Complaint

Mr S complains that an unregulated business called Commercial Land and Property Brokers ("CL&P") introduced him to Options SIPP UK LLP, (which was trading as Carey Pensions UK LLP ("Carey") at the time of the relevant events). Mr S subsequently switched his pension arrangements to a Self-Invested Personal Pension ("SIPP") with Carey and invested in Store First following the switch. Mr S says he has suffered a loss from the Store First investment and that Carey should compensate him for this loss.

The complaint has been made on Mr S's behalf by a Claims Management Company ("CMC"). The CMC says, in summary:

- Carey was required to adhere to the regulator's Principles and Rules.
- Mr S switched his personal pension to a SIPP with Carey, in order to make an investment called Store First, that was unregulated and high risk.
- Mr S was introduced to Carey by an unregulated business called CL&P. A director of CL&P was Terence Wright.
- Terence Wright was the subject of a warning published on the Financial Services Authority (FSA) website on 15 October 2010.
- CL&P was promoting unregulated investments to the general public and was remunerated by the unregulated investment companies.
- If Carey had carried out appropriate due diligence on CL&P it would have been obvious that no instruction from CL&P should have been accepted.
- Mr S received advice from CL&P that the Store First investment would provide him with a much better pension than his existing arrangements.
- CL&P pre populated the SIPP application form and sent the signed declaration form to Carey – neither of these was sent to Carey by Mr S. Mr S did not fully understand the forms but trusted CL&P, who gave him what he thought were plausible reasons why the forms needed to be signed.
- Carey's declaration forms were not implemented to treat Mr S fairly – they were only an attempt to absolve Carey of any liability.
- CL&P's letter of authority to act for Mr S was sub-standard, as it did not contain an address for CL&P. This demonstrates that Carey failed to apply the regulator's Principle 2 ("A firm must conduct its business with due skill, care and diligence").
- All CL&P instructions would be to invest in unregulated investments, regardless of the client's understanding, attitude to risk, investment knowledge and affordability. Carey Pensions breached the regulator's Principle 3 ("A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems"), in that it ignored the responsibility of safeguarding its clients.

For these reasons, the CMC believes Carey is responsible for the loss Mr S has suffered.

Background

Carey

Carey is a SIPP provider and administrator. At the time of the events in this complaint, Carey was regulated by the Financial Services Authority ("FSA"), which later became the Financial Conduct Authority ("FCA"). Carey was authorised, in relation to SIPPs, to arrange (bring about) deals in investments, to deal in investments as principal, to establish, operate or wind up a pension scheme, and to make arrangements with a view to transactions in investments.

CL&P

CL&P was an unregulated business based in Spain. Mr S says that he was cold-called by CL&P and told he could get a much better return on his pension if he switched it to a SIPP and invested in Store First.

At the time of the events complained of, one of the directors of CL&P was a Terence Wright.

On 15 October 2010, the following was published on the FSA website in a section titled "*Firms and individuals to avoid*", which was described on the website as "*a warning list of some unauthorised firms and individuals that we believe you should not deal with*":

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"

CL&P and Carey

Carey has told us that it was approached by CL&P in 2011 and that it entered into discussions about accepting introductions from it. Carey began to accept introductions from CL&P on 15 August 2011 and ended its relationship with it on 25 May 2012.

Carey says it carried out some due diligence on CL&P. 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.

I have set out below a summary, in chronological order, of what I consider to be the key events and/or actions during the relationship between Carey and CL&P, which I have taken from the available evidence (this includes evidence from Mr S's case file and generic submissions Carey has made to us on other cases about its due diligence on, and its relationship with, CL&P).

I have not seen any evidence to show Carey carried out any due diligence on CL&P before it began accepting introductions from it in August 2011. Rather, as I set out below, it began to accept introductions then carried out its due diligence whilst accepting business from CL&P.

Summary

15 August 2011 - Carey begins to accept introductions from CL&P.

20 September 2011 - Carey conducted a World Check (a risk intelligence tool which allows subscribers to conduct background checks on businesses and individuals) on a Zoe Adams and a Mark Lloyd. Ms Adams and Mr Lloyd were two of the people at CL&P Carey initially had contact with. This check did not reveal any issues.

27 September 2011 - Carey asked CL&P to complete a non-regulated introducer profile. The form itself explains its purpose as follows; *"As an FSA regulated pensions company we are required to carry out due diligence as best practice on unregulated introducer firms looking to introduce clients to us to gain some insight into the business they carry out."* Furthermore, when making this request, by email, Carey's Chief Executive, Christine Hallett, explained "*we require for our compliance process to perform due diligence on company's* (sic) *who we enter into a business and professional relationship with*".

29 September 2011 - The non-regulated introducer profile was completed by CL&P. It was completed and signed by 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, and three 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*".

The document makes no mention of Ms Adams or Mr Lloyd. After completing the document Mr Wright was asked to make the following declaration:

"I declare the above is a true and accurate reflection of [name of individual or Firm] and that Carey Pensions UK LLP can rely on this information.

I/we fully indemnify Carey Pensions UK LLP against any costs incurred as a result of any inaccuracies within this form.

I/we also acknowledge and accept that Carey Pensions UK will undertake any enquiries about the firm and its Directors/Partners it feels appropriate. "

9 December 2011- Carey had a conference call with representatives of CL&P. During that call the issue was raised of consumers being offered cash incentives by CL&P to transfer or switch to a SIPP and make investments. The note of the call included the following:

"[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*."

13 March 2012 - Carey's Head of Service and Operation, said in an email to CL&P:

"On another matter, we need our Terms of Business for Non Regulated introducers in place between our two companies. So that our records are all straight from a Compliance aspect I attach the Terms of Business and have entered a commencement date of 15 August 2011 which is the date of your first case with us and would be grateful if you could agree and complete the terms and return."

The agreement was signed by CL&P on 20 March 2012. It was signed by Ms Adams.

23 March 2012 - Carey's compliance support said in an email to CL&P:

"*To comply with our in house compliance procedures could you please supply the following information relating to CLP Brokers:*

A copy of the latest set of accounts
A certified copy passport for each of the main directors/principals/partners of the company"

29 March 2012 - a Team Leader at Carey sent an email to Ms Hallett, Carey's Chief Executive, with the subject – "*03-29-2012 - Storefirst Investment Query re Cash Back* [reference removed]". That email forwarded an email sent by the Team Leader to a consumer, which included the following:

"*you mentioned in our conversation a cash back amount you are expecting in the sum of £1,800 from CL&P following completion of the Storefirst investment*"

And the text addressed to Ms Hallett by the Team Leader said "*this is the second member this week to ask when are they getting their money*".

3 April 2012 - Carey's compliance support followed up on its 23 March 2012 email:

"*It is now becoming urgent that we receive the outstanding documentation. You very kindly passed this on to your colleague and I would be very grateful if we could receive the documentation as a matter of urgency Thank you in anticipation of your assistance*."

When asked, Carey said it has no record of receiving the information from CL&P.

15 May 2012 - Carey conducted a World Check on Terence Wright. The report included the following:

"***THE FOLLOWING INFORMATION WAS REPORTED IN ONE OR MORE OF THE SOURCES BELOW***

[FINANCIAL SERVICES WARNING]
Appears on the UK Financial Services Authority.

[REPORTS]

Appears on the FSA list of unauthorised firms and individuals,

***INFORMATION SOURCES**;*
http://www.fsa.gov.uk/pages/Doing/Regulated/Law/Alerts/unauthorised.shtml - ARCHIVE
http://www.fsa.gov.uk/Pages/Doing/Regulated/Law/Alerts/Index.shtml - ARCHIVE

Entered: 2011/10/24"

25 May 2012 - Carey terminated its agreement with CL&P. Carey's Head of Service and Operation told CL&P of Carey's decision in an email to CL&P of that date:

"*Despite your assurances that no clients have been or will be offered inducements (monetary or otherwise) for making investments through their SIPPs with us, we have received enquiries as to when client can expect to receive their money and have today been informed by a new client that they are expecting circa £2,000 on completion of the Storefirst investment purchase, which they confirmed was offered by a member of your staff.*

We have advised this client that we will not proceed with this case.

In light of this, it is with regret that I have to notify you that we are terminating our Introducer Agreement with you, with immediate effect, and can no longer accept business from you."

In reply to this email CL&P asked *"Regarding business which you have already accepted from us, will you still be processing this as the client's SIPPs have already been established?"*

28 May 2012 - Carey's Ms Hallett sent the following reply to CL&P:

"*We will process them where we have already established the schemes, we will be writing to all clients informing them if they have received any monies then they must declare this to HMRC and their fund would also be vulnerable to a tax charge as well.*

HMRC have already asked a number of SIPP providers for lists of clients who are investing in alternatives, they will I am sure be doing some random checks and will charge people for unauthorised transactions if they have received cash sums for transferring their pension and making investments.

I would urge you and your agents to review your position if you are continuing this as part of your sales process, ultimately no SIPP providers will be taking the business, it is not allowable as we have explained to you previously."

I have seen no evidence that shows Carey wrote to consumers to inform them that any cash incentives paid would be vulnerable to a tax charge.

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 (based on the information I have seen about the investment) 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).

The material I have seen shows the Store First investment was marketed as offering a guaranteed 8% return in the first two years, an indicated return of 10% in the following two years, and 12% in the next two years. It was also marketed as offering a "guaranteed" buy back after five years. But little of this materialised. It seems most investors received one or two years' income of 8%, but nothing beyond that. And investors have found it very difficult to sell, with those that have sold receiving a small fraction of the amount they paid for their "pods".

In the judgment in *Adams v Options SIPP UK LLP (formerly Carey Pensions UK LLP)* [2020] EWHC 1299 (Ch) ("*Adams v Carey*"), the judge found the value of Mr Adams' pods, acquired for around £52,000 in July 2012, to be £15,000 as of January 2017. I have also seen several results of auctions of the pods, where the sale price has been much lower than the price at which the pods were purchased.

In May 2014, the Self Storage Association of the UK ("SSA UK") issued a press release (amended in January 2015), detailing the outcome of a review it had commissioned Deloitte LLP to undertake of the marketing material made available to potential investors by Store First.

The release recommended that any potential investors in Store First storage units consider the following key points before taking any investment decision:

- *What will the impact be on the business model if VAT is charged on the rental of storage units to customers following a review by HMRC?*
- *How is Store First funding guaranteed returns to investors? Is this from operating profits, the proceeds from the sale of other storage pods to investors, or a different source?*
- *Compare the total value being paid for all the units in a Store First self storage site against the price at which stand-alone self-storage businesses have been valued and sold at recently.*
- *Consider if there is a realistic re-sale opportunity for, and exit, from this investment, particularly if Store First exits the business.*
- *Research the performance of investments based on a similar investment model that have been offered primarily in Australia, such as Ikin Self Storage in Townsville, Queensland and Strata Self Storage in Melbourne* (these schemes had failed).

The release refers to a number of misleading and inaccurate statements made by Store First in its marketing material. It also makes the following observations:

SSA UK's investigations indicate that these storage units are being rented to the general public at approximately £18 - £21 per square foot including insurance. Normally the rent paid by a self-storage operator would be at most half of the income per square foot earned through storage fees. Presuming the Store First sites were at industry average occupancy levels, SSA UK believe that they would have to be earning £23.95 per square foot just to pay the guaranteed rent to investors, excluding operating costs such as insurance, staff, business rates, utilities, marketing and management fees for Store First.

Store First is obliged to pay the guaranteed returns to investors, yet there does not appear to be sufficient income from the operations of the business to fund these returns

The analysis SSA UK has seen indicates that the purchase price being paid per square foot by investors to Store First for these self-storage units taken together equates to a much higher value than they would be worth if the whole sites were sold as stand-alone self-storage stores.

….a very serious question arises over how Store First is funding the guaranteed returns to existing investors, considering the absence of bank funding and the likely level of losses that require funding in each new store. It may yet prove to be the case that the rental returns being paid to investors are in fact being funded from the sale proceeds of new units, and not the operation of the self-storage business.

On 30 April 2019 the courts made an order shutting down Store First and three of the related companies by consent between those four companies and the Secretary of State. The Official Receiver was appointed as liquidator. At the time, the Chief Investigator for the Insolvency Service said:

These four companies unscrupulously secured millions of pounds worth of investments using a variety of methods that misled investors, particularly those with pension savings.

The court rightly recognised the sheer scale of the problem caused by Store First's sales of a flawed business model, based on misrepresentation and misleading information and has shut down these companies in recognition of the damage done to investors retirement plans.

The available evidence shows the following actions were taken by Carey in relation to the Store First investment, at the dates mentioned. I have set out my summary (updated following my provisional decision, to reflect the further evidence about Carey has now provided about its suspension of accepting Store First) in chronological order.

Summary

3 May 2011 – Carey is contacted by a promoter of Store First, Harley Scott Holdings Ltd, about a newly launched product – Store First. Harley Scott Holdings Ltd said that an unregulated business had asked it to "*pass the product through*" to Carey. In response, Carey says the investment will be put through its review process.

In its submissions to us Carey says this review process was established in accordance with its obligations and FSA recommendations at the time, which required it to conduct "*due diligence into the Store First investment to assess its suitability for holding within a SIPP"*.

9 June 2011 – Carey says it will accept the investment in its SIPP, having considered:

- the brochure
- the agreement for Grant of Sublease
- the sublease
- Companies House searches
- a Compliance review (referring to an Enhanced Support Solutions report).

It has provided us with copies of these documents.

In the letter dated 9 June 2011, sent to the unregulated business which Harley Scott Holdings Ltd had referred to in its request to Carey, confirming its acceptance of Store First, Carey noted:

- The investor purchases a 250 year lease of a storage unit within a storage facility. The unit is then sublet to the management company, Store First, subject to an initial 6 year term with 2 year break clauses.

- The investor's interest can be sold/assigned at any time. The break clauses allow the investor to rent out the units individually without the services of the management company (but it insisted they use the management company).

- There was no apparent established market for the investment.

- The investment was potentially illiquid in that it was a direct property investment which may take time to sell. However, it could be sold providing a willing buyer can be found and was assignable so could be transferred in specie to beneficiaries.

It also said its acceptance was subject to a member declaration and indemnity being completed and signed by each member, and the appointment of a solicitor to act for the Trustees in respect of any purchase.

20 May 2012 – the *Adams v Carey* judgment refers to an internal Carey email of this date, referring to a conversation between Carey and Store First about commission, during which Store First had said it “believed” 12% commission was paid to CL&P.

15 August 2012- a meeting between Store First and Carey took place. Items on the agenda included “*Rental Income Process/Delays*”, “*Sale Process/Delays*” and “*Agreed Actions*”. No further details (such as minutes) of this meeting have been provided.

17 August 2012 - A member bulletin is sent to Carey by an information service it subscribed to which included the following:

Storefirst Limited

We are aware of a web-based news article that mentions 'Toby Whittaker's firm faces tax investigation' and goes on to reference notes made within the February 2011 accounts of Harley Scott Holdings. [the information service] *has sought confirmation from Toby Whittaker on this and have been referred to* [Store First's auditors] *who* [the information service] *understands to be the Harley Scott accountants.* [Store First's auditors] *have supplied a letter to* [the information service] *to clarify the position regarding Storefirst, however as the letter is addressed to* [the information service] *we have been asked not to circulate the letter as* [Store First's auditors] *wish to control its distribution.* [Store First's auditors] *have agreed though to issue a similar letter addressed to individual SIPP operators/trustees upon request. We will leave it to our* [the information service] *clients to decide whether they require such a letter, however where a letter is required, the contact details for* [Store First's auditors] *are below and they are on notice they may receive requests from clients of* [the information service].

17 August 2012 – Carey suspended its acceptance of the investment "*because of concerns about the administration and system and controls of the investment provider*."

17 August 2012 – Carey sends an internal email referring to the above bulletin, which included the following;

Storefirst – we suspended further new investment, and in light of the comments from [the information service it subscribed to]*, I have emailed* [Store First's auditors] *and have requested a copy of the letter of explanation, which I* [sic] *forward upon receipt.*

20 August 2012 - Store First's auditors send a letter to Carey letter from Store First's auditors to Carey dated 20 August 2012 which included the following:

We confirm that the tax enquiry referred to in the Harley Scott group of companies accounts to 28 February 2011 do not include either Group First Limited nor Store First Limited and furthermore, neither Group First Limited nor Store First Limited are currently under tax enquiry

24 September 2012 - update to Carey from a Store First director.

27 September 2012 - Store First provides Carey with a list of "guaranteed rental" and "non-guaranteed rental" investors. Following my provisional decision, I asked Carey why it requested this list. In reply, it said:

Following the monitoring of investors that held Store First, all of which we understood had applied for the investment as per the marketing material, the marketing material provided for a Title in a Leasehold property in the form of storage units with a 6 year leaseback and a guaranteed rental income. Despite the marketing material not providing any other option, we found that only a small proportion of Store First investors were receiving the rental income as expected and therefore we requested a list of all of our investors rental arrangements.

27 September 2012 – Carey lifted its suspension on accepting Store First. An internal Carey email of that date from Ms Hallett, sent to the Carey Group CEO and other senior members of staff, confirms this. The email from Ms Hallett included the following:

My view is we can start again? As long as we have put the requisite processes and controls in place to be on their case should we not receive what we are expecting, also do we need to make our member declarations clearer re what option the clients have selected eg guaranteed and non-guaranteed to ensure there is no come back on us at a later date that they did not realise

27 September 2012 – A reply to the above email from the CEO of the wider Carey Group, which simply said "*I agree*" (to the suggestion in Ms Hallet's email).

30 October 2012 – Mr S's investment in Store First facilitated by Carey.

5 April 2013 – Carey's technical review committee decides it will accept no further Store First investments. The note of this meeting refers to an FSA letter dated 11 January 2012 raising concerns about outstanding loans from Store First to Toby Whittaker. In its submissions to us, Carey says:

CPUK [Carey] *took this decision because, by April 2013, it had received a number of queries and concerns from its customers and other sources which CPUK considered had not been satisfactorily resolved by Store First. CPUK wanted to act quickly to protect its customers and therefore ceased administering investments into Store First.*

The minutes of the 5 April 2013 meeting say:

This investment was suspended 17.08.2012 because of concerns about the administration and system and controls of the investment provider. The meeting considered the further investment information provided in respect for this investment:

- *Best International Review;*
- *Legal Opinions;*
- *FSA Letter dated 11 January 2012;*
- *Extracts from 2011 Audit;*

The Meeting resolved that, based on the information provided, although there may not be a tax charge liability for this investment, other factors as undernoted have also been taken into consideration and it is not therefore considered prudent to proceed further.

