DRN-3230371

The complaint

Miss C has complained that, before allowing her to open a self-invested personal pension ("SIPP"), Heritage Pensions Limited did not carry out the appropriate checks on either the advisor who recommended and introduced the transaction or on the investments the SIPP was to be used for.

What happened

<u>The parties</u>

Miss C

Miss C is a private individual. She was, at the time of her investment, self-employed. She owned her own home, but this was subject to a mortgage. She was 49 years old and intended to retire at 60.

Miss C had a defined benefit final salary scheme and two defined contribution plans, with a total value just under £228,000. I will note here that my provisional decision referred to this amount as being just under £220,000 – this was my own typographical error however, and I do not believe this fact to be in dispute as both party's records show the same sums. Miss C also had around £30,000 in premium bonds and £5,000 in an ISA. No evidence has been provided of any further investment experience.

Heritage Pensions Limited

Heritage is a SIPP provider and administrator, regulated by the Financial Conduct Authority ("FCA") and its predecessor, the Financial Services Authority ("FSA"). Heritage is authorised, in relation to SIPPs, to arrange (bring about) deals in investments, deal in investments as principal, establish, operate or wind up a pension scheme and make arrangements with a view to transactions in investments.

TailorMade

TailorMade Independent Limited ("TMI") was an independent financial adviser ("IFA") previously authorised by the FCA and the FSA. This company was previously named The TailorMade SIPP Limited.

TMI specialised in giving advice to retail customers on the merits of their transferring their pension monies into SIPP schemes. It was one of a number of companies operating under the "TailorMade" brand. Although legally separate, these companies were under common control and worked closely together.

One of these other companies, TailorMade Alternative Investments Limited ("TAI"), acted to promote, to customers, alternative investments; typically illiquid, esoteric investments – including in Harlequin Property, Green Oil Plantations Ltd, and Food Water and Energy SA. TAI was not regulated by the FSA/FCA.

Harlequin Property

The Harlequin group of companies was involved in the development and distribution of overseas property investments and resorts, primarily based in the Caribbean.

The developments failed and funds invested were not always used as intended. A number of Harlequin entities are now in insolvency, with some senior figures involved with those companies facing prosecution. The FSA and subsequently the FCA did not regulate any of these companies.

Green Oil Plantations Ltd

Green Oil Plantations Ltd was building a Millettia tree plantation in Australia. The commercial uses of these trees include for bio-oil, animal feed, fertiliser, etc. And to earn carbon credits. Investors were offered shares in the company, which would be rewarded from the sale of harvested trees. Unfortunately, the investment failed, and this company dissolved in 2019.

Food Water and Energy SA

Food Water and Energy SA is a company based in Argentina. Apparently, through subsidiaries and affiliates, it owns and operates large tracts of farmland in South America and Europe.

Investors could purchase a beneficial interest in such land for a term of either 5 or 10 years, with the intention that they would be rewarded with a portion of any profits from farming that land. One of the investment opportunities offered was SCS Farmland (Weisburd), relating to land in Argentina. It seems this investment has not yielded any reward and has likely failed.

What happened

Miss C had benefits in pension schemes with Royal Bank of Scotland, Phoenix Life and Friends Life, with a total value just under £228,000.

In 2012, following advice from TMI, she opened a SIPP with Heritage with the intention of investing into Harlequin Property, Green Oil Plantations and SCS Farmland ("the investments"). The cash value of Miss C's pension benefits was transferred into the Heritage SIPP and, in October 2012, a large proportion was invested in the investments.

Sadly, the investments all appear to have failed. And it is highly likely Miss C has lost all, or almost all, of the money she invested.

The relationship between TMI and Heritage

Heritage was approached by TMI in November 2011. Heritage has said that prior to agreeing to accept business from introducers, it carried out appropriate due diligence into them. And that it:

> "*regularly declined to do business with introducers in whom they did not have confidence*."

Heritage says it also applied a checklist of seven objective factors ("business hurdles") to all new business. If one of these business hurdles was not met, the new business was declined. These business hurdles were:

1. Missing risk warning documents;

2. Member crystallised funds early due to ill health;
3. Member aged over 65;
4. Member bankrupt;
5. Pension earmarking/sharing order on transfers in;
6. Temporary address and/or request all documents go via a third party; and,
7. Part of a syndicated SIPP with no obvious connection to other members.

In terms of TMI, an explanation of the group of TailorMade companies was provided, and this included that TMI provided regulated advice on pension transfers and that another of the companies, TAI, promoted non-regulated alternative investments products.

TAI was not authorised by the FSA or FCA. TAI, or a network of introducers it used, presented marketing information for the investments to potential customers. And, if they were interested, the customer was then introduced to TMI which would provide advice on whether it was appropriate to transfer their existing pension into a SIPP. The SIPP would then, commonly, be used to invest in the alternative investment.

TAI was paid via commission from the investment providers, and a substantial portion of this commission (often 50%) was then paid to the introducer if this was a separate company. The introducer was also paid a commission by TMI if the SIPP was created through TMI. Heritage was provided with details of the four directors of TMI, and Heritage says it was comforted by the fact each had more than 10 years' regulated experience. It isn't clear if full information relating the interests these directors shared across the TailorMade companies was given to Heritage though.

