DRN-4629845

The complaint

Ms S complains that Carey Pensions UK LLP ('Carey') (now called Options UK Personal Pensions LLP, but I'll refer to Carey throughout for ease) shouldn't have allowed her to invest in its Self-Invested Personal Pension ('SIPP') and that it failed to carry out sufficient due diligence on the investments made within it. She says it should compensate her for her loss.

For simplicity, I refer to Ms S throughout, even where the submissions I'm referring to were made by her representative.

What happened

I've outlined the key parties involved in Ms S' complaint below.

Involved parties

Carey

Carey is a regulated pension provider and administrator. It's authorised to arrange deals in investments, deal in investments as principal, establish, operate or wind up a personal pension scheme and to make arrangements with a view to transactions in investments.

SNL Properties Ltd ('SNL')

As I understand it, SNL was an unregulated introducer. SNL was seemingly run by a Ms K and Mr W.

Ethical Forestry Limited ('Ethical Forestry')

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

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

In December 2016, Ethical Forestry went into liquidation. The liquidator's report, dated 24 January 2022 said, amongst other things, that many investors were led to believe they had ownership of trees and cropping rights in relation to the trees and were given GPS

co-ordinates to these. However, it's clear these rights weren't given as these weren't capable of being granted under Costa Rican law.

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

Freedom Bay

This was an unregulated investment that promised high returns as well as the opportunity to stay in the resort on a luxury island. Investors owned a fractional share in a hotel suite directly from the developer, Malgretoute Hotel Development Company Ltd trading as Freedom Bay.

Freedom Bay was seemingly marketed as offering investors guaranteed 6% interest during the construction period and a guaranteed income of 8% for three years once completed. Following the guaranteed period, investors would receive 50% of the income from the suite. This meant that over the five years period, they would get at least one-third of what they originally put down back.

The resort was still unfinished in 2019 even though the original completion date was in 2012. There was a two-year 'get-out' clause that meant investors would get a refund if the resort wasn't completed within 24 months, however most were unable to get this.

In or around 2017, Malgretoute Hotel Development Company Ltd went into receivership and the insolvency practitioner said there were challenges relating to the land assets, as it had only paid a deposit for the land and didn't have the ability to complete the purchase, leading to various legal proceedings.

<u>The transaction</u>

On 9 September 2011, Carey received Ms S' signed SIPP application form to transfer her existing pension scheme into one with Carey and to invest the monies in Ethical Forestry and Freedom Bay. Ms S' signature on the SIPP application form was witnessed by Ms K of SNL. And next to the '*Financial Adviser Details'* section, '*N/A*' was noted.

Carey also received a typed letter that was signed by Ms S, giving Carey permission to provide SNL with any information SNL requested in respect of Ms S' SIPP and the investments.

The same day, Carey emailed SNL and thanked it for Ms S' SIPP application. Carey asked SNL to get Ms S to fully complete an introducer/adviser notification form in respect of her investments. Carey updated SNL that the Freedom Bay investment was still with its investment committee awaiting approval. And Carey said that it would confirm to SNL once it had received the required information from Freedom Bay.

Carey also sent Ms S a letter confirming her SIPP had been established on 9 September 2011. It asked her to complete a member declaration and indemnity in respect of Ethical Forestry and it updated her that her application to invest in Freedom Bay was awaiting approval by its investment committee.

And, by mid-September 2011, just over £36,400 was transferred into Ms S' SIPP with Carey.

Ethical Forestry

On 12 September 2011, Carey sent Ms S the member declaration and indemnity form for Ethical Forestry that it had said she needed to complete. The top of the form contained a box with information including Ms S' details, the name of the investment and '*N/A'* was typed next to the space for 'Adviser'. And the form went on to set out, amongst other things, that:

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

Carey received the signed declaration from Ms S on 15 September 2011.

On 19 September 2011, Carey emailed Ms K of SNL letting it know it had received the transferred pension monies and Carey again asked SNL to complete the introducer/adviser notification form, along with an Unregulated Collective Investment Scheme ('UCIS') form for Ms S that it had attached.

Around the same time Carey emailed Ms S, updating her that it was still awaiting information from Freedom Bay so could only go ahead with the Ethical Forestry investment at that time. And that it was awaiting documents from SNL on Ms S' behalf, which it had emailed to Ms K and hoped to receive from her shortly.

Later on 19 September 2011, Carey forwarded the emails it had sent to Ms K on to Mr W of SNL. In the attached letter entitled '*Re Alternative Investment Request – Ethical Forestry*…', Carey told SNL that following SNL's request to allow the Ethical Forestry investment into the SIPP, Carey's investment committee had considered the information provided and wanted to draw SNL's attention to certain information. As well as Carey's key findings, which I'll come on to later, the letter also listed the due diligence documentation Carey had received on the Ethical Forestry investment, including the investment purchase form, FAQs, prospectus and projections. It seems Carey went on to conclude that Ethical Forestry appeared to be an acceptable investment as there didn't appear to be a tax charge. But it said that to proceed with this it needed certificates of title once the investment had been completed and limitation of liability wording to be added to all contracts and agreements.

Carey also asked SNL to sign and return an attachment to the above letter – seemingly what it has referred to as the introducer/adviser notification form – confirming that '*This letter is signed by* [Mr W] *of* [SNL] *as confirmation that I have discussed the information provided with my clients and wish to proceed with the investment as noted*', which he did later that day.

At the same time, Mr W of SNL returned the completed UCIS form to Carey, which said at the top that:

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

Under the box '*Introducer Firm*' it said SNL. Below this under '*Adviser Name*' Mr W's name was noted down, although the box '*Has advice been provided'* was ticked '*No*'. And under '*Which category of investor has the client been categorized* (sic) *as*', sophisticated investor

was selected. Just below this the explanatory text said that 'where the client has been categorised *as…sophisticated, please attach a copy of the relevant certificate confirming this*…'. And the form was signed by Mr W for or on behalf of SNL.

The same day it seems Carey was provided with an updated UCIS form by SNL, where the selection of sophisticated investor had been crossed out and experienced investor had instead been ticked.

And, on 19 September 2011, £18,000 of Ms S' SIPP monies was invested into Ethical Forestry. The Ethical Forestry purchase order form signed by Carey on 19 September 2011 noted that Ms K of SNL was the adviser, as did another incomplete version of the form signed by Ms S in July 2011. And it said that Ms S would be purchasing units costing £18,000, which I note was amended shortly after to £12,000.

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

On 18 July 2012, Ethical Forestry sent Carey details of the plantation address for Ms S, along with the plot size and batch number, along with GPS co-ordinates for the trees, a title deed for the trees with the given co-ordinates, along with terms and conditions and the cropping contract which set out that Carey had a non-exclusive right of access for cropping.

Ms S doesn't appear to have received any payments or returns from her Ethical Forestry investment.

Freedom Bay

On 24 February 2012, Ms S sent Carey the Freedom Bay reservation agreement – which she'd signed on 9 September 2011 – agreeing to purchase a week's fractional ownership in a villa for £21,875 via her SIPP. She also returned a signed Alternative Investment Instruction and Declaration form. Amongst the typed information at the top of the form, there was no information typed next to '*ADVISER*'. And the declaration set out, amongst other things, that:

- Ms S was fully aware Freedom Bay was unregulated investment that's considered high risk and speculative and may prove difficult to value and sell;
- She understood the Financial Services Compensation Scheme wouldn't apply.
- Carey was acting on an execution only basis and hadn't provided any advice;
- Ms S had read and understood the information provided by Freedom Bay including, but not limited to, the prospectus, brochure and application forms.
- She'd taken her own advice, including financial, investment and tax advice.
- Ms S undertook to forego the right to personal usage and that any breach of this undertaking would result in HMRC levying tax charge penalties on her and her SIPP.
- Should the investment be subject to a tax charge within the scheme these will be paid directly from her fund or by her;
- In the event any local tax charges became due these will be paid by her SIPP
- Neither her, nor any person connected with her, has or will receive any inducement for transacting the investment; and that
- Ms S indemnified Carey against any and all liability arising from the investment.

On or around 28 February 2012, £21,975 of Ms S' pension monies within the SIPP was invested in Freedom Bay.

The Freedom Bay purchase agreement set out that Carey agreed to buy a Fractional Ownership Certificate entitling Ms S to become a fractional owner with the benefit of certain fractional interests in the noted property.

The schedule also set out, amongst other things, that the trustee was to hold the purchase price in escrow until the villa was fully constructed and equipped and/or title to the property was under the control of the trustee. And that once the seller had received the purchase price the purchaser would be registered as fractional owner and would be issued with a final fractional ownership certificate evidencing their entitlement to fractional ownership interests. It said that the fractional ownership interest included the right to share in the sale proceeds of the property when/if it is sold as contemplated.