The other factors as undernoted by Carey were:

Lack of clarity in respect of the scheme being a UCIS and concerns raised by FSA (now FCA);

Loans outstanding to the director TS Whittaker

Store First was the subject of a winding up petition issued by the Business Secretary in 2017. On 30 April 2019 the court made an order to wind-up Store First Limited and three associated companies in the public interest by consent between those four companies and the Secretary of State. The Official Receiver was appointed as liquidator and has responsibility for dealing with the assets and liabilities of the four companies.

A company called Pay Store now manages the Store First sites and rents out the storage units, trading as Store First. The freeholds of each Store First site have been sold by the Official Receiver to a company called Store First Freeholds Limited. As a result of this, investors have been offered the opportunity to transfer their investment to this company, for nil consideration.

Mr S's dealings with CL&P and Carey

Mr S had a personal pension. The cash value of this was switched into a SIPP with Carey, and invested in Store First, after Mr S had been contacted by CL&P. I have set out the events which took place during Mr S's dealings with Carey in detail below.

April 2012

Mr S signed a letter of authority which said:

I am writing in regards to my application for a SIPP with Carey Pensions.

I hereby give you permission to liaise directly with CLP Brokers in respect of all matters regarding my pension arrangement.

Please see their contact details below:

CLP Brokers
0845 557 6746
enquiries@clpbrokers.com

The letter is undated, but a date stamp shows it was received by Carey on 17 April 2012. Mr S signed an application form for a Carey SIPP on 11 April 2012. Carey sent Mr S a welcome letter on 18 April 2012. This letter confirmed the SIPP account number and that the establishment date of the SIPP was18 April 2012. So, it seems the application was received on 17 April 2012, along with the letter of authority, that both were sent to Carey by CL&P, and the SIPP was opened the following day.

September 2012

Mr S's personal pension provider sent £42,477.80 to Carey on 3 September 2012.

October 2012

On 2 October 2012, Mr S signed the following in relation to the Store First investment:

I, [Mr S] *being the member of the above Scheme instruct Carey Pension Trustees UK Ltd to Purchase a Leasehold Storage Unit(s) in the Store First investment through Harley-Scott Holdings Ltd for a consideration of £39,000, 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 <u>not</u> 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]

I confirm that I agree to [name of solicitor] *fee of £400 + VAT for transacting this investment.*

I confirm I am fully aware that additional costs will be incurred in this transaction including, but not limited to:
£48 CHAPs Fee;
£8 Land Registry Search Fee;
Stamp Duty Land Tax - To be advised by Solicitor at completion;
Any other taxes - To be advised by Solicitor at completion;

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.

In this decision I will refer to this document as “the indemnity”.

On 30 October 2012, Carey wrote to Mr S to confirm £39,586 had been paid out of his SIPP for the Store First investment and associated costs.

November 2012

Mr S’s Store First investment was made on 5 November 2012.

In its response to my provisional decision, summarised below, Carey says there were a number of documents relevant to its dealings with Mr S - the SIPP application form, a letter of authority, its terms and conditions, a key features document, and the SIPP rules – not all of which were specifically mentioned in my provisional decision. For completeness, I confirm the file I have considered includes all of these documents, and I have given careful consideration to them, alongside the rest of the available evidence.

Submissions made by Mr S

Mr S says he understood he was receiving advice from CL&P and that he trusted it. He says he was told his pension would do better if he moved it to a SIPP with Carey and invested in Store First.

We asked Mr S if he received a "cash back" incentive from CL&P after the investment had been made. Mr S has confirmed that he received £2,000. When we asked the CMC for Mr S's recollections about this it told us:

"he was not actively looking to move his pension but received a cold call from CL&P in which he was told that his previous pension was 'doing nothing' not increasing in value he felt persuaded by CL&P that just for transferring his previous pension to Carey Pensions UK he would be offered a 'welcome bonus' of some sort and upon investing he would receive guaranteed returns of 12% per annum."

We were also told that Mr S "*remembers receiving an email from CL&P to say they were closing down after his transfer had completed*".

We recently asked Mr S for some further detail of his recollections. We asked the following questions, and received the replies quoted in italics:

- Were you interested in changing your pension at the time of being contacted by CL&P? Why? What attracted you to CL&P? What attracted you to the Store Pod investment?

"*I was not interested in changing my pension over and had no plans to. I was cold called by CL&P who seemed to know some details about my current pension and advised me it wasn't doing anything where it was. I can't remember knowing what Store Pods were or hearing about them at the initial stages, but I remember being promised 12% guaranteed returns for a minimum 3 or 5 years*."

- What role did you think CL&P had in this transaction?

"I thought they were an investment company and who were the people who run the SIPP. However, I learned afterwards from CL&P that Careys were my SIPP provider and I felt reassured as I did research on Careys and found they were a legitimate company."

- Did CL&P recommend any products to you? Can you recall what it said to you?

"I can't remember the specifics of what was recommended to me, only that the recommended product was guaranteed to generate 12% returns over 3-5 years."

- What was your understanding of the "welcome bonus" CL&P was offering? What did you think of this?

"I thought this was because I was investing so much money with them so it was a welcome bonus."

- If you had been aware that the "welcome bonus" might have tax consequences, what would you have done?

"I never even thought about that as I only saw this as a welcome bonus so it never entered my head. If I had known there to be tax consequences, I would've asked about them, but I saw this as a welcome bonus, I never thought to do this."

- If Carey had told you that Mr Terence Wright, a director of CL&P, was the subject of an FSA alert, what would you have done?

"If I knew he was a 'con man' I would've never transferred my pension, as I would've known then that what I was being promised was a scam."

- Carey ended its relationship with CL&P in May 2012. If you had been made aware of this what would you have done?

"*I would have asked a lot of questions why and would have expected Careys to be clear and honest with me. I would have also asked them if it would be safe for me to continue with the transfer*."

- What is your understanding of how the Store First investment works?

"When I finally found out what the store first investments pods were, I understood that Careys were managing them and I was responsible for the management costs. I understood there would be a charge for my pods but as I was guaranteed 12% returns for the first 3-5 years, I understood why there was a fee, but the fee would be minimal compared to the amount I was guaranteed to receive in returns."

- Did you understand the risks associated with a high risk, speculative investment? What are they in your own words?

"I didn't know at the time and I still don't know now what they are."

- What was your understanding of the risks associated with the Store First investment? Please explain your answer fully.

"For the first 3-5 years I was told I'd have a guaranteed 12% on returns so I didn't think there was a risk. I believe after the 3-5 years were over I would be moved to something else."

- What did you think Carey's role was at the time?

"I originally thought it was all CL&P but then they advised me I would be a Careys client. I did my research on Careys and was happy that they looked like a legitimate company and I thought they were looking after the investment."

- Your SIPP was set up in April 2012 and your investment in Store First was made on 5 November 2012. Were you aware that you were still free to choose whether or not to invest in Store First after the SIPP had been set up?

"No"

- On 2 October 2012, you signed a Members Declaration & Indemnity (the indemnity) which included the following statement "I am fully aware that this investment is an Alternative Investment and as such is High Risk and / or Speculative". Did you read the indemnity before signing it? What does this indemnity mean to you in your own words?

"I can't remember reading this document before signing it. After looking Careys up, I was happy they were a legitimate company and I trusted them. I do not understand what that statement means now, so would not have understood at the time."

Carey's submissions

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 S.

- Carey acts as the administrator only of Mr S's SIPP. Mr S 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. As an execution only business, Carey would have been in breach of COBS 11.2.19 had it not followed the signed instructions given to it by Mr S.

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

- Carey did not suggest or recommend the Store First investment to Mr S. It is not responsible for the performance or current market value of his storage units.

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

- Carey carried out an internal investment review and due diligence on Store First 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 S's investment.

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 with Carey on 20 March 2012.

- Carey first became aware 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).

- Carey thinks it is likely that the lack of response to its request for copies of the passports of the directors of CL&P and accounts 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 were high risk.

In relation to its due diligence on introducers Carey highlights that it made changes following the regulator's Thematic Review in September 2009 and adherence to treating its customers fairly and has told us:

"*In the early days CPUK* [Carey] *accepted execution only and advised business and there was no specific requirement for non regulated introducers. In late 2011 we reviewed our internal processes and as good practice implemented a combined Non Regulated Introducer Profile and Terms of Business. The due diligence process was improved, with company checks, accounts and affiliated companies also being reviewed and checks against sanctions lists.*

The non regulated introducer would sign the profile which confirmed that they had read and agreed to the Terms of Business. There is reference to this improvement in our process in the FSA letter dated 29 September 2011, following a visit to CPUK"

The investigator's view

Our investigator considered the complaint and concluded it should be upheld. He said, in summary:

- 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 were 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 should not 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 that Terence Wright was subject to a warning on the FSA's website.

- Carey's concerns were such that it actually stopped doing business with CL&P once it became aware of the warnings and incentives issue. Had it completed the relevant checks before accepting business from CL&P it ought to have concluded that it shouldn't enter into a relationship with it.

- It is not clear why Carey did not ask for accounts and identification documents at the outset, but only did this after the relationship had been ongoing for a number of months. The fact that CL&P failed to provide this information, despite reminders, was cause for concern. Had Carey asked at the outset and CL&P had failed to provide them, it should not have entered into a relationship with CL&P.

- The wording of the FSA warning about Terence Wright changed sometime between 2010 and 2013. However, the aim of the warning was clearly to highlight that this was an individual who parties ought to be wary of conducting business with, and that Terence Wright was "targeting" UK customers.

- Carey should have been concerned the agreement with CL&P signed in March 2012 wasn't signed by the directors of CL&P.

- Carey was concerned CL&P was offering "cash back" incentives to consumers in December 2011. And ultimately, Carey's concerns about CL&P were such that by 25 May 2012 it stopped doing business with CL&P completely.

- In this case Mr S has said that he received a payment of £2,000 from CL&P, when completing the transfer and investment. He understood it to be for transferring his pension. Given Mr S's level of experience in pensions and investments, he did not think that this would, necessarily, have led him to think that something was wrong.

- And the fact remains that Carey had been aware that incentives were being offered by CL&P before it passed Mr S's money for investment. This ought to have raised serious questions about the conduct of CL&P and the quality of the business it was bringing about. If CL&P was offering consumer's incentives that called into question its integrity.

- Carey put some reliance on the indemnity signed by Mr S. But it should not have accepted his application at all, so should not have required him to sign any documents. And asking Mr S to sign the indemnity did not mean it was fair and reasonable to proceed with Mr S's investment instructions.

Carey's response to the investigator's view

Carey did not accept the view. It said, in summary:

- In assessing the complaint, we must take into account the overarching context of the relationship that Carey has with its customers, including Mr S, being one of a self-invested personal pension scheme in which Carey acts on a strictly execution only/non-advised basis and is member-directed throughout. Carey is not permitted to, and does not, provide advice or otherwise comment on the suitability of investments or any other aspect of a customer's SIPP. Carey expressly states that all customers should seek independent financial advice from an adviser who is regulated by the Financial Conduct Authority.

- The fundamental consideration that underpins the view is the contention that had Carey identified that Mr Terence Wright was on the FSA's warning list and informed Mr S of this, then it should not have accepted business from CL&P, or Mr S would not have proceeded with the investment.

- There is a material difference between a warning detailing that you should not deal with a particular individual and a notice informing you that an individual is not a regulated individual and that the ombudsman service and FSCS would not be available to you if you chose to deal with such individual. The wording in the FCA's notice published on 15 October 2010, which was available to Carey at the time it undertook its due diligence on CL&P, does not include any such warning stating that Terence (Terry) Wright is an individual to avoid or be wary of; the Notice 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. Carey reasonably considered at all times that CL&P was an unregulated introducer which was not providing advice.

- There is nothing in the notice published on 15 October 2010 to indicate that Terence (Terry) Wright is an individual to avoid as such, it is not fair or reasonable to state that on the basis of a notice that simply informs that Terence (Terry) Wright is not regulated by the FCA, that Carey should not have accepted this business.

- 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 on notice to stop accepting business from Mr Wright, is irrelevant in this case because Carey had already severed its Terms of Business some 18 months before the warning in 2013 regarding Mr Wright was published.

- The fact that the FSA later made express comment as to Mr Wright's conduct, but did not make any comment of a similar nature in the earlier wording plainly indicates that at the time that Carey accepted business from CL&P, the FSA did not believe Mr Wright to have been providing financial services or products without authorisation at that time, nor consider it necessary to express any concerns in this regard.

- If the FSA did not consider there to be any cause for concern at the relevant time and there was no way through reasonable due diligence checks for Carey to establish any cause for concern, then plainly it is not fair or reasonable to have expected Carey to have rejected business from CL&P on this basis.

- COBS 11.2.19R, which deals with execution only business and was in force at the relevant time, stated as follows:

  "Whenever there is a specific instruction from the client, the firm must execute the order following the specific instruction.

  A firm satisfies its obligation under this section to take all reasonable steps to obtain the best possible result for a client to the extent that it executes an order, or a specific aspect of an order, following specific instructions from the client relating to the order or the specific aspect of the order."

- The significance of this rule to an execution only business, such as Carey, cannot be overstated. Carey would have been in breach of COBS if it had not executed Mr S's specific instructions to make the investment.

- There is no rule, guidance, or requirement that a regulated business is prohibited or encouraged not to do business with an entity which is the subject of an FSA/FCA warning, solely by virtue of the fact that it is subject to that warning.

- The investigator's view amounts to a requirement for Carey to have refused business from a business associated with an individual on the basis that it should have been "wary of conducting regulated business with" him, despite the FSA/FCA not having made such a comment, prohibiting businesses from dealing with Mr Wright, or having taken any action against him.

My provisional decision

I issued a provisional decision in October 2020. I provisionally concluded it was fair and reasonable to say Carey should not have accepted Mr S's application from CL&P and, failing that, it should not have accepted his request to invest in Store First made in October 2012.

My provisional findings are attached to the decision, and form part of it, and the key points are summarised in my findings below – so I will not repeat them here.

Carey's response to my provisional decision

Carey did not accept my provisional decision. I set out below a summary of what I consider to be the main points Carey made in its response. The list is not exhaustive. However, before making this decision, I carefully considered Carey's response in full.

The first section of Carey's response dealt with what it describes as the scope of its duty. This focussed on the relevant considerations I identified in my provisional decision and my finding on what, acting fairly and reasonably, Carey ought to have done by way of due diligence on CL&P and Store First, by reference to a number of court cases, the contract between Carey and Mr S and (in its view) my departure from the law. On these points, Carey said, in summary:

- The decision cites *R (British Bankers Association) v Financial Services Authority* and *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* but largely ignores the decision in *Adams v Options UK Personal Pensions LLP* (formerly Carey Pensions UK LLP), notwithstanding that Carey was also the defendant in Adams and that the facts of that case were effectively identical to those in the present complaint.

- The decision also fails to explain why it reaches a different conclusion to that reached by the High Court in *Adams v Carey.*

- The decision seeks to impose on Carey a duty of due diligence, in particular a duty to decide whether to accept or reject particular investments and/or referrals of business. However, my construction of the Principles is flawed, it is neither fair nor reasonable to determine Mr S's complaint by reference to the regulatory publications mentioned, and Carey was not under the duty of due diligence that the decision seeks to impose.

- A contravention of the Principles cannot in itself give rise to any cause of action at law.

- As made clear in Adams at [paragraph 163], reports, guidance and correspondence issued after the events at issue cannot be applied to Carey's conduct at the time. It follows that the 2012 thematic review, 2013 SIPP operator guidance and 2014 "Dear CEO' letter are of no relevance. In any event, regulatory publications of the type I refer to cannot found a claim for compensation in themselves and do not assist in construction of the Principles.

- Regulatory publications cannot alter the meaning of, or the scope of the obligations imposed by, the Principles (Adams paragraph 162). Thus, if there was no obligation imposed on Carey by the Principles to consider and act on the suitability of the SIPP or the underlying investment, the publications to which the decision refers cannot impose such a duty.

- The 2009 thematic review does not, in fact, provide "guidance" in any meaningful sense and does not claim to do so, and it is certainly not statutory guidance. The 2009 thematic review in fact does little more than highlight some "examples of measures" that "SIPP operators could consider, taken from examples of good practice that [the FSA] observed". Moreover, many of the matters which the thematic review invites firms to consider" are plainly directed at firms providing advisory services, not firms, such as Carey, providing execution-only services.

- Even if the 2009 thematic review had been statutory guidance made under FSMA s.139A , the breach of such statutory guidance would not give rise to a claim for damages under FSMA s.138D.

- Indeed, the FCA's Enforcement Guide deals with the status of statutory guidance as follows: "*Guidance is not binding on those to whom the FCA's rules apply. Nor are the variety of materials (such as case studies showing good or bad practice, FCA speeches and generic letters written by the FCA to Chief Executives in particular sectors) published to support the rules and guidance in the Handbook. Rather, such materials are intended to illustrate ways (but not the only ways) in which a person can comply with the relevant rules*."

- In light of the matters outlined above, it is submitted that it would be neither fair nor reasonable for me to determine Mr S's complaint by reference to the FCA publications referred to in the decision and, indeed, that to do so would only exacerbate the problem referred to in paragraph 73 of *R (on the application of Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service* [2017].

- The High Court held in Adams that the duties imposed by the COBS Rules cannot all apply to all firms in all circumstances.

- Contrary to COBS, however, my decision seeks to impose on Carey a duty of due diligence that it does not in fact owe. It seeks, in effect, to override COBS careful allocation of duties between different types of firm conducting different types of business, and to impose duties on Carey in addition to those provided for under COBS, by means of a generalised appeal to the Principles.

- If under the Principles Carey really had had the obligations of due diligence that are set out in the decision, and had acted in accordance with them, it would have been required to engage in the activity of advising on investments, and so place itself in contravention of its regulatory permissions. Hence the importance of the contractual documentation governing the arrangements between the parties considered below.

- However, the very basis on which I propose that Carey should have rejected Mr S's application and request is that it should have concluded that the investment was in fact unsuitable, and notified Mr S accordingly.

- The relationships between Carey, Mr S, CL&P and Store First are the same as in Adams; and the judge in Adams found that "*at all material times…* [Carey] *was clear about the limits of its role, the role of CLP and the role of the investor. Further, it seems to me that* [Carey] *put in place appropriate documentation to ensure that each of the three knew and understood the limits of their role in the overall process*".

