DRN-4692602

The complaint

Mr M complains that Carey Pensions UK LLP ('Carey') (now called Options UK Personal Pensions LLP, but I'll refer to Carey throughout for ease) failed to carry out sufficient due diligence on the investments made within his Self-Invested Personal Pension ('SIPP').

What happened

In November 2012, Mr M says he was advised by a business I'll refer to as 'ILAWS' to transfer his existing 'frozen' pensions to a Carey SIPP and make an investment in Global Forestry.

ILAWS was not regulated by the Financial Services Authority ('FSA', now the Financial Conduct Authority – 'FCA'). The Director of ILAWS, someone I'll refer to as 'Mr T', submitted the paperwork to Carey; Mr T had previously been the Director of two firms that provided mortgage advice. However, Mr T was not regulated in any capacity when he submitted Mr M's SIPP application to Carey.

The application form for the Carey SIPP was signed by Mr M on 7 November 2012 and detailed that he wanted to switch two personal pension schemes into the SIPP to invest £31,000 in Global Forestry. The declaration Mr M signed confirmed, amongst other things, that:

- He would instruct Carey Pensions UK LLP to make the Investments as detailed in the application form;
- He agreed to indemnify Carey Pensions UK LLP 'The Administrator' and Carey Pension Trustees UK Ltd against any claim in respect of any decision made by himself/or his financial adviser/Investment Manager or any other professional adviser he chose to appoint from time to time;
- He understood that Carey Pensions UK LLP and Carey Pension Trustees UK Ltd were not in any way able to provide him with any advice;
- He was establishing the Carey Pension Scheme on an execution only basis.

Global Forestry was an investment in a leasehold plot of a Teak tree plantation in Brazil run by GFI Consultants Ltd ('GFI'). The investment aim was for a positive return generated through the development of Teak trees. Mr M's specific investment was the 'Belem Sky Plantation Project'.

Carey wrote to Mr M confirming his SIPP had been established on 3 December 2012 and provided him with the SIPP terms and conditions, key features and fee schedule.

In December 2012, around £35,400 was received into Mr M's SIPP from two of his existing pension schemes.

On 3 January 2013, GFI sent Mr M's signed Global Forestry SIPP investment application form, investment agreement and SIPP rental agreement to Carey.

Carey sent Mr M a Global Forestry member instruction and declaration form. Mr M signed this on 15 January 2013 declaring, amongst other things, that:

- He instructed Carey to purchase a leasehold plot of land through Global Forestry Investments for a consideration of £31,000.
- He was fully aware the investment was an unregulated 'Alternative Investment' and as such was high risk, speculative and that it could prove difficult to value or sell.
- Carey was acting on an execution only basis and hadn't provided any advice.
- He'd read and discussed the adviser notification letter with his financial adviser and wanted to proceed.
- He had taken his own advice, including but not limited to financial, investment and tax advice regarding the investment.
- He didn't hold Carey responsible for any exchange rate fluctuations that might adversely affect the value of the investment.
- Should the investment be subject to a tax charge within the scheme this would be paid directly from his fund or by him.
- He indemnified Carey against any and all liability arising from or in connection with the investment.

Mr M invested £31,000 of his pension monies in Global Forestry and he paid a GFI an administration fee of £775. GFI provided Mr M with confirmation of the investment in February 2013.

In 2014, Global Forestry investment went into administration. And, in 2015, the Serious Fraud Office ('SFO') announced it had opened an investigation into it. In 2019, the SFO said that former directors of GFI had been charged with offences relating to alleged fraud concerning Global Forestry between August 2010 to December 2015. But that it couldn't provide any further comment while the investigation continued. And, in 2022, the Directors were found guilty of conspiracy to defraud and misconduct in the course of winding up. The SFO noted an intricate web of money transfers, forged documents and investment identities used to scam pensioners and savers out of their money under the false pretence of environmental protection.

Mr M received an email in September 2014 from Carey with an update on his Global Forestry investment. It said it had been made aware that GFI had been issued with a winding up order and a liquidator had been appointed. Carey said it would provide further updates once it understood how the liquidation affected his investment.

In December 2014, Mr M's annual SIPP statement showed the investment had been valued at nil. In the covering letter, Carey said:

"Your holding in Global Forestry Investments has been valued at nil on your Annual Valuation as we have not received the income due for 2013 and 2014 and we have been unable to contact the company to verify the position of your holding. We will continue to monitor the situation and will keep you informed of any updates we receive."

Mr M's December 2015 annual SIPP statement showed the investment was still valued at nil. In the covering letter, Carey said:

"Please be aware that unfortunately we have valued your holding in Global Forestry Investments at nil for the purposes of your Annual Valuation. This is because the investment is currently in liquidation. The liquidator is in the process of verifying whether there are any assets that can be sold in order to be able to make a distribution to you as a creditor. The liquidator is required to provide an annual report to all creditors. The next report is due in

May 2016 and we are not expecting to receive any further communication from them until then. We are unable to confirm how long the liquidation will take however, we will provide you with all information that is provided to us by the liquidator."

Mr M received an email in February 2018 from Carey informing him that because his SIPP contained investments that had no value, his SIPP was being moved to the 'Carey Pension Scheme 2 Trust'. This was so a dedicated team could monitor and administer the illiquid holdings. It said Mr M wouldn't be affected by this change and the terms remained the same.

In January 2019 Mr M's representative made a complaint on his behalf to Carey. The complaint letter referred to Mr M having been advised by ILAWS, an unregulated firm, to transfer a final salary occupational pension scheme ('OPS') and other personal pensions to a SIPP to invest in Global Forestry. It said Carey ought to have known ILAWS wasn't regulated and shouldn't have accepted the application to make such an unsuitable investment from it.

In February 2019, Carey sent Mr M its final response letter. It said, in summary, that:

- It received a SIPP application form and instruction from Mr M to invest the proceeds of two personal pensions in Global Forestry. There was no evidence to show that an OPS had been transferred to the SIPP.
- Mr M was informed in September 2014 that GFI had gone into liquidation. And in December 2014 he was informed that Carey hadn't received income payments due in 2013 and 2014 and the investment had been valued at nil since then.
- Mr M was aware of the problems with his investment since September 2014. As such, his complaint was time-barred as it wasn't made until January 2019, which more than three years later from the date he was aware of his cause for complaint.

Mr M's representative informed Carey that although Mr M was aware of the problems with his investment since late 2014, he wasn't aware he had any cause to complain about Carey's role in the transaction until recent publicity surrounding cases of this nature.

