The Pensions Ombudsman

Ombudsman's Determination

Applicant	Mrs H
Scheme	The Carey Pension Scheme (**the Scheme**)
Respondents	Carey Pension Trustees UK Limited
	Carey Pensions UK LLP

Complaint Summary

1. Mrs H has complained that Carey did not exercise sufficient due diligence before allowing her to invest in the "Princess Project" (**the Princess Project**) promoted by Silva Tree (**Silva Tree**), a Panamanian registered company, and in carbon credits through Carbonex SARL (**Carbonex**) via the Scheme in the period between November 2010 and February 2011. Her investments have now been valued at nil and, as a result, she has lost a significant sum of money.

Summary of the Ombudsman's Determination and reasons

2. The complaint is not upheld because at the time the investments were made, it was not the responsibility of either Carey Pension Trustees UK Limited or Carey Pensions UK LLP to carry out the level of due diligence suggested by Mrs H, taking into account the relevant law and the expectations that were set at the time by the Financial Services Authority (**FSA**).

Parties to the dispute

3. Mrs H's complaint is the lead case for a group of seven linked cases (our references CAS-11756-Q4H0 to CAS-11762-X3M5 inclusive), where each applicant transferred their pension to the Scheme. The facts of all seven cases are broadly identical. As such, I have largely referred to "the Applicants" throughout, and my overall findings apply to all seven complaints.

4. The Scheme is a Self-Invested Personal Pension (**SIPP**). Carey Pensions Trustees UK LLP is the Trustee for the SIPP, and Carey Pensions UK LLP is the Administrator for the SIPP. Both parties have responded as one in this matter and, for ease of reference, I will refer to them collectively as Carey (although I recognise they have different roles, responsibilities and regulatory regimes).

Detailed Determination

Material facts

5. Between November 2010 and February 2011, all of the Applicants invested in the Princess Project through Silva Tree. Mrs H and one other Applicant also invested in Carbonex. The Applicants were informed about the investments by one of their number, who was a family member/family friend respectively, and who was not qualified to give investment advice. The individual concerned has confirmed that Silva Tree had recommended Carey as a SIPP provider.

6. The Princess Project was a timber-based investment. The Applicants were investing in timber from a plantation in Panama, and returns were advertised as 'guaranteed' by the promotional literature. The returns were purported to be guaranteed as a contract was already in place with a buyer for the timber. However, by January 2014, it became apparent that the plantation was under-performing and the Applicants' investments were accordingly valued at nil.

7. Carey has confirmed that the plantation under-performed due to a number of factors. In particular, it states it was informed that the trees required more intensive management than originally predicted, which rendered the project more expensive. There was also a lack of experience for the particular trees being used, and a lack of availability of fieldworkers. Ultimately, the forecasted returns started to be outweighed by the cost of maintaining the plantations, and eventually there were insufficient funds to continue the work required.

8. Between May and June 2012, Mrs H and one other Applicant also invested in Carbonex, a company incorporated and registered in Luxembourg. The investment involved trading voluntary and certified emission reduction credits. Carbonex purported to be a carbon credit trader with the credits being held by a nominee company, on behalf of the investor, until a buyer was found and the credits could be sold. However, unfortunately, there have consistently been no buyers found and as such the Applicants' investments with Carbonex have been valued at nil. Carbonex has since been declared insolvent.

9. It is assumed for the purposes of this investigation that both the Silva Tree and Carbonex investments would be classed by the Financial Conduct Authority (**FCA**), (the successor to the FSA), as Unregulated Collective Investment Schemes (**UCIS**), and would therefore be subject to the more stringent procedures expected of SIPP providers by the FCA from October 2013 onwards, as set out in the Guidance issued following its second thematic review of SIPPs (see paragraph 72 below)

Summary of Applicants' position

10. Although Carey did not provide advice, it did operate the SIPPs. The Applicants believed that because Carey had carried out due diligence on the proposed investments and confirmed that they were capable of being held in the SIPPs, Carey

had approved the investments, and was acting in their best interests. By facilitating the investments, Carey permitted others to defraud the Applicants.

11. The Applicants have said that as a regulated company, Carey owed them a duty of care to act in accordance with the FCA's Conduct of Business Sourcebook (**COBS**) as it stood at the relevant time – in particular COBS 4 (communication re financial promotions), 9 (suitability) and 10 (appropriateness for non-advised products) - see Appendix A where the relevant parts have been reproduced; and Principle 6 of the Principles for Business (see Appendix B) - but failed to do so. The Applicants have also said that Carey failed to act in accordance with the FSA 2009 thematic review (see Appendix B, which sets out those parts of the guidance relied upon by the Applicants).

12. The Applicants consider that it was not enough for Carey to simply warn of the risks inherent in the investments, and that had Carey acted in line with its obligations and carried out more checks on Silva Tree and Carbonex, they would never have been allowed to invest, and subsequently lose, their money. It is unclear how the investments were valued, and Carey did not carry out sufficient due diligence to demonstrate that the investments were suitable for being held in a SIPP. The Applicants feel that Carey did not give bespoke warnings highlighting the specific risks of investing in these investments.

13. The Applicants state that upon carrying out the due diligence on the investments, it should have become apparent to Carey that the investments were not in their best interests. For example, the Applicants received no independent legal or financial advice, the investments that the Applicants were investing a substantial proportion of their pensions in were irregular and should have warranted further investigation.