The target completion date was given as December 2013. And, in January 2016, Carey was made aware that the villa Ms S had purchased a fractional interest in had received a practical completion certificate. And, in October 2016, Carey was sent the certificate for this by the trustee, affirming the interest for the fractional period.

While Ms S was seemingly paid interest on her Freedom Bay investment in 2013 and 2014, as well as further payments in 2015 and 2016, she received nothing further after that. And, in 2017, Ms S was made aware that Freedom Bay was in receivership.

Ms S' complaint

As mentioned above, Ethical Forestry went into liquidation in 2016 and in September 2016 Carey let Ms S know her investment was valued at 'nil'. In March 2017, the developer of Freedom Bay went into receivership and Carey appears to have given this a '*nil*' value from June 2017.

Ms S first complained, via her representatives, to Carey in May 2018 that it didn't do enough due diligence on SNL or the investments, which were unregulated and high-risk, and it shouldn't have accepted her applications.

Carey replied in July 2018 and, unhappy with this response, Ms S referred her complaint to our Service.

Carey has said in its responses in respect of Ms S' complaint, amongst other things, that:

- Carey isn't limited to dealing with only with regulated brokers and it didn't inappropriately deal with SNL. It followed its strict processes in place for dealing with unregulated introducers.
- It's an execution-only SIPP provider and it acted in line with Ms S' instructions in accordance with COBS 11.12.9R. All instructions and correspondence regarding Ms S' decisions came directly from her. Carey didn't accept instructions from SNL in relation to her SIPP. It only provided SNL with information as per Ms S' instruction.
- SNL acted as the introducer, which was made clear in all correspondence, As SNL wasn't regulated and Ms S hadn't appointed a regulated financial adviser given there were no details of one on documents including, for example, her SIPP application and member declarations, Carey classified her as a direct client who hadn't used a financial adviser. And it made this clear in correspondence. It recommended Ms S seek financial advice and if she wasn't actually a sophisticated investor then she should have done so.
- Carey can't comment on any interactions Ms S had with SNL, including discussions

or information SNL might have provided her with or whether or not it held itself out to be an adviser. If Ms S really felt SNL had advised her then she'd have said on the documents. And given she didn't Carey can't reasonably be expected to have known Ms S might have been advised by SNL. There's no evidence of this or that SNL made arrangements for Ms S. And it's unlikely a court would enforce Carey's agreement with Ms S under FSMA 2000 given it had no knowledge of any contravention by SNL and that Ms S told Carey she wasn't being advised, despite numerous prompts for her to say otherwise.

- It entered into an introducer agreement with SNL – seemingly on 18 September 2011 – setting out the terms of business ('TOB') and conduct expected of it. The TOB specifically prohibited SNL from providing advice, as it wasn't authorised to do so.
- It provided risk warnings about the investment being high risk and/or speculative, recommended Ms S seek advice and took steps to ensure she understood her instructions were on an execution only basis. Ms S signed member declarations confirming she understood this and all documentation. It was reasonable for it to have accepted Ms S' signature.
- The FCA's Thematic Reviews were guidance as to best practice only, these weren't prescriptive, exhaustive or rule making. And some of the guidance was issued after the events complained of in Ms S' case.
- Carey didn't provide advice and wasn't permitted to do so. It didn't consider the suitability of the switch and underlying investment for Ms S. It was Ms S' decision to use SNL – which she engaged prior to her first contact with Carey – and to instruct the switch and investments. Ms S had the opportunity to seek regulated advice if she'd wanted to, but chose not to. And Carey isn't permitted to comment on the suitability of the introducer a customer has chosen to use.
- Carey conducted due diligence on SNL and the investments to ensure these were capable of being held in the SIPP in accordance with HMRC regulations. To do so it reviewed investment information, did company background checks and reviewed an independent report from a third-party compliance company.

During the course of Ms S' complaint she's said, amongst other things, that:

- She was a retail client with no previous investment experience.
- She wanted financial security in retirement.
- Miss K and Mr W of SNL introduced her to the investments and provided her with advice, also promising that with the Freedom Bay investment she could stay in the apartment which she was keen to do with her mother.
- She wasn't previously interested in changing her pension, she was persuaded to do so by Miss K on the basis her current pension wouldn't perform well compared to the investments and these were in her best interests to have a comfortable pension.
- She wasn't made aware of any risks whatsoever, instead the focus being put on the time she'd be able to spend abroad with her mother.
- The switch and investments were made to sound so attractive to her, during a time when she was struggling, vulnerable and naïve. SNL made her feel it would be foolish not to invest. And they said that the investment was so good that she'd be paid £5,000 for switching to the SIPP, which she used to pay bills and care for her elderly mother.
- She knew Miss K and Mr W and trusted them.

One of our Investigators reviewed Ms S' complaint and said, in summary, that Ms S said that SNL advised her to switch and make the high risk and unusual investments. The evidence supports this and that SNL made arrangements for the switch and investment to happen, such that SNL carried out regulated activities when it wasn't permitted to. And Carey ought to have had cause for concern about SNL, such that it shouldn't have accepted Ms S'

applications. He also said Ms S entered into the agreement with Carey in consequence of SNL's actions and the court would likely conclude it was just and equitable for the agreement between Ms S and Carey to be enforced in any event.

While Ms S accepted our Investigator's findings, Carey responded with further comments. It said, amongst other things, that:

- Only the SIPP guidance published prior to receiving Ms S' SIPP application and subsequent investment instructions is relevant. Otherwise our Service would be considering Ms S' complaint with the benefit of hindsight, which no reasonable court would do. The later guidance introduced new expectations and reflects more than what the industry was already doing.
- Reference to the Reviews contravene the decision in Adams on the basis these:
    - have no bearing on the construction of the Principles as the contents of the documents cannot found a claim for compensation of itself;
    - cannot alter the meaning of, or the scope of the obligations imposed by, the Principles;
    - do not provide "*guidance*" and even if they were considered statutory guidance made under FSMA s.139A, any breach would not give rise to a claim for damages under FSMA s.138D.
- The FCA's Enforcement Guide says that "*Guidance is not binding on those to whom the FCA's rules apply. Nor are the variety of materials (such as case studies showing good or bad practice, FCA speeches and generic letters written by the FCA to Chief Executives in particular sectors) published to support the rules and guidance in the Handbook. Rather, such materials are intended to illustrate ways (but not the only ways) in which a person can comply with the relevant rules.*"
- Regardless of whether or not Carey was aware of SNL's involvement with Ms S, and to what extent it undertook due diligence on SNL, no breach can arise simply by virtue of Carey dealing with unregulated introducers. The regulations have never prohibited that. And, in so far as that has enabled underlying investments to be placed within execution only SIPPs which were unsuitable, that's a consequence of the regulatory regime.
- Carey had a very limited legal obligation to undertake due diligence in respect of the investments. The judge in *Adams* refused to recognise a due diligence duty, instead concluding that obligations are framed by reference to the context of the contractual relationship.
- No evidence has been provided that SNL was undertaking regulated activities by providing advice when it wasn't authorised to do so. And Carey hasn't had the opportunity to address this point at an oral hearing with Ms S.
- It entered into clear TOBs with SNL on 18 September 2011. And had Carey known that SNL was likely to provide advice or conduct regulated business to potential customers, it would not have agreed to deal with SNL. It was therefore reasonable for Carey to believe that SNL was not conducting regulated activities. Carey acted in a competent manner, and it is denied that it should or could have advised Ms S or refused to establish the SIPP.
- Ms S wasn't introduced by SNL, the SIPP application came directly from her. And just because SNL wasn't regulated doesn't mean Carey should have known inappropriate advice was being provided to Ms S.
- Carey had SNL complete the UCIS form as an overabundance of caution and this supports that no advice was provided to Ms S by SNL.
- Our Service is imposing an obligation on it to undertake a qualitative assessment of the investments and to pass this on, effectively amounting to a recommendation to Ms S not to proceed, which overreaches its legal obligations and goes further than published regulatory material.

- Its risk warnings were self-explanatory, it couldn't have provided any clearer indication that the investments were high risk. And it's unclear why Ms S went ahead anyway in spite of the warnings if she now believes the investments were unsuitable.
- It's clear Ms S was keen to proceed to release funds and would likely have gone ahead and found a way to invest even if it hadn't dealt with SNL, as another SIPP operator could properly have dealt with the investments.
- Ms S should bear a measure of responsibility for her actions, which should be reflected in any compensation due. It would be unfair for it to be held responsible for the full losses given Ms S chose to invest in products she'd been told were high risk.
- It would be unfair if Carey couldn't rely on the indemnities and declarations Ms S agreed to.
- A fair and reasonable comparator for redress would be the lower discount rates, as per DRN 2670669.
- Our Service recommended £500 compensation for distress and inconvenience but provided no evidence to support that Ms S has suffered any degree of upset.

