DRN-4711080

The complaint

Mr L 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

On 5 April 2011, Mr L applied for a Carey SIPP through his financial adviser, a business that was an appointed representative ('AR') of a principal ('Firm A') between 13 March 2006 and 2 September 2011. Mr L's application form detailed that he wanted to switch four personal pension schemes into the SIPP to invest £40,000 in Global Forestry.

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

The same day, Carey wrote to Mr L confirming his SIPP had been established.

In mid-April 2011, just over £47,500 was transferred into Mr L's SIPP from his existing pension schemes. And, on 20 April 2011, Mr L signed Carey's Alternative Investment Instruction and Declaration form for Global Forestry declaring, amongst other things, that:

- He was fully aware this investment is high risk and/or speculative and wanted to proceed.
- 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.
- Mr L 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 these will 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.

And, in or around May 2011, £41,000 of Mr L's pension monies in the SIPP, rather than the initially intended £40,000, was invested in Global Forestry. In January 2012, Mr L received a £2,666.67 return from his Global Forestry investment.

In May 2012, Mr L also went on to invest £7,000 of his pension monies in the SIPP in Carbon Credits – another high-risk unregulated investment – via the Carbon Advice Group, the latter of which was dissolved in October 2014.

In 2014, GFI went into administration. And, in 2015, the Serious Fraud Office (SFO) announced it had opened an investigation into GFI. In 2019, the SFO said that the former directors of GFI had been charged with offences relating to alleged fraud concerning the Global Forestry investment 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 and sentenced with 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 scan pensioners and savers out of their money under the false pretence of environmental protection.

It doesn't seem to be in dispute here that Mr L's Global Forestry and Carbon Credit investments can't be redeemed and are illiquid.

Mr L's complaint

On 11 September 2017, Mr L complained to Carey that it should have been more suspicious of the investments and acted in its role as trustee. He asked it to put him back in the financial position he would otherwise have been in.

In November 2017, Carey sent Mr L its final response letter. It said, in summary, that:

- It's an execution-only SIPP provider, as explained to Mr L in all the documentation and it acted on his specific instructions.
- It didn't provide advice and wasn't permitted to do so. It didn't consider the suitability of the switch and underlying investment for Mr L. His regulated financial adviser was responsible for that in respect of Global Forestry and Mr L's complaint should be directed to it. When Mr L made the investment into Carbon Credits, Firm A was no longer appointed as his financial adviser, so Mr L made his own decision to invest in this on an execution only basis.
- It's clear from the documentation that Mr L was aware he was investing in a leasehold plot of land through Global Forestry.
- Mr L signed member declarations confirming he understood this and all documentation. It was also made clear in the documentation that he was aware he was investing in Carbon Credits, which was high risk and potentially illiquid. And it recommended he seek financial advice.
- It ensured the investments were suitable to be held in a SIPP.

In mid-January 2018, unhappy with Carey's response, Mr L referred his complaint to our Service. Mr L has said throughout the course of his complaint, amongst other things, that:

- He's risk adverse, the investments were inconsistent with his requirements and his capacity for loss.
- He was advised it was better to consolidate his pensions and investments, as it was safe, the investments were eco-friendly and 'on the up'. He wasn't advised of the risks, only of the benefits. And he was made aware of everything, including the Carbon Credit investment, through the initial adviser.
- He had no prior interest in changing his pension.
- He has no other pension provision.
- The matter has caused him sleepless nights and he's found it very difficult to accept the loss of his pension.

Our Investigator asked Carey a series of detailed questions in respect of the due diligence it had carried out on Firm A and the Global Forestry investment and for evidence of this. As well as asking for copies of letters sent to Mr L in respect of the status of the investments, transaction history and statements, for example. However, despite Carey having asked our Service for more time, it doesn't appear to have gone on to provide this information. So our Investigator went on to issue their findings.