14. Had Carey acted in accordance with the recommended practices outlined in the FSA's 2009 thematic review and had carried out even the most basic of steps, sufficient warnings could have been made to the Applicants, and the investments would not have taken place. Cognisance should have been given to the fact that: no independent legal or financial advice had been obtained by any of the Applicants; the seedlings to be planted in the Panamanian plots would never have grown successfully; the carbon credits were purchased at a grossly exaggerated price and could never have been sold by the Applicants; the promised returns were extremely high; and the proposed investments represented up to 100% of the Applicants' pension funds.

Summary of Respondent's position

15. In response to the Applicants' arguments that it has breached COBS, Carey has stated that the referenced COBS parts are not applicable. In particular, Carey has confirmed that it never provided any advice to the Applicants nor promoted any investments. It has highlighted that it is not permitted to provide advice. Furthermore, as a SIPP provider it does not give advice about what investments members of the SIPP should make – and this is outlined in its key facts document (**KFD**).

16. The KFD states:

    "You can appoint an advisor or manage the investments yourself. You (or your advisor) must tell us what investments to make. We will not give you any advice."

17. The Deed of Establishment of the scheme, dated 27 July 2009, provides at clause 7.2 that Carey Pensions UK LLP shall in relation to a member's fund exercise the powers of investment "only in accordance with any directions given by the relevant Member…"

18. Carey has also highlighted that its application form, which each Applicant signed a copy of, states:

    "Please note: Carey Pensions UK LLP and Carey Pension Trustees UK Ltd will not at any point review any aspects of your appointed Investment Manager's financial status or investment and risk strategies."

    "Carey Pensions UK LLP and Carey Pension Trustees UK Ltd will also not have any involvement in your investment choices and selection, nor give advice on the suitability of your investment choices."

    "Your investment choices are the sole responsibility of you and/or your Financial Adviser/Investment Manager."

19. Carey has also evidenced that the Applicants requested their Silva Tree investments as part of their applications for the SIPP. This evidence shows that the Applicants all knew one another and had decided to invest in Silva Tree before they approached Carey.

20. In addition, Carey has stated that it exercised due diligence in relation to both the Silva Tree and Carbonex investments before allowing the Applicants to invest. To begin with, it has shown that it obtained independent reports from a company called Enhance for carbon credit investments and for Silva Tree.

21. Enhance's report on Silva Tree is dated 15 November 2009 and confirms that Silva Tree's projects appear to be investments that are suitable to be held in a SIPP. While Enhance's report on carbon credits was not in relation to Carbonex specifically, it provides insight on the carbon credit industry and suggests such investments are also suitable for a SIPP. This report is dated 15 October 2010.

22. In addition, Carey has argued that it reviewed a large number of documents for each investment, including the promotional literature for the investments, relevant media coverage of the companies, the leasehold agreements involved in the Princess Project, and a report from the sustainable forestry project on timber investments.

23. Carey has demonstrated that the investments were then reviewed by a Technical Review Committee before they were included in the SIPP. An internal document headed "Investment Alternative Acceptance/Declination – Procedure 2012" states that the Technical Review Committee will consider the information purely from an

HMRC rules perspective and the Scheme trust deed and rules; and that it will not consider the suitability, appropriateness, or qualitative features of any of the products. Carey has also sent a copy of the Minutes of these meetings, which confirm that Carey had assessed whether the investments in question posed a tax charge liability and concluded they did not. The Minutes also evidence that it was agreed the investments could be included as long as the members signed declaration forms to indicate their acceptance of the relevant risks involved. This was because Carey's due diligence had revealed that, while the investments appeared capable of being held in a SIPP, they were high risk.

24. Carey has provided a copy of a signed SIPP member declaration and indemnity form for each Applicant and for the Silva Tree investment. It was a one-page document and included the following statements that the Applicant signed their agreement to:

    "I, [name of member…] write to instruct Carey Pension Trustees UK Ltd to Purchase land to the value of £XXXXX on my behalf for the above Scheme."

    "I am fully aware that both Carey Pensions UK LLP and Carey Pension Trustees UK Ltd acted on an Execution Only Basis."

    "I am fully aware that this is [sic] investment is High Risk and/or Speculative and confirm that I wish to proceed."

    "Neither Carey Pensions UK LLP nor Carey Pension Trustees UK Ltd have provided any advice whatsoever in respect of this investment."

    "I indemnify both Carey Pensions UK LLP and Carey Pension Trustees UK Ltd against any and all liability arising from this investment."

25. The SIPP member instruction and declaration form for Carbonex was two pages in length and included specific information about the carbon credit industry. In particular, it included the following under the heading 'Background':

    "The purpose of this introduction is to highlight some of the SIPP related risks involved with Carbon Credits in order that you are aware of these prior to purchase.

    Whilst carbon credits generally have been around for some time, the market for trading them is still immature – this means there may not be a ready buyer of the Carbon Credits held within your SIPP and no guarantee they could be sold at a profit were a buyer found.

    Expert commentators suggest that the market in trading Carbon Credits may take some time to develop (assuming it does develop) – typically three to five years is mentioned although again these cannot be guaranteed.

    Consequently it should be appreciated by you as the scheme member instructing us to purchase Carbon Credits within your SIPP that this investment is potentially high risk, long term in nature and illiquid."

26. On the same form under the heading "Your instruction as the Scheme Member to us as SIPP Operator and Trustee," each Applicant confirmed their instruction and confirmations as follows:

    "… to purchase Carbon Credits through Carbon – Ex for a consideration of £22,456.25…

    I confirm that I have considered carefully the information provided by Carbon-ex and have a good understanding of Carbon Credits….

    I confirm that because of the potential liquidity issues Carey Pensions UK LLP has suggested a range of 0-50% of my fund be invested in this investment but that the decision of the amount invested rests with me and my advisers and we have made the decision of the amount to invest, as noted above".

