complaint

Mr C has said that CL&P (an unregulated introducer) advised him to move two pensions to a SIPP and then make two investments - Store First and GAS Verdant. He thinks this advice was unsuitable.

Mr C believes that if Options SIPP UK LLP had carried out adequate due diligence on CL&P, it would not have accepted the instructions. This is because it should have been aware of the warning on the Financial Services Authority (FSA) website about Terence Wright, who was a director of CL&P.

Options SIPP UK LLP was until recently known as Carey. I'll refer to it as Carey throughout this decision, as that was its name at the time of the events in question.

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. Mr C says he was cold-called by CL&P, and told he could get a much better return on his pensions if he transferred them to a SIPP and invested in Store First and GAS Verdant.

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 Terence Wright, and confirmed the following:

- CL&P was a Spanish firm, and was trading from a Spanish address.
- It used an "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 plus 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 a UK location. 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 an eight year period.

Mr C's dealings with CL&P and Carey

Mr C had a personal pension and a deferred final salary pension. He says he was cold called by CL&P and advised to move his existing pensions to a Carey SIPP in order to invest in Store First and GAS Verdant.

On 10 November 2011, Mr C signed Carey's SIPP application form. On 14 November 2011, Carey received Mr C's signed letter of authority. The letter confirms that Carey was able to liaise directly with CL&P regarding his pension affairs. A welcome letter was issued to Mr C on 15 November 2011.

Mr C went on to sign the member declaration and indemnity for his Store First investment on 21 January 2012. At the same time he signed the member declaration and indemnity for his Gas Verdant investment.

The funds were invested in GAS Verdant on 25 January 2012 and in Store First on 3 February 2012.

For each of these investments Mr C signed a member declaration which confirmed that he knew the investments were speculative/high risk. The key sections of this declaration include:

'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 can 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 taken my own advice including financial, investment and tax advice in respect of this investment.'

Carey's position

In its submission to us Carey said, in summary:

- Carey does not (and is not permitted to) provide any advice to clients in relation to the establishment of a SIPP, transfers in or the underlying investments, nor does it comment in any way on the suitability of a SIPP, the transfers in and investments for an individual's circumstances. It did not advise, nor purport to advise, Mr C.

- Carey acts as the administrator only of Mr C's SIPP. Mr C opened his SIPP and went on to invest on an execution only (i.e. non-advised) basis and this was made very clear in communications with him, the documentation issued to him, and the paperwork he read, signed and agreed to.

- CL&P was a non-regulated introducer and as such, it was never suggested to Mr C by Carey Pensions that CL&P was a financial adviser or was authorised to provide advice. Mr C was therefore categorised as a direct client of Carey.

- Carey did not suggest or recommend the Store First or GAS Verdant investments to Mr C. Carey is not responsible for the performance or current market value of these investments.

- Carey acted on Mr C's instructions to establish the SIPP, request the transfers in and specifically to make the investments on his behalf into Store First and GAS Verdant, in the amounts instructed by him.

- Carey carried out an internal investment review and due diligence on the intended investments and concluded that these investments were suitable to be held within a UK pension scheme.

- Carey undertook due diligence on CL&P and this due diligence did not reveal any reason why Carey should not accept introductions from CL&P, at the time of Mr C's investment.

Mr C's complaint was looked at by an investigator it was her view that the complaint should be upheld. In summary she said that whilst Carey undertook significant due diligence on CL&P it was not properly carried out. In respect of the due diligence the investigator identified the following failings:

- Carey did not carry out proper background checks on the directors of CL&P. If it had it would have established that one of the directors (Terrence Wright) was on the FSA's warning list of individuals.

- There was a warning notice on the FSA website. This was first posted in 2010 and updated in 2013. Whilst the wording changed the key message – being that Mr Wright was a person to be wary of dealing with – hadn't changed.

- Despite requests CL&P didn't provide copies of either its accounts or identity documents for its directors.