In early November 2011 Heritage had met with TailorMade. It was noted that:

> *"…Tailor Made* [is] *a group of companies that offer a variety of services. These include a regulatory* [sic] *company that provides pension and pension transfer advice a non-regulated company that promotes unregulated investments."*

And:

> *"We discussed the various investments TailorMade was promoting.* [Alistair Burns of TailorMade] *explained he always sought legal opinion about the products they promoted before approaching SIPP providers for their confirmation. He felt his due diligence was very through. For all investment products they were promoting he had legal opinion as to the suitability and agreed he would share this information..."*

There was a further meeting in mid-November. The minutes of the meeting included the following:

> *"*[Alistair Burns] *has a number of companies i.e. TailorMade group which includes an FSA regulated firm which provides independent pension transfer advice and recommendations; and a company that "promotes" non-regulated alternative investment products."* (The use of the quotation marks for the word promotes appears in the original minutes.)

And:

> *"*[TailorMade] *asked about alternative investments and whether these were permitted by the Heritage SIPP.* [Heritage] *explained* [it] *was aware TailorMade had conducted their own compliance and asked for copy documents. This would assist greatly Heritage with their compliance…*
>
> [TailorMade] *asked typically how long it took Heritage to approve an Investment.* [Heritage] *explained this depended on the due diligence TailorMade had undertaken and provided to Heritage. Assuming the due diligence carried out was comprehensive Heritage could move forward with its own due diligence subject to no further information / due diligence being required."*

In this meeting, TMI confirmed that it had been inspected by the FSA who were satisfied with the services it provided. No details of this inspection were apparently obtained though, and it is not known what form the FSA review took, when it took place, or what its findings actually were. Heritage has said it did check the FSA register to confirm TMI was appropriately authorised.

Heritage prepared an Introducer Profile, which was completed on 23 November 2011. This 'fact find' was a list of standard questions Heritage seems to have used for all introducers it was engaging with. It was completed with details such as TailorMade's process for monitoring pension sales and transfers, the number of transactions it made, etc. It confirmed Heritage was aware that customer referrals were made to TMI from agents/introducers, though it didn't state whether this initial part of the process would involve TAI.

It was though confirmed that TAI provided customers with details of particular investments. And that these had apparently been 'approved' by a third-party specialist. We know that the investments TAI provided details of were six illiquid, esoteric, investments such as biofuel oil, farmland and overseas property (and these included the investments into which Miss C invested).

The Introducer Profile included the following:

> *"What is the process for monitoring pension sales?*
>
> *Introductions received from agents/introducers. TailorMade SIPP Ltd send client introductory letter, client agreement and services and costs disclosure document, fee schedule, business card, attitude to risk profiler and a fact find. If client completes and returns forms SIPP is set up. TailorMade Alternative Investments contact client and provide investment brochure which includes only investments that have been approved by a third party specialist* [name given]*. Copies of the investment sign-off have been provided directly to Heritage by a director of* [that third party]*. Client given option to make their investment choices or refer to an IFA for further advice."*
>
> *…*
>
> *How would the firm describe its client profile?*
>
> *Individuals with preserved pension arrangements, who are dissatisfied with their current pension performance, and who require control over their investments decisions. Individuals who require independent advice and a more proactive service.*
>
> *…*
>
> *What determines whether a client is recommended a member-directed scheme over a personal pension or stakeholder plan and is this documented?*
>
> *Client indicates on fact find their preferred investment option, and choice of investment and investment flexibility.*

> …
>
> *How does the firm demonstrate it is meeting its TCF* [treating customers fairly] *requirements?*
>
> *TailorMade SIPP Ltd is authorized by the FSA and provides independent advice with no bias. They offer a transparent fee structure, provide clear literature and regular training is provided with external speakers to ensure competency is maintained. The firm is subject to a regular external compliance audit."*

And concluded with the following summary:

> *"TailorMade appear to write a lot of SIPP business and have provided clear insight into their process which we are told has been reviewed by the FSA satisfactorily. To manage work performance and risk restrict new business to circa 20 per month. Agree to discuss the position every quarter."*

Though it was apparently provided with copies of the investment sign-offs from the third-party specialist (referred to in the Introducer Profile), Heritage did not seek to obtain copies of the brochures, etc. that TAI provided to customers. However, copies have been provided to this service by Miss C.

Brief summaries of the investments were included in leaflets provided by TAI, inviting investors to invest using personal or pension funds via a SIPP. Miss C has said she was attracted by the returns on offer and that she understood these to be guaranteed. The leaflet relating to the Harlequin investment said that investors could expect:

> "*Guaranteed income of 10% of the initial purchase price for 2, 3 or 10 years...*"

This leaflet went on to set out, under the heading "Investor Protection", that Harlequin Property was financially secure and already had resorts that were operating. The Green Oil and SCS Farmland leaflets included details of insurance, lease protections, etc. that would protect investors if the investment failed. Miss C has said that this investor protection guaranteeing compensation should anything fail was also a significant factor in her choosing to move her existing pension holdings into these investments.

TMI also provided a leaflet which provided a brief explanation of SIPPs, and said that TMI's:

> "*sole purpose is to offer advice on the merits of moving preserved pension schemes into a SIPP*."

It also said:

> "[TMI] *would urge anyone considering transferring preserved pension funds from their current arrangement(s) to a SIPP (or any other pension contract) to obtain professional advice from a qualified IFA (Independent Financial Adviser) before doing so*."