27. The form then asked the member to confirm that they agreed with a number of statements, including the below:

    "1. I understand that Carey Pensions UK LLP as the Administrator and Carey Pension Trustees UK Ltd as the Trustee of the Scheme act on an Execution Only Basis upon my instruction.

    2. Neither Carey Pensions UK LLP nor Carey Pension Trustees UK Ltd have provided any advice, whatsoever, in respect of the SIPP or this investment, including but not limited to financial, investment, tax advice.

    …

    4. I understand this investment is an Unregulated "Alternative Investment "and as such is considered High Risk and Speculative and that it may prove difficult to value, sell / realise.

    …

    6. I understand that investment values can fall as well as rise and that the whole of this investment may be lost.

    7. I have reviewed and understand the information and documentation provided by Carbon – Ex….

    8. I have taken my own advice.

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    15. My normal day to day business is not that of trading carbon credits.

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    17. I indemnify both Carey Pensions UK LLP and Carey Pension Trustees UK Ltd against any and all claims….."

28. Carey's position is that it does not assess the suitability of the underlying investment for an individual's circumstances as it does not provide advice. Carey is not responsible for the on-going monitoring of investments and does not provide continuous updates. Carey has no control over the performance or value of the investments. This was made clear in the documentation. The original purchase price was used for the purposes of annual valuations. Following the apparent inability of Silva Tree to provide a valuation of those investments and a market review by Carey of the Carbon Credits market, it appeared there were no ready buyers for either investment. Carey made the decision to value them at nil going forward. This could change in the future and is not guaranteed to remain valued at nil.

29. Carey considers that it complied with Principle 6 of the FCA Principles for Business as it provided clear information and acted in accordance with the Applicants' instructions. It ensured the investments were suitable to be held within a SIPP from a tax perspective. It did treat the Applicants fairly because it ensured that they understood they were entering into investments on an execution only basis and gave risk warnings.

30. Carey did not approve or communicate any document which was in the form of an investigation or inducement to enter into Silva Tree or Carbonex investments; so the duties in COBS 4 do not apply. COBS 9 does not apply as it did not make a personal recommendation to the Applicants. It acted on an execution only basis. COBS 10 applies to firms which provide investment services in the course of the Markets in Financial Instruments Directive (**MiFID**) or equivalent third country business other than making a personal recommendation and managing investments. Carey carries on designated investment business only in that the regulated activities for which it has permission are limited to personal pension schemes and rights to or interests in securities. Its permission does not extend to MiFID financial instruments and Carey does not as a matter of fact carry on MiFID business or equivalent third country business, and so the obligations in COBS 10 do not apply to Carey.

31. With the above in mind, Carey feels that it exercised a reasonable level of due diligence and ensured the Applicants were fully informed of the potential risks of their investments. Carey has emphasised that it administered the SIPP on an execution only basis and it is not responsible for the losses the Applicants have suffered.

Conclusions

32. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were many other exchanges of information between all the parties.

The Scheme Rules

33. Rule 7.1 provides the Scheme Administrator with wide ranging investment powers, including under 7.1.2: “any interest in land or property” and under 7.1.5 “by entering into and engaging in any obligations or contracts or dealings including dealings in currencies, traded options, financial futures, commodities or commodity futures.”

34. However, as is the case with many SIPPs, the Scheme Rules have been drafted in such a way as to allow the member control over investment decisions, and to strip away powers and discretions that would otherwise lie with a trustee or scheme administrator. Notably, Rule 7.2 states that: “The Scheme Administrator shall, in relation to an Individual Fund, exercise the powers in Rule 7.1 only in accordance with any directions given by the relevant member, except where to do so would in the opinion of the Scheme Administrator…breach the provisions of the Rules, prejudice the status of the Scheme as a registered pension scheme or provide a benefit not specifically permitted by the Rules or be (or be treated as making a scheme chargeable payment)…”. The steps taken by Carey show that it gave due consideration to the proposed investments to check that they would be compatible with the Rules, would not prejudice the registration status of the Scheme and would not incur a scheme chargeable payment.

35. I am therefore satisfied that in allowing the investments, Carey was acting in accordance with the Scheme Rules.

Carey’s role as Trustee and Administrator

36. The principal question in relation to the Applicants’ complaints against Carey is whether it carried out appropriate due diligence and whether it was maladministration for it to permit the assets to be held within the SIPP. In considering whether there was maladministration I have to consider Carey’s legal obligations to the Applicants, and whether it acted consistently with good industry practice.

37. Carey acted as Trustee and Administrator of the SIPP. I have, therefore, considered its obligations to the Applicants in both roles – recognising that the powers of both, particularly in relation to investment, are limited.

38. The concept of a statutory duty of care as it applies in this case is defined in the Trustee Act 2000 (**the Act**). The Act was introduced principally to solve the problems faced by many private trusts and some charities that had investment powers restricted by the Trustee Investment Act 1961, which was no longer appropriate.

39. All trusts now have wide investment powers by virtue of the Act. There is also a new statutory duty of care to sit alongside common law trustee duties and responsibilities. The Act states that it applies to investments “to investment by trustees and persons having the investment powers of trustees.” There is an exemption for occupational pension schemes, but no specific exemption for SIPPs (being personal pensions).

40. I have copied below an extract from the Explanatory Notes that accompany the statutory provisions. It reads:

"The duty is a default provision. It may be excluded or modified by the terms of the trust. This new duty will apply to the manner of the exercise by trustees of a discretionary power. It will not apply to a decision by the trustees as to whether to exercise that discretionary power in the first place."

