DRN-3991722

Financial Ombudsman Service

The complaint

Miss C 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 allowed her to invest in its Self-Invested Personal Pension ('SIPP') and that it failed to carry out sufficient due diligence on the investments made within it. She says it should compensate her for her loss.

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

What happened

I've outlined the key parties involved in Miss C'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.

SNL Properties Ltd ('SNL')

As I understand it, SNL was an unregulated introducer.

Sustainable Agroenergy plc ('SA')

SA offered investments based on trees grown in Cambodia. The investments involved leasing plots of land from SA, along with the trees planted on them, and renting them out to a Cambodian company connected to SA and receiving a return either as annual income payments or additional land plots.

In November 2011, the Serious Fraud Office ('SFO') opened a criminal investigation into SA. In February 2012, it obtained company and freezing orders against SA. And, in March 2012, the company entered receivership.

The SFO investigation focused on the sale and promotion of SA's products, including the ones Miss C invested in. The SFO found that investors had been deliberately misled about the nature of the investment and that a person responsible for sales had obtained commission rates of 65% of the amounts invested. It also noted that SA was effectively insolvent by mid-2011. The SFO later brought charges and three men were found guilty and given prison sentences in or around 2014.

The transaction

On 24 August 2011, Miss C signed a SIPP application form to transfer her existing personal pension schemes into one with Carey and to invest the funds in Agroforestry and Capital Builder leases offered by SA, which was witnessed by SNL. Miss C's application didn't provide any financial adviser details in the section for that or that any fees would be paid to an adviser.

On 9 September 2011, Carey thanked SNL for Miss C's application and asked it to get her to fully complete a letter giving Carey permission to provide SNL with any information that SNL requests in respect of her SIPP and its purchase of investments.

By 16 September 2011, just over £22,000 was transferred into Miss C's SIPP with Carey.

On 6 October 2011, Carey received Miss C's signed Alternative Investment Member Declaration and Indemnity forms which said, amongst other things, that she was fully aware the investments are high risk and/or speculative, that Carey hadn't provided any advice, it was acting on an execution only basis and that Miss C had taken appropriate investment and financial advice and wished to proceed. It also said that Miss C indemnified Carey against any and all liability arising from the investments.

On 12 October 2011, Carey sent SA the completed lease and rental agreements for the investments, signed and dated by Miss C on 6 September 2011. These said that Miss C would purchase the lease of 2 plots for £6,250 in Agroforestry and 2 plots for £12,000 in Capital Builder. These said that the plots were held in trust for SA and that after the plots had been paid for, these would be held in trust for the benefit of Miss C. The trustee would issue a Certificate of Leasehold which would evidence Miss C's beneficial ownership of the land. The terms said that the plots could be sold back to SA for the original purchase price during years five to ten of the lease. And that the lease could be offered for sale to a third party at any time. According to agreements, from year three onwards Miss C was to receive 50% of the gross value of the extracted reserves the Cambodian company would generate from the trees on her plots. And the income from Miss C's Capital Builder plots was to be reinvested during the first ten years to purchase further plots at a discount.

The same day, just over £18,500 of Miss C's SIPP monies was invested into SA.

As mentioned above, in November 2011, the SFO opened a criminal investigation into SA. In February 2012 a court froze SA's assets and, in March 2012, SA entered receivership. I'm also aware that, in April 2012, the administrator for SA wrote to investors saying SA had no title to the land being invested in and no way its business model could work, and most of the land was unsuitable for jatropha trees. The administrator said investors had been promised returns of 5% in the first year, 12% in the second year, and 20% in the third and subsequent years.

<u>Miss C's complaint</u>

Miss C first complained, via her representatives, to Carey in December 2016 that it shouldn't have allowed her to invest in her SIPP and that it didn't do enough due diligence on SNL or the SA investments which were unregulated and high-risk.

Carey replied in February 2017. It said, in summary, that:

- It was aware SNL wasn't regulated by the then Financial Services Authority ('FSA') (now the Financial Conduct Authority ('FCA'), which I'll refer to throughout for ease). Carey isn't limited to dealing only with regulated brokers and it didn't inappropriately deal with SNL. It followed its strict processes and adequate risk management systems, which were in place for dealing with unregulated introducers.

