complaint

Mr H is being represented by a claims management company. His complaint about Options SIPP UK LLP is essentially that it accepted an application for and arranged to transfer benefits from his existing pensions into a self-invested personal pension (SIPP) to fund high-risk unregulated investments (Store First and GAS Verdant Australian Farmland) without carrying out adequate due diligence.

In summary, Mr H's representative raised the following key points:

- Mr H has suffered significant losses because he invested in a SIPP to fund unsuitable investments.
- Carey shouldn't have accepted instructions from the non-regulated introducer, CL&P Brokers (CL&P).
- Mr H was misled by CL&P Brokers and Carey allowed that to happen because it disregarded the regulator's Principles. Carey cannot absolve itself of its responsibility for the quality of business it administers.
- Carey failed to apply the Principles for Business 1, 2, 3 and 6 and it's also apparent that its systems and controls for monitoring, gathering and analysing information were inadequate.
- As a result, Mr H ended up with an unsuitable SIPP and investment. If Carey had applied the Principles and had the necessary procedures and controls in place, he wouldn't now be in this position.

At the time of the events being complained about, Options SIPP was called Carey Pensions UK LLP (Carey) and I'll refer to it by that name.

background

Carey

Carey is a SIPP provider and administrator, regulated by the Financial Conduct Authority (FCA). Carey is authorised, in relation to SIPPs, to arrange (bring about) deals in investments, deal in investments as principal, establish, operate or wind up a pension scheme and make arrangements with a view to transactions in investments.

CL&P

CL&P was an unregulated business based in Spain. One of the directors of CL&P was a Terence Wright. On 15 October 2010, the following was published on the Financial Services Authority (FSA), website:

> ***ALERT***
>
> *The Financial Services Authority (FSA) has today published this statement in order to warn investors against dealing with unauthorised firms.*
>
> *The purpose of this statement is to advise members of the public that an individual*
>
> ***Terence (Terry) Wright***

is not authorised under the Financial Services and Markets Act 2000 (FSMA) to carry on a regulated activity in the UK. Regulated activities include, amongst other things, advising on investments. The FSA believes that the individual may be targeting UK customers via the firm Cash In Your Pension.

Investors should be aware that ***the Financial Ombudsman Service and the Financial Services Compensation Scheme*** *are not available if you deal with an unauthorised company or individual.*

To find out whether a company or individual is authorised go to our Register of authorised firms and individuals at http://www.fsa.gov.uk/register/home.do.

the relationship between CL&P and Carey

Carey was approached by CL&P in 2011 and entered into discussions about accepting introductions from it. Carey says it carried out some due diligence on CL&P at this time. It says it reviewed CL&P's profile, conducted searches, reviewed CL&P's website and literature and had conversations with CL&P's representatives over the telephone.

Carey began to accept introductions from CL&P on 15 August 2011.

A non-regulated introducer profile was completed by CL&P on 29 September 2011. It was signed by a Mr Wright, and confirmed the following:

- CL&P was a Spanish firm, and was trading from a Spanish address.
- It used a "0845" telephone number.
- It had been trading for two years, and had two directors – Terence Wright and Lesley Wright.
- It had eight agents, and promoted four investments – Store First, Verdant Australian Farmland, and two other unregulated investments.
- It worked with four other SIPP operators.
- Its source of business was "referrals and web enquiries".
- Its sales process involved a call and follow up emails.
- It took 2-5% commission, and this was the source of its earnings.
- Its staff had been given training and it had worked with "various compliance officers".

Carey had a conference call with representatives of CL&P on 9 December 2011. During that call the issue of consumers being offered cash incentives by CL&P to transfer to a SIPP and make investments was raised, and concern about final salary scheme transfers. The note of the call included the following:

Concern was raised at a recent AMPS [Association of Member-Directed Pension Schemes] *conference regarding Final Salary Transfers to SIPPs, the need for clients to take advice, the fact that ordinarily you would not expect more than 5% of FSTVs to be execution only and these would only be relevant for suitably qualified individuals such as IFAs, Brokers, Investment Professionals.* [Carey staff member] *explained the matters raised at the conference. Discussed with CLP because some 30% of the business received into Careys from them is in relation to FS transfers which previously have been processed with member declarations. All agreed that in future cases of FS Transfers would be referred to suitably qualified IFAs for relevant advice and copy of that advice would be provided to Careys for file records.*

> [Carey staff member] *also raised a concern that a potential member had asked when they would receive their money from their Store First Investment,* [CL&P representatives] *confirmed that no clients or connected parties referred by CL&P receive any form of inducement for either establishing the SIPP or making the Store First Investment and that CL&P policy does not include offering inducements.*
>
> [Carey staff member] *emphasised that it is completely against all rules that clients or connected parties receive any form of inducement for making particular investments*.

An agreement between Carey and CL&P was signed in March 2012. This was back-dated to August 2011. Carey says this was done to cover all the investments that had been introduced to it by CL&P.

Carey terminated its agreement with CL&P on 25 May 2012. It says the basis for this was Carey again becoming aware that CL&P was offering consumers cash incentives for transferring to a Carey SIPP and making investments. It says this came to light when consumers contacted it to ask when the money would be paid.

Store First

The Store First investment took the form of one or more self storage units, which were part of a larger storage facility in the UK. Investors bought one or more units in the facility, and were offered a guaranteed level of income for a set period of time. After that, they could either take whatever income the unit(s) provided, or sell them (assuming there was a market for them).

Store First was the subject of a winding up petition issued by the Business Secretary in 2017. Action relating to that is ongoing, and investors have recently been offered the opportunity to transfer their investment to a newly-created freehold company, for nil consideration. I understand the investment has no realisable value.

GAS Verdant

The Verdant Australian Farmland investment took the form of a 'land purchase contract' which involved a company based in Cyprus (GAS Global Agricultural Services Ltd) leasing plots of agricultural land in Australia to investors. Crops were to be planted on the plots, and the objective was to provide an income to investors through the sale of those crops and capital growth through the sale of the plot of land after eight years.

Mr H's dealings with CL&P and Carey

In 2012, Mr H says he was advised by CL&P to transfer his pension benefits to a SIPP to fund investments in Store First and GAS Verdant.

Mr H applied for a SIPP with Carey in March 2012. The application included the request to transfer his existing personal pension benefits with AXA and Aviva to the SIPP. Mr H also signed a letter of authority authorising Carey to liaise with CL&P in respect of his pension arrangements.

Mr H's SIPP was established in March 2012, and the transfer of his pension benefits worth almost £75,000 was received into the SIPP on 3 May 2012.

