Neutral Citation Number: [2024] EWCA Civ 541

Case No: CA 2023 000024

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
MR JUSTICE BOURNE
[2022] EWHC 3325 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 May 2024

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LADY JUSTICE ASPLIN
and
LORD JUSTICE POPPLEWELL

- -

Between:

OPTIONS UK PERSONAL PENSIONS LLP	**Claimant/ Appellant**
- and –	
FINANCIAL OMBUDSMAN SERVICE LIMITED	**Defendant/ Respondent**
-and-	
(1) SIMON FLETCHER **(2) FINANCIAL CONDUCT AUTHORITY**	**Interested Parties**

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Jonathan Hough KC and Simon Pritchard (instructed by **Eversheds Sutherland (International) LLP**) for the **Claimant/Appellant**
James Strachan KC and Scarlett Milligan (instructed by **The Financial Ombudsman Services Limited**) for the **Defendant/Respondent**
Jemima Stratford KC and Malcolm Birdling (instructed by **Financial Conduct Authority)** for the **Second Interested Party**
The First Interested Party was not represented and did not appear

Hearing dates: 16 & 17 April 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 20 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Asplin:

1. The Claimant seeks judicial review of a decision of Ombudsman Mr David Bird, of the Defendant, the Financial Ombudsman Service Limited ("FOS"), dated 28 March 2022 (the "Decision"). By the Decision, Mr Bird (the "Ombudsman") upheld a complaint made against the Claimant by the First Interested Party, Mr Fletcher ("Mr Fletcher"), and determined that it should compensate Mr Fletcher for the loss to his pension fund monies.

2. The Claimant contends that the Decision should be quashed on three grounds. They are that: (i) when awarding compensation in circumstances in which the court would not or could not do so, an ombudsman must acknowledge this in terms and give reasons for holding a firm liable in circumstances in which it would not be liable at law, but the Ombudsman failed to do so; (ii) the Ombudsman erred in finding that the Claimant owed duties to prospective members of its SIPP to carry out due diligence on those who had introduced them and the investments selected; and (iii) the Ombudsman's conclusions in relation to particular breaches of duty were unreasonable.

Procedural background

3. Permission to bring this judicial review claim was refused by Cockerill J on the papers on 11 October 2022 and by Bourne J at a renewed oral hearing. Bourne J's judgment and order are both dated 21 December 2022. The neutral citation for the judgment is [2022] EWHC 3325 (Admin). Permission to appeal that decision and permission to apply for judicial review was granted by Carr LJ (as she then was) on 22 March 2023. She also directed that the judicial review claim be retained in the Court of Appeal in accordance with CPR 52.8(6).

Factual background in outline

4. At the time at which the relevant events took place, the Claimant was known as Carey Pensions UK LLP. It has since changed its name to Options UK Personal Pensions LLP. In the circumstances, it is convenient to refer to it as "Carey" rather than "Options".

5. Carey commenced business in April 2009. It is a regulated self-invested personal pension ("SIPP") provider and administrator. SIPPs were introduced under the Finance Act 1989. They are a form of personal pension which allows the holder to decide how contributions should be invested, subject to HMRC requirements. It allows for a wider range of investments than could be held in other personal pensions. From April 2007, SIPP operators have been subject to regulation, under the Financial Services and Markets Act 2000 (the "FSMA 2000") as a result of the Financial Services and Markets Act (Regulated Activities) Order 2001 (the "FSMA Order"). Regulation was initially by the Financial Services Authority ("FSA"), and thereafter by its statutory regulatory successor, the Second Interested Party, the Financial Conduct Authority (the "FCA"). The parties referred to the regulatory body throughout simply as the FCA for convenience, and I shall do the same except where the acronym "FSA" is referred to in a quotation.

6. On 27 July 2009, by a declaration of trust, Carey established a SIPP and appointed itself administrator. It operates its business on an "execution-only" basis which means that having accepted an application for membership of the SIPP from an individual such as Mr Fletcher, Carey processes investment and sale instructions and keeps SIPP members informed of their holdings. Although Carey is authorised by the FCA to carry out certain regulated activities, including establishing, operating and winding up personal pension schemes, it is not authorised to advise SIPP members on either establishing a SIPP or selecting investments to be held within it.

7. In August 2011, Carey began accepting members from an unregulated introducer, Commercial Land and Property Brokers Sociedad Ltda ("CL&P"), a company incorporated in Spain. Mr Fletcher was one such member. He was introduced to Carey by CL&P in September 2011. Mr Fletcher says he was cold-called by CL&P and told that he would receive a greater retirement income if he transferred his pension to a SIPP operated by Carey and invested in Store First "Store Pods", that the returns were guaranteed and that there was very little risk. The Store Pod investment involved buying leases of storage units and sub-letting those units for income. The income was generated from the sub-letting and the capital return upon the sale of the storage units. Mr Fletcher also received £2,000 "cashback" from CL&P after the Store First investment was made. Mr Fletcher's receipt of cashback was unbeknownst to Carey.

8. Carey had obtained a report about Store First investments and Store Pods, in particular, in April 2011. Ms Hallett, Carey's Chief Executive Officer, stated in her witness statement that Carey obtained the research from an independent compliance company named Enhanced Support Solutions Limited. She stated that Carey did so in order to satisfy itself as to the genuineness of the investment and that it could be held in a SIPP without giving rise to a tax charge. The report identified Store First and Harley Scott Holdings Ltd as being involved with the investment and stated that "No adverse history has been found affecting these parties . . ." Reference was also made to a county court judgment having been issued against Harley Scott Holdings Ltd, which it said was in the course of being settled, but which did not impact upon the investment. It was also stated that the investment would be unregulated and suggested that a "high risk/illiquid" disclaimer be used by Carey.

9. On 20 September 2011, upon arey conducted checks in relation to CL&P using a risk database then run by Thomson Reuters known as "World Check". Carey checked on Zoe Adams and Mark Lloyd. They were the two people at CL&P with whom Carey had had contact. The check revealed nothing of concern.

10. Thereafter, Carey received a completed copy of its "non-regulated introducer profile" from CL&P, signed by a Mr Terence Wright, a director of CL&P, which was dated 29 September 2011. The introductory paragraphs to the profile read, where relevant, as follows:

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

> Thank you for taking the time to complete these documents to ensure our due diligence requirements are met."

11. Amongst other things, the completed form made clear that: CL&P was a Spanish limited company, the directors of which were Terence Wright and Lesley Wright; that one of the products it promoted was investment in Store First; its sales process was by way of a call explaining SIPPs and the products with a follow up email; 40% of its business was pension based; and that it worked with FSA regulated independent financial advisers ("IFAs") in both the UK and Spain but primarily suggested that clients use their own IFA. Lastly, it is of note that Mr Wright answered "No" to whether "you or the Firm [are] subject to any ongoing FSA or other regulatory body review, action or censure?" In fact, the FCA had published an "alert" about Terence Wright on its website on 15 October 2010. It stated that Mr Wright was not authorised under the FSMA 2000 to carry on a regulated activity in the UK and that the FSA believed that he might be targeting UK customers via the firm "Cash In Your Pension".

12. On 29 September 2011, Mr Fletcher completed an application form to establish a SIPP with Carey into which he intended to transfer his pension monies of £28,000 and that £25,000 of the transfer should be invested in Store First. That sum was subsequently increased to £26,500 and the amount transferred into the SIPP was also increased to £30,000 odd. The application form contained declarations including: an acknowledgment that Mr Fletcher accepted the Terms and Conditions; that he had read and understood the Key Features Documents, Terms and Conditions and all aspects of the application form; that he understood that it was his sole responsibility to make decisions relating to the purchase, retention or sale of any investment; that he understood that Carey was not providing him with advice; and that he was establishing the Carey Pension Scheme on an "execution only" basis. In fact, he had not received the Key Features Document or the Terms and Conditions from Carey at that stage.

13. Mr Fletcher signed a document headed "Alternative Investment – Storefirst Member Declaration & Indemnity" on the same day that he completed the Carey application form. It was an instruction to Carey to purchase leasehold storage units in Store First through Harley Scott Holdings Ltd. Amongst other things, it stated as follows:

> "I am fully aware that this investment is an Alternative Investment and as such is High Risk and/or Speculative.
>
> I confirm that I have read and understand the documentation regarding this investment and have taken my own advice, including financial, investment and tax advice.
>
> I am fully aware that both Carey Pensions UK LLP and Carey Pension Trustees UK Ltd act on an Execution Only Basis and confirm that neither Carey Pensions UK LLP nor Carey Pension Trustees UK Ltd have provided any advice whatsoever in respect of this investment.
>
> . . . .

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

14. Mr Fletcher's application form was received by Carey on 3 October 2011 and on its receipt a copy of the Key Features and Terms and Conditions were sent out to him. The Terms and Conditions state, amongst other things, that: nothing provided to the client by Carey, "whether verbally or in writing should be construed as financial or investment advice as defined by [FSMA 2000] unless expressly stated" (clause 4.1); it was the client's responsibility to ensure a transfer of pension benefits was in the client's best interests (clause 7.2); Carey was not responsible for investment decisions the client makes (clause 10.4); investments were made at Carey's discretion and it could refuse to secure or cash in or dispose of any investment for a numbered of stated reasons (clause 11.1); and that "No investment can be completed until our approval has been granted. Where approval for an investment is sought by you, we will respond as soon as reasonably practicable based upon the extent of the enquiries we need to make to establish the acceptability of an investment . . . ." (clause 11.2).