And I'm aware that in submissions on other cases with our Service involving SNL and/or SIPP due diligence that Carey has also said, amongst other things, that:

- It provided training and guidance to SNL, carried out checks on it and an introducer profile was completed. It checked Companies House, obtained photo ID of the shareholder and director, checked World Check and held a meeting in person with them likely at Carey offices, although it said it can't provide a meeting note.
- It accepted business from SNL between September 2011 and September 2012. Six members were introduced to it by SNL.
- 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 the customer.
- Carey did not suggest or recommend the investments. It is not responsible for the performance or current market value of these. The mere underperformance of an investment does not create a wrong or liability.
- Our Service is holding it to a standard which is unclear and is on any view much more demanding than is fair or reasonable.
- Our Service has failed to correctly apply s.27 and s.28 of FSMA.
- We haven't set out where we have departed from the law, and why we have taken that approach.
- Our Service has failed to apply the settled legal principles of causation and contributory negligence in circumstances where it is clear that a customer was determined to proceed with the investment regardless of whether or not Carey accepted the applications.
- Our Service is seeking 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, our construction of the Principles is flawed, it is neither fair nor reasonable to determine the complaint by reference to the regulatory publications mentioned, and Carey was not under the duty of due diligence that we seek to impose.
- As made clear in *Adams*, reports, guidance and correspondence issued after the events at issue cannot be applied to Carey's conduct at the time. In any event, the regulatory publications of the type referred to cannot found a claim for compensation in themselves and do not assist in construction of the Principles.
- It would be neither fair nor reasonable for me to determine the complaint by reference to the FCA publications and to do so would only exacerbate the problem

referred to in *R (on the application of Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service* [2017].

- Contrary to COBS our Service 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 the obligations of due diligence our Service has set out, 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.
- The relationships are the same as in *Adams* which held that:
    - 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*"
    - "*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*";
    - "*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*"; and
    - "*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*".
- Our Service has ignored, or 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.
- Our Service only acknowledges our divergence from *Adams* in passing, and the brief justifications for it are misconceived.
- The judge's conclusion in *Adams* is avoided through the finding that, regardless of the relevant contractual arrangements, Carey should have concluded that the investment was inappropriate and refused to accept the application. Again, however, this is to misapprehend the relationship between the Principles and Carey's contractual arrangements. 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, 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.
- It is well established that a reasonable person is expected to read their correspondence: *Webster v Cooper & Burnett* [2000]. The indemnity was drafted in plain, simple English. There was no uncertainty as to its meaning.
- Carey's duties extended no further than those owed to the claimant in *Adams* and, accordingly, it is neither reasonable nor fair for Carey to pay compensation.
- In *Adams* the judge held that, in construing Carey's regulatory obligations, regard should be had to the consumer protection objective in FSMA s.5(2)(d) that the general principle that consumers should take responsibility for their decisions. And

that 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. The Principles reflect the statutory objective. And those statutory objectives include the consumer protection objective: see *Kerrigan v Elevate Credit International Limited*.
- Our Service has failed to have regard to FSMA s.5(2)(d), and to the authority of *Adams* and *Kerrigan* in this respect.

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

My provisional findings

I issued a provisional decision upholding this complaint on 2 February 2024. Ms S responded confirming she had no further comments to make. Carey didn't respond with any further comments or information in respect of Ms S' complaint.

What I've decided – and why

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

When deciding what's fair and reasonable in all the circumstances of this complaint, I need to take account of relevant law and regulations, regulator's rules, guidance and standards, codes of practice and, where appropriate, what I think was good industry practice at the relevant time.

While I've considered the entirety of the detailed submissions the parties have provided, my decision focuses on what I consider to be the central issues. The purpose of my decision isn't to comment on every point or question made, rather it's to set out my decision and reasons for reaching it.

Having done so, I remain of the view that Ms S' complaint should be upheld for the reasons previously set out in my provisional decision, which I've largely repeated below.

Preliminary point - Carey's request for an oral hearing

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

Carey has said an oral hearing is necessary to explore the extent of SNL's role, Ms S' understanding, motivations for entering the transactions and the roles played by the parties.

Our Service provides a scheme under which certain disputes may be resolved quickly and with minimum formality (s.225 of FSMA). DISP 3.5.5R provides the following:

> *"If the Ombudsman considers that the complaint can be fairly determined without convening a hearing, he will determine the complaint. If not, he will invite the parties to take part in a hearing. A hearing may be held by any means which the Ombudsman considers appropriate in the circumstances, including by telephone. No hearing will be held after the Ombudsman has determined the complaint."*

Given my statutory duty under FSMA to resolve complaints quickly and with minimum formality, I'm satisfied that it wouldn't normally be necessary for me to hold a hearing in most cases (see the Court of Appeal's decision *in R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service* [2008] EWCA Civ 642).

So, the key question for me to consider when deciding whether a hearing should be held is whether or not: "…*the complaint can be fairly determined without convening a hearing*".

We do not operate in the same way as the Courts. Unlike a Court, we have the power to carry out our own investigation. And the rules (DISP 3.5.8R) mean I, as the Ombudsman determining this complaint, am able to decide the issues on which evidence is required and how that evidence should be presented. I am not restricted to oral cross-examination to further explore or test points.

If I decide particular information is required to decide a complaint fairly, in most circumstances we are able to request this information from either party to the complaint, or even from a third party. In this case, Carey has had the opportunity to consider, and comment on, our Investigator's view and comments Ms S has provided.

I have carefully considered the submissions Carey has made. However, I'm satisfied that I am able to fairly determine this complaint without convening a hearing. In this case, I'm satisfied I have sufficient information to make a fair and reasonable decision. So, I don't consider a hearing is required. The key question is whether Carey should have accepted Ms S' application at all. Ms S' understanding of matters are secondary to this. And I am, in any event, able to test this to the extent I think necessary by asking questions of Ms S in writing where I think necessary.

As I am satisfied it is not necessary for me to hold an oral hearing, I will now turn to considering the merits of Ms S' complaint.

Relevant considerations

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

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

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

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

And at paragraph 77 of BBA Ouseley J said:

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

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

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

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

The BBSAL judgment also considers s.228 of the FSMA and the approach an Ombudsman is to take when deciding a complaint. The judgment of Jacobs J in BBSAL upheld the lawfulness of the approach taken by the Ombudsman in that complaint, which I've described above, and included the Principles and good industry practice at the relevant time as relevant considerations that were required to be taken into account.

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

On 18 May 2020, the High Court handed down its judgment in the case of *Adams v Options SIPP* [2020] EWHC 1229 (Ch). Mr Adams subsequently appealed the decision of the High Court and, on 1 April 2021, the Court of Appeal handed down its judgment in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474. I've taken account of both judgments when making this decision on Ms S' case.

I note that the Principles for Businesses didn't form part of Mr Adams' pleadings in his initial case against Carey SIPP. And, HHJ Dight didn't consider the application of the Principles to SIPP operators in her judgment. The Court of Appeal also gave no consideration to the application of the Principles to SIPP operators. So, neither judgment said anything about how the Principles apply to an Ombudsman's consideration of a complaint. But, to be clear,

I don't say this means *Adams* isn't a relevant consideration at all. As noted above, I've taken account of both judgments when making this decision on Ms S' case.

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

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

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

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

I note there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams (summarised in paragraph 120 of the Court of Appeal judgment) and the issues in Ms S' complaint. In particular, HHJ Dight considered the contractual relationship between the parties in the context of Mr Adams' pleaded breaches of COBS 2.1.1R that happened after the contract was entered into. And he wasn't asked to consider the question of due diligence before Carey SIPP agreed to accept the investment into its SIPP.

In Ms S' complaint, amongst other things, I'm considering whether Carey ought to have identified that the introductions from SNL and the Ethical Forestry and Freedom Bay investments involved a significant risk of consumer detriment. And, if so, whether it ought to have declined to accept Ms S' applications.

The facts of Mr Adams' and Ms S' cases are also different. I make that point to highlight that there are factual differences between *Adams v Options SIPP* and Ms S' case. And I need to construe the duties Carey owed to Ms S under COBS 2.1.1R in light of the specific facts of her case.

So, I'm satisfied that COBS 2.1.1R is a relevant consideration – but that it needs to be considered alongside the remainder of the relevant considerations, and within the factual context of Ms S' case.

However, it's important to emphasise that I must determine this complaint by reference to what I think is fair and reasonable in all the circumstances of the case. And, in doing that, I'm required to take into account relevant considerations which include: law and regulations; regulator's rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. There is a clear and relevant point of difference between this complaint and the judgments in *Adams v Options*

SIPP. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

I also want to emphasise that I don't say that Carey was under any obligation to advise Ms S on the SIPP and/or the underlying investments. Refusing to accept an application isn't the same thing as advising Ms S on the merits of the SIPP and/or the underlying investments. But I am satisfied Carey's obligations included deciding whether to accept particular investments into its SIPP and/or whether to accept introductions from particular businesses. And this is seemingly consistent with Carey's own understanding of its obligations at the relevant time. I'm aware that Carey introduced a process which was in place in respect of introducers around the time as completing its TOB with SNL, this included an introducer profile which said that "*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*."