Carey asked Mr H to complete a *"Member Declaration and Indemnity"* form in relation to the Store First investment, which read as follows:

> *I, [Mr H] being the member of the above Scheme instruct Carey Pension Trustees UK Ltd to Purchase a Leasehold Storage UniC(s) in the Storefirst investment through Harley-Scott Holdings Ltd for a consideration of £46,500 on my behalf for the above Scheme.*
>
> *I am fully aware that this investment is an Alternative Investment and as such is High Risk and/or Speculative.*
>
> *As the Member of the Pension Scheme, I confirm that neither I nor any person connected to me is receiving a monetary or other inducement for transacting this investment.*
>
> *I confirm that I have read and understand the documentation regarding this investment and have taken my own advice, including financial, investment and tax advice.*
>
> *I am fully aware that both Carey Pensions UK LLP and Carey Pension Trustees UK Ltd act on an Execution Only Basis and confirm that neither Carey Pensions UK LLP nor Carey Pension Trustees UK Ltd have provided any advice whatsoever in respect of this investment.*
>
> *I confirm that my business/occupation is not renting out storage units.*
>
> *Should any aspect of this investment be deemed by HMRC to provide Taxable Moveable Property and/or any tax charges be deemed by HMRC to apply in future these will be paid directly from the fund or by me as the member of the Scheme.*
>
> *I also understand and agree that, in the event of my demise, if Carey Pension Trustees UK Ltd is unable to sell the asset within HMRC timescales that it may be transferred to my beneficiaries through my estate and accordingly may be subject to any Inheritance Tax.*
>
> *I instruct Carey Pensions to appoint the following solicitor to act on behalf of the Scheme:*
>
> *[details of solicitor and charges]*
>
> *I agree to Carey Pensions Fee of £500 + VAT, amounting for transacting this investment.*
>
> *I agree that any and all fees and costs will be paid by my Scheme, or in the event of default, by me personally.*
>
> *I agree to provide Carey Pension Trustees UK Ltd with any further information and/or documentation they may require prior to completing the purchase of this investment.*
>
> *I indemnify both Carey Pensions UK LLP and Carey Pension Trustees Ltd against any and all liability arising from this Investment.*

Carey also asked Mr H to complete a *"Member Declaration and Indemnity"* form in relation to the GAS Verdant investment, which read as follows:

> *I, [Mr H], being the member of the above Scheme Instruct Carey Pension Trustees UK Ltd to Purchase 5 UNITS of Farmland in the GAS - Verdant Australian Farmland Investment for a consideration of £25,000 on my behalf for the above Scheme.*
>
> *I am fully aware that this investment is "Alternative" and is therefore considered High Risk and/or Speculative.*
>
> *As the Member of the Pension Scheme, I confirm that neither I nor any person connected to me is receiving a monetary or other inducement for transacting this investment.*
>
> *I am fully aware that both Carey Pensions UK LLP and Carey Pension Trustees UK Ltd act on an Execution Only Basis and confirm that neither Carey Pensions UK LLP nor Carey Pension Trustees UK Ltd have provided any advice whatsoever in respect of this investment.*
>
> *I confirm that I have taken my own advice including financial, investment and tax advice, in respect of this investment.*
>
> *I do not hold Carey Pensions UK LLP or Carey Pension Trustees UK Ltd responsible for any exchange rate fluctuations that may adversely affect the value of this investment.*
>
> *I confirm that I will appoint a harvest manager.*
>
> *Should any aspect of this investment be subject to a tax charge within the pension scheme any such charges will be paid directly from the fund or by me as the member of the Scheme.*
>
> *I agree to provide Carey Pension Trustees UK Ltd with any further information and/or documentation they may require prior to completing the purchase of this investment.*
>
> *I also understand and agree that, in the event of my demise, if Carey Pension Trustees UK Ltd is unable to sell the asset within HMRC timescales that it may be transferred to my beneficiaries through my estate and accordingly may be subject to any Inheritance Tax.*
>
> *I indemnify both Carey Pensions UK LLP and Carey Pension Trustees Ltd against any and all liability arising from this Investment.*
>
> *I agree to the fee of 1% (up to a maximum of £500) of the purchase price being £250 for transacting this investment.*

The declaration and indemnity forms were signed on 10 May 2012.

Once the application and declaration were received, Carey set up the SIPP and processed the applications for the GAS Verdant and Store First investments, which were completed on 17 May 2012 and 29 June 2012 respectively. It was at this point that Mr H received an incentive payment of £5,500.

The Store First and GAS Verdant investments haven't performed as hoped and as a result, Mr H may have lost all or most of the money invested.

Mr H complained to Carey. His representative said Carey shouldn't have accepted the application for a SIPP and investments with Store First and GAS Verdant from CL&P.

Carey's response

Carey didn't accept Mr H's claim, saying he complained too late. It said he should have realised he had cause for complaint when he received his annual SIPP valuation in March 2015. He then had three years to complain and because he didn't do so until June 2018, he's now out of time.

Mr H didn't accept this outcome and referred his complaint to us.

jurisdiction

When Mr H contacted us with his complaint, Carey maintained its view that he'd complained too late and objected to us looking at it. I've previously considered whether we can investigate this complaint and I set out my reasons for thinking we could in a decision on jurisdiction. In summary, I said:

- DISP 2.8.2 essentially says a consumer must complain within six years of the act being complained about, or if later, three years from the date he/she ought to have known they had cause for complaint.

- Carey had argued that the complaint points raised by Mr H's representative are centred *"almost entirely"* on the establishment of the SIPP and that the time limits should be applied from the date this was completed. But my interpretation of the complaint was that it also concerns the investments arranged within the SIPP and that these are what caused the losses that prompted it.

- Carey was involved in the regulated activity of arranging investments and this activity wasn't completed until 29 June 2012 when the Store First investment was finalised.

- Mr H's letter of complaint was dated 11 June 2018 and Carey says it was received on 26 June 2018. Both dates are within six years of the Store First investment being completed. Any consideration of whether Mr H should have been aware he had cause for complaint more than three years before he did so is irrelevant in this scenario.

- Mr H's complaint came more than six years after the GAS Verdant investment was finalised in May 2012. But even if the investments are treated separately in respect of the time limits, I didn't think the evidence showed Mr H should have been aware he had cause for complaint about the GAS Verdant scheme more than three years before June 2018.

- The annual statement from March 2015 that Carey referred to does show the Store First investment was valued at 50% of what Mr H invested. But the GAS Verdant scheme was still valued at £25,000 at that time, so I didn't think anything in the statement should have made him aware there may be an issue with that. The first

evidence I saw that showed the GAS Verdant investment was worth less than Mr H invested is the following annual statement dated March 2016 and he complained within three years of receiving that.