15. Under the heading "Your Commitments" in the Key Features document it included the following: "Taking responsibility for the management of the investments in your fund. You can manage them yourself or through an investment adviser." Under "Risk Factors" it stated that "Investment performance may be better or worse than expected which could affect the potential size of your pension" and ". . . You are recommended to seek professional advice before proceeding with a transfer, as in some cases you could lose valuable benefits for you and your family. . . ".

16. The receipt of Mr Fletcher's pension fund monies by Carey was acknowledged on 10 November 2011 and the investment in Store Pods was completed on 5 December 2011.

17. In a conference call with CL&P on 9 December 2011, Carey raised a concern about a suggestion that an investor was expecting a payment in return for making a Store First investment. CL&P said that no parties referred by them received any such inducement. Carey emphasised that such inducements were prohibited.

18. On 12 March 2012, Carey's compliance support sent an email to CL&P asking for its latest accounts and for certified copies of the passports of the main directors/principals/partners of the company.

19. Thereafter, on 20 March 2012, Ms Adams signed Carey's Non-regulated Introducer Agreement Terms of Business on CL&P's behalf. That document stated, however, that it was intended to take effect from 15 August 2011. It is also of note that it stated expressly that Carey would not accept "execution only" business from introducers until they had completed and signed the Introducer's Profile and Terms of Business. It also stated that Carey reserved the right to decline any application and that it was not required to give reasons for such a refusal. It also contained undertakings on the part of the introducer: that the introducer would not provide advice as defined in FSMA 2000 in relation to the SIPP, including advice on the selection of the SIPP operator, contributions, transfer of benefits, taking benefits and HMRC rules; that the introducer would supply any required documentation and information reasonably requested as part of Carey's due diligence process; and that the introducer would issue

Carey's Key Features documents, Fee Schedule, Terms and Conditions and provide evidence that the client had received, read and understood those documents prior to any application being made.

20. On 29 March 2012, Carey staff again expressed concerns about reports of clients being offered cash inducements. Having no record of having received the accounts and certified copies of passports which had been requested, Carey chased for them on 3 April 2012.

21. On 15 May 2012, Carey conducted a World Check search on Terence Wright. It revealed that he was on an FCA list of unauthorised firms and individuals and that he was on an FCA Warning List. Although Mr Wright had been flagged in this way in 2010, the information only appeared on the World Check site from 24 October 2011.

22. Thereafter, on 25 May 2012, Carey terminated its agreement with CL&P, relying on the giving of inducements as the reason for doing so.

FCA Assessment Procedure

23. In the meantime, back in July 2011, the FCA had conducted a telephone assessment of Carey's business. Under a question relating to due diligence on introducers, Carey is recorded as having stated that it conducted a "Well Check" (which is likely to be a reference to World Check) on directors as well as an "FSA register check". There was a dispute about whether that meant the kind of check which would show up FCA alerts such as that which was posted on the FCA website in relation to Mr Wright, or was purely a reference to whether an individual or firm was regulated.

24. On 2 September 2011, the FCA requested further information in advance of a visit to Carey's offices. The visit took place on 20 September 2011, the same day as the World Check search on Zoe Adams and Mark Lloyd was completed. Handwritten notes in relation to the visit state, amongst other things, that Carey was introducing a non-regulated introducer checklist and terms of business. The note goes on in this regard to state "firm to put into place prior to accepting non-regulated introductions." There is also reference to an explanation about non-regulated introductions which is recorded as "group wide referrals from firms like tax specialist solicitors". There is a dispute about whether the impression was given that the terms of business and checklist were to be put in place for future business or that no business of this type would be accepted without following the procedure. There is also a dispute as to whether the FCA were shown all relevant files or were misled in relation to Carey's practices.

25. In any event, in a letter dated 29 September 2011, the FCA stated, amongst other things, that Carey "appeared to have adequate processes in place, and was committed to continue to review and where necessary, improve its procedures and practices to ensure they remain fit for purpose." Under the heading, "Financial Crime Related - Introducers" it was stated that Carey should continue with its plans to introduce a Terms of Business agreement and non-regulated introducer checklist and that that should be implemented before accepting any business from these types of firms. Under "Financial Crime Regulated – Due Diligence on Approved Investments" it stated that Carey should ensure that all esoteric and UCIS investments which have

been approved for acceptance by the Trustee have appropriate signed and completed Trustee Committee meeting approval on file, along with due diligence undertaken.

26. The letter made clear that the results of the assessment were based solely on responses during discussions and the evidence which was reviewed during the visit. It went on: "It was not possible to cover all areas of potential concern during this process, and the Firm is responsible for taking the appropriate and ongoing measures to ensure that it is compliant with the FSA's principles and rules and that its clients are treated fairly."

The Complaint

27. The Store Pod investment failed and Mr Fletcher lost the entire pension fund. He made a complaint to Carey in September 2017 which was rejected. His complaint was made to the FOS in November 2017. That complaint was investigated. The investigator's view was that the complaint should be upheld. Carey disputed that view and the complaint was referred to the Ombudsman who issued a Provisional Decision dated 26 November 2021 (the "Provisional Decision"). Having received and considered further submissions on behalf of Carey, in response to the Provisional Decision, the Ombudsman reached the Decision which is the subject of this judicial review.

The Decision

28. The Decision is a lengthy document. Given the nature of the challenges to it, it is helpful to have the scheme of the Decision and the detail of the way in which the Ombudsman addressed the issues in mind.

29. It is important to bear in mind that the Ombudsman repeated content from the Provisional Decision in the Decision itself and made clear that the Provisional Decision should be read in conjunction with the Decision itself. Furthermore, in the Provisional Decision, reference was made to a previous published decision (DRN5472159) which had also involved Carey's acceptance of a SIPP application and Store First investment application from CL&P in February 2012. Rather than set it out again, the Ombudsman relied on the detail in relation to Carey's relationship with and due diligence on CL&P and the general detail of Store First and Carey's due diligence on that investment, which appeared in the published decision.

30. The Ombudsman repeated a section of the Provisional Decision in which he stated that in considering what was fair and reasonable in all the circumstances of the complaint, he had taken into account "relevant law and regulations; regulators rules [sic]; guidance and standards; codes of practice; and where appropriate, what I consider to have been good industry practice at the relevant time." He went on:

> "34. I confirm I have taken account of the judgment of the High Court in the case of Adams v Options SIPP [2020] EWHC 1229 (Ch) and the Court of Appeal judgment in Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 474.
>
> 35. I am of the view that neither of the judgments say anything about how the Principles apply to an ombudsman's consideration of a complaint. But, to be clear, I do not say this

means Adams is not a relevant consideration at all. As noted above, I have taken account of both judgments when making this decision on Mr F's case.

36. I acknowledge that COBS 2.1.1R (A firm must act honestly, fairly and professionally in accordance with the best interests of its client) was considered by HHJ Dight in the High Court case. Mr Adams pleaded that Options SIPP 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 SIPP had complied with the best interests rule on the facts of Mr Adams' case.

37. The Court of Appeal rejected Mr Adams' appeal against HHJ Dight's dismissal of the COBS claim on the basis that Mr Adams was seeking to advance a case that was radically different to that found in his initial pleadings. The Court found that this part of Mr Adams' appeal did not 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.

38. I note that there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Mr F's complaint. The breaches were summarised in paragraph 120 of the Court of Appeal judgment. In particular, as HHJ Dight noted, he was not asked to consider the question of due diligence before Options SIPP agreed to accept the store pods investment into its SIPP. The facts of the case were also different.

39. I think it is also important to emphasise that I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And, in doing that, I am 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. This 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.

40. To be clear, I have proceeded on the understanding Carey was not obliged – and not able – to give advice to Mr F on the suitability of its SIPP or the Store First investment for him personally. But I am satisfied Carey's obligations included deciding whether to accept particular investments into its SIPP and/or whether to accept introductions of business from

> particular businesses. As the published decision sets out, this is consistent with Carey's own understanding of its obligations at the relevant time."

31. At [42] the Ombudsman stated that Carey should have carried out due diligence on CL&P and upon the Store First investment to the sort of standard which was consistent with good industry practice and its regulatory obligations at the time and should have used the knowledge it gained from the due diligence to decide whether or not to accept or reject a referral of business or a particular investment. He concluded that the contract between Carey and Mr Fletcher did not mean that Carey should not be held responsible for failing to comply with its regulatory obligations to carry out due diligence on CL&P and the Store First investment [43] and that Carey had sufficient information available to it or that which it could have obtained through a reasonable level of due diligence which should have led it to reject Mr Fletcher's referral and application [44].