- SNL acted only as the introducer, which was made clear in all correspondence to Miss C. Carey has no record of Miss C receiving regulated advice, so it classified her as a direct client. Miss C's statements reflected that she didn't have a recorded financial adviser. And it can't comment on any interactions Miss C had with SNL, including discussions or information it might have provided her with.
- It was an execution-only SIPP provider and this was clearly explained to Miss C in documentation, including the application form, member declarations, terms and conditions and key features, which she signed confirming she'd understood this and that she was a direct client.
- At the time of Miss C's application in September 2011 it had no reason to believe it shouldn't accept introductions from SNL. It entered into an introducer agreement with SNL on 18 September 2011, setting out the terms of business ('TOB') and conduct expected of it. Carey provided training and guidance to SNL, carried out checks on it and introducer profile was completed.
- The FCA's Thematic Reviews were guidance as to best practice only, these weren't prescriptive, exhaustive or rule making.
- It ensured that the SA investment was capable of being held in the SIPP in accordance with HMRC regulations. And to do that it reviewed legal paperwork, product information, did company background checks and obtained an independent report from an external compliance entity.
- It provided numerous risk warnings about the investment being high risk and/or speculative, recommended Miss C seek financial advice and took steps to ensure she understood her instructions were on an execution only basis.
- It was clear from Miss C's signed declarations what type of investment she was entering into. These refer to the "*Beneficial interest in leasehold plot of land in Cambodia growing trees for production of Green Oil*". So Miss C was fully aware she was investing in plots of land.
- Carey didn't provide advice and wasn't permitted to do so. It didn't consider the appropriateness/suitability of the switch and underlying investment for Miss C. It was Miss C's decision to use SNL and to instruct the switch and investments. Miss C had the opportunity to seek regulated financial advice if she'd wanted to, but she chose not to. And Carey isn't permitted to comment on the suitability of the introducer a customer has chosen to use either.
- Miss C reconfirmed the investment instructions in her SIPP application in her signed investment member declarations, which were blank in respect of any adviser, and that it was acting on her specific instructions. And that she also confirmed she'd taken (or had the opportunity to take) her own financial advice on the suitability of the switch and underlying investment.
- Carey acted on Miss C's written introductions and in line with its terms and conditions. The current status, value and market conditions in respect of the SA investment were outside of its control.
- While Miss C has said that she didn't understand the documents she signed, which she's also said were provided to her by SNL and pre-populated, it was reasonable for Carey to accept her declarations confirming she had understood at face value. And there was no reason for it to look behind her signature.

In April 2017, unhappy with this response, Miss C referred her complaint to our Service. And, during the course of her complaint, she's said, amongst other things, that:

- The forms were pre-populated for her in respect of the investment choice and amount, for example.
- She was introduced to the SA investment by someone named Mr E, who she understood to be an agent for SA. He advised her to switch her existing schemes to invest in SA, which would provide high returns. She believed in Mr E, as he came

with highly recommended, seemingly by someone who was an acquaintance or friend.

- She wasn't offered any payment or investment.
- The pension monies were those she'd accumulated throughout her working journey and now has no pension to look forward to.
- If Carey had refused her applications then she would not have transferred her existing schemes.

One of our Investigators reviewed Miss C's complaint and said, in summary, that Miss C said that SNL advised her to switch and make the investments. It's unlikely she thought of taking this course of action alone and SNL made arrangements for these things to happen, such that SNL carried out regulated activities when it wasn't permitted to. And Carey ought to have realised this. Our Investigator also said that Carey should've known through due diligence on the SA investment that it wasn't appropriate for a SIPP. And so it shouldn't have accepted Miss C's SIPP application knowing she intended to invest in SA. They said that Miss C has herself confirmed that if Carey had declined this then she would have left her existing pensions in place.

While Miss C accepted our Investigator's findings, Carey responded with further comments and a copy of its TOB with SNL. It said, amongst other things, that:

- In respect of SNL it checked Companies House, obtained photo ID of the shareholder and director, checked World Check and held a meeting in person with them likely at Carey offices, although it couldn't provide a meeting note.
- It accepted business from SNL between September 2011 and September 2012. Miss C was the first of six members introduced to it by SNL. And only one other member introduced by SNL invested in SA.
- It reviewed SA investment marketing material, barrister's opinion and contracts. It verified that the trustee was regulated as it was responsible for ensuring title to land and it obtained third party compliance opinions on status of the investment to be held in a SIPP.