And:

> "[TMI] *do not offer advice on the suitability of products which a SIPP can hold*."

Heritage has said that it confirmed TMI had a process for producing customer suitability reports and having them signed off by a pensions transfer specialist before being shown to the relevant client. Heritage has said that it did not routinely obtain copies of these reports and it does not appear Heritage was provided with Miss C's report. However, I am aware that Heritage did receive copies of the suitability reports for other customers in similar circumstances to Miss C, and that Heritage would have seen such reports prior to Miss C investing.

In its submissions to this service, Heritage has said it understood that; "*non-regulated investments were 'promoted' and therefore unadvised*". The Introducer Profile itself does not mention whether TMI had specifically claimed it gave no advice on the actual investments. But it does say that customers were given the option to make their investment choice or contact an IFA for further advice.

However, in its submissions to this service, Heritage has also said TMI offered their customers specific advice upon the suitability of the proposed investment, should the customer want it. And Heritage has said its:

> "*understanding was that all business was referred on an advised basis, both in relation to the proposed transfer of pension assets into a Heritage SIPP and the particular investment. Heritage was entitled to rely reasonably upon the information provided by* [TMI] *as a regulated entity*."

TMI confirmed to Heritage that it had arranged 490 SIPPs in its last business year, about a quarter of which involved pension transfers. It isn't clear how much this had increased in the circa six months prior to the approach to Heritage. However, by May 2012, TMI said it was involved in the creation of around 100 new SIPPs each month.

Heritage decided to limit the number of new SIPPs it would provide via TMI to 20 cases per month in order to "*iron out any creases*" and to "*manage work performance and risk*", according to the relevant meeting notes and Introducer Profile respectively.

TMI signed a terms of business agreement with Heritage on 21 November 2011. These terms were the standard terms Heritage used for intermediaries. They required TMI to maintain the necessary permissions, etc. to carry out the activities required under the agreement, and that it would comply with relevant rules and law. And included the following statement:

> "*For avoidance of doubt this includes whether ensuring the Heritage SIPP is suitable for the client… This includes transfers into the Heritage SIPP FROM Defined Benefit Occupational Pension Schemes*".

It also provided that TMI took full responsibility for any advice given, including regulated investment advice, in relation to the assets held within the SIPP. But no reference was made to the type of investment that would be involved or on what sort of product TMI would or would not provide advice in relation to.

Between November 2011 and December 2012, TMI introduced 180 clients to Heritage. Heritage has said all of these clients were introduced on an advised basis, though it isn't clear whether this advice extended only to the transfer into the SIPP or also included advice on the underlying investment.

TMI asked Heritage on a number of occasions if it was willing to accept more transfers per month, but meeting notes indicate Heritage was comfortable with the level of business it was receiving and did not agree to any increase. Nonetheless, TMI business represented 43% of all business received by Heritage between November 2011 and December 2012.

Heritage has said that around a quarter of the applications derived from occupational pensions transfers, and around two-thirds involved investing in non-mainstream investments.

I also note that in February 2012 Heritage had a phone discussion with TailorMade. Heritage's note includes:

> *"No changes to their model"*

And in May 2012 it noted:

> *"…TM has a well-oiled NB machine. No changes in model albeit always looking to streamline their processes."* (I assume NB means new business.)

Meeting notes from July and October 2012, show that TailorMade told Heritage there were no changes to its model. However, they also confirm that TailorMade were, at the time, in the process of obtaining FSA authorisation for a SIPP company of their own, a process which was completed in October 2012. Heritage has said it took comfort from this.

In November 2012, Heritage became aware of allegations being made against Harlequin Property, and it asked a number of questions about this investment before agreeing to suspend future investments into this product. Heritage has said that it also contacted customers, including Miss C, after it became aware of the potential issues with Harlequin Property.

Around this time, the FSA was also carrying out further enquiries as to TMI's processes. And following a visit to TMI from the FSA and a more general, though related, alert published by the FSA in early 2013, Heritage was informed there were issues with TMI's process for giving advice.

The January 2013 FSA alert explained that the regulator had become aware of certain firms operating inappropriate advice models, whereby they did not provide advice on the suitability of the underlying investment in situations similar to Miss C's. It stated, in part:

> "*the provision of suitable advice generally requires … when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes.*"

TMI ceased taking on new pension transfer business at this point and entered liquidation in late 2013, ultimately being wound up.

<u>*Miss C's dealings with TMI and Heritage*</u>

Miss C has said that, in 2012, she was invited to attend an event run by TailorMade. Prior to this Miss C says she had not given her pensions much thought, and she was comfortable with the arrangements she had.

At this event, she was introduced to a number of investment opportunities including Harlequin Property, Green Oil and SCS Farmland. Miss C has said that she was led to believe these investments were low risk. She's said it was at this meeting she was given the leaflets referred to above.

Following this meeting, TMI provided Miss C with regulated advice on creating the SIPP, and also then administered part of this process.

As part of this, Miss C completed a Risk Profile Questionnaire, which was signed on 17 June 2012. This consisted of a number of questions relating to Miss C's attitude to risk. TMI then used this to produce a suitability report.