32. In relation to due diligence on CL&P, the Ombudsman held that it was fair and reasonable to say that by 3 October 2011, Carey ought to have known that CL&P's director was Mr Wright and that he was on the FCA's "Firms and individuals to avoid" list which was described on the website as "a warning list of some unauthorised firms and individuals that we believe you should not deal with" [47]. The Ombudsman also noted at [48] that Ms Hallett accepted in evidence in the *Adams* case that no check was made to see if Mr Wright's name appeared on a regulatory warning notice on the FCA's website until May 2012 and that had she been aware of such a warning in 2010 Carey would not have dealt with CL&P.

33. In relation to due diligence on the Store First investment the Ombudsman stated as follows:

> "52. As the published decision sets out, at the time Mr F's application was accepted Carey knew or ought to have known:
>
> - There were factors in the report Carey obtained on Harley Scott Holdings Ltd (the promoter of Store First) which ought to have been of concern – namely the adverse comments for the previous three years, the CCJ's, and the fact the business had recently changed its name.
>
> - Dylan Harvey (one of three previous names of Harley Scott Holdings Ltd, which at the time had the web address dylanharvey.com) and one of its directors, Toby Whittaker, were the subject of a number of national press reports, online petitions and proposed legal action, as a result of a failed property investment.
>
> - Harley Scott Holdings Ltd had recently been involved in a property investment scheme which had failed. It had also recently changed its name, and had been subject to a number of adverse comments in succession, following audit.

- Store First's marketing material set out high fixed returns, and said these were guaranteed. The material did not contain any type of risk warning, or illustrations of any other returns. No explanation of the guarantees was offered, or the basis of the projected returns – other than Store First's own confidence in its business model and the self-storage marketplace.

- The conclusion of the Enhanced Support Solutions report Carey had obtained was inconsistent with the result of Carey's own company searches. The report also makes no comment on the obvious issues with the marketing material.

- The marketing material showed there was a significant risk that potential investors were being misled.

- Store First appeared to be presenting the investment as one that was assured to provide high and rising returns, was underwritten by guarantees, and offered a high level of liquidity together with a strong prospect of a capital return - despite the fact that there was no investor protection associated with the investment and that, in Carey's own words, "there is no apparent established market" for the investment and "the investment is potentially illiquid"

- Store First had no proven track record for investors and so Carey couldn't be certain that the investment operated as claimed.

- Consumers may have been misled or did not properly understand the investment they intended to make.

53. As in the complaint subject to the published decision, I think all of the points listed above should have been considered alongside the fact the investment was being sold by an unregulated business, which was clearly targeting pension investors. I think it is fair and reasonable to find that Carey ought to have concluded there was an obvious risk of consumer detriment here.

54. So, given the circumstances at the time of Mr F's application, I think the fair and reasonable conclusion, based on what Carey knew or ought to have known at the time, is that Carey should not have accepted Mr F's application to invest in Store First. In my opinion, it ought to have concluded that it would not be consistent with its regulatory obligations, or best practice, to do so."

These paragraphs had formed part of the Provisional Decision.

34. The Ombudsman then went on to state that he had considered Carey's submissions in relation to the Provisional Decision in full. He set out a summary at [72] of the Decision. In particular, he noted that: (i) it was said that he had failed to take account of the relevant law and regulations or state the basis on which it was appropriate to depart from the law and that the Ombudsman was applying duties more extensive and onerous than the courts and has not explained that duty with any clarity; (ii) the judge in the *Adams* case had rejected the argument that Carey owed duties of the kind relied upon by reference to COBS rules and the Ombudsman should give weight to the judge's findings or explain why it can dismiss them; (iii) it had been reasonable and appropriate to use World Check but the FCA notice in relation to Mr Wright was not entered on that system until 24 October 2011. Even if Carey had run a check before entering into its relationship with CL&P, it would not have identified the notice, therefore; (iv) the findings in the Provisional Decision amounted to imposing an obligation on Carey to undertake a qualitative assessment of Store First and to pass it on to Mr Fletcher which amounted to a recommendation; (v) Carey did not cause Mr Fletcher's loss because he would have found a way to invest in Store First in any event; and (vi) the contract between Mr Fletcher and Carey effectively relieved Carey of liability.

35. The Ombudsman went on to set out Principles 2, 3 and 6 which he considered to be of particular relevance to his decision and noted that the Principles " 'are a general statement of the fundamental obligations of firms under the regulatory system' (PRIN 1.1.2G)" [93]. Having noted that Carey suggested that he was departing from the law or applying obligations beyond it, he set out passages from *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin) (the "*BBA* case") and *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878 (the "*Berkeley Burke* case") and noted at [100] that Ouseley J in the *BBA* case had held that it would be a breach of statutory duty to reach a view on a complaint without taking the Principles into account in deciding what was fair and reasonable in all the circumstances and that Jacobs J in the *Berkeley Burke* case had taken a similar approach. He concluded that he considered the Principles in the specific circumstances of the complaint before him and that he was not "departing from the law" in doing so.

36. The Ombudsman stated that he had taken into account the FCA 2009 and 2012 thematic review reports, the October 2013 finalised SIPP operator guidance and the July 2014 "Dear CEO" letter. Although he stated that he had considered them in their entirety, the Ombudsman set out what he considered to be the key parts of those publications at [102] – [108].

37. At [103] he set out passages from the FCA 2009 thematic review report which included the following:

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

> We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the member to confirm the position, or by contacting the firm giving advice and asking for clarification. Moreover, while they are not responsible for the advice, there is a reputational risk to SIPP operators that facilitate the SIPPs that are unsuitable or detrimental to clients.
>
> Of particular concern were firms whose systems and controls were weak and inadequate to the extent that they had not identified obvious potential instances of poor advice and/or potential financial crime. . ."

38. At [104] and [105] the Ombudsman quoted from the October 2013 finalised SIPP operator guidance in which the FCA stated that: "All firms, regardless of whether they do or do not provide advice must meet Principle 6 and treat customers fairly . . ." At [104] he also quoted a passage setting out examples of good practice which included the following:

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

39. At [105] the Ombudsman set out passages from the October 2013 finalised SIPP operator guidance relating to due diligence. These included:

> "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:
>
> o ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and
>
> o 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. . . "

40. At [106] the Ombudsman stated that the July 2014 "Dear CEO" letter provided "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" and at [107] set out a passage from the "Dear CEO" letter which stated how a SIPP operator might meet its obligations in relation to investment due diligence. The extract was as follows:

> "• Correctly establishing and understanding the nature of an investment
>
> • Ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation
>
> • Ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any

> contractual agreements are correctly drawn-up and legally enforceable)
>
> • Ensuring that an investment can be independently valued, both at point of purchase and subsequently
>
> • Ensuring that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc)"

41. The Ombudsman went on to acknowledge that only the 2013 guidance was formal statutory guidance [108] but noted that the documents provided "a *reminder* that the Principles for Business 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." He also stated that they went some way to indicating what he considered to be good industry practice at the relevant time and took account of the fact that some of them post-dated the events in the complaint [109] – [115].

42. Having noted that the Principles are not the basis upon which legal action can be taken [115], the Ombudsman stated that he was determining a complaint and needed to consider whether Carey had complied with its regulatory obligations as set out in the Principles. He stated that he was looking at the Principles, and the publications he had referred to in order to provide an indication of what Carey could have done to comply with its regulatory obligations [117].

43. At [125] the Ombudsman addressed Carey's submissions about the *Adams* case. He stated that the facts were very different from those in *Adams*. He went on:

> ". . . There are also significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and from the issues in Mr F's complaint. In particular, HHJ Dight considered the contractual relationship between the parties in the context of Mr Adams' pleaded breach of COBS 2.1.1R that happened after the contract was entered into. In Mr F's complaint, I am considering whether Carey ought to have identified that the introductions from CL&P involved a risk of consumer detriment and, if so, whether it ought to have accepted the introduction from CL&P and therefore, Mr F's application prior to entering into a contract with Mr F."

He added that he accepted that Carey could accept introductions from unregulated introducers but that what he had set out in the Provisional Decision was that "in the specific circumstances of his introduction, taking into account the investment to be made and the introducer itself, that Carey was not acting appropriately in accepting the application from Mr F and facilitating the investment. It was fair and reasonable, bearing in mind the particular facts of this case, to make the finding that Carey should not have accepted Mr F's application" [126]. The Ombudsman set out his reasons at [129], as follows:

"129. I have carefully revisited introducer due diligence, in light of Carey's response to my provisional decision. However, I remain of the same view as that set out in the provisional decision. As my provisional decision forms part of this decision (and this matter was addressed in the published decision), I will not repeat the full detail of my reasoning here. In summary, I said Carey failed to conduct sufficient due diligence on CL&P before accepting business from it and failed to draw fair and reasonable conclusions from what it did know about CL&P and the investment itself. It ought reasonably to have concluded that it should not accept Mr F's application, because:

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

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

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

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

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

- The evidence clearly shows that Carey should have been aware, before it accepted Mr F's application and before it sent Mr F's money to Store First, that CL&P was not a business it should accept his application from, given what it knew and what evidence was available to it at the time.

