DRN-4843563

The complaint

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

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

What happened

I've outlined the key parties involved in Mr C's complaint below.

Involved parties

Carey

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

Firm B

As I understand it, Mr C was contacted by someone I'll refer to as Mr A of Firm B, which was an unregulated introducer.

Ethical Forestry Limited ('Ethical Forestry')

Ethical Forestry was a company based in Bournemouth which invested in an offshore investment scheme relating to plantations of what appears to be two types of hardwood tree crops, Acacia and Melina. The Ethical Forestry brochure said that the investment worked by planting trees for private investors and institutions on a "for profit" basis on plantations in Costa Rica. The trees would be grown and then harvested for their wood for sale to the timber trade.

This investment was advertised as one that would return a high yield to investors over time once the trees were grown and sold. Some of these benefits investors were informed about included that these trees can grow to impressive heights over a 12-year period and don't suffer from humidity and moisture changes compared to other trees in Costa Rica. These trees were, however, subject to other naturally occurring weather issues, disease, pests, as well as management and ownership issues and political shifts in Costa Rica.

In December 2016, Ethical Forestry went into liquidation. The liquidator's report, dated 24 January 2022 said, amongst other things, that many investors were led to believe they had ownership of trees and cropping rights in relation to the trees and were given GPS co-ordinates to these. However, it's clear these rights weren't given as these weren't capable of being granted under Costa Rican law.

The abrupt collapse of Ethical Forestry led to the Serious Fraud Office ('SFO') opening a criminal investigation into it. And the SFO later brought charges related to alleged fraud concerning the running of Ethical Forestry.

Carbon Credits – Carbon-ex SARL

Carbon-ex SARL was registered in Luxembourg. It provided trading accounts which could be used for the buying and selling of carbon credits.

A carbon credit is a generic term for any tradable certificate or permit representing the right to emit one tonne of carbon dioxide or the equivalent mass of another greenhouse gas.

Buyers and sellers can use an exchange platform to trade, like a stock exchange for carbon credits. The quality of the credits is based in part on the validation process and sophistication of the fund or development company that acted as the sponsor to the carbon project.

<u>The transaction</u>

On 27 January 2011, Mr A of Firm B sent Mr C an email about Carbon Credits. In this, Mr A said that he was forwarding Mr C information regarding the investment opportunity and he included key facts and links to investment brochures.

On 10 April 2011, Carey received Mr C's signed application form to switch his existing pension scheme into a Carey SIPP. This asked Mr C to tick a box to indicate that he'd received advice on the switch which, along with the space for him to provide the adviser's details, was left blank. And the form was blank in respect of the intended investments.

The application form set out that Mr C was self-employed, earning up to £50,000 per year. And under '*Cancellation Rights*', Mr C signed to confirm acceptance that his 30-day SIPP cancellation rights had been waived.

On 14 April 2011, Carey sent Mr C a letter confirming his SIPP had been established. And, on 20 April 2011, after chasing Mr C for the transfer forms from his existing scheme, to which Mr C replied and said he'd post to it the next day, Carey said that:

'…*as soon as I get it I will have it signed and sent to Scottish Widows the same day. I know* [Mr A] *at* [Firm B] *is keen to get you invested in one of the investments he is promoting at the moment.*'

On 26 April 2011, Mr A of Firm B emailed Carey asking whether it had received information it needed back from Mr C. Mr A also discussed forwarding forms to Carey and Mr C for him to fill out in respect of Ethical Forestry and said that it could '*correspond with Ethical Forestry to allocate a small amount of timber*' to Mr C and that Ethical Forestry will honour the deal if '*we complete the application forms with his SIPP number*'.

Carey responded to Mr A of Firm B later that day, asking him to arrange for the timber to be reserved for Mr C, also copying Mr C in and asking him to complete the member declaration and indemnity form for the Ethical Forestry investment.

Carey received the completed form back the next day, which set out, amongst other things, that:

- Mr C was fully aware the investment is high risk and/or speculative;
- Carey was acting on an execution only basis and hadn't provided any advice;
- Mr C had read and discussed the Adviser Notification letter with his financial adviser and wished to proceed;
- Should the investment be subject to a tax charge within the scheme these will be paid directly from his fund or by him; and that
- Mr C indemnified Carey against any and all liability arising from the investment.

Carey doesn't appear to have provided us with a copy of the 'Adviser Notification letter' in respect of Mr C that the above form said he'd been asked to read and discuss with his financial adviser. That's despite my asking Carey to do so by the deadline to respond to my provisional decision.

Having previously seen copies of the 'Adviser Notification letter' that Carey sent to customers and their introducers/advisers in or around mid-2011 though, Carey said in this that, following a request to allow the Ethical Forestry investment into the SIPP, its investment committee had considered the information provided and wanted to draw attention to certain information. As well as Carey's key findings on Ethical Forestry, which I'll come on to, the letter listed the due diligence documentation Carey received on the investment, including the investment purchase form, FAQs, prospectus and projections. And Carey went on to conclude that Ethical Forestry appeared to be an acceptable investment as there didn't appear to be a tax charge. But it said that to proceed it needed certificates of title once the investment had been completed and limitation of liability wording to be added to all contracts and agreements. And towards the end of the letter, Carey asked the introducer/adviser to sign and return an attachment confirming that '*This letter is signed by* [insert name] *as confirmation that I have discussed the information provided with my clients and wish to proceed with the investment as noted*'.

I don't appear to have been provided with a copy of the Ethical Forestry Unregulated Collective Investment Scheme ('UCIS') form for Mr C that I'm aware Carey asked customers and/or their introducers/advisers to complete in respect of this investment from November 2010 – that's despite my asking Carey to provide us with a copy by the deadline to respond to my provisional decision. Having previously seen copies of this form though, Carey said at the top of the form that:

'*This form is to be submitted with all UCIS applications and requires completion by the introducing adviser. Completion of the form allows us to check the UCIS has been promoted in line with FSA rules plus provides valuable data about the type of investments our scheme members are investing in.*'.