- Carey had been accepting business from CL&P since August 2011 but it was not until March 2012 and after repeated requests that CL&P were asked to complete a non regulated introducer terms of business. So when dealing with Mr C's SIPP and investments the relationship between CL&P and Carey had not been formalised. Good practice would have been to have an agreement in place so that Carey would have understood the service to be offered by CL&P.

- Carey had been told by a number of consumers that CL&P had been offering 'cash back incentives'. Carey was aware of this issue in early December 2011 – before Mr C's pensions were moved. CL&P's involvement in the payment of illegal payments should have raised concerns about its integrity.

Her view was that if Carey had acted as it should have done it would not have accepted the switch/transfer of Mr C's pensions.

She also set out how Mr C should be compensated. For his final salary pension a calculation in line with the FCA methodology should be carried out. For the personal pensions the current value of the SIPP should be compared to the notional value of the original scheme if they had not been switched to the SIPP.

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 (there is no evidence to show Mr C was one of these clients).

- 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 they 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 was not 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 did not agree with the investigator. It made the following points:

- It said it was unable to respond fully until the investigator provided more detailed explanations of her conclusions.

- COBS 11.2.19 required Carey to execute Mr C's instructions - it had no discretion in the application of this rule.

- The 2010 FSA notice about Mr Wright, unlike the 2013 warning was not a cause for concern. The notice only said that Mr Wright was not authorised – a fact what all parties were well aware of. At the time there was nothing to suggest Mr Wright was carrying out regulated activities. The investigator had not explained why she considers Mr C is not responsible for any of the losses he has suffered. Carey gave him all the warnings it was required to give. Mr C confirmed that he had read and understood all the documentation he had been given. If the investigator did not provide further explanation then an ombudsman should first issue a provisional decision. In general correspondence about the group of complaints to which Mr C's complaint belongs Carey has also:

- Asked that a response be given to each of its points before a final decision was made.

- Suggested that we hold an oral hearing.

- Asked us to put the complaints on hold, pending a judgment in the Adams v Carey court case.

My findings

Some preliminary points

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

I do not consider it appropriate to wait for the outcome of Adams v Carey. That is a different case to Mr C's complaint and Mr C is not 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 the case was heard in March 2018 and the judge's decision has still not yet been handed down two years later. As far as I am aware, there is 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 C's case.

I am 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 had not 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 that Mr C'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 have carefully considered the points made by Carey in support of its request for me not to progress this complaint. 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 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 that the complaint is significant to both parties that is 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 is nothing in the particular circumstances of this case that has persuaded me that it cannot 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 Mr C's complaint without a hearing.

A provisional decision?

I note that Carey has asked for us to respond to specific points before I make a final decision. 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 am satisfied that Mr C and Carey have been given adequate opportunity to make representations. Mr C and Carey have also received a provisional assessment, which set out in detail the investigator's reasons for reaching their view (the *provisional assessment*). Carey disagrees with that decision.

I am 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 FOS* [2008] EWHC 2142, this service is dealing with complaints, not causes of action. Our jurisdiction is inquisitorial not adversarial, and we are 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 am satisfied it is appropriate for me to do that here.

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

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."

So, the Principles have a wide application, and I need to have regard to them when deciding what is 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 Financial Services Authority) 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 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 are not formal *"guidance"* (whereas the 2013 finalised guidance is). However, the fact that the reports and *"Dear CEO"* letter did not constitute formal guidance does not mean their importance should be underestimated. As mentioned, they provide a *reminder* that the Principles for Businesses apply and are an indication for the kinds of things a SIPP operator might do to produce the outcomes envisaged by the Principles. So I view them as significant and a relevant consideration for me to take into account when determining what I believe is fair and reasonable in the circumstances of this complaint.

I also note that Carey's regulatory obligations under the Principles existed from the outset of Mr C'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 2013 finalised guidance and the *"Dear CEO"* letter was 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 is 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 is clear the standards themselves did not change.

