropriate, what I consider to have been good industry practice at the relevant time. Having done so, I have reached the same view in this complaint as that set out in the published decision.

- In short, although there are some factual differences between this complaint and the one which was subject to the published decision, I am satisfied the outcome detailed in the published decision is the fair and reasonable one to reach in this case, for the reasons set out in the published decision.

- In my view the relevant considerations in this complaint set out in the published decision apply here – so I will refer to the published decision rather than repeat those considerations here.

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

- I am of the view that neither of the judgments say anything about how the Principles apply to an ombudsman's consideration of a complaint. But, to be clear, I do not say this means Adams is not a relevant consideration *at all.* As noted above, I have taken account of both judgments when making this decision on Mr H's case.

- I acknowledge that COBS2.1.1R (*A firm must act honestly, fairly and professionally in accordance with the best interests of its client)* was considered by HHJ Dight in the High Court case. Mr Adams pleaded that

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

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

- I note that there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Mr H's complaint. The breaches were summarised in paragraph 120 of the Court of Appeal judgment. In particular, as HHJ Dight noted, he was not asked to consider the question of due diligence before Options SIPP agreed to accept the store pods investment into its SIPP. The facts of the case were also different.

- I think it is also important to emphasise that I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And, in doing that, I am required to take into account relevant considerations which include: law and regulations; regulator's rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. This is a clear and relevant point of difference between this complaint and the judgments in Adams v Options SIPP. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.
- To be clear, I have proceeded on the understanding Carey was not obliged – and not able – to give advice to Mr H on the suitability of its SIPP or the Store First and GAS Verdant investments for him personally. But I am satisfied Carey's obligations included deciding whether to accept particular investments into its SIPP and/or whether to accept introductions of business from particular businesses. As the published decision sets out, this is consistent with Carey's own understanding of its obligations at the relevant time.

- I acknowledge Carey has applied to the Supreme Court for permission to appeal the Court of Appeal judgment and the outcome of that application is awaited. However, the grounds of appeal are in respect of issues not directly relevant to my determination of this case and therefore it is unnecessary to await either the consideration of the application or, if permission is granted, the Supreme Court judgment. I am satisfied it is appropriate to determine this complaint now.

- Having carefully considered the relevant considerations 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 on CL&P to the sort of standard which was consistent with good industry practice and its regulatory obligations at the

time *and* carried out due diligence on the Store First and Gas Verdant investments which was consistent with good industry practice and its regulatory obligations at the time. And Carey should have used the knowledge it gained from that due diligence to decide whether to accept or reject a referral of business or a particular investment.

- I am also satisfied that, as in the complaint subject to the published decision, the contract between Carey and Mr H does not mean that Carey should not be held responsible for failing to comply with its regulatory obligations to carry out adequate due diligence on CL&P and the Store First and Gas Verdant investments which ultimately led to Mr H losing a significant part of his pension.

- In this complaint, like the complaint subject to the published decision, Carey had obtained information many months before it facilitated Mr H's investment which led it to reject any further referrals from CL&P and had concerns at least about the Store First investment (if not the GAS Verdant investment) before it facilitated Mr H's investment. So in this complaint, like the complaint subject to the published decision, it would not be fair and reasonable to say the contract meant Carey could ignore all red flags and proceed with Mr H's business regardless.

- In my view, like the complaint subject to the published decision, had Carey done what it ought to have done here, and drawn reasonable conclusions from what it knew or ought to have known, it should not have accepted either the application for Mr H's SIPP from CL&P or the Store First and Gas Verdant investments.

Due diligence on CL&P

The published decision sets out what information Carey was privy to – or ought to have been privy to, had it carried out sufficient due diligence on CL&P.

Mr H's application was accepted on 21 February 2012. As the published decision sets out, it is fair and reasonable to say by that time Carey ought to have known that CL&P's director was Mr Terence Wright, and that he was on the FSA's "*Firms and individuals to avoid*" list, which was described on the website as "*a warning list of some unauthorised firms and individuals that we believe you should not deal with*":

Carey's Chief Executive, Ms Hallett, gave evidence to the court during the *Adams v Carey* hearing (at Paragraph 60) which HHJ Dight summarised as follows:

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

The money was sent to Store First in August 2012 and GAS Verdant around October 2012. As the published decision sets out it is fair and reasonable to say by that time Carey knew, or ought to have known:

- That what CL&P had told it in December 2011 about cash incentives not being offered was not correct. So CL&P was acting in a way which was, to use its own words, "*completely against all rules*". And CL&P was acting without integrity as it had not told it the truth when asked about cash incentives.