At the end of April 2011, just over £16,000 was transferred into Mr C's SIPP with Carey. On 3 May 2011, Carey emailed Mr C copying Mr A of Firm B in, letting him know it had received the transferred funds and that it would make the investment into Ethical Forestry. It also asked Mr C to complete a declaration form for Carbon-ex if he wished to invest in it. And, later that day, Mr C invested £6,000 of his SIPP pension monies into Ethical Forestry.

I'm aware that customer's usually completed purchase order forms in respect of Ethical Forestry, but I don't appear to have been provided with a copy for Mr C. That's despite my asking Carey to do so by the deadline to respond to my provisional decision.

On 4 May 2011, Ethical Forestry sent Carey a receipt, noting the number of trees Mr C had purchased. And under '*What happens now…*' it said that Mr C's trees would be reserved and prepared for planting and that once these were six months old it would count out his allocation, assign the GPS co-ordinates to his property lease and issue this to him along with title documents. I haven't been provided with a copy of any such information or title documents that might have been issued to Mr C, despite my asking Carey to do so by the deadline to respond to my provisional decision.

On 25 May 2011, Carey received the completed member declaration and indemnity form for Carbon-ex, signed by Mr C a few days before, which set out, amongst other things, that:

- Mr C was fully aware the investment is high risk and/or speculative;
- Carey was acting on an execution only basis and hadn't provided any advice;
- Mr C had taken appropriate advice in respect of this investment;
- Should the investment be subject to a tax charge within the scheme these will be paid directly from his fund or by him; and that
- Mr C indemnified Carey against any and all liability arising from the investment.

Later that day just under £9,000 of Mr C's SIPP pension monies were invested in Carbon Credits. And, on 11 October 2011, Carey received a letter which said it enclosed the confirmation of Mr C's purchase from Carbon-ex, along with a copy of an extract from a register showing evidence of the subaccount and Carbon-ex's part of the signed contract. Although we haven't been provided with the copy of the extract referred to, that's despite my asking Carey to do so by the deadline to respond to my provisional decision.

The signed Carbon Credit contract set out the following details:

Project Id: unfccc id: 1243
Project Type: Energy Industries
Project name: Sulige Natural Gas based Power Generation Project, Mongolia

And it said, amongst other things, that:

> *'All investments are speculative and will fluctuate in value. It should not be assumed that the value of investments will always rise. Past performance is not a reliable indicator of future results. You may get back less than the amount originally invested or even lose the full amount. You should carefully consider in light of your financial resources whether investing in Carbon Credits is suitable for you…*
>
> *…There may be a big difference between the buying price and the selling price of Carbon Credits. If you have to sell them immediately, you may get back much less than you paid for them. You may have difficulty in selling Carbon Credits at the price you wish to achieve and, in some circumstances, it may be difficult to sell them at any price. It can be difficult to assess what would be a proper market price for these investments. You should not invest in Carbon Credits unless you have thought carefully about whether you can afford to do so and have taken appropriate independent advice.*
>
> *Representations made by our sales consultants, agents or sales literature either orally, in paper or electronic form do not form part of these Terms. We give no warranty as to the future value of Carbon Credits.*
>
> *Forwards, options and other derivative contracts in relation to Carbon Credits are regulated investments in the United Kingdom. However, Carbon Credits sold by Carbonex are not derivatives and, as such, are not regulated investments. Accordingly, Carbonex is not required to be regulated by the Financial Services Authority ("FSA") or any other regulator in the United Kingdom. This means, among*

other things, that a person buying Carbon Credits from Carbonex will not benefit from any protections afforded by the FSA and would not have access to the Financial Services Ombudsman or the Financial Services Compensation Scheme.'

In September 2015, Carey told Mr C that there was currently no market for selling Carbon Credits, so it had valued his investment in this at zero. And Mr C was told in his April 2016 statement that his investment in Ethical Forestry had also been valued at zero.

Mr C doesn't appear to have received any payments or returns from his Ethical Forestry and Carbon-ex investments.

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

Mr C first complained, via his representatives, to Carey in May 2018. He said, in summary, that it didn't do enough due diligence on Firm B or the investments, which were unregulated and high-risk, and it shouldn't have accepted his applications. He said this has caused him to lose out and that he's unhappy with the additional fees he's had to pay Carey, which weren't made clear and he's continued to be charged despite the investments being illiquid.

Carey replied in July 2018 and, unhappy with this response, Mr C referred his complaint to our Service.

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

- It's an execution-only SIPP provider and it acted in line with Mr C's instructions in accordance with COBS 11.12.9R in accepting his SIPP and investment applications.
- There's no record or indication of any third-party involvement in Mr C's SIPP application and his decision to switch to the SIPP.
- Firm B has never been an introducer of business to Carey, it hasn't accepted introductions from Firm B and didn't have terms of business with it. It didn't pay any fees to, nor receive any payment from, Firm B. Carey's records show that Firm B was an investment provider, not an introducer. It might be that Mr C contacted Firm B and it provided him with investment information, but Carey wasn't a party to Mr C's activities and discussions. Carey wasn't contacted by Firm B until the switch had been requested and therefore concluded that Mr C contacted Firm B in relation to the investments after his SIPP had been established.
- Carey was aware Firm B was unregulated but it is permitted to deal with both regulated and unregulated firms. And Carey had strict processes in place for dealing with unregulated firms, which were followed.
- Carey didn't provide advice and wasn't permitted to do so. It didn't consider the suitability of the switch and underlying investment for Mr C and he had the opportunity to seek regulated advice if he'd wanted to.
- It provided risk warnings about the investment being high risk and/or speculative, recommended Mr C seek advice and took steps to ensure he understood his instructions were on an execution only basis. Mr C signed member declarations confirming he understood this and all documentation. It was reasonable for it to have accepted Mr C's signature.
- It conducted due diligence on both the Carbon Credits and Ethical Forestry investments. Its main objective was to ensure these were suitable to be held within a UK registered pension scheme. This included its Investment Committee reviewing legal paperwork, product information, company background checks and obtaining an independent report from a third-party external compliance entity. Carey determined that the investments were capable of being held within a SIPP in line with HMRC guidelines and its due diligence didn't indicate any reason not to accept the

investments.
- It applied SIPP administration fees in line with the terms and conditions and fee schedule, which Mr C agreed to. And the work it undertakes isn't dependent on investment performance.

