Neutral Citation Number: [2022] EWHC 3325 (Admin)

Case No: CO/2192/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2022

Before :

THE HON. MR JUSTICE BOURNE

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Between :

THE KING on the application of OPTIONS UK PERSONAL PENSIONS LLP (formerly OPTIONS SIPP UK LLP and CAREY PENSIONS UK LLP) **Claimant**

- and -

FINANCIAL OMBUDSMAN SERVICE LIMITED **Defendant**

- and -

(1) SIMON FLETCHER **1st Interested Party**

(2) FINANCIAL CONDUCT AUTHORITY **2nd Interested Party**

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Jonathan Hough KC and Simon Pritchard (instructed by **Eversheds Sutherland**) for the **Claimant**
James Strachan KC (instructed by **Financial Ombudsman Service**) for the **Defendant**
Jemima Stratford KC (instructed by **Fieldfisher**) for the **2nd Interested Party**

Hearing date: 1 December 2022

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Approved Judgment

This judgment was handed down remotely at 10am on 21 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HON. MR JUSTICE BOURNE

The Hon. Mr Justice Bourne:

Introduction and factual background

1. This is a renewed application for permission to apply for judicial review of a decision of the Defendant, the Financial Ombudsman Service ("FOS") made on 28 March 2022. The Claimant, now known as Options UK Personal Pensions LLP, previously traded as Carey Pensions UK LLP and is here referred to as Carey.

2. The decision of FOS was made on a complaint by a Mr Fletcher. In 2011, he was cold-called by a business called Commercial Land and Property Brokers ("CLP"). CLP was not regulated by the Financial Conduct Authority as an adviser. The CLP representative told Mr Fletcher that he would receive a greater retirement income, with very little risk, if he transferred pension savings into investments of a business called Store First, consisting of leases of storage units, held in a SIPP administered by Carey. Carey accepted Mr Fletcher's referral on 29 September 2011. He transferred about £30,000 from existing pension schemes into the SIPP and CLP paid him a £2,000 "cashback" which he wrongly believed would be tax-free. The investment in Store First was unsuccessful and Mr Fletcher suffered a significant loss. In his complaint to FOS he alleged that Carey did not carry out sufficient due diligence on CLP before accepting business from it.

3. Carey emphasizes that FOS is handling numerous complaints arising out of similar introductions by CLP, so the issues in this case have a wider significance.

4. In its decision, FOS set out a history of the business relationship between Carey and CLP which I now briefly summarise.

5. Carey first accepted introductions from CLP on 15 August 2011. On 20 September 2011 it conducted background checks using a database known as "World Check" on two individuals at CLP which revealed no issues. On 29 September 2011 it received a "non-regulated introducer profile" from CLP, signed by a Mr Terence Wright. In a conference call with CLP 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. CLP said that no parties referred by them received any such inducement and Carey emphasised that such inducements were prohibited. On 20 March 2012, a Ms Adams of CLP signed Carey's Terms of Business for Non Regulated Introducers. On 12 March 2012, Carey's compliance support asked CLP by email for its latest accounts and for certified copies of the passports of the main directors/principals/partners of the company. It chased for this on 3 April 2012, but Carey has no record of receiving the information. On 29 March 2012, Carey staff again expressed concerns about reports of clients being offered inducements. On 15 May 2012, Carey conducted a World Check search on Terence Wright, which revealed that he was on a FSA list of unauthorised firms and individuals. On 25 May 2012 Carey terminated its agreement with CLP, citing the giving of inducements as a reason.

6. Mr Fletcher complained that Carey had not undertaken any or any sufficient "due diligence" before accepting referrals from CLP and that this enabled CLP and Store First to trick him into losing his money.

7. On 26 November 2021 FOS issued a provisional decision, setting out why it believed that the complaint should be upheld. Carey did not accept the provisional decision, made further submissions and requested an oral hearing "in particular to explore Mr Fletcher's understanding of his investment and his and Carey's roles" and "to assess Mr Fletcher's motivation for entering into the transaction and what he would have done if given more information".