Mr M referred his complaint to the Financial Ombudsman Service in April 2019. The representative maintained Carey should not have accepted the application from the unregulated introducer and the investment was plainly in appropriate for Mr M.

Mr M has said throughout the course of his complaint, amongst other things, that:

- He was approached by Mr T of ILAWS who told him he could assist Mr M with unlocking his frozen pensions.
- Mr M believes he was advised to transfer two personal pensions and an OPS.
- Mr M didn't really understand what everything meant, he just signed the papers provided to him by ILAWS and Carey.
- He didn't have any real interest in moving his pensions, but was attracted by the promises Mr T made. Mr M thought Mr T was qualified to provide pension advice.
- Mr M was led to believe he was simply moving frozen pensions in order to allow them to grow, and that he was investing in a forestry scheme with guaranteed returns.
- He believed the investment was safe.
- Mr M didn't understand he'd lost his pension investment completely until 2018 and he'd complained a short while after in February 2019.

Carey provided its file but maintained Mr M's complaint was time-barred. It said in December 2014 it was contacted by Mrs M on Mr M's behalf about the update he'd received in September 2014, saying he was concerned and wanted to discuss it. But Carey said it

couldn't discuss this with Mrs M without Mr M's consent. It also said Mr M had signed a form in connection with the court's winding up order of GFI in June 2015, so he was well aware of the issues with his pension.

Our Investigator asked Carey a series of detailed questions in respect of the due diligence it had carried out on ILAWS and the Global Forestry investment and for evidence of this. But it doesn't appear to have responded to those questions. So our Investigator went on to issue their findings.

Our Investigator said Mr M's complaint had been made in time. She thought Mr M was aware of the loss to his pension by December 2014, but he had no reason to believe that Carey had failed in its responsibilities as his pension provider. She accepted that Mr M didn't think he had any cause to complain until Carey's contact in 2018 and he'd complained within three years of this date.

The Investigator went on to uphold Mr M's complaint on the grounds that Carey didn't carry out sufficient due diligence checks on the investment in Global Forestry, in line with the Principles and industry guidance. Had it done so, the Investigator thought Carey would've identified a number of red flags in respect of the investment that posed a significant risk of consumer detriment. She said that having Mr M sign indemnity declarations wasn't effective for Carey to meet its obligations. It should have refused Mr M's business instead. And if it had done this and shared its concerns with Mr M then it's unlikely the investment would have gone ahead. So she said Carey should put this right by compensating Mr M for his loss based on him having remained in his existing schemes. She also said that Carey should pay Mr M £500 compensation for the distress and inconvenience this matter has caused him.

Carey didn't accept this. It said, amongst other things, that:

- Mr M's complaint was time-barred. His complaint letter was received more than three years after he was aware of his cause for complaint.
- The FCA's Dispute Resolution ('DISP') rules are silent as to any requirement for the complainant to know who is responsible for their cause to complaint – the Investigator had created requirements that don't exist in DISP.
- Our Service has failed to take account of relevant law and regulations, as required by DISP or to set out whether and (if so) the basis upon which it is appropriate to depart from the relevant law. The duties suggested would not be recognised in a court and legal liability would not be established.
- Only the SIPP guidance published prior to receiving Mr M's SIPP application and subsequent investment instructions is relevant. Otherwise our Service would be considering Mr M's complaint with the benefit of hindsight, which no reasonable court would do. The later guidance introduced new expectations and reflected more than what the industry was already doing.
- Reference to the Reviews contravene the decisions in *Adams v Options SIPP* [2020] EWHC 1229 (Ch) and *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474 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 in themselves;
  - 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 Financial Services and Markets Act ('FSMA') s.139A, any breach would not give rise to a claim for damages under FSMA s.138D.
- The FCA's Enforcement Guide says that "*Guidance is not binding on those to whom the FCA's rules apply. Nor are the variety of materials (such as case studies showing*

good or bad practice, FCA speeches and generic letters written by the FCA to Chief Executives in particular sectors) published to support the rules and guidance in the Handbook. Rather, such materials are intended to illustrate ways (but not the only ways) in which a person can comply with the relevant rules."

- Carey had a very limited legal obligation to undertake due diligence in respect of the investments. The judge in *Adams* refused to recognise a due diligence duty, instead concluding that obligations are framed by reference to the context of the contractual relationship.
- Our Service is imposing an obligation on it to undertake a qualitative assessment of the investments and to pass this on, effectively amounting to a recommendation to Mr M not to proceed, which overreaches its legal obligations and goes further than published regulatory material.
- The fact an investment is speculative doesn't preclude it from being held within a SIPP. The extent to which an investment may be speculative might impact on the suitability for the investor. But Options wasn't permitted to advise, or even comment, on that.
- Expecting Options to refuse the business and share with Mr M why would have required it to provide advice to Mr M.
- We've said that had it carried out more due diligence it would have discovered the investment monies were being paid into personal accounts of GFI directors, but this is with the benefit of hindsight with no evidence this information was readily available at the time. The SFO didn't in fact discover this until 2015. And, in any event, the extent of its due diligence obligations were limited to establishing the investment wouldn't give risk to tax liabilities in accordance with HMRC guidelines.
- It hadn't seen a copy of GFI's open evening invitation and while this is currently available online there's no evidence it would have been at the time. And, in any case, while GFI was first registered with Companies House in April 2010, evidence shows it had been operating since 2008.
- Options would not have been able to identify that Global Forestry was a scam based on the evidence available to it at the time.
- The details the Investigator provided from the Global Forestry investment brochure were from the key facts document, which Carey hadn't seen at the time of the investment. Instead it reviewed the full brochure which clearly explains the basis of the investment returns.
- There is no prohibition on the acceptance of high-risk investments into a SIPP – the very purpose of a SIPP is to provide greater investment control and flexibility, which is often deliberately exercised by members in order to gain access to higher-risk investments.
- It was made clear to Mr M in the application that the investment was "high risk and speculative".
- It didn't cause Mr M's loss. It's likely he was extremely keen to proceed with the investment and would've found a way to invest regardless.
- Our Service has effectively said that no SIPP provider complying with its obligations could properly have accepted the investments, even if the customer had been sophisticated and fully informed, despite the investment presenting as legitimate. But that isn't logical and isn't supported by the evidence. Mr M could have asked it or another SIPP provider to proceed in any case.
- Carey's contract with Mr M relieves it of liability. To conclude otherwise would render it void and unenforceable.
- It isn't fair or reasonable for it to have to bear the loss where the investment simply didn't perform as hoped or expected or when it transpired to be a scam in circumstances it couldn't have predicted or reasonably foreseen.
- It would be manifestly unfair to hold Carey responsible for the loss given Mr M accepted the risks of making the investment. Mr M must bear some responsibility for

his decision to invest.