- In light of these findings, the judge in Adams went on to hold:

    - That in order to identify the extent of the regulatory duties imposed on Carey, "*one has to identify the relevant factual context*" and that "*the key fact… in the context is the agreement into which the parties entered, which defined their roles in the transaction*" [paragraph 148];
    - That "*there is a very plain inconsistency between the contract which was entered into between it and the claimant and the duties* [under COBS 2.1.1R] *which the claimant now suggests that the defendant owed to him*" [153];
    - That "*there was…* [no] *duty on* [Carey]*… to consider the suitability of appropriateness of a SIPP or the underlying investment. The contract between* [the parties] *makes that clear*" [157]; and
    - That "*a duty to act honestly, fairly and professionally in the best interests of the client, who is to take responsibility for his own decisions, cannot be construed… as meaning that the terms of the contract should be overlooked, that the client is not to be treated as able to reach and take responsibility for his own decisions and that his instructions are not to be followed*" [154].

- It is also notable that in Adams the FCA agreed that the function of a firm, as determined by its contract with an investor, would govern what it would be required to do in order to comply with its duties under the FCA Handbook.

- I appear to have ignored, or to have placed insufficient weight on, the fundamental fact of the parties' contractual arrangements, and on the clear demarcation of roles and responsibilities thereunder, and consequently to have constructed due diligence obligations for Carey to which it was not in fact subject.

- The indemnity that Mr S signed was only one of several documents that constituted the contract between the parties. The other documents comprise: the SIPP application form, a letter of authority, Carey's terms and conditions, a key features document, and the SIPP rules. The relevant provisions of these documents all made clear that Carey was acting on an execution-only basis. Notwithstanding their importance, the PD makes no reference to these documents whatsoever.

- Further, in suggesting that, notwithstanding the clear terms of the relevant contractual arrangements, Carey owed obligations of due diligence under the Principles, the reasoning of the decision runs wholly contrary to that in Adams, in which, as noted above, it was held that Carey's duties under the regulatory regime fall to be construed in light of its contractual arrangements. However, the decision only acknowledges this divergence in passing, and only advances two brief justifications for it, both of which are misconceived.

- The decision refers to paragraph 154 of Adams. The clear import of the judge's conclusion is sought to be avoided through the finding that, regardless of the relevant contractual arrangements, Carey should have concluded that Store First was an inappropriate investment and refused to accept Mr S's application. Again, however, this is to misapprehend the relationship between the Principles and Carey's contractual arrangements with Mr S. The latter, as set out in Adams, reflect the legal basis upon which Carey – like other similar firms – conducted its business: the concept of execution-only services is well known in the financial services context, as is reflected in the case law (see Adams paragraph 136), one of the reasons clients seek the services of execution-only SIPP providers being that they do not wish to pay the higher charges of advisory pension providers. To seek to use the Principles, notwithstanding this factual context, to impose on Carey the duties of due diligence set out in the decision, is both artificial and illegitimate.

- The decision refers to the judge's finding in Adams that the claimant would have proceeded with his application in any event, on which ground the decision is purportedly distinguished. However, the claimant's motivation in Adams was only a secondary basis on which the judge reached his decision, and one which in any event went to the question of causation rather than the scope of Carey's duties: Adams [paragraph 160]. It does not and cannot mean that the findings in Adams as to the effect of the contractual arrangements between the parties is somehow irrelevant or inapplicable to Mr S's complaint; on the contrary, these arrangements are of fundamental importance.

- Mr S says, and I appear to have accepted, that he does not think he read the wording of Carey's indemnity, and that he would not have understood it even if he had. That is not good enough.

- It is well established that a reasonable person is expected to read his correspondence: *Webster v Cooper & Burnett* [2000]. Consistently with this principle, the judge in Adams held that the claimant had to take responsibility for his actions in contracting with Carey. So must Mr S here. If Mr S did not in fact trouble himself to read the wording of the contractual documentation that he signed (and, as submitted below, absent oral exploration of Mr S's evidence, this is not accepted by Carey), that cannot be laid at Carey's door. Contrary to the requirements laid down in *R (on the application of Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service*, I fail to explain the decision's divergence in this regard from both Webster and Adams; indeed, the former case is not even cited.

- The indemnity was drafted in plain, simple English. There was no uncertainty as to its meaning, and Mr S has no basis for suggesting that, if he had read it, he would not have understood it.

- I should also have regard to the length of time between Mr S's first communication with Carey in April 2012 and his instruction to Carey to proceed with his investment in October 2012. Those six months allowed him ample time to read and digest all relevant documentation, to carry out any research he wished and to query anything if he had concerns. He could have changed his mind had he wished. But he did not.

- On the contrary, Mr S's own evidence is that he conducted such research as he considered necessary before proceeding with his investment, demonstrating that, in accordance with the terms of his contract with Carey, he understood that the investment was his own decision, and that he took responsibility for it.

- It follows that, in construing the ambit and application of the Principles, there is no reason not to take the parties' contractual arrangements into account; on the contrary, and in accordance with Adams, they must be. Had I had proper regard to them, I should and would have found that Carey's duties to Mr S extended no further than those owed to the claimant in Adams and, accordingly, that it is neither reasonable nor fair for Carey to pay Mr S compensation.

- At Adams paragraph 149 the judge held that, in construing Carey's regulatory obligations, regard should be had to FSMA s.5(2)(d): "*I also view the 'consumer protection objective' as relevant in ascertaining the duty* [imposed on Carey]*, even though the section of FSMA which contains it is aimed at the FCA itself. The provision requires the FCA, in securing an appropriate degree of protection for consumers, to have regard to, among other things, 'the general principle that consumers should take responsibility for their decisions'. In this case those decisions, as between the claimant and the defendant, are set out in the documents which comprise the contract between them*."

- The FCA did not disagree with this approach. Nor is there anything unusual about the FCA's stance in this regard: PRIN 1.1.2G states that, "*The Principles are a general statement of the fundamental obligations of firms… under the regulatory system… They… reflect the statutory objectives*". Those statutory objectives include the consumer protection objective: see Kerrigan v Elevate Credit International Limited at [30]-[31].

- However, the decision fails to have regard to FSMA s.5(2)(d), and to the authority of Adams and Kerrigan in this respect, and offers no justification for this failure.

- The conclusion reached in the decision as to the scope of Carey's duties is the same as the position advanced by the claimant in Adams, as summarised by the judge at paragraph 140. As noted above, however, the judge unequivocally found against Mr Adams. The decision offers no explanation for its departure from this clear authority, from the general regulatory principle enshrined by FSMA s.5(2)(d), and indeed from the fundamental principle of freedom of contract. It enables Mr S to recover against Carey for losses flowing from non-contractual obligations which were utterly inconsistent with, and indeed contrary to, the express obligations in the parties' contractual arrangements. That can be neither fair nor reasonable.

Carey's response then goes on to address the findings I made in relation to the due diligence Carey carried out, as follows (in summary):

CL&P and the "cashback" paid to Mr S

- No breach can arise on Carey's part simply by virtue of its dealing with unregulated introducers. The regulatory regime has never prohibited unregulated introducers from connecting clients with SIPP providers, and neither the FSA nor the FCA have ever sought to prohibit SIPP providers from accepting business by this route. This was made very clear in Adams at paragraphs 23, 78 and 95. Insofar as this has enabled low quality underlying investments to be placed within execution-only SIPPs, that is the consequence of the regulatory regime. It would be unfair and unreasonable to place the liability for losses flowing from such investments on the execution-only SIPP provider. That, however, is precisely what the decision seeks to do.

- Given the proper scope of Carey's regulatory duties, as established in Adams and as considered above, there can also be no breach on Carey's part as a result of its dealings with CL&P: in light of his conclusions on the scope of Carey's duties, the judge in Adams found that adequate due diligence had been carried out (see paragraphs 16 and 155).

- The decision concludes that Carey should have checked the FSA notice published on 15 October 2010 regarding Terry Wright, one of CL&P's directors and that, had it done so, this would have alerted them to likely problems with CL&P. However: the FSA notice was not entered onto World Check (the service used by Carey) until 24 October 2011, i.e. after Carey had carried out its checks on CL&P's other representatives and after it had started accepting business from CL&P. Even if Carey had at this stage run a check in respect of Mr Wright, therefore, it would not have identified the notice in question. Carey did not routinely check the FSA's list of unauthorised firms and individuals, nor was it under any obligation to do so.

- Moreover, and in any event, in the form in which it had been published in 2010, the notice stated only that Mr Wright was not regulated by the FSA and referred only to a business named Cash In Your Pension. There was no contradiction between the FSA notice and any statement provided by Mr Wright that he was not subject to any FSA action or censure. Even if, therefore, Carey's search of World Check had revealed the FSA notice, there is no reason this would necessarily have led Carey to conclude at the time that it should not enter into business with CL&P.

- The decision says that CLP's promises to clients of cashback payments should have put them on notice. However, Carey was not aware until May 2012 that these payments were being offered as cash incentives (at which point it terminated the relationship with CLP), its understanding being that they were rental income payments into clients' SIPPs.

- There is no reason Carey should have known that Mr S had been promised or received any cash inducement. He confirmed in his member declaration that he had not.

- While cash inducements contravene HMRC rules, they have no bearing on the suitability or otherwise of the investment at issue – and it is the failed investment that is the subject of Mr S's complaint. He is not complaining that he has suffered tax charges.

- Indeed, there is nothing unlawful about paying cash back to an investor. It is just, at worst, potentially tax inefficient. The judge in Adams did not consider that CL&P's promise of a cash inducement to Mr Adams rendered Carey in breach of any regulatory duty. I have again failed to explain why I reached a different view.

- The decision says Carey should have met its own standards and checked CL&P's accounts before accepting business from it. However, as the decision notes, the standards in question were only set in late 2011. Shortly thereafter, in March 2012, Carey duly requested accounts from CL&P and, when they were not forthcoming, in May 2012 terminated the relationship.

- By the time of the termination, the involvement of CL&P in Mr S's transaction with Carey had ceased. It is accordingly submitted that there was nothing unreasonable about Carey's conduct in this regard.

- The decision notes that Carey severed its relationship with CLP in May 2012 and finds that it should have communicated this to Mr S. However, there is no reason the issues that were discovered with CL&P should have put Carey on notice that there was any issue with the underlying investment with Store First. Carey dealt with numerous introducers and regulated advisers who were introducing/advising clients in relation to Store First. It had no reason to suspect that, just because there were issues with CL&P, which Carey only belatedly discovered, there might be any particular issue or risks for clients in respect of the underlying investment itself.

- Moreover, Carey did not contact Mr S regarding the severance of its relationship with CL&P because CL&P were introducers only and, in accordance with the contract between the parties, Carey's relationship with Mr S was direct.

Store First

- Given the proper scope of Carey's regulatory duties, as established in Adams, there can be no breach on Carey's part as a result of its dealings with Store First.

- No breach arises on Carey's part simply by virtue of Store First's status as a high-risk investment. As the judge found in Adams (at paragraphs 158 to 159), the fact that Store First was high risk did not make it manifestly unsuitable. The suitability of a high-risk investment depends on the particular financial circumstances of the particular customer and his or her attitude to risk: and Carey did not know Mr S's financial position or his attitude to risk and, as an execution-only SIPP provider, was under no regulatory obligation to ascertain these details. Thus, even if it was an unsuitable investment for Mr S, that was not manifest or obvious to Carey.

- Indeed, it appears that the FSA at the time acknowledged this: in Adams (at paragraph 500 the judge referred to an internal Carey email of 20 May 2012, which noted Store First's statement that they had "confirmed they have been liaising with FSA regarding the investment and explaining to FSA the procedure and structure and FSA have not raised any concerns". Although the decision refers to this email, it wholly ignores this statement.

- Moreover, the judge in Adams found that Carey had carried out adequate due diligence on Store First. Carey carried out such due diligence as was required to ensure the investment met the applicable HMRC criteria, which is all Carey was required to do.

- Moreover, and irrespective of the true scope of Carey's duty, the criticisms made in the PD of Carey's due diligence on Store First are unfounded.

- Contrary to the findings reached in the decision, there is nothing in the company searches or internet research carried out by Carey, in the report it obtained from Enhanced Support Solutions or in the marketing material that Store First provided that, considered objectively, should have suggested any problem with Store First. The investment provided investors with the opportunity to own affordable commercial property, and to receive regular rental income. My findings are coloured by hindsight, in particular in that they read the SSA report of May 2014 back into the situation in 2012. However, the SSA report emphasises that "the analysis and opinions set out in this Note constitutes a judgment as of the date of the Note".

- Moreover, the SSA is a specialist storage industry association and its note is based on a report produced by Deloitte. It is entirely unrealistic to expect Carey, as a SIPP operator and administrator, to have had an equivalent level of knowledge and expertise to that possessed by SSA and Deloitte (let alone to have had this over two years before the SSA report was issued).

- If, contrary to the above, Carey had been in possession of such knowledge and expertise, had engaged in the level of analysis of Store First demonstrated by the SSA report, and had communicated the same to its clients, it would clearly have exceeded its regulatory permissions.

- As noted in the decision, Carey suspended investments in Store First in August 2012. This was a precautionary step in response to notification Carey had received of a tax investigation into Harley Scott Holdings, and Carey took this step on the basis that, although a separate entity from Store First, Harley Scott Holdings was also owned by the owner of Store First, Toby Whittaker. Having issued the suspension, Carey made enquiries of Store First's auditors who confirmed that Store First was not subject to any tax investigation. Carey also requested confirmation from Store First as to which of its investors were being paid a guaranteed income. In light of the responses received from Store First and its auditors, Carey lifted the suspension in October 2012. There was, accordingly, no reason for Carey not to proceed with Mr S's investment in Store First on 30 October 2012.

Finally, Carey's response addresses my findings on fair compensation, as follows (in summary):

Calculating compensation

- The correct approach to quantifying compensation in cases of the present kind was set out in Adams at paragraph 175, by reference to the decision in Rubenstein v HSBC Bank plc. The measure of compensation should be assessed "according to usual common law principles" for breach of contract or tort. The judge in Adams accordingly found that the claimant, had he been entitled to damages (which he was not), would have been entitled to "the difference between the value, at the appropriate point, of the cash fund which he transferred and value of the leases as ascertained by reference to the expert evidence…, and interest", emphasising that: (i) "the assessment would be undertaken as if this had been a claim for damages for negligent professional advice (from a valuer, solicitor or other advisor prior to entry into a property transaction) which a client relied on in making an investment decision in real property"; and (ii) accordingly, "there is no basis for calculating the award as if it were in some way to reflect an intended guarantee of the investment".

- By contrast, the decision proposes that Carey should calculate and pay compensation to Mr S on the basis of the difference between the likely value of [his] pension as at the date of the decision, had he left it where it was instead of transferring to the SIPP and the transfer value of the SIPP at the date of the decision (assuming the Store First investment to have no value but taking into account the cash back payment that Mr S received).

- In quantifying the loss of Mr S's investment by reference to the likely current value of his pension had he not transferred it, instead of as an investment in real property (on the basis of expert evidence as to the value of the Store First leases, and taking no account of hypothetical investment returns), the decision's proposed method runs directly contrary to that set out in Rubenstein and Adams. No explanation or justification for this difference in approach is offered.

Hearing request

In its reply to my provisional decision, Carey also made a request for a hearing. I have issued a response to that request separately.

The CMC's response to my provisional decision

In reply to my provisional decision the CMC representing Mr S simply said he accepted the decision – it made no comments on my provisional findings.

Further information provided by Carey

In light of Carey's submissions on its suspension of Store First in August 2012, we asked it to provide copies of all correspondence it had with Store First and/or its auditors, and copies of any internal file notes or meeting notes or emails on the subject. And to explain why it specifically asked about which Store First investors were being paid a guaranteed income.

The further evidence and explanation it provided covered the events which took place between 15 August 2012 and 27 September 2012. I have included the full detail of this in my above summary of the actions taken by Carey in relation to the Store First investment.

My findings

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

I would again like to assure both parties that I've looked at all of their submissions with care. In this decision I have again concentrated on the key arguments and evidence that are material to my determination of the complaint.

In reconsidering what is fair and reasonable in all the circumstances of this complaint, I have taken into account relevant law and regulations; regulators rules, guidance and standards; codes of practice; and where appropriate, what I consider to have been good industry practice at the relevant time. Having done so, I have not been persuaded to depart from my provisional findings as to what is fair and reasonable in all the circumstances of this complaint.

The Principles

In my view, the FCA's Principles for Businesses are of particular relevance to my decision. 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). And, I consider that the Principles relevant to this complaint include Principle 2, 3 and 6 which 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 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly."*

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

> *"The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The Specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular 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 of BBA Ouseley J said:

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

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

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

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

The BBSAL judgment also considers section 228 of Financial Services & Markets Act 2000 ("FSMA") and the approach an ombudsman is to take when deciding a complaint. The judgment of Jacobs J in BBSAL upheld the lawfulness of the approach taken by the ombudsman in that complaint, which I have described above, and included the Principles and good industry practice at the relevant time as relevant considerations that were required to be taken into account.

I’ve reconsidered whether *Adams v Carey* means that the Principles should not be taken into account in deciding this case. And, I remain of the view that it doesn’t. In *Adams v Carey*, HHJ Dight did not consider the application of the Principles and they did not form part of the pleadings submitted by Mr Adams. One of the main reasons why HHJ Dight found that the judgment of Jacobs J in BBSAL was not of direct relevance to the case before him was because “the specific regulatory provisions which the learned judge in Berkeley Burke was asked to consider are not those which have formed the basis of the claimant’s case before me.” So, *Adams v Carey* says nothing about the application of the FCA’s Principles to the ombudsman’s consideration of a complaint.

As outlined above, Ouseley J in the BBA case held that it would be a breach of statutory duty if I were to reach a view on a complaint without taking the Principles into account in deciding what is fair and reasonable in all the circumstances of a case. And, Jacobs J adopted a similar approach to the application of the Principles in BBSAL. I also note Carey does not say the Principles are not relevant *at all.* Instead it disagrees with my view of what they meant in practice – a point I return to below.

Carey has pointed out a contravention of the Principles cannot in itself give rise to any cause of action at law. That may be true. However, I am dealing with a complaint, not a cause of action, and what I am seeking to identify here is what is relevant to my consideration of what is fair and reasonable in the circumstances of this case. For the reasons I have given, I remain satisfied that the FCA’s Principles are a relevant consideration that I must take into account when deciding this complaint.

Regulatory publications

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.

I have again considered the relevance of these publications. I will first again set out material parts of the publications (although I have considered them in their entirety).