- I was satisfied Mr H complained within six years of the completion of the activity being complained about, which included arranging the investments within his SIPP. And even if the investments are treated separately, he complained within six years of the Store First investment being finalised and within three years of the first date I felt he should have been aware there may be an issue with the GAS Verdant scheme.

the investigator's view

One of our investigators then considered the merits of Mr H's complaint and he thought it should be upheld. In summary, he said:

- The FCA's Principles for Businesses and the regulatory publications which remind SIPP operators of their obligations and set out how they might achieve the outcomes envisaged by the Principles are relevant considerations here.

- Carey carried out significant due diligence, but it took a piecemeal approach, and in the meantime accepted business from CL&P. Had it carried out all its due diligence at the outset, it ought to have concluded it shouldn't accept business from CL&P at all.

- Carey should have conducted background checks on the directors of CL&P at the outset, rather than on two members of CL&P's staff. Had Carey checked the directors at the outset it would have discovered Mr Wright was subject to a warning on the FSA's website.

- Mr H was paid an incentive of £5,500 shortly after the transaction completed. Given his limited experience of pensions and investments, he wouldn't have been aware this might not be right.

- Carey put some reliance on the documents signed by Mr H, particularly the declaration and indemnity forms. But it shouldn't have accepted the application at all, so shouldn't have required him to sign any documents. Asking Mr H to sign documents didn't mean it was fair and reasonable to proceed with his investment instructions.

further information provided by Carey

We asked Carey to provide us with some further information about its relationship with CL&P. Its response included the following general points;

- 551 clients were introduced to Carey via CL&P. 466 clients had been introduced by the time CL&P signed the Terms of Business.

- There was an FCA regulated financial adviser who provided pension transfer advice to 73 of the clients introduced to Carey by CL&P, in relation to defined benefit pension transfers.

- Carey first had awareness of the issue of consumers being offered cash incentives by CL&P in late November 2011. This was following the AMPS committee issuing an alert that it had received reports from a number of pension providers about inducements being paid to scheme members without the knowledge of the pension provider, and the member being told to hide the payment. No details were given about the parties involved. With this in mind, and following a potential new member introduced by CL&P asking Carey when they would receive their cash, Carey held an urgent telephone conference with representatives from CL&P (the notes of this call are quoted above).

- It has no record of receiving the accounts for CL&P and certified copies of the directors' passports it asked for. It thinks it is likely that this lack of response was a factor in its decision to terminate its relationship with CL&P.

- CL&P only introduced the clients to Carey at inception, it wasn't an ongoing service agent and, as such, the relationship was always between Carey and the members from establishment of the SIPPs, as its direct clients. It was the clients' decision to select CL&P as their introducer.

- There were numerous introducers in the market and regulated advisers who were introducing/advising clients regarding the Store First Investment and whose clients sought SIPP services from Carey and other SIPP administrators. Carey had no reason to suspect that because one of these - CL&P - had been offering cash inducements that there might be any particular issue or additional risks for clients in respect of the underlying investment.

- The member declaration was very clear regarding what the investments were and, crucially, that they are high risk.

Carey's response to the investigator's view

Carey didn't accept the investigator's assessment and made the following key points:

- It still believes the complaint is time-barred under DISP 2.8.2.

- This is based on the timeline that Mr H established his SIPP on 6 March 2012 and his pension benefits were switched on 3 May 2012. Both of events occurred more than six years before he complained through his representative in June 2018.

- It's re-examined the complaint points made by Mr H's representative and these are, almost in their entirety, about the establishment of the SIPP and the use of an unregulated introducer in the lead up to the transfer of his personal pensions to Carey. There are very few vague references to investments in general and not specifically to Store First or GAS Verdant. So as the complaint is about the establishment of the SIPP, the time limits must be based on this.

- Concerns around Mr H's investments were communicated to him in his annual valuations and a formal notification issued on 10 March 2015 in which he was told they'd been valued at less than 50% of their original purchase price. This should have put him on notice that he had reason to complain. If he was dissatisfied about the establishment of his SIPP, he didn't make Carey aware of his concerns within the time limits.

- It's not aware of any exceptional circumstances that would justify the complaint being considered outside the relevant time limits.

- Even if it's objection to us considering the complaint on the grounds it's time-barred doesn't stand, it shouldn't be held responsible for the loss of Mr H's investments. Carey is an execution-only SIPP provider. It only ever acted on Mr H's direct instructions to invest in his chosen investments, investments in which he signed to say he had understood the risks. Carey has always recommended to all its members at establishment of their SIPP to seek regulated financial advice. Mr H chose not to do that.

In response to other complaints where Carey hasn't objected to the merits being considered, it has commented on these issues in more detail, making the following key points:

- Cary doesn't give advice. It acts on a strictly member directed (or execution-only) basis. It expressly states that all customers should seek independent financial advice from an adviser regulated by the FCA.

- Of the various reports referred to by the investigator, only the 2009 report existed at the time of the events in this complaint. The other guidance was published later and it cannot be in doubt that the regulator's expectations evolved (and increased) substantially over time.

- The FSA alert from 2010 simply amounted to a notification that Mr Wright wasn't authorised to carry on regulated activities. And that this was a fact Carey knew and was the basis upon which it accepted referrals from CL&P. It wasn't until the alert was updated in 2013 that there was a clear warning Mr Wright shouldn't be dealt with. Mr H's SIPP and investment applications had already been received and processed by this time.

- Carey was obliged by FSA rule COBS 11.2.19 to execute investment instructions. This requirement as a rule must take precedence over any guidance the regulator had given then or later.

- Our investigators haven't refer to any specific law or regulation for finding it liable. Carey isn't in a position to understand the provisional assessment until this is done.

More generally**,** Carey has also said that our consideration of the complaint should await the High Court's decision in the case of Adams v Carey as the ombudsman is obliged to follow the law, and so far there has been no court decision on the duties of a SIPP provider in situations such as those presented in this complaint.

my findings

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

some preliminary points

delay deciding this case until judgment in Adams v Carey has been handed down?

I don't consider it appropriate to wait for the outcome of *Adams v Carey*. That is a different case to this complaint and Mr H isn't party to those proceedings. That being said, I understand the case does involve an investment being made in Store First introduced by CL&P. But that case was heard in March 2018 and the judge's decision has still not yet been handed down, more than two years later. As far as I am aware, there's no publicly available information about when the decision is likely to be published. And any judgment, when eventually handed down, could be subject to appeal.

The ombudsman service is required to resolve the complaints it receives quickly and with minimum formality (see section 225(1) of the Financial Services and Markets Act 2000 ("FSMA") and *Westcott Financial Services Limited v Financial Ombudsman Service [2014] EWHC 3972 Admin*). I must therefore carefully take this into consideration in deciding whether or not I should delay deciding this case until after the outcome in *Adams v Carey* becomes known. And, given the substantial delay in the judgment being handed down, I don't think I should delay deciding Mr H's case.

