DRN-5126311

The complaint

Mr W 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 Self-Invested Personal Pension ('SIPP') and investment application from an unregulated third party. He says it should compensate him for his loss.

For simplicity, I refer to Mr W 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 W'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.

Unregulated firms

As I understand it, Mr W was in touch with three unregulated firms, which I'll refer to as Firm A, Firm B and Firm C, the latter of which was a Spanish firm. Although most of Mr W's communication appears to have been with a Mr J.M of Firm B.

Firm D

Firm D was a wealth management firm that was, at the time of the events complained about, an appointed representative ('AR') of Alexander David Securities Ltd, the latter of which was regulated by the FCA and went into liquidation in 2022.

Firm D provided services which included execution only and advisory stockbroking, as well as discretionary fund management services.

Emmit Plc ('Emmit')

Emmit plc was a company admitted to trade on AIM, a market operated and regulated by the London Stock Exchange (LSE).

The FCA issued a statement about the promotion of shares in Emmit on 31 October 2014. It said it had been made aware that individuals were being encouraged to transfer money from their pension schemes into SIPPs and use that money to buy shares in Emmit. It said some investors were being offered "cash back" on their investments in Emmit of up to 30% of the transfer value, paid by a third party, as an incentive to do this. Some investors appeared to have invested 100% of their pension assets into Emmit shares and could suffer significant financial loss if they have done this without fully understanding what they were doing. The FCA said that pension investors constituted a significant proportion of the demand for the shares, which might have impacted the normal balance between supply and demand causing the trade price to rise.

The FCA added that according to Emmit's last unaudited interim accounts its liabilities exceeded its assets as at 30 June 2014,. And that the LSE had undertaken a precautionary suspension of the trading of the shares in Emmit on 17 October 2014.

Eligere Investments PLC ('Eligere')

Eligere was a company admitted to trade on GXG, which I understand was a European regulated market.

The FCA issued a statement about Eligere in April 2015, which said that while the firm wasn't authorised by it to offer, promote or sell financial services, it was targeting people in the UK. And I understand that trading of Eligere was suspended in June 2015.

<u>The transaction</u>

I understand that Mr W was encouraged by the above unregulated firms to transfer to a SIPP to invest in Emmit and Eligere through a stockbroker advisory dealing account.

It seems Carey received Mr W's signed SIPP application form to transfer his existing pension schemes into a Carey SIPP on 24 March 2014, which had been signed by him on 16 January 2014. I understand that the particular form he filled out would have set out in a heading at the top that this was '*FOR DIRECT CLIENTS*'. And that it went on to explain underneath that:

'[Carey] *have not provided any advice and are not responsible for the suitability or appropriateness of your decision to establish a SIPP*'…*This application form should be used if you are a client establishing a SIPP without advice. You have made this decision independently and are aware of the implications of this decision*.'

Underneath, Mr W would have been asked to '*provide a short statement in your own words as to the reason for establishing the SIPP on an execution only basis…without the use of a professional adviser*'. And Carey has said that Mr W's handwritten statement said '*I have done a lot of research on investments and pensions, I don't feel the need to pay a financial advisor to tell me what I already know'.*

Under the '*Investments*' heading of the application form, it said that as Mr W didn't have a financial adviser his investment choices were his responsibility and it would act on these, as long as it was an accepted investment in the scheme. And that, if at any point Mr W's position changed and appointed a financial adviser then he must let it know. This section set out that Mr W wanted to open an advisory dealing account with Cornhill Capital Limited ('Cornhill').

The application form also set out that Mr W was self-employed as an installer and that his selected retirement age was 65 years. Under '*Cancellation Rights*' on the form, Mr W ticked to say that he wished to waive his 30-day SIPP cancellation right. And the spaces for Mr W to sign the form had an 'X' next to it.

Carey has said that alongside Mr W's SIPP application form it received a typed letter of authority in respect of Firm C that was signed by Mr W on 27 January 2014. Although Carey doesn't appear to have provided us with a copy of this authority – that's despite being asked to do so by the deadline to respond to my provisional decision – I understand from similar complaints against Carey with our Service that gave Carey permission to provide Firm C with any information it requested in respect of the customer's SIPP and the investments

On 19 March 2014, Carey appears to have spoken with Mr W over the phone to go through what I understand to be its non-advised pro-forma checklist – although it doesn't appear to have provided us with a copy of the particular checklist it filled out in respect of Mr W at the time, despite being asked to do so by the deadline to respond to my provisional decision.

Mr W's Carey SIPP was established on or around 23 March 2014. And at some point it seems Carey went on to send Mr W's existing pension scheme the respective signed transfer form.

Carey has said that it emailed Mr W on 25 March 2014 and confirmed the details of the call it had with him on 19 March 2014 – although it doesn't appear to have provided a copy of this email, despite being asked to do so by the deadline to respond to my provisional decision. Carey has told us that, amongst other things, it said in this email that:

- It understood Mr W had signed terms of business with Firm C on a non-advised basis.
- It had explained that Firm C is based in Spain and it isn't a regulated firm so it can't provide him with financial advice.
- Mr W confirmed he hadn't been offered any inducements.
- Carey doesn't provide financial advice and neither it nor Firm C are responsible for his investment decisions, which are solely his responsibility.
- Having explained that Mr W had the opportunity to seek independent financial advice, the reason he had decided not to is because he felt sufficiently informed to proceed without this due to carrying out his own research.
- Mr W wished to proceed on an execution only basis without first seeking advice.

On 14 April 2024, just under £32,000 of Mr W's existing pension monies was transferred into his Carey SIPP from his existing personal pension.

Carey said that it received Mr W's completed Cornhill application form on 3 April 2014, signed and dated by him on 28 March 2014 – although Carey doesn't appear to have provided us with a copy of this, despite being asked to do so by the deadline to respond to my provisional decision.

On 9 May 2014, Carey received Mr W's completed member declaration form in respect of Cornhill, which he'd signed and dated on 7 May 2014. This set out, amongst other things, that:

- Carey was acting on an execution only basis and hadn't provided any advice.
- The stockbroker as part of the advisory stockbroking account would build the portfolio to match Mr W's risk profile, the advice doesn't consider his personal financial situation as a whole but only to the portfolio and Mr W should take independent advice from time to time on the whole of his circumstances.
- Mr W understood investment values can fall as well as rise and his entire investment may be lost.
- Should the investment be subject to a tax charge within the scheme these will be paid directly from Mr W's fund or by him.
- Mr W hadn't been offered any form of inducement for opening the Cornhill account.
- He indemnified Carey against any and all liability arising from the investments.

On 12 May 2014 Carey received an email from Mr W confirming he wished to change his mind and open an advisory stockbroking account with Firm D instead, due to Cornhill having done nothing for nearly three weeks. Mr W also asked for a new member declaration form in respect of Firm D, which Carey has said he also signed and dated on 12 May 2014.

On 24 May 2014, Mr W signed and dated Firm D's application form, which Carey sent to and was accepted by Firm D on 27 May 2024. Mr W said on this, amongst other things, that aside from his personal pension monies totalling around £31,000, he had a property worth £200,000 but with an outstanding mortgage of £140,000. He earnt around £15,000 per year, he had no surplus income after his expenditure and no savings or investments. Mr W said that he worked as an installer, he had never worked in financial services and he was a medium or medium/high risk investor. Mr W also ticked a box to confirm he didn't want to receive copies of investment contract notes.