- A fair and reasonable comparator for redress would be the lower discount rates, as per used in a previous final decision (DRN 2670669). Our Service uses a low discount rate for calculating redress for some complaints and using a higher index for others. This prejudices it when it's being asked to use the higher index.
- To allow Mr M to retain the investment within the SIPP if it cannot be returned to Carey when compensation is calculated on the assumption this would be returned or have a nil value would give Mr M a windfall.
- Our Service recommended £500 compensation for distress and inconvenience but provided no evidence to support that Mr M has suffered any degree of upset – it said it should be provided with any evidence to that effect to allow it to comment on that.
- The execution only SIPP market provides autonomy, and if it is to be held liable for poor investment choices this will severely impact the market, depriving customers of the low-cost route.
- There is real unfairness if an execution-only SIPP provider is liable for poor investment choices of consumers or investments that turn out to be scams given its business is structured on the basis that it isn't investigating the quality of the investment and its fees and charges are based on that approach.
- It requests an oral hearing to properly determine whether the complaint is time-barred, to establish Mr M's understanding of and approach to the investment, as well as his motivation for entering the transaction.

Additional background information

I'm aware that in submissions on other cases with our Service involving SIPP due diligence 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.
- As an execution only business, Carey would have been in breach of the Conduct of Business Sourcebook ('COBS') 11.2.19 had it not followed the signed instructions given to it. 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."

- 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.
- Our Service is holding it to a standard which is unclear and is on any view much more demanding than is fair or reasonable.
- 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.

- 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.
- 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, the Financial Ombudsman 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 firms 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 we have 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:
  - 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*"
  - "*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*";
  - "*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
  - "*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*".

- The Financial Ombudsman 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.

- 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.

I issued a provisional decision on 26 February 2024. I said I thought Mr M's complaint had been made in time and that Carey had failed to carry out adequate due diligence on the Global Forestry investment. I thought if Carey had done so, it should've refused to permit the investment to be held in the SIPP. And it was fair and reasonable to conclude that if Carey had refused to permit the Global Forestry investment in its SIPPs then Mr M would've retained his existing pensions and wouldn't have switched them to a SIPP or subsequently made the investment that he did. So I recommended that Carey should put Mr M back in the position he would have been in if he hadn't transferred his pensions to the Carey SIPP. I also recommended that it pay him £500 for the distress and inconvenience caused by the loss of his pension.

Mr M accepted my provisional decision. Carey confirmed it had received my provisional decision but did not respond by the deadline I gave. So, I'm now proceeding with my final decision.

What I've decided – and why

Preliminary point - Carey's request for an oral hearing

Although Carey hasn't responded to my provisional decision, I've reconsidered Carey's request for a hearing. Carey has said an oral hearing is necessary to properly determine whether the complaint is time-barred and to explore, for example, Mr M's understanding, motivations for entering the transactions and the roles played by the parties.

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

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

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

So, the key question for me to consider when deciding whether a hearing should be held is whether or not: "…*the complaint can be fairly determined without convening a hearing*". We do not operate in the same way as the Courts. Unlike a Court, we have the power to carry out our own investigation. And the rules (DISP 3.5.8R) mean I, as the Ombudsman determining this complaint, am able to decide the issues on which evidence is required and how that evidence should be presented. I am not restricted to oral cross-examination to further explore or test points.

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

I have considered the submissions Carey has made. However, I am satisfied that I am able to determine whether the complaint is within our jurisdiction without convening a hearing. We have already asked Mr M several questions about when he first became aware of his cause for complaint and I don't think holding an oral hearing will shed any further light on this point.

I'm also satisfied I am able to fairly make a decision on the merits of this complaint without convening a hearing. In this case, I am satisfied I have sufficient information to make a fair and reasonable decision. So, I do not consider a hearing is required. The key question is whether Carey should have accepted Mr M's application at all. Mr M's understanding of matters are secondary to this. And I am, in any event, able to test this to the extent I think necessary by asking questions of Mr M, whether by phone or in writing. As I am satisfied it is not necessary for me to hold an oral hearing, I will now turn to Mr M's complaint.

Jurisdiction

Although Carey hasn't responded to my provisional decision, I've reconsidered all the available evidence and arguments to decide whether we can consider Mr M's complaint.

The rules I must follow in determining whether we can consider this complaint are set out in the DISP rules, published as part of the FCA's Handbook.

DISP2.8.2R says that, unless Carey consents, we can't look into this complaint if it's been brought:

- more than six years after the event complained of;
- or, if later, more than three years after Mr M was aware – or ought reasonably to have become aware – he had cause for complaint;
    - unless the complaint was brought within the time limits, and there's a written acknowledgement or some other record of it having been received; or
    - unless, in the view of the Ombudsman, the failure to comply with the time limits was as a result of exceptional circumstances.

Mr M's representatives referred this complaint to Carey in January 2019. The complaint was that Carey shouldn't have accepted Mr M's SIPP and investment application from ILAWS as it was unregulated. Carey accepted the SIPP application in December 2012, which was more than six years before Mr M referred his complaint to Carey in January 2019. So, I have to consider when Mr M ought reasonably to have been aware of his cause for complaint.

And having established that date, whether Mr M complained to Carey within three years of it. This means if Mr M ought reasonably to have been aware of his cause for complaint before January 2016, he made his complaint to Carey too late under the Regulator's rules. And when I say here cause for complaint, I mean cause to make this complaint about this respondent firm, Carey, not just knowledge of cause to complain about anyone at all. This appears to be contrary to Carey's understanding of the matter so I'll explain this further below.

In thinking about when Mr M was aware, or ought reasonably to have been aware, that he had cause for complaint, I've considered how 'cause for complaint' should be interpreted in the context of the FCA Handbook.

The Handbook includes the following rule (GEN 2.2.1R):

"Every provision in the Handbook must be interpreted in the light of its purpose."

And guidance in the same section says the purpose of any provision in the Handbook is to be gathered first and foremost from the text of the provision in question and its context amongst other relevant provisions (GEN 2.2.2(G)).

The Handbook also says (GEN 2.2.7(R)):

"In the Handbook …

1) *an expression in italics which is defined in the Glossary has the meaning given there; and*
2) *an expression in italics which relates to an expression defined in the Glossary must be interpreted accordingly.*'

The term 'cause for complaint' is not defined in the FCA's glossary. But where DISP says the Ombudsman cannot consider a complaint if it is out of time, the word 'complaint' is in italics. So it is a defined term in the FCA Glossary and must be treated accordingly.

