DRN-5370310

The complaint

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

What happened

I've outlined what I think are some of the key parties and events involved in Mr V'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.

Ethical Forestry Limited ('Ethical Forestry')

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

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

In December 2015, Ethical Forestry went into liquidation. The liquidator's report, dated 24 January 2022 said, amongst other things, that many investors were led to believe they had ownership of trees and cropping rights in relation to the trees and were given GPS co-ordinates to these. However, it's clear these rights weren't given, as these weren't capable of being granted under Costa Rican law.

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

The transaction

In July 2010, Mr V's Carey SIPP was established, following receipt of an application form signed by him on 12 July 2010, which noted a third party as his financial adviser. In or around October 2010, just over £27,000 was transferred into Mr V's Carey SIPP from an existing SIPP with another provider. And Mr V seemingly went on to invest his Carey SIPP monies in a property syndicate.

Over a year later, on 31 October 2011, Carey received a letter from Mr V, which said that he wanted to invest in Ethical Forestry and he was funding the investment purchase by way of transferring additional funds to his Carey SIPP from his other SIPP provider and by way of making up any shortfall in the investment amount via a contribution to the SIPP himself.

Alongside this letter, Mr V sent Carey a completed Ethical Forestry purchase order form. The adviser section was blank, and the form said that Mr V wanted to purchase units costing £6,000. And, amongst other things, it said in small writing that Mr V understood the risks association with the investment, including (but not exclusively) those relating to currency risks, illiquidity and un-recoverable local taxation and that Mr V had carried out his own due diligence to his satisfaction.

Also accompanying Mr V's letter was a signed a copy of Carey's member declaration and indemnity form for the Ethical Forestry investment. The adviser section was left blank and the rest of the form set out, amongst other things, that:

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

Carey doesn't appear to have provided us with a copy of the 'Adviser Notification letter' in respect of Mr V that the above form said he'd been asked to read and discuss with his financial adviser – seemingly as Mr V was giving Carey direct instructions himself without his financial adviser's involvement.

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

I also don't appear to have been provided with a copy of the Ethical Forestry Unregulated Collective Investment Scheme ('UCIS') form for Mr V that I'm aware Carey asked customers and/or their introducers/advisers to complete in respect of this investment from November

2010 – again possibly because Mr V was giving Carey direct instructions himself. Having previously seen copies of this form though, Carey said at the top of the form that:

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

On 23 November 2011, Carey sent Mr V's completed purchase order form to Ethical Forestry. And, shortly after, £6,000 of Mr V's Carey SIPP monies was invested in Ethical Forestry.

On 29 November 2011, Carey received a receipt, noting the number of trees Mr V had purchased. And under '*What happens now…*' it said that Mr V's trees would be reserved and prepared for planting and that once these were six months old Ethical Forestry would count out his allocation, assign the GPS co-ordinates to his property lease and issue this to him along with title documents.

On 19 July 2012, Carey received details of the plantation address for Mr V, along with the plot size and batch number and a title deed for the trees with the given co-ordinates. As well as terms and conditions and the cropping contract, which set out that Carey had a non-exclusive right of access for cropping.

On 1 April 2016, Carey emailed Mr V and said Ethical Forestry had gone into liquidation and it suggested that he seek independent financial advice. Mr V responded on 4 April 2016 and said that this was '*Very upsetting reading which I did hear in the press a while back…*' and that he hoped the outcome would recoup all his investment. And Mr V's Ethical Forestry investment is seemingly now valued at £1.

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

Mr V first complained to Carey on 20 November 2018. He said, in summary, that he'd recently checked his statement and his Ethical Forestry invested was valued at nil. He said Carey had failed in its duty of care, as it failed to carry out sufficient due diligence on the investment and that it ought to refused his application to invest in this, causing him a significant loss.

Carey replied on 14 January 2019 and, unhappy with this response, Mr V referred his complaint to our Service in January 2019. And during Mr V's complaint he's said, amongst other things, that:

- He moved from his existing SIPP provider to the Carey SIPP to invest in a property syndicate, that he was already invested in outside his pension. But then he also later invested in Ethical Forestry, which turned out to be fraudulent.
- There was no introducer involved – he was attracted to the investment because it was in forestry and because of the high returns he was told about by Ethical Forestry.
- Carey facilitated the investment and he thought it would check this out before allowing him to invest in it.
- He complained once he heard that the investment had gone wrong and that he'd lost his investment.
- Other than to Carey, he hasn't complained to any other parties in respect of this matter and he hasn't received any compensation.