The 2009 Thematic Review Report

The 2009 report included the following statement:

“We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses (‘a firm must pay due regard to the interests of its customers 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."*

- *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).*

The later publications

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).*

In its response to my provisional decision Carey says the 2009 thematic review is not statutory guidance. That is a point I acknowledged in my provisional decision. I again acknowledge that the 2009 report (and the 2012 report and the *"Dear CEO"* letter) are not formal guidance (whereas the 2013 finalised guidance is). However, I remain of the view the fact that the reports and *"Dear CEO"* letter did not constitute formal (i.e. statutory) guidance does not mean their importance or relevance should be underestimated.

Carey says the 2009 thematic review does not provide "guidance" in any meaningful sense, does not claim to do so, and does not assist in the construction (I assume by this it means construing, interpreting, or explaining) of the Principles. I do not agree. At its introduction the report says:

In this report, we describe the findings of this thematic review, and make clear what we expect of SIPP operator firms in the areas we reviewed. It also provides examples of good practices we found.

And, as mentioned above, the report then goes on to provide "….*examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms"*

The report is therefore a *reminder* that the Principles apply and gives an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. The report set out the regulator's expectations of what SIPP operators should be doing and therefore indicates what I consider amounts to good industry practice at the relevant time. So I remain satisfied it is relevant and therefore appropriate to take it into account.

In its response to my provisional decision, when making its points about the regulatory publications, Carey has referred to *Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service*. However, whilst the judge in that case made some observations about the application of our statutory remit, that remit remains unchanged. And, as noted above, in considering what is fair and reasonable in all the circumstances of a case, I'm required to take into account (where appropriate) what I consider to have been good industry practice at the relevant time.

Carey also says many of the matters which the report invites firms to consider are plainly directed at firms providing advisory services, not firms, such as it, providing execution-only services. It has not specified which parts of the report it thinks are plainly directed at firms providing advisory services. But, again, I do not agree. I think the report is also directed at firms like Carey acting purely as SIPP operators. The report is *"very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses".* And the good practice examples quoted above are presaged by the "*We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice …."*

I also remain satisfied that Carey, at the time of the events under consideration here, thought the 2009 thematic review report was relevant and that it set out examples of good industry practice. The summary of Carey's approach to introducer due diligence (which I've summarised above), had the title "*The changes CPUK* [Carey] *introduced following the Thematic Review in September 2009 and adherence to TCF and 'Appropriateness'*". Given the importance Carey attached to the 2009 report at the time, it is surprising it now argues it is not a relevant consideration to what is fair and reasonable in all the circumstances of this case.

The remainder of the publications also provide a *reminder* that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and to produce the outcomes envisaged by the Principles. In that respect, these publications also go some way to indicate what I consider amounts to good industry practice at the relevant time. I therefore remain satisfied it is appropriate to take them into account too – although it is the 2009 report which is clearly of the most relevance to this complaint.

However, I do not think the fact that the later publications (i.e. those other than the 2009 Thematic Review Report), post-date the events that are the subject of this complaint mean that the examples of good industry practice they provide were not good practice at the time of the relevant events.

It is clear from the text of the 2009 and 2012 reports, (and the *"Dear CEO"* letter published in 2014), that the regulator expected SIPP operators to have incorporated the recommended good industry 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 had not changed.

The later publications 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 those Principles. I note Carey's point that the judge in the Adams case did not consider the 2012 thematic review, 2013 SIPP operator guidance and 2014 "Dear CEO' letter to be of relevance to his consideration of Mr Adams' claim. But it does not follow that those publications are irrelevant to my consideration of what is fair and reasonable in the circumstances of this complaint. I am required to take into account good industry practice at the relevant time. And, as mentioned, the publications indicate what I consider amounts to good industry practice at the relevant time.

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, Dear CEO letter and guidance gave non-exhaustive examples of good industry practice. 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.

To be clear, as I confirmed in my provisional decision, I do not say the Principles or the publications obliged Carey to ensure the investment in Store First was suitable for Mr S. It is accepted Carey was not required to give advice to Mr S, and could not give advice. And I accept the publications do not alter the meaning of, or the scope of, the Principles. But they are evidence of what I consider to have been good industry practice at the relevant time, which would bring about the outcomes envisaged by the Principles. As Carey notes from the FCA's Enforcement Guide, publications of this type "*illustrate ways (but not the only ways) in which a person can comply with the relevant rules".* And so it is fair and reasonable for me to take them into account when deciding this complaint.

It also may be true that the publications, like the Principles, are not a basis on which legal action can be taken. But, as noted above, I am dealing with a complaint, not a cause of action, and what I am seeking to identify here is what is relevant to my consideration of what is fair and reasonable in the circumstances of this complaint.

I would also add, that even if I agreed with Carey that any publications or guidance that post-dated the events subject of this complaint do not help to clarify the type of good industry practice that existed at the relevant time (which I don't), that does not alter my view on what I consider to have been good industry practice at the time. That is because I find that the 2009 report together with the Principles provide a very clear indication of what Carey could and should have done to comply with its regulatory obligations that existed at the relevant time before accepting any introduction from CL&P and/or allowing the Store First investment into the SIPP.

Ultimately, 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. And, in doing that, I'm looking to the Principles and the publications listed above to provide an indication of what Carey could have done to comply with its regulatory obligations.

What did Carey's obligations mean in practice?

In this case, the business Carey was conducting was its operation of SIPPs. I remain 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. I do not agree with Carey's assertion, in its response to my provisional decision, that it could not reject an introduction or an application to make a particular investment without contravening its regulatory permissions by giving investment advice. This seems completely at odds with how it acted in practice. Carey's response seems to ignore the fact that on 25 May 2012 Carey terminated its agreement with CL&P with immediate effect and let it know that it could no longer accept business from it. This was because despite previous assurances from CL&P to the contrary, Carey became aware that customers had been offered cash inducements. Similarly, on 5 April 2013, Carey's technical review committee decided to accept no further Store First investments because it had received a number of queries and concerns from its customers and other sources which had not been satisfactorily resolved and it acted in order to protect its customers. Although, I consider if Carey had undertaken an appropriate level of due diligence these actions should have been taken much earlier, it appears that in finally taking the necessary steps to protect its customers, Carey did not consider it was contravening its regulatory permissions by giving investment advice - and nor do I.

This response also seems contrary to the evidence of Carey's own understanding of its obligations and good practice at the time.

The regulatory publications provided some examples of good industry practice observed by the FSA and FCA during their work with SIPP operators including being satisfied that a particular introducer is appropriate to deal with.

As mentioned in my provisional decision, Carey told us "*In late 2011….. The due diligence process was improved, with company checks, accounts and affiliated companies also being reviewed and checks against sanctions lists".* And 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 clients to us to gain some insight into the business they carry out."*

So, long before the time of Mr S's application in April 2012, Carey understood and accepted its obligations meant that it had a responsibility to carry out due diligence on CL&P, to inform a decision on whether to accept an introduction of business from CL&P. Carey had set a standard for its introducer due diligence which it thought was consistent with good (or "best") practice at the relevant time and that, in turn, was consistent with its regulatory obligations.

I remain satisfied that, to meet its regulatory obligations, when conducting its business, Carey was required to consider whether to accept or reject particular referrals of business, with the Principles in mind. This seems consistent with Carey's own understanding – its submissions to us note that "*adherence to TCF"* is something it had in mind when considering its approach to introducer due diligence i.e. the question of whether it should accept business from a particular introducer.

It is also clear that Carey understood and accepted its obligations meant that it had a responsibility to carry out due diligence on the Store First investment too. As I set out later in this decision, Carey also set a standard for investment due diligence which it thought was consistent with good (or "best") practice at the relevant time. I remain satisfied that, to meet its regulatory obligations, when conducting its business, Carey was also required to consider whether to accept or reject particular investments, with the Principles in mind.

I note Carey's Terms and Conditions, which it highlighted in its response to my provisional decision, include the following:

"11. Investment instructions

11.1 *The trustee, as directed by us, will be involved, as outlined in this section, with the investment process. Investments are made at our discretion and we may refuse to secure or cash in or dispose of any investments for the following reasons:*
11.1.1 *your instructions are not confirmed to us in writing;*
11.1.2 *in our opinion making the proposed investment would give rise to a tax charge including, but not limited to, a taxable property charge, unauthorised payment charge, tax surcharge or scheme sanction charge, or where the proposed investment could be deemed to be a trading activity giving rise to income or capital gains tax;*
11.1.3 *in our opinion the proposed investment is unlawful, impracticable, contrary to a court order or contrary to legislation;*
11.1.4 *there are insufficient cleared funds available within your fund;*
11.1.5 *in our opinion the proposed investment could expose your fund and/or the scheme to liabilities your fund may not be able to meet;*
11.1.6 *it is shown, to our satisfaction, that you no longer have the capacity to enter in agreements or contracts due to physical or mental impairment and we have not received your valid power of attorney, or other legally acceptable document, to accept instructions on your behalf;*

11.2 *No investment can be completed until our approval has been granted. Where approval for an investment is sought by you, we will respond as soon as reasonably practicable based upon the extent of the enquiries we need to make to establish the acceptability of an investment. In some cases this may involve obtaining a professional valuation or opinion, the cost of which will be borne by you or your fund. Where an investment is not approved, we will inform you of this decision."*

I do not think the list of reasons why Carey might decline to accept an investment instruction is exhaustive. But it's clear that Carey understood it could, and should, consider whether to accept a particular investment instruction.

In its response to my provisional decision, Carey has made a number of references to its contract with Mr S (i.e. the nature of the relationship between it and Mr S). I have carefully considered all the documentation Carey refers to in its response. However, on this point, there is little more I can do than reiterate the basis on which my provisional decision was made - on the understanding that Carey acted purely as a SIPP operator - and to confirm this decision is made on the same basis. As mentioned above, I do not say Carey should (or could) have given advice to Mr S or otherwise have ensured the suitability of the Store First investment for him. So, I have not overlooked or discounted the basis on which Carey was appointed. And, this decision on what is fair and reasonable in the circumstances of Mr S's case, is made with all of those matters in mind.

All in all, I am satisfied that, in order to meet the appropriate standards of good industry practice and the obligations set by the regulator's rules and regulations, Carey should have carried out due diligence on CL&P to the sort of standard it has described in its submissions to us – which were consistent with good industry practice and its regulatory obligations at the time *and* carried out due diligence on the Store First investment which was consistent with good industry practice and its regulatory obligations at the time. And in my opinion, Carey should have used the knowledge it gained from that due diligence to decide whether to accept or reject a referral of business or a particular investment.

I am satisfied Carey's regulatory obligations could have been met in the way I describe without providing Mr S with advice – none of this amounts to a consideration of the suitability of an investment in Store First for Mr S personally. These are general considerations. And, as I've highlighted above, Carey did belatedly take action to reject any further referrals from CL&P and to accept no further Store First investments.

In my view, the contract between Carey and Mr S does not mean that Carey should not be held responsible for failing to comply with its regulatory obligations to carry out adequate due diligence on CL&P and the Store First investment which ultimately led to Mr S losing a significant part of his pension. This is especially true when Carey had obtained information many months before it facilitated Mr S's investment which led it to reject any further referrals from CL&P and had concerns about the Store First investment before it facilitated Mr S's investment. It would not be fair and reasonable to say the contract meant Carey could ignore all red flags and proceed with Mr S's business regardless.

For the remainder of my decision, I have adopted the main headings used in my provisional findings, as I revisit each point. As a reminder, my provisional decision forms part of this final decision.

Due diligence on CL&P

I have carefully revisited introducer due diligence, in light of Carey's response to my provisional decision. However, I remain of the same view as that set out in the provisional decision. As my provisional decision forms part of this decision, I will not repeat the full detail of my reasoning here. In summary, I said Carey failed to conduct sufficient due diligence on CL&P before accepting business from it and ought reasonably to have concluded that it should *not* accept business from CL&P, and ended its relationship with it before Mr S's application was made, because:

- From late 2011, in accordance with its own standards (as submitted to us), Carey should have carried out company checks on CL&P, reviewed CL&P's accounts, and checked "*sanctions lists*". These standards appear to be consistent with good industry practice and Carey's regulatory obligations at the relevant time.

- Carey ought to have known the FSA kept a list of alerts, relating to unregulated businesses, which were often based overseas. As a SIPP operator considering accepting business from an unregulated overseas firm, it should have been mindful of the FSA's list of alerts and it ought to have checked this list before proceeding with accepting business from CL&P.

- Carey ought to have undertaken sufficient enquiries into CL&P to understand who its directors were, and checked the FSA's warning list as part of its due diligence on CL&P. Had it carried out these checks before accepting business from CL&P it would have discovered that CL&P's director was Mr Terence Wright, and that he was on the FSA warning list.

- It is fair and reasonable to conclude that the FSA warning was a clear warning – an *alert* - relating specifically to Mr Terence Wright, providing links to guidance on consumer protection and warnings about scams.

- CL&P's director Mr Terence Wright's presence on the FSA warning list should have led Carey to conclude it should not do business with CL&P. I note this is a view which was held by Ms Hallett when she gave evidence to the court during the *Adams v Carey* hearing. Such a conclusion was the proper one it ought to have reached bearing in mind Carey's responsibilities under the Principles.

- The evidence clearly shows that Carey was on notice, before Mr S's application was received by it, that what CL&P had told it in December 2011 about cash incentives not being offered was not correct. Carey should have reacted promptly to this information – particularly given it knew it had been contacted by CL&P customers about cash incentives previously. Instead it continued to accept applications from CL&P – including Mr S's.

- Prompt action on the issue of cash incentives would have inevitably led Carey to discover that cash incentive payments were being offered by CL&P at that time, and that what CL&P had told Carey was not correct.

- If Carey had acted with a reasonable amount of diligence it would have discovered that CL&P was acting in a way which was, to use its own words, "*completely against all rules*" (see further below). And it would have known that CL&P was acting without integrity as it had not told it the truth when asked about cash incentives. In my view, the only fair and reasonable thing it should have done was to decide not to accept any further business from CL&P.

- It appears a request for CL&P's accounts was not made until 23 March 2012. Carey has told us it has no record of receiving the information and that this was a likely factor in its eventual decision to end its relationship with CL&P.

- It is fair and reasonable that Carey should have met its own standards, set in late 2011, and should have checked CL&P's accounts at the outset before accepting any business from it. If checks on CL&P's accounts had been attempted earlier, the fact that CL&P was unwilling to provide this information should have raised a red flag. And, if not receiving the accounts when requested was, (as Carey has submitted), a factor in ending its relationship with CL&P, it is fair and reasonable to conclude that if the accounts had been requested at the outset and CL&P had failed to provide them, it is unlikely Carey would have accepted any introductions from CL&P at all.

I am satisfied that the due diligence requirements that I set out above, and in my provisional decision, is the level of due diligence it is reasonable to conclude Carey was required to conduct on CL&P given its regulatory obligations, and in all the circumstances here.

I've set out below my consideration of what I consider to be the key points Carey has made in response to my provisional findings in relation to the due diligence obligations it had in respect of CL&P.

<u>The FSA Warning</u>

I accept Carey was not prohibited from dealing with unregulated introducers. But my finding is not that Carey should have declined to do business with CL&P solely because it was unregulated. My finding is based on what Carey knew or what it ought to have known about CL&P specifically at the time of accepting Mr S's application, and even more starkly in my view, what it knew at the time of processing his investment instruction when it had already terminated its agreement with this unregulated introducer. It should be remembered that CL&P's director was on the FCA's warning list, and, by the time Carey facilitated Mr S's investment in Store First, it knew that CL&P had been misleading it as to whether it had been offering inducements, and had terminated its relationship with CL&P.

In relation to the warning, in its response to my provisional decision, Carey says the FSA notice was not entered onto World Check (the checking service it used) until 24 October 2011 - after Carey had carried out its checks on CL&P's other representatives and after it had started accepting business from CL&P. And so, if it had run a check on Mr Terence Wright at the outset, this would not have revealed his entry on the FSA's warning list. Carey adds that it was under no obligation to check the list itself.

I remain of the view that Carey, as a regulated SIPP operator, ought to have known the FSA kept a list of alerts, relating to unregulated businesses, which were often based overseas. As a SIPP operator considering accepting business from an unregulated overseas firm, it should have been mindful of the FSA's list of alerts and, in compliance with its regulatory obligations, it ought to have checked this list before accepting business from CL&P.

I remain of the view that checking the warnings posted on the FSA's website is something that Carey should have done as a matter of course before it began accepting any business from CL&P. I consider this amounts to good industry practice and, I remain of the opinion it would have been fair and reasonable, and in accordance with its regulatory obligations, for such a check to take place *before* it entered into a relationship with CL&P.

So, if I accept that use of the World Check service to check Mr Terence Wright at the outset would not have revealed his entry on the list, this does not change my view. Carey should have checked the FSA's list. The fact that Carey chose to use a tool and the tool may have missed something doesn't mean it shouldn't be held responsible – for the reasons given, it should have checked the list itself. To my mind, the fact Carey now say that the tool they used wouldn't have picked up the warning in any event is irrelevant to my finding that Carey failed to undertake sufficient due diligence on CL&P and missed the fact that Mr Terence Wright was subject to an FSA alert.

Turning now to the warning itself, in its response to my provisional decision Carey says Mr Terence Wright's entry on the list, in the form in which it had been published in 2010, stated only that Mr Terence Wright was not regulated by the FSA and referred only to a business named Cash In Your Pension. And it points out there was no contradiction between the FSA notice and any statement provided by Mr Terence Wright that he was not subject to any FSA action or censure. On this basis, it says even if its search of World Check had revealed the FSA notice, there is no reason this would necessarily have led it to conclude at the time that it should not enter into business with CL&P.

I would again highlight that Carey's Chief Executive, Ms Hallett, gave evidence to the court during the *Adams v Carey* hearing (at Paragraph 60) which HHJ Dight summarised as follows:

"It was also brought to my attention that from October 2010 the FCA had published warnings about dealing with another director, Mr Terence Wright, who was not authorised under FSMA to carry out regulated activity. Ms Hallett accepted in cross examination that no check was made to see whether his name appeared on a regulatory warning notice on the FCA's website until May 2012. The relationship between the defendant and CLP was severed on 25 May 2012. She accepted that had she been aware of such a warning in 2010 the defendant would not have dealt with CLP."

Carey's response to the provisional decision appears to be completely at odds with this testimony of its Chief Executive.

In any event, I do not accept Carey's argument that the 2010 version of the FSA alert would not necessarily have led it to conclude that it should not enter into business with CL&P. For all the reasons given in my provisional decision, I remain of the view that the October 2010 alert was a clear indication that the regulator had serious concerns about the way Mr Terence Wright conducted his business and therefore should have put Carey on notice that it should not accept business from Mr Terence Wright.