- Multiple requests had been made for copies of CL&P's accounts, but CL&P was unwilling to provide this information.

So for the same reasons set out in the published decision, it is my finding that if Carey had carried out sufficient due diligence on CL&P or acted on the information it subsequently received in a timely manner, it should not have accepted Mr H's application from CL&P – or, at the very least, not continued to process it.

Investment due diligence

The published decision sets out what information Carey was privy to – or ought to have been privy to, had it carried out sufficient due diligence on Store First.

As the published decision sets out, at the time Mr H's application was accepted Carey knew or ought to have known:

- There were factors in the report Carey obtained on Harley Scott Holdings Ltd (the promoter of Store First) which ought to have been of concern – namely the adverse comments for the previous three years, the CCJ's, and the fact the business had recently changed its name.

- Dylan Harvey (one of three previous names of Harley Scott Holdings Ltd, which at the time had the web address dylanharvey.com) and one of its directors, Toby Whittaker, were the subject of a number of national press reports, online petitions and proposed legal action, as a result of a failed property investment.

- Harley Scott Holdings Ltd had recently been involved in a property investment scheme which had failed. It had also recently changed its name, and had been subject to a number of adverse comments in succession, following audit.
- Store First's marketing material set out high fixed returns, and said these were guaranteed. The material did not contain any type of risk warning, or illustrations of any other returns. No explanation of the guarantees was offered, or the basis of the projected returns – other than Store First's own confidence in its business model and the self-storage marketplace.

- The conclusion of the Enhanced Support Solutions report Carey had obtained was inconsistent with the result of Carey's own company searches. The report also makes no comment on the obvious issues with the marketing material.

- The marketing material showed there was a significant risk that potential investors were being misled.

- Store First appeared to be presenting the investment as one that was assured to provide high and rising returns, was underwritten by guarantees, and offered a high level of liquidity together with a strong

prospect of a capital return - despite the fact that there was no investor protection associated with the investment and that, in Carey's own words, "*there is no apparent established market"* for the investment and *"the investment is potentially illiquid"*

- Store First had no proven track record for investors and so Carey couldn't be certain that the investment operated as claimed.

- Consumers may have been misled or did not properly understand the investment they intended to make.

And, by the time the money was sent to Store First, as the published decision sets out, Carey knew, or ought to have known:

- Store First was paying commission of 12% to CL&P. Payment of such a high level of commission to an unregulated business was very serious cause for concern, given how the investment was being marketed. How Store First was funding such levels of commission alongside guaranteed income payments and guaranteed buy backs called the nature of the Store First investment into serious question.

- There were issues with Store First which were of sufficient concern for it to suspend acceptance of the investment.

On the latter point, Carey suspended acceptance of new investments in Store First in August 2012. It has not confirmed the date at which this suspension was placed. But it has provided details of an internal meeting, which took place on 15 August 2012, at which concerns about Store First were discussed. And it has provided a copy of an internal email dated 17 August 2012 which says new investments in Store First had been suspended. So it seems likely the decision to suspend new investments in Store First was taken during or shortly after the 15 August 2012 meeting. Mr H's investment therefore appears to post- date that decision.

It therefore seems clear from the available evidence that by the date on which Carey sent cash from Mr H's SIPP to Store First, Carey had the concerns that led to the suspension of the acceptance of new investments in Store First and had taken the step of suspending such investments. Carey has not said why it allowed Mr H's investment to proceed. Even ignoring that, as set out in the published decision Carey had concerns that related to, "*Rental Income Process/Delays*", "*Sale Process/Delays*", a tax investigation and that *"the marketing material provided for …. a guaranteed rental income"* but "*only a small proportion of Store First investors were receiving the rental income as expected".*

As in the complaint subject to the published decision, I think all of the points listed above should have been considered alongside the fact the investment was being sold by an unregulated business, which was clearly targeting pension investors. I think it is fair and reasonable to find that Carey ought to have concluded there was an obvious risk of consumer detriment here.

So, given the circumstances at the time of Mr H's application, I think the fair and reasonable conclusion, based on what Carey knew or ought to have known at the time, is that Carey should not have accepted Mr H's application to invest in Store First. In my opinion, it ought to have concluded that it would not be consistent with its regulatory obligations, or best practice, to do so.