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

- Mr V's November 2018 complaint has been made too late for our Service to consider it. Mr V was already aware there was a problem with his investment prior to April 2016, given Mr V said in an email at that time that he'd already heard about Ethical Forestry having gone into liquidation in the press a while back.
- While Mr V had a financial adviser when he established his Carey SIPP, he later came to it directly to make the Ethical Forestry investment, acting of his own volition and without advice when doing so.
- It's an execution-only SIPP provider and it acted in line with Mr V's instructions in accordance with COBS 11.12.9R in accepting his SIPP and investment applications.
- Carey didn't provide advice and wasn't permitted to do so. It didn't consider the suitability of the investment for Mr V and he had the opportunity to seek regulated advice if he'd wanted to.
- It provided risk warnings about the investment being high risk and/or speculative, recommended Mr V seek advice and took steps to ensure he understood his instructions were on an execution only basis. Mr V signed member declarations confirming he understood this and all documentation. It was reasonable for it to have accepted Mr V's signature.
- It conducted due diligence on the Ethical Forestry investment. Its main objective was to ensure these were suitable to be held within a UK registered pension scheme. This included its Investment Committee reviewing legal paperwork, product information, company background checks and obtaining an independent report from a third-party external compliance entity. Carey determined that the investment was capable of being held within a SIPP in line with HMRC guidelines and its due diligence didn't indicate any reason not to accept the investment.
- Mr V previously made a request to invest in another high-risk investment, showing he was, or is, wanting to make such investments. So Carey isn't causative of any loss, as Mr V would have proceeded to invest in Ethical Forestry elsewhere even if it hadn't actioned his instructions.

One of our Investigators reviewed Mr V's complaint and said it had been made in time for us to consider it and that it should be upheld. And she said that to put things right, Carey should put Mr V back in the position as though he hadn't switched to the Carey SIPP.

While Mr V accepted our Investigator's findings, Carey responded with further comments. It said, amongst other things, in Mr V's case and in submissions on similar complaints against Carey with our Service concerning the same investment, that:

- Mr V's complaint has been made too late for our Service to consider it. Our Investigator has accepted that the complaint was made more than six years after the events complained of and that Mr V was aware of a significant fall in the value of his investment after Ethical Forestry went into liquidation in August 2015. Mr V's April 2016 email supports this and he could have raised any concerns he had about Ethical Forestry with his third-party adviser.
- In respect of Mr V's understanding and approach to the Ethical Forestry investment, including his motivations for entering this and what he would have otherwise done, Carey hasn't had the chance to explore this at an oral hearing with Mr V.
- 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 V's SIPP application and subsequent investment instructions is relevant. Otherwise our Service would be considering Mr V's complaint with the benefit of hindsight, which no reasonable court would do. The later guidance introduced new expectations and reflects more than

what the industry was already doing.

- Reference to the Reviews contravene the decision in Adams on the basis these:
    - have no bearing on the construction of the Principles as the contents of the documents cannot found a claim for compensation of itself;
    - cannot alter the meaning of, or the scope of the obligations imposed by, the Principles;
    - do not provide "*guidance*" and even if they were considered statutory guidance made under FSMA s.139A, any breach would not give rise to a claim for damages under FSMA s.138D.
- The FCA's Enforcement Guide says that "*Guidance is not binding on those to whom the FCA's rules apply. Nor are the variety of materials (such as case studies showing good or bad practice, FCA speeches and generic letters written by the FCA to Chief Executives in particular sectors) published to support the rules and guidance in the Handbook. Rather, such materials are intended to illustrate ways (but not the only ways) in which a person can comply with the relevant rules.*"
- Carey had a very limited legal obligation to undertake due diligence in respect of the investments. The judge in *Adams* refused to recognise a due diligence duty, instead concluding that obligations are framed by reference to the context of the contractual relationship.
- Our Service is imposing an obligation on it to undertake a qualitative assessment of the investments and to pass this on, effectively amounting to a recommendation to Mr V not to proceed, which overreaches its legal obligations and goes further than published regulatory material.
- It is well established that a reasonable person is expected to read their correspondence: *Webster v Cooper & Burnett* [2000].
- Its risk warnings were self-explanatory, it couldn't have provided any clearer indication that the investments were high risk. And it's unclear why Mr V went ahead anyway despite the warnings if he now believes the investment was unsuitable.
- It's likely Mr V was keen to proceed with the investment and would have found a way to do so had Carey not accepted his application and another SIPP operator could properly have dealt with the investment.
- Mr V 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 V chose to invest in a product he'd been told was high risk.
- It would be unfair if Carey couldn't rely on the indemnities and declarations Mr V agreed to.
- A fair and reasonable comparator for redress would be the lower discount rates, as per DRN 2670669.
- Our Service recommended compensation for distress and inconvenience, but provided no evidence to support that Mr V has suffered any degree of upset.
- The implications of this outcome are serious for the execution only SIPP market.