S.27/28 FSMA

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

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

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

s.28(3) FSMA provides that:

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

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

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

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

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

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

The other three reasons, in summary, were:

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

The regulatory publications

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

- The 2009 and 2012 Thematic Review reports.
- The October 2013 finalised SIPP operator guidance.
- The July 2014 "*Dear CEO*" letter.

I've considered the relevance of these publications. And I've set out material parts of the publications here, although I've considered them in their entirety.

The 2009 Thematic Review Report

The 2009 report included the following statement:

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

treatment of their customers. COBS 3.2.3(2) states that a member of a pension scheme is a 'client' for COBS purposes, and 'Customer' in terms of Principle 6 includes clients.

It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six TCF consumer outcomes.
…
We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the members to confirm the position, or by contacting the firm giving advice and asking for clarification. Moreover, while they are not responsible for the advice, there is a reputational risk to SIPP operators that facilitate SIPPs that are unsuitable or detrimental to clients.

Of particular concern were firms whose systems and controls were weak and inadequate to the extent that they had not identified obvious potential instances of poor advice and/or potential financial crime. Depending on the facts and circumstances of individual cases, we may take enforcement action against SIPP operators who do not safeguard their customers' interests in this respect, with reference to Principle 3 of the Principles for Businesses ('a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems').

The following are examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms:

- *Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm's clients, and that they do not appear on the FSA website listing warning notices.*

- *Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.*

- *Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified.*

- *Being able to identify anomalous investments, e.g. unusually small or large transactions or more 'esoteric' investments such as unquoted shares, together with the intermediary that introduced the business. This would enable the firm to seek appropriate clarification, e.g. from the client or their adviser, if it is concerned about the suitability of what was recommended.*

- *Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely.*

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

- *Identifying instances of clients waiving their cancellation rights, and the reasons for this"*

The later publications

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

> *"This guide, originally published in September 2009, has been updated to give firms further guidance to help meet the regulatory requirements. These are not new or amended requirements, but a reminder of regulatory responsibilities that became a requirement in April 2007.*
>
> *All firms, regardless of whether they do or do not provide advice must meet Principle 6 and treat customers fairly. COBS 3.2.3(2) is clear that a member of a pension scheme is a 'client' for SIPP operators and so is a customer under Principle 6. It is a SIPP operator's responsibility to assess its business with reference to our six TCF consumer outcomes."*

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

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

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

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

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

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

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

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

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

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

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

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

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

*"**Due diligence***

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

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

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

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

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

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

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

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

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

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

- correctly establishing and understanding the nature of an investment
- ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation
- ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable)
- ensuring that an investment can be independently valued, both at point of purchase and subsequently, and
- ensuring that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc.)

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

I acknowledge that the 2009 and 2012 reports and the "*Dear CEO*" letter aren't formal guidance (whereas the 2013 finalised guidance is). However, the fact that the reports and "*Dear CEO*" letter didn't constitute formal guidance doesn't mean the importance of these should be underestimated. These provide a reminder that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it's treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications which set out the regulators' expectations of what SIPP operators should be doing also go some way to indicate what I consider amounts to good industry practice, and I'm therefore satisfied it's appropriate to take these into account.

It's relevant that when deciding what amounted to good industry practice in the BBSAL case, the Ombudsman found that "*the regulator's reports, guidance and letter go a long way to clarify what should be regarded as good practice and what should not*." And the judge in BBSAL endorsed the lawfulness of the approach taken by the Ombudsman.

At its introduction the 2009 Thematic Review Report says:

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

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

So, I'm satisfied that the 2009 Report is a reminder that the Principles apply and it gives an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. The Report set out the regulator's expectations of what SIPP operators should be doing and therefore indicates what I consider amounts to good industry practice at the relevant time. So I remain satisfied it's relevant and therefore appropriate to take it into account.

In Carey's submissions on other cases with our Service involving SIPP due diligence, including when making its points about regulatory publications, it has referenced the *R. (on the application of Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service* [2017] EWHC 352 (Admin) case. While the judge in that case made some observations about the application of our statutory remit, that remit remains unchanged. And, as noted above, in considering what's fair and reasonable in all the circumstances of a case, I'm required to take into account (where appropriate) what I consider to have been good industry practice at the relevant time.

I think the Report is also directed at firms like Carey acting purely as SIPP operators, rather than just those providing advisory services. The Report says that "*We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses*…" And it's noted prior to the good practice examples quoted above that "*We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs*."

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

I've carefully considered what Carey has said about publications published after Ms S' SIPP was set up. But, like the Ombudsman in the *BBSAL* case, I don't think the fact that some of the publications post-date the events that took place in relation to Ms S' complaint, mean that the examples of good practice they provide weren't good practice at the time of the relevant events. Although the later publications were published after the events subject to this complaint, the Principles that underpin these existed throughout, as did the obligation to act in accordance with the Principles.

It's also clear from the text of the 2009 and 2012 Thematic Review Reports (and the "*Dear CEO"* letter in 2014) that the regulator expected SIPP operators to have incorporated the recommended good practices into the conduct of their business already. So, whilst the regulators' comments suggest some industry participants' understanding of how the good practice standards shaped what was expected of SIPP operators changed over time, it's clear the standards themselves hadn't changed.

I note Carey's point that the judge in the *Adams* didn't consider the 2012 Thematic Review Report, 2013 SIPP operator guidance and 2014 "*Dear CEO*" letter to be of relevance to their consideration of Mr Adams' claim. But it doesn't follow that those publications are irrelevant to my consideration of what's fair and reasonable in the circumstances of this complaint. I'm required to take into account good industry practice at the relevant time. And, as mentioned, the publications indicate what I consider to amount to good industry practice at the relevant time.

That doesn't mean that in considering what's fair and reasonable, I'll only consider Carey's actions with these documents in mind. The reports, "*Dear CEO*" letter and guidance gave non-exhaustive examples of good practice. They didn't say the suggestions given were the limit of what a SIPP operator should do. As the annex to the "*Dear CEO*" letter notes, what should be done to meet regulatory obligations will depend on the circumstances.

To be clear, I don't say the Principles or the publications obliged Carey to ensure the transactions were suitable for Ms S. It's accepted Carey wasn't required to give advice to Ms S, and couldn't give advice. And I accept the publications don't alter the meaning of, or the scope of, the Principles. But as I've said above these are evidence of what I consider to have been good industry practice at the relevant time, which would bring about the outcomes envisaged by the Principles. And, as per the FCA's Enforcement Guide, publications of this type "*illustrate ways (but not the only ways) in which a person can comply with the relevant rules*". So it's fair and reasonable for me to take them into account when deciding this complaint.

I'd also add that, even if I agreed with Carey that any publications or guidance that post-dated the events subject of this complaint don't help to clarify the type of good industry practice that existed at the relevant time (which I don't), that doesn't alter my view on what I consider to have been good industry practice at the time. That's because I find that the 2009 Report together with the Principles provide a very clear indication of what Carey could and should have done to comply with its regulatory obligations that existed at the relevant time before accepting Ms S' applications.

It's important to keep in mind the judge in *Adams v Options* didn't consider the regulatory publications in the context of considering what's fair and reasonable in all the circumstances, bearing in mind various matters including the Principles (as part of the regulator's rules) or good industry practice.

And in determining this complaint, I need to consider whether, in accepting Ms S' application to establish a SIPP and to invest in Ethical Forestry and Freedom Bay, Carey complied with its regulatory obligations: to act with due skill, care and diligence; to take reasonable care to organise and control its affairs responsibly and effectively; to pay due regard to the interests of its customers and treat them fairly; and to act honestly, fairly and professionally. In doing that, I'm looking to the Principles and the publications listed above to provide an indication of what Carey should have done to comply with its regulatory obligations and duties.

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

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

Ultimately, what I'll be looking at here is whether Carey took reasonable care, acted with due diligence and treated Ms S fairly, in accordance with her best interests. And what I think is fair and reasonable in light of that. And I think the key issue in Ms S' complaint is whether it was fair and reasonable for Carey to have accepted her SIPP application and Ethical Forestry and Freedom Bay applications in the first place. So, I need to consider whether Carey carried out appropriate due diligence checks on SNL and the Ethical Forestry and Freedom Bay investments before deciding to do so.

And the questions I need to consider include whether Carey ought to, acting fairly and

reasonably to meet its regulatory obligations and good industry practice, have identified that consumers introduced by SNL and/or investing in Ethical Forestry and Freedom Bay were being put at significant risk of detriment. And, if so, whether Carey should therefore not have accepted Ms S' applications.