On 29 May 2014, just over £30,500 of Mr W's Carey SIPP pension monies were transferred to his stockbroking account with Firm D.

On 4 June 2014, Mr W emailed Firm D and said:

> *'Dear* [Firm D]
>
> *… I wish to invest £15,277.50 in Eligere investments pic (ELI) gxg listed securities with a 55 pence limit for T3 settlement.*
>
> *I wish to invest £15,277.50 in Emmitt plc (EMT) aim listed securities with a £1.95 limit for T1 settlement.*
>
> *Please advise me via email when this has been transacted.*'

Carey hasn't told our Service whether or not it's aware of what, if anything, Firm D said to Mr W in response – that's despite being asked to do so with evidence by the deadline to respond to my provisional decision. However, in any event, I'm aware from similar cases with our Service against Carey involving the same introducer and investments that Firm D responded to some customers and said, for example, that:

'*…This investment…would be a high risk investment. Before I proceed you will have to confirm that you are willing to change your risk profile to high risk. We advise that you check with your financial advisor regarding the changes to your risk profile. This is to ensure that you the client has the necessary experience and knowledge in order to understand the risks involved in relation to the product.*'

Mr W later went on to make some further small investments through his account with Firm D. And I understand that, in 12 November 2014, Carey made customers aware of the FCA's October 2014 statement in respect of Emmit along with providing their latest valuation, which I understand reflected that investments in this had been temporarily suspended and were valued at 'nil'. And that, on or around 23 October 2015, Carey also emailed customers to let them know that the trading of Eligere shares had also been suspended and would be valued at 'nil' until further notice.

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

Mr W first wrote to Carey, via his representative in August 2016 letting it know that it intended to send a letter before action, on the basis Carey had failed to conduct sufficient due diligence in line with its duties.

In September 2019, Mr W raised a formal complaint with Carey. And Carey sent him its final response letter on 8 November 2019. Unhappy with this response, Mr W referred his complaint to our Service in April 2020.

Carey added in its responses in respect of Mr W's complaint and in other similar complaints with our Service involving the same introducer and investment, amongst other things, that:

- Its records show that Mr W selected Firm C as his introducer, as reflected by the letter of authority which it received along with his SIPP application form.
- As Firm C wasn't regulated and acted only as the introducer, Carey classified Mr W as a direct client. It had no relationship with Firm C other than administering SIPPs for which customers had used Firm C as an introducer.
- It carried out full due diligence on Firm C and put in place terms of business ('TOB') in line with its introducer process at the time. Firm C signed Carey's Overseas Introducer TOB on 4 February 2014. It also obtained Firm C's December 2013 accounts, a copy of its deed of constitution and carried out internet searches on its directors. Carey said that it also completed an introducer profile to understand Firm C's business and called all customers engaging with Firm C to answer a set out questions to check their understanding of who it was.
- It didn't carry out any ongoing or further checks on Firm C or have any further discussions with it about the business it was introducing after the TOB were put in place, as these were in place for less than a year.
- Carey said that it terminated its agreement with Firm C in October 2014, as it had heard from some clients that Firm C may have been offering inducements to clients prior to opening SIPPs with it.
- Between February and October 2014, it received 34 introductions from Firm C which accounted for just under 22% of Carey's new business during that period. From a sample of 25 of the 34 introductions, 12% of the transfers were from defined benefit schemes and 0% invested in non-mainstream investments.
- Carey isn't responsible for any involvement that Mr W had with other third parties such as Firm B. It has never had any dealings with Firm B and wasn't aware of its involvement.
- It can't comment on Mr W's interactions and discussions with Firm C or other unknown third parties such as Firm B.
- At no point did Mr W indicate he had received or believed he'd received advice. Instead he indicated that he hadn't received advice, so it isn't reasonable to expect Carey to have known if Mr W did.
- It isn't readily apparent from the SIPP application form that the handwritten statement might not have been written by Mr W in the way he's alleged. And it's unreasonable to expect Carey to have known at the time whether the whole application had been completed by him or not.
- The call Carey made to Mr W was part of a formal call back procedure for customers introduced by non-regulated introducers as an additional layer of checks to protect members. And Mr W didn't dispute Carey's follow up email to his confirming the content of the call. Whether or not Mr W was under the guidance of Firm B it seems he misled it during the call. So Carey can't have known there was any cause to doubt the information he provided it with.
- It's an execution-only SIPP provider, not a financial adviser, and Mr W signed documents confirming he understood this.
- The 2009 FCA report, while providing helpful guidance, is not a rulebook and it doesn't provide an exhaustive and prescriptive list of criteria that SIPP providers must comply with to meet their regulatory responsibilities, let along common law duties. And, in any event, Carey is satisfied it conducted itself in line with the behaviour set out by the FCA in the report.

- It doesn't agree that s.27 of the Financial Serviced and Markets Act 2000 ('FSMA') applies and even so it thinks the court would find that it was just and equitable to enforce the agreement under s.28. Carey can't possibly have known that Firm B was carrying out a regulated activity in contravention of the general prohibition. Particularly when Mr W deliberately concealed or failed to inform Carey that he was or believed he was being advised, despite numerous prompts to do so from it.
- In respect of Firm D, it was a regulated advisory stockbroker. Carey obtained copies of Firm D's customer terms and conditions and carried out FCA and Companies House and internet searches in May 2014. Carey said that it also put TOB in place with Firm D, which said it could only purchase investments permitted by Carey into the scheme, which included those that were liquid and trading on a recognised investment exchange, thus providing up to date current market values. And that it's investment committee approved Firm D within its schemes on that basis.
- It provided risk warnings, recommended Mr W seek advice and took steps to ensure he understood his instructions were on an execution only basis. Mr W signed member declarations confirming he understood this and all documentation. And it was reasonable for it to have accepted Mr W's signature.
- It acted on and in line with Mr W's instructions only and this was made clear in all correspondence.
- Mr W applied for an advisory service with Firm D, so it is responsible for any advice provided in respect of how he invested the funds with it. Carey had no involvement in selecting the investments. And Carey was unaware that the medium risk advisory mandate had not been followed and that Firm D actioned Mr W's instruction to invest in Emmit and Eligere on an execution only basis. So Mr W and Firm D have contributed to his losses.
- Mr W holds a restricted SIPP, which restricts the type of investments he is allowed to invest in and the investment in Emmit and Eligere may not have been allowed had it known about this and might have been declined. Eligere was not a permitted investment by it.

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

- The SIPP pension monies represented the entirety of his private pension provision.
- Mr W was either cold called or told about the opportunity by his brother who he was working with at the time. A call was arranged for the firms – who I understand to be a Mr I.M of Firm A and Mr J.M of Firm B – to speak to them both at the same time. They were asked for their approximate pension values and were told they 'couldn't even afford to buy a pint of beer with that'. Mr W was told he'd get a better return if he switched his pension and invested in shares recommended to him. Mr W recalls speaking with.
- He wasn't otherwise interested in changing his pension and only began to think of this after speaking to the above firms.
- He was an inexperienced retail investor, who was provided him a pre-drafted instruction email to send to Firm D.
- He understood the firms were financial advisers, who were offering him sound advice based on their knowledge and expertise – he relied on what they told him.
- He wasn't provided with any written report, but was told that if he transferred his pension and made the recommended investments then he'd see much better returns and be able to enjoy his retirement.
- Mr W was told that to make the investments recommended he needed to establish a SIPP. Based on his reliance on the firms advice, he understood the investment risks to be minimal. He understood that as with all investments there was a little risk, but had been advised this was low. He was told the shares were safe and promised good returns.