That doesn't mean that in considering what is fair and reasonable, I will 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 looking at whether, in accepting Mr C's SIPP application from CL&P, Carey acted fairly and reasonably, I need to consider if it complied with its general duties 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 am 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 its work with SIPP operators.

The due diligence carried out by Carey on CL&P

As set out above there is an obligation on SIPP operators to carry out due diligence on firms that introduce business to it – this includes unregulated introducers as well as authorised firms. This is accepted by Carey - it has said:

"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."

So the key question is whether this due diligence was carried out to the required standard – not whether there was an obligation to carry out due diligence.

Carey carried out the following due diligence on CL&P:

On 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 advice tailored to the individual'* (my emphasis)
- *'In accordance with the Financial Services and Markets Act 2000, CLP brokers do not provide any financial advice.'*

On 20 September 2011 background checks were completed on two employees of CL&P.

On 27 September 2011 Carey wrote to CL&P and asked it to complete a non-regulated introducer profile. It said:

'As previously mentioned we require for our compliance process to perform due diligence on company's (sic) who we enter into a business and professional relationship with so I would be grateful if you could complete the attached Introducer profile and sign and return it to us following which we will then issue you a Non-Regulated Terms of Business for signing.

I look forward to the completed form duly signed as soon as possible'

The non-regulated introducer profile was returned on 29 September 2011. It was signed by Terence Wright, and named him and Lesley Wright as directors of CL&P. In the event this document was only partially completed with some questions left unanswered.

The form also asked the following question:

'Are you or the firm subject to any ongoing FSA or other regulatory body review action or censure' - to which the answer given was no – this was incorrect.
On 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.

On 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).

On 23 March 2012 – it asked CL&P for a copy of its accounts and passports of the directors.

On 3 April 2012 – it repeated its request to CL&P for a copy of its accounts and passports of the directors.

On 15 May 2012 – it completed a background check on Terence 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 it ought to have led it to conclude that it would not be fair and reasonable to accept Mr C's business from CL&P. I have 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 matter of course as 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 C'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 Mr Wright 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 her 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 if it had used 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 person at the outset it should have led it to draw a different conclusion about the acceptance of business from CL&P at the outset.

Carey now says, in its representations in this complaint relating to the FSA's list, that *'…the Notice* (the alert) *amounts simply to a notification that Mr Wright is not authorised to carry on regulated activities, a fact of which Carey was well aware and upon which basis 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 is fair and reasonable to conclude that 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 had 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 Mr Wright's conduct.

Carey has tried to downplay the significance of the 2010 warning by contrasting it with the later one published in 2013. It says that the 2010 warning does not 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 do not agree with Carey's characterisation of the 2010 warning and I'm surprised that in response to the investigator's provisional assessment Carey suggests that the regulator does not detail any concern about Mr Wright in the 2010 warning. Whilst it does not 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 would not 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 was not 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 should not accept business from Mr Wright.

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 could not 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 that its director Terence Wright was on the FSA warning list and acting fairly and reasonably it should have declined to do business with him. I think this alone was sufficient for Carey to conclude that acting fairly and reasonably and taking account of the need to act in Mr C's best interests it should not 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 C fairly, the 2010 warning alone should have resulted in Carey declining to do business with CL&P. However, as Carey does not accept that the 2010 warning should have led it to conclude it should not 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 C fairly, it is fair and reasonable to say that 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."*

In response to the investigator's view, Carey says that it reasonably considered at all times that CL&P was an unregulated introducer which was not providing advice. However, I don't agree that 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 was not regulated to do so.

Mr C says he received advice. 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 investments are high risk and unregulated. There's also no suggestion that Mr C 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 C 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 is fair and reasonable, to say that 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 that 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 that customers were not advised or were directed to a regulated adviser, and how CL&P ensured that it was not 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 that 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 that 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 that it's likely that Carey would have found that were insufficient safeguards against advice being given.

Knowing this, and the regulator's warning about Mr Wright, I think Carey ought to have identified that 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 would not be consistent with its regulatory obligations - it would not be treating Mr C fairly and in his best interests - to accept business from CL&P.