I let both parties know that I was minded to say that our Service can consider Mr V's complaint, that I don't think an oral hearing is necessary and that Mr V's complaint should be upheld. But, while my reasons for thinking this should be upheld are largely the same as our Investigator, my reasons for thinking that Mr V's complaint has been made in time for us to be able to consider it differ. And I let the parties know I'm minded to recommend different redress to that which the Investigator recommended. I haven't set out the content of my initial thoughts in full again here though, as these remain largely the same and are therefore largely repeated below in 'What I've decided – any why'.

Mr V responded and said that he accepted my initial thoughts. And, while Carey asked for an extension until 10 January 2025 to respond – which was granted – it didn't go on to provide one.

What I've decided – and why

Our time limits

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

Mr V's complaint to Carey concerned his investment into Ethical Forestry. More specifically he said he was unhappy that it permitted him to invest in Ethical Forestry via his SIPP and that it should put him back into the position as though he hadn't invested in this.

Our Service doesn't have a free hand to consider every complaint brought to us. We must follow the rules we're bound by, known as the Dispute Resolution ('DISP') Rules – found in the Financial Conduct Authority's handbook. And DISP 2.8.2R says that, unless the business consents (Carey hasn't), we can't consider a complaint if it's referred to us:

> "… (2) more than:
>
> > (a) six years after the event complained of; or (if later)
> > (b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;
>
> unless the complainant referred the *complaint* to the *respondent* or to the *Ombudsman* within that period and has a written acknowledgement or some other record of the *complaint* having been received;
>
> unless:
>
> (3) in the view of the *Ombudsman*, the failure to comply with the time limits in *DISP 2.8.2 R*…was as a result of exceptional circumstances*;…"*

Carey has said, amongst other things, that Mr V's complaint was made more than three years from when he was made aware that his Ethical Forestry investment had failed.

I think the events complained of here – that Carey failed to exercise sufficient due diligence on Ethical Forestry investment before accepting Mr V's application to invest in this in or around 31 October 2011, causing him to lose out – took place more than six years before he referred his complaint to Carey on 20 November 2018 and then to our Service.

In which case, I've also gone on to consider whether Mr V was aware or ought reasonably to have become aware he had cause for complaint about this respondent firm, Carey, more than three years before he first made his complaint to it in November 2018.

Carey first wrote to Mr V on 1 April 2016 to let him know Ethical Forestry had gone into liquidation and suggested that he seek independent financial advice. And I recognise Mr V responded to Carey on 4 April 2016 and said that this was '*Very upsetting reading which I did hear in the press a while back…'*, therefore showing that he was already aware by that point that his investment was, or may be, in trouble and that he was upset by this.

However, Ethical Forestry doesn't appear to have gone into liquidation until mid-December 2015, after which I understand the liquidator then began to contact investors. When bearing this in mind, I think it naturally follows that when Mr V told Carey on 4 April 2016 that he'd already heard about the liquidation, he was most likely referring to information he'd seen or heard about this from mid-December 2015 onwards. And Mr V’s complaint to Carey was made within three years of this, in November 2018.

Carey said itself that prior it to being made aware of the liquidation around April 2016 it had no concerns about the Ethical Forestry investment and there no was indication that this was experiencing any trouble. And I haven’t seen anything to make me think that Mr V was, or ought reasonably to have become, aware that something had or may have gone wrong with his Ethical Forestry investment that had, or may have, caused him a loss more than three years before he raised his complaint with Carey in November 2018.

So, I think that Mr V’s complaint has been made in time for us to be able to consider it.

Oral hearing

Carey has said an oral hearing is necessary to explore, for example, Mr V’s understanding and motivations for entering the transactions.

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 V provided further information, which Carey was given the opportunity to consider and comment on in response to my initial thoughts, by the deadline provided.