- Mr W received a payment of £1,800 from the firms involved for making the investment.

Mr W also provided us with a letter from the Financial Services Compensation Scheme dated 4 March 2024, which confirmed that it wouldn't continue investigating a claim from him against Alexander David Securities Ltd on the basis that before it could do so he should exhaust his complaint against Carey via our Service.

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

- Our Service should have redirected Mr W's complaint to Firm D as our rules permit us to do under DISP 1.7, as the investment was made via Firm D without any involvement or notification to Carey in breach of their TOB. Such that it wouldn't be fair or reasonable to place liability for losses on Carey, given it couldn't have prevented or influenced the investment decision. Carey didn't have any opportunity to undertake or review due diligence on the Emmit and Eligere investments. It wasn't party to the correspondence between Mr W and Firm D in respect of these and it was entitled to take a degree of comfort in the fact that Firm D was a regulated adviser.
- Mr W withdrew his Carey complaint with our Service in November 2022 while he was pursuing an FSCS claim against Firm D, evidencing that he believed Firm D to be responsible for his alleged losses. And Mr W should not reasonably have been allowed to reopen his complaint with us about Carey over a year later, when it had been formally withdrawn.
- Carey isn't limited to dealing with only with regulated introducers.
- Carey called Mr W and specifically outlined the potential risk areas and followed this up in a clear email. No weight has been given to these steps that it took. Mr W took the decision to proceed, so he should bear responsibility for this.
- We haven't provided anything to evidence that the unregulated introducers were undertaking regulated activities.
- 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.
- Only the SIPP guidance published prior to receiving Mr W's SIPP application and subsequent investment instructions is relevant. Otherwise our Service would be considering Mr W's complaint with the benefit of hindsight.
- 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.*"
- The completed SIPP application was completed in handwriting closely matching Mr W's. And the forms contain personal information that couldn't have been completed without his involvement. This demonstrates Mr W's involvement, understanding and

willingness to proceed with the transactions.
- Mr W could have found a way to invest in Emmit and Eligere through another provider even if Carey had not dealt with Firm C.
- Mr W's understanding of the transactions and their relationship with Carey should be the subject of an oral examination, rather than based on the limited evidence without having sought to understand more of Mr W's motivations at the time.
- Mr W 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 W chose to invest in products he'd been told were high risk. And to hold Carey wholly responsible discounts the liability of Firm D.
- The contract between Mr W and Carey was effective to relieve it of any liability. To conclude otherwise would render void and unenforceable a validly concluded contract.
- The implications of this outcome are serious for the execution only SIPP market.
- Restitution under s.27 FSMA wouldn't be available in this case, not least because the factors relied upon by the Court of Appeal in Adams for refusing s.28 relief are absent in the facts of this case.
- 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 W has suffered any degree of upset.

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

I issued a provisional decision on Mr W's complaint and concluded that we can and should consider it, and that it should be upheld. Carey didn't respond with any further information. And Mr W let us know he accepted my provisional decision, with no further comments to add, other than that he expects to be a basic rate taxpayer in retirement.

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.

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.

Carey's request for an oral hearing

Carey has said an oral hearing is necessary to explore Mr W'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 Mr W has provided further information, 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. Mr W'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 W in writing where I think necessary.

In summary, for the above reasons, I am satisfied it is not necessary for me to hold an oral hearing.

Jurisdiction and dismissal

Carey has said that our Service doesn't have jurisdiction to, or can't properly proceed to determine Mr W's complaint, on the basis:

- Mr W's complaint should be directed to Firm D under DISP 1.7.
- Mr W's Carey complaint should not have been reopened after it was previously withdrawn while he sought to pursue a Firm D claim via the FSCS.

Having carefully considered Carey's submissions on this point, I am satisfied Mr W's complaint is one we can and should consider, for the following reasons.

DISP 1.7

The purpose of DISP 1.7 is to allow a respondent business (rather than our Service) to efficiently forward a consumer's complaint – within the time limits – rather than asking the consumer to go back to a different business and start the process all over again. Even if a respondent business chose to do that, our rules don't absolve it of liability in respect of the complaint or mean that our Service can't consider a complaint against it. And it is not for a business, Carey here, to decide liability, that's a matter for our Service to decide, as below.

Mr W's reopened complaint

Turning to Carey's comments about Mr W's case being reopened with our Service after it had been withdrawn, this doesn't mean our Service doesn't have jurisdiction to or shouldn't consider this complaint. I think we can and should consider it.

DISP doesn't stipulate that once a complaint is withdrawn we can't consider it anymore. I recognise that DISP 3.5.9 (4) and DISP 3.5.15 give our Service the discretion to treat complaints as withdrawn if a complainant doesn't supply requested information or fails to comply with a time limit. But neither apply in the circumstances of Mr W's case.

DISP 3.3.4R sets out the limited grounds on which I can dismiss a complaint and it ultimately says that I 'may' dismiss a complaint without considering the merits, not that I must. So I've discretion to decide what I'll do in the circumstances.

Mr W's complaint was withdrawn by our Service with his consent on the basis he also had an open claim with the FSCS in respect of Alexander David Securities Ltd, of which Firm D was an AR of at the relevant time. Mr W later found out that the FSCS had started to let customers know that it wouldn't continue investigating a claim against Alexander David Securities Ltd on the basis that before it could do so he should exhaust his complaint against Carey via our Service. And so Mr W came back to our Service to pursue his Carey complaint again. So I'm satisfied that I don't need to exercise my discretion to dismiss Mr W's complaint under DISP 3.3.4R.

In summary, I'm satisfied I have the jurisdiction to consider Mr W's complaint and that I should consider it.

Relevant considerations

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

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

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

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

inappropriate. It cannot be an error of law for the Principles to augment specific rules."

And at paragraph 77 of BBA Ouseley J said:

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

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

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

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

The BBSAL judgment also considers 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 W'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 W's case.

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

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

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

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

I note there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams (summarised in paragraph 120 of the Court of Appeal judgment) and the issues in Mr W'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.

And in Mr W's complaint, amongst other things, I'm considering whether Carey ought to have identified that the introductions from Firm C involved a significant risk of consumer detriment and, if so, whether it ought to have ceased accepting introductions from Firm C before entering into a contract with Mr W. And I'm also considering whether Carey ought to have identified that the investments proposed involved a significant risk of consumer detriment and, if so, whether it ought to have declined to accept applications to invest in Firm D before it received Mr W's application.