It should be noted that the answers Miss C gave on the Risk Profile Questionnaire, generally appear to indicate that she was willing to take some risks, but did not want to invest a large proportion in high-risk investments and could only stand to lose a small/medium level. She agreed that she would rather know she was getting a guaranteed rate of return rather than be uncertain about her investments.

TMI prepared a suitability report for Miss C, dated 7 August 2012. Heritage has indicated it did not see this report at the time of the sale. However, Heritage has said it did see suitability reports for other customers in similar circumstances to Miss C. The suitability reports were clear that they had been produced based on the customer having already expressed an interest in using their pension fund to purchase alternative investments, with TMI providing advice to the customer on the transfer of her existing pensions into a SIPP.

No advice was provided on the suitability of the underlying investments, although some warnings were provided that these products had not been risk assessed, were not regulated and that that could be classed as illiquid.

Miss C's suitability report records her attitude to risk as being 'high-medium' risk – 6 out of 10, where 10 is the highest risk. And says that Miss C's intention to invest in alternative investments does not match this risk profile.

When asked about this report, Miss C has told this service:

> "*My assumption from my initial telephone conversation with* [TMI] *regarding risk was low/medium as I have stated, however when completing a suitability questionnaire where there are 5 possible multi-choice answers for each question it appears that my responses led to a 6 out of 10 risk score whereas from the telephone interview it certainly was low/medium. I was never informed that this would have an adverse effect as I understand 70% of people end up with this score and as far as I am concerned these general questionnaires should only be used as a guide as they are not totally specific to me. I can confirm that it was not brought to my attention that the suitability report was anything other than a guide to consolidating my pensions into a SIPP…*
>
> *All 3 investments had investor protection guarantees so as far as I am concerned there was no risk. I would never have invested in something that was not a guaranteed investment and with Harlequin as mentioned before I only bought into that because of the promised of deposits being returned if the purchase did not go ahead.*"

On 3 August 2012, Miss C was provided with an illustration of fund benefits for her anticipated Heritage SIPP. And, on 10 August 2012, Miss C signed an application form for the SIPP ("the Application Form") with Heritage. As well as detailing basic information about Miss C, the form indicated she had no immediate plans in terms of her investment strategy.

The Application Form stated that Heritage does not provide financial or investment advice. Miss C's financial adviser is recorded as being TMI. TMI are also listed as being the introducer, though it is not made clear whether this is limited to the SIPP or the underlying investments as well.

On 4 October 2012, Miss C signed a Heritage appropriateness test form in relation to the Harlequin Property investment. This form related to investing in Harlequin Property and asked a number of questions, largely about Miss C's understanding, that have all been ticked 'yes'. Similar forms were signed for the other two investments on 23 October 2012, completed in the same way.

The appropriateness test forms state the test applies to, "*investments made without advice from a financial adviser*". And the test is seeming intended for business involving direct promotions of derivatives and warrants, rather than the arrangements Miss C was entering.

Within these appropriateness test forms, Miss C ticked to confirm, amongst other things, that she had read the terms and conditions of the investment, and understood the risks involved and that she could lose all of her money. And that the investments did not represent a significant portion of her overall savings and investments.

When questioned more recently about how these forms were completed, Miss C has said that she understood the guarantees referred to above meant that there were no significant risks with the investments.

Miss C was also likely provided with a copy of the Heritage SIPP terms and conditions, and by signing the Application Form she agreed to those terms and conditions. One of these terms was:

> "*It is your responsibility alongside your adviser, if any, to ensure that a transfer of other pension benefits is in your best interests. We do not give and are not authorised to give advice, nor do we check your transfer application for suitability other than to confirm the eligibility of the transfer*."

A supplemental deed to the Application Form was signed on 20 September 2012. This included the following indemnity clause:

> "*10.* [Heritage] *shall not be liable for any acts or omissions not due to its own willful neglect or willful default and* [Miss C] *and the Trustee shall keep* [Heritage] *indemnified against the consequences of any loss to the trust fund resulting from investment decisions made by* [Miss C] *and the trustees from time to time of the trusts created by this Deed*."

Miss C's SIPP commenced on 20 September 2012. And on 27 September 2012, she was given 30 days to change her mind, although she had previously signed a waiver of these rights as part of the Application Form. She did not exercise these rights and then signed the investment contracts on 23 October 2012. At the end of October and in early November 2012, payments were made to complete the various investments.

Heritage has said its staff did not have direct contact with Miss C before she made her investment and that Heritage dealt with TMI only.

Sadly, the investments seem to have failed and it's highly likely that Miss C has lost almost of the money she invested in them. Miss C did receive some limited dividends from the liquidator in relation to her £20,000 Green Oil investment, when this company was dissolved. There is also currently a balance of a few thousand pounds in cash in her SIPP. But Heritage has given her Harlequin and SCS Farmland investments a nominal value of £1 each.

Post-investment events relating to TMI

The FSA was carrying out an assessment of TMI's operating model from late 2012. This, and TMI's response to an FSA alert in January 2013, led TMI to stop making new pension transfers and ultimately enter liquidation, before being wound up.