And I'm aware that in submissions on other SIPP due diligence cases with our Service that Carey has also said, amongst other things, that:

- Carey does not (and is not permitted to) provide any advice to clients in relation to the establishment of a SIPP, transfers in or the underlying investments, nor does it comment in any way on the suitability of a SIPP, the transfers in and investments for an individual's circumstances. It did not advise, nor purport to advise the customer. Carey expressly states that all customers should seek independent financial advice.
- Carey acts as the administrator only of a SIPP. When a customer acts on an execution only (i.e. non-advised) basis this is made very clear in communications with them, the documentation issued, and the paperwork he read, signed and agreed to.
- Carey did not suggest or recommend the investments. It is not responsible for the performance or current market value of these. The mere underperformance of an investment does not create a wrong or liability.
- We haven't set out where we have departed from the law, and why we have taken that approach.
- Our Service has failed to apply the settled legal principles of causation and contributory negligence in circumstances where it is clear that a customer was determined to proceed with the investment regardless of whether or not Carey accepted the applications.
- 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 the specific instructions to make the investment.
- Our Service is seeking to impose on Carey a duty of due diligence, in particular a duty to decide whether to accept or reject particular investments and/or referrals of business. However, our construction of the Principles is flawed, it is neither fair nor reasonable to determine the complaint by reference to the regulatory publications mentioned, and Carey was not under the duty of due diligence that we seek to impose.
- As made clear in *Adams*, reports, guidance and correspondence issued after the events at issue cannot be applied to Carey's conduct at the time. In any event, the regulatory publications of the type referred to cannot found a claim for compensation in themselves and do not assist in construction of the Principles.
- 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 the Financial Services and Markets Act 2000 ('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.*"
- It would be neither fair nor reasonable for me to determine the complaint by reference to the FCA publications and to do so would only exacerbate the problem referred to in *R (on the application of Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service* [2017].
- Contrary to COBS our Service seeks to impose on Carey a duty of due diligence that it does not in fact owe. It seeks, in effect, to override COBS careful allocation of duties between different types of firm conducting different types of business, and to impose duties on Carey in addition to those provided for under COBS, by means of a generalised appeal to the Principles.
- If under the Principles Carey really had the obligations of due diligence our Service has set out, and had acted in accordance with them, it would have been required to engage in the activity of advising on investments, and so place itself in contravention of its regulatory permissions. Hence the importance of the contractual documentation governing the arrangements between the parties considered below.
- The relationships are the same as in *Adams* which held that:

- o To identify the extent of the regulatory duties imposed on Carey, "*one has to identify the relevant factual context*" and that "*the key fact… in the context is the agreement into which the parties entered, which defined their roles in the transaction*"
  - o "*there is a very plain inconsistency between the contract which was entered into between it and the claimant and the duties* [under COBS 2.1.1R] *which the claimant now suggests that the defendant owed to him*";
  - o "*there was*… [no] *duty on* [Carey]… *to consider the suitability of appropriateness of a SIPP or the underlying investment. The contract between* [the parties] *makes that clear*"; and
  - o "*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… 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*".

- Our Service has ignored, or placed insufficient weight on, the fundamental fact of the parties' contractual arrangements, and on the clear demarcation of roles and responsibilities thereunder, and consequently to have constructed due diligence obligations for Carey to which it was not in fact subject.
- Our Service only acknowledges our divergence from *Adams* in passing, and the brief justifications for it are misconceived.
- The judge's conclusion in *Adams* is avoided through the finding that, regardless of the relevant contractual arrangements, Carey should have concluded that the investment was inappropriate and refused to accept the application. Again, however, this is to misapprehend the relationship between the Principles and Carey's contractual arrangements. The latter, as set out in *Adams*, reflect the legal basis upon which Carey – like other similar firms – conducted its business: the concept of execution-only services is well known in the financial services context, as is reflected in the case law, one of the reasons clients seek the services of execution-only SIPP providers being that they do not wish to pay the higher charges of advisory pension providers. To seek to use the Principles, notwithstanding this factual context, to impose on Carey the duties of due diligence set out in the decision, is both artificial and illegitimate.
- It is well established that a reasonable person is expected to read their correspondence: *Webster v Cooper & Burnett* [2000]. The indemnity was drafted in plain, simple English. There was no uncertainty as to its meaning.
- Carey's duties extended no further than those owed to the claimant in *Adams* and, accordingly, it is neither reasonable nor fair for Carey to pay compensation.
- In *Adams* the judge held that, in construing Carey's regulatory obligations, regard should be had to the consumer protection objective in FSMA s.5(2)(d) that the general principle that consumers should take responsibility for their decisions. And that those decisions, as between the claimant and the defendant, are set out in the documents which comprise the contract between them.
- The FCA did not disagree with this approach. The Principles reflect the statutory objective. And those statutory objectives include the consumer protection objective: see *Kerrigan v Elevate Credit International Limited*.
- Our Service has failed to have regard to FSMA s.5(2)(d), and to the authority of *Adams* and *Kerrigan* in this respect.