The National Archive of the FSA website shows the description of the list on the FSA's website in August 2011 (when Carey's relationship with CL&P began) was as follows:

"Firms and individuals to avoid

We have a warning list of some unauthorised firms and individuals that we believe you should not deal with."

The regulator therefore described those featuring on the list as "*firms and individuals that we believe you should not deal with".* I consider that this supports my view that Carey should have been particularly circumspect before it agreed to do business operated by an individual who featured on that list.

I also remain of the view that the presence of Mr Terence 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. I think there is a contradiction between Mr Terence Wright's answer to Carey and his presence on the list. A censure is an expression of severe disapproval, and I think the FSA adding Mr Terence Wright to its list was exactly that. His being added to the list is also clearly action by the FSA. So Mr Terence Wright's answer to Carey was not consistent with the facts.

<u>The offering of cash incentives/inducements</u>

On the subject of the cash incentive, Carey says, in its response to my provisional decision:

- It was not aware until May 2012 that these payments were being offered as cash incentives, its understanding up until then being that they were rental income payments into clients' SIPPs. And once it became aware of the cash incentives, it terminated its relationship with CL&P.

- There is no reason it should have known that Mr S had been promised or received any cash incentive/inducement. He confirmed in his member declaration that he had not.

- While cash inducements contravene HMRC rules, they have no bearing on the suitability or otherwise of the investment at issue.

- Paying cash back to an investor is just, at worst, potentially tax inefficient.

Given the contemporaneous evidence and Carey's previous submissions on this point, it is surprising it now says that it did not think cash incentives were being offered until May 2012, and that it believes such incentives to be, at worst, tax inefficient.

As set out in my provisional decision, Carey spoke to CL&P in a conference call on 9 December 2011. And, Carey has told us that in that call CL&P:

"…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."

And a 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."

So, Carey's notes of the 9 December 2011 conference call between it and representatives of CL&P show they specifically discussed cash inducements and confirm that at that time, Carey considered such payments to be "*completely against all rules."*

So, in December 2011, Carey at least suspected cash incentives were being offered. And, as I found in my provisional decision, acting in accordance with its regulatory obligations and best practice, Carey ought to have carried out some independent investigation in order to get to the bottom of this issue. In my mind, it should have at least contacted customers introduced by CL&P to check whether they had been offered, or had received, a cash incentive/inducement.

I note that on 29 March 2012, a Team Leader at Carey sent an email to Ms Hallett, Carey's CEO, noting "this *is the second member this week to ask when are they getting their money."* The Team Leader at Carey clearly thought this was an issue serious enough to escalate to Carey's CEO.

I would reiterate that when Carey finally terminated its agreement with CL&P in May 2012, its email to CL&P said it had done this because *"Despite your assurances that no clients have been or will be offered inducements (monetary or otherwise) for making investments through their SIPPs with us, we have received enquiries as to when client can expect to receive their money and have today* [25 May 2012] *been informed by a new client that they are expecting circa £2,000 on completion of the Storefirst investment purchase*".

I also note that in Ms Hallett's follow up email to CL&P of 28 May 2012 she described cash incentives as "*not allowable as we have explained to you* [CL&P] *previously*."

Given the available evidence, I find it surprising that Carey now says it thought the payments were rental income being paid into its customers' SIPPs. This is the first time Carey has made this claim and it appears to be inconsistent with the evidence Carey has previously provided to us, which shows Carey knew – before it received Mr S's application – that CL&P was making direct cash payments to customers. The payments were therefore unauthorised payments, and Carey was clearly aware of that – hence its concern.

As noted above, Carey's own Terms and Conditions said it may refuse to make an investment if "*making the proposed investment would give rise to a tax charge including… unauthorised payment charge*". Again, this appears to be inconsistent with its response to my provisional decision – where Carey seems to be attempting to diminish the significance of a consumer becoming liable for an unauthorised payment charge, explaining it viewed such cash payments to customers as just, at worst, potentially tax inefficient. I think if an unauthorised tax charge was so insignificant then it is highly unlikely it would be included in Carey's Terms and Conditions as a reason to refuse to make an investment.

Taking account of the available evidence, I am satisfied that Carey suspected (and later knew) cash incentives were being paid, and – rightly, in my view – saw this as a significant issue at the time, even if its view on this has since changed.

I remain of the view that Carey should have taken prompt action in December 2011 which would ultimately have led to it discovering cash incentives were being paid or, failing that, taken prompt action in March 2012 when it did know cash incentives were being paid. And I remain of the opinion that such action ought to have led to Carey ending its relationship with CL&P before it received the application from Mr S. Not least because its awareness of such payments meant it would have known that CL&P was acting without integrity – as it had not told it the truth when asked about cash incentives in December 2011.

I note that in its response to the provisional decision Carey says it was not aware until May 2012 that payments were being offered as cash incentives (at which point it terminated the relationship with CLP). However, the available evidence shows Carey knew in March 2012 what it knew in May 2012. And arguably what it ought to have known in December 2011. On that basis, I consider it ought to have ended the relationship sooner. But, in any event, it does not dispute it knew in May 2012 and, notwithstanding what it now says about the significance of cash incentives, it appears to accept this was reason to end the relationship – at a time which predates the completion of Mr S's application.

<u>The request for CL&P's accounts</u>

In response to my provisional findings on its request for a copy of CL&P's accounts, Carey says the standards I mention were only introduced in late 2011. And that shortly thereafter, in March 2012, it requested accounts from CL&P and, when they were not forthcoming, terminated the relationship in May 2012.

I do not agree that March 2012 is "shortly" after Carey introduced the standards in late 2011. Or that it was fair and reasonable to wait until May 2012 to terminate the relationship given the number of red flags that should have warned Carey that there was a significant chance of consumer detriment by continuing to accept business from CL&P.

Carey also now appears to accept this was a valid reason to terminate the relationship with CL&P (albeit belatedly, as with the cash incentives). And this again predates Carey's facilitation of Mr S's investment in Store First.

Conclusion on introducer due diligence

In conclusion I remain of the opinion that in the circumstances it is fair and reasonable for me to find that if Carey had carried out sufficient due diligence on CL&P, or acted on the information it subsequently received in a timely manner, it should not have accepted business (including Mr S's application) from CL&P.

Investment due diligence

I have carefully revisited investment due diligence, in the light of Carey's response to my provisional decision. However, I remain of the same view as that set out in the provisional decision. As my provisional decision forms part of this decision, I will not repeat the full detail of my reasoning here. In summary, I said Carey ought to have had significant cause for concern about the nature of the Store First investment because:

- The company searches were carried out on the promoter of Store First, Harley Scott Holdings Ltd, not Store First itself. In my view, I think it would have been fair and reasonable for Carey to have conducted some further basic searches, given there were factors in the report on Harley Scott Holdings Ltd which ought to have been of concern – namely the adverse comments for the previous three years, the CCJs, and the fact the business had recently changed its name.

- A simple internet search at the time Carey conducted its investment due diligence on Store First (i.e. in May 2011) would have revealed that Dylan Harvey (one of three previous names of Harley Scott Holdings Ltd, which at the time had the web address dylanharvey.com) and one of its directors, Toby Whittaker, were the subject of a number of national press reports, online petitions and proposed legal action, as a result of a failed property investment.

- There were aspects of the press reports which I think ought to have given Carey cause for concern. The company which had approached Carey about Store First – and on which Carey had conducted its searches (Harley Scott Holdings Ltd) – had recently been involved in a property investment scheme which had failed. It had also recently changed its name, and had been subject to a number of adverse comments in succession, following audit. All this ought to have given Carey significant cause for concern.

- Carey says that as part of its due diligence on Store First it obtained copies of Store First's marketing material. The material set out high fixed returns, and said these were guaranteed. However, the material does not contain any type of risk warning, or illustrations of any other returns. No explanation of the guarantees was offered, or the basis of the projected returns – other than Store First's own confidence in its business model and the self-storage marketplace.

- I note Carey considered a report by Enhanced Support Solutions (ESS). In my view, this report was of limited value. The report was cursory, and based only on some of the material Carey had regard to i.e. the marketing material and lease documents. As a result, I think Carey should have found it difficult to reconcile the view reached by ESS with the information available to it.

- The conclusion of the ESS report is inconsistent with the result of Carey's own company searches. The report also makes no comment on the obvious issues with the marketing material. So, I don't think Carey could have taken any comfort from the ESS report or attached any significant weight to it.

- In my opinion, there were a number of things about the marketing material which ought to have given Carey significant cause for concern and which should have led it to have drawn similar conclusions to those later reached by SSA UK (on the basis of a report by Deloitte LLP) and the Insolvency Service. Namely, that there was a significant risk that potential investors were being misled.

- Carey should not have overlooked the fact that Store First appeared to be presenting the investment as one that was assured to provide high and rising returns, was underwritten by guarantees, and offered a high level of liquidity together with a strong prospect of a capital return - despite the fact that there was no investor protection associated with the investment and that, in Carey's own words, "*there is no apparent established market"* for the investment and *"the investment is potentially illiquid"*

- Store First had no proven track record for investors and so Carey couldn't be certain that the investment operated as claimed. Carey should also have been concerned about a guarantee offered by a new business with no track record (and promoted by a business with a questionable one).

- I think, in light of this, Carey should have been concerned that consumers may have been misled or did not properly understand the investment they intended to make.

- I think all of this should have been considered alongside the fact the investment was being sold by an unregulated business, which was clearly targeting pension investors. In my opinion, it is fair and reasonable to find that Carey ought to have concluded there was an obvious risk of consumer detriment and it should at least have done more to understand the Store First investment before allowing it into its SIPP.

- Looking beyond Carey's initial due diligence – which, for the reasons I have set out, ought to have given it significant cause for concern – the available evidence shows that Carey was aware of other causes for concern in relation to Store First by the time it accepted the investment into Mr S's SIPP on 30 October 2012.

- Based on the available evidence, it appears that on 20 May 2012, Carey became aware that Store First was paying commission of 12% to CL&P. Given how the investment was being marketed, I think the payment of such a high level of commission to an unregulated business ought to have given Carey very serious cause for concern. And I think Carey also ought to have been concerned about how Store First was funding such levels of commission alongside guaranteed income payments and guaranteed buy backs. It calls the nature of the Store First investment into serious question.

- It also seems that Carey became aware of unspecified (at the time of my provisional decision) issues with Store First in August 2012 (and possibly earlier) which were of sufficient concern for it to suspend acceptance of the investment. And it seems Carey knew of concerns expressed by the FSA about loans to Mr Toby Whittaker by Store First. Although it is not clear at the time of my provisional decision) if the latter pre-dates Mr S's investment.

- Carey facilitated Mr S's investment in Store First on 30 October 2012. This was after it had already suspended acceptance of the investment because of concerns it had identified. It appears the suspension must have been lifted at some stage – although at this time Carey has provided no explanation for why or when it was lifted at (again this finding was based on what was known at the time of my provisional decision).

I've set out below my consideration of what I consider to be the key points Carey has made in its response to these findings.

<u>The high-risk nature of Store First</u>

In its response to my provisional decision, Carey says no "breach" arises as a result of Store First being high-risk. It says that being a high-risk investment does not make it manifestly unsuitable – instead suitability of a high-risk investment depends on the particular financial circumstances of the particular customer. And, Carey says it was not in a position to make an assessment of that in the case of Mr S.

I accept these points. I do not say that Carey ought to have reached the conclusion that an investment in Store First was unsuitable for Mr S. And I am also not saying that Carey should not have allowed the Store First investment into its SIPP because it was high risk. Instead, it is my fair and reasonable opinion that there were things Carey knew or ought to have known about the Store First investment which ought to have led Carey to conclude it would not be consistent with its regulatory obligations or good practice to allow it into its SIPP. Or to at the very least have had significant concerns about the investment – which it ought to have considered alongside what it knew, or ought to have known, about CL&P.

I note Carey says it received a statement (I assume in May 2012, as its internal email dates from that time) from Store First which stated "[Store First] *confirmed they have been liaising with FSA regarding the investment and explaining to FSA the procedure and structure and FSA have not raised any concerns*". But this significantly post-dates Carey's initial decision to accept Store First - which, in my opinion, was not a fair and reasonable decision. So things should never have got to this point.

In any event, if Carey's point is that this statement was a sufficient basis for it to accept investment instructions after May 2012 that is not a point I accept. I do not think the statement is sufficient to counter the points which should have given Carey cause for concern which I've set out in my provisional decision and summarised above. It also lacks detail. The fact the FSA had not at that point raised any concerns does not necessarily mean it thought there were no issues with Store First. I've also not seen sufficient evidence to conclude Carey took much comfort from this statement or, at least, thought it dealt with all the issues there might be with the investment. It seems Carey identified issues with the investment following this statement and it first suspended and later terminated its acceptance of it.

Carey says there was nothing in the company searches or internet research it carried out, in the report it obtained from Enhanced Support Solutions or in the marketing material that Store First provided that, considered objectively, should have suggested any problem with the Store First investment. I do not agree with this for the reasons I've set out in my provisional decision. In my opinion, the factors I have identified should have, when considered objectively, put Carey on notice that there was a significant risk of consumer detriment. And, without more evidence to ensure the investment was appropriate for its SIPP, I am satisfied that Carey should not have accepted the investment.

In any event, by the time Carey facilitated Mr S's investment in Store First in October 2012, Carey was aware of further concerns with the investment and had in fact already suspended it in August 2012.

<u>Applying the findings of the SSA report</u>

Carey says my findings are coloured by hindsight - that I've read the SSA report of May 2014 back into the situation in 2012. It also says it would not be realistic to expect it to have engaged in the level of analysis of the Store First investment undertaken by the SSA report.

I do not say Carey should have identified all the issues the SSA report sets out. I only say that, based on the information available to Carey at the relevant time, it should have drawn a similar overall conclusion - that there was a significant risk that potential investors were being misled. I can appreciate Carey's concern about the use of hindsight. I do not say it ought to have foreseen all the issues which later came to light with Store First. But I am satisfied, on a fair and reasonable basis, that a significant risk of consumer detriment ought to have been apparent from the information available to it at the time. Carey was privy to a number of "red flags" at the time it made the decision to accept the investment – and, acting in accordance with its regulatory obligations, and being mindful of the fact that this investment was being introduced by an unregulated introducer, these ought to have led it to the conclusion Store First was not an investment it should allow into its SIPP.

<u>The suspension of Store First</u>

In my provisional decision, I noted that Carey facilitated Mr S's investment in Store First after it had already suspended the investment. I said that acceptance of the investment must have been lifted at some stage, but noted Carey had provided no explanation of why or when it was lifted. In its response to the provisional decision, Carey explained that it suspended investments in Store First in August 2012 as a precautionary step after it received notification that Harley Scott Holdings (a promotor of Store First) was subject to a tax investigation.

Carey says it subsequently made enquiries of Store First's auditors, who confirmed that Store First was not subject to any tax investigation. It added that it also requested confirmation from Store First as to which of its investors were being paid a guaranteed income. As noted above, it has since explained that the latter was done because:

"Following the monitoring of investors that held Store First, all of which we understood had applied for the investment as per the marketing material, the marketing material provided for a Title in a Leasehold property in the form of storage units with a 6 year leaseback and a guaranteed rental income. Despite the marketing material not providing any other option, we found that only a small proportion of Store First investors were receiving the rental income as expected and therefore we requested a list of all of our investors rental arrangements".

It says the responses received from Store First and its auditors meant there was no reason for it not to proceed with Mr S's investment in Store First on 30 October 2012.

However, I disagree that this was the appropriate conclusion for Carey to reach in the circumstances here. Based on the evidence Carey has provided in relation to the exchanges it had with Store First and its auditors in August and September 2012, I do not think this should have given Carey sufficient comfort to remove the Store First suspension.

The letter from Store First's auditors may have been sufficient to address any concern Carey had about Store First being subject to a tax investigation. But, as I have set out here and in my provisional decision, whether or not there was a tax investigation was not the only issue with Store First – and it seems from the evidence now available that Carey itself thought there were other issues too.

Carey says it understood the investment provided for a title in a leasehold property and a guaranteed rental income. However, Carey notes it had identified that only a small proportion of Store First investors were receiving the rental income as expected from the investment. Carey has provided an agenda for a meeting it had with Store First on 15 August 2012. This meeting – which predates the bulletin which refers to the tax investigation – included the agenda item "*Rental Income Process/Delays*" for discussion. Following that, on 27 September 2012, Store First sent Carey the list of "guaranteed rental" and "non-guaranteed rental" investors

The 15 August 2012 meeting agenda also includes the item and "*Sale Process/Delays*". So, it seems Carey had concerns that customers had not been receiving the rental income from the Store First investment they expected. And concerns about processes and delays, and that all these concerns pre-dated Mr S's investment in Store First.

Carey's CEO, Ms Hallett, also appears to have recognised the risk that customers did not fully understand the Store First investment they had made (or that they had not been given accurate information about it) when making the decision to lift the suspension and continue accepting the Store First investment into Carey's SIPP. As noted above, the 27 September 2012 Carey internal email from Ms Hallett said Carey should "*make our member declarations clearer re what option the clients have selected eg guaranteed and non-guaranteed to ensure there is no come back on us at a later date that they did not realise.*"

I note the indemnity that Carey requested Mr S sign before facilitating his investment in Store First does not include anything to alert him to this issue. So, in Mr S's case at least, it seems no steps were taken to ensure he understood what the Store First investment apparently offered.

I am satisfied that in the circumstances, Carey had further reasons to have significant concerns about the Store First investment before it proceeded with Mr S's investment instructions. It had suspended the investment after identifying factors it was concerned about, and I am not persuaded that it did enough to allay the risk factors it had identified before making the decision to lift the suspension and facilitate Mr S's investment in Store First.

It is clear that Carey had concerns about processes and delays. And, more starkly, it had concerns that its customers who had invested in Store First were not receiving the rental income as expected from the investment. I think this was a significant risk factor that Carey ought to have got to the bottom of before lifting the suspension it had placed on accepting the Store First investment into its SIPP. And, from the evidence Carey has provided, I am not satisfied that Carey did enough, in accordance with its regulatory obligations and best practice, to ensure that the Store First investment was being run as marketed to consumers, and thus making it appropriate in the circumstances to lift the suspension.