The facts of Mr Adams' and Mr W's cases are also different. I make that point to highlight that there are factual differences between *Adams v Options SIPP* and Mr W's case. And I need to construe the duties Carey owed to Mr W 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 W'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 W on the SIPP and/or the underlying investments. Refusing to accept an application isn't the same thing as advising Mr W 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. And this is seemingly consistent with Carey's own understanding of its obligations at the relevant time. I'm aware that Carey introduced a process which was in place in respect of introducers by the time it accepted Mr W's application from Firm C, which included having TOB with the party, completing an introducer profile with it and a call back with the customer, for example.

S.27/28 FSMA

The Court of Appeal overturned the High Court judgment on the basis of the claim pursuant to s.27 FSMA. S.27 FSMA provides that an agreement between an authorised person and another party, which is otherwise properly made in the course of the authorised person's regulated activity, is unenforceable as against that other party if it is made *"in consequence of something said or done by another person ("the third party") in the course of a regulated activity carried on by the third party in contravention of the general prohibition*".

s.27(2) provides that the other party is entitled to recover:

> *"(a) any money or other property paid or transferred by him under the agreement; and*
>
> *(b) compensation for any loss sustained by him as a result of having parted with it*."

s.28(3) FSMA provides that:

> "*If the court is satisfied that it is just and equitable in the circumstances of the case, it may allow–*
>
> *(a) the agreement to be enforced; or*
>
> *(b) money and property paid or transferred under the agreement to be retained*."

The General Prohibition is set out in s.19 FSMA. It stipulates that:

> "*No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is –*
>
> *a) an authorised person; or*
>
> *b) an exempt person*."

In *Adams*, the Court of Appeal concluded that the unauthorised introducer of the SIPP had carried out activities in contravention of the General Prohibition, and so s.27 FSMA applied. It further concluded that it would not be just and equitable to nonetheless allow the agreement to be enforced (or the money retained) under the discretion afforded to it by s28(3) FSMA.

At paragraph 115 of the judgment the Court set out five reasons for reaching this conclusion. The first two of these were:

> *i) A key aim of FSMA is consumer protection. It proceeds on the basis that, while consumers can to an extent be expected to bear responsibility for their own decisions, there is a need for regulation, among other things to safeguard consumers from their own folly. That much reduces the force of Mr Green's contentions that Mr Adams caused his own losses and misled Carey;*
>
> *ii) While SIPP providers were not barred from accepting introductions from unregulated sources, section 27 of FSMA was designed to throw risks associated with doing so onto the providers. Authorised persons are at risk of being unable to enforce agreements and being required to return money and other property and to pay compensation regardless of whether they had had knowledge of third parties' contraventions of the general prohibition;*

The other three reasons, in summary, were:

- The volume and nature of business being introduced by the introducer was such as to put Options on notice of the danger that the introducer was recommending clients to invest in the investments and set up Options SIPPs to that end. There was thus reason for Options to be concerned about the possibility of the introducer advising on investments within the meaning of article 53 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("the RAO").
- Options was aware that: contrary to what the introducer had previously said, it was taking high commission from the investment provider, there were indications that the introducer was offering consumers "cashback" and one of those running the introducer was subject to a FCA warning notice.
- The investment did not proceed until after the time by which Options had reasons for concern and so it was open to Options to decline the investment, or at least explore the position with Mr Adams.

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 firMr Wo conduct their business with due skill, care and diligence. All firMr Whould 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 W'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 W'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'm also satisfied that Carey, at the time of the events under consideration here, thought the regulatory publications were relevant. Carey says it did carry out some due diligence on Firm C and Firm D. So it clearly thought it was good practice to do this, at the very least.

Carey might say 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.

The publications make frequent reference to introducers and investments but not execution only, advisory or discretionary fund managers. However, given the non-exhaustive nature of the guidance and its purpose to make clear to SIPP providers that they have a responsibility for the quality of the SIPP business they administer, I'm satisfied that the points made could be borne in mind in relation to other businesses SIPP operators deal with, such as fund managers.

In this regard I note that on 18 April 2013, so well before Mr W's SIPP application was accepted by Carey, the FCA published a Final Notice relating to a person I will call Mr B, who had been a director of a SIPP provider called Montpelier Pension Administration Services ('MPAS').

The FSA had conducted a supervisory visit of MPAS in October 2010 as part of the SIPP Thematic Review. A number of findings were made against Mr B arising out of that visit including, amongst other things, that he'd failed to exercise due skill, care, and diligence in managing the business of MPAS in breach of Principle 6. The findings of fault included findings relating to:

- Due diligence and monitoring of introducers.
- Due diligence of new assets to be accepted into MPAS' schemes.
- Due diligence and monitoring of discretionary fund managers.

Specifically, on the discretionary fund managers point, the FCA Final Notice stated that:

> "4*.38 A proportion of the assets administered by MPAS were managed by discretionary fund managers during the Relevant Period, and MPAS typically entered into agreements with those discretionary fund managers upon recommendation by MPAS' Introducers. However, no due diligence was undertaken in relation to the recommended fund managers, nor was any ongoing monitoring undertaken to ensure that those with responsibility for management of members' assets were doing so properly*…"

And

> "*5.6. Additionally,* [Mr B] *did not understand the significance of certain systems and controls, including the use of management information to identify and mitigate areas of risk in the business, and due diligence and continued monitoring of Introducers and discretionary fund managers and the SIPP assets, which would have reduced the risk of members being unsuitably advised or their assets unsafely managed*.".

And

> "*5.22.* [Mr B] *failed to ensure that any controls were in place in relation to discretionary fund managers, in the form of agreements setting out the terms on which SIPP assets were to be managed. By failing in this regard,* [Mr B] *exposed*

members to the risk that their assets would be mismanaged without detection by MPAS, and especially given that no other procedures were in place for continuous monitoring of discretionary fund managers.

5.23. The Authority therefore considers that in having failed to take reasonable steps to ensure that systems and controls were in place in key areas of MPAS' business, in breach of Statement of Principle 7, [Mr B] *has demonstrated a serious lack of competence and capability as a significant influence function holder.*"

To be clear, I don't say that the Final Notice mentioned above was regulatory guidance that I'm required to take into account. But I'm satisfied the above does help to demonstrate that the obligations on SIPP operators, as discussed in the guidance and other publications referred to above, wouldn't necessarily be satisfied only by carrying out due diligence on introducers and investments.

I also don't say that the Principles or the publications obliged Carey to ensure the transactions were suitable for Mr W. It's accepted Carey wasn't required to and couldn't give advice to Mr W. 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 W'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 W's application to establish a SIPP from Firm C and in permitting his monies to be invested with Firm D, Carey complied with its regulatory obligations: to act with due skill, care and diligence; to take reasonable care to organise and control its affairs responsibly and effectively; to pay due regard to the interests of its customers and treat them fairly; and to act honestly, fairly and professionally. In doing that, I'm looking to the Principles and the publications listed above to provide an indication of what Carey should have done to comply with its regulatory obligations and duties.

Submissions have been made about breaches of the Principles not giving rise to any cause of action at law, and breaches of guidance not giving rise to a claim for damages under FSMA. I've carefully considered these but, to be clear, it's not my role to determine whether something that's taken place gives rise to a right to take legal action. I'm deciding what's fair and reasonable in the circumstances of this complaint – and for all the reasons I've set out above I'm satisfied that the Principles and the publications listed above are relevant considerations to that decision.