As to Gas Verdant, this was also an unregulated, esoteric, high risk investment. The

'Verdant Australian Farmland' investment took the form of a 'land purchase contract' which involved a company based in Cyprus (GAS Global Agricultural Services Ltd) leasing plots of agricultural land in Australia to investors. Crops were to be planted on the plots, and the objective was to provide an income to investors through the sale of those crops and capital growth through the sale of the plot of land after an eight year period.
This investment would now appear to have failed, with Mr H's investment being valued at zero.

Carey has not said what due diligence it carried on Gas Verdant. Be that as it may, by the time of that investment Carey should have been aware, as dscussed, that it should not have accepted the application from Mr H and so the Gas Verdant investment should never have taken place. As well as that, and the fact that the Store First investment was suspect, it should have given Carey additional cause for concerns that most of the rest of Mr H's pension funds were being invested in another unregulated investment where total loss was possible.

***Was it fair and reasonable in all the circumstances for Carey to proceed with Mr* H's instructions?**

My view on this point, in relation to this complaint, is largely the same as the view set out in the published decision. The key points here are:

- It was not fair and reasonable for Carey to have accepted Mr H's application from CL&P in the first place. So, Mr H'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, whether those investments were Store First or Gas Verdant.

- The Principles exist to ensure regulated firms treat their clients fairly. I consider there is a significant imbalance of knowledge between the parties which creates unfairness in the circumstances of this case. At the time of receiving Mr H's application and executing his investment instructions, Carey knew things that Mr H did not.

- Carey was required by its regulatory obligations to ensure that it treated its customers fairly. In the circumstances, I am satisfied that this would have required Carey to either have stopped Mr H from proceeding any further with the Store First and Gas Verdant investments, or as a minimum, to have explained the situation to Mr H as soon as possible and let him have the opportunity of making an informed decision whether or not to proceed.
- If it had done the latter, I am satisfied that Mr H would not have proceeded with the investment in Store First and Gas Verdant. And he would therefore not have lost his entire pension fund.

- Mr H has told us that had he been made aware that Carey had ended its relationship with CL&P, he would have become suspicious and asked why. In my view, it is unlikely this would have led to Mr H having confidence to continue dealing with CL&P.

- Mr H has told us he was told by CL&P that he was *"guaranteed"* returns. So, when he signed the indemnity, I am not persuaded that he did so with a full understanding of what high risk meant. Instead he was assured by what he had been told by CL&P and thought that the returns

were *"guaranteed*".

- I do not think the cash incentive was a factor of significant influence. Rather it seems it was the prospect of high guaranteed returns which was the main motivating factor for Mr H.

Is it fair to ask Carey to compensate Mr H?

My view on this point, in relation to this complaint, is also largely the same as the view set out in the published decision. The key points here are:

- I do not consider the fact that Mr H signed the indemnity means that he shouldn't be compensated if it is fair to do so.

- Had Carey acted in accordance with its regulatory obligations and best practice, it should not have accepted Mr H's application to open a SIPP introduced from CL&P. That should have been the end of the matter – it should have told Mr H that it could not accept the business. So if that had happened, the arrangement for Mr H would not have come about in the first place, and the loss he suffered could have been avoided.

- Had Carey explained to Mr H why it would not accept the application from CL&P or was terminating the transaction, I find it very unlikely that Mr H would have tried to find another SIPP operator to accept the business.

- In any event, I don't think it's fair and reasonable to say that Carey should not compensate Mr H for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found it did. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted the application from CL&P, or would have terminated the transaction before completion.

- I'm satisfied that it would not be fair to say Mr H's actions mean he should bear the loss arising as a result of Carey's failings. I acknowledge Mr H was warned of the high-risk nature of Store First and declared he understood that warning. But Carey failed to act on, nor did it share, significant warning signs with Mr H so that he could make an informed decision about whether to proceed with the investment. And, in these circumstances, I am satisfied that Carey should not have asked him to sign the indemnity at all.

With all this in mind, I'm of the opinion that it is fair and reasonable in all the circumstances of this case to find that Carey is unable to rely on the indemnity that Mr H signed in order to avoid liability for the regulatory failings it has made in this case. So I am satisfied that it is fair and reasonable to conclude that Carey should compensate Mr H for the loss he has suffered to his pension.

Bearing in mind and that I have not received any further submissions since I issued my provisional decision, having reviewed the complaint, I would confirm that my decision remains that the complaint should be upheld.

Putting things right

I am satisfied that Carey's failure to comply with its regulatory obligations at the relevant time led to Mr H switching his existing pensions to a SIPP when he would not have otherwise have done so. And that has led to Mr H suffering a significant loss to his pension. My aim is therefore to return Mr H to the pension position he would now be in but for Carey's failings. When considering this I have taken into account the Court of Appeal's supplementary judgement ([2021] EWCA Civ 1188), insofar as that judgement deals with restitution/compensation.