8. In the further submissions responding to the provisional decision, Carey argued (in particular) that (1) the due diligence duty to which FOS referred was not recognised by law, i.e. there was no such actionable duty that a Court would recognise, and (2) if FOS was imposing a duty going beyond legal requirements then it was bound to give a clear explanation of that decision and the reasons for it, and had not done so.

9. The decision letter, dated 28 March 2022, set out the provisional decision in full, summarised Carey's further submissions, set out the reasons for refusing an oral hearing and then set out the final decision of FOS on the complaint.

10. FOS upheld the complaint. It took into account the fact that Carey acts on an execution-only basis i.e. it does not advise or comment on the suitability of its customers' investments and it tells all customers that they should seek independent financial advice from an adviser regulated by the FCA. However, FOS decided that Carey failed to carry out sufficient due diligence before accepting any business from CLP. Had Carey carried out sufficient checks at the outset on all directors, it would have discovered that Terence Wright was the subject of an FSA warning notice from 15 October 2010. The notice appeared on the FSA's website in a list headed "Firms and individuals to avoid" and was described as a "warning notice of some unauthorised firms and individuals that we believe you should not deal with". The notice stated that Mr Wright was not authorised to carry out regulated activities in the UK including advising on investments and that the FSA believed that he "may be targeting UK customers". Further, if Carey had requested accounts and identification documents at the outset, it would have been alerted by CLP's failure to provide them. FOS considered that although Carey had no duty to advise Mr Fletcher, it was not fair or reasonable for it to accept his application for the SIPP or the Store First Investment. FOS also ruled that it was fair and reasonable for Carey to compensate Mr Fletcher for his financial loss, plus £500 for trouble and upset.

11. So far as the oral hearing request was concerned, FOS decided that the complaint could be fairly determined without one. The decision maker considered that the relevant questions had already been put to Mr Fletcher and that his answers were consistent with information previously provided. No dispute of fact had been identified which would require further oral evidence. The decision maker also noted that even if there were a hearing, this would be inquisitorial rather than adversarial in nature and Carey would not be able to cross examine Mr Fletcher.

Legal framework

12. Section 226 of the Financial Services and Markets Act 2000 ("FSMA") provides that FOS will deal with certain eligible complaints and refers to this jurisdiction as the "compulsory jurisdiction".

13. In respect of such complaints, sections 228 and 229 provide (so far as material):

> "**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.
> …
> **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.
> … "

14. The scheme is subject to rules contained in part of the FCA Handbook known as the "Dispute Resolution: Complaints" sourcebook ("DISP"). DISP 3.6.4 R provides:

> "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."

15. DISP 3.5 stipulates the processes for resolving complaints. In particular, DISP 3.5.5 R states:

> "If the Ombudsman considers that the complaint can be fairly determined without convening a hearing, he will determine the complaint. If not, he will invite the parties to take part in a hearing. A hearing may be held by any means

> which the Ombudsman considers appropriate in the circumstances, including by telephone. No hearing will be held after the Ombudsman has determined the complaint."

16. A party who wishes to request a hearing must do so in writing, setting out issues he/she wishes to raise and any reasons why the hearing should be in private (DISP 3.5.6 R). When deciding whether there should be a hearing and, if so, whether it should be in public or private, the Ombudsman must have regard to the provisions of the ECHR (DISP 3.5.7 G).

17. In *R (Thompson) v Law Society* [2004] EWCA Civ 167 at [45]-[51], it was held that common law principles of fairness and ECHR Article 6 would require an oral hearing of disciplinary allegations if there were disputed issues of fact which could not fairly be resolved without such a hearing. That test was approved in *R (Heather Moor & Edgecomb) v FOS* [2008] EWCA Civ 642, in which the Court of Appeal heard and dismissed a claim for judicial review of a decision by the FOS to uphold a complaint without an oral hearing.