And where the Handbook says it sets out how complaints are to be dealt with by respondents, 'complaint' is again in italics. So again it is a defined term.

So although the term 'cause for complaint' isn't in italics in the FCA Handbook, it appears as part of the rule that sets out what 'complaints' (in italics) the Ombudsman cannot consider. And it's reasonable to infer in light of the above rules and guidance on interpreting the Handbook that the Handbook's definition of the word 'complaint' was intended to apply to that phrase.

The term 'complaint 'is defined for the purposes of DISP in the FCA handbook as:

"…any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a person about the provision of, or failure to provide, a financial service…which:

a) *Alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience; and*
b) *Relates to an activity of that respondent, or any other respondent with whom that respondent has some connection in marketing or providing financial services or products …which comes under the jurisdiction of the Financial Ombudsman Service."*

And *respondent* means a regulated firm covered by the jurisdiction of the Financial Ombudsman Service.

So the Glossary definition of 'complaint' requires that the act or omission complained of must relate to an activity of '**that** respondent' or firm (my emphasis).

Accordingly the material points required for Mr M to have awareness of a cause for complaint include:

- awareness of a problem;
- awareness that the problem had or may cause him material loss; and
- awareness that the problem was or may have been caused by an act or omission of Carey (the respondent in this complaint).

It's therefore my view that it's necessary for Mr M to have had an awareness (within the meaning of the rule) that related to Carey, not just awareness of a problem that had caused a loss. Knowledge of a loss alone is not enough. It can't be assumed that upon obtaining knowledge of a loss a consumer had knowledge of its cause. And I don't accept that the three year time limit necessarily means knowledge of a loss means the consumer has three years to make enquiries to discover all parties who might be responsible, failing which they run out of time to make a complaint.

There are a number of points that I think are relevant to this discussion:

- The Regulator published reports on the results of two thematic reviews on SIPP operators in 2009 and 2012, issued guidance for SIPP operators in 2013 and wrote to the CEOs of SIPP operators in 2014. A common theme of those communications is that the Regulator considered that SIPP operators had obligations in relation to their customers even where they don't give advice, and that many SIPP operators had a poor understanding of those obligations.

- Mr M transferred just over £35,000 into his SIPP in late 2012 and £31,000 was invested into Global Forestry in early 2013.

- Mr M thought he was making a safe investment with guaranteed returns.

- In September 2014 Mr M was told by email that GFI was being liquidated. Carey said it would be in touch when it understood how the liquidation affected his investment. It said it was contacted by Mrs M on Mr M's behalf in December 2014 about this update, saying he was concerned and wanted to discuss it. But Carey said it couldn't discuss this with Mrs M without Mr M's consent.

- In December 2014 Mr M received his annual valuation showing the investment value had been reduced to nil. The covering letter explained Carey hadn't received the income due from the investment in 2013 and 2014.

- Carey says Mr M signed a form in connection with the court's winding up order of GFI in June 2015, so he was well aware of the issues with his pension.

- In December 2015 Carey sent Mr M his annual valuation which still showed the investment was valued at nil. The covering letter said the investment was in liquidation and the liquidator was in the process of verifying whether there were any assets that could be sold in order to be able to make a distribution to him as a creditor. It said the liquidator was required to provide an annual report to all creditors and the next one was due in 2016.

- I'm satisfied that the contents of some of the correspondence I've referred to above evidence that Mr M was aware, or ought reasonably to have become aware, more than three years before he complained to Carey, that there was a problem with his pension that had caused him some loss or damage. Mr M says he had been told by ILAWS that the investment was safe and had a guaranteed return. But less than two years after making the investment, he was told that his investment had been valued at nil and it wasn't clear whether he would get any of his money back. But, I'm not satisfied that Mr M would have, or ought to have, been aware that Carey had any responsibility for the position he was in.

- Although Carey hasn't provided a copy of the email, it seems Mr M's wife contacted Carey on Mr M's behalf after receiving the update of September 2014. So, I don't doubt Mr M was concerned about what he was told about his pension. But it doesn't appear any discussion took place and in any event, I don't think Mr M, or any other reasonable investor in his position, would've considered that the loss of his investment was in some way the fault of Carey. I think Mr M would've most likely considered this was because of GFI going into liquidation. And I think any other reasonable investor in his position would've considered the same.

- So, there's nothing I've seen that was sent to Mr M more than three years before his complaint was referred to Carey that would have caused Mr M, or a reasonable retail investor in his position, to link Carey to the problem he'd experienced with the pension investment. I think it's worth highlighting that Mr M wasn't advised by Carey about setting up the SIPP or the suitability of investments. And I think the obvious first thought when problems arose would have been that the business that recommended the investment – ILAWS – might have misled him or that the people who ran the Global Forestry investment might have caused the issue.

- I'm not aware of anything Carey said or did at the outset of its relationship with Mr M that would have caused him to think it might be responsible if such a problem occurred. Nor am I aware of anything Carey said or did that ought to have caused Mr M to think it was responsible once the problem had occurred.

- I don't think Mr M would need to have understood the details of Carey's obligations to have been aware (or in a position whereby he ought reasonably to have been aware) of his cause for complaint. But I think Mr M would have needed to have actual or constructive awareness that an act or omission by Carey had a causative role in the problem causing him loss or damage. And I don't think Mr M, or a reasonable investor in his position, ought reasonably to have attributed his problem to acts or omissions by Carey more than three years before he complained to Carey.

- Mr M has said that he only became aware of his cause for complaint in 2018, when Carey contacted him to say it had transferred his SIPP to the Carey Pension Scheme 2 Trust. I can see why Carey would question why that would give Mr M reason to complain, given the transfer was related to the investment failure. But ultimately Mr M says this was when he considered Carey might have done something wrong and I've seen no evidence that Mr M was aware, or ought reasonably to have been aware, more than three years prior to his representative raising a complaint with Carey in January 2019, that Carey may have done something wrong and might be wholly or partly responsible for the position he was in.

I've carefully considered all the evidence we've been provided and, on balance, I don't think that Mr M was aware (or ought reasonably to have become aware) that he had cause for complaint against Carey more than three years before his complaint was referred to it. So,

I'm satisfied this complaint's been brought in time and that it's one we can consider. As such, I've gone on to consider the merits of this complaint below.

Merits of the complaint

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

Given that Mr M accepted my provisional decision and Carey didn't provide a response, I see no reason to depart from my provisional findings. As such, I've decided to uphold Mr M's complaint and I've largely repeated my findings, as per my provisional decision, below.