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

Ultimately, what I'll be looking at here is whether Carey took reasonable care, acted with due diligence and treated Mr W 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 W's complaint is whether it was fair and reasonable for Carey to have accepted his applications in the first place. So, I need to consider whether Carey carried out appropriate due diligence checks on Firm C and Firm D 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 C and/or investing with Firm D were being put at significant risk of detriment. And, if so, whether Carey should therefore not have accepted Mr W's applications from Firm C and with the proposed involvement of a fund manager on an advisory basis (initially Cornhill and then Firm D).

The contract between Carey and Mr W

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

My final decision is made on the understanding that Carey acted purely as a SIPP operator. I don't say Carey should (or could) have given advice to Mr W or otherwise have ensured the suitability of the SIPP or investments for him. I accept that Carey made it clear to Mr W that it wasn't giving, nor was it able to give, advice and that it played an execution-only role in his SIPP investments. And that forms Mr W 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 W'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 W 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 SIPP business, Carey had to decide whether to accept or reject referrals of business and/or particular investments 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 advice.

The regulators' reports and guidance provided some examples of good practice observed by the FCA during its work with SIPP operators. This included being satisfied that an introducer is appropriate to deal with and that a particular investment is appropriate to accept. That involves conducting checks – due diligence – on introducers and investments to make informed decisions about accepting business. This obligation was a continuing one, and to be clear, I consider this ought to have included having a clear oversight and understanding of the specific investments its clients, such as Mr W, were having their pension funds invested in.

As set out above, to comply with the Principles, Carey needed to conduct its business with due skill, care and diligence; organise and control its affairs responsibly and effectively;

and pay due regard to the interests of its clients (including Mr W) and treat them fairly. Its obligations and duties in this respect weren't prescriptive and depended on the nature of the circumstances, information and events on an ongoing basis.

I think it's clear that Carey understood and accepted, and well before the time of Mr W's applications, that its obligations meant it had a responsibility to carry out due diligence on Firm C and on the investments to be held in either its SIPP or via a third-party fund manager, given it entered into TOB with both Firm C and Firm D. And considering that Carey also completed an introducer profile with Firm C and call backs with customers being introduced by it.

I think Carey also understood that, to meet its regulatory obligations, when conducting its business, it was required to consider whether to accept or reject particular referrals of business, with the Principles in mind, given that Carey has said that if it had known customers were investing in Emmit and Eligere via Firm D then it may have declined this. And given that it's TOB with Firm C reflect that Carey had the right to reject any business from it.

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 on Firm C and Firm D 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 its due diligence to decide whether to accept or reject a referral of business or any application that involved a request to involve Firm D as a fund manager, be it as execution only, advisory (as initially set out in Mr W's case) or as a discretionary investment manager.

Carey's due diligence on Firm C

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

As I've said, I think Carey's aware of this, given that when our Service previously asked it a series of questions about the due diligence it undertook into Firm C, from the information provided in response it said it took the following actions:

- Entered into TOB with Firm C.
- Had Firm C complete an introducer profile.
- Obtained Firm C's most recent company accounts and a deed of its constitution in Spain.
- Carried out internet searches, for example, on Firm C's directors and obtained photo ID.
- Called customers engaging with Firm C to answer a set out questions to check their understanding of who Firm C was. And then Carey confirmed customer's answers to them via email.

From the information that has been provided, I'm satisfied Carey did take some steps towards meeting its regulatory obligations and good industry practice. And I recognise the type of SIPP application Mr W submitted to Carey was for direct clients and that this confirmed, as set out more fully above, that he was establishing the SIPP without advice and in that case the investment choices were his. And that Firm C filled out an introducer checklist where it told Carey, amongst other things, that it was not giving customers any advice.

However, for the reasons given below, I don't think the steps we've seen evidence of went far enough, or were sufficient, to actually meet Carey's regulatory obligations and good industry practice. I think that if Carey had undertaken sufficient due diligence then it ought to have identified potential risks of consumer detriment associated with the business being introduced to it by Firm C, and prior to its receipt of Mr W's business.

The business introduced to Carey by Firm C

As set out above, Carey's due diligence obligations were ongoing and an example of good practice identified in the FSA's 2009 Thematic Review Report was:

> "*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*."

It seems Carey had access to information about the number and type of introductions that Firm C made to it, because Carey has when asked been able to provide us with information about this. For example, Carey told us that between February and October 2014 it received 34 introductions from Firm C. Carey has also said that these accounted for just under 22% of its new business over that time. And, while Carey hasn't told us what number introduction Mr W was to it at the end of March 2014, I'm aware from other cases with our Service against Carey involving the same introducer and similar investments that it had already received its 15^{th} introduction from Firm C by mid-February 2014.

I don't think simply keeping records about the number and nature of introductions that Firm C made without scrutinising that information would have been consistent with good industry practice and Carey's regulatory obligations though. As highlighted in the 2009 Thematic Review Report, the reason why the records are important is so that potentially unsuitable SIPPs can be identified.

I think Carey should have been concerned, and before Mr W's application, that it had received apparently similar applications from the same unregulated introducer and over a short period of time. Particularly where it seems that most, if not all, of these customers had signed direct unadvised SIPP applications and had written similar statements for doing so on the form, while waiving their SIPP cancellation rights. I say this because, in similar cases with our Service against Carey involving the same introducer and investment, I can see that customers who were introduced to Carey by Firm C completed the SIPP application for direct clients (like Mr W) and that these contained a handwritten statement all along similar lines to Mr W's, whose SIPP application form said that '*I have done a lot of research on investments and pensions, I don't feel the need to pay a financial advisor to tell me what I already know'.*

In addition, while a number of customers initially set out on the SIPP application that they wanted to invest via Cornhill on an advisory basis, shortly after they applied to Carey to change the stockbroker to Firm D. It seems most of the customers also said on their Cornhill application forms that were sent to Carey that they didn't have any experience of share dealing, no investment experience was noted down when asked and yet most, if not all, the customers said they wanted to invest on a medium or medium/high risk basis. And despite not having previously noted down any investment experience on their Cornhill applications, it appears that such customers, like Mr W, went on to say on their Firm D application (that was also sent to Carey) that they now had previous advisory broking experience and most, if not all, gave similar, if not the same, answers in respect of the type of investments they'd previously invested in.

Most, if not all customers, also went on to give the same, or similarly worded, execution only instructions to Firm D to invest the majority of their SIPP pension monies in a few high-risk investments (including Emmit and Eligere, as in Mr W's case), against their initial investment mandate. I recognise Carey wasn't provided with a copy of the execution only instructions sent to Firm D at the time (which I'll come back to later). And that in Mr W's case he ticked a box on his Firm D application form to say that he didn't want to receive a copy of the contract notes setting out which investments had been made and how much had been invested after these had been made. However, in some cases I've seen against Carey involving the same introducer and similar investments made via Firm D, the contract notes were sent and addressed to Carey on behalf of the scheme member shortly after the investments were made.

So I think Carey was likely also put on notice that customers were investing the majority of their SIPP pension monies in these same niche shares presenting significant risks; these weren't the type of investments that you would normally expect to form the significant part of a customer's pension provision. And even if Carey wasn't aware at the time what such customers were investing in via Firm D, if Carey had made reasonable enquiries, whether with the customers directly or with Alexander David Securities Ltd for clarification, due to the risks of customer detriment given the very similar patterns in the applications and in the process being followed over a short period of time, then I think it's likely to have found this out for reasons I'll come on to.