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

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

44. In relation to the use of World Check and the date of the entry relating to Mr Wright, the Ombudsman stated that Carey should have checked the FCA list itself. The fact that it was said that the World Check tool would not have picked up the warning at the time was irrelevant to the finding that Carey failed to undertake sufficient due diligence on CL&P [136]. The Ombudsman also repeated Ms Hallett's evidence in this regard in the *Adams* case at [137].

45. Lastly, the Ombudsman stated at [145] that Carey should have concluded that it would not be consistent with its regulatory obligations, or best practice, to accept Mr Fletcher's application to invest in Store First. He made clear that this did not require Carey to assess the suitability of the investment for Mr Fletcher's particular circumstances or to make a recommendation to Mr Fletcher. Instead, he stated that it was "something that Carey should have taken account of, in addition to the introducing business, in deciding whether to accept the application and investment as part of its regulatory responsibilities" [146].

Legislative background and Rules

46. Section 137A FSMA 2000 confers the power on the FCA to make rules and apply them to authorised persons and section 139A provides that the FCA may give guidance. Rules and guidance made and given by the FCA appear in the FCA Handbook. The suffix "R" denotes that a provision is a rule, while the suffix "G" denotes that it is guidance. Save and to the extent that it is expressly mentioned, we are concerned with the rules and guidance which were current at the time of Carey's activities in relation to Mr Fletcher's SIPP.

47. In summary, sub-sections 138D(2) and (3) FSMA 2000 provide that contravention by an authorised person of a rule made by the FCA is actionable at the suit of a private person who has suffered loss as a result, but that a rule may provide otherwise.

48. Chapter 2 of the Principles for Businesses ("PRIN") source book within the FCA Handbook sets out 11 (now 12) Principles for Businesses for general application, under the module titled 'High-Level Standards' (which is also referred to as "FCA Principles"). Terms which appear in italics are defined in the glossary. At PRIN 1.1.2G it is stated that the Principles are "a general statement of the fundamental obligations of *firms* under the *regulatory system"*. PRIN 1.1.6AG explained the consequences of breaching the Principles in the following terms:

> "Breaching a *Principle* makes a *firm* liable to disciplinary sanctions. In determining whether a *Principle* has been breached it is necessary to look to the standard of conduct required by the *Principle* in question. . . ."

PRIN 1.1.9G provides:

> "Some of the other *rules* and *guidance* in the *Handbook* deal with the bearing of the *Principles* upon particular circumstances. However, since the P*rinciples* are also designed as a general statement of regulatory requirements applicable in new or unforeseen situations, and in situations in which there is no need for *guidance*, the FSA's other *rules* and *guidance* should not be viewed as exhausting the implications of the *Principles* themselves."

PRIN 3.4.4R ('Actions for Damages') states that the Principles do not give rise to a private right of action by a private person under section 138D FSMA 2000.

49. The Principles which the Ombudsman considered in this case were Principles 2, 3 and 6. Principle 2 is that "a *firm* must conduct its business with due skill, care and diligence." Principle 3 is that "[A] *firm* must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems." Principle 6 is that "[A] *firm* must pay due regard to the interests of its customers and treat them fairly." The glossary to the FCA Handbook provides under the heading "client" that every client is a customer and that "client" includes a potential client.

50. The Conduct of Business Sourcebook Rules ("COBS") are included in the FCA Handbook. Of particular relevance is the "client's best interests rule" COBS 2.1.1.R. This is actionable by a third party pursuant to section 138D(2) of FSMA. COBS 2.1.1R(1) provides as follows:

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

The parties also refer to COBS 9 and 10 ("Suitability (including basic advice)" and "Appropriateness (for non-advised services)" respectively. COBS 11.2.1R ("Obligation

to execute orders on terms most favourable to the client"), COBS 11.2.19R ("Following specific instructions from a client"), and COBS 19 ("concerning provisions of personal recommendations in relation to pension funds"). It is unnecessary to set these out in full here.

51. The Financial Ombudsman Service (FOS) is a creature of statute. It was created by Part XVI of the FSMA 2000. Section 226 creates a "compulsory jurisdiction" for the resolution of complaints, which is the relevant jurisdiction in this case. Section 228 FSMA 2000 is concerned with the determination of such complaints. It provides as follows:

> "228 Determination under the compulsory jurisdiction
>
> (1) This section applies only in relation to the compulsory jurisdiction.
>
> (2) A complaint is to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case.
>
> (3) When the ombudsman has determined a complaint he must give a written statement of his determination to the respondent and to the complainant.
>
> (4) The statement must—
>
> (a) give the ombudsman's reasons for his determination;
>
> (b) be signed by him; and
>
> (c) require the complainant to notify him . . ., before a date specified in the statement, whether he accepts or rejects the determination.
>
> (5) If the complainant notifies the ombudsman that he accepts the determination, it is binding on the respondent and the complainant and final."

The consequences of a determination in the complainant's favour are dealt with at section 229:

> "229 Awards
>
> (1) This section applies only in relation to the compulsory jurisdiction.
>
> (2) If a complaint which has been dealt with under the scheme is determined in favour of the complainant, the determination may include—
>
> (a) an award against the respondent of such amount as the ombudsman considers fair compensation for loss or damage (of

> a kind falling within subsection (3)) suffered by the complainant ("a money award");
>
> (b) a direction that the respondent take such steps in relation to the complainant as the ombudsman considers just and appropriate (whether or not a court could order those steps to be taken).
>
> (3) A money award may compensate for—
>
> (a) financial loss; or
>
> (b) any other loss, or any damage, of a specified kind.
>
> … "

52. Schedule 17 FSMA 2000 contains provisions requiring the establishment of a panel of ombudsmen. Part III of the schedule concerns the compulsory jurisdiction and provides for the making of procedural rules. Paragraph 14 provides that the scheme operator must make rules which are to set out the procedure for the reference of complaints and their investigation, consideration and determination by an ombudsman and that the rules may, amongst other things, specify matters which are to be taken into account when determining whether an act or omission is fair and reasonable. The Rules which govern the Financial Ombudsman's jurisdiction are made by the FCA. The Dispute Resolution: Complaints" sourcebook ("DISP") is included within the FCA Handbook. DISP 3.6.4R provides that:

> "In considering what is fair and reasonable in all the circumstances of the case, the Ombudsman will take into account:
>
> (1) relevant:
>
> (a) law and regulations;
>
> (b) regulators' rules, guidance and standards;
>
> (c) codes of practice; and
>
> (2) (where appropriate) what he considers to have been good industry practice at the relevant time."

This rule was formerly numbered DISP 3.8.1R.

Ground 1 – need to identify and explain departure from legal standards

53. Mr Hough KC who appeared with Mr Pritchard, on behalf of Carey, submitted that the Ombudsman had failed to satisfy the requirements set out in *R (Heather Moor & Edgecomb) v FOS* [2008] Bus LR 1486 (CA). It is said that he failed to address whether Carey would be liable under a duty which a court would recognise as founding a claim and, if holding Carey liable in the absence of a breach of an actionable regulation or other actionable legal duty, failed to give reasons for taking

that course. Although it is accepted that the Principles are part of the regulatory framework, Mr Hough points out that they are not legally actionable and as a result, reasoning was required when holding Carey liable.

54. In summary Mr Strachan KC, who appeared with Ms Milligan, on behalf of FOS, submits that the Ombudsman fulfilled his function in accordance with the statutory jurisdiction, he did not depart from the law, gave adequate reasons and explained his conclusions in clear and comprehensible terms. It was submitted that the Principles are part of the relevant law and/or regulator's rules and form part of the existing legal obligations which apply to Carey and that the Ombudsman reached his Decision on the basis of the law as set out in COBS 2.1.1R, the Principles, and the decisions in the *BBA* and *Berkeley Burke* cases.

55. Ms Stratford KC, who appeared with Mr Birdling on behalf of the FCA, endorsed and adopted Mr Strachan's submissions in relation to this ground. In addition, she submitted that Carey's case was dependent upon an over legalistic reading of the Decision and was a thinly disguised attack on the merits. She also emphasised that the Principles are part of the law and that COBS 2.1.1R and Principle 6 overlap. Accordingly, she submitted that the Ombudsman did not depart from the law and that the fact that Principles are not actionable by way of a claim is irrelevant.

The Main Authorities

56. The *Heather Moor* case, upon which much of this ground of challenge is based, is the only relevant Court of Appeal authority. It was concerned with a firm of independent financial advisors which advised their client, Mr L, to leave his employer's final salary pension scheme and put the proceeds in a new pension plan policy invested in equities. The advisor based its projections on an assumed rate of growth in the fund of 9% per annum which were regarded as modest. Mr L also consulted another advisor who stated that 9% was far from modest and that the regulator had recently informed advisors that they should use lower investment growth assumptions. Mr L accepted the first advice, nevertheless, and transferred his pension pot. His fund fell in value and he sought compensation. In response to a provisional decision of an FOS ombudsman, the advisor firm submitted evidence from an experienced financial advisor that some competent investment advisors would have recommended the pension transfer.

57. In the final decision, the ombudsman relied upon DISP 3.8.1R (now DISP 3.6.4R) which set out the matters which he should take into account in considering what was fair and reasonable in the circumstances of the case and held that good industry practice in 1999 would not have recommended the transfer. The judge refused the advisor's application for permission to apply for judicial review but the Court of Appeal granted permission directing that it should be heard by the full court.