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

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.

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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.

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

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

On 18 May 2020, the High Court handed down its judgment in the case of *Adams v Carey 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 Carey UK Personal Pensions LLP* [2021] EWCA Civ 474. I've taken account of both judgments when making this decision on Miss C'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 Miss C'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 Carey 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 Carey 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 he was seeking to advance a case that was radically different to that found in her 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 Carey 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 Miss C'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 Miss C's complaint, amongst other things, I'm considering whether Carey ought to have identified that the SA investment involved a significant risk of consumer detriment. And, if so, whether it ought to have declined to accept applications to invest in SA before it received Miss C's application.

The facts of Mr Adams' and Miss C's cases are also different. I make that point to highlight that there are factual differences between *Adams v Carey SIPP* and Miss C's case. And I need to construe the duties Carey owed to Miss C 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 Miss C'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 Carey 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 Miss C on the SIPP and/or the underlying investments. Refusing to accept an application isn't the same thing as advising Miss C on the merits of the SIPP and/or the underlying investments.

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 the 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 for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and 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 Miss C'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 Miss C'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 her 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 Miss C. It's accepted Carey wasn't required to give advice to Miss C, 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 Miss C's application.

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

And in determining this complaint, I need to consider whether, in accepting Miss C's application to establish a SIPP and to invest in SA, 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 SNL/the business SNL was introducing and the SA investment *before* deciding to accept Miss C's applications.

Ultimately, what I'll be looking at here is whether Carey took reasonable care, acted with due diligence and treated Miss C 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 Miss C's complaint is whether it was fair and reasonable for Carey to have accepted her SIPP application and SA application in the first place. So, I need to consider whether Carey carried out appropriate due diligence checks on SNL and the SA 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 SNL and/or investing in SA were being put at significant risk of detriment. And, if so, whether Carey should therefore not have accepted Miss C's application for the Carey SIPP and/or SA investment.

The contract between Carey and Miss C

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

My final 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 Miss C or otherwise have ensured the suitability of the SIPP or SA investment for her. I accept that Carey made it clear to Miss C 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 forms Miss C 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 Miss C'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 Miss C on the suitability of the SIPP or SA investment.

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 checks – due diligence – on introducers and investments to make informed decisions about accepting business. This obligation was a continuing one.

As set out above, to comply with the Principles, Carey needed to conduct its business with due skill, care and diligence; organise and control its affairs responsibly and effectively; and pay due regard to the interests of its clients (including Miss C) and treat them fairly. Its obligations and duties in this respect weren't prescriptive and depended on the nature of the circumstances, information and events on an ongoing basis.

So, I think Carey ought to have understood well before the time of Miss C's application that its obligations meant that it had a responsibility to carry out appropriate checks on SNL to ensure the quality of the business it was introducing. And I think Carey also ought to have understood that its obligations meant that it had a responsibility to carry out appropriate due diligence on investments, like the SA holding, before accepting them into its SIPPs.

Carey's due diligence on the SA investment

Carey had a duty to conduct due diligence and give thought to whether an investment itself was acceptable for inclusion in a SIPP. That's consistent with the Principles and the regulators' publications as set out earlier in this decision. It's also consistent with HMRC rules that govern what investments can be held in a SIPP.

Despite saying it wasn't responsible for the quality of the SA investment, Carey told Miss C and our Service that it did a range of due diligence activities on the SA investment. Carey said that it:

- Reviewed SA investment marketing material, barrister's opinion and contracts.

- Verified that the trustee was regulated as it was responsible for ensuring title to land.