During the course of Mr C's complaint he's said, amongst other things, that:

- He received a 'cold call' from Mr A of Firm B, who told Mr C that his existing pension wasn't generating as much as it would in a SIPP and he was promised high returns.
- Firm B recommended the switch to invest in Carbon Credits and Ethical Forestry and he was told his pension monies would almost double year on year. He was told the opportunity was too good to miss.
- Mr C was told that the investment risks were low and that his pension would only grow. He was so strongly convinced that the investments would grow that he believed this was the only way for him to generate a return on his pension and didn't understand the risks involved in transferring.
- He's unsure what he would have done if Carey had refused the investments.
- He didn't receive any incentive payments or other lump sums back in respect of the switch and investment.

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

- Mr C's complaint has been made too late for our Service to consider it. It was made in May 2018 and Mr C was first made aware there was a problem when Carey made him aware his Carbon Credits investment had been valued at zero in September 2015.
- Our Service hasn't set out where we have departed from the law, and why we have taken that approach. And we're holding it to a duty more extensive or onerous than that recognised by the courts.
- We haven't provided anything to evidence that Firm B was undertaking regulated activities. Mr C should prove how and to what extent it was involved in his decision to invest in Carbon Credits and Ethical Forestry. And Carey hasn't had the opportunity to address this point at an oral hearing with Mr C.
- Only the SIPP guidance published prior to receiving Mr C's SIPP application and subsequent investment instructions is relevant. Otherwise our Service would be considering Mr C's complaint with the benefit of hindsight, which no reasonable court would do. The later guidance introduced new expectations and reflects more than what the industry was already doing.
- Reference to the Reviews contravene the decision in Adams on the basis these:
    - have no bearing on the construction of the Principles as the contents of the documents cannot found a claim for compensation of itself;
    - cannot alter the meaning of, or the scope of the obligations imposed by, the Principles;
    - do not provide "*guidance*" and even if they were considered statutory guidance made under FSMA s.139A, any breach would not give rise to a claim for damages under FSMA s.138D.
- The FCA's Enforcement Guide says that "*Guidance is not binding on those to whom the FCA's rules apply. Nor are the variety of materials (such as case studies showing good or bad practice, FCA speeches and generic letters written by the FCA to Chief Executives in particular sectors) published to support the rules and guidance in the Handbook. Rather, such materials are intended to illustrate ways (but not the only ways) in which a person can comply with the relevant rules.*"

- Regardless of whether or not Carey was aware of Firm B's involvement, and the extent to which Carey undertook due diligence into it, no breach can arise on Carey's part by virtue of it dealing with an unregulated introducer.
- 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 C not to proceed, which overreaches its legal obligations and goes further than published regulatory material.
- It is well established that a reasonable person is expected to read their correspondence: *Webster v Cooper & Burnett* [2000].
- Its risk warnings were self-explanatory, it couldn't have provided any clearer indication that the investments were high risk. And it's unclear why Mr C went ahead anyway in spite of the warnings if he now believes the investments were unsuitable.
- Our Service has failed to correctly apply s.27 and s.28 of FSMA.
- It's likely Mr C was extremely keen to proceed with the investments and would have found a way to do so had Carey not accepted his application. Mr C was determined and another SIPP operator could properly have dealt with the investment.
- Mr C has provided no explanation as to how Firm B obtained his contact details, it's possible he provided these with the purpose of being contacted by such a firm, instigating the relationship.
- Mr C should bear a measure of responsibility for his actions, which should be reflected in any compensation due. It would be unfair for it to be held responsible for the full losses given Mr C chose to invest in products he'd been told were high risk.
- It would be unfair if Carey couldn't rely on the indemnities and declarations Mr C agreed to.
- A fair and reasonable comparator for redress would be the lower discount rates, as per DRN 2670669.
- Our Service recommended £500 compensation for distress and inconvenience but provided no evidence to support that Mr C has suffered any degree of upset.
- The implications of this outcome are serious for the execution only SIPP market.

<u>My provisional decision</u>

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

Carey has since recognised to our Service that, while the events being complained about happened more than six years ago, it agrees that Mr C's complaint was made within the three years of when he was made aware, or ought reasonably to have become aware, of a problem with his investments.

I issued a provisional decision on Mr C's complaint and concluded that it should be upheld. Mr C accepted it, with no further comments to make. And Carey didn't respond.

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 C'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've considered this preliminary point and the next on the basis of the applicable rules and law and not on the basis of what is fair and reasonable in all the circumstances.

As I've said above, Carey has since recognised to our Service that, while the events being complained about happened more than six years ago, it agrees that Mr C's May 2018 complaint was made within the three years of when he was first made aware, or ought reasonably to have become aware, of a problem with his investments in September 2015. So, I haven't considered this issue any further, as it is accepted that Mr C's complaint was made in time for our Service to consider it. And I haven't seen any evidence to make me think otherwise.

Preliminary point – Carey's request for an oral hearing

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

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

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

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

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

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

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

I have carefully considered the submissions Carey has made. However, I'm satisfied that I am able to fairly determine this complaint without convening a hearing. In this case, I'm satisfied I have sufficient information to make a fair and reasonable decision. So, I don't consider a hearing is required. The key question is whether Carey should have accepted Mr C's applications at all. Mr C'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 C by phone or in writing where I think necessary.

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

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

I acknowledge that COBS 2.1.1R (*A firm must act honestly, fairly and professionally in accordance with the best interests of its client*) overlaps with certain of the Principles, and that this rule was considered by HHJ Dight in the High Court case. Mr Adams pleaded that 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 her initial pleadings. The Court found that this part of Mr Adams' appeal didn't so much represent a challenge to the grounds on which HHJ Dight had dismissed the COBS claim, but rather was an attempt to put forward an entirely new case.