Since 2015, the FCA has issued a number of notices in relation to TMI's directors and made a number of points in relation to the operation of TMI. These include:

- TMI provided advice, to consumers who were considering switching or transferring their pension funds to a SIPP, to make unregulated investments in biofuel oil, farmland and overseas property. Those investments were high risk, illiquid and esoteric and not suitable for all retail customers.
- TMI reviewed consumers' overall financial circumstances and assessed their attitude to risk. But the advice process couldn't be relied on to ensure appropriate recommendations were made, as the overriding factor was to aim to use the pension funds to purchase unregulated investments. In nearly all cases, TMI had recommended to move to a SIPP. This included cases where the consumer was transferred from an occupational scheme, where the assumption should be that the transfer is unsuitable.
- TMI's recommendation process was inadequate as, rather than taking into account consumers' individual needs, it produced recommendations based on the consumers' objective of using their pension funds to purchase unregulated investments.
- TMI failed to ensure the investments consumers intended to make into the SIPPs were suitable.
- A number of individuals at TMI were the owners or agents of an unregulated introducer business, which was responsible for most of the unregulated investment introductions which led consumers to move to SIPPs. This created a conflict of interest.

The FSCS claim

Following TMI being wound up, Miss C made a claim against TMI through the Financial Services Compensation Scheme (FSCS). The FSCS estimated the amount lost by Miss C as a result of moving from her pensions schemes was in the region of £350,000. But, in February 2015, she received a payment of only £50,000 from the FSCS – this being the relevant limit on such claims at the time.

On 13 December 2017, the FSCS reassigned Miss C's rights of complaint against third parties to her. And she has brought this complaint against Heritage.

Miss C's complaint

Following the reassignment of her rights, Miss C complained to Heritage. Miss C has complained that Heritage failed to carry out adequate due diligence on TMI and the investments themselves. And that this led to her losses.

Miss C has also complained about other aspects of Heritage's actions. These include:

- HMRC rules that investors shouldn't be able to borrow more than 50% of their investment was not met by the process around the Harlequin investments
- Miss C did not receive any portion of the small refund of deposits that Harlequin made in 2014

- Heritage continues to charge her an administration fee for her SIPP even though the investments in the SIPP are effectively worthless, and
- Heritage were overly reliant on the comments made by Harlequin Property rather than investigating these or checking with Miss C.

Heritage didn't accept the complaint. It made a number of points, including:

- Heritage said it had met its responsibilities by, in part, carrying out appropriate due diligence on TMI. Heritage also stressed the due diligence it had carried out on the investments themselves and provided details of this.
- Heritage also said it had not provided any advice to Miss C. It was TMI's responsibility to provide advice to her. And that it was clear that Miss C had taken advice from TMI both on the SIPP and on the investment within it. Heritage said to Miss C that her choice of investment:

  > "*was a decision made by yourself having taken advice from your financial advisers* [TMI]."

- Heritage said it was not advised at any time by TMI that any other introducer was involved.
- Heritage told Miss C it was not required to obtain a copy of the suitability report in relation to her investment.
- Heritage said the answers Miss C gave in the appropriateness test forms indicated she understood the transaction she was entering and was comfortable with the risks involved.
- Heritage denied that a SIPP wrapper was unsuitable for Miss C, and it did not consider it had an obligation to ensure that the investments were being made in Miss C's best interests.
- Heritage said it had satisfied itself that the investments were not in breach of tax legislation. And had also sought legal opinion on investments in Harlequin Property and was satisfied that this did not constitute an unregulated collective investment scheme (UCIS).
- The contract with Harlequin Property was for a purchase of 30% of the relevant property and Heritage said any remaining portion was not something the SIPP was required to fund. It was for Miss C to fund the remainder and Heritage was not obliged to determine how this would occur.
- Ultimately, Heritage considered it had complied with the good practice for SIPP providers that the FSA had issued and that in doing so, it had met the requirements upon it. Heritage considered that if any party was responsible for Miss C's losses, it was TMI which had provided the regulated advice. And that Heritage was not responsible for this advice.

Our investigation

The matter was then referred to us and our investigator looked into it, taking into account all the submissions made by the parties.

After completing his investigations, our investigator wrote to the parties on 25 October 2019.He explained why he thought Mrs T's complaint should be upheld. Heritage did not agree with the investigator.

My provisional decision

I issued a provisional decision on 12 November 2021. After setting out the background I said:

> **What I've provisionally decided – and why**
>
> I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.
>
> As well as the evidence provided by Heritage and Miss C, I've taken into account relevant evidence provided on similar complaints that have been referred to this service from other customers of Heritage. As well as information in the public domain about the detail of the structure and workings of TailorMade.
>
> I have borne in mind that not all of this information would have been available at the time of the sale of Miss C's SIPP. But one of the questions I have to ask is how much of this structure and workings should have been something Heritage appreciated.
>
> *Relevant considerations*
>
> In accordance with my duty under section 228 of the Financial Services and Markets Act 2000 (FSMA), I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. When considering what is fair and reasonable in the circumstances of this complaint, I'm required to take into account relevant considerations which include: law and regulations; regulator's rules, guidance and standards; and codes of practice. I'm also required to take into account, where appropriate, what I consider to have been good industry practice at the time.
>
> I consider the following to be relevant considerations in this complaint.
>
> *The Principles*
>
> In my view, the FCA's Principles for Businesses are of particular relevance to my decision on what's fair and reasonable in this case. The Principles, which are set out in the FCA's handbook, *"are a general statement of the fundamental obligations of firms under the regulatory system"* (PRIN 1.1.2 G). Principles 2, 3, and 6 say:
>
> > *"Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.*
> >
> > *Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems*
> >
> > *Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly*".