I have carefully considered the submissions Carey has made. However, I’m currently 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 V’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 V 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.

The merits of Mr V's complaint

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

I've looked at everything, including all the points made by the parties, and taken this into account alongside the considerations I've detailed above. I have not, however, responded below to all the points made; I have concentrated on what I consider to be the main issues.

I'm required to determine this complaint by reference to what I consider to be fair and reasonable in all the circumstances of the case. When considering what is fair and reasonable in the circumstances, I need to take account of relevant law and regulations, regulator's rules, guidance and standards, codes of practice and, where appropriate, what I consider to have been good industry practice at the relevant time.

I have taken into account a number of considerations including, but not limited to:

- The agreement between the parties.
- The Financial Services and Markets Act 2000 ("FSMA").
- Court decisions relating to SIPP operators, in particular Options UK Personal Pensions LLP v Financial Ombudsman Service Limited [2024] EWCA Civ 541 (*"Options"*) and the case law referred to in it including:
    - Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 474 ("*Adams"*)
    - R (Berkeley Burke SIPP Administration) v Financial Ombudsman Service [2018] EWHC 2878 (*"Berkeley Burke"*)
    - Adams v Options SIPP UK LLP [2020] EWHC 1229 (Ch) (*"Adams – High Court"*)
- The Financial Conduct Authority ("FCA") (previously Financial Services Authority) ("FSA") rules including the following:
    - PRIN Principles for Businesses
    - COBS Conduct of Business Sourcebook
    - DISP Dispute Resolution Complaints
- Various regulatory publications relating to SIPP operators and good industry practice.

The legal background:

As highlighted in the High Court decision in *Adams* the factual context is the starting point for considering the obligations the parties were under. And in this case it is not disputed that the contractual relationship between Carey and Mr V is a non-advisory relationship.

Setting up and operating a SIPP is an activity that is regulated under FSMA. And pensions are subject to HM Revenue and Customs rules. Carey was therefore subject to various obligations when offering and providing the service it agreed to provide – which in this case was a non-advisory service.

I have considered the obligations on Carey within the context of the non-advisory relationship agreed between the parties.

The case law:

I'm required to determine this complaint by reference to what is in my opinion fair and reasonable in all the circumstances. I am not required to determine the complaint in the same way as a court. A court considers a claim as defined in the formal pleadings and they will be based on legal causes of action. Our Service was set up with a wider scope which means complaints might be upheld, and compensation awarded, in circumstances where a court would not do the same.

The approach taken by our Service in two similar (but not identical) complaints was challenged in judicial review proceedings in the *Berkeley Burke* and the *Options* cases. In both cases the approach taken by the ombudsman concerned was endorsed by the court. A number of different arguments have therefore been considered by the courts and may now reasonably be regarded as resolved.

It is not necessary for me to quote extensively from the various court decisions.

The Principles for Businesses:

The Principles for Businesses, which are set out in the FCA's Handbook "*are a general statement of the fundamental obligations of firms under the regulatory system"* (see PRIN 1.1.2G). The Principles apply even when the regulated firm provides its services on a non-advisory basis, in a way appropriate to that relationship.

Principles 2, 3 and 6 are of particular relevance here. They 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 am satisfied that I am required to take the Principles into account (see *Berkley Burke*) even though a breach of the Principles does not give rise to a claim for damages at law (see *Options*).

The regulatory publications and good industry practice:

The regulator 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.

The 2009 Report included:

> *"We are concerned by a relatively widespread misunderstanding among SIPP operators that they bear little or no responsibility for the quality of the SIPP business that they administer, because advice is the responsibility of other parties, for example Independent Financial Advisers…*

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."

The Report also included:

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."*

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

"This guide, originally published in September 2009, has been updated to give firms further guidance to help meet the regulatory requirements. These are not new or amended requirements, but a reminder of regulatory responsibilities that became a requirement in April 2007.

All firms, regardless of whether they do or do not provide advice must meet Principle 6 and treat customers fairly. COBS 3.2.3(2) is clear that a member of a pension scheme is a 'client' for SIPP operators and so is a customer under Principle 6. It is a SIPP operator's responsibility to assess its business with reference to our six TCF consumer outcomes."

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

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

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

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

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

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

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

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

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

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

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

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

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

*"**Due diligence***

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

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

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

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

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

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

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

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

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

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

- correctly establishing and understanding the nature of an investment

- ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation

- ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable)

- ensuring that an investment can be independently valued, both at point of purchase and subsequently, and

- ensuring that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc.)