I note that in *Adams v 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 C's complaint. In particular, HHJ Dight considered the contractual relationship between the parties in the context of Mr Adams' pleaded breaches of COBS 2.1.1R that happened after the contract was entered into. And he wasn't asked to consider the question of due diligence before Carey SIPP agreed to accept the investment into its SIPP.

In Mr C's complaint, amongst other things, I'm considering whether Carey ought to have identified that the business introduced by Mr A of Firm B and the Carbon Credits and Ethical Forestry investments involved a significant risk of consumer detriment. And, if so, whether it ought to have declined to accept Mr C's applications.

The facts of Mr Adams' and Mr C's cases are also different. I make that point to highlight that there are factual differences between *Adams v Options SIPP* and Mr C's case. And I need to construe the duties Carey owed to Mr C 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 C's case.

However, it's important to emphasise that I must determine this complaint by reference to what I think is fair and reasonable in all the circumstances of the case. And, in doing that, I'm required to take into account relevant considerations which include: law and regulations; regulator's rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. There is a clear and relevant point of difference between this complaint and the judgments in *Adams v 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 C on the SIPP and/or the underlying investments. Refusing to accept an application isn't the same thing as advising Mr C on the merits of the SIPP and/or the underlying investments. But I am satisfied Carey's obligations included deciding whether to accept particular investments into its SIPP and/or whether to accept introductions from particular businesses.

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

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

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

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

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

I’d also add that, even if I agreed with Carey that any publications or guidance that post-dated the events subject of this complaint don’t help to clarify the type of good industry practice that existed at the relevant time (which I don’t), that doesn’t alter my view on what I consider to have been good industry practice at the time. That’s because I find that the 2009 Report together with the Principles provide a very clear indication of what Carey could and should have done to comply with its regulatory obligations that existed at the relevant time before accepting Mr C’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 C’s application to establish a SIPP and to invest in Carbon Credits and Ethical 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 Firm B/the business it was introducing and the Carbon Credits and Ethical Forestry investments *before* deciding to accept Mr C's applications.

Ultimately, what I'll be looking at here is whether Carey took reasonable care, acted with due diligence and treated Mr C 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 C's complaint is whether it was fair and reasonable for Carey to have accepted his SIPP application and Carbon Credits and Ethical Forestry applications in the first place. So, I need to consider whether Carey carried out appropriate due diligence checks before deciding to do so.

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

The contract between Carey and Mr C

Carey made some submissions about its contract with Mr C 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 C or otherwise have ensured the suitability of the SIPP or investments for him. I accept that Carey made it clear to Mr C 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 the form Mr C 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 C's case is made with all of this in mind. So, I've proceeded on the understanding that Carey wasn't obliged – and wasn't able – to give advice to Mr C on the suitability of the SIPP or investments.

What did Carey's obligations mean in practice?

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

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

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

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

Carbon Credits

I think Carey's obligations certainly went beyond checking that the Carbon Credits 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 Carbon Credits in respect of Mr C's complaint – that's despite my asking it to do so in response to my provisional decision – it previously provided our Service with the following information on another complaint (the subject of published decision DRN-3043418):

- It first became aware of this type of carbon credits when contacted by a business (seemingly unconnected to Firm B) on 14 October 2010 asking if it could be included in a Carey SIPP.

- Before accepting this type of Carbon Credits as an investment within its SIPPs Carey instructed a third-party business to review whether this could be held within a SIPP. A report was given on 15 October 2010 and circulated with an email on 19 October 2010. That report concluded the investment was liquid; could be included in a SIPP; and was unlikely to attract any pension scheme tax charges.

- At that time it also reviewed the information it could find about Carbon-ex. In particular its website, brochure and investment model. It has said that these appeared professional to it and gave a good overview of the business.

- On 25 October 2010, it held an Investment Committee Meeting to decide whether to accept the investment and decided to do so provided that:

    - Each customer investing in it completed an 'Alternative Investment Member Declaration and Indemnity' that set out the risks.
    - Where relevant, the customer adviser issued an 'Adviser Notification Letter' to set out that the investment had been discussed and the customer wanted to proceed.
    - Its limitation of liability wording was added to all contracts and assignment documents.

So Carey did undertake some due diligence checks into the Carbon Credits. But I think this was limited and that 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 C's Carbon Credit application, for the reasons set out below.

Carey appears to have carried out limited due diligence on the investment itself. Other than looking at Carbon-ex's website and marketing brochures, the only due diligence it carried out seems to have been a report from a third-party written several months before Mr C's investment application.

The report says it's likely the investment would qualify for a SIPP, but it isn't conclusive on this. Further, an email that was sent with the report on 19 October 2010 – after the report had been carried out – said:

'*The interim investment commentary is attached for this one. I say 'interim' as I must admit carbon credit trading is a completely new one to me. As far as I can tell, there do seem to be exchanges that will set the price for carbon credits although my sense is this is an immature market with a limited and slightly chequered history. Having said that, I cannot see any obvious reasons why it should not be allowed, however I will continue to do a bit more research generally*.'

This Service doesn't appear to have been provided with any further research that was done though.

In relation to the due diligence Carey should have carried out, I think that it should – as a minimum – have:

- Identified the Carbon Credits investment as a high-risk, speculative and non-standard investment and carried out due diligence on it.
- Correctly established and understood the nature of the investment.
- Considered whether the investment was an appropriate investment to make available via its SIPPs.
- Made sure the investment was genuine and not a scam, or linked to fraudulent activity.
- Made sure the investment worked as claimed.
- Ensured that the investment could be independently valued, both at the point of purchase and subsequently.