Our Investigator said, in summary, there were red flags in respect of the investments that Carey ought to have identified, such that it should have refused Mr L's applications. He said that having Mr L sign indemnity declarations wasn't effective for Carey to meet its obligations. It should have refused Mr L's business instead. And if it had done this and shared its concerns with Mr L then it's unlikely the investments would have gone ahead. So he said it should put this right. And that Carey should also pay Mr L £500 compensation for the distress and inconvenience this matter has caused him.

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

- 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.
- Mr L has made his complaint about the switch to the SIPP and the Global Forestry investment more than six years after the events complained of and more than three years after he ought reasonably to have become aware he had cause for complaint in light of the correspondence it sent to him in 2013 and 2014 about the status Global Forestry. Including being told that investment returns hadn't been received and that Mr L should seek financial or legal advice or contact Action Fraud if he believed he'd been a victim of fraud. It said this put Mr L on notice of potential issues and a train of enquiry would have led any reasonable person to consider their position vis a vis the SIPP provider. So it said Mr L's complaint had been made too late for our Service to consider it.
- Only the SIPP guidance published prior to receiving Mr L's SIPP application and subsequent investment instructions is relevant. Otherwise our Service would be considering Mr L's complaint with the benefit of hindsight, which no reasonable court would do. The later guidance introduced new expectations and reflects more than what the industry was already doing.
- Reference to the Reviews contravene the decision in Adams on the basis these:
    - have no bearing on the construction of the Principles as the contents of the documents cannot found a claim for compensation of itself;
    - cannot alter the meaning of, or the scope of the obligations imposed by, the Principles;
    - do not provide "*guidance*" and even if they were considered statutory guidance made under Financial Services and Markets Act ('FSMA') s.139A, any breach would not give rise to a claim for damages under FSMA s.138D.
- The Financial Conduct Authority's ('FCA' – previously the Financial Services Authority ('FSA')) 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 L 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 it is 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 L why would have required it to provide advice to Mr L.
- 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.
- 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.
- Mr L had a regulated financial adviser and it was entitled to take a degree of comfort from that. So it's unfair and unreasonable to place the liability on it. And when Firm A remains an active company.
- Following its due diligence on Carbon Credits, it updated its member declaration to include further wording, such as that the market for trading Carbon Credits is still immature, there may not be a ready buyer and no guarantee they could be sold for a profit if so. And that the investment is potentially high risk, long term and illiquid. And Mr L signed this, which was in clear plain language, confirming he wanted to proceed, such that he was aware of the risks. And it's declaration reflects the contents of the FSA warning.
- The declaration Mr L signed also said that he had considered the information provided by Carbon Advice Group, which provided investors with a document named 'Investing in the Global Markets', which made clear the risks. If these warnings didn't sufficiently convey the risks then what would have. It is well established that a reasonable person is expected to read their correspondence: *Webster v Cooper & Burnett* [2000].
- It didn't cause Mr L's loss. It's likely he was keen to invest given his desire to make green investments and would have done so even if it had refused his application.
- 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 Mr L could have asked it to proceed in any case.
- Its contract with Mr L relieves it of liability. To conclude otherwise would render it void and unenforceable.
- Mr L should bear some responsibility for his own decisions.
- 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.
- A fair and reasonable comparator for redress would be the lower discount rates, as per 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 L to retain the investment within the SIPP if it cannot be returned to it when compensation is calculated on the assumption this would be returned or have a nil value would give Mr L a windfall.
- Our Service recommended £500 compensation for distress and inconvenience but provided no evidence to support that Mr L 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.
- It requests an oral hearing to properly determine the complaint, in particular concerning Mr L's understanding of and approach to the investment, as well as his motivation for entering the transaction.
- It told Mr L that the investment was high-risk. Mr L ought to have understood a simple and clear statement that he signed to this effect. Our Service is departing from settled law on this point without clear explanation. In Adams it is recognised that the statements describing the SIPP provider's role as execution only did not lack clarity.