18. *Heather Moor & Edgecomb* is also relevant to the scope of FOS's substantive powers. The claimants ("HME") were financial advisers who gave pensions advice to an investor, as a result of which he suffered losses. FOS decided that the advice was contrary to good industry practice and that it was fair and reasonable for HME to compensate the investor. In the judicial review claim HME contended that section 228, on a proper construction, "required FOS to determine complaints in accordance with the rules of English Law". Stanley Burnton LJ at [36] ruled that the wording of section 228, requiring a complaint to be determined "by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case", meant that FOS could determine a case in accordance with rules including those not found in the common law. Ruling that this did not infringe ECHR Article 6, he continued at [49]:

> "The ombudsman is required by DISP 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 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."

19. I then turn to some of the relevant "regulators' rules and guidance and standards".

20. Section 137A of FSMA empowers the FCA to make rules applying to authorised persons. Rules made by the FCA are published in the FCA Handbook and are denoted by the letter R following a number, whereas provisions containing mere guidance have the letter G. By FSMA section 150, the rules are generally actionable by Court claim but they may provide that specific provisions are not.

21. Some rules are actionable by civil claim. These include rule 2.1.1R of the Conduct of Business Sourcebook Rules ("COBS") which requires a firm to act "honestly, fairly and professionally in accordance with the best interests of its client".

22. Some rules are not actionable. Chapter 2 of the FSA Handbook ("PRIN") is entitled Principles for Businesses. It sets out 11 Principles of general application. PRIN 3.4.4R provides, pursuant to section 150(2), that they are not actionable, meaning that a breach does not give rise to a Court claim for breach of statutory duty. Of particular relevance is Principle 6:

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

23. In *R (BBA) v FSA and FOS* [2011] EWHC 999 (Admin), the BBA submitted that, because the Principles are not actionable, FOS could not take them into account when ruling on whether to grant redress to a customer on a complaint. Ouseley J rejected that submission, ruling that the only effect of section 150(2) was to bar a civil claim for breach of statutory duty, and at [81] referred to paragraph 49 of *Heather Moor & Edgecomb* as supporting the case of FOS in this regard.

24. In *R (Berkeley Burke SIPP Administration Ltd) v FOS* [2018] EWHC 2878 (Admin), as in the present case, an investor was introduced to a SIPP provider and was persuaded to transfer his pension into an investment offered by the introducer. The investment in that case proved to be fraudulent and the investor lost his money. The ombudsman upheld a complaint, finding that the claimant had failed to act fairly and reasonably by failing to carry out "adequate due diligence" in relation to the investment. Dismissing an application for judicial review and applying the rationale from *BBA*, Jacobs J held that the ombudsman was entitled to apply the FCA's Principles for Businesses and to have regard to good industry practice when deciding what was fair and reasonable.

25. So far as civil claims are concerned, it is necessary to refer to a claim brought against Carey by another individual who was introduced by CLP to the Store First investment. The first instance decision is reported as *Adams v Options SIPP* [2020] EWHC 1229 and an appeal decision is reported as *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474. Mr Adams alleged that (1) under sections 27-28 of FSMA his agreement with Carey was unenforceable and he was entitled to recover money transferred under it, (2) Carey had acted in breach of the requirement under COBS rule 2.1.1R and (3) Carey was jointly liable for negligent advice given by CLP.

26. The claim was dismissed. The first and second heads of claim only were renewed on appeal.

27. Allowing the appeal on the first head of claim, the Court of Appeal ruled that Mr Adams could recover his money from Carey under section 27 (which, subject to section 28, creates such an entitlement where an agreement with an authorised person is made in consequence of something said or done by a third party when carrying on a regulated activity without authorisation) and that it was not just and equitable to allow Carey to enforce the agreement under section 28.