I accept Carey took some steps to meet its obligations, but I don't believe it did enough to satisfy these. Had Carey carried out sufficient due diligence, I think it's most likely it would've identified points of concern. And that, at the time of proceeding with Mr C's instructions, Carey either knew, or ought reasonably to have known that:

- Carbon-ex (via a network of unregulated introducers) was a platform that purported to offer a service which involved it buying Carbon Credits for a consumer, then selling these to businesses. The investment was based on Carbon Credits being sold for more than was paid for them. But there's no evidence that Carey asked questions to ensure these could be independently valued and that there was a market for selling them.
- Mr C's contract said he'd agreed to purchase 1800 VCS carbon credit units (which I understand stood for Voluntary Carbon Standard at the time, a type of Voluntary Emission Reduction) at a price of £4.87 per unit. While the project appears to have been registered with the United Nations Framework Convention on Climate Change,

I haven't seen any independent verification that the units met the VCS standard.

- The FAQs on Firm B's website in October 2010 said in respect of Carbon Credits, under '*How does the investment work?*' that:

  '[Firm B] *keep their carbon credit prices low, and can therefore offer credits to investors from just £5. By selling these on to companies and individuals investors are able to profit from the growing demand for carbon credits. Most companies sell for between £10 and £15, meaning significant profits for investors on resale*.'

  While the marketing material led consumers to believe they'd achieve a significant return, I haven't seen that it was demonstrated that there was any ready market for Mr C's units and how he would find businesses to buy his small allocation of Carbon Credits. Voluntary carbon credits weren't traded on regulated exchanges and there's no centralised market.

- In addition, a key issue with Carbon Credits is there is no price transparency – there is no independent source regarding the price being set, and nothing to confirm at what price the credits were acquired. So, there was no way to establish how the price was being arrived at. In which case, there could've been a very significant difference between the price the units were acquired at and the price these were sold to Mr C at. This is something Carey could and should have investigated.

- As I've said, Carey had received information to the effect that Carbon Credits was an, "*immature market with a limited and slightly chequered history*". And Mr C's Carbon Credits contract stated, amongst other things, that:

  "*There may be a big difference between the buying price and the selling price of Carbon Credits. If you have to sell them immediately, you may get back much less than you paid for them. You may have difficulty in selling Carbon Credits at the price you wish to achieve and, in some circumstances; it may be difficult to sell them at any price. It can be difficult to assess what would be a proper market price for these investments.*"

  So, at the time there was little confirmation that Mr C's SIPP was acquiring anything of realisable value, whether the units existed and, if they did, whether they were being sold at inflated prices.

- These investments were unlikely to be suitable for the majority of retail investors. And they were only likely to be suitable for a small element of the investment portfolio of a sophisticated investor.

- This was an unregulated investment in which a significant proportion of Mr C's Carey SIPP pension monies was being invested. Carey knew or ought reasonably to have known that Mr C wasn't receiving regulated advice about the investment and that Firm B, an unregulated firm, might have been involved in advising and/or making arrangements for this high risk, unregulated investment.

I accept that, on the face of it, it could be argued that a Carbon Credit investment could be a legitimate one. And that the FSA consumer warning issued on 3 August 2011 in relation to Carbon Credit trading and which said the following, was after Mr C's investment into these had already been made:

> *'Whilst not all carbon credit trading schemes are a scam, it is often not made clear to*

investors that trading on these markets requires skill and experience.

You may lose money on your investment by not being able to sell, or at least get a competitive rate, when trading a small volume of carbon credits.'

However, I think the fair and reasonable conclusion, based on what Carey knew or ought to have reasonably known *at the time* is that it should not have accepted Mr C's application to invest in carbon credits.

Although Carbon Credits may at first sight have seemed plausible at the time of Mr C's investment, it wasn't clear if there was – or ever would be – a market for the Carbon Credits Mr C was buying. And, even if there was, it has been highlighted that it often wasn't possible to sell them. The fact Mr C might have struggled do so should've caused Carey significant concern – especially considering that around two thirds of Mr C's SIPP pension monies were invested in Carbon Credits. It also isn't clear how Mr C would be able to take any benefits from his pension if the investment was difficult to value or realise.

It could be argued that not being able to independently value an investment wouldn't be indicative of its performance or legitimacy. But the investment was predicated on Carbon Credits being sold for more than what was paid for them. So, I think there should have been concerns if it wasn't possible to independently value them. And if an independent valuation had been possible, it has now been highlighted that voluntary Carbon Credits were often sold at "significantly inflated prices". So it seems likely this would then have been identified. This would effectively render the investment fundamentally unviable.

Carey should also have been aware that investors would be unlikely to benefit, in terms of the investment itself, from any regulatory protections (the investment being unregulated) such as access to the Financial Services Compensation Scheme or our Service.
In the circumstances, I'm satisfied there were a number of concerns Carey should've identified. It should've known there was a significant risk of consumer detriment, and it shouldn't have permitted the investment to be held in its SIPP. When doing so, I think it didn't act with due skill, care and diligence or treat Mr C fairly.

In respect of Carbon-ex, the company that'd been named on the investment when Carey carried out its due diligence in 2010 was Carbon-ex GMBH – based in Germany, while the company Mr C entered into the carbon credit contract with was Carbon-ex SARL – based in Luxembourg. Carbon-ex SARL only filed its incorporation documents on 1 October 2010. The fact it was based abroad was also an extra risk factor. And there's no evidence that Carey asked any questions that would've allowed it to weigh up the risk created. But having concluded that Carey shouldn't have allowed the Carbon Credits investment in any event, I've not gone on to consider what Carey could've discovered about Carbon-ex or what conclusions it should've drawn from this any further.

To be clear, I reiterate, I'm not making a finding that Carey should've assessed the suitability of the Carbon Credits investment for Mr C. I accept Carey had no obligation to give him advice, or to otherwise ensure the suitability of an investment for him.

I'm satisfied Carey could've identified the concerns I've mentioned, and ought to have drawn the conclusions I've set out, based on what was known at the time. Carey ought to have identified significant concerns in relation to the investment, and it ought to have led it to conclude it shouldn't accept the Carbon Credit Investment into its SIPPs before it accepted Mr C's application to do so. It ought to have identified that there was a high risk of consumer detriment here.