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

The 2009 and 2012 Thematic Review Reports and the *"Dear CEO"* letter aren't formal guidance (whereas the 2013 finalised guidance is). However, all of the publications provide a reminder that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and 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 them into account (as did the ombudsman whose decision was upheld by the court in the *Berkeley Burke* case).

Points to note about the SIPP publications include:

- The Principles on which the comments made in the publications are based have existed throughout the period covered by this complaint.
- The comments made in the publications apply to SIPP operators that provide a non-advisory service.
- Neither court in the *Adams* case considered the publications in the context of deciding what was fair and reasonable in all the circumstances. As already mentioned, the court has a different approach and was deciding different issues.
- What should be done by the SIPP operator to meet the regulatory obligations on it will always depend upon the circumstances.

What did Carey's obligations mean in practice?

I'm satisfied that to meet its regulatory obligations when conducting its operation of its non-advisory SIPP business, Carey was required to consider whether to accept or reject particular investments and/or referrals of business with the Principles in mind. I say this based on the overarching nature of the Principles (as is clear from the case law) and based on good industry practice. I am also satisfied that bearing in mind the Principles and good industry practice that this obligation was not confined *only* to rejecting an investment on the basis it was not allowed by the SIPP Trust or HMRC regulations.

I am satisfied that to meet its regulatory obligations when conducting its operation of its non-advisory SIPP business, a SIPP operator could decide not to accept a referral of business or a request to make an investment without it giving the customer advice. And I am satisfied that in practice many did refuse to accept business and/or refuse to make investments without giving advice.

I am satisfied that, to comply with its regulatory obligations, a non-advisory SIPP operator should have due diligence processes in place to check any firms introducing business to them and the investments they are asked to make on behalf of members or potential members. And that they should use the knowledge gained from the due diligence checks to decide whether to accept such business and/or allow a particular investment.

The Ethical Forestry investment and what Carey ought reasonably to have concluded

I've reviewed the documents Carey sent us to evidence the checks it carried out on the Ethical Forestry investment. I'm satisfied that the documents Carey says it reviewed did allow it to broadly understand the nature of the Ethical Forestry investment. Although I note that some of the information and checks – including, for example, World Check and company checks – date from 2012 and 2015 respectively, rather than from when it first accepted the investment into its SIPPs seemingly around late 2010. But I think Carey's obligations certainly went beyond checking that an investment existed and would not result in tax charges. And I think some of the information should have given Carey real cause for concern about the risk of consumer detriment associated with the Ethical Forestry investment.

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

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

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

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

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

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

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

In order to correctly understand the nature of the investment though and consistent with its regulatory obligations, Carey should have also had regard to, and given careful consideration to, how Ethical Forestry was marketed to investors when undertaking due diligence into the proposed investment – particularly as it was proceeding on the basis that this investment was being made on a direct non-advised basis by Mr V. And this includes conducting some further basic independent searches.

I note that Carey has provided a copy of the Ethical Forestry marketing material it says it reviewed as part of its due diligence. So, clearly Carey thought it was important to look at this material at the time too. And, for the reasons given below, I think it's fair to say that the information provided about the Ethical Forestry investment was at best unclear and that a number of the statements made in promotional material were misleading.

The marketing material I've seen says Acacia is "*a safe and secure investment*". The brochure for the Melina and/or Acacia tree crops says the investment is "*secure, dependable and stable*" and that it is "*Low risk – No peaks or troughs, just steady and stable increases*".

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

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

In October 2010:

"*Our forestry investments are suited for pensions because:*

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

And in November 2010:

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

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

Carey should also have been concerned about how the projected returns were set out in the marketing material. The Acacia brochure said, for example, that the projected returns for an

£18,000 investment over 10 years would be £93,642 and for an accumulating investment over 22 years the projected return was £732,297 and would be “ideal for SIPPs pensions and personal investment portfolios”. These were said to be “*conservative estimates*”.

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

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

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

For the reasons I’ve given, I think the investment promotional material was unclear and misleading. So, Carey should have had significant concerns about how the investment was being promoted and the information being provided to investors about the investment. There was a significant risk of consumer detriment, as there was a real risk that investors could be investing in Ethical Forestry without appreciating the risks involved. I think that these concerns alone ought to have led Ethical Forestry to conclude that it shouldn’t permit this investment within its SIPPs, and at the very least this ought to have led Ethical Forestry to understand the importance of undertaking comprehensive independent due diligence.