58. On the claim for judicial review on the grounds that the ombudsman service failed to make its determination according to law and that an oral hearing should have been held, it was held that: an oral hearing was not necessary; and that by section 228 FSMA 2000, the ombudsman was required to determine a complaint by reference to what was in his opinion fair and reasonable in all the circumstances of the case and was not confined to the common law: [36] – [41]. Stanley Burnton LJ, with whom Rix LJ concurred and with whom Laws LJ agreed, reached this conclusion on the

basis of sections 228 and 229(2)(a) FSMA 2000; and also referred to his earlier decision in *R (IFG Financial Service Ltd) v Financial Ombudsman Service Ltd* [2006] 1 BCLC 534, in which he had reached the same conclusion and had held at [13] that "in the opinion of the ombudsman" in section 228 FSMA 2000 made it clear that the ombudsman may be subjective in arriving at his opinion of what is fair and reasonable in all the circumstances of the case. He had also added in that case, at [74] that: "[I]f the ombudsman considers that what is fair and reasonable differs from English law, or the result that there would be in English law, he is free to make an award in accordance with that view, assuming it to be a reasonable view in all the circumstances." In the *Heather Moor* case, Stanley Burnton LJ confirmed that he had come to the same conclusion having considered the matter afresh in the light of the Human Rights Act 1998 and contentions based on the rule of law [41].

59. He addressed the question of whether the FOS scheme established under FSMA 2000 satisfied the requirements of the principle of the rule of law and the relevant Convention jurisprudence at [49] in the following terms:

> "Does the scheme established under the 2000 Act, interpreted in accordance with its natural meaning, comply with these requirements? In my judgment, it can and does. The ombudsman is required by DISP rule 3.8.1 to take into account the relevant law, regulations, regulators' rules and guidance and standards, relevant codes of practice and, where appropriate, what he considers to have been good industry practice at the relevant time. He is free to depart from the relevant law, but if he does so he should say so in his decision and explain why. The other matters referred to in this rule are matters that a court would take into account in determining whether a professional financial adviser had been guilty of negligence or breach of his contract with his client. Again, if the ombudsman is to find an advisor liable to his client notwithstanding his compliance with all those matters, the ombudsman would have to so state in his decision and explain why, in such circumstances, assuming it to be possible, he came to the conclusion that it was fair and reasonable to hold the adviser liable. In these circumstances I consider that the rules applied by the ombudsman are sufficiently predictable. All the matters listed in DISP rule 3.8.1 are formulated or ascertainable with sufficient precision. So far as guiding the conduct of financial advisors are concerned, provided that they comply with "the relevant law, regulations, regulators' rules and guidance and standards, relevant codes of practice and, where appropriate . . . good industry practice", they can be assured that they will not be liable to their client in the absence of some exceptional factor requiring a different decision. Lastly, the common law requires consistency: that like cases are treated alike. Arbitrariness on the part of the ombudsman, including an unreasoned and unjustified failure to treat like cases alike, would be a ground for judicial review."

60. At [54], Stanley Burnton LJ pointed out that in order to succeed on their case, the claimant needed to show both that the ombudsman was required to apply the substantive common law and that he did not do so. He stated that the claimant had failed in the first of these contentions because the ombudsman was "free to depart from the common law." In relation to the second, it was recorded that the ombudsman had stated that he was not applying the relevant law but had taken it into account in deciding what was fair and reasonable in the circumstances of the case. The specific complaint was an alleged failure to apply the rule in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 which was authority for the proposition that a professional man is not to be held negligent if what he did was in accordance with a practice accepted by reasonable persons in his profession. Stanley Burnton LJ went on at [56], however, to decide that the ombudsman had clearly had the *Bolam* test in mind, had considered the relevant question and given adequate reasons for rejecting the advisor's contentions. Accordingly, the ground for judicial review failed on the facts.

61. In his concurring judgment, Rix LJ stated as follows:

> "80. The effect of these provisions is not to leave the ombudsman's determination to his entirely subjective views, as though he was operating according to the length of his foot, so to speak. That, it seems to me, is not the effect of the statutory language which defers to the "opinion of the ombudsman". Rather, that is typical language to emphasise that the decision is for the ombudsman, not for a judge. However, the ombudsman remains amenable, through the ordinary process of judicial review, to a challenge on such grounds as perversity or irrationality. That was not in dispute. It was the view of Stanley Burnton J in *R (IFG Financial Service Ltd) v Financial Ombudsman Service Ltd* [2006] 1 BCLC 534, para 13. That is not the same, however, as saying that the ombudsman is bound to apply the common law in all its particulars. He is, after all, dealing with complaints, and not legal causes of action, within a particular regulatory setting. Rather, he is obliged ("will") to take relevant law, among other defined matters, into account.
>
> 81. Is such a jurisdiction compatible with the rule of law, generally regarded as requiring accessibility, clarity and predictability? Stanley Burnton LJ has referred to the writings of Lord Bingham of Cornhill and Professor Craig in this regard, at para 48 above. In my judgment, that question can be approached in two separate ways. One is to consider whether the statutory provisions, and the scheme rules adopted pursuant to them, promote a jurisdiction which in its essentials meets the requirements of the rule of law. It seems to me that the provisions which I have cited above achieve at least that much. The compulsory jurisdiction is set up by statute, provides for an over-arching test of "fair and reasonable" and allows for the statement of rules which elaborate that test, and the whole process is subject to judicial review in the courts. As such, the

> jurisdiction is not unlike, at that structural level, much other administrative or quasi-judicial decision-making found in a modern state.
>
> 82. The second consideration, however, is to ask whether the jurisdiction in practice works compatibly with the desiderata of the rule of law as a doctrine. If it were to be concluded that it does not, then it might be necessary, in a nation which prides itself on its adherence to the rule of law, to undertake some rethinking. That would primarily be a matter for Parliament and the FOS rather than the courts, as long at any rate as there is no breach of constitutional safeguards such as might be found either in the common law or, now, in the Human Rights Act 1998. . ."

62. Reliance is also placed upon Ouseley J's decision in the *BBA* case. In that case, the British Bankers Association's application for judicial review was granted but the claim was dismissed. The claim was concerned with the regulatory response to the mis-selling of payment protection insurance policies ("PPIs"). The British Bankers Association (the "BBA") challenged the lawfulness of the FSA's published Policy Statement 10/12 entitled "The assessment and redress of Payment Protection Insurance complaints". It was said that the statement was unlawful because it treated the Principles as giving rise to obligations owed by firms to customers, leading to compensation being payable for their breach despite the fact that the Principles are not actionable in law. In the alternative, it was argued that since the FSA had made specific rules governing the manner which PPIs were sold, it was unlawful to provide in the Policy Statement that a customer might be entitled to redress by reference to the Principles which conflicted with or augmented those specific rules.

63. Ouseley J addressed the relevance of the fact that the Principles are not actionable by a person who has suffered loss as a result of their contravention at [71] – [91]. In particular, at [71], he considered the effect of sub-sections 150(1) and (2) FSMA 2000 which are now sub-sections 138D(2) and (3). He stated:

> "71. I do not find the claimant's submissions persuasive, preferring instead those of the FSA and FOS. The statutory provision being construed is section 150. Section 150(1) deals with contraventions of rules by making them actionable as breaches of statutory duty. "Actionable" means giving rise to a cause of action in a court of law. Section 150(2) removes that actionability. Section 150(2) does nothing else. "Actionable" in section 150(1) simply does not mean "capable of giving rise to obligations or compensation". So section 150 does not apply to the Principles. It does not alter their function in any other way. It leaves intact any other function or effect which a non-actionable rule might have. The clear words of the section are wholly inapt to prevent rules which are not actionable giving rise to obligations as between firms and customers.
>
> . . .

> 76. All that the FSA decision under section 150(2) does is to prevent a cause of action for breach of statutory duty arising in respect of the Principles; that is the only limitation on their role. That fact cannot make them irrelevant to the ombudsman's duty to reach a decision as to what is fair and reasonable in all the circumstances of the case. Nor is there a justification for treating Principles, which cannot give rise to legal action, differently from those other relevant materials which by their nature cannot do so: regulators' guidance, codes of practice and good industry practice.
>
> 77. Indeed, it is my view that it would be a breach of statutory duty for the ombudsman to reach a view on a case without taking the Principles into account in deciding what would be fair and reasonable and what redress to afford. Even if no Principles had been produced by the FSA, the FOS would find it hard to fulfil its particular statutory duty without having regard to the sort of high level principles which find expression in the Principles, whoever formulated them. They are of the essence of what is fair and reasonable, subject to the argument about their relationship to specific rules."