I think it's highly unusual that a number of seemingly unconnected retail customers were using similarly worded statements in their SIPP applications and following a similar process to invest the majority of their SIPP pension monies in these high-risk investments via Firm D. I think this was a clear and obvious potential risk of consumer detriment.

And I think it's highly unlikely that they were doing so independently in the circumstances. The possibility that the advice to buy the shares was coming from an unauthorised person was increased by the riskiness of concentrating pension funds in the shares of a few small, obscure companies: an FCA-authorised firm would have regulatory obligations not to give unsuitable investment advice, and I think it would be unlikely to find such shares a suitable pension investment for many (if any) of their clients, let alone a string of retail clients, and all around a period of just over several months.

In my view, the circumstances ought reasonably to have caused Carey to take a closer look at the business it was receiving from Firm C. And if it had looked at the information available then I think it would have also seen that Mr W worked as an installer, he earnt around £15,000 per year, he had no surplus income or savings and he was transferring all his existing private pension monies (aside from state pension) to the SIPP. Mr W didn't work in finance or pensions. And these details 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.

This is consistent with Mr W's testimony that he was advised to do so and given pre-drafted wording by the unregulated parties, including Firm B – who, in my experience, it seems that most, if not all, of the customers introduced to Carey by Firm C communicated with in reality. And, as set out above, in other similar cases against Carey with our Service involving the same unregulated firms and similar investments made via Firm D, I've seen evidence from the time which supports that most customers were told what to write by Firm B, for example, in their handwritten statement on their SIPP application and in their investment instructions to Firm D.

For example, I've previously seen that Firm B emailed a customer in mid-February 2014 and said:

> ‘As discussed, please print off the attached page from the Careys application form.
>
> In the box titled:-
>
> **The reason I want to establish a SIPP without the use of a Professional Adviser is:**
>
> Please hand write the following sentence:-
>
> *I have finished my own research and I am pleased to inform you that I am not involving a financial advisor.*
>
> At the bottom left hand side of the page (just below the standard SIPP and restricted SIPP boxes) write your name in BLOCK CAPITALS and add your signature.
>
> Don’t worry about the tick boxes… Admin will do these….’ (no emphasis added).

And I’ve previously seen that Firm B emailed another customer on 18 July 2014 and said:

> ‘***Copy and paste what I have written in BLACK and send to*** **[Firm D].**
>
>> *Dear* [Firm D]
>>
>> *…I wish to invest £11,315.00 in Eligere Investments plc (ELI) gxg listed securities with a 55 pence limited for T3 settlement.*
>>
>> *I wish to invest £11,315.00 in Emmit pic (EMT) aim listed securities with a £1.95 limit for T1 settlement.*
>>
>> *Please advise me via email when this has been transacted.*’ (my emphasis).

I can see that the above investment instructions were set out and worded in the same way, and with the same terminology, as those Mr W sent to Firm D on 4 June 2014 in respect of Emmit and Eligere (as set out in ‘what happened’ above).

I also think it’s unusual that Mr W was asked by Firm C to provide Carey with authority to provide it (Firm C) with *any* information it requested in relation to his SIPP, alongside his completed SIPP application form. I’m aware that these authority forms were a typed template with space for customer’s to sign. And I think Carey ought to have been aware that it’s unlikely this is something Firm C would require in the usual course of events if it was acting purely as an introducer in line with Carey’s expectations.

I appreciate Carey has said that it completed call backs with customers introduced to it by Firm C where customers confirmed, for example, that Firm C hadn’t provided them with advice and they’d decided not to take advice. Carey has said that it didn’t have any cause to doubt the information it was provided with on the documentation and during call backs at the time. And I recognise that Carey asked for customers to complete forms and declarations. But I don’t think Carey went as far as it should have in the circumstances.

I can see that the call backs Carey completed with customers were based on it using a pro-forma checklist i.e. a call script where the calls were seemingly only a few minutes long and I can see that a number of the questions asked were closed with ‘yes’ or ‘no’ answers requested, with customers only being asked to answer specific questions in their own words on two occasions. And where customers were asked open questions it seems they gave responses along similar lines to Mr W, where Carey has said that in its follow up email it noted that the reason Mr W had given it during the call for deciding not to take advice was because he felt he was '*sufficiently informed to proceed without this due to carrying out his own research*.'.

So, again, if Carey had looked more closely at the information readily available to it in the way I think it should have, then I think it ought reasonably to have recognised this pattern and that there was a clear and obvious potential risk of consumer detriment here.

In light of this, Carey could simply have concluded that, given the potential risks of consumer detriment – which I think were clear and obvious at the time – it shouldn't have continued accepting applications from Firm C and before it received Mr W's applications. That would have been a fair and reasonable step to take, in the circumstances. Alternatively, Carey could have taken fair and reasonable steps to try to address the potential risks of consumer detriment in the first instance by, for example, conducting further independent verification checks to enhance its understanding of the introductions it was receiving from Firm C and on the content of the information provided to it to check for authenticity.

The 2009 Thematic Review Report said that:

> "…*we would expect (SIPP operators) 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*.".

And if Carey had contacted Mr W to query, for example, the type of SIPP application he'd submitted, why he'd waived his cancellation rights, what his intended investments were and whether he'd had advice on any of the above then he had no reason not to disclose that he understood he'd been advised to switch to invest in Emmit and Eligere via Firm D by unregulated third parties involved in the transactions and that he was a retail investor. I recognise Mr W was seemingly told what to say by the unregulated parties involved at times, but I've no reason to think that he wouldn't have been honest during a further call with Carey.

It also follows from the above that there was a significant risk Mr W had been given advice by an unregulated third party without permission to do so, in breach of the general prohibition in Section 19 of FSMA – I'll explore this further below. And Carey ought reasonably to have concluded that it would not be consistent with its regulatory obligations to accept Mr W's business and proceed with his applications.

In conclusion

In summary, I think Carey should have concluded, and before it accepted Mr W's business from Firm C, that it shouldn't accept introductions from it. Carey therefore didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr W fairly by accepting his applications. To my mind, Carey didn't meet its obligations or good industry practice at the relevant time, and allowed Mr W to be put at significant risk of detriment as a result.

In light of this, I haven't considered whether Carey carried out sufficient initial and ongoing due diligence on Firm D. It's my view that had Carey complied with its obligations under the Principles to carry out sufficient due diligence checks on Firm C and the quality of business it was introducing to Carey, then this arrangement wouldn't have come about in the first place.

Did Carey act fairly and reasonably in proceeding with Mr W'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

Carey has said that COBS 11.2.19R obliged it to execute investment instructions and that once the SIPP has been established, it is required to execute the specific instructions of its client.

Before considering this point, I think it is important for me to reiterate that, it was not fair and reasonable for Carey to have accepted Mr W's application in the first place. So in my opinion, Mr W's SIPP should not have been established and the opportunity to execute investment instructions or proceed in reliance on an indemnity should not have arisen at all.

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

> *'The heading to COBS 11.2.1R shows that it is concerned with the manner in which orders are to be executed: i.e. on terMr Wost 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 investment instruction i.e. to proceed with the application.