I'm required to determine the complaint on the basis of what I consider to be fair and reasonable in all the circumstances taking into account, but not being bound by, various matters including the law. I may depart from the law if I consider it fair and reasonable to do so, as long as I provide sufficient reasons for doing so.

It's also relevant here that there has been judgment by Jacobs J in relation to a judicial review in respect of a final determination that specifically considered the due diligence obligations of SIPP operators: *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878).

Berkeley Burke (BBSAL) had brought a claim for judicial review about a decision of an ombudsman which found that BBSAL as SIPP operator hadn't treated its client fairly or reasonably when it accepted an investment into his SIPP. The ombudsman had found that the FCA Principles and good industry practice at the time meant that the SIPP operator ought to have carried out due diligence before accepting an investment into the SIPP.

The judgment of Jacobs J provides a strong endorsement for the approach taken by the ombudsman in that complaint. The judgment also considers section 228 FSMA and the approach an ombudsman is to take when deciding a complaint. I accept Mr H's complaint is different from the complaint in the BBSAL case, and that each complaint will be determined on its own individual merits. However, the relevant considerations are similar. As a result, in my view, it's unnecessary to await the judgment in *Adams v Carey*.

I've carefully considered the points made by Carey in support of its view we shouldn't progress complaints like Mr H's. In deciding that request I've weighed the interests of all the parties and my statutory commitments. Having done so, I consider it wouldn't be fair and reasonable to put this case on hold while we await the outcome of the separate civil claim.

oral hearing?

Our rules allow for the possibility of an oral hearing (at DISP 3.5.5R):

> *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.*

Carey hasn't requested a hearing in this complaint as such, but I'm aware it has suggested previously that there should be a hearing because of the significance of the issues and to allow it to better understand the investigators' reasoning (in other cases). I've therefore thought about this carefully and in the specific circumstances of this complaint I'm satisfied I can fairly determine the matter without a hearing. In particular, I note:

- The Financial Ombudsman Service was set up as an informal dispute resolution forum and this complaint falls squarely within the jurisdiction of the ombudsman service. While I accept the complaint is significant to both parties, that's very often the case and that point alone cannot be the test for whether or not an oral hearing needs to be convened in order to fairly determine the case. There's nothing in the particular circumstances of this case that's persuaded me it can't be fairly determined without a hearing.

- Carey clearly believes the ombudsman service has misunderstood the applicable law and regulation and it has set out its position clearly in writing.

- Both parties have been given an ample opportunity to make representations and set out their positions.

- The Court of Appeal has adopted a very flexible approach to what's fair in this context (*R on the application of Heather Moor & Edgecomb Ltd v Financial Ombudsman Service [2008] EWCA Civ 642*).

After carefully, taking account of all the available evidence, I'm satisfied I can fairly determine this complaint without convening a hearing.

a provisional decision?

Carey has asked for us to respond to specific points before making a final decision on other cases. DISP 3.5.4R sets out the procedure I must follow when determining a complaint:

> *If the Ombudsman decides that an investigation is necessary, he will then:*
>
> 1. *ensure both parties have been given an opportunity of making representations;*
>
> 2. *send both parties a provisional assessment, setting out his reasons and a time limit within which either party must respond; and*
>
> 3. *if either party indicates disagreement with the provisional assessment within that time limit, proceed to determination.*

I'm satisfied the parties have been given adequate opportunity to make representations. Both parties have also received a provisional assessment, which set out in detail the investigator's reasons for reaching his view (the *provisional assessment*). Carey disagrees with that assessment.

I'm required to give reasons for my decision, not to give a point by point response to everything that has been said by the parties to the complaint. As recognised by the High Court in *R (Williams) v Financial Ombudsman Service* [2008] EWHC 2142, this service is dealing with complaints, not causes of action. Our jurisdiction is inquisitorial not adversarial, and we're required to resolve complaints quickly and with the minimum of formality in

accordance with section 225 of FSMA. It would not be consistent with our powers or remit to do as Carey has asked and respond to each and every point it has made before making a determination.

So the next step is for me to proceed to determination. And I'm satisfied it's appropriate for me to do that here.

jurisdiction

The rules I must follow are set out in the Dispute Resolution (DISP) rules, published as part of the Financial Conduct Authority's Handbook. The rules say that, without the consent of the business involved, we can't consider a complaint that is brought to us outside set time limits. DISP rule 2.8.2 says:

> *The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service . . . 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;*

Carey's objection seems to be underpinned by the view that the complaint is only about the transfer of Mr H's pension benefits to the SIPP. But it remains my interpretation that the complaint is about the entire transaction covering the pension transfer and investments this funded, and it's the investments that caused the losses which prompted the complaint. In support of this, I note Carey said the complaint centres *'almost entirely'* on the establishment of the SIPP, so I think it has effectively conceded other issues are involved.

Carey was involved in the regulated activity of arranging investments and this activity wasn't completed until the Store First investment was finalised on 29 June 2012. Mr H's letter of complaint was dated 11 June 2018 and Carey says it was received on 26 June 2018. Both dates are within six years of the Store First investment being completed and any consideration of whether he complained within three years of becoming aware he had reason to is irrelevant, at least in respect of the Store First investment.

I'm aware Mr H complained more than six years after the GAS Verdant investment was finalised in May 2012. But I don't believe the evidence shows he should have been aware there was an issue with that investment more than three years before June 2018. The annual statement from March 2015 that Carey has referred does show the Store First investment was valued at 50% of what Mr H invested. But the GAS Verdant scheme was still valued at £25,000, and there's nothing in the statement that should have made him aware there may be an issue with that. The earliest I can see Mr H was made aware the GAS Verdant investment was worth less than he invested is the following annual statement dated March 2016. Mr H complained within three years of receiving this.

Taking everything into account, it remains my view that Mr H complained within six years of the completion of the activity being complained about, which included arranging the

investments within his SIPP. But even if the investments are considered separately, he complained within six years of the Store First investment being finalised and within three years of the first date he should have been aware there may be an issue with the GAS Verdant scheme.

In considering whether Mr H complained in time, I think it's also important to recognise that he's not complaining about investment performance or any advice he received to take out the investments that lost him money. Instead, he's complaining about a failure by Carey, as the SIPP provider, to fulfil its obligations and I think it's far more relevant to consider when he should reasonably have become aware he had reason to complain about that.

The realisation that his investments had lost money in 2015 (for Store First) and 2016 (for GAS Verdant) may well have caused Mr H concern about their performance and any advice he received. But I don't think that realisation necessarily provided sufficient knowledge of grounds for the specific complaint being made here about Carey's failings. In saying this, I'm conscious Mr H doesn't appear to have been a particularly knowledgeable or experienced investor who would have been expected to know and understand the obligations and expectations of a SIPP provider.