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

- There was no investor protection associated with this investment. It was illiquid, subject to currency fluctuations and there may be no market for it. There were also other risks involved such as disease or fire that could’ve destroyed the trees allocated to investors.
- It was being specifically targeted for investment by pension investors, it was a speculative overseas based investment with inherent high risks that made it very obviously unsuitable for all but a small category of investors and even then, only a small part of such an investor’s portfolio.
- Ethical Forestry had no proven track record for investors and so Carey couldn’t be certain that the investment wasn’t impaired or operated as claimed.
- The very high projected returns set out should have been questioned. I don’t expect Carey to have been able to say the investment would have been successful. But such high projected returns without any apparent basis should have given Carey cause to question its credibility.
- The marketing material was, at best, unclear as to the risks associated with the

investment. So, Carey should have been concerned that consumers may have been misled or did not properly understand the investment they intended to make.
- As set out by the liquidator, investors were led to believe they had ownership of trees and cropping rights in relation to the trees and were given GPS co-ordinates to these, when these rights weren't given as these weren't capable of being granted under Costa Rican law.
- Carey knew or ought reasonably to have known that Mr V wasn't receiving advice about the investment.

All in all I am satisfied that Carey ought to have had significant concerns about the Ethical Forestry investment from the beginning. I think the type of concerns set out above ought to have been a red flag when it was considering whether to accept this investment into its SIPPs. And, knowing all this, I don't think it was fair or reasonable for Carey to have accepted the Ethical Forestry investment into its SIPPs.

Had Carey done what I think it should have, and drawn reasonable conclusions from what it knew or ought reasonably to have known, I think that it ought to have concluded there was a significant risk of consumer detriment if it accepted the Ethical Forestry investment into its SIPPs and that this wasn't acceptable for its SIPPs.

As such, and based on the available evidence, I don't think Carey undertook appropriate steps or drew reasonable conclusions from the information that I'm satisfied would have been available to it, had it undertaken adequate due diligence into the Ethical Forestry investment before it did so. I don't think Carey met its regulatory obligations and, in accepting Mr V's application to invest in Ethical Forestry, it allowed his funds to be put at significant risk.

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

And I'm also not saying that Carey shouldn't have allowed the Ethical Forestry investment into its SIPPs because it was high risk. Instead, my fair and reasonable decision is that there were things Carey knew or ought reasonably to have known about the Ethical Forestry investment and how it was being marketed, which ought to have led Carey to conclude it wouldn't be consistent with its regulatory obligations or good practice to allow it into its SIPPs. And that Carey failed to act with due skill, organise and control its affairs responsibly, or treat Mr V fairly by accepting this into his SIPP.

I think the fair and reasonable conclusion based on the evidence available is that Carey shouldn't have accepted Ethical Forestry into its SIPPs and Mr V's application to invest in this. I think it ought to have concluded that it would not be consistent with its obligations to do so. To my mind, Carey didn't meet its regulatory obligations or good industry practice at the relevant time, and allowed Mr V to be put at significant risk of detriment as a result.

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

I recognise Mr V signed forms confirming he understood that Carey wouldn't accept any liability for issues that might arise in respect of the investment and that it seems he declared that he'd received details of the risk factors and terms and conditions for the investment and wished to proceed with this.

For the reasons given above though, I think Carey should have refused to permit the Ethical Forestry investment within its SIPPs. So things shouldn't have progressed beyond that.

Indemnities

In my view it's fair and reasonable to say that just having Mr V sign indemnity declarations wasn't an effective way for Carey to meet its regulatory obligations to treat him fairly, given the concerns Carey ought to have had about the investment. Carey knew that Mr V had signed forms intended to indemnify it against losses that arose from acting on his instructions. And, in my opinion, relying on such indemnities when Carey knew, or ought to have known, the Ethical Forestry investment was putting him at significant risk wasn't the fair and reasonable thing to do.

In the circumstances I think very little comfort could have been taken from the declaration stating that Mr V understood the investment risks. Having identified the risks I've mentioned above, it's my view that the fair and reasonable thing to do would have been to refuse to accept Mr V's application.

The Principles exist to ensure regulated firms treat their clients fairly. And I don't think the paperwork Mr V signed meant that Carey could ignore its duty to treat him fairly. I'm satisfied that indemnities contained within the contractual documents don't absolve Carey of its regulatory obligations to treat customers fairly when deciding whether to accept or reject business.