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 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 our Service seeks to impose on Carey a duty of due diligence that it does not in fact owe. It seeks, in effect, to override COBS careful allocation of duties between different types of firm conducting different types of business, and to impose duties on Carey in addition to those provided for under COBS, by means of a generalised appeal to the Principles.
- If under the Principles Carey really had the obligations of due diligence our Service has set out, and had acted in accordance with them, it would have been required to engage in the activity of advising on investments, and so place itself in contravention of its regulatory permissions. Hence the importance of the contractual documentation governing the arrangements between the parties considered below.
- The relationships are the same as in *Adams* which held that:

    - 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*".

- Our Service has ignored, or placed insufficient weight on, the fundamental fact of the parties' contractual arrangements, and on the clear demarcation of roles and responsibilities thereunder, and consequently to have constructed due diligence obligations for Carey to which it was not in fact subject.
- Our Service only acknowledges our divergence from *Adams* in passing, and the brief justifications for it are misconceived.
- The judge's conclusion in *Adams* is avoided through the finding that, regardless of the relevant contractual arrangements, Carey should have concluded that the investment was inappropriate and refused to accept the application. Again, however, this is to misapprehend the relationship between the Principles and Carey's contractual arrangements. The latter, as set out in *Adams*, reflect the legal basis upon which Carey – like other similar firms – conducted its business: the concept of execution-only services is well known in the financial services context, as is reflected in the case law, one of the reasons clients seek the services of execution-only SIPP providers being that they do not wish to pay the higher charges of advisory pension providers. To seek to use the Principles, notwithstanding this factual context, to impose on Carey the duties of due diligence set out in the decision, is both artificial and illegitimate.
- 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*.

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

I issued a provisional decision on Mr L's complaint and concluded that it should be upheld. Mr L accepted my provisional findings and had no further comments to add. Options didn't provide any further comments or information in response.

What I've decided – and why

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

Having done so, I remain of the view that Mr L's complaint should be upheld for largely the same reasons as those set out in my provisional decision, which I've largely repeated below.

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

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

Preliminary point - jurisdiction

For the avoidance of doubt, I am considering this point, and the other preliminary point below, on the basis of the applicable rules and law and not on the basis of what is fair and reasonable in all the circumstances.

Carey has made a passing reference to this case perhaps being time barred.

Before considering the merits of Mr L's complaint in respect of the switch to the Carey SIPP to make the Global Forestry investment, I've considered whether he complained within the time limits allowed for making complaints. The rules our Service is bound by, known as the Dispute Resolution (DISP) Rules – found in the FCA handbook – say in DISP 2.8.2R that, unless the business consents (Carey hasn't), we can't consider a complaint if it's referred to us:

> *"… (2) more than:*
>
> *(a) six years after the event complained of; or (if later)*
>
> *(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;*

unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;…"

Mr L has complained that Carey should have been more suspicious of the investment and acted in its role as trustee. So I think the crux of his complaint is that if Carey had carried out sufficient due diligence on the Global Forestry investment then he wouldn't have been able to make this.

As the events complained of took place in or around May 2011 and Mr L didn't raise his complaint with Carey until September 2017 and then our Service until January 2018, it has been referred to us more than six years after the events occurred.

This means the issue left for me to decide is whether I think Mr L complained within three years of when he became aware, or when he ought reasonably to have become aware, he had cause to complain. And when I say here cause to complain, I mean cause to make this complaint about this respondent firm, Carey, not just knowledge of cause to complain about anyone at all.

In order to be aware of cause for complaint, the complainant should reasonably know there is a problem, that they have or may suffer loss, and that someone else is or might be responsible for the problem – and who that someone is. So to have knowledge of cause for complaint about Carey, Mr L needed to be aware, or should reasonably have been aware, there's a problem which has or may cause him loss and that Carey might be responsible for this.

Carey has said that Mr L was aware of the problems with his investment as far back as 2013 and 2014. It said it told him in May 2014, following updates it sent him in mid to late 2013 about delays in payment of returns, that these still hadn't been received and GFI hadn't responded to its request for an explanation despite numerous chasers. And that it advised Mr L to see financial or legal advice if he had questions or to contact Action Fraud if he believed he'd been a victim of fraud. Carey said this should have caused Mr L to be aware he had cause for complaint.