28. Of more relevance to the present case was the second head of claim. Mr Adams' pleaded case was that Carey had committed actionable breaches of rule 2.1.1R by establishing and administering a SIPP that was manifestly unsuitable for him and by failing to follow FCA guidance relating to SIPPs. Those arguments, however, were not pursued by Mr Adams on appeal. Instead, he sought to argue that Carey was in breach of a duty of due diligence under rule 2.1.1R, as was found by FOS in the present case. The Court described this at [125] as "an attempt to put forward a new case" and did not allow him to pursue it. At [127] Newey LJ said that the "implications of COBS 2.1.1R … would be more appropriately addressed in a case where the issues are live".

Ground 1

29. The Claimant, represented by Jonathan Hough KC and Simon Pritchard, contends that it at all times complied with its contractual and common law duties and that it was under no duty to carry out due diligence of the kind suggested by FOS. They submit that whilst COBS rule 2.1.1R represented the broadest available legally actionable FCA duty, liability under that rule was rejected in *Adams*.

30. The ombudsman, Mr Hough submits, neither stated that the decision was founded on identified legal duties nor stated and explained that he was making a finding of liability which a Court would not have made. He points out that in *BBA*, Ouseley J said at [186]:

> "I would … accept that if the FOS is 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."

31. Since FCA Principle 6 would not give rise to liability in a Court, if the decision was founded on it, Mr Hough submits, such a finding would be a departure from the law which had to be explained.

32. Nor, Mr Hough submits, can the decision be based on *Berkeley Burke*. The issue about a sufficient explanation of the FOS decision did not arise in that case, which turned on an investment which proved to be a scam where the SIPP provider had not conducted fraud checks, whereas in this case the investment product was found to be genuine.

33. Nor, Mr Hough submits, can the finding be based on the Court of Appeal's decision in *Adams*. That claim succeeded by application of FSMA section 27. That provision was not part of the FOS analysis in the present case and the facts of *Adams* and this case were different.

34. James Strachan KC, representing the Defendant, contends in response that FOS clearly explained why his decision was not inconsistent with the Court's decision in *Adams* and that he had considered both COBS rule 2.1.1R and the FCA Principles including Principle 6. The ombudsman made it clear at paragraph 100 of his (final) decision that in applying the Principles, he was not "departing from the law".

35. *Adams*, Mr Strachan submits, was not an exhaustive analysis of the requirements of COBS2.1.1R including any requirement of due diligence, because the Court did not allow the latter to be added to the pleaded case. The FOS, by contrast, analysed the requirements of COBS2.1.1R and the wider regulatory framework including Codes of Practice and good industry practice. In so doing, he applied the "relevant law" as identified in the case law from *Heather Moor* onwards.

36. Moreover, Mr Strachan submits, there is little or no real difference between the meaning of rule 2.1.1R, which is actionable, and Principle 6, which is not. Both impose an obligation of acting fairly and both are framed by reference to the interests of the client or customer.

37. Mr Strachan's submissions were endorsed by Jemima Stratford KC who appeared for the FCA as an interested party. She too emphasized that the approach taken by FOS is well established in case law and that FOS clearly explained what rules and guidelines were material. Ms Stratford submitted that it was revealing that Mr Hough sought to distinguish *Berkeley Burke* on the basis of a factual distinction (a fraudulent investment as opposed to a merely imprudent one), because that indicated the lack of any distinction between the legal principles applicable to that case and this one.

38. I accept the submissions of Mr Strachan. The obligation to explain a departure from the law, referred to in *Heather Moor*, has nothing to do with any distinction between actionable and non-actionable rules. Rather, the obligation of FOS when deciding what is fair and reasonable is to have regard to all relevant legal and guidance materials, actionable and non-actionable. If FOS upholds a complaint against a provider despite their complying with all such rules and guidance, that must be explained, but that is not this case. This complaint was upheld by reference to the relevant rules and guidance.