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 V fairly by asking him to sign an indemnity absolving it of all responsibility, and relying on such an indemnity, when it ought to have known that Mr V was being put at significant risk.

COBS 11.2.19R

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

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

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

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

Is it fair to ask Carey to compensate Mr V?

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

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 V signed the indemnity means that he shouldn't be compensated if it is fair and reasonable to do so.

In deciding whether Carey is responsible for any losses that Mr V has suffered on the investments in his SIPP I need to look at what would have happened if Carey had done what it should have done.

As I've said, Carey should have refused Mr V's Ethical Forestry application. That should have been the end of the matter – Carey should have told Mr V that it could not accept the business. And I am satisfied, if that had happened, the arrangement for Mr V would not have come about in the first place, and the loss he suffered could have been avoided.

Carey has argued that Mr V would have invested regardless of its involvement. But I'm not persuaded by this. Had Carey explained to Mr V why it would not accept his application or was terminating the transaction, I find it very unlikely that Mr V would have tried to find another SIPP operator to accept the business. I've taken into account that Mr V has said there was no introducer involved and he was attracted to the investment himself. But if Carey had explained to Mr V even in general terms why it would not accept his application or that it was terminating the transaction, I find it very unlikely that he would have tried to find another SIPP operator to invest in Ethical Forestry with.

And, in any event, I don't think it's fair and reasonable to say that Carey shouldn't compensate Mr V for his loss based on speculation that another SIPP operator would have made the same mistakes as I think it did. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have permitted the Ethical Forestry investment into its SIPPs.

So I'm satisfied that Mr V would not have continued with the Ethical Forestry investment, had it not been for Carey's failings and would have remained in his existing scheme. And, I consider that Carey failed unreasonably to put a stop to that course of action when it had the opportunity and obligation to do so.

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

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

responsibility for his own decisions and that his instructions are not to be followed."

For the reasons I've set out, I'm satisfied that it would not be fair to say Mr V's actions mean he should bear the loss arising because of Carey's failings. I do not say Carey should not have accepted the application because the investment was high risk. I acknowledge Mr V was warned of the high risk and declared he understood that warning. But, as I set out above, Carey did not share significant warning signs with Mr V the investment so that he could make an informed decision about whether to proceed or not. And, in any event, Carey should not have asked him to sign the indemnity at all as the investment application should never have been accepted or alternatively the transaction should have been terminated at a much earlier stage in the process.

So I am satisfied in the circumstances, for all the reasons given, that it is fair and reasonable to conclude that Carey should compensate Mr V for the loss he has suffered.

I am not asking Carey to account for loss that goes beyond the consequences of its failings. I am satisfied those failings have caused the full extent of the loss in question. That other parties might also be responsible for that same loss is a distinct matter, which I am not able to determine. However, that fact should not impact on Mr V's right to fair compensation from Carey for the full amount of his loss.

Mr V taking responsibility for his own investment decisions

Section 5(2)(d) of the FSMA (now section 1C) requires the FCA, in securing an appropriate degree of protection for consumers, to have regard to, amongst other things, the general principle that consumers should take responsibility for their own investment decisions. Having considered this I'm satisfied that it wouldn't be fair or reasonable to say Mr V's actions mean he should bear the loss arising as a result of Carey's failings.

For the reasons given above, I think that if Carey had acted in accordance with its regulatory obligations and good industry practice it shouldn't have nor permitted his investment application. That should have been the end of the matter – if that had happened, I'm satisfied the arrangement for Mr V wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

As I've made clear, Carey needed to carry out appropriate due diligence the Ethical Forestry and reach the right conclusions. I think it failed to do this. And merely having Mr V sign forms containing declarations wasn't an effective way of Carey meeting its obligations, or of escaping liability where it failed to meet these.

Mr V used the services of a regulated provider, trusting it to act in his best interests. So, I don't think it would be fair to say in the circumstances that Mr V should suffer the loss because he ultimately instructed the transaction to be effected. Overall, I'm satisfied that in the circumstances, for all the reasons given, it's fair to say Carey should compensate Mr V for the loss he's suffered.

Putting things right

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

As set out above, Mr V's complaint to Carey, and the complaint I'm considering, was that he was unhappy that it permitted him to invest in Ethical Forestry via his SIPP and that it should put him back into the position as though he hadn't invested in this, so the redress I've set out below reflects this.