For these reasons, my view that we can investigate this complaint hasn't changed. The remainder of my decision will now focus on the merits and the reasons I'm upholding it.

relevant considerations

In my view, the FCA's Principles for Businesses are of particular relevance to my decision on what's fair and reasonable in the circumstances of this complaint. 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"* (PRIN 1.1.2G). Principles 2, 3 and 6 say:

> *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 – Clients' interests – A firm must pay due regard to the interests of its clients and treat them fairly.*

In *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin) 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 requirement 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:

> *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.*

Subsequently Jacobs J at paragraph 104 in *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* having set out some paragraphs of the British Banking Association judgment, including paragraph 162 set out above, said;

> *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.*

So, the Principles have a wide application, and I need to have regard to them when deciding what's fair and reasonable in the circumstances of this complaint.

In my view, 2.1.1R in the Code of Business Sourcebook (COBS) is also relevant. It says:

> *A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*

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

- The 2009 and 2012 thematic review reports.
- The October 2013 finalised SIPP operator guidance.
- The July 2014 "Dear CEO" letter.

The September 2009 thematic review report pre-dates the events subject of this complaint and is therefore particularly relevant. The 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 clients. 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 member 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 the 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 clients' interests in this respect, with reference to Principle 3 of the Principles for Business ('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.*

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

> *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 clients 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 un-authorised 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 non-regulated 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.*
- *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 their relevance, I have considered them 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 their importance should be underestimated. As mentioned, they 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 goes some way to indicate what I consider amounts to good industry practice.

I also note that Carey's regulatory obligations under the Principles existed from the outset of Mr H's relationship with it. So the reports, letter and guidance – which each gave the regulator's view on the kinds of steps a SIPP operator might take in practice to achieve the outcomes envisaged by the Principles – are each relevant considerations in this case.

I recognise that the 2012 report, the 2013 finalised guidance and the *"Dear CEO"* letter were published after the events subject to this complaint, but the Principles that underpin them existed throughout, as did the obligation to act in accordance with the Principles and with COBS 2.1.1R (the client's best interests rule).

It's also clear from the text of the 2009 and 2012 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 standards shaped what was expected of SIPP operators changed over time, it's clear the standards themselves didn't change.

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, letter and guidance gave non-exhaustive guidance. They did not 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.

So, in determining this complaint, I need to consider whether Carey complied with its regulatory obligations as set out by the Principles to act with due skill, care and diligence, to take reasonable care to organise its business affairs responsibly and effectively, to pay due regards to the interests of its customers, to treat them fairly, and to act honestly, fairly and professionally in accordance with the clients' best interests. And, in doing that, I'm looking to the Principles and the publications listed above, as well as COBS 2.1.1R to provide an indication of what Carey could have done to comply with its regulatory obligations and duties.

In this case, the business Carey was conducting was its operation of SIPPs. I'm satisfied that meeting its regulatory obligations when conducting this business would include deciding whether to accept or reject particular investments and/or referrals of business. The regulators' reports and guidance provided some examples of good practice observed by the FSA and FCA during their work with SIPP operators.

the due diligence carried out by Carey on CL&P

It's clear Carey understood and accepted that it had a responsibility to carry out due diligence on CL&P. On the non-regulated introducer profile, Carey stated*,*

> *As an FSA regulated pensions company we are required to carry out due diligence as best practice on unregulated introducer firms looking to introduce client to us to gain some insight into the business they carry out.*

The evidence Carey has provided indicates it took the following due diligence on CL&P:

- 19 September 2011 - it obtained a print out of the CL&P website. This contained the following information:
    - *we are working hard to become the leading supplier of commercial land and products across different areas with good long term growth.*
    - *expert* <u>*advice*</u> *tailored to the individual* (my emphasis)
    - *In accordance with the Financial Services and Markets Act 2000, CLP brokers do not provide any financial advice.*
- 20 September 2011 – it completed background checks on two representatives of CL&P.
- 27 September 2011 – it asked CL&P to complete a non-regulated introducer profile.
- 29 September 2011- the non-regulated introducer profile was completed by CL&P. It was signed by Terence Wright, and named him and Lesley Wright as directors of CL&P.
- 9 December 2011 – it spoke to representatives of CL&P and discussed the high portion of business it had introduced which related to the transfer of final salary schemes, and the payment of "cash back" incentives. It was agreed that in future any

defined benefit transfers would be referred to a suitably qualified IFA for relevant advice and a copy of that advice would be provided to Carey for its file record.

- 13 March 2012 – it asked CL&P to sign a non-regulated introducer agreement, backdated to the time it first started to refer business to Carey (15 August 2011).
- 23 March 2012 – it asked CL&P for a copy of its accounts and passports of the directors.
- 3 April 2012 – it repeated its request to CL&P for a copy of its accounts and passports of the directors.
- 15 May 2012 – it completed a background check on Mr Wright, which revealed he was the subject of an FSA alert.

When taken together, these efforts went some way towards meeting the examples of good practice set out by the regulator in the publications I've set out above. I expect Carey's action was taken with these – and its overarching regulatory obligations – in mind. However, rather than conducting sufficient due diligence proactively, before deciding to accept business from CL&P, in my view Carey took a reactive piecemeal approach. Acting fairly and reasonably to meet its regulatory obligations Carey should have taken many of the steps it subsequently took prior to accepting any business from CL&P. If it had done so, I think that ought to have led it to conclude that it wouldn't be fair and reasonable to accept Mr H's business from CL&P. I've set out below in more detail the steps I think Carey should have taken and what, acting fairly and reasonably, it should have concluded having taken those steps.

what should Carey have done?

the FSA warning

At the very outset, I think Carey should have checked the regulator's list of unauthorised firms and individuals. The list featured warnings ("alerts") about unauthorised individuals and businesses. Checking the warnings posted on the FSA's website is something that Carey should have done as a matter of course as a part of sufficient due diligence, before it began accepting any business from CL&P. CL&P was an unregulated business, based in Spain, and was proposing to deal with the pensions of UK consumers, in an "introductory" capacity. As I explain later in this decision, I think if Carey had carried out sufficient due diligence, or drawn reasonable conclusions from what it already knew, it ought to have known CL&P was going to be doing more than merely introducing consumers to Carey's SIPP. But, in any event, Carey ought to have known the FSA kept a list of alerts, relating to unregulated businesses, which were often based overseas, dealing with UK consumers. As a SIPP operator considering accepting business from an unregulated overseas firm it should have been mindful of this list and, acting fairly and reasonably, it ought to have checked it before proceeding.