Ground 2

39. Carey argues that the ombudsman erred in law in finding that it owed duties to prospective SIPP members to carry out due diligence on those who introduced them and on investments which they had selected (without Carey being involved in the selection), because:

    i. Carey did not owe any legal obligation to refuse Mr Fletcher's SIPP application or his investment instructions. Under the FCA Rules, it was not subject to any of the duties in COBS to assess the suitability of the SIPP or proposed investments.

    ii. Carey had no legal duty, contractual or regulatory, to SIPP members to vet the firms who referred them. Even if it had a duty to take reasonable steps, its usual and reasonable practice of using World Check would not have identified the relevant alert at the relevant time.

iii. Carey had no legal duty, contractual or regulatory, to SIPP members to vet their prospective investments.

iv. The investment losses were outside the scope of the duties which FOS found were owed. They did not have the requisite nexus to the introducer due diligence duty because they did not arise from any misconduct by the introducer. They did not have the requisite nexus to the investment due diligence duty because they did not arise from the supposed features of concern which the ombudsman expected Carey to identify.

v. While, on the basis of authority, the ombudsman could legitimately use the FCA Principles to augment or clarify existing duties, he could not use them to impose duties which are not contained in regulatory rules applying to a firm in Carey's position and which are outside Carey's contractual remit and inconsistent with the express limits of the responsibilities it undertook to SIPP members. Such duties conflicted with Carey's regulatory duty under COBS 11.2.19R(1) to follow investment instructions of SIPP members.

40. Mr Hough observes that the arguments in the last of those sub-paragraphs were in issue in *Berkeley Burke* and that, following dismissal of the judicial review claim at a substantive hearing, permission to appeal was granted but the case did not proceed because of the insolvency of the claimant in that case. He contends that permission should be given to advance those arguments in this claim.

41. Mr Strachan responds by submitting that FOS clearly explained what due diligence it considered was required of Carey in respect of both CLP and Store First, how those due diligence requirements arose from the regulatory obligations that it had identified and why they did not conflict with Carey's non-advisor role, and that there is no inconsistency with anything decided in *Adams*. He suggests that it is absurd to contend that it was outside the scope of Carey's duties to check the FSA's own website for warnings about directors of companies from whom it was proposing to accept introductions. Mr Strachan characterises this ground as merely a "thinly veiled disagreement" with the ombudsman's analysis and therefore a merits challenge rather than a true judicial review ground.

42. Mr Strachan also submits that decisions on permission to appeal are not usually to be cited and that I cannot be assisted by the grant in *Berkeley Burke*.

43. Ms Stratford adds that a provider owes no absolute duty to execute a client's instructions, that proposition having been rejected in *BBA* and in *Berkeley Burke*. On the contrary, as she points out by reference to a "thematic review" published by the FCA in 2009, a SIPP provider by exercising due diligence performs an important "gatekeeper" function.

44. I agree that this is in reality a challenge to the Defendant's decision on the merits. That decision is firmly based on the rules and guidance identified in the decision letter and is entirely consistent with case law such as *Berkeley Burke*. Whilst the decision did not draw a distinction between the requirements of rule 2.1.1R and those of Principle 6, that is readily explained by the similarity or the overlap between the two. This is not a case

where FOS found that all binding rules had been complied with but that the Principles nevertheless required the complaint to be upheld. There is also no inconsistency with *Adams* because the relevant breach of rule 2.1.1R was not pleaded in that case. I perceive no error of law and therefore ground 2 has no prospect of success.

Ground 3

45. Mr Hough contends that the ombudsman failed to give adequate reasons for the decision, failing properly to articulate and explain the duties of due diligence which he found to be applicable. The decision, he says, leaves unclear what steps Carey should have taken. The ombudsman does not say how Carey should have discovered the FSA alert about Mr Wright. He found that Carey should have looked into the promoter of the investment and the investment marketing materials but did not identify the purpose or extent of those duties.

46. Mr Strachan's response is that the decision is entirely adequate in these regards and gives reasonable examples of what would have been expected.