I accept that there is a possibility that, if Carey had made enquiries, CL&P might not have been forthcoming with information about its business model. But that is 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 CL&P. As such, I think this too should have led Carey to conclude that there was a real risk of consumer detriment and that it would not be treating Mr C fairly and in his best interests in accepting his introduction from CL&P.

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

Further points

Defined benefit (final salary) transfer

One of Mr C's pensions was a final salary scheme, and the transfer to the Carey SIPP was submitted to Carey by CL&P as execution only business. In December 2011, Carey had a conference call with CL&P and explained that concern had been raised at a recent AMPS conference regarding Final Salary Transfers to SIPPs and the need for clients to take advice. In this call Carey noted that "*ordinarily you would not expect more than 5% of FSTVs* [final salary transfers] *to be execution only and these would only be relevant for suitably qualified individuals such as IFAs, Brokers, Investment Professionals."*

Similarly, in the same conference call in December 2011, Carey agreed with CL&P "*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."* It is clear from this agreement that Carey had identified a real risk of consumer detriment where a consumer was transferring from a final salary pension to a SIPP on an execution only basis and that this new requirement was put in place in order to protect consumers from this detriment. With this in mind, I think it is fair and reasonable in the circumstances of Mr C's case to conclude that Carey should have applied this requirement before accepting his application from CL&P.

Although the application forms for Mr C's transfer had been received before December 2011, the transfer did not complete until January 2012, and had certainly not completed by the time Carey became aware that it was unusual to see such business on an execution only basis, and that it should be expected to come only from those who worked in the investment industry. It had agreed with CL&P that future final salary transfers would be referred to a suitably qualified IFA for advice and a copy of the suitability report provided to Carey. This did not happen in the case of Mr C.

In those circumstances – and particularly given all the other factors listed here – it is not clear why Carey proceeded with Mr C's instructions on an execution only basis and without ensuring he had received suitable advice in accordance with its own recent procedure. Although Carey was not able to give advice, and is not expected to have done so, I do expect Carey, in the circumstances, to have been very wary of accepting Mr C's application – particularly given what it had been told at the AMPS conference.

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. It should not therefore have proceeded with Mr C's application, in the light of this knowledge. I think Carey's awareness of cash incentives should have led to conclude it should not proceed with *all* business brought to it by CL&P. 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.

I make these further points only for completeness, as they refer to things which happened after Mr C's application had been accepted. For the reasons I have set out, I do not think Carey should have accepted Mr C's application *at all.*

Should Carey have proceeded regardless?

the member declaration and indemnities

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

The main point to make here is that Carey should never have accepted the business from CL&P, for the reasons given. So Mr C should never have got to the point of signing a member declaration, or the indemnities, as the business should not 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 C'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 C's application and because of the documents he had signed. There was no evidence of any regulated party (other than Carey) being involved in this transaction. In these circumstances I think very little comfort could have been taken from a declaration by Mr C that he had decided not to take advice (in relation to the transfer of his final salary and personal pension) and understood the risks or the indemnity stating that Mr C had taken his own advice, and understood the risks (in relation to the investment).

Carey accepting business whilst asking Mr C to sign documents to absolve it of all responsibility was not treating Mr C 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 C to sign a declaration and an indemnity absolving it of all responsibility when it ought to have known that Mr C's 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 C to absolve it of the consequences.

COBS 11.2.19R

I note that 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 is 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 C's SIPP in the first place. And, for the reasons I set out above, it is my view that Carey should not have done so.

This argument was considered and rejected by the judge in the recent case of Berkeley Burke v Financial Ombudsman Service [2018] EWHC 2878 (Admin). 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 C fairly or acted in his best interests by accepting Mr C's business from CL&P. To my mind, Carey did not meet its regulatory obligations, and allowed Mr C to be put at significant risk of detriment as a result.