- Obtained third party compliance opinions on status of the SA investments to be held in a SIPP, ensuring that these were capable of being held in the SIPP in accordance with HMRC regulations. And to do that it reviewed legal paperwork, product information, did company background checks and obtained an independent report from an external compliance entity.

While such actions might have been good practice, Carey hasn't provided evidence to demonstrate it took these actions, or what conclusions it drew from any information arising from these.

Taking into account the available evidence and the relevant considerations I've described, and what's fair and reasonable in the circumstances of this case my view is that Carey should, at least, have done the following:

- Identified the SA investment as a high-risk, speculative and non-standard investment, so it should have carried out sufficient due diligence.

- Considered whether the SA investment was appropriate for a pension scheme.

- Ensured the investment was genuine and not a scam, or linked to fraudulent activity.

- Independently verified that SA's assets were real and secure, and the investment operated as claimed.

- Ensured the investment could be independently valued, both at point of purchase and subsequently.

- Ensured Miss C's SIPP wouldn't become a vehicle for a high-risk and speculative investment that wasn't a secure asset and could be a scam.

Had Carey carried out adequate due diligence checks it would have been aware of concerns regarding the SA investment which indicated a significant risk of consumer detriment and, in which case, it ought reasonably to have concluded that it should not accept Miss C's application to invest in SA. I say that because, for example:

- SA purported to offer a very high return through oil produced by jatropha trees. There appears to have been no basis for the high projected return. I don't expect Carey to have been able to say the investment would be successful. But a high projected return without any apparent basis should have given Carey cause to question the investment's credibility.

- There was information available which called into question the viability of the proposed business model (particularly in light of the very high projected returns).

- SA had no track record.

- SA's first accounts which had been published on 6 October 2011 – which I note was before the SA investment was made in Miss C's case – were subject to a qualified opinion from the auditors, which means there was some limitation or exception to accounting standards. The auditor said, '…*we have not obtained all the information and explanations that we consider necessary for the purpose of our audit and adequate accounting records have not been kept by* [SA] *as required by the Companies Act 2006*'.

- It's not clear how the lease of a parcel of land in Cambodia could be valued or realised.

- The investment was based overseas and would be subject to the domestic laws and regulations that apply to the ownership of land and matters governing investments. That created additional risk.

- The lease and rental agreements signed for the investment didn't specify the location of the plots to be leased on behalf of Miss C. They said beneficial ownership of the plots would be evidenced by a Certificate of Leasehold and didn't offer any evidence of title held by the lessor.

- SA didn't have title to the land, so if Carey had done the check on title to the asset it ought to have concluded title wouldn't be obtained.

The information that was available to Carey, and which would have come to light had it undertaken adequate checks, ought to have led Carey to the following conclusions:

- SA didn't have title to the land.

- There was a risk the investment might be fraudulent – it wasn't clear how such high returns could be offered.

- The land leases, if they existed, might have been difficult to independently value, both at point of purchase and subsequently. It was also possible that there might be no market for them. So an investor might not have been able to take benefits from their pension, or make changes to it, if they wanted to.

- The investment in SA would allow Carey's clients' SIPPs to become a vehicle for a high-risk and speculative investment that wasn't a secure asset and could have been a scam.

I'm satisfied Carey should've identified a number of the concerns I've mentioned, and ought to have drawn the conclusion I've set out, based on what was known at the time. Carey ought to have identified significant points of concern, which ought to have led it to conclude it should not accept the SA investment. It ought to have identified that there was a high risk of consumer detriment here. And it's the failure of Carey's due diligence that's resulted in Miss C being treated unfairly and unreasonably.

To my mind, Carey didn't meet its regulatory obligations or good industry practice at the relevant time. I think it's fair and reasonable to conclude that Carey didn't act with due skill, care and diligence, and it didn't treat Miss C fairly, by accepting the SA investment in her SIPP.

There's a difference between accepting or rejecting a particular investment for a SIPP and advising on its suitability for the individual investor. I accept that Carey wasn't expected to, nor was it able to, give advice to Miss C on the suitability of the SIPP and/or SA investment for her personally. To be clear, I'm not making a finding that Carey should have assessed the suitability of the SA investment for Miss C. I accept Carey had no obligation to give advice to Miss C or to ensure otherwise the suitability of an investment for her.