The contract between Carey and Ms S

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

My decision is made on the understanding that Carey acted purely as a SIPP operator. I don't say Carey should (or could) have given advice to Ms S or otherwise have ensured the suitability of the SIPP or investments for her. I accept that Carey made it clear to Ms S that it wasn't giving, nor was it able to give, advice and that it played an execution-only role in her SIPP investments. And that forms Ms S signed confirmed, amongst other things, that losses arising as a result of Carey acting on her instructions were her responsibility.

I've not overlooked or discounted the basis on which Carey was appointed. And my decision on what's fair and reasonable in the circumstances of Ms S' case is made with all of this in mind. So, I've proceeded on the understanding that Carey wasn't obliged – and wasn't able – to give advice to Ms S on the suitability of the SIPP or investments.

What did Carey's obligations mean in practice?

In this case, the business Carey was conducting was its operation of SIPPs. And I remain satisfied that, to meet its regulatory obligations, when conducting its operation of SIPPs business, Carey had to decide whether to accept or reject particular investments and/or referrals of business with the Principles in mind. To be clear, I don't agree that it couldn't have rejected applications without contravening its regulatory permissions by giving investment advice.

The regulators' reports and guidance provided some examples of good practice observed by the FCA during its work with SIPP operators. This included being satisfied that an introducer is appropriate to deal with and that a particular investment is appropriate to accept. That involves conducting checks – due diligence – on introducers and investments to make informed decisions about accepting business. This obligation was a continuing one.

As noted above, it is clear from Carey' non-regulated introducer profile, that it understood and accepted its obligations meant that it had a responsibility to carry out due diligence on SNL.

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, given it has said that if it had known SNL was likely to provide advice or conduct regulated business to potential customers, it would not have agreed to deal with SNL. And given it's TOB with SNL reflect that Carey had the right to reject any applications.

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 SNL 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.

Carey's due diligence on SNL

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

I think Carey's aware of this, given that when our Service previously asked it a series of questions about the due diligence it undertook into SNL, from the information provided in response – largely on another case where SNL was also the introducer – it said it took the following actions:

- Entered into TOB with SNL where it undertook that it wouldn't provide advice in relation to the SIPP.
- Provided training and guidance to SNL, carried out checks on it and an introducer profile was completed.
- Checked Companies House, obtained photo ID of the shareholder and director and checked World Check.
- Held a meeting in person with SNL likely at Carey's offices, although it said it can't provide a meeting note.

While this suggests Carey took some steps toward meeting its regulatory obligations and good industry practice, other than the first page of the relevant TOB with SNL dated 18 September 2011 Carey doesn't appear to have provided us with supporting evidence of the above from the time to show that, for example, it sought to query or understand the nature of work in respect of SNL's business objectives, the types of clients it dealt with and types of investments it intended to introduce. That's despite our Service having asked for this. I again asked Carey to provide such information in my provisional decision, but it hasn't done so.

I note Carey has said that Ms S' SIPP application – received 9 September 2011 – came directly from her rather than via SNL as an introduction and that it had no relationship with SNL. It hasn't provided a cover letter or email, for example, from Ms S attaching the application which shows this was directly received from her rather than SNL though. And, in any case, the same day, seemingly alongside Ms S' SIPP application, Carey also received the letter I've referred to above where Ms S gave Carey permission to provide SNL with any information it requested in respect of her SIPP and the investments. And I can see Carey emailed SNL the same day thanking it for Ms S' application. So I think Carey was aware Ms S' business had been introduced to it by SNL.

I don't think the steps Carey took that we've seen evidence of went far enough, or were sufficient, to meet its regulatory obligations and good industry practice in the particular circumstances of Ms S' complaint though. I think Carey ought to have identified potential risks of consumer detriment associated with the business introduced to it by SNL in respect of Ms S.

I recognise Carey put in place TOB with SNL that prohibited it from providing advice in relation to the SIPP. Carey said to SNL in an email dated 13 September 2011, where it attached the TOB for it to sign, that the commencement date would be 8 September 2011 for compliance purposes to ensure that its records were straight. But the first page of the TOB reflects that the agreement took effect from 18 September 2011. Carey had already accepted some business, including Ms S' SIPP application, from SNL by that point though. And given Carey also said it had no relationship with SNL prior to Ms S' application, it seems likely that the other actions Carey has said it took in respect of SNL were also after it had already accepted a few introductions from it.

Carey had due diligence obligations in respect of the business it had already accepted from SNL. I don't think it was enough for it to just seek to try to backdate its TOB to cover this or that Carey could fairly assume that SNL hadn't provided advice in Ms S' case in the circumstances. And Carey's email indicates to me that it was concerned about its records for compliance purposes at that stage, rather than on the quality of business it had already received from SNL.

Carey's obligations in respect of SNL were also ongoing and wider than just having TOB in place, given the examples of good practice refer to ensuring that Carey conducted appropriate and sufficient due diligence by, for example, also monitoring introducers. And I think Carey ought to have had cause for concern about SNL's involvement in Ms S' business.

I think it's unusual that Ms S was asked – seemingly by SNL – to provide Carey with authority to provide SNL with any information it requested in relation to her SIPP and investments, alongside her completed SIPP application form. I think it's clear that the authority form was a typed template with space for Ms S to sign. And I think Carey ought to have been aware that it's unlikely this is something SNL would require in the usual course of events if it was acting purely as an introducer in line with Carey's expectations. Ms S' SIPP application, which I'll come back to, was also witnessed by Ms K of SNL and there were '*X*''s in all places where Ms S needed to sign the form, indicating it was filled out for her and that she was then prompted on where to sign.

The business SNL introduced for Ms S involved higher risk investments that may be illiquid. I appreciate Carey identified this, but the examples of good practice say that doing so would enable Carey to seek appropriate clarification from the prospective member or their adviser if it had any concerns. And, while Carey asked for forms and declarations to be completed, including the UCIS form in respect of Ethical Forestry for example, I don't think Carey went as far as it should have in Ms S' circumstances.

While the UCIS form reflects that Carey wanted to check the investment had been promoted in line with rules, as there were restrictions on who this could be promoted to, I think the completed form raised more concerns. Despite saying at the top that this was to be completed by the introducing adviser – SNL was an introducer not an adviser – this was filled out by Mr W of SNL. And while on the one hand this said no advice had been provided, it also named Mr W as the adviser separately to having named SNL as the introducer. So the information provided was at odds.

It was Mr W that categorised Ms S as a sophisticated investor on the form, rather than Ms S herself. And Carey was provided with an amended version by SNL seemingly the same day, where the sophisticated selection had been crossed out and experienced investor had instead been ticked. I think this is likely because the form said a certificate was required for a sophisticated investor, when it wasn't for an experienced investor, and SNL couldn't provide one for Ms S because it wasn't an authorised person and because this wasn't relevant to her for reasons set out below. I can't see that Carey was provided with or sought any explanation behind this change though.

UCIS are also only suitable for small number of clients and Carey was aware Mr W wasn't authorised in order to be able to suitably categorise Ms S as either sophisticated or experienced. So I think this ought to have given Carey cause for concern too. But I can't see that Carey queried this with SNL or asked for any evidence of Ms S' experience. Instead Carey accepted what SNL said on the form and approved the investment shortly after.

That's despite there also being information readily available in the public domain from mid-2010 – on what was seemingly SNL's website – evidencing that SNL had been promoting

what appears to be other UCIS, or investments that share the characteristics of the Freedom Bay investment that Carey seemingly thought to be a UCIS, in possible contravention of s.21 FSMA. For example, this offered rental guarantees and said that "…*we can offer private investors the opportunity to buy overseas property ranging from studio apartments to 6 bedroom luxury villas, off-plan at well below market value, rewarding investors with high capital appreciation and excellent short and long term returns on investment.*".

While Carey was aware that SNL was unauthorised and that Ms S hadn't received regulated advice, given it has said it treated her as a direct unadvised client, Carey asked SNL to discuss the investment committee information document with Ms S, which I note contained complex information, and accepted SNL's confirmation that it had done so. I note that the UCIS and introducer/adviser forms were also returned by Mr W of SNL to Carey within an hour of him being sent these by it. So I think Carey ought to have been concerned as to what extent these were considered and discussed with Ms S, if at all, which I'll come back to later.

I recognise Ms S' SIPP application said '*N/A*' on the '*Adviser*' section. But, as I've said above, there were clear '*X*''s in all places where Ms S needed to sign the form, indicating it was filled out for her and then she was prompted to sign. In addition, the form was witnessed by Ms K of SNL. The sections at top of the member declaration forms, which were blank or said '*N/A'* next to the 'Adviser' section, were also typed and pre-populated. And at other times SNL was being held out as the adviser in the documentation Ms S saw, given the adviser on the Ethical Forestry purchase order form seemingly completed and signed by Carey on 19 September 2011 noted in handwriting that Ms K of SNL was the adviser, as did another version of the form signed by Ms S in July 2011.