When considering what's fair and reasonable in the circumstances, I need to take account of relevant 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.

In deciding what's fair and reasonable in the circumstances, it's appropriate to take an inquisitorial approach. And, ultimately, what I'll be looking at here is whether Carey took reasonable care, acted with due diligence and treated Mr M fairly, in accordance with his best interests. And what I think is fair and reasonable in light of that. And I think the key issue in Mr M's complaint is whether it was fair and reasonable for Carey to have accepted Mr M's SIPP business in the first place.

Relevant considerations

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

"*Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.*

Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.

Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly."

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

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

And at paragraph 77 of BBA Ouseley J said:

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

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

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

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

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

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

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

I note that the Principles for Businesses didn't form part of Mr Adams' pleadings in his initial case against Options SIPP. And, HHJ Dight didn't consider the application of the Principles to SIPP operators in his judgment. The Court of Appeal also gave no consideration to the application of the Principles to SIPP operators. So, neither 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 Mr M's case.

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

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

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

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

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

In Mr M's complaint, amongst other things, I'm considering whether Carey ought to have identified that the Global Forestry investment involved a significant risk of consumer detriment. And, if so, whether it ought to have declined to accept Mr M's application.

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

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

I also want to emphasise that I don't say that Carey was under any obligation to advise Mr M on the SIPP and/or the underlying investments. Refusing to accept an application isn't the same thing as advising Mr M on the merits of the SIPP and/or the underlying investments. But I am satisfied Carey's obligations included deciding whether to accept particular investments into its SIPP. And I don't accept that it couldn't make such an assessment without straying into giving the member advice.

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.)

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

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

At its introduction the 2009 Thematic Review Report says:

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

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

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

In Carey's submissions on other cases with our Service involving SIPP due diligence, including when making its points about regulatory publications, it has referenced the *R. (on the application of Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service* [2017] EWHC 352 (Admin) case. While the judge in that case made some observations about the application of our statutory remit, that remit remains unchanged. And, as noted above, in considering what's fair and reasonable in all the circumstances of a case, I'm required to take into account (where appropriate) what I consider to have been good industry practice at the relevant time.

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

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

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

It's also clear from the text of the 2009 and 2012 Thematic Review Reports (and the "*Dear CEO"* letter in 2014) that the regulator expected SIPP operators to have incorporated the recommended good practices into the conduct of their business already. So, whilst the regulators' comments suggest some industry participants' understanding of how the good

practice standards shaped what was expected of SIPP operators changed over time, it's clear the standards themselves hadn't changed.

I note Carey's point that the judge in *Adams* didn't consider the 2012 Thematic Review report, the 2013 SIPP Operator Guidance and 2014 "*Dear CEO*" letter to be of relevance to his consideration of Mr Adams' claim. But it doesn't follow that those publications are irrelevant to my consideration of what'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 Mr M. It's accepted Carey wasn't required to give advice to Mr M, and couldn't give advice. And I accept the publications don't alter the meaning of, or the scope of, the Principles. But as I've said above these are evidence of what I consider to have been good industry practice at the relevant time, which would bring about the outcomes envisaged by the Principles. And, as per the FCA's Enforcement Guide, publications of this type "*illustrate ways (but not the only ways) in which a person can comply with the relevant rules*". So it's fair and reasonable for me to take them into account when deciding this complaint.

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

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

And in determining this complaint, I need to consider whether, in accepting Mr M's application to establish a SIPP and to invest in Global Forestry, 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 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.

Furthermore, 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 the investments *before* deciding to accept Mr M's applications.

Ultimately, what I'll be looking at here is whether Carey took reasonable care, acted with due diligence and treated Mr M fairly, in accordance with his best interests. And what I think is fair and reasonable in light of that. And I think the key issue in Mr M's complaint is whether it was fair and reasonable for Carey to have accepted his application in the first place. So, I need to consider whether Carey carried out appropriate due diligence checks on the Global Forestry 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 investing in Global Forestry were being put at significant risk of detriment. And, if so, whether Carey should therefore not have accepted Mr M's application.

The contract between Carey and Mr M

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

My decision is made on the understanding that Carey acted purely as a SIPP operator. I don't say Carey should (or could) have given advice to Mr M or otherwise have ensured the suitability of the SIPP or investments for him. I accept that Carey made it clear to Mr M that it wasn't giving, nor was it able to give, advice and that it played an execution-only role in his SIPP investments. And that forms Mr M signed confirmed, amongst other things, that losses arising as a result of Carey acting on his instructions were his 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 Mr M's case is made with all of this in mind. So, I've proceeded on the understanding that Carey wasn't obliged – and wasn't able – to give advice to Mr M on the suitability of the SIPP or investments.

The due diligence carried out by Carey on the Global Forestry investment – and what it should have concluded

I think Carey's obligations went beyond checking that the Global Forestry investment existed and would not result in tax charges. And I think some of the information it should have obtained ought to have given Carey real cause for concern about the risk of consumer detriment associated with this. And, in light of the evidence I've seen, I think Carey failed to draw a reasonable conclusion on accepting Mr M's application with the intention to invest in Global Forestry, for the reasons set out below.

In order to correctly understand the nature of the investment, I think Carey should have reviewed how Global Forestry was marketed to investors. Carey has said it looked at the full Global Forestry brochure. So, clearly Carey thought it was important to look at this material at the time too. But Carey hasn't provided us with a copy of the marketing material it says it reviewed with the file it provided to us on this case. As such, it's difficult to say what conclusions Carey ought to have reached based on the due diligence checks it actually carried out.

But in any event, the checks performed ought to have gone beyond looking at the brochure produced by GFI. Carey ought to have carried out its own research, which would include making internet searches about the investment company and the individuals involved with it.

The online marketing material I've seen on GFI's own website in October 2012 said that its tropical hardwood investments in Brazil were a "*certified, competitive, low risk*" investment. On the 'Investment Opportunities' page, the Belem Sky Plantation was described as having a minimum 10% return on investment per year.

The financial returns page from June 2012 said:

"Timber has consistently proven to be a profitable investment. Over the years it has out performed many of the traditional investments but rarely appears on the investment radar for the small investor. This may be because it has often been necessary to make large investments or because ***the returns don't suffer from the fluctuations of typical investments like shares or metals****. Our projections mean that* ***you can expect a 10% return per annum on your investment*** *in the Belem Sky Plantation Project, this will be based on Rental Returns.* (my emphasis).