While I haven't been provided with copies of the relevant communications, if it is as Carey has described then Mr L might have known something had gone wrong in 2014. But, in any event, I'm not satisfied that Mr L had, or our ought reasonably to have had, sufficient knowledge that Carey was or might be responsible for the problem.

I've seen no evidence that Mr L was sent or told anything more than three years before his complaint was referred to Carey in September 2017, that ought to have indicated to him, or a reasonable retail investor in his position, that it might have done something wrong and caused him to think it had responsibility either wholly or in part for the position he was in – the position of having a SIPP with investments in that had suffered losses. Carey hasn't suggested that there was anything in the communication it said it sent to Mr L in 2013 and 2014 or otherwise to make him think this might be the case.

By 2015, the regulator, the Financial Conduct Authority, had published reports on the results of two thematic reviews on SIPP operators in 2009 and 2012, issued guidance for SIPP operators in 2013 and written to the CEOs of SIPP operators in 2014. A common theme of those communications is that the regulator considered SIPP operators had obligations in relation to its customers even where it didn't give advice, and that many SIPP operators had a poor understanding of those obligations.

So, in the circumstances, I don't consider either Mr L, or reasonable retail investors in his position, should have had an understanding of the obligations SIPP providers were under, or that Carey otherwise caused or contributed to his loss, when Mr L received the information that it says was enough to make him aware he had cause for complaint.

Mr L said that he was first made aware he might have cause for complaint about Carey in 2017 when he spoke to our Service about what happened. While I haven't been able to find a record of this communication from the time, I think it ties in with Mr L going on to make his complaint to Carey within three years of this, in September 2017.

And, in any case, having carefully considered all the evidence we've been provided, I've not seen anything that should have alerted a reasonable retail investor in Mr L's position that Carey had responsibility for the position he was in i.e. that he could attribute his problem to acts or omissions by it, more than three years before his complaint was made to it. So I'm satisfied this complaint has been brought in time and that it's one we can consider.

Preliminary point - Carey's request for an oral hearing

Carey has said an oral hearing is necessary to explore, for example, Mr L's understanding, motivations for entering the transactions and the roles played by the parties.

Our Service provides a scheme under which certain disputes may be resolved quickly and with minimum formality (s.225 of FSMA). 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. In this case, Carey has had the opportunity to consider, and comment on, our Investigator's view as well as information provided by Mr L.

I have considered the submissions Carey has made. However, I am satisfied that I am able to fairly determine 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 L's application at all. Mr L'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 L, 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 L's complaint.

Relevant considerations

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

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

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

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

And at paragraph 77 of BBA Ouseley J said:

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

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

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

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

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

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

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

I note that the Principles for Businesses didn't form part of Mr Adams' pleadings in his initial case against Carey SIPP. And, HHJ Dight didn't consider the application of the Principles to SIPP operators in her judgment. The Court of Appeal also gave no consideration to the application of the Principles to SIPP operators. So, neither judgment said anything about how the Principles apply to an Ombudsman's consideration of a complaint. But, to be clear, I don't say this means *Adams* isn't a relevant consideration at all. As noted above, I've taken account of both judgments when making this decision on Mr L'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 L's complaint. In particular, HHJ Dight considered the contractual relationship between the parties in the context of Mr Adams' pleaded breaches of COBS 2.1.1R that happened after the contract was entered into. And he wasn't asked to consider the question of due diligence before Carey SIPP agreed to accept the investment into its SIPP.

In Mr L'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 L's application.

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

The regulatory publications

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

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

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

The 2009 Thematic Review Report

The 2009 report included the following statement:

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

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

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

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

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

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

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

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

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

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

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

The later publications

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*"**Due diligence***

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

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

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

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

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

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

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

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

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

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

- correctly establishing and understanding the nature of an investment
- ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation
- ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable)
- ensuring that an investment can be independently valued, both at point of purchase and subsequently, and
- ensuring that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc.)