So my finding isn't that Carey should have concluded that Miss C wasn't a candidate for high-risk investments. It's that Carey should have concluded the SA investment wasn't acceptable for its SIPPs and it thereby failed to treat Miss C fairly or act with due skill, care and diligence when it accepted the SA investments into her SIPP.

I think it's important I emphasise here that I'm not saying that Carey should necessarily have discovered everything that later became known had it undertaken sufficient due diligence before accepting the SA investment into its SIPP. But I do think that appropriate checks would have revealed some fundamental issues which were, in and of themselves, sufficient basis for Carey to have declined to accept the SA investment in its SIPPs.

Carey's due diligence on SNL

Carey had a duty to conduct due diligence and give thought to whether to accept Miss C's SIPP application from SNL. That's consistent with the Principles and the regulators' publications as set out earlier in this decision.

However, given what I've said about Carey's due diligence on the SA investment and my conclusion that it failed to comply with its regulatory obligations and good industry practice at the relevant time, I don't think it's necessary for me to also consider Carey's due diligence on SNL at this stage. I'm satisfied that Carey wasn't treating Miss C fairly or reasonably when it accepted her application to invest in SA, so I've not gone on to consider the due diligence it may have carried out on SNL and whether this was sufficient to meet its regulatory obligations. And I make no findings about this issue.

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

For the reasons previously given above, I think Carey should have refused to accept Miss C's application to invest in SA. So things shouldn't have got beyond that.

Carey has referred to forms Miss C signed. In my view it's fair and reasonable to say that just having Miss C sign indemnity declarations wasn't an effective way for Carey to meet its regulatory obligations to treat her fairly, given the concerns Carey ought to have had about her introduction.

Carey knew that Miss C had signed forms intended to indemnify it against losses that arose from acting on her instructions. And, in my opinion, relying on such indemnities when Carey knew, or ought to have known, Miss C's dealings were putting her at significant risk wasn't the fair and reasonable thing to do.

Having identified the risks I've mentioned above, it's my view that the fair and reasonable thing to do would have been to refuse to accept Miss C's application.

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

I'm satisfied that Miss C's SIPP shouldn't have been established given it was done so with the intention of investing in SA. And so the opportunity to proceed in reliance on an indemnity shouldn't have arisen at all. And I'm firmly of the view that it wasn't fair and reasonable in all the circumstances for Carey to proceed with Miss C's application.

Carey said in its response to Miss C's complaint that it was acting on an execution only basis and on Miss C's written instructions. And I'm aware that it has said in other cases with our Service that it was obliged to proceed in accordance with COBS 11.2.19R which obliged it to execute investment instructions. It effectively said that once the SIPP had been established, it was required to execute the specific instructions of its client.

On this point I think it's important for me to reiterate that it wasn't fair and reasonable, for Carey to have accepted Miss C's applications in the first place. So in my opinion, Miss C's SIPP shouldn't have been established and the opportunity to execute investment instructions shouldn't have arisen at all.

An 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.'*

And I don't think that Carey's argument on this point is relevant to its obligations under the Principles to decide whether to accept an application to open a SIPP in the first place or to make the SA investment.

Is it fair to ask Carey to pay Miss C compensation in the circumstances?

The involvement of other parties

In this decision I'm considering Miss C's complaint about Carey. However, I accept that other parties were involved in the transactions complained about – including SNL and SA.

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

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

The starting point therefore, is that it would be fair to require Carey to pay Miss C compensation for the loss she's suffered as a result of its failings. And, having carefully considered if there's any reason why it wouldn't be fair to ask Carey to compensate Miss C for her loss, I don't think there is.

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

Having taken everything Carey has said into consideration, I think that it's appropriate and fair in the circumstances for Carey to compensate Miss C to the full extent of the financial losses she's suffered due to Carey's failings. And, having carefully considered everything, I don't think that it would be appropriate or fair in the circumstances to reduce the compensation amount that Carey is liable to pay to Miss C.

To be clear, I'm not making a finding that Carey should have assessed the suitability of the SIPP or the SA holdings for Miss C. I accept that Carey wasn't obligated to give advice to Miss C, or otherwise to ensure the suitability of the pension wrapper or investments for her. Rather, I'm looking at Carey's separate role and responsibilities – and for the reasons I've explained, I think it failed in meeting its responsibilities.