47. In my judgment there is no merit at all in ground 3. The decision letter, at paragraphs 129-146, explains in entirely sufficient detail what Carey could and should have done.

Ground 4

48. Mr Hough contends that the decision was irrational, containing logical flaws or conclusions outside the range of what was reasonable. In particular:

    i. The decision, which was not based on Mr Fletcher's personal circumstances, was logically inconsistent with the lack of a finding that the Store First investment was unsuitable for all investors or unsuitable to be held in a SIPP.

    ii. Given that World Check would not have revealed the alert on Mr Wright, it was unreasonable to hold that due diligence would necessarily have revealed it.

    iii. It was unreasonable to expect Carey to research the financial standing and history of the promoter of Store First, or to refuse all instructions to invest in Store First because of unverified and non-specific comments in the press about the promoter and a previous (unrelated) investment scheme.

    iv. It is normal for marketing documents for investments to portray potential returns in relatively optimistic terms, and the ombudsman made no finding that the Store First materials contained actual misrepresentations (still less that Carey should have become aware of such misrepresentations). Moreover, the ombudsman has not explained how Carey could have assessed a supposed risk of investors being misled, given that it was not Carey's role to consider and advise upon the risks and potential returns from investments which SIPP members might choose.

    v. It was illogical to base the decision on the lack of proper risk warnings in Store First marketing materials, where it was not for Carey to assess the specific risks

of the investment and Carey provided generic risk warnings and required Mr Fletcher to acknowledge the investment as high-risk.

49. Mr Strachan replies that this too is a challenge to the merits of what the Ombudsman has decided, and that nothing expressed by way of disagreement comes close to establishing the high threshold of showing any arguable irrationality in the Ombudsman's decision.

50. Here too, I accept Mr Strachan's submissions. It was the duty of FOS to form an expert judgment on what was required of Carey by way of due diligence. That judgment was detailed, clearly explained and logical. Ground 4 expresses a difference of opinion on the merits but does not mount an arguable rationality challenge.

Ground 5

51. Carey argues that the Ombudsman's refusal to convene an oral hearing meant that the procedure was unfair. Such a hearing, Mr Hough submits, was necessary because:

    i. There was a tension between Mr Fletcher saying that he made the investment because he was in desperate need of the cashback payment but also that he would not have proceeded if he had been told about the FSA alert concerning Mr Wright.

    ii. The ombudsman speculated about what Mr Fletcher would have done if Carey had not accepted his instruction.

    iii. Mr Fletcher claimed that he was unaware that the SIPP was a high risk investment despite signing a declaration acknowledging that fact.

    iv. Mr Fletcher claimed that he was not told that the investment could fall in value despite this being obvious to any reasonable customer.

52. Mr Strachan responds that the Ombudsman has given a clear and logical explanation of why fairness did not require an oral hearing in this case.

53. Under DISP 3.5.5R, the question for FOS was whether the complaint "can be fairly determined" without a hearing. In the decision letter, the ombudsman correctly noted that the procedure is generally of an inquisitorial kind. Consistently with that, questions were sent to Mr Fletcher. His answers were set out in the provisional decision so that Carey could respond to them. FOS found Mr Fletcher's case to be consistent and to contain no sign of untruth. An oral hearing was not necessary to add anything to that process and even if such a hearing were held, it would not mean that Carey would have the opportunity to cross-examine Mr Fletcher.

54. Reconsidering the question of fairness for myself, I agree with the reasoning of FOS. The issue of what Mr Fletcher might or might not have done in particular circumstances was the subject of a fair and sufficient investigation.

55. Moreover, as FOS said in the decision, the finding was that Carey should not have accepted the SIPP application and it would not have been reasonable for any other SIPP provider to do so. In the circumstances, if Carey had complied with its duties then Mr Fletcher's intentions would not have affected the outcome. That was a further and alternative reason why a hearing was not necessary.

56. Ground 5 is therefore not arguable.

Conclusion

57. Permission to apply for judicial review is refused.