And in the 'IFAs' section, on a page entitled 'What we do?' the website stated:

"Investors within the Belem Sky Opportunity have benefited from the following investment features:

- *10% contractual annual return on investment*
- *Investment uncorrelated to other asset classes"*

A 22 page online Global Forestry slideshow brochure dated 17 May 2010, and therefore seemingly available in the public domain to investors and Carey at the time, also said that tropical forestry investments provided a "*non-volatile market with high long-term returns, and a low risk-to return ratio*". And that forestry investments offer *"stable long term return projections*" with "*more dependable less volatile returns*".

It also said it offered "*Flexible exit return dates…great exit strategy flexibility*", as well as "*Early Returns*", a "*Minimum 10% ROI PA*". And that there was "*Early buy back option available*", which it went on to say was being offered by GFI "*to directly purchase your plots any time after 3 years with a return of 5%*".

In the FAQs under "*How do the projected returns compare with leaving my money in a bank?*" it said that a £5,000 investment over 25 years would produce a "*projected return of £56,849 (over 12% ROI)"* compared to an assumed average bank interest rate of 5% giving a return of £16,932.

I haven't seen any Global Forestry marketing material which shows that customers were given any explanation behind or basis for the guarantees offered. For example, it doesn't detail how Global Forestry planned to fund the guaranteed 10% minimum investment return per annum. And, in my view, Carey should have been concerned about how the projected returns were set out in the marketing material. Carey said that the full brochure clearly explained the basis of the returns, but it hasn't provided a copy of this brochure.

However, I note the website explained the 10% return on the investment was based on 'rental returns'. It further explained the rental company would take its fees and costs from the harvest proceeds and pay the agreed rental fee to the investor from these funds. And I can see that Mr M signed an agreement with a rental company, which provided for annual rent of £500 per 0.1 hectare plot, which equated to a 10% return on his investment. The rental

agreement Mr M signed also provided for an extra 2% return on his investment. And the agreement stated that it could not be terminated by the rental company until a minimum period of four years had passed.

While the 10% annual return was described as 'guaranteed' to investors in all the materials I've seen, it doesn't appear that investors were warned that the payment of rental income, whilst a contractual right, was still dependent on the rental company generating enough profit to fulfil the guarantees being given to investors. Furthermore, I can't see that any consideration or warning was given as to the ongoing availability of such rental agreements over the long-term in any of the marketing information I've seen. These were inherent and significant risks of the investment, which investors were likely unaware of. And given the investment was being marketed as medium to long-term, I think these risks ought to have been highlighted.

In addition, neither the brochure nor the website detailed how GFI planned to fund the early buy back option with a 5% return that it was responsible for. And there appears to be some inconsistency in terms of how the 5% return was described. In the 22-page brochure, it stated, *"GFI offers to directly purchase your plots any time after 3 years with a return of 5%"*. And at various times the website has set out that GFI offered to directly purchase investors plots any time after three years with a return of 5%.

But in the investment agreement Mr M signed, it states:

"After having held the Lease for a minimum of four years, the Investor shall be entitled to exercise an option, to surrender it to GFI in consideration for the payment by GFI of the original Price plus 5%"

This suggests that Mr M could redeem the investment for the original price plus 5%, so having invested £31,000, he would receive £32,550 after four years. But this is a different offering to the marketing material which suggested a 5% return on the investment, which over three years, would equate to £35,886. This is quite a significant difference, and I'm not persuaded the marketing material I think investors would've likely seen made that clear.

Carey should have also been concerned that neither the marketing material nor the website clearly reflected the risks. Carey clearly recognised that Global Forestry is an alternative investment and may be high risk and/or speculative in light of the member declaration. The Global Forestry investment was certainly not "*low risk*" or secure on any reasonable analysis. Despite this, it appears to have been marketed as such to pension investors.

In the IFAs section of the website, there was a page entitled 'Suitability' which appears to have been an attempt to set out which type of investors the investment might be suitable for. It stated:

"The GFI timber investment will be suitable for investors who:

- *Wish to receive a fixed annual investment return of 10% but with considerably less uncertainty than traditional stock markets*
- *Are looking to diversify their existing portfolio away from mainstream asset classes*

However, the GFI timber investment may not be suitable for investors who:

- *Do not wish to take any risk with their capital*
- *Do not wish to invest in Brazil*
- *Have a time horizon of less than three years"*

But I don't think this provided any real clarity. In fact, the implication was that the investment would be suitable for anyone who wanted to take a degree of risk (i.e. more than zero risk) and was able to commit to invest for more than three years. To my mind, this would include most investors, however inexperienced or risk averse. Furthermore, it again highlighted the guaranteed 10% return and said this came without the uncertainty of traditional stock markets – the investment was presented as more or less 'a sure bet'.

I can't see that the website provided any real risk warnings to investors. I recognise the online brochure did go on to say that past growth rates aren't a guarantee of those in the future and should be viewed realistically. But it immediately tempered this by saying market values have realistically risen over the years. And while it said at the end of the brochure that there are no guarantees teak will go up, it again immediately tempered this by saying that it had risen every year for the past 20, that it was a very safe commodity and an excellent investment, but with no evidential basis given for these statements.

And neither the website nor brochure gave alternative projections in different market conditions or highlighted the risk factors associated with unregulated investments such as this. So there wasn't sufficient explanation about the factors that the anticipated high returns were likely based on, other than the investment provider's own confidence in its business model and marketplace.

The website also failed to explain that GFI didn't have any protection or regulatory status in the UK, despite offering its view on which type of investors the investment might be suitable for.

I also think it's unclear what investors ownership rights were. For example, while the brochure said that all investors would receive "*A Lease/License for the land their trees occupy*", suggesting they'd have rights over the land too, the Investment Process page on the GFI website from May 2010 said "*the client has no ownership interest in the land, only trees*".

And I think that what I've highlighted above is supported by the liquidator's comments that GFI operated, or was allowed to operate, with a lack of commercial probity and that, in particular, it misled investors in relation to the security of their investment, the fixed returns, the flexible exit strategy and the environmental and social benefits.

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

- There was no investor protection associated with this investment. It was illiquid, subject to currency fluctuations and there could be no market for it.
- There were other risks involved such as disease or drought that could've destroyed the trees allocated to investors.
- It was being targeted for investment by pension investors and was described as low risk. But it was in fact a speculative overseas based investment with inherent high risks that made it very obviously unsuitable for all but a small category of investors and even then, only a small part of such an investor's portfolio.
- The high projected returns and guarantees set out should have been questioned. I don't expect Carey to have been able to say the investment would or wouldn't have been successful. But such high projected returns and guarantees without any mention of the risks should have given Carey cause to question its credibility.
- The marketing material either didn't contain, or was unclear, as to the risks associated with the investment. So, Carey should have been concerned that consumers may have been misled or did not properly understand the investment they intended to make.