Conclusion on investment due diligence

In conclusion, I remain satisfied that Carey ought to have had significant cause for concern about the nature of the Store First investment from the beginning. And I think these concerns, in themselves, should have at the very least led it to be very cautious about accepting Store First and to think very carefully about the basis on which it should be accepted, mindful of its obligation to prevent consumer detriment. And its concerns ought to have increased in 2012, given what Carey later became aware of. Given the circumstances at the time of Mr S's application, I think the only fair and reasonable conclusion, based on what Carey knew or ought to have known at the time, is that Carey should not have accepted Mr S's application to invest in Store First. In my opinion, it ought to have concluded that it would not be consistent with its regulatory obligations, or best practice, to do so.

Overall conclusion on due diligence

I remain of the view that, had Carey done what it ought to have done, and drawn reasonable conclusions from what it knew or ought to have known, it should not have accepted either the application for Mr S's SIPP from CL&P or the Store First investment. So, I will now reconsider whether, notwithstanding this, Carey should fairly and reasonably have proceeded with Mr S's instructions.

Was it fair and reasonable in all the circumstances for Carey to proceed with Mr S's instructions?

I have carefully revisited this point, in the light of Carey's response to my provisional decision. However, I remain of the same view as set out in the provisional decision. Again, as my provisional decision forms part of this decision, I will not repeat the full detail of my reasoning here. In summary, my findings were:

- It was not fair and reasonable for Carey to have accepted Mr S's application from CL&P in the first place. So, Mr S's SIPP should not have been established and the opportunity to execute investment instructions or proceed in reliance on an indemnity should not have arisen at all.

- I do not think that Carey's argument on COBS 11.2.19R 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 or to execute the instruction to make the Store First investment.

- Carey ought to have been cautious about accepting Mr S's application even though he had signed an indemnity. There was no evidence of any other regulated party (other than Carey) being involved in this transaction. So very little comfort could have been taken from the declaration stating that Mr S had taken his own advice, and understood the risks.

- The Principles exist to ensure regulated firms treat their clients fairly. I consider there is a significant imbalance of knowledge between the parties which creates unfairness in the circumstances of this case.

- At the time of receiving Mr S's application and executing his investment instructions, Carey knew things that Mr S did not. It knew CL&P had been offering cash incentives and that funds may be vulnerable to a tax charge. It knew that one of the directors of CL&P was on the FSA's warning list. It also knew that because of CL&P's conduct it had terminated its relationship with it. And its concerns with the Store First investment were sufficient to lead it to suspend acceptance of the investment in August 2012.

- So, at a minimum, (setting aside what I say at the outset of this section about Carey not accepting the application from CL&P in the first place), Carey should have provided Mr S with the information it now possessed so he could make an informed decision about whether to proceed with the Store First investment or not.

- Carey itself appears to accept that it was necessary to contact its clients in order to inform them of the situation about the inducements and the possibility of a tax charge. Despite this, it did not contact Mr S to provide him with this important information.

- Mr S has told us that had he been made aware that Carey had ended its relationship with CL&P, he would have asked lots of questions of it in order to check whether it was safe to continue with the investment. And, in my view, it is unlikely that the questions Mr S would have asked Carey about CL&P would have yielded answers which gave Mr S confidence to continue dealing with CL&P.

- In *Adams v Carey*, the judge found that Mr Adams would have proceeded with the transaction regardless – he *"knew that it was a high risk and speculative investment but nevertheless decided to proceed with it, because of the cash incentive".*

- But, in this case, Mr S has told us he was told by CL&P that he was "guaranteed" returns. So, when he signed the indemnity, I am not persuaded that he did so with a full understanding of what high risk meant. Instead he was assured by what he had been told by CL&P and thought that the returns were "guaranteed".

- Another difference in this case is the influence of the cash incentive. The incentive was, in Mr S's words, a "bonus" – so I do not think it was a factor of significant influence. Rather it seems it was the prospect of high guaranteed returns which was the main motivating factor for Mr S.

- Based on the available evidence I find on balance that Mr S did not understand that his "*welcome bonus*" promised from CL&P was a "*monetary or other inducement for transacting this investment*". Rather, I accept his evidence that he understood the "welcome bonus" was essentially a thank you for investing so much money.

- In any event, even if I'd found that Mr S did understand the indemnity, it is relevant that by the time he'd signed it, Carey was aware that many of its clients were receiving inducements.

- In the indemnity itself, no mention is made to the possible consequences of accepting any sort of payment, or to this being something which was not allowed under the rules.

- In my opinion, asking Mr S to sign an indemnity absolving Carey of all responsibility, and relying on such an indemnity, when it ought to have known that Mr S's dealings with CL&P were putting his investment at significant risk was not fair and reasonable in all the circumstances.

- I note that the judge in *Adams v Carey* accepted Carey's evidence that notwithstanding Carey knowing that Mr Terence Wright was on the warning list, and that if it had known earlier it would not have dealt with CL&P at all, this was not a reason to decline to proceed with the transaction.

- However, in my opinion, this case is very different on the facts from that of Mr Adams. Once the facts were known to Carey, it is fair and reasonable to expect Carey to have explained the situation to Mr S as soon as possible. And, if it had done so, I am satisfied that Mr S would not have proceeded with the investment in Store First. And he would therefore not have lost his entire pension fund. Given the substantial delay in receiving the funds into the SIPP, Carey had ample time to bring the issues to the attention of Mr S.

In response to my provisional decision, Carey says that by the time it took the decision to terminate its relationship with CL&P, the involvement of CL&P in Mr S's transaction had come to an end. And, accordingly there was nothing unreasonable about it continuing with Mr S's application. It adds that it did not contact Mr S regarding the severance of its relationship with CL&P because CL&P were introducers only and, in accordance with the contract between the parties, Carey's relationship with Mr S was direct. Carey says that any issues with CL&P did not mean there were issues with the underlying investment, Store First.

However, in my opinion, it was not fair and reasonable in the circumstances for Carey to proceed with Mr S's transaction. The fact that CL&P's role of introducing the application had come to an end does not mean it was fair and reasonable for Carey to proceed, given everything it knew, without at the very least providing Mr S with the information it had and allowing Mr S to come to his own decision on whether or not he wanted to proceed in light of all the facts. I accept that CL&P's role was that of an introducer only. However, whatever CL&P's role, and whether that role had come to an end or not, Carey was privy to a number of reasons why proceeding with Mr S's application brought with it a significant risk of consumer detriment, and it failed to take even the minimal step of making Mr S aware of what it knew and allowing him to be given the choice of making an informed decision of whether or not to proceed.

I note Carey's point that it is well established that a reasonable person is expected to read their correspondence, and the indemnity was written in plain language. I consider this further below but, insofar as Carey's proceeding with Mr S's instructions is concerned, I remain of the view set out in my provisional decision. I do not think – even if Carey assumed Mr S did read the indemnity and understood it – that this was something Carey could take sufficient comfort from, or that it was fair or reasonable for it to ask Mr S to sign the indemnity at all, in the circumstances given the complete mismatch in the knowledge of the parties by the time it asked him to sign.

In summary, I remain of the view that once the relevant facts were known to Carey, it was required by its regulatory obligations, to ensure that it treated its customers fairly. And, in the circumstances, I am satisfied that this would have required Carey to either have stopped Mr S from proceeding any further with the Store First investment, or as an absolute minimum, to have explained the situation to Mr S as soon as possible and let him have the opportunity of making an informed decision whether or not to proceed. It simply was not treating Mr S fairly to carry on without informing him of the relevant facts. And, if it had done the latter, I am satisfied that Mr S would not have proceeded with the investment in Store First. And he would therefore not have lost his entire pension fund. I remain of the view that, given the significant time between the SIPP being opened and the investment made, Carey had ample time to bring the issues to the attention of Mr S.

Is it fair to ask Carey to compensate Mr S?

I have carefully reconsidered this point, in the light of Carey's response to my provisional decision. However, I remain of the same view as set out in the provisional decision. Again, as my provisional decision forms part of this decision, I will not repeat the full detail of my reasoning here. In summary, my findings were:

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

- Had Carey acted in accordance with its regulatory obligations and best practice, it is fair and reasonable in my view to conclude that it should not have accepted Mr S's application to open a SIPP introduced from CL&P. That should have been the end of the matter – it should have told Mr S that it could not accept the business. And I am satisfied, if that had happened, the arrangement for Mr S would not have come about in the first place, and the loss he suffered could have been avoided.

- I would reach a similar conclusion (i.e. that the loss he suffered could have been avoided) if Carey had terminated the transaction at a later stage once it was in possession of certain facts that meant it ought to have identified that there was a significant chance Mr S could suffer financial detriment and was in the position to prevent it. Or similarly, if Carey, had explained to Mr S the facts it had since learnt about both CL&P and the Store First investment, and allowed him to make an informed choice about whether to proceed or not.

- Had Carey explained to Mr S why it would not accept the application from CL&P or was terminating the transaction, I find it very unlikely that Mr S would have tried to find another SIPP operator to accept the business.

- In any event, I don't think it's fair and reasonable to say that Carey should not compensate Mr S for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found it did. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted the application from CL&P, or would have terminated the transaction before completion.

- I appreciate Mr S has told us he did not read the indemnity before he signed it, as he trusted Carey. And it was clearly unwise to sign a document without reading it. But, given what he has told us, I do not think it would have changed the course of things if he had read it. He trusted what he had been told by CL&P.

- For all the reasons I've set out, I'm satisfied that it would not be fair to say Mr S's actions mean he should bear the loss arising as a result of Carey's failings. I acknowledge Mr S was warned of the high-risk nature of Store First and declared he understood that warning. But, as I set out above, Carey failed to act on, nor did it share significant warning signs with Mr S so that he could make an informed decision about whether to proceed with the investment. And, in these circumstances, I am satisfied that Carey should not have asked him to sign the indemnity at all. And, for the reasons I have set out, I am satisfied that the application should never have been accepted in the first place, or alternatively, Carey should have put a stop to the transaction at a much earlier stage in the process.

In response to my provisional decision, Carey says that there is no reason why it should have known that Mr S had been promised or received any cash inducement, as he confirmed in his member declaration that he had not. It adds that Mr S had ample time to read and digest all the relevant documentation, to carry out any research he wished, and to query anything if he had concerns. And it points out that Mr S's own evidence is he conducted research on Carey before proceeding with his investment. Carey says this demonstrates that Mr S understood that the investment was his own decision, and that he took responsibility for it. As noted above, Carey has also said it is well established that a reasonable person is expected to read correspondence, and the indemnity was written in plain language.

Carey also points out that the judge in *Adams v Carey* held (at paragraph 149) that in construing Carey's regulatory obligations, regard should be had to section 5(2)(d) of FSMA (now section 1C). This section requires the FCA, in securing an appropriate degree of protection for consumers, to have regard to, amongst other things, the general principle that consumers should take responsibility for their own investment decisions.

I think it is important to reiterate here that had Carey acted in accordance with its regulatory obligations and best practice, it is fair and reasonable to conclude that in the circumstances it should not have accepted Mr S's application from CL&P to open a SIPP *at all*. And, in addition, given what Carey knew or ought to have known by the time it came to facilitating Mr S's investment in Store First in October 2012, it should not have proceeded with this transaction. This means it should never have asked Mr S to sign the indemnity – or at the very least, it should not have done so without informing him of the relevant information it had become aware of so that he was able to make an informed decision on whether or not to proceed with the investment.

I also think the evidence shows that Mr S proceeded in reliance on what CL&P had told him, rather than his own independent research, as Carey suggests. It seems from Mr S's comments, that he only looked into the Store First investment in more detail when things started to go wrong.

Finally, whilst I agree that the indemnity was written in relatively plain language, I think it needs to be viewed in context. Mr S clearly trusted CL&P and was reassured by what he had been told by it – in particular that the investment came with guarantees (something which Carey was aware of as it was set out in the Store First marketing material). So, the warning that Store First was "high risk" becomes essentially meaningless when it is given in the context of "guaranteed returns". It is difficult to reconcile these statements, and it is something Carey should have identified as highly vulnerable to a misunderstanding. Which is why I have reached the conclusion that Carey ought to have identified a real risk of consumer detriment and taken more care to treat Mr S fairly and, at minimum, ensured it had taken steps to help Mr S understand the risks. In my view, I am not satisfied that the indemnity was sufficient in the circumstances.

I did consider in my provisional decision whether it would be fair to say Mr S's actions mean he should bear the loss arising as a result of Carey's failings. And I remain of the view that it would not be fair to say that. I am mindful of section 5(2)(d) of FSMA, but it does not follow that it is fair and reasonable to say Mr S is responsible for the loss he has suffered simply because he ultimately made the decision to invest in Store First. In the circumstances of this particular case, I think the key point is that Carey was aware of important facts which it failed to disclose to Mr S when it should have been clear to Carey that there was a serious risk of consumer detriment. There was an imbalance of knowledge. And, for all the reasons I have given, I am satisfied Mr S would not have made the same investment decision had he been aware of those facts. This is, in any event, a secondary point, as I do not think that, if complying with its regulatory obligations and good industry practice, Carey should have accepted Mr S's application *at all,* and he would hence have been unable to enact his decision to transfer his pension into a SIPP and make the investment in Store First.

With all this in mind, I remain of the opinion that it is fair and reasonable in all the circumstances of this case to find that Carey is unable to rely on the indemnity that Mr S signed in order to avoid liability for the regulatory failings it has made in this case. And, I remain satisfied, for all the reasons given here and in my provisional decision, that it is fair and reasonable to conclude that Carey should compensate Mr S for the loss he has suffered to his pension.

Putting things right

Carey says that my proposal as set out in the provisional decision for how compensation should be calculated runs contrary to that set out in *Rubenstein v HSBC* and the Adams case. It suggests Mr S's loss should be calculated by reference to an investment in real property, rather than what his previous pension would be worth now.

FSMA and the DISP rules set out that a money award may be such amount as the ombudsman considers to be fair compensation for, (amongst other things) financial loss, whether or not a court would award compensation (see section 229 of FSMA and DISP 3.7.2R).

In this case, I have not seen any evidence that suggests Mr S would have made an alternative real property investment if Carey had refused to accept his application from CL&P or to invest in Store First. So Carey's proposed approach would not - in my view - be fair compensation for Mr S.

I am satisfied that Carey's failure to comply with its regulatory obligations and industry best practice at the relevant time have led to Mr S suffering a significant loss to his pension. And, my aim is therefore to return Mr S to the pension position he would now be in but for Carey's failings.

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

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

2. Take ownership of the Store First investment if possible.

3. Pay compensation for the loss into Mr S's pension. If that is not possible pay compensation for the loss to Mr S direct. In either case the payment should take into account necessary adjustments set out below.

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

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 S has suffered as a result of making the transfer

To do this, Carey should work out the likely value of Mr S's pension as at the date of this decision, had he left it where it was instead of transferring to the SIPP.

Carey should ask Mr S's former pension provider to calculate the current notional transfer value 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 likely to be a reasonable proxy for the type of return that could have been achieved by the sort of funds Mr S would have been invested in, had he not transferred to the SIPP.

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 S has suffered. The Store First investment should be assumed to have no value. Account should however be taken of the cash back payment paid out to Mr S.

2. Take ownership of the Store First investments

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 Carey is unable to take ownership of the Store First investment it should remain in the SIPP. I think that is fair because I think it is unlikely it will have any significant realisable value in the future. I understand Mr S has the option of returning his Store First investment to the freeholder for nil consideration. That should enable him to close his SIPP, if Carey does not take ownership of the Store First investment.

In the event the Store First investment remains in the SIPP and Mr S 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 S for loss he has suffered calculated in (1).

Since the loss Mr S has suffered is within his pension it is right that I try to restore the value of his pension provision if that is possible. So 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 S could claim. The notional allowance should be calculated using Mr S's marginal rate of tax.

On the other hand, Mr S may not be able to pay the compensation into a pension. If so compensation for the loss should be paid to Mr S 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 S should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mr S's marginal rate of tax in retirement. For example, if Mr S 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 S 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 S has been caused some distress and inconvenience by the loss of his pension benefits. This is money Mr S cannot afford to lose and its loss has caused him to lose all confidence in pension providers. I consider that a payment of £500 is appropriate to compensate for that upset.

interest

The compensation must be paid as set out above within 28 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 28 days.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 26 March 2021.

John Pattinson
Ombudsman

COPY OF PROVISIONAL DECISION

My provisional findings

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

I'd like to assure both parties that I've looked at all of their submissions with care. In this decision I concentrate on the key arguments and evidence that are material to my determination of the complaint.

In considering what is fair and reasonable in all the circumstances of this complaint, I have taken into account relevant law and regulations; regulators rules, guidance and standards; codes of practice; and where appropriate, what I consider to have been good industry practice at the relevant time.

The Principles

In my view, the FCA's Principles for Businesses are of particular relevance to my decision. 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). And, I consider that the Principles relevant to this complaint include Principle 2, 3 and 6 which 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."*

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

> *"The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The Specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular 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 of BBA Ouseley J said:

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

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

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

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

The BBSAL judgment also considers section 228 of Financial Services & Markets Act 2000 ("FSMA") and the approach an ombudsman is to take when deciding a complaint. The judgment of Jacobs J in BBSAL upheld the lawfulness of the approach taken by the ombudsman in that complaint, which I have described above, and included the Principles and good industry practice at the relevant time as relevant considerations that were required to be taken into account.

I've considered whether Adams v Carey means that the Principles should not be taken into account in deciding this case. And, I find that it doesn't. In Adams v Carey, HHJ Dight did not consider the application of the Principles and they did not form part of the pleadings submitted by Mr Adams. So, Adams v Carey says nothing about the application of the FCA's Principles to the ombudsman's consideration of a complaint.

As outlined above, Ouseley J in the BBA case held that it would be a breach of statutory duty if I were to reach a view on a complaint without taking the Principles into account in deciding what is fair and reasonable in all the circumstances of a case. And, Jacobs J adopted a similar approach to the application of the Principles in BBSAL. I am therefore satisfied that the FCA's Principles are a relevant consideration that I must take into account when deciding this complaint.

Regulatory publications

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 2009 Thematic Review Report

The 2009 report included the following statement:

"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses ('a firm must pay due regard to the interests of its clients and treat them fairly') insofar as they are obliged to ensure the fair treatment of their 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."*
- *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).*

The later publications

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. 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 ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications which set out the regulators expectations of what SIPP operators should be doing also goes some way to indicate what I consider amounts to good industry practice at the time, and I am therefore satisfied it is appropriate, to take them into account.