The indemnity

The indemnity sought to confirm, amongst other things, that Mr W would not hold Carey responsible for any liability resulting from the investment and that Mr W wasn't receiving an inducement.

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 W'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 W 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 W 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 W was being put at significant risk.

Summary of my findings on due diligence

In summary, Carey did not comply with good industry practice, act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr W fairly by accepting his applications in the light of the circumstances I've explained, and considering what Carey knew or ought to have known about the type, nature and quality of business it was receiving from Firm C. For all the reasons given, I am satisfied that, in my opinion, 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 investment or the SIPP for Mr W. I accept Carey had no obligation to give advice to Mr W, 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 investment and SIPP was not suitable for Mr W.

Rather, Carey was able to accept or reject applications for business and I say that it should have rejected Mr W's applications.

s.27 and s.28 FSMA

As set out in the relevant considerations section above, I have also considered the application of s.27 and s.28 FSMA.

I have set out the key sections of s.27 and s.28 above and have considered these carefully, in full. In my view I need to apply a four-stage test to determine whether s.27 applies and whether a court would exercise its discretion under s.28, as follows:

1. Whether an unauthorised third-party was involved;
2. Whether there is evidence that the third-party acted in breach of the General Prohibition in relation to the particular transaction and, if so;
3. Whether the customer entered into an agreement with an authorised firm in consequence of something said or done by the unauthorised third-party in the course of its activities that contravened the General Prohibition; and
4. Whether it is just and equitable for the agreement between the customer and the authorised firm to be enforced in any event.

Was an unauthorised third-party involved?

There is no dispute that there were unauthorised third parties involved.

Is there evidence the unauthorised third party acted in breach of the General Prohibition?

Under Article 53 of the RAO (as set out in the version that was current at the relevant time) the following are regulated activities:

> *53. Advising a person is a specified kind of activity if the advice is—*
>
> > *(a) given to the person in his capacity as an investor or potential investor, or in his capacity as agent for an investor or a potential investor; and*
> >
> > *(b) advice on the merits of his doing any of the following (whether as principal or agent)—*
> >
> > > *(i) buying, selling, subscribing for or underwriting a particular investment which is a security or a relevant investment, or*
> > >
> > > *(ii) exercising any right conferred by such an investment to buy, sell, subscribe for or underwrite such an investment.*

Under Article 25 of the RAO (as set out in the version that was current at the relevant time) the following are regulated activities:

> *25. (1) Making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite a particular investment which is—*
>
> (a) *a security,*
> (b) *a relevant investment, or*
> (c) *an investment of the kind specified by article 86, or article 89 so far as relevant to that article, is a specified kind of activity.*
>
> *(2) Making arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting investments falling within paragraph (1)(a), (b) or (c) (whether as principal or agent) is also a specified kind of activity.*

There is an exclusion under Article 26 of "*arrangements which do not or would not bring about the transaction to which the arrangements relate*".

I have considered these in turn.

Advice

I think the following part of the Court of Appeal's judgment in the Adams case is of particular relevance here:

Paragraph 82:

> *"In short, CLP's recommendation that Mr Adams invest in storepods carried with it advice that he transfer out of his Friends Life policy and put the money into a Carey SIPP. Investment in storepods may have been the ultimate objective, but it was to be gained by transferring out of the Friends Life policy and into a Carey SIPP. CLP thus proposed that Mr Adams undertake those transactions too and, in so doing, gave "advice on the merits" of selling a "particular investment which is a security" (viz. the Friends Life policy) and buying another "particular investment which is a security" (viz. a Carey SIPP). Although, therefore, the advice to invest in storepods was not of itself covered by article 53 of the RAO, CLP nonetheless*

> *gave Mr Adams advice within the scope of article 53 and so acted in contravention of the general prohibition."*

Mr W's evidence is that unauthorised third parties advised him to switch out of his existing personal pension into the Carey SIPP and to invest in Emmit and Eligere via Firm D. I think that evidence is plausible and credible, for the reasons given. And, as set out above, I don't think it's credible that Mr W was independently and proactively determining to switch to a SIPP to invest the majority of his SIPP pension monies in high-risk investments, without a positive recommendation.

To confirm, given the facts of Mr W's complaint and the surrounding circumstances as I have set out above, I am satisfied that an unauthorised third party likely advised Mr W to switch out of his existing pension into the Carey SIPP to invest in Emmit and Eligere via Firm D, undertaking the regulated activity defined at article 53 of the RAO.

Making arrangements

I think the following parts of the Court of Appeal's judgement in the *Adams* case are of particular relevance here:

Paragraph 99:

> "…..*The fact remains that CLP "pre-completed the application form so that* [Mr Adams] *could just sign it" (to quote Mr Adams' witness statement). It also told Mr Adams of documents he would need to supply for anti-money laundering purposes and explained that the "completed forms and* [his] *anti money laundering documents will be collected by courier and taken to Carey Pensions UK". "Arrangements" being a "broad and untechnical word" in article 25 of the RAO as well as section 235 of FSMA, it is apt to describe what CLP did."*

Paragraph 100

> *"I consider, too, that the steps which CLP took can fairly be said to have been such as to "bring about" the transfers from Friends Life and into the Carey SIPP. Contrary to the Judge's understanding, it does not matter that CLP's acts "did not necessarily result in any transaction between* [Mr Adams] *and* [Carey]*" or that "the process was out of CLP's hands to control in any event". Nor is it determinative whether steps can be termed "administrative".*
>
> *CLP's "procuring the letter of authority", role in relation to anti-money laundering requirements and (especially) completion of the Carey application form were much more closely related to the relevant transactions than, say, the advertisement which originally prompted Mr AdaMr Wo contact CLP. It is to be remembered that CLP filled in sections of the application form dealing with "Personal Details", "Occupation & Eligibility", "Transfers", "Investments" and "Nomination Of Beneficiaries". In my view, what CLP did was thus significantly instrumental in the material transfers. In other words, there was, in my view, sufficient causal potency to satisfy the requirements of article 26 of the RAO."*

As explained above, I've seen evidence that the unauthorised third parties told customers, like Mr W, what to say in writing and over the phone in respect of the content and progress of their applications. In other similar cases with our Service, I've seen that Mr J.M of Firm B responded to an email update request from a customer on 2 April 2014 and said that he was planning on calling them the next day to '*explain the Carey's compliance call which is the* *final stage'* in the process, I think likely referring to Carey's customer call back process. And, for the reasons given, I think that's what's likely to have happened in Mr W's case.

In addition, I can see that the spaces for Mr W to sign his SIPP application form had an 'X' next to it, suggesting that this had been filled out form him, likely by one of the unauthorised parties, and that he'd been pointed as to where to sign.

Firm C also requested authority beyond that which a simple introducer of business would reasonably be expected to require. And I'm aware from other similar cases with our Service against Carey concerning the same introducer that Carey provided Firm C with requested updates in respect of the progress of outstanding applications with Firm D.

So the steps taken can fairly be said to have been such as to "*bring about*" the switch from Mr W's existing personal pension into the Carey SIPP and his investments in Emmit and Eligere via Firm D – they had sufficient causal potency to satisfy the requirements of article 26 of the RAO.