In addition, most of Mr V's Carey SIPP pension monies were invested elsewhere after the transfer to it in 2010. Whereas Mr V's investment into Ethical Forestry was a smaller proportion (at £6,000) of his Carey SIPP pension monies and this investment was made more than a year after he'd transferred to Carey. And this all suggests to me that investing in Ethical Forestry wasn't driving Mr V's transfer to the Carey SIPP and that the latter would likely have gone ahead in any event.

For the above reasons though, had Carey done what it should have and refused to permit the Ethical Forestry investment within its SIPP, I think it's most likely that Mr V wouldn't have invested in this. I take the view that Mr V would have invested differently. It's not possible to say precisely what he would have done. But I'm satisfied that what I've set out below is fair and reasonable way to put things right in the circumstances.

To compensate Mr V, on a fair and reasonable basis, Carey must:

- Compare the performance of Mr V's Ethical Forestry investment with that of the benchmark shown below. If the actual value is greater than the fair value, no compensation is payable.

  If the fair value is greater than the actual value, there is a loss and compensation is payable.

- Carey should add interest as set out below.

- Carey should pay into Mr V's pension plan to increase its value by the total amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

- If Carey is unable to pay the total amount into Mr V's pension plan, it should 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 total amount should be reduced to notionally allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mr V won't be able to reclaim any of the reduction after compensation is paid.

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

- It's reasonable to assume that Mr V is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr V 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 V have disputed that this is a reasonable assumption. That's despite being asked to do so by the deadline given to respond to my initial thoughts and despite 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.

- If the SIPP needs to be kept open only because of the illiquid investment/s and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.

- Pay to Mr V £200 for the distress and inconvenience caused by the loss of a proportion of his pension provision.

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

Income tax may be payable on any interest paid. If Carey deducts income tax from the interest it should tell Mr V how much has been taken off. Carey should give Mr V a tax deduction certificate in respect of interest if Mr V asks for one, so **he** can reclaim the tax on interest from HM Revenue & Customs if appropriate.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
The monies invested in Ethical Forestry	Still exists but illiquid	FTSE UK Private Investors Income Total Return Index	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)

Actual value

This means the actual amount payable from the Ethical Forestry investment at the end date.

It may be difficult to find the *actual value* of the illiquid investment/s. This is complicated where an asset is illiquid (meaning it could not be readily sold on the open market) as in this case. Carey should establish an amount it's willing to accept for the investment/s as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investment/s.

If Carey is able to purchase the illiquid investment/s then the price paid to purchase the holding/s will be allowed for in the actual value.

If Carey is unable to purchase illiquid assets, their value should be assumed to be nil for the purpose of calculating the *actual value*. Carey may require that Mr V provides an undertaking to pay Carey any amount **he** may receive from the illiquid assets in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Carey will need to meet any costs in drawing up the undertaking.

Fair value

This is what the monies invested in Ethical Forestry would have been worth at the end date had they produced a return using the benchmark.

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 V to have to pay annual SIPP fees to keep the SIPP open. But, for the sake of completeness, if the SIPP needs to be kept open only because of the illiquid investment/s and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.

Distress & inconvenience

I think the loss of part of the pension provision that is the subject of this complaint has likely caused Mr V some distress and inconvenience – it would have understandably been worrying to have found out he'd lost this. And Carey should pay Mr V £200 to compensate him for this. I think this is a fair and reasonable amount in the circumstances, when bearing in mind this made up a small proportion of Mr V's Carey SIPP pension monies.

Why is this remedy suitable?

I've decided on this method of compensation because:

- I can't say definitively into what holdings, and in what proportions, Mr V's monies would have been invested had Carey not accepted his Ethical Forestry application. However, overall, I consider the benchmark below is a fair and reasonable proxy for the return Mr V's monies might have experienced over the period in question if they hadn't been invested in the manner that they were.

- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds.

- I'm satisfied that the mix and diversification provided by using a benchmark of the FTSE UK Private Investors Income total return index for the investment would be a fair measure for comparison for what Mr V's monies might have been worth if they hadn't been and invested in the manner that they were.

My final decision

For the reasons given, my final decision is that I uphold Mr V's complaint and Options UK Personal Pensions LLP must put things right in the way I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr v to accept or reject my decision before 2 April 2025.

Holly Jackson
Ombudsman