I don't think that Carey met its regulatory obligations or the standards of good practice at the time, and it allowed Mr C's pension fund to be put at significant risk as a result. So, I think it's fair and reasonable to conclude that Carey didn't act with due skill, care and diligence, and it didn't treat Mr C fairly, by accepting the Carbon Credits investment in his SIPP. Carey didn't meet its regulatory obligations or the standards of good practice at the time, and it allowed Mr C's pension fund to be put at significant risk as a result.

Ethical Forestry

I've reviewed the documents Carey sent to us to evidence the checks it carried out on the Ethical Forestry investment. I'm satisfied that the documents Carey says it reviewed did allow it to broadly understand the nature of the Ethical Forestry investment, although I note that some of the information and checks – including World Check and company checks – date from 2012 and 2015 respectively rather than 2011 when Mr C made his investment. But I think Carey's obligations certainly went beyond checking that an investment existed and would not result in tax charges. And I think some of the information should have given Carey real cause for concern about the risk of consumer detriment associated with this.

The third-party report on Ethical Forestry provided to Carey by Enhance included the following points:

- There is no established market for buying and selling this investment. The investment can be assigned or sold to another investor subject to a buyer being found, or the trees can be harvested and the proceeds taken. The harvest proceeds in the early years will likely be less due to the immaturity of the trees.
- The investment should be viewed as illiquid.
- The investment is unregulated so no investor protection applies.

Carey's Adviser Notification Letter that seemingly set out the details of its investment committee's November 2010 review said, amongst other things, that Ethical Forestry:

- Is a UCIS and therefore there's no FSCS protection.
- Investor's only own cropping rights, they don't own the trees but retain the right to chose the harvest manager.
- Returns are based on the number and size of trees, as well as prevailing timber prices, and paid net of fees and expenses.
- There's no apparent established market, although the investment may be assigned or sold if a willing buyer can be found.
- The investment is potentially illiquid because although the trees can be harvested and proceeds taken in early years, it's likely these will be less than in later years due to immaturity of the trees. And any other sale or assignment is based on finding a willing buyer.
- A tax charge is unlikely based on the information provided and its understanding of current legislation and a Costa Rican tax is deducted at source.

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

- It is an alternative investment and may be high risk and/or speculative.
- It was unclear how HMRC would consider the investment, although it said it thought this was likely to be ok based on its understanding of matters.
- All members should take their own tax, investment and financial advice to determine if this is a suitable investment for them.

It seems Carey went on to conclude in the letter that, based on the information provided, Ethical Forestry appeared to be an acceptable investment as there didn't appear to be a tax charge. But it said that in order to proceed with this it needed, amongst other things, certificates of title once the investment had been completed and limitation of liability wording to be added to all contracts and agreements.

In order to correctly understand the nature of the investment, Carey should also have reviewed how Ethical Forestry was marketed to investors – particularly as it was proceeding on the basis that this investment was being made on a non-advised basis by Mr C. I note that Carey has provided a copy of the Ethical Forestry marketing material it says it reviewed as part of its due diligence. So, clearly Carey thought it was important to look at this material at the time too.

The marketing material I've seen says Acacia is "a safe and secure investment". The brochure for the Melina and/or Acacia tree crops says the investment is "secure, dependable and stable".

The investment committee meeting minutes from November 2010 say that Carey said it had regard to the Ethical Forestry website. But, in September 2009, statements on the website read:

"If you are looking for ***certified, high return investments, low risk****, ethical investment which is both profitable and carbon friendly, our Tropical Hardwood Investments demand your serious consideration*" *(*my emphasis).

In October 2010:

"Our forestry investments are suited for pensions because:

- **Timber investments Out-Perform** - As an asset class timber has consistently out-performed most stocks and commodities for the last 100 years, including oil, gas and gold.
- **Are low risk** - No peaks or troughs, just steady and stable increases.
- **Are Very Stable** - Timber prices are extremely stable and not correlated to the stock market.
- **Offer Higher returns** - Historically, timber investments offer higher returns than traditional investment". (no emphasis added).

And in November 2010:

"*Ethical Forestry's investments offer* ***steady, stable increases*** *with* ***predictably high returns****, and as they are not correlated to the stock market, they do not suffer from unpredictable peaks and troughs*." (my emphasis).

In my view, Carey should have been concerned that neither the marketing material nor the website reflected the risks highlighted by the investment committee. The investment committee said that Ethical Forestry is an alternative investment and may be high risk and/or speculative. Ethical Forestry investment was certainly not "*low risk*" and "*secure*" on any reasonable analysis. Despite this, the investment appears to have been marketed as such to pension investors.

Carey should also have been concerned about how the projected returns were set out in the marketing material. The Acacia brochure said, for example, that the projected returns for an £18,000 investment over 10 years would be £93,642 and for an accumulating investment over 22 years the projected return was £732,297 and would be "*ideal for SIPPs pensions and personal investment portfolios*". These were said to be "*conservative estimates*".

The website also said in respect of Melina that "*A typical investment of £18,000 invested over 10 years is projected to return £93,642. By comparison, a high-return account at 6% compound interest per annum would yield just £32,235 over 10 years",* and the Melina brochure also added that a 24-year accumulating investment was projected to pay out £1,059,312.

I don't think that the marketing material contained any evidential basis for what appears to be wholly unrealistic "*conservative*" returns for investors – almost 4,000% or 5,000% growth for an accumulating investment in the tree crops. Reference is made to historic figures from the Costa Rica National Forestry Office. But no detail is provided for investors to verify these figures. And, in any case, neither the website or brochures say that past performance is no indicator of what might happen in the future or give alternative projections in different market conditions or highlight the risk factors associated with unregulated investments such as this.

I note that a 48-page Melina Due Diligence brochure provided to us by Carey contained further information, including for example, a disclaimer which explained that Ethical Forestry wasn't regulated by the FSA, that investment values may rise or fall, there were no performance guarantees and customers might not get back the full amount paid. But I'm not sure whether investors would've also seen this lengthy document. It didn't explain that customers would not have recourse to the FSCS or our Service. And I think that a warning ought to have been given in all the marketing materials and on the website rather than on one leaflet.