Given the facts of Mr W's complaint and the surrounding circumstances as I have set out above, I am therefore satisfied that unauthorised third parties carried out regulated activities, and therefore breached the General Prohibition. And any one regulated activity is sufficient for these purposes so this test would be met if these had only undertaken arranging (which, for the reasons I have set out, I do not think is the case).

Did Mr W enter into an agreement with Carey in consequence of the unauthorised third parties actions?

I am satisfied the SIPP was opened in consequence of the advice given, and arrangements made, by unauthorised third parties.

I recognise that the possibility Mr W might be able to receive a payment by switching his pension might have been of interest to him. But I haven't seen anything from the time to suggest Mr W had cause to switch to a SIPP to make high risk investments regardless of the unauthorised third parties' involvement. There's nothing to suggest Mr W expressed a prior interest in doing so and in such investments. And the documentation he filled out showed he had limited, if any, investment experience.

For the reasons given above, I think the advice and the unregulated firm(s) actions played a crucial role in the transactions. And that it's unlikely so many ordinary retail clients would all unilaterally decide to invest in such little-known niche shares around the same time.

So I am satisfied that if unauthorised third parties hadn't advised Mr W to switch his existing personal pensions to a SIPP with Carey in order to invest in Emmit and Eligere (seemingly initially via Cornhill and then Firm D), and then made the arrangements for that to happen, then Mr W would not have entered into an agreement with Carey.

Would the courts conclude it is just and equitable for the agreement between Mr W and Carey to be enforced in any event?

Having carefully considered this, I am satisfied a court would not conclude that it is just and equitable for the agreement between Mr W and Carey to be enforced in any event. I think very similar reasons to those mentioned by the Court of Appeal in the *Adams* case apply here:

- A key aim of FSMA is consumer protection. It proceeds on the basis that, while consumers can to an extent be expected to bear responsibility for their own decisions, there is a need for regulation, among other things to safeguard consumers from their own folly.

- While SIPP providers were not barred from accepting introductions from unregulated sources, s.27 of FSMA was designed to throw risks associated with doing so onto the providers. Authorised persons are at risk of being unable to enforce agreements and being required to return money and other property and to pay compensation regardless of whether they had had knowledge of third parties' contraventions of the general prohibition.
- As set out above Carey was aware, or ought reasonably to have become aware, that:
  - Unauthorised third parties were involved that were stepping far beyond the role of an introducer from the outset in Mr W's case.
  - Customers were seemingly being offered cash incentives, acting "completely against all rules".
- The investment did not proceed until these things were known or ought reasonably to have been known to Carey and so it was – or should have been – open to it to decline Mr W's applications.

So I am satisfied s.27 FSMA offers a further and alternative basis on which it would be fair and reasonable to conclude Mr W's complaint should be upheld. I have therefore gone on to consider the question of fair compensation.

Is it fair to ask Carey to compensate Mr W?

In deciding whether Carey is responsible for any losses that Mr W 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 not accepted Mr W's applications in the first place.

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

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

Had Carey acted fairly and reasonably it should have concluded that it shouldn't accept Mr W's applications. That should have been the end of the matter – it should have told Mr W that it could not accept the business. And I am satisfied, if that had happened, the arrangement for Mr W would not have come about in the first place, and the loss he suffered could have been avoided.

For the reasons given above, without the unregulated firm(s) involvement I don't think Mr W would have otherwise had any interest in pursuing high-risk investments in shares via a SIPP. And had Carey explained to Mr W that it would not accept the applications or that it was terminating the transaction, I find it very unlikely for reasons already given above that Mr W would have tried to find another SIPP operator to accept the business. I think it's likely Mr W would have lost trust in the unregulated firm(s) if Carey, as a regulated firm, had said it wouldn't process his instruction.

So I'm satisfied that Mr W would not have continued with the SIPP, had it not been for Carey's failings. And, whilst I accept other parties might have some responsibility for initiating the course of action that led to Mr W's loss, I consider that Carey failed to comply with its own obligations and didn't put a stop to the transactions proceeding by declining to accept Mr W's applications when it had the opportunity 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 W'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. As I set out above, Carey did not share significant warning signs with Mr W in respect of his applications, so that he could make an informed decision about whether or not to proceed. And, in any event, Carey should not have asked Mr W to sign the indemnity at all as the application should never have been accepted or alternatively the transactions should have been terminated at a much earlier stage in the process.

Furthermore, as set out above, I am satisfied there is a legal basis on which Mr W is entitled to compensation, by virtue of s.27 FSMA.

In making these findings, I've taken into account the potential contribution made by other parties to the losses suffered by Mr W. But in considering what fair compensation looks like in this case, I think it's reasonable to make an award against Carey that requires it to compensate Mr W for the full measure of his loss. Carey accepted Mr W's business. And, but for Carey's failings, I'm satisfied that Mr W's pension monies wouldn't have been switched to Carey and later invested in Emmit and Eligere via Firm D.

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 W 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. And that should not impact on Mr W's right to fair compensation from Carey for the full amount of his loss. The key point here is that but for Carey's failings, Mr W wouldn't have suffered the loss he's suffered. As such, I'm of the opinion that it's appropriate and fair in the circumstances for Carey compensate Mr W to the full extent of the financial losses he's suffered due to its failings, and notwithstanding any failings by other firms involved in the transactions.

Carey has argued that Mr W 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 W would have gone ahead to switch to a SIPP to make the investments elsewhere if Carey had refused his applications. As I've said above, I'm not persuaded that if Mr W had understood the risks that he would have risked his pension monies at the time in the circumstances. And, in any case, 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 accepted Mr W's business from Firm C in the circumstances.

Putting things right

My aim is to return Mr W 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 W 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 W nor Carey have disputed this, despite being made aware it won't be possible for us to amend this once any final decision has been issued on the complaint. So, I've proceeded on the basis that there were no such guarantees.

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 W'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 personal pensions as in Mr W's case.

In summary, Carey should:

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

2. Obtain the actual current value of Mr W'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 W'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 W £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 W's previous pension plan, if this hadn't been transferred to the Carey SIPP.

   Carey should ask the operator of Mr W'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 W 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 W.

And account should also be taken of the £1,800 cash back payment Mr W received in the calculation by way of treating it as an income withdrawal payment paid at the outset.

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

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

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

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

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

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

It's reasonable to assume that Mr W is likely to be a basic rate taxpayer at his selected retirement age, so the reduction would equal 20%. However, if Mr W 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 E 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 W £500 for the distress and inconvenience the problems with his pension have caused him.

   In addition to the financial loss that Mr W has suffered as a result of the problems with his pension, I think that the loss suffered to Mr W's pension provision has likely caused him distress. Mr W lost what seems to be the entirety of his pension provision (aside from state pension) 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.

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

SIPP fees

If the investment/s can't be removed from the SIPP, and because of this it can't be closed after compensation has been paid, then it wouldn't be fair for Mr W 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 W or into his SIPP within 28 days of the date Carey receives notification of Mr W's acceptance of my final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation isn't paid within 28 days.

My final decision

For the reasons given, my final decision is that I uphold Mr W's complaint and 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 W to accept or reject my decision before 3 December 2024.

Holly Jackson
Ombudsman