41. The provision to which the explanatory note refers is Paragraph 7 of Schedule 1 of the Act (which disapplies the Duty of Care contained in Part 1 of the Act). It states:

"The duty of care does not apply if or in so far as it appears from the trust instrument that the duty is not meant to apply."

42. I consider that the statutory duty of care in relation to investments does not apply to Carey either as Trustee or Administrator as explained in Paragraph 7 of Schedule 1 to the Act. It does not apply to Carey as Trustee because, aside from its limited role in relation to investments, Rule 8.1 of the Scheme Rules states that "The duty of care under section 1 of the Trustee Act 2000 shall not apply to any trustee in relation to the Scheme", and it does not apply to Carey as Administrator because although under Rule 7.1 (see paragraph 33 above) the Administrator ostensibly has very wide powers of investment, Rule 7.2 (see paragraph 34 above) and the contractual documentation with the Applicants make it clear that investments will be selected by the member personally.

43. Carey's responsibility as Administrator is limited, notably to consider whether or not an investment falls within the list permitted by HM Revenue & Customs (**HMRC**). While it can choose not to allow an investment even if it is permitted by HMRC, there is no requirement on it to do so. HMRC allow SIPPs to invest in a very wide range of investments. The fact a specific type of investment is available to invest in a SIPP does not confer any view as to the suitability of the investment itself.

44. If the duty of care applied, then Carey would be required to arrange investments and periodically review them in the manner of occupational schemes and private trusts which would be entirely inconsistent with the purpose of a SIPP set up in this way.

45. I acknowledge that the Applicants feel that upon carrying out the due diligence on the investments, it should have become apparent to Carey that the investments were not in the Applicants' best interests, taking into account the esoteric nature of the investments, the substantial proportion of their pensions that the Applicants were investing in them, and that the Applicants were not in receipt of independent legal or financial advice. However, as Carey was not advising the Applicants, it was not in a position to know what their best interests were, whether the investments were suitable for their particular circumstances, or what proportion of their overall pension funds were being invested in this manner (given that they might have had other pension funds elsewhere). To have made enquiries in this regard might have led Carey into the realm of providing advice, something which it was not permitted to do.

Regulatory requirements

46. I must now consider the FCA Principles and the COBS Rules cited by the Applicants in relation to the duty of care that they considered Carey owed to them and ascertain whether they do impose any such overarching duty on Carey.

47. In (1) Green (2) Rowley v The Royal Bank of Scotland [2013] EWCA Civ 1197, the Court of Appeal rejected an argument made on behalf of the claimants that the existence of the FCA Rules created a co-extensive duty of care on the product provider, while In O'Hare & Anr v Coutts & Co [2016] EWHC 2224 (QB) it was held that the duties contained in the FCA Rules added nothing to the obligations imposed by contract. Finally, in CGL Group Ltd v Royal Bank of Scotland Plc [2017] EWCA Civ 1073, the court found that the imposition of a duty of care would "undermine a regulatory scheme which has carefully identified which class of customers are to have remedies for which kind of breach" and that the regulator (the FCA) had the necessary powers at its disposal and the responsibility to bring enforcement proceedings as required. To impose a duty of care in addition to this would therefore go against the intention of Parliament as set out in the regulations.

48. From the above cases, I conclude that the mere existence of the FCA Principles and COBS Rules does not give rise to any overarching duty of care on the part of a SIPP provider such as Carey.

49. However, this does not mean that in carrying out its administrative functions, Carey did not have any general duty to act as a reasonable professional SIPP provider should. The question I need to address is what the extent of any such duty is. Although as stated above, their existence does not of itself create an overarching duty of care, the FCA Principles and COBS Rules, together with the FSA and FCA's published guidance for SIPP operators following the thematic reviews, are nevertheless helpful in establishing the minimum standard of care expected of a reasonable, professional SIPP provider. I will accordingly assess the actions of Carey at the relevant time against the applicable Principles, the relevant parts of COBS, and the 2007 and 2009 thematic reviews.

50. With regard to a possible breach of the COBS Rules by way of a claim under s138D of the Financial Services and Markets Act 2000 (**FSMA**) (action for damages), based on the facts of this case and for the reasons explained below, I do not find, applying a civil standard of proof, there to be any breach of the COBS Rules (or maladministration).

51. In particular, COBS 4 does not apply as Carey was not responsible for publishing, approving, or communicating the promotional literature about Silva Tree and Carbonex.

52. COBS 9 would only apply if Carey had made a personal recommendation in relation to an investment or was managing the investments (in circumstances which involve the exercise of discretion). The evidence is clear that Carey made no personal

recommendation, and no discretion has been exercised by it in relation to the investments. The evidence also indicates that Carey did not provide advice, nor was it authorised to do so.

53. For COBS 10 (the appropriateness of financial products and services) to be applicable, the activities carried out by Carey would have had to have fallen within the ambit of COBS 10.1. Specifically, it would either have had to have been providing investment services in the course of MiFID or equivalent third country business (COBS 10.1.1), arranging or dealing in warrants or derivatives for retail clients following a direct offer financial promotion (COBS 10.1.2), or assessing appropriateness on behalf of another MiFID investment firm (COBS 10.1.3). Carey has consistently stated that it did not conduct MiFID business and this has not been disputed by the Applicants, there is no evidence to suggest that the investments were either warrants or derivatives entered into following a direct offer financial promotion, or that Carey was assessing appropriateness on behalf of another MiFID investment firm in relation to this matter. COBS 10 is accordingly not applicable in this case.