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

- There was no investor protection associated with this investment. It was illiquid, subject to currency fluctuations and there may be no market for it. There were also other risks involved such as disease or fire that could've destroyed the trees allocated to investors.
- It was being specifically 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.
- Ethical Forestry had no proven track record for investors and so Carey couldn't be certain that the investment wasn't impaired or operated as claimed.
- The very high projected returns 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 without any apparent basis should have given Carey cause to question its credibility.
- The marketing material was, at best, 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.
- As set out by the liquidator, investors were led to believe they had ownership of trees and cropping rights in relation to the trees and were given GPS co-ordinates to these, when these rights weren't given as these weren't capable of being granted under Costa Rican law.
- Carey knew or ought reasonably to have known that Mr C wasn't receiving regulated advice about the investment and that Firm B, an unregulated firm, might have been

involved in advising and/or making arrangements for this high risk, unregulated investment.

Knowing all this, I don't think it was fair or reasonable for Carey to have accepted the Ethical Forestry investment into Mr C'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 Ethical Forestry investment and declined to accept it into Mr C's SIPP.

Did a third party arrange and/or advise on Mr C's investments?

As I've said, Carey had a duty to conduct due diligence and give thought as to whether to accept business from third parties arranging or advising on investments. That's consistent with the Principles and the regulators' publications as set out earlier in this decision.

This is also seemingly consistent with Carey's own understanding of its obligations at the relevant time. Carey has said in respect of Mr C's complaint that it had strict processes in place for dealing with unregulated firms, which were followed. And I'm aware that Carey introduced a process that was in place in respect of introducers around 2011, this included an introducer profile which said that "*As an FSA regulated pensions company we are required to carry out due diligence as best practice on unregulated introducer firms looking to introduce clients to us to gain some insight into the business they carry out*."

Carey has said, amongst other things, that Firm B didn't introduce Mr C to it, that it concluded that Mr C contacted Firm B in relation to the investments after his SIPP had been established and that at all times Mr C said he wasn't receiving any advice.

However, Mr C has said that he received a cold call from Mr A of Firm B, who advised him as to the returns he'd receive on his pension monies and convinced him that his existing pension wasn't generating as much as it otherwise would, that this was the only way for him to generate an income on his pension and that the investments were low risk.

Carey was also made aware from Mr C's SIPP application form that he was self-employed, earning under £50,000 per year and that he was transferring a relatively low amount of just over £16,000 to the SIPP. So Mr C didn't appear to work in finance or pensions. And these details in his application form don't support that he'd be independently making the decision to switch his pension and waive his cancellation rights, while understanding the implications of this, without the input of a third party. In addition, I think it's unlikely that Mr C, based on his testimony and circumstances, found out about and decided to make higher risk investments – that may be illiquid and UCIS by Carey's own admission, which are only suitable for a small number of clients – on his own volition. This is consistent with Mr C's clear testimony that Firm B advised him to do so.

While Mr C didn't detail the intended investments on the SIPP application form, I think it was clear soon after Carey received this – and before it had requested the switch of Mr C's existing pension to the SIPP – that he intended to make such investments. And that the correspondence Carey had with Mr C and Mr A demonstrates this and Firm B's continued involvement.

I think Carey openly recognised its existing awareness of this in the email dated 20 April 2011 – just 10 days after it received Mr C's SIPP application form and, as I've said, before it requested the switch of his existing pension – when it said '…***I know*** [Mr A] *at* [Firm B] *is* ***keen*** *to get you invested in one of the investments he is promoting at the moment.*' (my emphasis). So it seems Carey already knew, or should reasonably have known, of Firm B's involvement some time before it sent this email. And that Firm B intended to get Mr C into the Carbon Credit and Ethical Forestry investments or that these were amongst the investments it was promoting.

On 26 April 2011, Mr A of Firm B also emailed Carey and said he could correspond with Ethical Forestry which will honour the deal if '***we** complete the application forms with his SIPP number*' (my emphasis). And, later that day, when updating Mr C and Mr A that the switch would be processed, Carey asked Firm B to '***arrange** for the timber to be reserved*' (my emphasis).

I also think it's noteworthy that Firm B's website in January 2011 said things like '*At* [Firm B] *we only **recommend** projects which can be placed within a UK SIPP Pension*…' (my emphasis). And that '*Our mission is to provide the most up-to-date information and investment **advice** in the world's most favourable Alternative Investment and SIPP investment markets*.' (my emphasis).

So I think there was a clear and obvious potential risk of consumer detriment here. Carey should have been alive to the risk that an unregulated firm, that wasn't subject to regulatory controls, had been involved in promoting, advising on and/or arranging the switch to invest in Carbon Credits and Ethical Forestry in Mr C's case, which were unlikely to be suitable for the vast majority of retail clients.

I appreciate Carey identified the investments were higher risk, but the examples of good practice say that doing so would enable it to seek clarification from the prospective member if it had any concerns. And that SIPP providers should identify instances of clients waiving their cancellation rights and the reasons for this. While Carey asked for forms and declarations to be completed, if Carey had contacted Mr C to query, for example, the intended investments, why he'd waived his cancellation rights and Firm B's role then I think it's likely to have found out that Mr C was a retail investor who understood he'd been advised by Firm B to switch to make the investments.

Given what I've said about Carey's due diligence on the investments though and my conclusion that it failed to comply with its regulatory obligations and good industry practice at the relevant time, I don't think it's necessary for me to comment in any further detail on Firm B's involvement and what I think Carey ought to have identified in respect of this here.