I note that the non-regulated introducer profile had a question which asked "*Are you and/or the Firm subject to any on-going FSA or other regulatory body review, action or censure.*" Mr Wright answered that question *"No".* However, it was not sufficient in my view to simply ask the introducer a general question. Rather, I think Carey, acting fairly and in Mr H's best interests, should have carried out checks on Mr Wright. I think a reasonable step for it to have taken was to check the FSA's list of warnings. Had it done so, it would have discovered

that Mr Wright was on the list and subject of the warning I have quoted in the background section.

I also note the background checking service Carey used revealed Mr Wright's presence on the list when it ran a check on him on 15 May 2012. When Carey began accepting business from CL&P it used this checking service, but used it to check two representatives of CL&P, rather than to check Mr Wright. I agree with what the investigator said about this in his view – acting fairly and reasonably Carey should have checked Mr Wright at the outset, not two representatives of CL&P. The available evidence shows Carey knew Mr Wright was a director of CL&P – it is therefore him they should have checked at the outset.

So I think that Carey, acting fairly and reasonably, *should* have checked the FSA's list at the outset, and *would* have checked the FSA's list at the outset (via the checking service).

I note that Carey ended its relationship with CL&P shortly after completing the check on Mr Wright. It therefore seems likely this check was a factor in its decision to end the relationship. So had Carey focussed its checks on the correct target at the outset it may have led it to draw a different conclusion about the acceptance of business from CL&P at the outset.

Carey has said the alert relating to Mr Wright was a notice that amounts simply to a notification that he wasn't authorised to carry on regulated activities. And that this was a fact it was well aware of and was the basis upon which it accepted referrals from CL&P.

I think Mr Wright's appearance on the list ought to have highlighted to Carey that the regulator was concerned enough about Mr Wright's activities to warn consumers about him. And I think in the circumstances it's fair and reasonable to conclude the warning was aimed at protecting consumers from detriment in their dealings with him.

With this in mind, I think the warning should have acted as a significant reason for Carey to be concerned about any business Mr Wright was involved in – not just "Cash In Your Pension". The warning mentioned that Mr Wright was involved in the area of pensions – which is the same business area as CL&P was active in. And the warning said that Mr Wright was not authorised and may be *"targeting UK customers"* in connection with investment business conducted through an unregulated company, Cash In Your Pension.

I also think the presence of Mr Wright on the list, after he'd answered *"no"* to a question asking him if he was subject to any FSA action or censure, should immediately have raised a red flag to Carey – it should have given rise to significant concern about his conduct.

Carey has tried to downplay the significance of the 2010 warning by contrasting it with one that was published in 2013. It says that the 2010 warning doesn't detail any concern by the regulator about Mr Wright. I accept that the 2013 warning provides strong advice to only deal with financial firms authorised by the FCA. However, I don't agree with Carey's characterisation of the 2010 warning or any suggestion the regulator didn't detail any concern about him in the 2010 warning. Whilst it doesn't explicitly say that Mr Wright had been undertaking a regulated activity, the inference that he had is, in my view, clear. If the regulator had no concerns it wouldn't have issued an alert in order to warn investors against dealing with unauthorised firms followed by advice telling members of the public that Mr Wright wasn't authorised to carry on a regulated activity including advising on investments.

Carey accepts that the wording in the 2013 warning, if it had been published at the time of it accepting business from CL&P, would have been sufficient to stop it doing business with Mr Wright/CL&P. Carey has said:

> *The fact that the FCA updated their notice in 2013 to a clear warning including an express comment that Mr Wright was an individual to avoid, a warning that would have put Carey Pensions on notice to stop accepting business from Mr Wright.* (my emphasis)

In my view the October 2010 warning was also a clear indication that the regulator had serious concerns about the way Mr Wright conducted his business and therefore should equally have put Carey on notice that it shouldn't accept business from him.

A warning headed 'ALERT' in bold is clearly not a routine, unimportant document. It's clear from the wording itself that the FSA was warning investors against dealing with unauthorised firms and specifically named Mr Wright. He was involved in '*targeting*' (to use the FSA's phrase) UK based pension investors, which should have been of particular concern for a SIPP operator considering accepting business from him. The warning also provided links to:

- A list of unauthorised firms
- A press release about unauthorised firms targeting UK investors
- A document telling investors about the tactics adopted by unauthorised firms targeting UK investors.
- A document explaining share scams.

So the warning was more than a mere statement of fact that an unauthorised firm couldn't carry out regulated activities. It was a clear warning – an "alert" - relating specifically to Mr Wright, providing links to guidance on consumer protection and warnings about scams. In my view the 2010 warning is as serious in its implications as the 2013 warning.

So in summary, if Carey had undertaken sufficient due diligence on CL&P it would have discovered its director, Mr Wright, was on the FSA warning list and, acting fairly and reasonably, that it should have declined to do business with him. I think this alone was sufficient for Carey to conclude, acting fairly and reasonably and taking account of the need to act in Mr H's best interests, that it shouldn't have accepted business from CL&P.

CL&P's business model

As I've highlighted above, in the circumstances, I think that acting in accordance with its regulatory obligations and the requirement to treat Mr H fairly, the 2010 warning alone should have resulted in Carey declining to do business with CL&P. However, as Carey doesn't accept that the 2010 warning should have led it to conclude it shouldn't accept business from CL&P I have, for completeness, considered what other due diligence Carey should have carried out, as an absolute minimum.

Carey should have made enquiries to satisfy itself CL&P was not conducting business in a way that could result in a real risk of detriment for consumers. In complying with its regulatory obligations and the requirement to treat Mr H fairly, it's fair and reasonable to say Carey should have ensured that it fully understood CL&P's business model before it accepted any business from it. And I note Carey appears to have recognised this itself, having explained in the introduction to the non-regulated introducer profile "*As an FSA regulated pensions company we are required to carry out due diligence as best practice on*

unregulated introducer firms looking to introduce client to us to gain some insight into the business they carry out."

Carey has said that it reasonably considered at all times that CL&P was an unregulated introducer that wasn't providing advice. However, I don't agree this is a reasonable conclusion given the information that was either readily available at the time or that could have been discovered through a basic level of due diligence. Rather, I think there was a significant risk that CL&P was targeting UK pension consumers and giving them advice even though it wasn't regulated to do so.

Mr H says he was advised by CL&P and I think it's fair to say that it's unusual for people to make important decisions about their pensions without advice or a recommendation about where to invest funds – particularly where the investment is high risk and unregulated. There's also no suggestion that Mr H spoke to anyone else about his pension options or that any other party was involved. So I think on balance it's likely that Mr H was advised by CL&P to make the Store First and GAS Verdant investments.