It is relevant that when deciding what amounted to have been good industry practice in the Berkeley Burke case, the ombudsman found that *“the regulator’s reports, guidance and letter go a long way to clarify what should be regarded as good practice and what should not.”*

I’m also satisfied that Carey, at the time of the events under consideration here, thought the 2009 thematic review report was relevant and it set out examples of good industry practice. The summary of Carey’s approach to introducer due diligence (which I’ve summarised above), had the title “*The changes CPUK introduced following the Thematic Review in September 2009 and adherence to TCF and ‘Appropriateness’*”.

Like the ombudsman in the Berkeley Burke case, I do not think the fact that the publications, (other than the 2009 Thematic Review Report), post-date the events that are the subject of this complaint mean that the examples of good industry practice they provide were not good practice at the time of the events.

The later publications 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 those Principles.

It is also clear from the text of the 2009 and 2012 reports, (and the *“Dear CEO”* letter published in 2014), that the regulator expected SIPP operators to have incorporated the recommended good industry 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 had not changed.

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, Dear CEO letter and guidance gave non-exhaustive examples of good industry practice. 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.

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. And, in doing that, I’m looking to the Principles and the publications listed above to provide an indication of what Carey could have done to comply with its regulatory obligations and duties.

What did Carey’s obligations mean in practice?

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 regulatory publications provided some examples of good industry practice observed by the FSA and FCA during their work with SIPP operators including being satisfied that a particular introducer is appropriate to deal with.

As mentioned at page 15 , Carey has told us "*In late 2011….. The due diligence process was improved, with company checks, accounts and affiliated companies also being reviewed and checks against sanctions lists".*

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 clients to us to gain some insight into the business they carry out."*

So, long before the time of Mr S's application in April 2012, Carey understood and accepted its obligations meant that it had a responsibility to carry out due diligence on CL&P. It had set a standard for its introducer due diligence which it thought was consistent with good (or "best") practice at the relevant time and that, in turn, was consistent with its regulatory obligations.

I am satisfied that, to meet its regulatory obligations, when conducting its business, Carey was required to consider whether to accept or reject particular referrals of business, with the Principles in mind. This seems consistent with Carey's own understanding – its submissions to us note that "*adherence to TCF"* is something it had in mind when considering its approach to introducer due diligence i.e. the question of whether it should accept business from a particular introducer.

It is also clear Carey understood and accepted its obligations meant that it had a responsibility to carry out due diligence on the Store First investment too. As I set out later in this decision, Carey also set a standard for investment due diligence which it thought was consistent with good (or "best") practice at the relevant time. I am satisfied that, to meet its regulatory obligations, when conducting its business, Carey was also required to consider whether to accept or reject particular referrals of business, with the Principles in mind.

All in all, I am satisfied that, in order to meet the appropriate standards of good industry practice and the obligations set by the regulator's rules and regulations, Carey should have carried out due diligence on CL&P of the sort of standard it has described in its submissions to us – which were consistent with good industry practice and its regulatory obligations at the time *and* carried out due diligence on the Store First investment which was consistent with good industry practice and its regulatory obligations at the time. And in my opinion, Carey should have used the knowledge it gained from its due diligence to decide whether to accept or reject a referral of business or particular investment.

Due diligence on CL&P

The actions Carey took – which were carried out after its relationship with CL&P began, rather than before it accepted business from CL&P – are set out in detail in the background sections above. So I will not repeat them here. However, I would note at this point that the actions Carey took, in addition to being taken *after* Carey began accepting business from CL&P, appear to have been taken on a reactive, piecemeal, basis.

In addition, the available evidence shows Carey did not meet its own standards when carrying out due diligence on CL&P. From late 2011, in accordance with its own standards (as submitted to us), it should have carried out company checks on CL&P, reviewed CL&P's accounts, and checked "*sanctions lists*". As I set out above, these standards appear to be consistent with good industry practice and Carey's regulatory obligations at the relevant time (although it is not clear what a check of "sanctions lists" would encompass). However, Carey did not - in practice - act in a way which was consistent with good industry practice and its regulatory obligations at the relevant time. I explain this in more detail below.

The FSA list

CL&P was an unregulated business, based in Spain, and was proposing to deal with the pensions of UK consumers. Carey ought to have known the FSA kept a list of alerts, relating to unregulated businesses, which were often based overseas. Carey has not explained what a search/check of “sanctions lists” entailed. But I think a check of such lists should have included the FSA’s list of alerts. In any event, as a SIPP operator considering accepting business from an unregulated overseas firm, it should have been mindful of the FSA’s list of alerts, and in compliance with its regulatory obligations, it ought to have checked this list before proceeding with accepting business from CL&P, whether it considered the FSA’s list of alerts to be a “sanctions list” or not.

At the relevant time, the FSA’s list featured warnings (“alerts”) about unauthorised individuals and businesses. And, in my view, checking the warnings posted on the FSA’s website is something that Carey should have done as a matter of course before it began accepting any business from CL&P. This is consistent with good industry practice as highlighted in the 2009 thematic review report and later documents. And, I find it would have been fair and reasonable, and in accordance with its regulatory obligations, for such a check to take place *before* it entered into a relationship with CL&P.

As part of its independent checks, Carey used a risk intelligence tool called World Check. I understand this is a tool which is internationally recognised and commonly used by businesses to carry out background searches. And, I assume its use was part of what Carey describes as searches when explaining the due diligence standards it introduced in late 2011, (which, in my view, if they had been implemented effectively, were consistent with good industry practice and in compliance with Carey’s regulatory obligations).

However, although Carey used the tool here, it failed to run checks on the appropriate persons at CL&P. On 20 September 2011 it ran checks on a Ms Adams and a Mr Lloyd. However, I understand that these individuals were only employees of CL&P and neither controlled nor managed CL&P. So, the fact that the checks run on these individuals did not raise any issues is of little, if any, value. It does not mean that Carey had met its regulatory obligations here. In my view, as a first step, Carey ought to have carried out sufficient due diligence so as to properly establish who the directors or individuals who controlled CL&P were. Only then would it be able to run checks on the appropriate persons.

As part of its due diligence process, Carey required CL&P to fill out a “non-regulated introducer profile” questionnaire. CL&P completed the questionnaire on 29 September 2011. The profile named the two directors of CL&P, one of which was Mr Wright. The profile made no mention of Ms Adams or Mr Lloyd. So, at this point, Carey was aware Mr Wright was one of the directors of CL&P. If Carey had run Mr Wright’s details through the World Check tool then, it is likely to have identified that he appeared on the FSA’s warning list. I note that it was over seven months before it finally did this, on 15 May 2012. And the result, as I set out below, flagged that there was an alert for a “Mr Terence (Terry) Wright” on the FSA’s list. And, the tool provided links to the entry on the list.

I note that the profile CL&P completed asked the question: “Are you and/or the Firm subject to any on-going FSA or other regulatory body review, action or censure.” And, Mr Wright answered “No” to this question. However, it was not sufficient, in my view, to simply ask the introducer a general question. Rather, I think Carey, acting fairly, with due regard to Mr S’s interests, should have carried out its own check on Mr Wright. And that appears to have been Carey’s view too. Its comments suggest it understood it was good practice, consistent with its regulatory obligations, to make its own independent checks. So, it ought to have undertaken a check on Mr Wright *before* it began accepting introductions from CL&P.

Had Carey checked the FSA’s list in August 2011, it would have discovered that Mr Wright was the subject of the following alert:

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*"*

If Carey had acted in accordance with its regulatory obligations and good industry practice at the relevant time it ought to have undertaken sufficient enquiries on CL&P to understand who its directors were, and checked the FSA's warning list as part of its due diligence on CL&P. Had it carried out these checks before accepting business from CL&P it would have discovered that CL&P's director Terence Wright was on the FSA warning list.

Cash incentives

In November 2011, five months before it received Mr S's application, Carey became aware of a number of consumers who had received or were expecting to be paid 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 cash incentives were being offered, Carey spoke to CL&P in a conference call on 9 December 2011. Carey has told us that in that call CL&P:

"…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."

And a 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 email was sent to Ms Hallett (the CEO of Carey) by a Team Leader at Carey on 29 March 2012 – around three weeks before Mr S's application was received by Carey. The email forwarded the following email the Team Leader had sent to a consumer, which included the following:

"*you* [a consumer introduced to Carey by CL&P] *mentioned in our conversation a cash back amount you are expecting in the sum of £1,800 from CL&P following completion of the Storefirst investment*"

The text addressed to Ms Hallett by the Team Leader included the following:

"*this is the second member this week to ask when are they getting their money*".

So the evidence clearly shows that Carey was on notice, before Mr S's application was received by it, that what CL&P had previously told it about cash incentives not being offered was not correct. The email from the team leader to the consumer was clear and unequivocal – the consumer had been offered cash back by CL&P.

Carey should have reacted promptly to this information – particularly given it knew it had been contacted by CL&P customers about cash incentives previously. Instead it continued to accept applications from CL&P – including Mr S's.

Accounts

Based on the available evidence, it appears a request for CL&P's accounts was not made by Carey until 23 March 2012. It's not clear why the request was made at this time. But it seems CL& P did not respond as the request was repeated, as urgent, on 3 April 2012. CL&P replied to Carey to say the information would be in the post the next day. However, when asked, Carey has told us it has no record of receiving the information and that this was another likely factor in its eventual decision to end its relationship with CL&P.

In my opinion, it is fair and reasonable that Carey should have met its own standards, set in late 2011, and should have checked CL&P's accounts at the outset before accepting any business from it.

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, in light of the Principles and FSA/FCA regulatory publications I have quoted above, this means Carey did not comply with its regulatory obligations or with good industry practice at the relevant time.

If Carey had completed sufficient due diligence, what ought it reasonably to have concluded?

In my opinion, I think Mr Wright's appearance on the FSA's 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 that 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 and integrity.

I note that Carey ended its relationship with CL&P shortly after completing the check on Mr Wright. I'm satisfied that this check was a factor in its decision to end the relationship. In fact, Carey has told us 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. It 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)

Carey says, in its representations in this complaint relating to the FSA's list, that the 2010 warning would not have led it to the same conclusion. It says:

'…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.'*

However, Carey's Chief Executive, Ms Hallett, gave evidence to the court during the Adams v Carey hearing, which is summarised at Paragraph 60 of the judgment as follows:

"It was also brought to my attention that from October 2010 the FCA had published warnings about dealing with another director, Mr Terence Wright, who was not authorised under FSMA to carry out regulated activity. Ms Hallett accepted in cross examination that no check was made to see whether his name appeared on a regulatory warning notice on the FCA's website until May 2012. The relationship between the defendant and CLP was severed on 25 May 2012. She accepted that had she been aware of such a warning in 2010 the defendant would not have dealt with CLP".

This, in my view, is inconsistent with Carey's representations to us on this complaint.

In any event, although in its representations on this complaint Carey has said it believes the 2010 alert was less significant than the 2013 one, by contrasting the wording of the two alerts, I think the October 2010 alert was a clear indication that the regulator had serious concerns about the way Mr Wright conducted his business and therefore should have put Carey on notice that it should not accept business from Mr Wright.

Carey says that the 2010 alert does not detail any concern by the regulator about Mr Wright. I accept that the 2013 alert 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 alert and I'm surprised that Carey suggests that the regulator does not detail any concern about Mr Wright in the 2010 alert.

A publication 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 to a SIPP operator considering accepting business from him. The alert 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.

In my opinion, it is fair and reasonable to conclude that 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.

So in my opinion, CL&P's director Terence Wright's presence on the FSA warning list should have led Carey to conclude it should not do business with CL&P. That is my view and I note it is a view which was held by Ms Hallett when she gave evidence to the court during the Adams v Carey hearing. Ms Hallett told the court that if she had been aware of the warning in 2010 Carey would not have dealt with CL&P. Such a conclusion was the proper one it ought to have reached bearing in mind Carey's responsibilities under the Principles.

In addition, I think it is fair and reasonable to conclude that prompt action on the issue of cash incentives in November 2011 would have inevitably led Carey to discover that cash incentive payments were being offered by CL&P at that time, and that what CL&P had told Carey was not correct. It follows that Carey ought to have concluded that it could not rely on what CL&P was telling it and it would not be consistent with its regulatory obligations to deal with any further business from CL&P.

If Carey had acted with a reasonable amount of diligence it would have discovered that CL&P was acting in a way which was, to use its own words, "*completely against all rules".* And it would have known that CL&P was acting without integrity – it had not told it the truth when asked about cash incentives. In my view, the only fair and reasonable thing it could do would have been to decide not to accept any further business from CL&P.

A further opportunity to take prompt action was missed on 29 March 2012, when Ms Hallett was made aware a CL&P customer had asked when they would receive the cash incentive CL&P had offered. It was almost two months before Carey wrote to CL&P to say it was terminating its agreement with CL&P, because a client had "today" (i.e. on 25 May 2012) told it they were expecting around £2,000 cash. Carey should have taken prompt action on 29 March 2012 – which it failed to do – only finally terminating its relationship with CL&P in May 2012.

So Carey should have taken action – which would ultimately have led to it ending it relationship with CL&P - before it received an application from Mr S. It is unclear why Carey did not take action long before it did, and end its relationship with CL&P before Mr S's application was made.

Finally, I think if checks on CL&P's accounts had been attempted earlier, the fact that CL&P were unwilling to provide this information should have raised a red flag, as it apparently eventually did. This reluctance to provide basic information should have been a further factor which ought to have led Carey to question whether it should enter into or continue a relationship with CL&P. And, it would have meant Carey should never have entered into a relationship with CL&P at all.

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 ought reasonably to have concluded, had it complied with its regulatory obligations which required it to conduct sufficient due diligence on CL&P before accepting business from it and to act on information received about the conduct of CL&P before continuing to accept business from it, that it should *not* accept business from CL&P. If Carey had carried out proper introducer due diligence, or acted on the information received in a timely manner, it ought to have concluded that it should not accept 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 S's application from CL&P.

Investment due diligence

As I've explained above, Carey should not have accepted Mr S's introduction from CL&P. I think it is fair and reasonable to uphold this complaint on that basis alone. Nevertheless, given the submissions that Carey has previously made about its due diligence on Store First, and the regulatory obligations and good industry practice I have set out above, I've also considered the due diligence that Carey carried out on the investment. I have taken the same approach to considering this as I did to considering the due diligence undertaken on CL&P.

The actions Carey took are set out in detail in the background sections above, so I will not repeat them here. I think some of the actions Carey took were in-line with good practice at the relevant time when carrying out its due diligence on Store First. However, I think Carey failed to take *all* the actions that were required of it in order to comply with its regulatory obligations and good practice. And, based on what it knew, it failed to draw a reasonable conclusion on accepting the investment. I do not think Carey's actions went far enough, and I think it ought to have carried out further enquiries in the light of what was revealed by the due diligence it did carry out.

I note the company searches were carried out using a service called Company Searches. This was good practice but, consistent with its regulatory obligations, Carey should not only have carried out the searches but also given careful consideration to what they revealed.

The searches were carried out on the promoter of Store First, Harley Scott Holdings Ltd, not Store First itself – perhaps because at that point Store First was just being established. The result of the searches reported that Harley Scott Holdings Ltd had a website address "dylanharvey.com", and had changed its name three times having previously been called Dylan Harvey Group Ltd, Dylan Harvey Ltd and Grangemate Ltd. The report also said County Court Judgments ("CCJs") were recorded against the business and that auditors had made adverse comments in the previous three reporting years.

It's not clear what consideration Carey gave to this report, after it obtained it. But, in my view, I think it would have been fair and reasonable for it to have conducted some further basic searches, given there were factors in the report which ought to have been of concern – namely the adverse comments for the previous three years, the CCJs, and the fact the business had recently changed its name.

A simple internet search at the time of the searches (i.e. in May 2011) would have revealed that Dylan Harvey and one of its directors, Toby Whittaker, were the subject of a number of national press reports, online petitions and proposed legal action, as a result of a failed property investment. It was reported that hundreds of investors had invested money in a scheme to develop flats, but the flats had not been built and the investors had been unable to recover their money. Those investors were behind the online petitions and proposed legal action.

Carey says it obtained copies of Store First's marketing material. It has provided us with copies of this. Again, I accept that potentially this was good practice. In order to correctly understand the nature of the investment, I think it's fair and reasonable to say Carey should have reviewed how Store First was marketed to investors – particularly as it was proceeding on the basis that these investments were being made by consumers without regulated advice being provided. Clearly Carey thought it was important to look at this material at the time too.

But, again, consistent with its regulatory obligations, Carey should not only have obtained the material but should have given careful consideration to it.

The marketing material included the following prominent statements:

"You will receive guaranteed returns from a 6 year lease already in place upon completion, making this a high yielding, hassle-free investment which has been specifically designed to meet the needs of todays astute investor."

"You will receive a 6 year lease in place upon completion. The lease produces an excellent return of 8% (guaranteed for the first 2 years) rising to over 12% in years 5 and 6. The lease contains upward-only rental reviews and break clauses for both parties every two years."

"Guaranteed exit route option."

It then goes on to set out in a table the returns payable in years 1&2, 3&4 and 5&6 at 8%, 10% and 12%. In the question and answer section the following is included:

"What rental income can I expect?

Storepod rental starts at £17 per Sq/Ft per annum. The 6 year tenancy/lease in place on your Storepod has fixed upwards only rental reviews and break clauses (for both parties) every 2 years. This produces an 8% yield on your investment within the first two years, this then is predicted to rise to over 10% return in years 3&4 and then surpass 12% return in years 5&6.

Can I easily re-sell my Storepod?

Yes. You can re-sell your Storepod at any time and selling your Storepod couldn't be simpler. Store First Ltd can market your Storepod upon your request. We believe that because Storepods are so competitively priced when new, they will make a very attractive sale proposition in the future. We also expect that many tenants will wish to purchase the Storepod they are using. For example, other self storage PLCs usually achieve rent of between £20.00 - £25.00 per square foot. Our Storepods are costed at a rent of only £17.00 per square foot; once higher rents are achieved the capital value of the Storepod will increase.

Guaranteed exit route?

In year 5, investors have the option to enter the guaranteed buy-back scheme. In this scheme, Store First Management Ltd will guarantee to buy the Storepod back off the investor for the original price paid within the next 5 years. This is a unique offer in the market place and we are happy to be able to offer this exit route to our investors.

Most investors are driven to keep the property investment they have purchased and carry on receiving the rental yield produced for years to come, this means only a very limited number of Storepods per centre will ever come onto the resale market, this creates a high sale value and demand for the future".

The material says the "*figures shown are for illustration purposes*". But it does not contain any type of risk warning, or illustrations of any other returns. No explanation of the guarantees was offered, or the basis of the projected returns – other than Store First's own confidence in its business model and the self-storage marketplace.