I don't think it's credible that Ms S was independently and proactively determining to switch to a SIPP to invest her pension monies in Ethical Forestry and Freedom Bay by herself. This is consistent with Ms S' clear testimony that SNL persuaded her to do so, that she's a retail client with no previous investment experience and that at the time this made up a significant amount of her pension provision. Carey was also made aware from Ms S' SIPP application form that she was employed by what seems to be a council or local authority, earning only £25,000 per year and that she was transferring a relatively low amount of just over £40,000 to the SIPP. So Ms S doesn't appear to work in finance or pensions and nothing in her application form suggests she is a sophisticated investor.

I think there was a clear and obvious potential risk of consumer detriment here. Given what Carey ought reasonably to have identified in respect of Ms S' business being referred by SNL, I think that Carey should, on a fair and reasonable basis, have conducted independent verification checks on the content of the documentation provided to it to check for authenticity. And if it had then I think it's likely to have found out that Ms S wasn't a sophisticated or even experienced investor, but a retail investor, as explained above. And that Ms S understood SNL to have provided advice and had been offered a cash incentive by it too.

It follows that there was a significant risk SNL had given Ms S advice without permission to do so, in breach of the general prohibition in Section 19 of FSMA – I'll explore this further below. So Carey ought to have concluded that it would not be consistent with its regulatory obligations to accept Ms S' business from SNL and proceed with her applications.

As I've explained above, Carey should neither have accepted Ms S' introduction from SNL nor proceeded with her application to make the investments. I think it is fair and reasonable to uphold this complaint on that basis alone. Nevertheless, I've also considered the due diligence that Carey carried out on the investments. I have taken the

same approach to considering this as I did to considering the due diligence undertaken on SNL.

Investment due diligence

Carey has said that it conducted due diligence on the Ethical Forestry and Freedom Bay investments to ensure these were capable of being held in the SIPP in accordance with HMRC regulations. And that to do so it reviewed investment information, company background checks and an independent report from a third-party compliance company.

The 2014 Dear CEO letter is informative (but not determinative) about the kind of steps Carey could and should have taken and the things it should have had regard to in assessing the Ethical Forestry investment. As a reminder to SIPP operators, the letter said there were some key areas that SIPP operators should focus on and, as a reminder, set out the following:

> *Our review assessed due diligence processes in these five key areas:*
>
> - *correctly establishing and understanding the nature of an investment ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation*
> - *ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable)*
> - *ensuring that an investment can be independently valued, both at point of purchase and subsequently, and*
> - *ensuring that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc.)*
>
> *Please note that the due diligence necessary for individual investments may vary depending on the circumstances, and the five areas highlighted above are not exhaustive.*

The regulators publications are not prescriptive – and what should be done is dependent on the circumstances. And what emerges from the Principles for Business, COBS 2.1.1R and the regulator's publications is that Carey needed to act in Ms S' best interests in its role as an execution only SIPP operator and act reasonably to identify and prevent consumer detriment. So, it needed to conduct sufficient due diligence on the investments and draw a justifiable conclusion with this objective in mind.

Ethical Forestry

I've reviewed all the documents Carey has sent to us to evidence the checks it carried out on the Ethical Forestry investment. I'm satisfied that the documents Carey says it reviewed did allow it to broadly understand the nature of the Ethical Forestry investment, although I note that some of the information and checks – including World Check and company checks – date from 2012 rather than 2011 when Ms S made her investment. But I think Carey's obligations certainly went beyond checking that an investment existed and would not result in tax charges. And I think some of the information should have given Carey real cause for concern about the risk of consumer detriment associated with this.

The report on Ethical Forestry provided by the third party Enhance Support Solutions included the following points:

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

The report by the third party ThreeSixty included the following points:

- The investment should be considered illiquid and clients should be advised to give as much notice as possible when attempting to realise their investment.
- This is, obviously, a high-risk investment in that it is a single asset, in a foreign country, with currency and tax issues which must be considered.
- It is clearly not an investment for a first time investor but as a small part of a portfolio for a higher risk investor this would seem to be an attractive proposition.

Carey's letter setting out its investment committee's review said, amongst other things, that Ethical Forestry:

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

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

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

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

In order to correctly understand the nature of the investment, Carey should also have reviewed how Ethical Forestry was marketed to investors – particularly as it was proceeding on the basis that this investment was being made on a non-advised basis by Ms S. I note that Carey has provided a copy of the Ethical Forestry marketing material it says it reviewed

as part of its due diligence. So, clearly Carey thought it was important to look at this material at the time too.

The marketing material I've seen says Acacia is "a safe and secure investment". The brochure for the Melina and/or Acacia tree crops says the investment is "secure, dependable and stable".

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

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

In October 2010:

"Our forestry investments are suited for pensions because:

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

And in November 2010:

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

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

Carey should also have been concerned about how the projected returns were set out in the marketing material. The Acacia brochure said, for example, that the projected returns for an £18,000 investment over 10 years would be £93,642 and for an accumulating investment over 22 years the projected return was £732,297 and would be "*ideal for SIPPs pensions and personal investment portfolios*". These were said to be "*conservative estimates*". The website also said in respect of Melina that "*A typical investment of £18,000 invested over 10 years is projected to return £93,642. By comparison, a high-return account at 6% compound interest per annum would yield just £32,235 over 10 years",* and the Melina brochure also added that a 24 year accumulating investment was projected to pay out £1,059,312.

I don't think that the marketing material contained any evidential basis for what appears to be wholly unrealistic "*conservative*" returns for investors – almost 4,000% or 5,000% growth for an accumulating investment in the tree crops. Reference is made to historic figures from

the Costa Rica National Forestry Office. But no detail is provided for investors to verify these figures. And, in any case, neither the website or brochures say that past performance is no indicator of what might happen in the future or give alternative projections in different market conditions or highlight the risk factors associated with unregulated investments such as this.

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

- There was no investor protection associated with this investment. It was illiquid, subject to currency fluctuations and there may be no market for it. There were also other risks involved such as disease or fire that could've destroyed the trees allocated to investors.
- It was being specifically targeted for investment by pension investors, it was a speculative overseas based investment with inherent high risks that made it very obviously unsuitable for all but a small category of investors and even then, only a small part of such an investor's portfolio.
- Ethical Forestry had no proven track record for investors and so Carey couldn't be certain that the investment wasn't impaired or operated as claimed.
- The very high projected returns set out should have been questioned. I don't expect Carey to have been able to say the investment would have been successful. But such high projected returns without any apparent basis should have given Carey cause to question its credibility.
- The marketing material was, at best, unclear as to the risks associated with the investment. So, Carey should have been concerned that consumers may have been misled or did not properly understand the investment they intended to make.
- As set out by the liquidator, investors were led to believe they had ownership of trees and cropping rights in relation to the trees and were given GPS co-ordinates to these, when these rights weren't given as these weren't capable of being granted under Costa Rican law.
- Carey knew Ms S wasn't receiving regulated advice about the investment and it was probable that SNL, an unregulated firm, was involved in advising and making arrangements for this high risk, unregulated investment.

Knowing all this, I don't think it was fair or reasonable for Carey to have accepted the Ethical Forestry investment into Ms S' SIPP. Following the due diligence Carey says it conducted, it should have concluded that there was a very clear and obvious risk of consumer detriment. And, without more evidence to ensure the investment was an appropriate one to permit within its SIPPs, I'm satisfied that Carey shouldn't have accepted the Ethical Forestry investment. and declined to accept it into Ms S' SIPP.

Freedom Bay

While it seems from Carey's updates to SNL and Ms S that it was awaiting more information on Freedom Bay before accepting her application to invest in this, suggesting it did carry out some due diligence into it, I can't see that Carey has provided us with any evidence of what it received, what it considered or the conclusions its investment committee reached. In my provisional decision I asked Carey to provide me with such information, but it hasn't done so.

Given the statements Carey asked Ms S to agree to in the Alternative Investment Instruction and Declaration form though (set out above), I think it's clear Carey had some concerns about Freedom Bay.

As I've said, it appears Freedom Bay was marketed as offering investors guaranteed 6% interest for two years during the construction period and a guaranteed income of 8% for

three years once completed. Following the guaranteed period, investors would receive 50% of the income from the suite. This meant that over the five years period, investors were led to anticipate they would get back at least one-third of what they originally put down back. And there was a two-year 'get-out' clause that meant investors would get a refund if the resort wasn't completed within 24 months.