This is the kind of risk that ought to have been at the forefront of Carey's thinking when dealing with an unregulated business like CL&P - especially because of the regulator's warning about Mr Wright who the FSA believed was *"targeting"* UK customers, and the reference to *"advice"* contained in the print out of CL&P's website Carey had regard to.

I think given Carey's regulatory obligations, it's fair and reasonable to say it should have taken steps to understand much more about what CL&P's business model involved beyond the limited information contained in the non-regulated introducer profile and the other basic enquiries it made. Carey should, for example, have followed up on the very brief answers provided on the introducer profile about how CL&P actually contacted potential customers, the type of investments it would be introducing, what information was being provided to customers, what steps were being taken to ensure customers were not advised or were directed to a regulated adviser, and how CL&P ensured it wasn't conducting other regulated activities.

If it had conducted further enquiries as part of its due diligence before accepting this business I think Carey would have (or ought to have) identified it was unusual that CL&P, an unregulated business based in Spain, was contacting consumers in the UK about pension investments. I think it's likely it would have found that CL&P was calling customers to discuss their pensions, that it specialised in a few high risk esoteric investments and, following contact from CL&P, and without the involvement of any other regulated parties, many UK consumers were transferring their pensions to SIPPs to make these investments. I also think it's likely that Carey would have found were insufficient safeguards against advice being given.

Knowing this, and the regulator's warning about Mr Wright, I think Carey ought to have identified there was a real and significant risk of consumer detriment in introductions made to it by CL&P. This ought to have given it further reason to conclude that it wouldn't be consistent with its regulatory obligations - it wouldn't be treating Mr H fairly and in his best interests - to accept business from CL&P.

I accept there's a possibility that, if Carey had made enquiries, CL&P might not have been forthcoming with information about its business model. But that's not a reasonable basis for not making reasonable enquires. Further, if CL&P was reluctant or refused to provide information about its business model or if its answers were ambiguous and contradictory that

ought to have been something in and of itself that made Carey concerned about the integrity and motivations of those operating it. As such, I think this too should have led Carey to conclude there was a real risk of consumer detriment and that it wouldn't be treating Mr H fairly and in his best interests in accepting the introduction from CL&P.

Taking all of the above into consideration – individually and cumulatively – I think in the circumstances it's fair and reasonable for me to conclude Carey failed to conduct sufficient due diligence on CL&P before accepting business from it, and if it had carried out proper due diligence, that it ought to have concluded it shouldn't accept any business from it. I therefore conclude that it's fair and reasonable in the circumstances to say that Carey shouldn't have accepted Mr H's application.

cash incentives

In November 2011, Carey became aware of a number of consumers who had received incentive payments to move their pensions to Carey. Such payments are against the rules covering pensions and can attract a substantial tax charge from HMRC. On becoming aware of this, Carey spoke to CL&P. But I think it ought to have spoken to consumers directly about this, not just to CL&P. And I think such action would have led to the conclusion that cash incentive payments were being offered by CL&P.

In the light of that, I think Carey ought to have concluded it would not be consistent with its regulatory obligations to deal with any further business from CL&P – whether that was new business or "pipeline" business consisting of applications accepted but not completed. In light of this serious allegation, I think Carey should have questioned whether CL&P was a suitable and trustworthy firm to be dealing with. In my mind this should have been a significant red flag.

Mr H's SIPP application was received after Carey became aware incentive payments were being made and in my view, this is another reason why it shouldn't have accepted his application in the first place.

should Carey have proceeded regardless?

the member declaration and indemnity forms

The member declaration forms signed by Mr H sought to confirm he was aware the investment was high risk, had taken his own advice, and would not hold Carey responsible for any liability resulting from the investment.

The main point to make here is that Carey should never have accepted the business from CL&P, for the reasons given. So Mr H should never have got to the point of signing the declarations, as the business shouldn't have come about at all.

In any event, I don't think these documents, in themselves, are sufficient for me to conclude that Carey acted fairly and reasonably in proceeding with Mr H's instructions.

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 H's application and because of the documents he'd signed. There was no evidence of any other (than Carey) regulated party being involved in this transaction. In these circumstances I think very little comfort could have been taken from the declaration stating that Mr H had taken his own advice, and understood the risks in relation to the investments.

Carey accepting business whilst asking Mr H to sign documents to absolve it of all responsibility was not treating him fairly, given what Carey ought to have known. Carey was the regulated entity here. It had to act in a way that was consistent with the regulatory obligations that I've set out in this decision. In my view, asking Mr H to sign an indemnity absolving it of all responsibility when it ought to have known that his dealings with CL&P were putting him at significant risk was not the fair and reasonable thing to do. It should have refused the business, not gone ahead regardless and asked Mr H to absolve it of the consequences.

COBS 11.2.19R

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

However, in the circumstances it is my view that the crux of the issue in this complaint is whether Carey should have accepted the SIPP application from CL&P and established Mr H's SIPP in the first place. And, for the reasons I set out above, I don't believe it should have.

This argument was considered and rejected by the judge in the recent case of *Berkeley Burke v Financial Ombudsman Service*. In this case Jacobs J said:

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

I therefore don't think that Carey's argument on this point is relevant to its obligations under the Principles to decide whether or not to accept an application to open a SIPP in the first place.

in conclusion

All in all, I do not consider that Carey acted with due skill, care and diligence, organised and controlled its affairs responsibly, or treated Mr H fairly or acted in his best interests by accepting his business from CL&P. To my mind, Carey did not meet its regulatory obligations, and allowed Mr H to be put at significant risk of detriment as a result.

To be clear, I'm not making a finding that Carey should have assessed the suitability of the investment or the SIPP for Mr H. I'm not saying it had an obligation to give advice to Mr H, or otherwise ensure the suitability of a pension product or investment for him. My finding is not that Carey should have concluded that the investment or SIPP was not suitable for Mr H. It is that Carey did not meet its regulatory obligations and shouldn't have accepted the business from CL&P. It failed to treat Mr H fairly or act with due skill, care and diligence or take reasonable care to organise and control its affairs responsibly by doing so. And, in the circumstances, it's fair and reasonable for Carey to be held responsible for its failings.

is it fair to ask Carey to pay compensation?

I note Mr H signed the member declaration forms to confirm he wasn't receiving any inducement for making the investments and I'm conscious Carey has said in other cases that it wouldn't have accepted an application if it had known the opposite was true. But I must bear in mind that Mr H doesn't appear to have been an experienced or sophisticated investor and I don't think he would have been aware of the potential significance of the payment. In any event, it's not fair and reasonable that Mr H was put in the position of receiving the member declarations to begin with given what Carey knew (or should have found out) about CL&P at the time, including that it was making incentive payments to clients.

I'm required to make the decision I consider to be fair and reasonable in all the circumstances and I don't consider that Mr H's conduct in giving an incorrect answer about inducements is sufficient to cancel out in whole or in part the failings on the part of Carey.