Miss C taking responsibility for her own investment decisions

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

I've considered this carefully and I'm satisfied that it wouldn't be fair or reasonable to say Miss C's actions mean she should bear the loss arising as a result of Carey's failings. In my view, if Carey had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted Miss C's application to invest in SA at all. That should have been the end of the matter – if either of those things had happened, I'm satisfied the arrangement for Miss C wouldn't have come about in the first place, and the loss she's suffered could have been avoided.

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

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

So, overall, I'm satisfied that in the circumstances, for all the reasons given, it's fair and reasonable to say Carey should compensate Miss C for the loss she's suffered. I don't think it would be fair to say in the circumstances that Miss C should suffer the loss because she ultimately instructed the transactions be effected.

<u>Had Carey declined Miss C's application, would the transaction complained about still have been effected elsewhere?</u>

From the correspondence I've seen, I think that Miss C's pension monies were transferred to Carey to make the SA investment. That position seems to be supported by the contents of the SIPP application form, which details the investments she was transferring to make. And by Miss C's testimony that if Carey had refused her applications then she would not have transferred her existing schemes.

Carey might say that if it hadn't permitted the SA investment in its SIPPs, that the transfer and investment would still have been effected with a different SIPP provider. But I don't think it's fair and reasonable to say that Carey shouldn't compensate Miss C for her loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found Carey 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 permitted the SA investment into its SIPPs.

In the circumstances, I'm satisfied it's fair and reasonable to conclude that if Carey had refused to permit the SA investment in its SIPPs, the transactions wouldn't still have gone ahead and Miss C would have retained her monies in her existing schemes.

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

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

I recognise Carey has said that Miss C signed a declaration confirming she was fully aware the investments were high risk and/or speculative and that she wished to proceed. But Miss C was a retail customer. It seems that this was most, if not all, of Miss C's retirement provision given she's said it was the pension monies she'd accumulated throughout her working journey. And Carey says it was aware that Miss C hadn't been given regulated advice on the switch or the underlying investments.

And, in any case, I've also not seen any evidence to show Miss C was paid a cash incentive – Mrs C has said that she didn't receive any such payment. It therefore cannot be said she was "*incentivised*" to enter into the transaction. And, on balance, I remain satisfied that Miss C, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than trying to secure the best pension for herself.

So, in my opinion, this case is very different from that of Mr Adams. And I'm not satisfied that Miss C was determined to move forward with the transactions to take advantage of a cash incentive.

Having carefully considered all of the circumstances, I'm satisfied it's fair and reasonable to conclude that if Carey had refused to permit SA investments in its SIPPs, the transactions this complaint concerns wouldn't still have gone ahead.

Overall, I do think it's fair and reasonable to direct Carey to pay Miss C compensation in the circumstances. While I accept that other parties might have some responsibility for initiating the course of action that's led to Miss C's loss, I consider that Carey failed to comply with its own obligations and didn't put a stop to the transactions proceeding by declining to accept Miss C's applications when it had the opportunity to do so. And I'm satisfied that Miss C wouldn't have established the Carey SIPP, transferred monies in from her existing schemes or invested in SA if it hadn't been for Carey's failings.

In making these findings, I've taken into account the potential contribution made by other parties to the losses suffered by Miss C. But, as mentioned above, in considering what fair compensation looks like in this case, I think it's reasonable to make an award against Carey that requires it to compensate Miss C for the full measure of her loss. Carey accepted the SA investments into its SIPPs and, but for Carey's failings, I'm satisfied that Miss C's pension monies wouldn't have been transferred to it to invest in SA.

As such, I'm not asking Carey to account for loss that goes beyond the consequences of its failings. I'm 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. However, that fact shouldn't impact on Miss C's right to fair compensation from Carey for the full amount of her loss. The key point here is that but for Carey's failings, Miss C wouldn't have suffered the loss she's suffered. As such, I'm of the opinion that it's appropriate and fair in the circumstances for Carey to compensate Miss C to the full extent of the financial losses she's suffered due to its failings, and notwithstanding any failings by other firms involved in the transactions.

In conclusion

Taking all of the above into consideration, I think that in the circumstances of this case it's fair and reasonable for me to conclude that Carey should have decided not to accept the SA investment to be held in its SIPPs before it had received Miss C's application from SNL. I conclude that if Carey hadn't accepted the SA investment to be held in its SIPPs, Miss C wouldn't have established a Carey SIPP, transferred her existing scheme monies into it and invested in SA.