64. He addressed the status of the Principles in the following way:

> "161. . . The Principles are the overarching framework for regulation, for good reason. The FSA has clearly not promulgated, and has chosen not to promulgate, a detailed all-embracing comprehensive code of regulations to be interpreted as covering all possible circumstances. The industry had not wanted such a code either. Such a code could be circumvented unfairly, or contain provisions which were not apt for the many and varied sales circumstances which could arise. The overarching framework would always be in place to be the fundamental provision which would always govern the actions of firms, as well as to cover all those circumstances not provided for or adequately provided for by specific rules.
>
> 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.
>
> . . .
>
> 166. It follows that there is no reason in principle why the specific obligations in the rules should not be subject to the

> wider role of the Principles. The specific obligations are not to be seen as exhausting the requirement to comply with high level Principles. The unhelpful concept of the specific rules "occupying the field" is inapt to express the true position. The Principles "occupy the field"; they stand over the specific rules. It is the general performing its role as the overarching requirement which cannot be displaced by compliance with specific rules if the overarching requirement is breached. . . ."

65. At [184] Ouseley J added that:

> "The width of the ombudsman's duty to decide what is fair and reasonable, and the width of the materials he is entitled to call to mind for that purpose, prevents any argument being applied to him that he cannot decide to award compensation where there has been no breach of a specific rule, and the Principles are all that is relied on . . ."

He added, however, that he would accept that in order to find against a firm, which has complied with the relevant specific rules, on the basis of a breach of the Principles or common failings, "the ombudsman must explain that that is so, and give adequate reasons for his decision" [186].

66. The interaction of specific COBS rules and the Principles was also considered by Jacobs J in the *Berkeley Burke* case. In that case the claimant was a SIPP provider. A customer had applied to transfer his existing personal pension into the SIPP and to invest in a sustainable energy scheme operated by a company in Cambodia. The SIPP provider accepted the investment without much investigation other than to establish whether the investment was capable of being held in a SIPP in line with tax guidance. The customer signed paperwork accepting that the investment was high risk and that the SIPP provider was acting on an "execution only" basis and that the SIPP provider was not advising him. The investment turned out to be a scam. The ombudsman upheld a complaint and ordered the SIPP provider to pay compensation. The ombudsman held that the SIPP provider should have conducted due diligence to ascertain whether the investment was acceptable for a SIPP and relied upon PRIN 2.1.1R(2)(6).

67. The SIPP provider sought judicial review on the basis that the ombudsman had not been entitled to rely on PRIN 2.1.1R(2)(6) to impose a new duty, including where to do so would conflict with the duty imposed by COBS 11.2.19R to execute the customer's specific instruction to invest in the scheme. Jacobs J rejected the notion that the ombudsman was creating a new rule. He held that the ombudsman had identified the existing rules, the Principles, and applied them [86] and [90]. Amongst other things, Jacobs J also held that: it was entirely acceptable for the ombudsman to apply the Principles to the facts in a way which was not spelt out in specific rules [96]; that there is no inconsistency between the Principles and COBS 11.2.19R because the latter is concerned only with the manner of execution of an order which is properly accepted and has nothing to do with whether an order should be accepted in the first place [122]; and that COBS 11.2.19R did not override the Principles and that the question of the application of the Principles to the particular circumstances was a matter for the ombudsman [137].

68. The decisions in *Adams* are also referred to in the Decision. They addressed similar circumstances to the ones with which we are concerned, albeit in the form of an action before the court rather than a complaint to the FOS. Mr Adams was contacted by CL&P which suggested that he should make an unregulated investment in Store Pods through a SIPP provided by Carey. Mr Adams transferred his pension monies to the SIPP and invested in Store Pods. The investment performed badly. Mr Adams brought a claim against Carey to recover his investments on the basis that he had transferred his pension fund as a consequence of things done and said by CL&P in contravention of the general prohibition in section 19 FSMA 2000, being the provision of advice on the merits of a particular investment, for the purposes of article 53 of the FSMA Order and the making of arrangements to buy and sell an investment for the purposes of article 26.

69. Mr Adams sought to recover his investment pursuant to section 27 FSMA 2000. In summary, it provides that an agreement made by an authorised person (in this case, Carey) in the course of carrying on a regulated activity, in consequence of something said or done by a third person in breach of the general prohibition (arranging deals in investments and the giving investment advice by CL&P) is unenforceable and the other party is entitled to recover any money or property paid or transferred and compensation for any loss. The court has a discretion, however, to allow the agreement to be enforced or money and property paid or transferred to be retained if it considers it just and equitable in the circumstances of the case to do so: section 28(3) FSMA 2000. Mr Adams' secondary claim was based upon COBS 2.1.1R, a breach of which is actionable pursuant to section 138D(2) FSMA 2000.

70. HHJ Dight CBE, sitting as a High Court Judge, dismissed both Mr Adams' claims. The neutral citation for his judgment is [2020] EWHC 1229 (Ch). In relation to the COBS claim, the judge stated at [153] that in his judgment, "Rule 2.1.1 cannot be construed as imposing an obligation to advise which would not only be unlawful but which the parties had specifically agreed in their contract not to impose on the defendant [Carey]." He also made clear that he did not have to determine the question of due diligence prior to Carey agreeing to accept investment in store pods into their SIPP ([155]).

71. On appeal, Newey LJ with whom Andrews LJ concurred and Rose LJ agreed, held that the section 27 claim succeeded and that the discretion conferred by section 28(3) FSMA 2000 should not be exercised. In relation to the COBS claim, Newey LJ set out the alleged breaches of COBS 2.1.1R at [120] and at [124] he observed that the case on appeal bore little relation to the particulars of claim. It was that COBS 2.1.1R gave rise to a "product due diligence duty", an "intermediary due diligence duty" and a "non-allowable investment duty" amongst others. Newey LJ characterised this as an attempt to put forward a new case on appeal which should not be permitted and that accordingly, the appeal on the COBS claim failed [125] and [126]. He also declined the suggestion that the Court should comment upon the implications of COBS 2.1.1R [127].

72. I should also mention that Mr Hough sought to rely upon *R (Aviva) v FOS* [2017] EWHC 352 (Admin), [2017] Lloyds' Rep IR 404. That was a challenge by way of judicial review of a decision by the FOS upholding a complaint in relation to a life policy. The FOS consented to a quashing order but only on the grounds that the reasons given had been inadequate. Jay J held that the FOS had been right to concede

that the decision was flawed for inadequacy of reasons. He held that the ombudsman did not follow the relevant law, guidance and practice which she was not required to do but had not explained why, which it was incumbent upon her. Jay J added by way of "postscript" at [73] that he had personal concerns about the jurisdiction which "occupies an uncertain space outside the common law and statute."

Discussion and Conclusion

73. There can be no doubt, that the Ombudsman in this case, and the FOS in general, is not required to determine a complaint in accordance with the common law. Section 228 creates a much wider jurisdiction which has been recognised in all the cases to which we were referred. An ombudsman is required to reach an opinion about what is fair and reasonable in the circumstances of the particular complaint, having taken into account the matters set out in DISP 3.6.4R. As section 225(1) FSMA 2000 makes clear, the ombudsman service is intended to provide a quick and informal means of resolving certain disputes.

74. Further, as Ouseley J made clear in the *BBA* case, an ombudsman would be in breach of statutory duty if they failed to take the Principles into account when reaching an opinion as to what is fair and reasonable in the circumstances of a case; and the Principles create an overarching framework and are not constrained or diminished by a specific rule.

75. Although it was not emphasised in oral submissions, it was suggested in the written submissions on behalf of Carey, that despite being an overarching framework, because the Principles are not actionable by way of a claim, it was somehow novel that they should form the basis for a duty which led to redress for the complainant. It seems to me that this is incorrect and would seriously limit the effect of the Principles if that were so. They are clearly part of the relevant law and regulations which must be taken into account pursuant to DISP 3.6.4R when determining what is fair and reasonable in all of the circumstances. If having taken those matters (which include the Principles) into consideration, the ombudsman determines a complaint in favour of the complainant, section 229(2)(a) FSMA 2000 provides that fair compensation for loss and damage may be awarded (a "money award"). In my judgment, therefore, it is inherent in sections 228 and 229 of FSMA 2000 that circumstances which lead an ombudsman to determine a complaint in favour of the complainant, which may include the failure to observe guidance, best practice and non-actionable regulation, may also lead to a money award under section 229. That section is not circumscribed in any way. It enables compensation to be awarded in circumstances in which an action for damages would not lie.

76. That conclusion is also consistent with Ouseley J's approach to "actionability" in the *BBA* case, with which I agree. As I have already mentioned, he held at [71] that the fact that the Principles are not "actionable" does not alter their functions in any other way. He described the words of what was then section 150(2) as "wholly inapt to prevent rules which are not actionable giving rise to obligations as between firms and customers." This is well illustrated by the fact that under the powers conferred by section 206 of FSMA then in force (now in ss206 and 204A) the FCA could impose a penalty for contravention of a requirement, a power which it exercised by imposing multi-million dollar fines on banks for LIBOR rigging on the basis that it constituted a contravention of the Principles.

77. All of the authorities to which I have referred emphasise, quite rightly, the need for the ombudsman to explain his reasoning. As Rix LJ described it in the *Heather Moor* case at [80], despite the fact that the ombudsman is required to arrive at an opinion as to what is fair and reasonable in all the circumstances, he is not operating by the length of his foot. The ombudsman must take the matters in DISP 3.4.6R into account and must make the reasoning clear so that decisions can be understood and be amenable to judicial review on the grounds of perversity and/or irrationality. Unlike Jay J in the *Aviva* case, I have no doubt that a clear explanation of the matters taken into account and their relevance or otherwise provides sufficient safeguard.