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

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

And at paragraph 77:

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

In *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878) ("*BBSAL*"), Berkeley Burke brought a judicial review claim challenging the decision of an ombudsman who had upheld a consumer's complaint against it. The ombudsman considered the FCA Principles and good industry practice at the relevant time.

He concluded that it was fair and reasonable for Berkeley Burke to have undertaken due diligence in respect of the investment before allowing it into the SIPP wrapper, and that if it had done so, it would have refused to accept the investment. The ombudsman found Berkeley Burke had therefore not complied with its regulatory obligations and had not treated its client fairly.

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

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

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

Since Heritage made its most recent representations on this case, the Court of Appeal has handed down its judgment on *Adams v Carey*, following its consideration of Mr Adams' appeal.

I've considered both the High Court and Court of Appeal judgments, and whether *Adams v Carey* changes the weight that I should give to the Principles in deciding this case. And, I find that it doesn't. In the High Court judgment, HHJ Dight did not consider the application of the Principles and they did not form part of the pleadings submitted by Mr Adams. The Court of Appeal judgment gives no consideration to the application of the Principles either. So, *Adams v Carey* does not provide any assistance with the application of the FCA's Principles, and in particular, they say nothing about how the Principles apply to an ombudsman's consideration of a complaint.

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

COBS 2.1.1R

This rule says:

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

Unlike the Principles, COBS 2.1.1R was considered by HHJ Dight in *Adams v Carey*. Mr Adams pleaded that Options SIPP/Carey 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/Carey had complied with the best interests rule on the facts of that particular case.

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 Adam's 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).

Overall, I am satisfied that COBS 2.1.1R remains a relevant consideration – but that it needs to be considered alongside the remainder of the relevant considerations, and within the factual context of Miss C's case.

I note that there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and from the issues in Miss C'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/Carey agreed to accept the store pods investment into its SIPP. The facts of the case were also different.

So, I have considered COBS 2.1.1R - alongside the remainder of the relevant considerations, and within the factual context of Miss C's case, including Heritage's role in the transaction.

However, I think it is 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; regulators' 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 Carey.* That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

Regulatory publications

The FSA and the FCA have issued a number of publications which remind SIPP operators of their obligations and set out how they might achieve the outcomes envisaged by the Principles. These include:

- *"A report on the finding of a thematic review*" by the then regulator the FSA on SIPP operators published in September 2009 (the 2009 report).
- *"A report on the finding of a thematic review*" by the then regulator the FSA on SIPP operators published in October 2012 (the 2012 report).
- "*A guide for Self-Invested Personal Pensions (SIPP) operators*" published by the FCA in October 2013 (the 2013 guidance).
- A letter from the FCA's Director of Supervision sent to the CEOs of all SIPP operators in July 2014 (the 2014 Dear CEO letter).

I think these too are relevant considerations in this complaint. I have considered them in both determining what the regulator expected of firms and also in determining what amounted to good industry practice.

The 2009 report

The 2009 report pre-dates the events subject of this complaint. So, like the investigator, I think the 2009 report is most relevant. However, I've also quoted selected parts of the other publications which I think are of particular relevance. But to be clear, I've considered them in their entirety.

The 2009 report 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. It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six TCF consumer outcomes.*

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

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

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

- *Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm's clients, and that they do not appear on the FSA website listing warning notices.*
- *Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.*
- *Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified.*
- *Being able to identify anomalous investments, e.g. unusually small or large transactions or more 'esoteric' investments such as unquoted shares, together with the intermediary that introduced the business. This would enable the firm to seek appropriate clarification, e.g. from the client or their adviser, if it is concerned about the suitability of what was recommended.*
- *Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely.*
- *Routinely identifying instances of execution-only clients who have signed disclaimers taking responsibility for their investment decisions, and gathering and analysing data regarding the aggregate volume of such business.*

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

The later publications

In the 2013 guidance, the FCA states:

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

The 2013 guidance also set out the following:

> "***Relationships between firms that advise and introduce prospective members and SIPP operators***
>
> *Examples of good practice we observed during our work with SIPP operators include the following:*
>
> - *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for unauthorised business warnings.*
> - *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*
> - *Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.*
> - *Being able to identify irregular investments, often indicated by unusually small or large transactions; or higher risk investments such as unquoted shares which may be illiquid. This would enable the firm to seek appropriate clarification, for example from the prospective member or their adviser, if it has any concerns.*
> - *Identifying instances when prospective members waive their cancellation rights and the reasons for this.*

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

- *conducting independent verification checks on members to ensure the information they are being supplied with, or that they are providing the firm with, is authentic and meets the firm's procedures and are not being used to launder money*
- *having clear terms of business agreements in place which govern relationships and clarify responsibilities for relationships with other professional bodies such as solicitors and accountants, and*
- *using non-regulated introducer checklists which demonstrate the SIPP operators have considered the additional risks involved in accepting business from nonregulated introducers."*

In relation to due diligence, the 2013 guidance said:

"***Due diligence***

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

- *ensuring that all investments permitted by the scheme are permitted by HMRC, or where a tax charge is incurred, that charge is identifiable, HMRC is informed and the tax charge paid*
- *periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme*
- *having checks which may include, but are not limited to:*
    - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*
    - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*
- *ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified*
- *good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and*
- *ensuring these benchmarks clearly identify those instances that would lead a firm to decline the proposed business, or to undertake further investigations such as instances of potential pension liberation, investments that may breach HMRC tax relievable investments and non-standard investments that have not been approved by the firm*".