The only marketing material of Freedom Bay's that I've seen is from 2016, albeit under the name of a new developer company. This offered a high '*Projected annual income from 10%*' and said that ***'the IRR*** [which I understand to mean the internal rate of return] ***would be an excellent 17%***'. But these figures had no apparent basis, no detail is provided for investors to verify these figures. And I haven't seen anything to suggest Freedom Bay's earlier marketing material did provide this.

I haven't seen any Freedom Bay marketing material which shows that customers were given:

- Any type of risk warning.
- Sufficient explanation about the comparables that the anticipated high return was likely based on, other than the investment provider's own confidence in its business model and marketplace.
- Any explanation of the guarantees offered. For example:
    - The purchase price was seemingly intended to be held in escrow by the trustee until the property was completed, when this would be released to the developer. But it's unclear what the particular terms of release were, how it was anticipated that the development would be funded during construction in that case and details of how the two-year 'get out' clause worked. I can't see that Carey queried this or asked for evidence of the developer's accounts, for example.
    - Say how Freedom Bay was planning to fund the guaranteed 10% rental income for two years post completion, particularly given I can't see that this was dependent on occupancy.
- A warning that investors could be subject to local tax charges.

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

- The high projected returns should have been questioned. I don't expect Carey to have been able to say the investment would have been successful. But such high projected returns without any apparent basis should have given Carey cause to question its credibility.
- There was no investor protection associated with this investment. It was illiquid and may prove difficult to sell.
- One of its main marketing points was the timeshare aspect, that customers could choose to stay in the hotel room or rent it out. Yet Carey appears to have determined that there was a resulting risk of a HMRC tax charge such that customers, like Ms S, needed to forego this right when investing via a SIPP. So, Carey should have been concerned that consumers may have been misled or did not properly understand the investment in relation to the SIPP.
- Carey knew Ms S wasn't receiving regulated advice about the investment and it was probable that SNL, an unregulated firm, was involved in advising and making arrangements for this high risk, unregulated investment.
- As set out by the insolvency practitioner, Freedom Bay had only paid a deposit for the land and didn't have the ability to complete the purchase. Given it had only paid the deposit for the land, Freedom Bay seemingly didn't have and therefore wouldn't

have been able to evidence full title. And it's unclear how it was anticipated that Freedom Bay would also complete the intended building works for the hotel suites/villas in that case.
- Considering Carey mentioned inducements in the Freedom Bay declaration, but it didn't in respect of the Ethical Forestry declaration, this leads to me think Carey might have had concerns that customers might be being offered this in respect of Freedom Bay.

In light of the evidence I've seen and Carey's obligations as set out above – which I've said went beyond checking that an investment existed and would not result in tax charges – I think Carey failed to draw a reasonable conclusion on accepting the investments, for the reasons set out below. I think some of the information should have given Carey real cause for concern about the risk of consumer detriment associated with this.

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

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

COBS 11.2.19R

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.

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

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

> *'The heading to COBS 11.2.1R shows that it is concerned with the manner in which orders are to be executed: i.e. on 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 or to execute the instruction to make the Ethical Forestry and Freedom Bay investments i.e. to proceed with the application.

The indemnity

The indemnity sought to confirm that Ms S was aware the investment was high risk, had taken her own advice, and would not hold Carey responsible for any liability resulting from the investment. The Freedom Bay indemnity also asked Ms S to confirm she wasn't receiving an inducement.

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

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

With this in mind, I think Carey ought to have been cautious about accepting Ms S' applications even though she 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 Ms S had taken her own advice and understood the investment risks.

Carey had to act in a way that was consistent with the regulatory obligations that I've set out in this decision. In my view, Carey was not treating Ms S fairly by asking her to sign an indemnity absolving Carey of all responsibility, and relying on such an indemnity, when it ought to have known that Ms S' dealings with SNL were putting her at significant risk.

Summary of my findings on due diligence

In summary, Carey did not comply with good industry practice, act with due skill, care and diligence, organise and control its affairs responsibly, or treat Ms S fairly by accepting her applications from SNL in the light of the circumstances I've explained surrounding its involvement, and considering what Carey knew or ought to have known about the investments before Ms S' applications to invest in these were received, by proceeding in the light of what it knew or ought to have known about SNL and the investment by the time these were made. 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 Ms S. I accept Carey had no obligation to give advice to Ms S, or to otherwise ensure the suitability of a pension product or investment for her. My finding is not that Carey should have concluded that the investment and SIPP was not suitable for Ms S.

Rather, Carey was able to accept or reject applications for business and I say that it should have rejected Ms S' application for a SIPP introduced by SNL, and failing that, for the reasons I set out above, it should not have accepted her request to invest in Ethical Forestry and Freedom Bay.

s.27 and s.28 FSMA

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

I have set out the key sections of s.27 and s.28 above and have considered them carefully,

in full. In my view I need to apply a four-stage test to determine whether s.27 applies and whether a court would exercise its discretion under s.28, as follows:

1. Whether an unauthorised third-party was involved;

2. Whether there is evidence that the third-party acted in breach of the General Prohibition in relation to the particular transaction and, if so;

3. Whether the customer entered into an agreement with an authorised firm in consequence of something said or done by the unauthorised third-party in the course of its activities that contravened the General Prohibition; and

4. Whether it is just and equitable for the agreement between the customer and the authorised firm to be enforced in any event.

Was an unauthorised third-party involved?

There is no dispute SNL was an unauthorised third party.

Is there evidence SNL acted in breach of the General Prohibition?

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

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

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

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

a specified kind of activity.

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

I have considered these in turn.

Advice

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

Paragraph 82:

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

Ms S didn't actively contact SNL herself and her evidence is that it advised her to switch out of her existing personal pension, into the Carey SIPP and invest in Ethical Forestry and Freedom Bay. I think that evidence is plausible, and credible. As set out above, I do not think Ms S thought of taking this course of action of her own volition or would have done so without a positive recommendation from SNL which, she says, gave her various assurances about the risks involved. Ms S didn't find SNL in the course of looking for alternative pension provision and has said she wouldn't have otherwise considering switching.

To confirm, I am satisfied SNL advised Ms S to transfer out of her existing pension and transfer into the Carey SIPP – and so it undertook the regulated activity defined at article 53 of the RAO.

Making arrangements

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

Paragraph 99:

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

Paragraph 100

"I consider, too, that the steps which CLP took can fairly be said to have been such as to "bring about" the transfers from Friends Life and into the Carey SIPP. Contrary to the Judge's understanding, it does not matter that CLP's acts "did not necessarily result in any transaction between [Mr Adams] *and* [Carey]*" or that "the process was out of CLP's hands to control in any event". Nor is it determinative whether steps can be termed "administrative".*

CLP's "procuring the letter of authority", role in relation to anti-money laundering requirements and (especially) completion of the Carey application form were much more closely related to the relevant transactions than, say, the advertisement which originally prompted Mr Adams to contact CLP. It is to be remembered that CLP filled in sections of the application form dealing with "Personal Details", "Occupation & Eligibility", "Transfers", "Investments" and "Nomination Of Beneficiaries". In my view, what CLP did was thus significantly instrumental in the material transfers. In other words, there was, in my view, sufficient causal potency to satisfy the requirements of article 26 of the RAO."

As explained above, at the outset Ms S gave Carey permission to liaise directly with SNL in respect of all matters regarding her pension arrangement. And it seems the application form was pre-populated by SNL.

So the steps which SNL took can fairly be said to have been such as to "*bring about*" the transfer from Ms S' existing personal pension into the Carey SIPP – they had sufficient causal potency to satisfy the requirements of article 26 of the RAO.

I am therefore satisfied SNL carried out regulated activities, and therefore breached the General Prohibition. And any one regulated activity is sufficient for these purposes so this test would be met if SNL had only undertaken arranging (which, for the reasons I have set out, I do not think is the case).

Did Ms S enter into an agreement with Carey in consequence of SNL's actions?

I am satisfied the SIPP was opened in consequence of the advice given, and arrangements made, by SNL. If SNL advised Ms S to switch her existing personal pension to a SIPP with Carey in order to invest in Ethical Forestry and Freedom Bay, and then made the arrangements for that to happen I am satisfied Ms S would not have entered into an agreement with Carey.

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

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

- A key aim of FSMA is consumer protection. It proceeds on the basis that, while consumers can to an extent be expected to bear responsibility for their own decisions, there is a need for regulation, among other things to safeguard consumers from their own folly.
- While SIPP providers were not barred from accepting introductions from unregulated sources, s.27 of FSMA was designed to throw risks associated with doing so onto the providers. Authorised persons are at risk of being unable to enforce agreements and being required to return money and other property and to pay compensation regardless of whether they had had knowledge of third parties' contraventions of the

general prohibition.

- As set out above Carey was aware, or ought reasonably to have become aware:
    - SNL was stepping far beyond that of an introducer from the outset in Ms S' case.
    - SNL was offering cash incentives to consumers and therefore acting "completely against all rules".
- The investment did not proceed until these things were known or ought to have been known to Carey and so it was – or should have been – open to it to decline the investment.