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

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

COBS 11.2.19R

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

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

> *'The heading to COBS 11.2.1R shows that it is concerned with the manner in which orders are to be executed: i.e. on terms most favourable to the client. This is consistent with the heading to COBS 11.2 as a whole, namely: "Best execution". The text of COBS 11.2.1R is to the same effect. The expression "when executing orders" indicates that it is looking at the moment when the firm comes to execute*

the order, and the way in which the firm must then conduct itself. It is concerned with the "mechanics" of execution; a conclusion reached, albeit in a different context, in Bailey & Anr v Barclays Bank [2014] EWHC 2882 (QB), paras [34] – [35]. It is not addressing an anterior question, namely whether a particular order should be executed at all. I agree with the FCA's submission that COBS 11.2 is a section of the Handbook concerned with the method of execution of client orders, and is designed to achieve a high quality of execution. It presupposes that there is an order being executed, and refers to the factors that must be taken into account when deciding how best to execute the order. It has nothing to do with the question of whether or not the order should be accepted in the first place.'

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

The indemnity

The indemnity sought to confirm that Mr C was aware the investment was high risk, had taken his own advice, and would not hold Carey responsible for any liability resulting from the investment.

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

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

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

Carey had to act in a way that was consistent with the regulatory obligations that I've set out in this decision. In my view, Carey was not treating Mr C 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 C was being put at significant risk.

Summary of my findings on due diligence

In summary, for the reasons I've given, Carey did not comply with good industry practice, act with due skill, care and diligence, or treat Mr C fairly by accepting his SIPP application and permitting the investments in the circumstances.

For the reasons I've given, Carey should have been concerned about the investments, Firm B's role and any introduction that was or was likely to be made for the purpose of making these investments. At the least Carey should have identified the investments Firm B intended to get Mr C into and having done so Carey should have refused Mr C's application to open the SIPP or refused to proceed with the application. Either way, had Carey acted fairly and reasonably, it should not have requested the switch of Mr C's existing pension to the SIPP.

So, considering what Carey knew or ought to have known before proceeding with Mr C's applications and requesting the switch of his existing pension to the SIPP, it did not comply with good industry practice, act with due skill, care and diligence, organise and control its affairs responsibly, or treat him fairly by accepting his applications in the light of what it knew or ought to have known by the time these were made. For all the reasons given I'm satisfied that this is the fair and reasonable conclusion to reach.

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

Rather, Carey was able to accept or reject applications for business. And I say that it should have refused the application to open the SIPP or refused to proceed this and Mr C's requests to invest in Carbon Credits and Ethical Forestry.

Is it fair to ask Carey to compensate Mr C?

In deciding whether Carey is responsible for any losses that Mr C has suffered on his investments I need to look at what would have happened if Carey had done what it should have done i.e. had it not accepted or proceeded with Mr C's applications.

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 C 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 C has suffered on the investments in his SIPP I need to look at what would have happened if Carey had done what it should have done.

As I've said, Carey should have refused Mr C's application to open the SIPP or refused to proceed with the application. Either way, had Carey acted fairly and reasonably, it should not have requested the switch of Mr C's existing pension to the SIPP. That should have been the end of the matter – Carey should have told Mr C that it could not accept the business. And I am satisfied, if that had happened, the arrangement for Mr C would not have come about in the first place, and the loss he suffered could have been avoided.

Had Carey explained to Mr C why it would not accept the applications or was terminating the transaction, I find it very unlikely that Mr C would have tried to find another SIPP operator to accept the business. Mr C said he was approached via a cold call and I haven't seen anything to suggest he was already considering switching his pension at the time.

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

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

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

For all the reasons I've set out, I'm satisfied that it would not be fair to say Mr C'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 C 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 Mr C in respect of his applications and the investments 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 C 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 C's right to fair compensation from Carey for the full amount of his loss.

Carey has argued that Mr C 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 C would have gone ahead with the switch if Carey had refused his application and explained why this was the case. I'm not persuaded that if he'd understood the risks that he would have risked his existing pension at the time. And I think it's fair to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have permitted the Carbon Credits and Ethical Forestry investments into its SIPPs.

Putting things right

My aim is to return Mr C 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 think that Carey should calculate fair compensation by comparing the current position to the position Mr C would be in if he hadn't switched from his existing pension plan.

To date, we haven't received anything to suggest this was anything other than a defined contribution plan without any guarantees attached. And neither Mr C nor Carey have disputed this by the deadline to respond to my provisional decision. That's despite my letting them know that in the absence of further evidence on this point we'll proceed on the basis that there were no such guarantees. And that it won't be possible for us to amend this once any final decision has been issued on the complaint.

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 C's complaint. And I note that the above decision Carey has mentioned referenced discount rates because the complaint involved a pension transfer of a defined benefit occupational pension scheme, rather than a personal pension as in Mr C's case.

In summary, Carey should:

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

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

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

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

5. Pay an amount into Mr C'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 C £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 C's previous pension plan, if it hadn't been transferred to the Carey SIPP.

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

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

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

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

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

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

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

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

   If Carey doesn't purchase the investments, it may ask Mr C 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 C 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 C'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 C's SIPP, or if doing so would give rise to protection or allowance issues, it should instead pay that amount direct to her. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore, the compensation should be reduced to notionally allow for any income tax that would otherwise have been paid.

   The notional allowance should be calculated using Mr C's actual or expected marginal rate of tax in retirement at his selected retirement age.

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

Neither Carey nor Mr C have disputed that this is a reasonable assumption, despite being given the opportunity to do so in response to my provisional decision and being made aware that it won't be possible for us to amend this assumption once any final decision has been issued on the complaint.

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

   In addition to the financial loss that Mr C has suffered as a result of the problems with his pension, I think that the loss suffered to Mr C's pension provision has caused him distress. Mr C lost a significant proportion of his Carey SIPP pension provision when he was coming up to his early 50's and I think it's unlikely he can afford such a loss, 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 compensation has been paid, then it wouldn't be fair for Mr C to have to pay annual SIPP fees to keep the SIPP open. So, if the SIPP needs to be kept open only because of the illiquid investments and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.

Interest

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

My final decision

It's my final decision that Mr C's complaint should be upheld and that Options UK Personal Pensions LLP must pay fair redress as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 9 July 2024.

Holly Jackson
Ombudsman