54. Notwithstanding the fact that COBS 10 was not applicable, Carey carried out reasonable due diligence commensurate with its duty as a professional SIPP service provider in order to ensure that the investments were capable of being held within a SIPP. The reports it received from Enhance supported this, and the minutes from the relevant Technical Review Committee meetings confirm that Carey checked the investments would not breach HMRC rules either (see paragraphs 21 to 23 above).

55. Carey identified (notwithstanding the promotional material) that the investments in question were high risk. Carey also explained to the Applicants that trading in Carbon Credits may take some time to develop and that the investment was potentially high risk, long term and illiquid. Accordingly, Carey made certain that the Applicants signed various declarations (see paragraphs 24 to 27 above) confirming they were aware of the risks involved. The member declaration forms for the Carbonex investment in particular included detailed information about the potential risks with the investments. The Applicants confirmed by signing the forms that they understood the investments were high risk.

56. For completeness, I appreciate that Carey has not been able to produce a copy of Mrs H’s signed member declaration form for her investment in Silva Tree. However, she has not disputed that she signed one. Furthermore, on balance, I am satisfied that she did. This is because she applied at the same time as a number of people she knew, who wanted the same investments and were asked to complete the membership declaration forms.

57. I have also considered, as raised by the Applicants, Principle 6 and more particularly whether there is a general duty under COBS rule 2.1. – that is an obligation on the part of Carey to act honestly, fairly, and professionally. I have also taken into account the other FCA Principles, thematic reviews and guidance that applied at the time

(and, again, it is important to note that much has changed between the Applicants' initial investment and the regulatory world we find ourselves in today). However, I note that the FCA Principles, although part of the FCA Handbook, do not have the same status as Rules, in respect of which individuals who suffer loss as a result of a breach of such a Rule may have a right of action for damages for those losses; similarly, outcomes and recommendations from thematic reviews do not have the status of Rules, and are therefore not actionable on the part of an individual.

58. The requirements of COBS 2.1.1.R are construed very widely, particularly the obligation on firms to act in the best interests of the client, but these must be balanced against the principle that consumers should take responsibility for their own decisions – see Ehrentreu v IG Index Ltd (Rev 1) [2018] EWCA Civ 79. In this case the Court of Appeal held that very clear express words would be required to create a contractual obligation to protect another party from potentially inflicting economic harm on itself. The general principle of personal responsibility is particularly pertinent in relation to SIPPS, which by their very nature are self-invested, implying a greater degree of personal responsibility. The Scheme Rules, importantly, limit Carey's role and the limited role of Carey (execution only) was clearly communicated to the Applicants, and they were also informed that they must rely on persons other than Carey for advice. The investments were not promoted to the Applicants by Carey and Carey did not provide the Applicants with any information about the investments, including the anticipated performance of the investment.

59. COBS 2.1.1.R does not impose a duty on Carey to ensure the Applicants suffer no loss or that they only enter into investments it would recommend for them. Nor does COBS 2.1.1 R or Principle 6 mean that Carey cannot take into account its own financial interests. The Silva Tree and Carbonex investments were irregular investments, but Carey very much recognised this and took steps to ensure that the Applicants were made aware, without straying into the realms of providing advice, which it was not permitted to do in any event.

60. In the case of Adams v Options UK Personal Pensions LLP 2021 EWCA Civ 474 (**Adams v Carey**), Mr Adams had been introduced to Options UK (formerly Carey) by an unregulated introducer and was persuaded to invest in storage pods. His investment did not perform well, and he issued proceedings against Carey. Mr Adams' pleaded case was that Carey had acted in breach of COBS 2.1.1.R on the basis that a SIPP was manifestly unsuitable given the relatively small sum transferred, the storage pod investment was unsuitable for Mr Adams as it was illiquid and subject to valuation risk and it had breached the guidance and expectation of the FSA per the 2009 thematic review. However, on appeal Mr Adams moved away from his pleaded case, and as his case before the Court of Appeal bore "little relation to the Particulars of Claim" the Court of Appeal found that the COBS claim "must fail" and that "… Mr Adams might anyway have struggled to overcome the Judge's finding that any breach of duty was not causative of loss".

61. The position therefore remains as set out in the first instance decision, namely that COBS 2.1.1.R must be seen through the prism of the SIPP contract between provider and member and does not of itself increase the provider's contractual responsibilities.

62. The Applicants provided Carey with clear and unequivocal investment instructions, and critically I believe it is highly unlikely that anything Carey might have reasonably highlighted would have dissuaded them from making the investments. Indeed, Carey was aware that the Applicants were investing substantial proportions of their pensions in Silva Tree and Carbonex, hence why Carey suggested they consider only investing a proportion of their overall funds in such potentially illiquid investments. However, the Applicants acted expressly contrary to that suggestion, and appear to have made up their minds about their proposed investments prior to joining the SIPP. Given the similarities between Adams v Carey and the present cases, I consider that there was no breach of COBS 2.1.1.R on the part of Carey in these cases, and even if there had been such a breach, this would not have been the root cause of their financial losses.

63. The Court of Appeal in Adams v Carey also considered the question of whether there had been a breach of s.27 of the FSMA on the part of Carey. Under s.27, agreements involving a breach of the general prohibition on unregulated financial activity are unenforceable by whoever commits the breach. In Adams v Carey therefore, a breach by Carey would render the SIPP unenforceable.