- Investor ownership rights were unclear. And it's unclear how the lease of trees could be valued or realised.
- It seemingly misled investors in relation to the security of their investment, the fixed returns, the flexible exit strategy and the environmental and social benefits.
- 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 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:

- There was a risk the investment might be fraudulent – it wasn't clear how such high returns or guarantees 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 Global Forestry 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.

Knowing all this, I don't think it was fair or reasonable for Carey to have accepted the Global Forestry investment into Mr M's SIPP. Following the due diligence Carey says it conducted, it should have concluded that there was a very clear and obvious risk of consumer detriment. And, without more evidence to ensure the investment was an appropriate one to permit within its SIPPs, I'm satisfied that Carey shouldn't have accepted the Global Forestry investment into Mr M's SIPP.

To my mind, Carey didn't meet its regulatory obligations or good industry practice at the relevant time. So, 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 Mr M fairly, by accepting the Global Forestry investment in his 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 Mr M on the suitability of the SIPP and/or Global Forestry investment for him personally. To be clear, I'm not making a finding that Carey should have assessed the suitability of the investment for Mr M. I accept Carey had no obligation to give advice to Mr M or to ensure otherwise the suitability of an investment for him. So my finding isn't that Carey should have concluded that Mr M wasn't a suitable candidate for high-risk investments. It's that Carey should have concluded the Global Forestry investment wasn't acceptable for its SIPPs and it thereby failed to treat Mr M fairly or act with due skill, care and diligence when it accepted the investment into his 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 (following the SFO's investigation) had it undertaken sufficient due diligence before accepting the Global Forestry 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 Global Forestry investment in its SIPPs altogether.

Carey's due diligence on ILAWS

Carey also had a duty to conduct due diligence and give thought to whether to accept Mr M's SIPP application from ILAWS. That's consistent with the Principles and the Regulators' publications as set out earlier in this decision.

But I don't think it's necessary for me to also consider Carey's due diligence on ILAWS. That's because I'm satisfied the transfer of Mr M's existing pensions to a SIPP was arranged purely for the purpose of investing in Global Forestry. I say this because the SIPP application form stated that Mr M intended to invest in Global Forestry and the Global Forestry investment application was signed on 7 November 2012, the same day Mr M signed the SIPP application. So, from the outset of Mr M's relationship with Carey, it was aware that his intention was to invest the vast majority of his pension funds in Global Forestry.

As such, I don't think it is necessary for me to consider what due diligence checks Carey ought to have carried out on ILAWS and what it ought to have determined from those checks had it carried them out in detail. That's because I think Carey failed to comply with its regulatory obligations and good industry practice at the relevant time when it accepted Mr M's application to invest in Global Forestry through his SIPP. And I'm satisfied it ought to have declined to accept Mr M's application to invest in Global Forestry in the first place.

That being said, I do think there was an obvious issue with the introduction from ILAWS, and the process Carey required Mr M to undertake before it allowed him to make the investment. It ought to have been clear to Carey from the outset that ILAWS wasn't regulated in any capacity to arrange or advise on investments or pensions. Yet in asking Mr M to sign its SIPP member instruction and declaration for Global Forestry, it required him to confirm that he had discussed the investment with his Financial Adviser and taken investment advice. But Carey ought to have known that Mr M didn't have a financial adviser, other than ILAWS. And although there was nothing to stop ILAWS from giving Mr M advice, Carey ought to have known ILAWS was not regulated and as such, not authorised to give him such advice. At the very least Carey ought to have been aware that ILAWS had arranged the SIPP and investment, in breach of regulations. And it ought to have proceeded with extreme caution so as to limit the risk of detriment to Mr M.

Nevertheless, based on what I've seen, Mr M's application to take out the SIPP was to make the Global Forestry investment. And, for reasons I'll come on to below, if that application had been declined/rejected then his application to open the SIPP and switch his pensions would not have gone ahead. His SIPP therefore would not have been opened and his pensions would have stayed where they were.

So I've not gone on to consider the due diligence Carey may have carried out on ILAWS and whether this was sufficient to meet its regulatory obligations in any more detail.

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

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

COBS 11.2.19R

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

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

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

I therefore don't think that Carey's argument on this point is relevant to its obligations under the Principles to decide whether or not to execute the instruction to make the Global Forestry investment i.e. to proceed with the application.

The indemnity

In my view, for the reasons given, Carey should've refused to allow Mr M's investment in Global Forestry and his application to open the SIPP on the basis of that proposed investment. So, things shouldn't have progressed beyond that. Had Carey acted in accordance with its regulatory obligations and best practice, it is fair and reasonable in my view to conclude that it shouldn't have permitted the investment.

Further, in my view it's fair and reasonable to say that just having Mr M sign declarations, wasn't an effective way for Carey to meet its regulatory obligations to treat him fairly, given the concerns Carey ought to have had about the investment.

Carey knew that Mr M had signed forms intended, amongst other things, to indemnify it against losses that arose from acting on his instructions. And, in my opinion, relying on the contents of such forms when Carey knew, or ought to have known, allowing the Global Forestry investment to be held within its SIPPs would put investors at significant risk wasn't the fair and reasonable thing to do. The fair and reasonable thing to do would have been to refuse to accept the Global Forestry investment in its SIPPs at all.

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

Ultimately I'm satisfied that Mr M's investment in Global Forestry shouldn't have been permitted and so the opportunity to proceed in reliance on an indemnity shouldn't have arisen at all.

Is it fair to ask Carey to compensate Mr M?

In deciding whether Carey is responsible for any losses that Mr M has suffered on his

investment I need to look at what would have happened if Carey had done what it should have done i.e. refused to allow Mr M's investment in Global Forestry and his application to open the SIPP on the basis of that proposed investment in the first place.

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

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

In deciding whether Carey is responsible for any losses that Mr M has suffered on the investment in his SIPP I need to look at what would have happened if Carey had done what it should have done i.e. not accepted his applications. Had Carey acted fairly and reasonably it should have concluded that it should not accept Mr M's applications. That should have been the end of the matter – it should have told Mr M that it could not accept the business. And I am satisfied, if that had happened, the arrangement for Mr M would not have come about in the first place, and the loss he suffered could have been avoided.