78. In the passage in the *Heather Moor* case which Mr Hough relies upon, Stanley Burnton LJ refers to the need to explain a divergence from the "relevant law" and goes on to state that if the ombudsman finds an advisor liable notwithstanding that he has complied with *all* other relevant matters he would have to say so and explain why. It seems to me that Carey has sought to use the passage at [49] in the *Heather Moor* case in a very restrictive and unwarranted way. I do not understand the dicta to mean that in each and every case, the ombudsman must first, set out all the relevant contractual provisions and tortious duties which apply and state why it is considered appropriate in the particular case to go beyond them. Nor do I consider that it was intended that the same exercise should be carried out in a formulaic manner in relation to regulations which are actionable pursuant to section 138D(2) FSMA 2000, before turning on to non-actionable regulations, guidance and best practice.

79. In this case, it was obvious that the Ombudsman considered that the "execution only" nature of the contractual provisions did not prevent him from going on to consider the complaint in the light of regulation, guidance and best practice. That was precisely what he did. Furthermore, as I have mentioned, at [43] of the Decision he expressly concluded that the terms of the contract between Carey and Mr Fletcher did not mean that Carey should not be responsible for failing to comply with its regulatory obligations both in relation to the introducer and the investments. The Ombudsman also made clear that he was concerned with the position *before* any contractual relationship between Mr Fletcher and Carey arose. He stated that he was concerned with whether Mr Fletcher's application to become a member of the SIPP should have been accepted at all and reasoned that if it had been rejected, the investment in the Store Pods would never have taken place. It was inherent in his reasoning, therefore, that he was stepping beyond the contractual provisions. It was not necessary for the Ombudsman to be any more specific.

80. He also considered whether the investment ought to have been accepted separately, as a matter of regulation, guidance and best practice, despite the requirement in COBS 11.2.19R to execute a customer's investment instructions. As explained further below, I agree with Jacobs J in the *Berkeley Burke* case that those obligations arise at separate stages and that the best execution obligation only applies to orders which it was proper to have accepted in the first place.

81. The Ombudsman also made express reference to the *Adams* case, both in the High Court and the Court of Appeal and concluded that the position in relation to the complaint before him was different. He did so on the basis that the facts were different from the ones before him, that that was a claim under section 27 FSMA 2000 whereas he was concerned with a complaint under section 228 and on the basis that the consideration of the COBS 2.1.1R provisions by HHJ Dight arose in relation to

matters *after* the "execution only" agreement had been entered into. It seems to me, therefore, that the Ombudsman explained why he did not consider the *Adams* decisions to be directly relevant to the task before him and cannot be criticised in this regard.

82. The Ombudsman also referred to the decisions in the *BBA* and *Berkeley Burke* cases which, amongst other things, explain the significance and status of the Principles. It seems to me, therefore, that the Ombudsman set out the relevant law and regulation as it stood, explained why he was not following *Adams* and that the contractual provisions were not directly relevant and went on to make the Decision based upon all the factors he was required to take into account and on the basis of Principle 6, in particular. It is not suggested that the Principles are not binding on Carey or that they are not part of the regulatory framework.

83. This is consistent with the guidance in the *Heather Moor* case in which Stanley Burnton LJ went as far as to envisage a circumstance in which the ombudsman might uphold a complaint if he considered it fair and reasonable to do so in all the circumstances, despite there being no breach of any of the matters which he was required to take into account.

84. As I have already mentioned, the underlying complaint appears to be that the Principles are not actionable by a third party and therefore, a distinction should be made between Principle 6, which is not actionable by a complainant and COBS 2.1.1R which is. I agree with Mr Hough that the only references to COBS 2.1.1R which the Ombudsman makes are in the context of the *Adams* cases which he seeks to distinguish. He does not state that he is founding the Decision upon that rule. It will be apparent from what I have already said, however, that I consider the absence of any attempt to rely upon COBS 2.1.1R to be irrelevant. There is nothing in the FSMA regime to which we were referred, which warrants a dichotomy between rules which are actionable and those which are not. The ombudsman is entitled to take account of the matters set out in DISP 3.6.4R and has done so. Having done so in this case, the Ombudsman has reached the opinion that Carey has breached its duties which, for the most part, arose before the contract was executed, and that redress should be made. As I have already mentioned, that is consistent with the terms of section 229 FSMA 2000.

85. In any event, as Mr Strachan KC submitted, on the facts of this case (subject to Mr Hough's argument which I address below), if there was a breach of Principle 6, there was, inevitably, a breach of COBS 2.1.1R. If Carey's conduct was a failure to pay due regard to Mr Fletcher's interests and treat him fairly (Principle 6) it must also have been a failure to act fairly and professionally in accordance with his best interests (COBS 2.1.1R.)

86. It seems to me, therefore, that the Ombudsman gave adequate reasons, explained the relevant law and explained why he was relying on the Principles. The challenge to the Ombudsman's decision on this ground must fail, therefore.

Ground 2 – Misdirection on Legal Obligations of a SIPP Administrator

87. The second ground of challenge is that the Ombudsman erred in law in finding that Carey owed duties to a prospective SIPP member to carry out "due diligence" on

those who introduced them and on the investments which they had selected despite the "execution only" basis for the agreement between Carey and Mr Fletcher and the fact that Carey was not authorised to advise in relation to investments. In effect, Mr Hough complains that Carey is made liable on the basis of a due diligence requirement having taken account of the Principles, guidance and best practice, whereas an action on similar grounds under section 27 FSMA 2000 was rejected in the *Adams* case.

88. There are five separate bases for this ground. In summary, they are that: (i) the Ombudsman failed to have regard to the fact that Carey did not owe any legal obligation to refuse Mr Fletcher's SIPP application or his investment instructions. Carey was not subject to any COBS duties to assess the suitability of the SIPP or proposed investments; (ii) the Ombudsman failed to have regard to the fact that Carey owed no legal duty to SIPP members to vet those who referred them. There was no basis for such a duty in the contractual documentation or in any specific regulatory rules. If there were such a duty, Carey had fulfilled it by making the World Check enquiry; (iii) the same is said to be true in relation to vetting investments and the threshold for rejecting a prospective investment is unclear; (iv) the Ombudsman failed to have regard to the fact that he was proposing to make Carey liable for losses outside the scope of the duties allegedly breached; and (v) the Ombudsman erred in creating new and unforeseen duties. It is said that he was entitled to use the Principles to augment or clarify existing duties but not to create entirely new ones and in doing so he created a tension with the regulatory duty under COBS 11.2.19(1)R to execute investment instructions of SIPP members.

89. Before us, Mr Hough accepted, however, that COBS 11.2.19R does not preclude a SIPP provider from refusing to accept an investment. He went as far as to say that not only would the provider be entitled to refuse in the case of a scam investment or financial crime but also, for example, where it was clear that the introducer had made inappropriate promises about the investment. He said that circumstances of that nature only required a quick and straightforward enquiry by the SIPP provider but that any circumstances which would require extensive enquiries created a tension with regulatory duties. Mr Hough also drew attention to the requirement in the FSMA 2000 to consult in relation to the creation of new duties.

90. In written submissions, it was also noted that COBS 2.1.1R has been treated as requiring a firm to act properly and in the client's best interests when performing its agreed services but not to do more than it had undertaken to do. Reliance was placed upon HHJ Dight's judgment in *Adams* in which he explained at [153] that Carey's role in that case was "execution only" and that the member was responsible for their own investment decisions. He added at [154] that:

> ". . . A duty to act honestly, fairly and professionally, in the best interests of the client, who is to take responsibility for his own decisions, cannot be construed 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."

Mr Hough also referred us, by analogy, to *Quinn v IG Index Ltd* [2018] EWHC 2478 (Ch) which was a spread betting case. In that case, HHJ Pelling KC, sitting as Judge in the High Court observed at [88] that:

> "Notwithstanding the wide language used, in my judgment the obligation imposed by COBS 2.1.1R to 'act honestly, fairly and professionally in accordance with the best interests of its client …' does not impose on an authorised person carrying on designated investment business the duty of preventing a retail client from engaging in an execution only transaction, or execution only transactions, of a class that it has assessed is appropriate for the client concerned. To construe the provision as having such an effect would be to construe it as imposing a duty massively in excess of that which has been recognised at common law and massively in excess of what is the appropriate degree of protection identified in s.5(1) FSMA having regard to all the factors identified in s.5(2)(a), (b) and (d) FSMA."

91. Mr Strachan and Ms Stratford submit that the Ombudsman was entitled to decide as he did and no new duties have been created. The Ombudsman applied the Principles to the facts of the case which he was entitled and required to do and his approach was consistent with both the *BBA* and the *Berkeley Burke* cases.