64. Mr Adams had been introduced to Carey by CLP, an unregulated introducer. The Court found that CLP had carried on a regulated activity by providing "advice" on investments to Mr Adams, and despite the fact that Carey had had no knowledge of this, Carey's argument that the SIPP contract should be enforced under s.28 of FSMA, which permits the court to enforce a tainted transaction where the breach is minor or inadvertent, was rejected. Mr Adams' appeal was accordingly allowed on this point.

65. In the present cases by contrast, while the Applicants appear to have been persuaded to invest in Silva Tree and Carbonex by one of their own number, the individual in question has stated that Silva Tree suggested the use of the Carey SIPP. There is no evidence to suggest that the individual in question had any sort of introducer relationship with Carey or acted in such a capacity in relation to the other Applicants, and nor is there any evidence to suggest that Silva Tree had any such introducer relationship. Furthermore, there is nothing to suggest that any regulated activity was carried out by the individual in question in relation to the other Applicants, or by Silva Tree. There is accordingly no direct correlation between the decision in Adams v Carey in relation to s.27 FSMA and the facts in the present cases.

66. An argument made by the Applicants was that they received no independent legal advice and/or independent financial advice which, if Carey had carried out further checks, it would have realised. As stated above, even assuming that Carey had had such a duty to do so, it is questionable whether such knowledge would have made

any difference to the outcome, given that all seven Applicants knew each other beforehand and came to Carey with an investment (Silva Tree) that they wanted to invest in.

67. More particularly, the Applicants refer to the fact that the undated brochures for the Princess Project advertised by Silva Tree stated that the investment was "safe" and that there would be guaranteed returns of between 13.7% to 18.71 % every five years. By contrast Carey said they were high risk and speculative. Therefore, the Applicants feel that Carey should have contacted Silva Tree for clarification of the statements in the brochure and ensured the sustainability of the SIPP and potential detriment. However, it is not clear what, if any, response might have been forthcoming from Silva Tree, although it must be considered unlikely that they would have contradicted their own brochures.

68. For the Carbonex investments, although Carey warned the Applicants that the market was immature and that the Applicants might not find buyers for the investments, Carey have failed to provide evidence of where these specific warnings were provided.

69. The FSA Thematic Review of small SIPP operators in 2009 – (see Appendix B) focuses primarily on the relationship between the SIPP operator and intermediaries. Investment due diligence is not mentioned specifically until the 2012 Thematic Review, but the 2009 Review did make it clear that SIPP operators cannot absolve themselves of all responsibility, and that the FSA expected them to have procedures and controls, enabling them to identify possible instances of financial crime and consumer detriment.

70. It also stated that as a matter of good practice, providers should seek to identify anomalous investments, for example, unusually small or large transactions or more "esoteric" investments such as unquoted shares, together with the intermediary (if applicable) that introduced the business. This would enable the firm to seek appropriate clarification, for example from the client or their adviser, if it were concerned about the suitability of what was recommended; providers could also consider requesting copies of the suitability reports provided to clients by the intermediary giving advice.

71. While SIPP operators are not normally responsible for giving advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely. The FSA's vision of best practice would also involve routinely identifying instances of execution only clients who have signed disclaimers under which they assume sole responsibility for their investment decisions. However, no specific action in relation to the latter was suggested.

72. Following a second thematic review of SIPP operators in 2012, the FCA issued updated guidance in October 2013. This guidance made specific reference to UCIS and said that firms involved with such investments should:
    - have enhanced procedures for dealing with UCIS;
    - have KPIs and benchmarks linked to the sale of UCIS to monitor the business they are conducting;
    - ensure that any third-party due diligence that they use or rely on has been independently produced and verified; or
    - undertake appropriate due diligence on each UCIS scheme – this due diligence, together with all research should be kept under regular review.

73. The FCA followed this up by conducting a third thematic review of SIPP operators in 2014. This review focused on the due diligence procedures that SIPP operators used to assess non-standard investments, including UCIS. The FCA made clear that it expected all regulated firms to conduct their business with due skill, care and diligence. SIPP operators were expected to conduct and retain appropriate and sufficient due diligence when assessing that the assets allowed in their SIPP were suitable for a pension scheme.

74. I have set out the details of the approach and guidance issued by the FCA in order to show how the regulatory environment has developed over time, and how the expectations of the FCA in relation to SIPP providers have become more specific in the wake of each thematic review. However, the Applicants' investments had already been placed before any of the more recent guidance was issued, and it is important that the actions of the parties are judged against both the regulatory environment, and the level of knowledge and understanding of unorthodox investments and the risk of pension scams, that pertained at the time that the events in question took place.

75. It is natural that the Applicants are upset about what has happened. But I cannot apply current levels of knowledge and understanding, or present standards of practice, to a past situation, and I must therefore judge the actions of Carey on the relevant law and the regulatory expectations that the FSA would have had of it at the time the investments were made. I must also judge what might reasonably have been expected from Carey in terms of its ability to assess proposed investment opportunities overseas, including the ease or otherwise of obtaining reliable information, the costs associated with carrying out such due diligence, and given the nature of the proposed investments, the specialist knowledge required to be able to have an informed view of the potential risks involved.

76. For example, I do not consider that it was reasonable to expect Carey to have been aware of every risk that was potentially involved, such as the risk that the proposed seedlings would not thrive in the Panamanian climate – something that would have required specialist botanical knowledge which could not reasonably be expected of a pension provider, or the fact that the purchase price of the carbon credits was apparently greatly in excess of their true value, both of which would have been

beyond what might reasonably be expected in terms of due diligence at the time in question.