In deciding whether Carey is responsible for any losses Mr H has suffered on his Store First and GAS Verdant investments, I need to look at what would have happened if it had done what it should have, i.e. not accepted his application.

Had Carey undertaken sufficient due diligence before or at the time Mr H's business was introduced to it, it ought to have concluded that it shouldn't accept business from CL&P. That should have been the end of the matter – it should have told Mr H it couldn't accept the business. And I'm satisfied, if that had happened, the arrangement for Mr H wouldn't have come about in the first place, and the loss he suffered could have been avoided. The financial loss has flowed from Mr H transferring out of his existing pensions and into a SIPP. For the reasons I set out below, I'm satisfied that, had the SIPP application not been accepted, the loss wouldn't have been suffered.

Had Carey explained to Mr H that it wouldn't accept the application from CL&P, I find it very unlikely he would have tried to find another SIPP operator to accept the business. He's likely to have had no trust in CL&P once he became aware Carey wouldn't accept the business. In any event, I don't think it's fair and reasonable to say Carey shouldn't be responsible for its errors because another SIPP operator would have made the same mistakes. I think it's fair instead to assume that another SIPP provider wouldn't have processed the transaction if it had carried out sufficient due diligence in accordance with its own regulatory responsibilities and good industry practice. So again, I think the end result would have been that Mr H

wouldn't have made the Store First and GAS Verdant investments or the transfers from his existing pensions that preceded them.

So I'm satisfied Mr H wouldn't have continued with the SIPP, had it not been for Carey's failings, and would have remained in his existing pensions. And, while I accept CL&P is responsible for initiating the course of action that has led to his loss, I consider that Carey failed unreasonably to put a stop to that course of action when it had the opportunity and obligation to do so.

In making these findings, I've taken account of the potential contribution made by other parties to the losses suffered by Mr H. In my view, in considering what fair compensation looks like in this case, it's reasonable to make an award against Carey that requires it to compensate Mr H for the full measure of his loss. But for Carey's failings, Mr H's pension transfer wouldn't have occurred in the first place.

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

putting things right

My aim is to return Mr H to the position he would now be in but for what I consider to be Carey's failure to carry out adequate due diligence checks before accepting the SIPP application from CL&P.

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

1. Calculate the loss Mr H has suffered as a result of making the transfer.
2. Take ownership of the Store First and GAS Verdant investments.
3. Pay compensation for the loss into Mr H's pension. If that's not possible, pay compensation for the loss to Mr H direct. In either case the payment should take into account necessary adjustments set out below.
4. Pay £500 for the trouble and upset caused.

Lastly, in order to be fair to Carey, it should have the option of payment of this redress being contingent upon Mr H assigning any claim he may have against CL&P to Carey. The terms of the assignment should require Carey to account to Mr H for any amount it subsequently recovers against CL&P that exceeds the loss paid to him.

I'll explain how Carey should carry out the calculation set out at 1-3 above in further detail below:

1. *Calculate the loss suffered as a result of making the transfer*

To do this, Carey should work out the likely value of Mr H's pensions as at the date of this decision, had he left them where they were instead of transferring to the SIPP.

Carey should ask Mr H's former pension providers to calculate the current notional transfer value had he not transferred the benefits. If there are any difficulties in obtaining a notional valuation then the FTSE UK Private Investors Income Total Return index should be used to calculate the value. That's likely to be a reasonable proxy for the type of return that could have been achieved if suitable funds had been chosen.

The notional transfer value should be compared to the transfer value of the SIPP at the date of this decision and this will show the loss Mr H has suffered. The Store First investment should be assumed to have no value. Account should however be taken of the cash back incentive payment Mr H received.

2. *Take ownership of the Store First investment*

I understand Carey has been able to take ownership of the Store First investment, for a nil consideration, in other cases. It should do that here, if possible. If possible Carey should also take ownership of the GAS Verdant investment. It should calculate a commercial value for Mr H's GAS Verdant investment, then pay that sum (plus any costs involved) into the SIPP and take ownership of the investment. If Carey is unable to buy Mr H's investment in GAS Verdant it should give the investment a nil value for the purposes of calculating compensation.

If Carey is unable to take ownership of the Store First or the GAS Verdant investment, they should remain in the SIPP. I think that's fair because I think it's unlikely they will have any value in the future. I also understand Mr H has the option of returning his Store First investment to the freeholder for nil consideration.

In the event the Store First investment remains in the SIPP and Mr H decides not to transfer it to the freeholder he should be aware that he will be liable for all future costs associated with the investment such as the ongoing SIPP fees, business rates, ground rent and any other charges. He should also be aware it is unlikely he will be able to make a further complaint about these costs.

3. *Pay compensation for the loss calculated in (1).*

If possible the compensation for the loss should be paid into the pension. The compensation shouldn't be paid into the pension if it would conflict with any existing protection or allowance. Payment into the pension should allow for the effect of charges and any available tax relief. This may mean the compensation should be increased to cover the charges and reduced to notionally allow for the income tax relief Mr H could claim. The notional allowance should be calculated using Mr H's marginal rate of tax.

On the other hand, Mr H may not be able to pay the compensation into a pension. If so compensation for the loss should be paid to him direct. But had it been possible to pay the compensation into the pension, it would have provided a taxable income. Therefore the compensation for the loss paid to Mr H should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using his marginal rate of tax in retirement. For example, if Mr H is likely to be a basic rate

taxpayer in retirement, the notional allowance would equate to a reduction in the total amount equivalent to the current basic rate of tax. However, if Mr H would have been able to take a tax free lump sum, the notional allowance should be applied to 75% of the total amount.

4. Pay £500 for the trouble and upset caused.

I think the discovery that he'd lost significant pension benefits in this way would have caused Mr H considerable unnecessary trouble and upset and that he should be compensated for this. The precise impact of this and therefore the amount to award is difficult to assess. But in the circumstances, I think a substantial payment of £500 is fair.

SIPP fees

The investigator said in his view that future SIPP fees should be waived. Whilst Store First can be removed from the SIPP, I'm not sure about the GAS Verdant investment. If the SIPP needs to be kept open as a result of the GAS Verdant investment, then any future SIPP fees should be waived until the SIPP can be closed. If the SIPP is kept open with only the Store First investment in it then Mr H shall be liable for the future costs associated with it.

interest

The compensation must be paid as set out above within 28 days of the date Carey receives notification of Mr H'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

My final decision is that I uphold this complaint.

If Mr H accepts my decision, Options SIPP UK LLP must put things right using the method set out above. It should provide Mr H with details of its calculations in a clear and understandable format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 13 June 2020.

Jim Biles
Ombudsman