I note Carey considered a report by Enhanced Support Solutions (ESS). In my view this was of limited value. It was cursory, and based only on some of the material Carey had regard to i.e. the marketing material and lease documents. As a result, I think Carey should have found it difficult to reconcile the view reached by ESS with the information available to it. The report said:

"The following parties are involved in this investment:

Seller of the sub-lease: Store First Limited

UK Promoter: Harley Scott Holdings Limited

No adverse history has been found affecting these parties. A CCJ was issued against the promoter of the scheme however we understand this arose from a disputed invoice which is in the course of being settled. This is any event does not directly impact on the investment".

This conclusion is inconsistent with the result of Carey's own company searches. The report also makes no comment on the obvious issues with the marketing material. So, I don't think Carey could have taken any comfort from the ESS report or attached any significant weight to it.

If Carey had completed sufficient due diligence on Store First, what ought it reasonably to have concluded?

The failure of the previous scheme which Dylan Harley/Harley Scott Holdings had been involved in may have been entirely down to market forces. But there were aspects of the press reports which I think ought to have given Carey cause for concern. And I think the fact that the company which had approached Carey about Store First – and on which Carey had conducted searches – had recently been involved in a property investment scheme which had failed, had recently changed its name, and had been subject to a number of adverse comments in succession, following audit, ought to have given Carey significant cause for concern. Particularly when it considered the marketing material for Store First.

In my view there were a number of things about the marketing material which ought to have given Carey significant cause for concern and to have led it to have drawn similar conclusions to those later drawn by SSA UK (on the basis of a report by Deloitte LLP) and the Insolvency Service. Namely, that there was a significant risk that potential investors were being misled.

I think, as it had regard to this material, Carey could not overlook the fact that Store First appeared to be presenting the investment as one that was assured to provide high and rising returns, was underwritten by guarantees, and offered a high level of liquidity together with a strong prospect of a capital return - despite the fact that there was no investor protection associated with the investment and that, in Carey's own words, there was no apparent established market for the investment and the investment was potentially illiquid.

Store First had no proven track record for investors and so Carey couldn't be certain that the investment operated as claimed. Carey should also have been concerned about a guarantee offered by a new business with no track record (and promoted by a business with a questionable one).

I think, in light of this, Carey should have been concerned that consumers may have been misled or did not properly understand the investment they intended to make. Consumers could easily have been given the impression, from the marketing material, that they were assured of high returns with little or no risk and would easily be able to sell their investment when they wished to. Such an impression was clearly misleading.

I think all of this should have been considered alongside the fact the investment was being sold by an unregulated business, which was clearly targeting pension investors. In my opinion it is fair and reasonable that Carey ought to have concluded there was an obvious risk of consumer detriment.

Looking beyond Carey's initial due diligence – which, for the reasons I have set out, ought to have given it significant cause for concern – the available evidence shows that Carey was aware of other causes for concern in relation to Store First by the time it accepted the investment into Mr S's SIPP on 30 October 2012.

It seems that on 20 May 2012, Carey became aware that Store First was paying commission of 12% to CL&P. Given how the investment was being marketed I think the payment of such a high level of commission to an unregulated business ought to have given Carey very serious cause for concern. And I think Carey also ought to have been concerned about how Store First was funding such levels of commission alongside guaranteed income payments and guaranteed buy backs. It calls the nature of the Store First investment into serious question.

It also seems that Carey became aware of unspecified issues with Store First in August 2012 (and possibly earlier) which were of sufficient concern for it to suspend acceptance of the investment. And it seems Carey knew of concerns expressed by the FSA about loans to Mr Whittaker by Store First. Although it is not clear if the latter pre-dates Mr S's investment.

Carey facilitated Mr S's investment in Store First on 30 October 2012. This was after it had already suspended acceptance of the investment because of concerns it had identified. It appears the suspension must have been lifted at some stage – although at this time Carey has provided no explanation for why or when it was lifted.

DISP 3.5.9R provides that:

"The Ombudsman may:

> *…*
>
> *(3) reach a decision on the basis of what has been supplied and take account of the failure by a party to provide information requested…"*

Based on the evidence I have currently been provided with, I am minded to conclude that by proceeding with Mr S's investment when it did, Carey failed to conduct its business with due skill, care and diligence, take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems or pay due regard to the interests of its customers and treat them fairly. As a responsible SIPP operator, I currently have no evidence - and have been given no explanation - for why Carey would lift the suspension after identifying sufficient concerns to put one in place. I invite Carey to provide any evidence on this point, but if nothing further is provided, it is my view that it is fair and reasonable to conclude that Carey did not comply with its regulatory obligations – and this led directly to the loss Mr S suffered.

All in all, I am satisfied that Carey ought to have had a significant cause for concern about the nature of the Store First investment from the beginning. And I think these concerns, in themselves, should have at the very least led it to be very cautious about accepting Store First and to think very carefully about the basis on which it should be accepted, mindful of its obligation to prevent consumer detriment. In addition, by the time Mr S's application to invest in Store First was received, Carey had already become so concerned with the Store First investment that it had put in place a suspension. And, Carey has provided no reason for why this was lifted so as to allow Mr S's application to be put through in October 2012. Given the circumstances in place at the time of Mr S's application, I think the only fair and reasonable conclusion is that Carey should not have accepted Mr S's application to invest in Store First. In my opinion, it ought to have concluded that it would not be consistent with its regulatory obligations to do so.

In summary, had Carey done what it ought to have done, and drawn reasonable conclusions from what it knew or ought to have known, it ought not to have accepted either the application for Mr S's SIPP from CL&P or the Store First investment. So, I will now consider whether, notwithstanding this, Carey could fairly and reasonably have proceeded with Mr S's instructions.

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

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

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

COBS 11.2.19R

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

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 S's SIPP in the first place.

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

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

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

The indemnity

The indemnity sought to confirm that Mr S 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. It also asked Mr S to confirm that neither he nor any person connected to him was receiving a monetary or other inducement.

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

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

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

The Principles exist to ensure regulated firms treat their clients fairly.

Carey received the application from CL&P to open the SIPP for Mr S on 17 April 2012. Carey terminated its relationship with CL&P on 28 May 2012. The Co-operative didn’t send the sum of £42,477.80 to Carey until 3 September 2012 and it wasn’t until 2 October 2012 that Mr S signed the indemnity.

I consider there is a significant imbalance of knowledge between the parties which creates unfairness in the circumstances of this case.

Throughout this period, and certainly by the time Mr S was asked to sign the indemnity in October, Carey knew things that Mr S did not. For example, it knew CL&P had been acting “*against all the rules*” by offering cash incentives and that funds would be vulnerable to a tax charge. It knew that one of the directors of CL&P was on the FSA’s warning list. It also knew that because of CL&P’s conduct it had terminated its relationship with it and had advised a client who had been offered an inducement that it wouldn’t proceed with that application. And its concerns with the Store First investment were sufficient to lead it to suspend acceptance of the investment in August 2012.

So, at a minimum, (setting aside what I say at the outset of this section about Carey not accepting the application from CL&P in the first place), Carey was required to ensure it was treating Mr S fairly and acting in accordance with his best interests. And, Carey should therefore have provided Mr S with the information it now possessed so he could make an informed decision about whether to proceed with the Store First investment or not.

I note Carey itself appears to accept that it was necessary to contact its clients in order to inform them of the situation about the inducements and the possibility of a tax charge as when terminating its relationship with CL&P, Ms Hallett said, in her email of 28 May 2012:

"We will process them [ongoing applications] *where we have already established the schemes, we will be writing to all clients informing them If they have received any monies then they must declare this to HMRC and their fund would also be vulnerable to a tax charge as well".*

Despite what Carey had said to CL&P, it did not contact Mr S to provide him with this important information.

Mr S has told us he would have wanted to know if it was safe to continue (with the investment), and had he been aware that Carey had ended its relationship with CL&P, he would have asked lots of questions of it. I think it unlikely that course of action would have led to Mr S having an appetite to continue. Carey would not have been able to assure Mr S it was safe to deal with CL&P and its unlikely any questions asked of Carey about CL&P would have yielded answers which gave Mr S confidence to continue dealing with CL&P.

In Adams v Carey, the judge found that Mr Adams would have proceeded with the transaction regardless. HHJ Dight says (at paragraph 32):

"The Claimant knew that it was a high risk and speculative investment but nevertheless decided to proceed with it, because of the cash incentive.."

But, in this case, Mr S has told us he was told by CL&P that he was "guaranteed" returns. So, when he signed the indemnity I do not think he did so with a full understanding of what high risk meant, and was assured by what he had been told by CL&P. This is exactly why Carey should have been wary of dealing with CL&P – it had already proved to be unscrupulous so Carey should have been wary of what it was in fact telling Mr S, and whether that undermined or contradicted any warnings it gave about risk.

Another difference in this case is the influence of the cash incentive. The incentive was, in Mr S's words, a "bonus" – so I do not think it was a factor of significant influence. Rather it seems it was the prospect of high guaranteed returns which was the main motivating factor for Mr S.

In terms of the content of the indemnity I note that Carey asked Mr S, when signing the indemnity, to:

confirm that neither I nor any person connected to me is receiving a monetary or other inducement for transacting this investment.

However, based on the available evidence I find on balance that Mr S did not understand that his "*welcome bonus*" promised from CL&P was a "*monetary or other inducement for transacting this investment*". Rather, I accept his evidence that he understood the "welcome bonus" was essentially a thank you for investing so much money. So I think he viewed it as a return from the investment or CL&P, rather than an "inducement".

My view on this is supported by the many other consumers who appear to not have understood that they were doing anything wrong. This is reflected by the number who contacted Carey directly and asked when they would be receiving their money. I find it highly unlikely that if they were aware that they shouldn't have been receiving this money they would have been contacting the party that had asked them to sign an indemnity to confirm that they wouldn't be receiving money or any other inducement.

In any event, even if I'd found that Mr S did understand the indemnity it is relevant that by the time he'd signed it, Carey was aware that many of its clients were receiving inducements.

As I say above, Carey did not check with Mr S whether he had been offered the type of inducement that the indemnity referenced. Also, in the indemnity itself, no mention is made to the possible consequences of accepting any sort of payment, or to this being something which was not allowed under the rules. And I reiterate that Carey did not let Mr S know that Mr Wright featured on the FSA's warning list or that the Store First investment had been suspended from being allowed into a Carey SIPP wrapper for a period of time.

Carey had to act in a way that was consistent with the regulatory obligations that I've set out in this decision. In my view, asking Mr S to sign an indemnity absolving Carey of all responsibility, and relying on such an indemnity, when it ought to have known that Mr S's dealings with CL&P were putting him at significant risk was not the fair and reasonable thing to do.

I note that the judge in Adams v Carey accepted Carey's evidence that notwithstanding Carey knowing that Mr Wright was on the warning list, and that if it had known earlier it would not have dealt with CL&P at all, this was not a reason to decline to proceed with the transaction. Paragraph 60 of Adams v Carey judgment says:

It was also brought to my attention that from October 2010 the FCA had published warnings about dealing with another director, Mr Terence Wright, who was not authorised under FSMA to carry out regulated activity. Ms Hallett accepted in cross examination that no check was made to see whether his name appeared on a regulatory warning notice on the FCA's website until May 2012. The relationship between the defendant and CLP was severed on 25 May 2012. She accepted that had she been aware of such a warning in 2010 the defendant would not have dealt with CLP. However, I accept her evidence that this was not a reason to proceed with the transaction involving the claimant in circumstances where he had already given his instructions and the process was nearing completion.

However, in my opinion, this case is very different from that of Mr Adams. In Adams v Carey Mr Adams conceded that he would have proceeded with the application regardless. However, I am satisfied on the evidence provided by Mr S that this was not the case. Carey was belatedly in possession of the knowledge that Mr Wright was on the FSA warning list. In my view, for the reasons set out above, it should have been in possession of that information long before May 2012. But, nevertheless it now had that information. It also knew that CL&P was offering monetary inducements, which is against tax legislation relating to pensions. If CL&P had offered Mr S such a payment (which it seems it did) there was a real chance that he could be subject to a substantial tax charge from HMRC. It follows that I'm firmly of the view that for Carey to proceed with the transaction without drawing this to the attention of Mr S was not treating him fairly.

In my opinion, once the facts were known to Carey it was fair and reasonable for Carey to have explained the situation to Mr S as soon as possible. And, if it had done so, I am satisfied that Mr S would not have gone forward with the investment in Store First. And he would therefore not have lost his entire pension fund. And, given the substantial delay in receiving the funds into the SIPP, Carey had ample time to bring the issues to the attention of Mr S. In fact, by the time Carey received Mr S's instruction to proceed with the Store First investment, it had already suspended acceptance of the Store First investment into the SIPP.

Summary of my provisional findings on due diligence

In summary, Carey did not comply with good industry practice, act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr S fairly by accepting Mr S's application from CL&P, in the light of what it knew or ought to have known about CL&P before Mr S's application was received, or throughout its relationship with him. For all the reasons given, I am satisfied that, in my opinion, this is the fair and reasonable conclusion to reach.

For the avoidance of doubt, I'm not making a finding that Carey should have assessed the suitability of the investment or the SIPP for Mr S. I accept Carey had no obligation to give advice to Mr S, 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 S.

Rather, Cary was able to accept or reject applications for business and I say that it should have rejected Mr S's application for a SIPP introduced by CL&P, and failing that, for the reasons I set out above, it should not have accepted his request to invest in Store First made in October 2012.

Is it fair to ask Carey to compensate Mr S?

In deciding whether Carey is responsible for any losses that Mr S 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. had not accepted Mr S' SIPP application in the first place.

Carey says Mr S signed the indemnity which included the declaration that he was not receiving an inducement to make the investment. And it says that as Mr S did in fact receive a payment from CL&P, his declaration to the contrary was dishonest and amounts to fraud.

I accept that Mr S did give the indemnity, but as I've said previously, based on the available evidence, I find on balance that Mr S did not understand that his "*welcome bonus*" - promised from CL&P - was a "*monetary or other inducement for transacting this investment*". He has told us he understood this was essentially a thank you for investing so much money – so I think he viewed it as a return from the investment, rather than an "inducement".

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

In deciding whether Carey is responsible for any losses that Mr S has suffered on the investments in his SIPP I need to look at what would have happened if Carey had done what it should have done i.e. not accepted Mr S's application.

Had Carey acted fairly and reasonably it should have concluded that it should not accept Mr S's application to open a SIPP. That should have been the end of the matter – it should have told Mr S that it could not accept the business. And I am satisfied, if that had happened, the arrangement for Mr S 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 S 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. I would reach a similar conclusion if Carey had terminated the transaction at a later stage once it was in possession of certain facts that meant there was a significant chance Mr S could suffer financial detriment.

Had Carey explained to Mr S why it would not accept the application from CL&P or was terminating the transaction, I find it very unlikely that Mr S would have tried to find another SIPP operator to accept the business. As mentioned, he has told us he would have wanted to know if it was safe to continue. And, had he been aware Carey had ended its relationship with CL&P, he would have asked questions about it. I think it unlikely that course of action would have led to Mr S having an appetite to continue.

In any event, I don't think it's fair and reasonable to say that Carey should not compensate Mr S for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found it did. I think it's fair instead to assume that another SIPP provider wouldn't have accepted the application or would have terminated the transaction before completion if it had acted fairly and reasonably by following good industry practice and made decisions with its regulatory obligations in mind. So again, I think the end result would have been that Mr S would not have made the Store First investment or the switch from his existing pension that proceeded it.

I appreciate Mr S has told us he did not read the indemnity before he signed it, as he trusted Carey. And it was clearly unwise to sign a document without reading it. But, given what he has told us, I do not think it would have changed the course of things if he had read it. He trusted what he had been told by CL&P.

So I'm satisfied that Mr S would not have continued with the SIPP, had it not been for Carey's failings, and would have remained in his existing scheme. 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.

I have considered paragraph 154 of the Adams v Carey judgment, which says:

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

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

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

In making these findings, I take account the potential contribution made by other parties to the losses suffered by Mr S. 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 S for the full measure of his loss. But for Carey's failings, Mr S's pension transfer 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 S's right to fair compensation from Carey for the full amount of his loss.

In conclusion

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 should not have accepted Mr S's application from CL&P in the first place and certainly should have terminated the transaction before completion. For the reasons I have set out, I also think it is fair to ask Carey to compensate Mr S for the loss he has suffered.

I say this having given careful consideration to the Adams v Carey judgment but also bearing in mind that my role is to reach a decision that is fair and reasonable in the circumstances of the case having taken account of all relevant considerations.

Putting things right

My aim is to return Mr S 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 S's SIPP application from CL&P or for not terminating the transaction before completion.

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

5. Calculate the loss Mr S has suffered as a result of making the transfer.
6. Take ownership of the Store First investment if possible.
7. Pay compensation for the loss into Mr S's pension. If that is not possible pay compensation for the loss to Mr S direct. In either case the payment should take into account necessary adjustments set out below.
8. Pay £500 for the trouble and upset caused.

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

5. Calculate the loss Mr S has suffered as a result of making the transfer

To do this, Carey should work out the likely value of Mr S's pension as at the date of this decision, had he left it where it was instead of transferring to the SIPP.

Carey should ask Mr S's former pension provider to calculate the current notional transfer value 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 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 S has suffered. The Store First investment should be assumed to have no value. Account should however be taken of the cash back payment paid out to Mr S.

6. Take ownership of the Store First investments

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 Carey is unable to take ownership of the Store First investment it should remain in the SIPP. I think that is fair because I think it is unlikely it will have any significant realisable value in the future. I understand Mr S has the option of returning his Store First investment to the freeholder for nil consideration. That should enable him to close his SIPP, if Carey does not take ownership of the Store First investment.

In the event the Store First investment remains in the SIPP and Mr S 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.

7. Pay compensation to Mr S for loss he has suffered calculated in (1).

Since the loss Mr S has suffered is within his pension it is right that I try to restore the value of his pension provision if that is possible. So 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 S could claim. The notional allowance should be calculated using Mr S's marginal rate of tax.

On the other hand, Mr S may not be able to pay the compensation into a pension. If so compensation for the loss should be paid to Mr S 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 S should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mr S's marginal rate of tax in retirement. For example, if Mr S 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 S would have been able to take a tax free lump sum, the notional allowance should be applied to 75% of the total amount.

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

Mr S has been caused some distress and inconvenience by the loss of his pension benefits. This is money Mr S cannot afford to lose and its loss has caused him to lose all confidence in pension providers. I consider that a payment of £500 is appropriate to compensate for that upset.

interest

The compensation must be paid as set out above within 28 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 28 days.