Had Carey explained to Mr M why it would not accept his applications or was terminating the transaction, I find it very unlikely that Mr M would have tried to find another SIPP operator to accept the business. I say this because Mr M says ILAWS approached him and introduced the investment to him, he hadn't previously been interested in Global Forestry or making changes to his pension arrangements.

So I'm satisfied that Mr M would not have continued with the SIPP and the investment, had it not been for Carey's failings. Carey failed to put a stop to this course of action when it had the opportunity and obligation to do so, if it had been acting in Mr M's best interests.

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

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

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

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

So I am satisfied in the circumstances, for all the reasons given, that it is fair and reasonable to conclude that Carey should compensate Mr M for the loss he has suffered. I am not asking Carey to account for loss that goes beyond the consequences of its failings. I am satisfied those failings have caused the full extent of the loss in question. That other parties

might also be responsible for that same loss is a distinct matter, which I am not able to determine. However, that fact should not impact on Mr M's right to fair compensation from Carey for the full amount of his loss. I'm satisfied that if Carey had complied with its own distinct regulatory obligations as a SIPP operator, the arrangement for Mr M wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

Carey has said Mr M would have invested regardless of its involvement. But I'm not persuaded by this. I don't think there is any persuasive evidence that Mr M would have gone ahead with the transfer of his existing pensions if Carey had refused his application and explained why this was the case. I'm not persuaded that if he'd understood the risks that he would have been prepared to risk what appears to have been a significant portion of his pension provision at the time, particularly given he's provided testimony that he is risk averse and only proceeded because he believed the investment was safe.

Carey might say that if it hadn't permitted the Global Forestry investment in its SIPPs, that the switch 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 Mr M for his 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 investment into its SIPPs.

Having taken everything Carey has said into consideration, I think that it's appropriate and fair in the circumstances for Carey to compensate Mr M to the full extent of the financial losses he'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 him.

Mr M taking responsibility for his 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, but I'm satisfied that it wouldn't be fair or reasonable to say Mr M's actions mean he 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 Mr M's application to invest in Global Forestry at all. That should have been the end of the matter – if either of those things had happened, I'm satisfied the arrangement for Mr M wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

As I've made clear, Carey needed to carry out appropriate initial and ongoing due diligence on the Global Forestry investment and reach the right conclusions. I think it failed to do this. And just having Mr M 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 customers being aware of the risks and having signed documents confirming that the Global Forestry investment was high risk. But, as I've said, I don't agree that the evidence we've seen to date supports the contention that it's more likely than not that Mr M understood the Global Forestry 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 Mr M 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 Mr M for the loss he's suffered. I don't think it would be fair to say in the circumstances that Mr M should suffer the loss because he ultimately instructed the transactions be effected.

Conclusion

Having carefully considered all of the circumstances, I'm satisfied it's fair and reasonable to conclude that if Carey had refused to permit the Global Forestry investment in its SIPPs then Mr M would've retained his existing pensions and wouldn't have switched to a SIPP or subsequently made the investment that he did. So Carey should put him back in the position he would have been in.

Overall, I think it's fair and reasonable to direct Carey to pay Mr M compensation in the circumstances. While I accept that other parties might have some responsibility for initiating the course of action that's led to Mr M'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 Mr M's applications when it had the opportunity to do so. 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. As such, I'm of the opinion that it's appropriate and fair in the circumstances for Carey to compensate Mr M to the full extent of the financial losses he's suffered due to its failings, and notwithstanding any failings by other firms involved in the transactions.

As set out above, I'm satisfied that Carey should've put a stop to the transaction and that any subsequent investments wouldn't have gone ahead if it had treated Mr M fairly and reasonably. I've carefully considered causation, contributory negligence, apportionment of damages and DISP 3.6.4. But in the circumstances here, I'm still satisfied it's fair for Carey to compensate Mr M for his full loss.

Putting things right

My aim is to return Mr M to the position he would now be in but for Carey's failure to carry out appropriate due diligence checks.

As I've already mentioned above – if Carey had refused to permit Mr M to invest in Global Forestry through its SIPP, I'm satisfied the investment would not have gone ahead and Mr M would've retained his existing pension provisions.

In light of the above, Carey should calculate fair compensation by comparing the current position to the position Mr M would be in if he hadn't transferred his existing pension plans to the Carey SIPP. In summary, Carey should:

1) Obtain the current notional values, as at the date of this decision, of Mr M's previous pension plans, if they hadn't been transferred to the SIPP.

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

5) Pay an amount into Mr M'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 Mr M £500 for the distress and inconvenience the problems with his pension have caused him.

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 Mr M's previous pension plans, if they hadn't been transferred to the SIPP.

Carey should ask the operator of Mr M's previous pension plans to calculate the current notional values of Mr M's plans, as at the date of this decision, had he 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 Mr M has contributed to, or withdrawn from, his Carey SIPP since the outset. To be clear this doesn't include SIPP charges or fees paid to third parties like an advisor.

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

If there are any difficulties in obtaining a notional valuation from the operator of Mr M'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 Mr M has contributed to, or withdrawn from, his Carey SIPP since the outset.

2) Obtain the actual current value of Mr M'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 Mr M's pension provisions.

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

I'm satisfied that Mr M's Carey SIPP only still exists because of the illiquid investments that are held within it. And that but for these investments Mr M's remaining monies could have been transferred away from Carey. In order for the

SIPP to be closed and further SIPP fees to be prevented, any remaining investments need to be removed from the SIPP.

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

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

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

5) *Pay an amount into Mr M'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.*

   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 Mr M's SIPP, or if doing so would give rise to protection or allowance issues, it should instead pay that amount direct to him. 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 Mr M's actual or expected marginal rate of tax in retirement at his selected retirement age.

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

6) *Pay Mr M £500 for the distress and inconvenience the problems with his pension have caused him.*

   In addition to the financial loss that Mr M has suffered as a result of the problems with his pension, I think that the loss suffered has caused him distress. And I think that it's fair for Carey to compensate him for this as well. I think £500 is a reasonable sum given that Carey's actions led to a total loss to Mr M's pension, which will have been a significant source of worry for him as he approached retirement.

SIPP fees

If the investment 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 Mr M to have to pay annual SIPP

fees to keep the SIPP open. So, if the SIPP needs to be kept open only because of the illiquid investment 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 Mr M or into his SIPP within 28 days of the date Carey receives notification of Mr M's acceptance of my final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation isn't paid within 28 days.

My final decision

For the reasons given above, I uphold this complaint.

I require Options UK Personal Pensions LLP (which I have referred to as Carey throughout this decision) to calculate and pay fair compensation to Mr M as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 16 April 2024.

Hannah Wise
Ombudsman