77. The actions of Carey at the time that the Applicants requested the investments into Silva Tree and Carbonex were broadly in line with the FSA's description of best practice in the 2009 Thematic Review. It is clear that the esoteric nature of the proposed investments was quickly identified, due diligence was carried out, and the Applicants were informed of Carey's view that they were high risk and illiquid. It was also suggested to the Applicants that they consider investing a lower proportion of their funds into these investments because of this.

78. But even assuming that it could be argued that those examples could be said to inform the relevant standard of care under COBS 2.1, that a SIPP operator could be held accountable to, even though at the time in question it had not been clarified by FSA to it, it is questionable whether the Applicants would have acted otherwise. Moreover, the standard of care in respect of consumers does not necessarily correlate with regulatory duties that SIPP operators owed to the FCA. Any FCA thematic review has to be read in light of that tension between not providing advice and general suitability.

79. I understand that the Applicants have each lost a life-changing sum of money, and I fully sympathise with them for this. However, I do not believe it would be reasonable to require Carey to reimburse them.

80. I do not uphold the complaint.

Dominic Harris

Pensions Ombudsman

24 November 2023

Appendices

Appendix A

COBS 2.1.1(1)

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

(2) This rule applies in relation to designated investment business carried on:

(a) for a retail client…….

COBS 4.10.10:

“A firm (A) will not contravene any of the financial promotion rules if it communicates a financial promotion which has been produced by another person …

COBS 10.1.1

10 Appropriateness (for non-advised services)

10.1 Application and purpose provisions

10.1.1 R

This chapter applies to a firm which provides investment services in the course of MiFID or equivalent third country business other than making a personal recommendation and managing investments.

10.1.2 R

This chapter applies to a firm which arranges or deals in relation to a

derivative or a warrant with or for a retail client and the firm is aware, or ought reasonably to be aware, that the application or order is in response to a direct offer financial promotion.

COBS 10.3.1

If a firm considers, on the basis of the information received to enable it to assess appropriateness, that the product or service is not appropriate to the client, the firm must warn the client.

COBS 10.3.2

> If the client elects not to provide the information to enable the firm to assess appropriateness, or if he provides insufficient information regarding his knowledge and experience, the firm must warn the client that such a decision will not allow the firm to determine whether the service or product envisaged is appropriate for him.

COBS 10.3.3

> If a client asks a firm to go ahead with a transaction, despite being given a warning by the firm, it is for the firm to consider whether to do so having regard to the circumstances.

Appendix B

Thematic reviews etc

From April 2007 the activity of administering SIPPS became regulated.

In December 2008, the previous industry Regulator, the FSA, commenced a thematic review of SIPP businesses by examining the practices of SIPP operators. It decided to place increased focus on "Treating Customers Fairly" (TCF) which was at the forefront of the FSA's move towards a principles-based approach to regulation.

However, the FSA gave authorised firms flexibility in deciding what fairness meant to them and how best to meet TCF requirements in a way that suited their business. With this flexibility came a responsibility on the authorised firms to be able to justify their approach to the FSA and demonstrate that a TCF culture had been implemented. The FCA, successor to the FSA, has retained the TCF approach.

The 2008 review mainly dealt with the principles which underpin TCF and looked at the quality of the investment business the SIPP operator transacts, primarily focussing on how this is brought about.

FCA's TCF Consumer Outcomes

The six consumer outcomes that FCA say firms should strive to achieve to ensure fair treatment of customers are -

- Outcome 1: Consumers can be confident they are dealing with firms where the fair treatment of customers is central to the corporate culture.
- Outcome 2: Products and services marketed and sold in the retail market are designed to meet the needs of identified consumer groups and are targeted accordingly.
- Outcome 3: Consumers are provided with clear information and are kept appropriately informed before, during and after the point of sale.
- Outcome 4: Where consumers receive advice, the advice is suitable and takes account of their circumstances.
- Outcome 5: Consumers are provided with products that perform as firms have led them to expect, and the associated service is of an acceptable standard and as they have been led to expect.
- Outcome 6: Consumers do not face unreasonable post-sale barriers imposed by firms to change product, switch provider, submit a claim or make a complaint.

The FCA has also set out high-level Principles which it expects regulated entities to adhere to. The relevant Principles for these complaints are as follows -

The FCA Principles for Businesses

1. Integrity - A firm must conduct its business with integrity.

2. Skill, care and diligence - A firm must conduct its business with due skill, care and diligence.

…

3. Management and control - A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.

…

6. Customers' interests - A firm must pay due regard to the interests of its customers and treat them fairly.

7. Communications with clients - A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.

In September 2009, the FSA’s report into its findings from the thematic review were published -

FSA – Self-Invested Personal Pensions (SIPP) operators – a report on the findings of a thematic review - September 2009

The report described the findings of the reviews, FSA expectations of SIPP operators and examples of good practices found.

The report explained that COBS 3.2.3(2) states that a member of a SIPP is a ‘client’ for COBS purposes and ‘Customer’ in terms of Principle 6 includes the SIPP operator’s clients.

The main provisions of the report relied upon by the Applicants are -

- that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 – a firm must pay due regard to the interests of its customers and treat them fairly. 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.
- SIPP operators, although not responsible for the advice given by third parties, cannot absolve themselves of all responsibility, and so should have procedures and controls in place, and be gathering and analysing management information, enabling them to identify possible financial crime and consumer detriment such as unsuitable investments.
- A significant measure that SIPP operators could consider, taken from examples of good practice, included being able to identify anomalous investments e.g. unusually small or large transactions or more ‘esoteric’ investments. This would enable the

firm to seek clarification from the client or adviser if it were concerned about the suitability of what was being considered or recommended.