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

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

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

At its introduction the 2009 Thematic Review Report says:

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

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

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

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

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

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

I've carefully considered what Carey has said about publications published after Mr L'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 L's complaint, mean that the examples of good practice they provide weren't good practice at the time of the relevant events. Although the later publications were published after the events subject to this complaint, the Principles that underpin these existed throughout, as did the obligation to act in accordance with the Principles.

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

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

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

To be clear, I don't say the Principles or the publications obliged Carey to ensure the transactions were suitable for Mr L. It's accepted Carey wasn't required to give advice to Mr L, 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 L's applications.

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

And in determining this complaint, I need to consider whether, in accepting Mr L'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 the FSMA. I've carefully considered these but, to be clear, it's not my role to determine whether something that's taken place gives rise to a right to take legal action. I'm deciding what's fair and reasonable in the circumstances of this complaint – and for all the reasons I've set out above I'm satisfied that the Principles and the publications listed above are relevant considerations to that decision.

And taking account of the factual context of this case, I think that in order for Carey to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), amongst other things it should have undertaken sufficient due diligence into the investments *before* deciding to accept Mr L's applications.

Ultimately, what I'll be looking at here is whether Carey took reasonable care, acted with due diligence and treated Mr L 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 L'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 L's application.

The contract between Carey and Mr L

Carey made some submissions about its contract with Mr L 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 L or otherwise have ensured the suitability of the SIPP or investments for him. I accept that Carey made it clear to Mr L 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 L 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 L'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 L 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 certainly went beyond checking that the Global Forestry investment existed and would not result in tax charges and I think it understood this at the time. I say this because, while Carey hasn't provided us with a copy of the due diligence it carried out into Global Forestry in respect of Mr L's complaint, it has provided some information on another complaint with our Service that it said it considered before accepting the Global Forestry investment within its SIPPs. In summary, this shows that Carey:

- Checked World Check in respect of GFI, its directors and the trustee appointed by GFI.
- Received project summaries, legal opinion and information in respect of the title, ownership and the nature of the investment.
- Received sample copies of the rental agreements in respect of the plots of land.
- Reviewed Global Forestry investment brochures.

So Carey did undertake some due diligence checks into the Global Forestry. But I think it needed to do more to satisfy its obligations. And, in light of the evidence I've seen, I think Carey failed to draw a reasonable conclusion on accepting Mr L'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. And given Carey provided us with GFI brochures aimed at investors, it clearly thought it was important to look at this material at the time too. I think the checks Carey performed ought to have gone beyond looking at the brochure produced by GFI though. I think Carey ought to have carried out its own research, including making internet searches about the investment company. And that Carey ought to have had serious concerns about some of the information within the marketing material and real cause for concern about the risk of consumer detriment.

The online marketing material I've seen on GFI's own website in January 2011 said that its tropical hardwood investments in Brazil were a "*certified, high return, low risk*" investment, with "*High Returns 10-15% Returns (PA)"* and "*Minimum of 10% Returns every year, **contractually guaranteed***" (my emphasis).

It also said "*We provide lots of investor securities*" and that the contracts were "*Government backed and regulated*".

And the financial returns page from May 2010 said:

*"Timber has consistently proven to be a profitable investment…**the returns don't suffer from the fluctuations of typical investments** like shares or metals. Our projections mean that **you can expect a 12% return** per annum on your investment."* (my emphasis).

A 22-page online Global Forestry brochure dated 17 May 2010, that was seemingly available in the public domain to investors at the time, also said that topical forestry investments provide a "*non-volatile market with high long-term returns, and a **low risk**-to return ratio*" (my emphasis). And that forestry investments offer "*long term, stable investment*" 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*" (my emphasis). 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 think Carey should have been concerned about how the projected returns were set out in the marketing material. The 10% annual return was described as 'guaranteed' to investors in all the materials I've seen.