92. Ms Stratford emphasised in her written submissions that the best execution rules in COBS 11.2 apply only once an instruction has been accepted but they pre-suppose that there is an order which should properly be executed. Thus, a lack of authorisation to provide advice does not create an exemption from the requirement to conduct due diligence in relation to activities which a provider does have authority to carry out. She also drew attention to a passage in the FCA's 2009 thematic report which made clear that SIPP operators could not absolve themselves from any responsibility and would be expected 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".

Discussion and conclusions

93. In my judgment, there is nothing in this ground of challenge. As I have already explained, the *BBA* and *Berkeley Burke* cases make it clear that the Principles are part of the regulatory framework which applies to Carey and the application of those Principles may form the basis for an opinion that it would be fair and reasonable in the circumstances of the case to uphold a complaint and award compensation or redress. Having taken into account all relevant matters including guidance and best practice, that is what the Ombudsman did.

94. Mr Hough's acceptance that there were circumstances in which a SIPP provider could and should refuse to accept an application for membership and/or an investment instruction is consistent with the Ombudsman's conclusions. Mr Hough sought to limit such circumstances to criminal activities or a scam but went on to accept that it might cover circumstances in which the provider became aware that the introducer had offered inducements to the customer. He suggested that the provider should only have to carry out quick and easy enquiries. In fact, when pressed he was unable to

provide a clear line beyond which there would be no obligation to conduct any due diligence.

95. It is also of note that it is clear that Carey were conducting pre-contract due diligence, albeit haphazardly, and that their documentation was geared to do so. The opening paragraphs of their "non-regulated introducer profile" which I set out at [10] above, make it clear that they considered that they were required to carry out due diligence on unregulated introducers, as a matter of best practice. Their contractual documentation also made it clear that they could refuse to accept an application for membership for any reason and could refuse to execute investment instructions. This makes an argument that the requirement of due diligence which the Ombudsman found to have been breached was novel, rather difficult.

96. Furthermore, as the Ombudsman made clear, he was considering the position of a regulated and authorised provider *before* any contractual relationship was entered into. The nature of that relationship, "execution only" or otherwise, cannot bear on the obligations of such a person as a result of the relevant law, regulation, guidance and best practice *before* the contract is entered into.

97. In this regard, it is of note that both HHJ Dight in the *Adams* case, at first instance, and HHJ Pelling KC in the *Quinn* case, were concerned with the position once a contract had been entered into. As HHJ Dight acknowledged expressly at [155], he was not concerned with due diligence prior to the defendant agreeing initially to accept investments in Store Pods. It seems to me that the observations which both judges made in relation to COBS 2.1.1R were in the context of the contractual relationship concerned. In the light of the Ombudsman's legitimate reliance upon Principle 6, guidance and best practice, it is not necessary to consider the precise ambit of COBS 2.1.1R here. It is better to leave consideration of that matter to a case in which it is of central relevance and in which there are more detailed submissions on the topic.

98. The submission that such a due diligence requirement in relation to investments is contrary to COBS 11 and the nature of the contractual relationship is also misconceived. As I have already mentioned, the *BBA* and *Berkeley Burke* cases make clear that the Principles are not restricted by the terms of specific rules. Furthermore, as I have already mentioned, the due diligence and best practice with which the Ombudsman was concerned was as to whether Mr Fletcher should have been accepted as a member of the SIPP at all. It pre-dated the contract. In relation to the Store Pod investment, the due diligence requirement did not require Carey to give advice as to the suitability of the investment. It is not in doubt that it was not authorised to do so. The due diligence related to whether the type of investment should have been accepted per se, in the light of all the circumstances, including the nature of the introducer.

99. It seems to me therefore, that this ground of challenge also fails.

Ground 3 – Rationality

100. The third ground of challenge is that even if the duties of due diligence on which the Ombudsman relied, in fact, exist, it was irrational to decide that they had been breached. It is said that the Decision was unreasonable on the basis that it contained

significant logical flaws and/or that the conclusions reached were outside the range of reasonable responses open to the Ombudsman.

101. Mr Pritchard, on behalf of Carey, divided his submissions under this head of challenge between the Ombudsman's approach in relation to due diligence in relation to CL&P itself and in relation to the Store Pods investment.

102. In relation to CL&P, Mr Pritchard relied upon [155] in the judgment of HHJ Dight in the *Adams* case at which the judge stated that had he been required to determine the question of due diligence prior to the acceptance of Store Pod investments, on the evidence before him he would have concluded that Carey "undertook proper due diligence and behaved appropriately in the best interests of their clients in that respect".

103. Mr Pritchard went on to submit that any duty of due diligence could only stretch to reasonable efforts and it had been reasonable for Carey to use the World Check tool. Furthermore, he submitted that it did not matter that Mr Wright had not been the subject of the initial search because he was not on the World Check system at the time.

104. He also submitted that the answer which Carey gave to the questions posed by the FCA before their visit to Carey's premises in 2011 was accurate and therefore, the FCA was aware of what Carey was doing and approved their due diligence. He says that Carey told the FCA that it checked on World Check and then if an introducer claimed to be regulated, Carey would check on the FCA Register. He says that that procedure was contained in the document which the FCA produced encapsulating Carey's position and assessment "score" after its visit to Carey's offices on 14 July 2011. The FCA interprets this document differently and says that Carey had represented that it checked both the World Check data base *and* the FCA website. There is a similar dispute about Carey's answers to an FCA questionnaire in 2011, in which it answered a question in relation to what routine monitoring was carried out. The contents of the answer were required to be given in order of importance. Carey had answered "Check of FSA website/register" followed by "Worldcheck search undertaken".

105. Mr Pritchard also submits that the FCA is wrong to suggest that use of the World Check database amounted to impermissible outsourcing of Carey's responsibilities. He says that no outsourcing took place. Carey was merely using a recognised tool to fulfil its obligations.

106. In relation to the Store Pod investments, Mr Pritchard took us back to the Decision. He pointed out that at [54] the Ombudsman had decided that on the basis of what Carey knew or ought to have known at the time it should not have accepted Mr Fletcher's application to invest in Store First and ought to have concluded that it was not consistent with its regulatory obligations or best practice to do so. What Carey knew or ought to have known was set out in bullet points at [52] and refers back to the published decision referred to in the Provisional Decision at [143] – [146] which had been incorporated in the Decision.

107. Mr Pritchard took us to the report which Carey obtained in relation to the Store Pod investment and drew attention to: the fact that only one county court judgment was

referred to which was described as being in the course of being settled; that it was noted that the investment was unregulated and therefore, no protection would be offered through the FSCS; that the use of the "high risk/illiquid disclaimer" should be considered; and that it was confirmed that the investment was capable of being within a SIPP.

108. In relation to the matters relied upon by the Ombudsman at [52] of the Decision, Mr Pritchard: noted that the report revealed only one county court judgment and not three; stated that it was difficult to see what Carey should have done in relation to the adverse press comments about Dylan Harvey and Toby Whittaker who were associated with Harley Scott Holdings Ltd; questioned the relevance of a previous failed property investment in which Harley Scott Holdings Ltd had been involved; and pointed out that contrary to the fourth bullet point under [52], Store First's marketing material had included a risk warning and explained how the rent was guaranteed for the first two years.

109. Mr Pritchard submits, therefore, that the Ombudsman's reasoning was illogical and that the matters relied upon were not serious enough to justify the conclusion.

110. In summary, Mr Strachan with whom Ms Stratford agrees, submits that this ground amounts to mere disagreement with the Ombudsman. It contains no basis for saying that any finding was so unreasonable that no reasonable ombudsman would have made it.

Discussion and Conclusions

111. I agree with Mr Strachan and Ms Stratford. The matters relied upon fall far short of satisfying the high hurdle for a public law challenge on the basis of irrationality.

112. First, there is nothing irrational about the Ombudsman's reliance on the matters he sets out at [129] of the Decision. The complaints about the finding that Carey should have checked the FCA site rather than rely upon World Check do not come near to forming the basis for a public law challenge. It cannot be said that the Ombudsman was not entitled to conclude that as a matter of guidance and best practice, Carey should have checked the FCA site in the circumstances of this case. Furthermore, it cannot be said that such a conclusion is irrational.

113. Secondly, the arguments based on the submissions to the FCA and answers given during the regulatory visit take the matter no further forward. At best, the responses to which we were taken were ambiguous. In any event, they do not preclude the Ombudsman from reaching the conclusion he did and certainly do not render his conclusion irrational.

114. Thirdly, although there are differences between the matters relied upon by the Ombudsman in relation to the Store Pod investments in the Provisional Decision and the Decision itself and there was a discrepancy in relation to outstanding county court judgments against Harley Scott Holdings Limited, I do not consider this these are enough to render the conclusion irrational. At [52] of the Decision, the Ombudsman referred back to the published decision which, in turn, had placed reliance upon an earlier report on Harley Scott Holdings Limited by Comprehensive Company Reports. It had contained reference to three county court judgments, amongst other things.

115. Taking all the matters into account, it cannot be said that the Decision was irrational and that a reasonable ombudsman could not have arrived at the same conclusion.

116. Accordingly, I would dismiss this ground of challenge.

Conclusion

117. For all of the reasons set out above, I would dismiss the claim for judicial review.

Popplewell LJ:

118. I agree.

Underhill V-P:

119. I also agree.