The report provided other examples of measures that SIPP operators could consider, including -

- Confirming, both initially and ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, and that they have appropriate permissions to give the advice they are providing to the firm's clients.
- 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, so that potentially unsuitable SIPPS can be identified.
- Requesting copies of the suitability reports provided to clients by the intermediary giving advice. Although the SIPP operator is not responsible for advice, this information would enhance its understanding of its clients, making the facilitation of unsuitable SIPP investments less likely.

Less than two years later in 2011, the FSA conducted a second thematic review of SIPP operators, stating that its "view of the sector was changing". The report covering its findings was published in October 2012 -

FSA - Self-Invested Personal Pensions (SIPP) operators – a report on the findings of a thematic review October 2012

The report stated -

"we expect all SIPP operators to review their business in light of the content of this report and be able to demonstrate that they have done so, paying particular attention to: …

- whether inadequate corporate governance has resulted in their firm being targeted as a potential conduit for financial crime;
- whether the risk identification and risk mitigation planning in place is sufficiently robust to ensure the firm has safeguarded its customers' interests;

  …

- the level of non-standard investments that are held within their schemes and what consideration has been given to ensure the firm holds sufficient capital resources to meet Principle 4 at all times; and
- the evidence and quality of the due diligence undertaken on introducers and the investments held within their schemes, particularly where this is conducted by third parties."

The FCA explained it intended to run a programme of workshops for SIPP operators to ensure that:

- it explained its expectations;
- firms were aware of the requirements that applied to SIPP operators; and
- firms were aware how regulation fits in with SIPP operators' day-to-day activities.

FSA – a guide for SIPP operators – Annex 1 - October 2012

This guide concerning due diligence reminded firms of Principle 2. – i.e. to conduct their business with due skill, care and diligence, giving particular consideration to (in summary).

Due diligence

- Ensuring that all investments permitted by the scheme are permitted by HMRC or where a tax change is incurred that is identifiable, the HMRC is informed and the charge paid;
- Periodically reviewing the due diligence the firm undertakes for the introducers that use their scheme.
- Having checks which may include but are not limited to -
    - Ensuring that introducers have appropriate permissions, valuations and skills.
    - Ensuring all third party-party due diligence that the firm uses or relies on has been independently produced and verified.

This guidance was repeated in the finalised guidance October 2013 (see below).

FCA - Finalised guidance - A guide for Self-Invested Personal Pensions (SIPP) operators - October 2013

In 2013, following a second thematic review of SIPP operators the FCA issued a note called 'Finalised guidance – A guide for Self-Invested Personal Pensions (SIPP) operators'. This guide is said to be an update of the guide originally published in September 2009.

The section headed Relationships between firms that advise and introduce prospective members and SIPP operators stated that -

"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; …

- 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 [sic] SIPP operators have considered the additional risks involved in accepting business from non-regulated introducers."

A third thematic review was launched in October 2013, at the same time as the final guidance from the second review was first published, indicating that the Regulator remained concerned about aspects of the SIPP market. The principal findings from this review were summarised in an Annex to a "Dear CEO letter" sent by the FCA to all CEOs of SIPP operators in July 2014 – which specifically referred to the need for due diligence on non-standard investment business.

FCA - Dear CEO letter – July 2014

"Dear CEO

Action required: review of Self Invested Personal Pension (SIPP) operators

As you may be aware, we have recently conducted a thematic review of SIPP operators following up on the guidance we issued in October 2013 (FG13/8). In this review, we focused on:

- the due diligence procedures SIPP operators used to assess non-standard investments; and
- how well firms were adhering to the relevant prudential rules.

During our review, we found that a significant number of SIPP operators are still failing to manage these risks and ensure consumers are protected appropriately, despite our recent guidance. In our view, the failings we identified put UK consumers' pension savings at considerable risk, particularly from scams and pension fraud. We have already discussed this with the firms concerned, explaining that these failings are unacceptable and need to be addressed.

I am now writing to you, and to the CEOs of all SIPP operators, because our thematic review indicates that these failings continue and are widespread, despite previous communications. We are concerned that many firms in this sector continue to demonstrate a lack of engagement with some areas of their regulatory obligations, and hence pose a threat to the quality of outcomes experienced by consumers.

Annex to Review of SIPP operators Dear CEO letter

Action required

We are asking you to review your business in light of these findings. We expect you to specifically review that:

- when your firm undertakes non-standard investment business you have adequate procedures in place to assess these investments, and
- the capital position within your firm is being accurately reported.

Key review findings

Our thematic review identified significant failings in each of the following areas:

- due diligence procedures to assess non-standard investments

…

Due diligence on non-standard investment business

Principle 2 of the FCA's Principles for Business requires all firms to conduct their business with due skill, care and diligence. SIPP operators should ensure that they conduct and retain appropriate and sufficient due diligence, for example, assessing that assets allowed into a scheme are appropriate for a pension scheme. Our thematic review found that most SIPP operators failed to undertake adequate due diligence on high-risk, speculative and non-standard investments despite being aware of the Financial Services Authority (FSA) guidance originally published in 2012 which clarified our expectations of firm conduct.

…

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.

We found that most firms do not have the expertise or resources to assess this type of business, but were still allowing transactions to go ahead. This increases the risk that a pension scheme may become a vehicle for high risk and speculative investments that are not secure assets, many of which could be scams. It is not acceptable for firms to put consumers at risk this way.

…

We also found that many SIPP operators accepted investments into their schemes without adequate consideration of how investments could be valued or realised.

Finally, we found many firms continuing to rely on marketing and promotional material produced by investment providers as part of due diligence processes, despite previous guidance highlighting the need for independent assessment of investments."