The 2013 guidance also included details on the due diligence a firm might be expected to carry out in relation to UCIS. Heritage has disputed that the Harlequin Property investment was a UCIS. And whilst this service may not agree with that stance, I do not feel it is necessary to consider this aspect of due diligence in this decision and so I also do not consider it necessary to make any determination in relation to the categorisation of the Harlequin Property investment.

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

The 2014 Dear CEO letter also sets out how a SIPP operator might meet its obligations in relation to investment due diligence. It says those obligations could be met by:

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

I acknowledge that the 2009 and 2012 reports and the 2014 Dear CEO letter aren't formal *"guidance"* (whereas the finalised 2013 guidance is). However, the fact that the reports and *"Dear CEO"* letter did not constitute formal guidance does not mean their importance should be underestimated. They provide a *reminder* that the Principles for Businesses apply and are an indication for the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications which set out the regulators expectations of what SIPP operators should be doing also goes some way to indicate what I consider amounts to good industry practice, and I am, therefore, required to take them into account.

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

Jacobs J quoted from the ombudsman's provisional decision under the heading "industry good practice" at para 99 of the *BBSAL* judgment and went onto say that:

> *"This conclusion is not the subject of any judicial review challenge for which permission has been granted, and accordingly this case must be determined on the basis of that conclusion. The relevant conclusion is either a factual conclusion as to what constituted good industry practice at the time, or perhaps more strictly the Ombudsman's conclusion as to what he considered to be such practice. On any view, it was not (as Mr. Kirk sought to submit in reply) a conclusion of law. The Ombudsman's conclusion as to good industry practice at the time is, in my view, fatal to the contention that the effect of the Ombudsman's decision was to create "new, unexpected duties"*

Heritage has referred to the comments of HHJ Dight, in *Adams v Carey*, that regulatory publication cannot give rise to a claim. But I am not considering a legal claim here. My role is to determine what is fair and reasonable in all the circumstances of this complaint, and in doing so I am obliged to take account of, amongst other things, the Principles and the regulatory publications insofar as they provide examples of good industry practice.

I'm also satisfied that Heritage, at the time of the events under consideration here, thought the 2009 report was relevant and it set out examples of good industry practice.

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

Like the ombudsman in the Berkeley Burke case, I do not think the fact the publications other than the 2009 report post-date the events here means the examples of good practice they provide was not good practice at the time of the events.

The later publications were published after the events subject to this complaint, but the Principles that underpin them existed throughout, as did the obligation to act in accordance with the Principles.

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

That doesn't mean that in considering what is fair and reasonable, I will only consider Heritage's actions with these documents in mind. The reports, Dear CEO letter and guidance gave non-exhaustive examples of good practice. They did not say the suggestions given were the limit of what a SIPP operator should do. As the annex to the 2014 Dear CEO letter notes, what should be done to meet regulatory obligations will depend on the circumstances.

In this case, the business Heritage was conducting was its operation of SIPPs. And in determining this complaint, I need to consider whether Heritage complied with its regulatory obligations as set out by the Principles to act with due skill, care and diligence, to take reasonable care to organise its business affairs responsibly and effectively, to pay due regards to the interests of its customers (in this case Miss C), to treat them fairly, and to act honestly, fairly and professionally. And, in doing that, I'm looking to the Principles and the publications listed above to provide an indication of what Heritage could have done to comply with its regulatory obligations and duties.

Having said all of the above, I reiterate the starting point is that I'm required to make a decision on what's fair and reasonable in all the circumstances of this complaint.

The role of TAI and TMI

Miss C has said the investments were introduced to her by TailorMade. She's said that she was unaware that TAI and TMI were separate companies. It isn't clear where Heritage would have been aware that TAI had introduced the investments to Miss C specifically. But it is clear that Heritage would've been aware that TailorMade's business model was for TAI, or another unregulated introducer – often acting as TAI's agent, to carry out these introductions.

In any event it doesn't seem to be in dispute that it was TMI that introduced Miss C to Heritage for the provision of her SIPP.

To meet its regulatory obligations as a SIPP operator when conducting this business Heritage had to decide whether to accept or reject the business and/or particular investments. It had to pay due regard to Miss C's interests and treat her fairly.

As mentioned, Heritage haven't been entirely clear when setting out, to us, its understanding on whether the business from TMI was referred on an advised basis or not.

However, the evidence I have seen, including the Introducer Profile which Heritage prepared when deciding whether to enter into its agreement with TMI, shows that TMI's business model was that clients had the option of choosing their own investments or referring to an IFA. I haven't seen anything to suggest that TMI itself offered advice on the investments, or any reason why Heritage would think that was the case.

The suitability report which TMI sent to Miss C made clear that the recommendation to transfer her pension was predicated on her own decision to invest in an overseas commercial property. It didn't purport to give advice about that decision.

Heritage has said that it didn't (and wasn't required to) see the suitability report and that it wouldn't have been able to assess suitability anyway because it wasn't authorised to, and because it wasn't in possession of the underlying information.