I note the website explained that this was based on 'rental returns'. And that a 15-page brochure set out that investors would rent their plots to a GFI approved rental company, which would take its fees and costs from harvest proceeds and pay the agreed rental fee of a 10% minimum contractual annual return to the investor from these. While I haven't been provided with a copy of any rental agreement that might have Mr L signed, I can see from samples that these provided for an annual rent of £500 per plot, equivalent to a 10% return on the investment. And it appears the rental companies had undertaken to pay rent for the first three years to be held in escrow by the trustee until this was due to be paid to investors.

But the other marketing material I've seen, such as the 22-page online brochure, doesn't set out any such involvement by rental companies. Instead this seems to suggest that the investment income was derived directly from thinning and harvesting the trees, as opposed to rental income. So the marketing information provided to customers wasn't always transparent as to the structure of the investment and who was responsible for payment of the returns.

And 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 having enough funds and/or generating enough profit to fulfil and honour the guarantees and undertakings given. These were inherent and significant risks with the investment, which investors were likely unaware of.

The 15-page brochure said that the rental companies had gone through extensive due diligence before GFI had selected these. But, other than seemingly being provided with a short paragraph as to the background of the rental companies and their costs for years one to four, I can't see that Carey was provided with, or requested, any further information to understand the strength of the guarantees and undertakings being given or that it sought to independently verify the information it had been provided with.

Furthermore, while a 'Belem Sky Plantation Opportunity' leaflet again referred to a minimum 10% return on the investment and the early buy back option, a disclaimer in it seemed to suggest there were no guarantees in respect of income after the first year. This appears to contradict what the other marketing materials stated about the minimum contractual return, when it was marketed as a mid to long-term investment. I think this ought to have raised concerns with Carey about the way the investment was being marketed. And I don't know whether customers like Mr L would have had sight of this leaflet before investing. So it isn't clear whether they would've understood that there might in fact be no income guarantees after the first year after all.

In addition, neither the brochures nor the website detailed how GFI planned to fund the early buy back option with a 5% return that it was responsible for. This was dependent on GFI's ability to do so. And there appears to be some inconsistency in terms of how this return was described. The 22-page online brochure said that *"GFI offers to directly purchase your plots any time after 3 years with a return of 5%"*. So the marketing material suggested a 5% return on the investment and, given Mr L invested £41,000, over three years this would equate to £47,462.62. However, the investment agreements I've seen set out that after three years the investor would be entitled to the *original purchase price* back plus 5%, which instead suggests that Mr L could expect to receive £43,050 after three years. This is a significantly different offering, and I'm not persuaded the marketing material that I think investors are likely to have seen would've made this clear.

While Carey recognised that Global Forestry is an alternative investment and may be high risk and/or speculative in light of the member declaration, it should have been concerned that neither the website nor brochures gave alternative projections in different market conditions or clearly highlighted the risks associated with unregulated investments such as this. The Global Forestry investment was certainly not "*low risk*" and secure on any reasonable analysis, even though it appears to have been marketed as such to pension investors.

There wasn't sufficient explanation in the marketing material I've seen 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. I recognise that the 15-page brochure showed the average timber returns over a 14-year period against global equity markets and it included a comparison in respect of projected annual returns between GFI timber and other markets, such as the FTSE 100. But it also said that this information was put together by GFI's research team. And I can see that the comparison was done on the basis that GFI would always provide a guaranteed minimum return of 10% per annum, which as I've said, seemingly wasn't guaranteed over the long-term.

I recognise the brochures provided some warnings. For example, the 22-page online brochure said 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 that there are no guarantees teak will go up, it again tempered this by saying that this had risen every year for the past 20, it's a very safe commodity and an excellent investment, but with no evidential basis given for these statements. The 15-page brochure similarly said that the market value of teak had steadily increased over the last 20 years.