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

Is it fair to ask Carey to compensate Ms S?

In deciding whether Carey is responsible for any losses that Ms S has suffered on her investments I need to look at what would have happened if Carey had done what it should have done i.e. had not accepted Ms S' applications in the first place.

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

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

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

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

Had Carey explained to Ms S why it would not accept the applications from SNL or was terminating the transaction, I find it very unlikely that Ms S would have tried to find another SIPP operator to accept the business.

So I'm satisfied that Ms S would not have continued with the SIPP, had it not been for Carey's failings and would have remained in her existing scheme. And, whilst I accept SNL is responsible for initiating the course of action that led to Ms S' 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 Options* High Court judgment, which says:

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

should be overlooked, that the client is not to be treated as able to reach and take responsibility for his own decisions and that his instructions are not to be followed."

For all the reasons I've set out, I'm satisfied that it would not be fair to say Ms S' actions mean she 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 Ms S was warned of the high risk and declared she understood that warning.

But, as I set out above, Carey did not share significant warning signs with her in respect of SNL, her applications and the investments so that she could make an informed decision about whether to proceed or not. In any event, Carey should not have asked her 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.

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

So I am satisfied in the circumstances, for all the reasons given, that it is fair and reasonable to conclude that Carey should compensate Ms S for the loss she has suffered. I am not asking Carey to account for loss that goes beyond the consequences of its failings. I am satisfied those failings have caused the full extent of the loss in question. That other parties might also be responsible for that same loss is a distinct matter, which I am not able to determine. However, that fact should not impact on Ms S' right to fair compensation from Carey for the full amount of his loss.

Carey has argued that Ms S would have invested regardless of its involvement. But I'm not persuaded by this. Carey seemingly only started to do due diligence on SNL after it had started to do business with SNL and after it had accepted Ms S' application. And I don't think there is any persuasive evidence that Ms S would have gone ahead with the transfer if Carey had refused her application and explained why this was the case. I recognise Ms S said she was experiencing hard times when SNL told her she'd receive an incentive payment, but I'm not persuaded that if she'd understood the risks that she would have risked a significant amount of her pension provision at the time. And I think it's fair to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted Ms S' business from SNL or permitted the Ethical Forestry and Freedom Bay investment into its SIPPs.

Putting things right

My aim is to return Ms S to the position she would now be in but for what I consider to be Carey's due diligence failings.

In light of the above, I think that Carey should calculate fair compensation by comparing the current position to the position Ms S would be in if she hadn't transferred from her existing pension plan.

To date, we haven't received anything to suggest this was anything other than a defined contribution plan without any guarantees attached. So I've proceeded on the basis that there were no such guarantees. Neither Ms S nor Carey disputed this, despite being given the opportunity to do so by the deadline for responding to the provisional decision and being made aware that it won't be possible for us to amend this once a final decision has been issued

Carey has said that a fair and reasonable comparator for redress would be the lower discount rates, as per DRN 2670669. But I'm considering the circumstances individual to Ms S' complaint. And I note that the above decision Carey has mentioned referenced discount rates because the complaint involved a pension transfer of a defined benefit occupational pension scheme, rather than a personal pension as in Ms S' case.

In summary, Carey should:

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

2. Obtain the actual current value of Ms S' Carey SIPP, as at the date of this decision, less any outstanding charges.

3. Deduct the sum arrived at in step 2) from the sum arrived at in step 1).

4. Pay a commercial value to buy any illiquid investments (or treat them as having a zero value).

5. Pay an amount into Ms S' Carey SIPP, so that the transfer value of this is increased by an amount equal to the loss calculated in step 3). This payment should take account of any available tax relief and the effect of charges. The payment should also take account of interest as set out below.

6. Pay Ms S £500 for the distress and inconvenience the problems with her pension have caused her.

I've explained how Carey should carry out the calculation, set out in steps 1 - 6 above, in further detail below:

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

   Carey should ask the operator of Ms S' previous pension plan to calculate the current notional value this, as at the date of this decision, had he not transferred into the SIPP. Carey must also ask the same operator to make a notional allowance in the calculations, so as to allow for any additional sums Ms S has contributed to, or withdrawn from, her Carey SIPP since the outset. To be clear this doesn't include SIPP charges or fees paid to third parties like an adviser.

   Any notional contributions or notional withdrawals to be allowed for in the calculations should be deemed to have occurred on the date on which monies were actually credited to, or withdrawn from, the Carey SIPP by Ms S.

   And account should also be taken of the £5,000 cash back payment Ms S says she received in the calculation by way of treating it as an income withdrawal payment paid at the outset.

   If there are any difficulties in obtaining a notional valuation from the operator of Ms S' previous pension plan, Carey should instead calculate a notional valuation by ascertaining what the monies transferred away from this would now be worth, as at the date of this decision, had these achieved a return from the date of transfer equivalent to the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index).

I'm satisfied that's a reasonable proxy for the type of return that could have been achieved over the period in question. And, again, there should be a notional allowance in this calculation for any additional sums Ms S has contributed to, or withdrawn from, her Carey since outset.

2. Obtain the actual current value of Ms S' Carey SIPP, as at the date of this decision, less any outstanding charges.

   This should be the current value as at the date of this decision.

3. Deduct the sum arrived at in step 2) from the sum arrived at in step 1).

   The total sum calculated in step 1) minus the sum arrived at in step 2), is the loss to Ms S' pension provisions.

4. Pay a commercial value to buy Ms S' share in any investments that cannot currently be redeemed.

   I'm satisfied that Ms S' Carey SIPP only still exists because of the illiquid investments that are held within it. And that but for these investments Ms S' monies could have been transferred away from Carey. In order for the SIPP to be closed and further SIPP fees to be prevented, any remaining investments need to be removed from the SIPP.

   To do this Carey should reach an amount it's willing to accept as a commercial value for the investments, and pay this sum into the SIPP and take ownership of the relevant investments.

   If Carey is unwilling or unable to purchase the investments, then the actual value of any investments it doesn't purchase should be assumed to be nil for the purposes of the redress calculation. To be clear, this would include their being given a nil value for the purposes of ascertaining the current value of Ms S' SIPP in step 2).

   If Carey doesn't purchase the investments, it may ask Ms S to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from these investments. That undertaking should allow for the effect of any tax and charges on the amount Ms S may receive from the investments, and any eventual sums she would be able to access from the SIPP. Carey will need to meet any costs in drawing up the undertaking.

5. Pay an amount into Ms S' Carey SIPP, so that the transfer value of this is increased by an amount equal to the loss calculated in step 3). This payment should take account of any available tax relief and the effect of charges. The payment should also take account of interest as set out below.

   The amount paid should allow for the effect of charges and any available tax relief. Compensation shouldn't be paid into a pension plan if it would conflict with any existing protections or allowances.

   If Carey is unable to pay the compensation into Ms S' SIPP, or if doing so would give rise to protection or allowance issues, it should instead pay that amount direct to her. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore, the compensation should be reduced to notionally allow for any income tax that would otherwise have been paid.

The notional allowance should be calculated using Ms S' actual or expected marginal rate of tax in retirement at her selected retirement age.

It's reasonable to assume that Ms S is likely to be a basic rate taxpayer at her selected retirement age, so the reduction would equal 20%. However, if Ms S would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

Neither Ms S nor Carey disputed that this is a reasonable assumption when they were given the opportunity to, despite being told that it won't be possible for us to amend this assumption once any final decision has been issued on the complaint.

6. Pay Ms S £500 for the distress and inconvenience the problems with her pension have caused her.

   In addition to the financial loss that Ms S has suffered as a result of the problems with her pension, I think that the loss suffered to Ms S' pension provision has caused her distress. She's explained that she's been upset at having lost her pension which she paid into for ten years. Ms S lost a significant proportion of her pension provision when she was in her mid-50's, I think it's unlikely she can afford such a loss and there isn't much time to recover it before retirement, so I think this is likely to have caused her worry. And I think that it's fair for Carey to compensate her for this as well.

SIPP fees

If the investment/s can't be removed from the SIPP, and because of this it can't be closed after compensation has been paid, then it wouldn't be fair for Ms S to have to pay annual SIPP fees to keep the SIPP open. So, if the SIPP needs to be kept open only because of the illiquid investments and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.

Interest

The compensation resulting from this loss assessment must be paid to Ms S or into her SIPP within 28 days of the date Carey receives notification of Ms S' acceptance of my final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation isn't paid within 28 days.

My final decision

For the reasons given. It's my final decision that this complaint is upheld and Options UK Personal Pensions LLP (previously called Carey Pensions UK LLP) must calculate and pay fair compensation to Ms S as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms S to accept or reject my decision before 18 March 2024.

Holly Jackson
Ombudsman