For the reasons I've set out, I also think it's fair and reasonable to direct Carey to compensate Miss C for the loss she's suffered as a result of it permitting her to invest her pension monies in SA.

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

Putting things right

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

Miss C transferred from her existing pension schemes to the Carey SIPP to make the SA investment. As I've already mentioned above, if Carey had refused to permit this investment, then I think it's likely Miss C would have retained her existing schemes. And, if Miss C would have gone elsewhere, I don't think it's fair and reasonable to assume that another SIPP provider would have permitted the SA investment into its SIPPs, for the reasons given above.

In light of the above, I think that Carey should calculate fair compensation by comparing Miss C's current position to the position she would be in if she hadn't transferred from her existing pensions schemes and invested in SA.

From the information provided I can see that Miss C's existing pension plans were personal. I haven't received anything to suggest these had any guarantees attached. So I've proceeded on the basis that there were no such guarantees.
In summary, Carey should:

1) Obtain the current notional value, as at the date of this decision, of Miss C's previous pension plans, if these hadn't been transferred to the SIPP.

2) Obtain the actual current value of Miss C's 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 Miss C's share in any investments that cannot currently be redeemed.

5) Pay an amount into Miss C's SIPP, so that the transfer value of the SIPP 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 Miss C £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 Miss C's previous pension plan, if it hadn't been transferred to the SIPP.*

   Carey should ask the operator of Miss C's previous pension plans to calculate the current notional value of her plans, 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 Miss C has contributed to, or withdrawn from, her SIPP since outset. To be clear this doesn't include SIPP charges or fees paid to third parties.

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 SIPP by Miss C.

If there are any difficulties in obtaining a notional valuation from the operator of Miss C's previous pension plan, Carey should instead calculate a notional valuation by ascertaining what the monies transferred away from the plan would now be worth, as at the date of this decision, had they 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 Miss C has contributed to, or withdrawn from, her SIPP since outset.

2) *Obtain the actual current value of Miss C's 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 Miss C's pension provisions.

4) *Pay a commercial value to buy Miss C's share in any investments in her SIPP that cannot currently be redeemed.*

   I think it would be best if any illiquid assets held could be removed from the SIPP. Miss C would then be able to close the SIPP, if she wishes. That would then allow her to stop paying the fees for the SIPP. For calculating compensation, Carey should establish an amount it's willing to accept for the investment/s as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investment/s.

   If Carey is able to purchase the illiquid investment/s then the price paid to purchase the holding/s will be allowed for in the current transfer value (because it will have been paid into the SIPP to secure the holding/s).

   If Carey is unable, or if there are any difficulties in buying Miss C's illiquid investment/s, it should give the holding/s a nil value for the purposes of calculating compensation. In this instance Carey may ask Miss C to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the relevant holding/s. That undertaking should allow for the effect of any tax and charges on the amount Miss C may receive from the investment/s and any eventual sums she would be able to access from the SIPP. Carey will have to meet the cost of drawing up any such undertaking.

5) *Pay an amount into Miss C's SIPP, so that the transfer value 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 the pension for Miss C, 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 Miss C's actual or expected marginal rate of tax in retirement at her selected retirement age.

It's reasonable to assume that Miss C is likely to be a basic rate taxpayer at her selected retirement age – and neither party disputed this in response to the Investigator's findings – so the reduction would equal 20%. However, if Miss C 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%.

6) *Pay Miss C £500 for the distress and inconvenience the problems with her pension have caused her.*

   In addition to the financial loss that Miss C has suffered as a result of the problems with her pension, I think that the loss suffered to Miss C's pension provision has caused her distress. She's explained that she'd accumulated these monies throughout her working journey and has since felt that she now has no real pension to look forward to. And I think that it's fair for Carey to compensate her for this as well.

SIPP fees

If the illiquid 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 Miss C 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 Miss C or into her SIPP within 28 days of the date Carey receives notification of Miss C'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.

Carey must also provide the details of its redress calculation to Miss C in a clear, simple format.

My final decision

For the reasons given, it's my final decision that Miss C's complaint should be upheld and that Options UK Personal Pensions LLP must pay fair redress as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss C to accept or reject my decision before 4 March 2024.

Holly Jackson
Ombudsman