The GFI website didn't provide any explanation behind the investor securities it said it offered or the government backing and regulation it referred to having. The website also failed to explain that GFI didn't have any protection or regulatory status in the UK. I note that the legal disclaimer of the Belem Sky Plantation Opportunity leaflet explained that neither GFI nor the investment were regulated, meaning investors had no recourse to our Service or the Financial Services Compensation Scheme. But as I've said, I'm not sure whether investors would've seen this leaflet. And I think this warning ought to have been given in all the marketing materials and on the website rather than at the back of one leaflet.

I also think it is unclear what investor's ownership rights were. For example, while the brochures said that 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.

Overall, looking at 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 and there may be no market for it.
- There were other risks involved such as disease or fire that could've destroyed the trees allocated to investors.
- It was being targeted for investment by pension investors, it was 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 have been successful. But such high projected returns and guarantees without any apparent basis 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.
- 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 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 L'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 L's SIPP.

To my mind, Carey didn't meet its regulatory obligations or good industry practice at the relevant time. I think it's fair and reasonable to conclude that Carey didn't act with due skill, care and diligence, and it didn't treat Mr L 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 L 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 L. I accept Carey had no obligation to give advice to Mr L or to ensure otherwise the suitability of an investment for him.

So my finding isn't that Carey should have concluded that Mr L wasn't a 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 L 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 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.

Carey's due diligence on Firm A and Carbon Credits

Carey had a duty to conduct due diligence and give thought to whether to accept Mr L's SIPP application from Firm A's AR. And to do the same in respect of his later investment application into Carbon Credits. That's consistent with the Principles and the regulators' publications as set out earlier in this decision.

I don't think it's necessary for me to also consider Carey's due diligence on Firm A and the Carbon Credits investment at this stage though, given what I've said about Carey's due diligence on the Global Forestry investment and my conclusion that it failed to comply with its regulatory obligations and good industry practice at the relevant time. I'm satisfied that Carey wasn't treating Mr L fairly or reasonably when it accepted his application to invest in Global Forestry in the first place.

Mr L's application to take out the SIPP was seemingly to make the Global Forestry investment (as mentioned on the SIPP application form) and, for reasons I'll come on to below, if that had been declined/rejected then his application to open the SIPP and switch his pensions would not have gone ahead, his SIPP would not have been opened, his pensions would have stayed where they were and I think it's unlikely the Carbon Credits investment would later have been made.

So I've not gone on to consider the due diligence Carey may have carried out on Firm A and the Carbon Credits investment and whether this was sufficient to meet its regulatory obligations.

Did Carey act fairly and reasonably in proceeding with Mr L'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' 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 L'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.

My remit is, of course, to make a decision on what I think is fair and reasonable in all the circumstances. And my view is that it's fair and reasonable to say that just asking Mr L to sign 'risk' or 'indemnity' 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 had to act in a way that was consistent with the regulatory obligations that I've set out in this decision. In my view, Carey was not treating Mr L fairly by asking him to sign an indemnity absolving Carey of all responsibility, and relying on such an indemnity, when it ought to have known that Mr L was being put at significant risk.

Is it fair to ask Carey to compensate Mr L?

In deciding whether Carey is responsible for any losses that Mr L 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 L'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 L 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 L 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 L's applications. That should have been the end of the matter – it should have told Mr L that it could not accept the business. And I am satisfied, if that had happened, the arrangement for Mr L would not have come about in the first place, and the loss he suffered could have been avoided.

Had Carey explained to Mr L why it would not accept his applications or was terminating the transaction, I find it very unlikely that Mr L would have tried to find another SIPP operator to accept the business.

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

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 L'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 L 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 L 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 L'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 L wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

Carey has said Mr L 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 L would have gone ahead with the transfer if Carey had refused his application and explained why this was the case. I'm not persuaded that Mr L would have risked what he's said was nearly all his pension provision at the time (aside from state pension) if he'd understood the risks, particularly given he's provided testimony that he is risk adverse. Mr L was a retail customer. And I think his testimony about his circumstances is supported by his SIPP application form, which said he worked in a trade and earnt £60,000 per year.