In light of my above findings, Carey should calculate fair compensation by comparing the current position to the position Mr H would be in if he had not switched from his existing pensions. In summary, Carey should:

1. Calculate the loss Mr H has suffered as a result of making the pension switches.

2. Take ownership of the Store First and GAS Verdant investments if possible.

3. Pay compensation for the loss into Mr H's pension. If that is not possible pay compensation for the loss to Mr H direct. In either case the payment should take into account necessary adjustments set out below.

4. Pay £500 for the trouble and upset caused.

I'll explain how Carey should carry out the calculation set out above in further detail below:

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

To do this, Carey should work out the likely value of Mr H's pensions as at the date of this decision, had he left them where they were instead of transferring to the SIPP.

Carey should ask Mr H's former pension providers to calculate the current notional transfer values had he not transferred his pensions. If there are any difficulties in obtaining a notional valuation then the FTSE UK Private Investors Income Total Return index should be used to calculate the value. That is likely to be a reasonable proxy for the type of return that could have been achieved if suitable funds had been chosen.

The notional transfer values should be compared to the transfer value of the SIPP at the date of this decision and this will show the loss Mr H has suffered. The Store First and GAS Verdant investments should be assumed to have no value. Account should however be taken of the cash back payment paid out to Mr H. This can be taken into account in the calculation on the basis of it having been paid at the outset i.e. the same approach can be taken as was taken by the Court of Appeal in its supplementary judgement.

2. Take ownership of the Store First investment

I note that the Court of Appeal attached a value to the Store First investment. However, here, I am able to ask Carey to take ownership of the investment. And I understand Carey has been able to take ownership of the Store First investment, for a nil consideration, in other cases. So it should do that here, if possible. I am satisfied that is

a fair approach in the circumstances of this case, as it may allow the SIPP to close (subject to the position with the Gas Verdant investment) and gives Carey the option of retaining the investment or realising its current market value. If the Gas Verdant investment still exists then Carey should also take ownership of it.

If Carey is unable to take ownership of the Store First and Gas Verdant investments they should remain in the SIPP. I think that is fair because I think it is unlikely they will have any significant realisable value in the future. I understand Mr H has the option of returning his Store First investment to the freeholder for nil consideration. That may enable him (subject to the position with the Gas Verdant investment) to close his SIPP, if Carey does not take ownership of the Store First investment.

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

He would only be liable for any SIPP fees if the Gas Verdant can be sold or no longer exists. If Carey does not take ownership of the Gas Verdant investment and it still exists and cannot be sold, then Carey should waive any SIPP fees until it can be sold or ceases to exist.

3. Pay compensation to Mr H for loss he has suffered calculated in (1).

Since the loss Mr H has suffered is within his pension it is right that I try to restore the value of his pension provision if that is possible. So if possible the compensation for the loss should be paid into the pension. The compensation shouldn't be paid into the pension if it would conflict with any existing protection or allowance. Payment into the pension should allow for the effect of charges and any available tax relief. This may mean the compensation should be increased to cover the charges and reduced to notionally allow for the income tax relief Mr H could claim. The notional allowance should be calculated using Mr H's marginal rate of tax.

On the other hand, Mr H may not be able to pay the compensation into a pension. If so compensation for the loss should be paid to Mr H direct. But had it been possible to pay the compensation into the pension, it would have provided a taxable income. Therefore, the compensation for the loss paid to Mr H should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mr H's marginal rate of tax in retirement. For example, if Mr H is likely to be a basic rate taxpayer in retirement, the notional allowance would equate to a reduction in the total amount equivalent to the current basic rate of tax. However, if Mr H would have been able to take a tax free lump sum, the notional allowance should be applied to 75% of the total amount.

4. Pay £500 for the trouble and upset caused.

Mr H has been caused some distress and inconvenience by the loss of his pension benefits. This is money Mr H cannot afford to lose and its loss has undoubtedly caused him upset. I note the Court of Appeal did not find compensation should be paid for non financial loss. But my role here is to determine what, in my view, is fair compensation in the particular circumstances of this case. And I consider that a payment of £500 is fair to compensate for the upset Mr H has suffered.

interest

The compensation must be paid as set out above within 28 days of the date Carey receives notification of his 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 is not paid within 28 days.

My final decision

For the reasons given, my decision is that I uphold Mr H's complaint. Options UK Personal Pensions LLP should calculate and pay compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 18 February 2022.

David Bird
Ombudsman