To be clear, I am not making a finding that Carey should have assessed the suitability of the investment or the SIPP for Mr C. I accept Carey had no obligation to give advice to Mr C, 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 C. It is that Carey did not meet its regulatory obligations and should not have accepted the business from CL&P. It failed to treat Mr C 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 is fair and reasonable for Carey to be held responsible for its failings.

Is it fair to ask Carey to compensate Mr C?

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

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

Had Carey explained to Mr C that it would not accept the application from CL&P I find it very unlikely that Mr C would have tried to find another SIPP operator to accept the business. He is likely to have had no trust in CL&P once he became aware Carey would not accept the business. In any event, I don't think it's fair and reasonable to say that Carey should not 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 C would not have made the Store First and Gas Verdant investment or the transfers from his existing pensions that preceded them.

So I am satisfied that Mr C would not have continued with the SIPP, had it not been for Carey's failings, and would have remained in his existing schemes. And, whilst I accept that 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 take account the potential contribution made by other parties to the losses suffered by Mr C. In my view, in considering what fair compensation looks like in this case, it is reasonable to make an award against Carey that requires it to compensate Mr C for the full measure of his loss. But for Carey's failings, Mr C's pension transfers would not have occurred in the first place.

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

putting things right

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

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

1. Calculate the loss Mr C has suffered as a result of making the transfers.

2. Take ownership of the Store First and GAS Verdant investments.

3. Pay compensation for the loss into Mr C's SIPP. If that is not possible pay compensation for the loss directly to Mr C. In either case the payment should take into account the 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 C assigning any claim he may have against CL&P, to Carey. The terms of the assignment should require Carey to account to Mr C for any amount it subsequently recovers against CL&P that exceeds the loss paid to Mr C.

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

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

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

For the part of the transfer which related to defined benefits Carey should undertake a redress calculation in line with the revised methodology issued by the FCA in October 2017. This calculation should be carried out as at the date of my final decision, and using the most recent financial assumptions published at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate actuarial services provider promptly following receipt of notification of Mr C's acceptance of the decision.

Carey may wish to contact the Department for Work and Pensions (DWP) to obtain Mr C's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P). These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the employer's scheme on Mr C's SERPS/S2P entitlement.

For the remainder Carey should ask Mr C's former pension provider to calculate the current notional transfer values had he not transferred his pension. 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 is a reasonable proxy for the type of return that could have been achieved if suitable funds had been chosen.

The total of these notional transfer values should be compared to the transfer value of the SIPP at the date of this decision and the difference will be the loss Mr C has suffered.

2. *Take ownership of the Store First investment and GAS Verdant 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 take ownership of the GAS Verdant investment. Carey should calculate a commercial value for Mr C'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 C'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 is fair because I think it is unlikely they will have any value in the future. I understand Mr C 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 C 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 to Mr C for the loss he has suffered as calculated in step 1.*

If possible the compensation for the loss should be paid into a pension. The compensation should not be paid into a pension if it would conflict with any existing protection or allowance. Payment into a 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 C could claim. The notional allowance should be calculated using Mr C's marginal rate of tax.

On the other hand, Mr C may not be able to pay the compensation into a pension. If so compensation for the loss should be paid to Mr C 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 C should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mr C's marginal rate of tax in retirement. For example, if Mr C 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 C 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.*

Mr C has been caused some distress by the loss of all of his pension benefits. I consider that a payment of £500 is appropriate to compensate for that upset.

SIPP fees

The investigator said in her view that future SIPP fees should be waived. Whilst Store First can be removed from the SIPP I am 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 C shall be liable for the future costs associated with it.

interest

The compensation resulting from this loss assessment must be paid to Mr C or into his SIPP within 90 days of the date Carey receives notification of his 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 is not paid within 90 days.

It’s possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period – and so any period of time where the only outstanding item required to undertake the calculation is data from the DWP may be added to the 90 day period in which interest won’t apply.

my final decision

For the reasons given, my decision is that I uphold Mr C’s complaint. Options SIPP UK LLP should calculate and pay compensation as set out above.

Michael Stubbs
ombudsman