Carey might say that if it hadn't permitted the Global Forestry investment in its SIPPs, that the switch and investments 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 L 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 L 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.

<u>Mr L taking responsibility for his own investment decisions</u>

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

I've considered this carefully and I'm satisfied that it wouldn't be fair or reasonable to say Mr L'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 L'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 L 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 L sign forms containing declarations wasn't an effective way of Carey meeting its obligations, or of escaping liability where it failed to meet its obligations.

I've carefully considered what Carey has previously said about customer's being aware of the risks and having signed documents confirming that the 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 L 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 L 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 L for the loss he's suffered. I don't think it would be fair to say in the circumstances that Mr L 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 L would've retained his existing pensions and wouldn't have switched to a SIPP or subsequently made the investments that he did, including the Carbon Credits investment. 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 L 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 L'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 L'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. That other parties might also be responsible for that same loss is a distinct matter. However, that shouldn't impact on Mr L's right to fair compensation from Carey for the full amount of his loss. The key point here is that but for Carey's failings, Mr L wouldn't have suffered the loss he's suffered. As such, I'm of the opinion that it's appropriate and fair in the circumstances for Carey to compensate Mr L 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 L 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 L for his full loss.

Putting things right

My aim is to return Mr L to the position he would now be in but for what I consider to be Carey's due diligence failings.

In light of the above, I provisionally think that Carey should calculate fair compensation by comparing the current position to the position Mr L would be in if he hadn't switched from his existing pension plans. But for Carey's failings I think that Mr L would've retained his existing pensions and that he wouldn't have switched to a SIPP or subsequently made the investments that he did, also including the later Carbon Credits investment. And I think the following redress will put this right.

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

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

In summary, Carey should:

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

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

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

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

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

6. Pay Mr L £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 L's previous pension plans, if it hadn't been transferred to the Carey SIPP.

   Carey should ask the operators of Mr L's previous pension plans to calculate the current notional value this, as at the date of this decision, had he not switched into the SIPP. Carey must also ask the same operators to make a notional allowance in the calculations, so as to allow for any additional sums Mr L 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 adviser.

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

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

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

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

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

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

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

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

   I'm satisfied that Mr L's Carey SIPP only still exists because of the illiquid investments that are held within it. And that but for these investments Mr L's monies could have been switched 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 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 L's SIPP in step 2).

   If Carey doesn't purchase the investments, it may ask Mr L 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 L 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 L's Carey SIPP, so that the transfer value of this is increased by an amount equal to the loss calculated in step 3). This payment should take account of any available tax relief and the effect of charges. The payment should also take account of interest as set out below.

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

   If Carey is unable to pay the compensation into Mr L'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 L's actual or expected marginal rate of tax in retirement at his selected retirement age.

   It's reasonable to assume that Mr L is likely to be a basic rate taxpayer at his selected retirement age, so the reduction would equal 20%. However, if Mr L 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%. Neither Carey nor Mr L have disputed that this is a reasonable assumption, despite being given the opportunity to do so in response to the provisional decision and being made aware that it won't be possible for us to amend this assumption once a final decision has been issued.

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

   In addition to the financial loss that Mr L has suffered as a result of the problems with his pension, I think that the loss suffered to Mr L's pension provision has caused him distress. He's explained that this matter has caused him sleepless night and he's found it very difficult to accept the loss of his pension. Mr L lost a significant proportion of his pension provision, I think it's unlikely he can afford such a loss and there isn't much time to recover it before retirement, so I think this is likely to have caused him worry. And I think that it's fair for Carey to compensate him for this as well.

SIPP fees

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

Interest

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

My final decision

For the reasons given. It’s my final decision that this complaint is upheld and Options UK Personal Pensions LLP must calculate and pay fair compensation to Mr L as set out above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr L to accept or reject my decision before 24 April 2024.

Holly Jackson
Ombudsman