However, Heritage has said it did see suitability reports for other customers in similar circumstances to Miss C. Whilst there were differences between the reports to reflect the individual aspects of the customers, largely speaking the reports seen by this service were the same. And the information in the report is consistent with the way TMI told Heritage it operated. So, Heritage did know how TMI operated, and knew that Miss C would not have received advice on the investments from TMI.

In addition, the appropriateness test which Heritage asked Miss C to complete for each investment was one designed to be used when instructions are given to make a complex investment in circumstances where the client hasn't received independent advice. The form makes this clear. That suggests that Heritage was aware that clients could be choosing their investments without advice. Miss C completed the form, seemingly without question. That again should reasonably have alerted Heritage to the possibility that she hadn't received advice in relation to the investments.

The contract between Heritage and Miss C

Heritage says that, consistent with the decision in *Adams v Carey*, the regulatory rules have to be read in the light of the contract between the customer and the SIPP provider.

I don't think the considerations in the *Adams v Carey* case are analogous to the circumstances in this complaint, in which I'm considering the Principles. I accept that Heritage made clear to Miss C that it was not giving her financial advice. But I don't think that absolved Heritage of its regulatory obligations to treat customers fairly when deciding whether to accept or reject business.

Heritage has said itself that its understanding was that TMI was responsible for providing Miss C with investment advice as her regulated financial adviser and that TMI had provided her with that advice.

So, although Heritage says it accepted Miss C's business on an "execution-only" basis that appears to have been on the understanding that she had received investment advice from TMI. I think there were reasons to doubt that, as mentioned above, and that Heritage should have been wary of accepting Miss C's business in these circumstances.

In the *Adams v Carey* case, the judge at first instance found that Mr Adams would have proceeded with the transaction regardless. HHJ Dight said (at para. 32):

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

In this case there is no suggestion that Miss C received an incentive to invest. She says she must have signed the forms (to say she was prepared to take a risk) because she had been led to believe they were low risk and understood that her investments would be guaranteed. And the party that had led to her having this understanding was either TAI or TMI.

Heritage had to act in a way that was consistent with its regulatory obligations. I don't think the contract between Heritage and Miss C means that Heritage no longer had the responsibilities placed on it by its regulatory obligations, or that it didn't have to pay due regard to Miss C's interests and treat her fairly.

I don't think it would be fair for Heritage to rely on the contract when it had (or ought to have had) concerns about the way TMI was operating. It still had to treat Miss C fairly when deciding whether to *accept or reject* the introduction of her business by TMI.

Heritage could have declined Miss C's application. I don't consider that would have amounted to giving her financial advice. So, I don't think the fact that Heritage wasn't authorised to give advice precluded it from meeting its regulatory obligations to think carefully about the quality of the business is was accepting. And I don't think that Heritage needed to carry out an assessment of Miss C's needs and circumstances in order to identify the risk of consumer detriment in the business model operated by TMI.

<u>What did Heritage's obligations mean in practice?</u>

In this case, the business Heritage was conducting was its operation of SIPPs. I'm satisfied that meeting its regulatory obligations when conducting this business would include deciding whether to accept or reject particular investments and/or referrals of business.

I note that in *Adams v Carey*, HHJ Dight found that the factual context of a case would inform the extent of the duty imposed by COBS 2.1.1R (*A firm must act honestly, fairly and professionally in accordance with the best interests of its client)*. HHJ Dight said at paragraph 148:

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

Heritage says the Principles and COBS rules need to be addressed in the context of the specific area in which it was acting. It says it was in a non-advisory/execution-only relationship with Miss C and the regulations did not impose an obligation on a SIPP operator to *"refuse to accept the underlying investment"* even where that could be done *"without having to give advice to the investor himself".*

As mentioned, I do not say that Heritage was under any obligation to advise Miss C on the SIPP and/or the underlying investment. I only say that to meet its regulatory obligations when operating its SIPP it had to give consideration to whether to accept or reject particular investments and/or referrals of business.

In paragraph 159 of the *Adams v Carey* judgment HHJ Dight said:

> *"…to ascertain the suitability or otherwise of the investment for the claimant himself the defendant would have had to make detailed enquiries about the claimant's financial circumstances and, in my view, take advice on the value of the investment, evaluate the risks inherent in and lastly make a judgment call on the question of whether those risks were appropriate for the claimant in the light of the information which they had obtained about his financial situation and appetite for risk. That was not the role which the parties had agreed in the contract that the defendant would have. COBS Rule 2.1.1 cannot, in my view, be interpreted as requiring the defendant to take those steps."*

In my view this simply says that the obligation to act in a client's best interests set by COBS 2.1.1R does not oblige a firm to give advice on the suitability of an investment for an individual investor, where the firm was not contracted to provide advice. That is consistent with the approach I am taking in this complaint. In this section of the judgment, the alleged breach of COBS 2.1.1R under consideration was taking into the SIPP what was claimed to be a manifestly unsuitable underlying investment, where suitability meant suitability for Mr Adams. The judge does not say the SIPP operator was not obliged to give *any* consideration to whether to accept or reject an application. Only that such consideration did not need to include the suitability of the intended investment for the individual investor. It does not follow from this, for example, that the SIPP operator was obliged to accept and execute the client's instructions in all circumstances.

And, in my view, refusing to accept an application is not the same thing as advising Miss C on the merits of investing and/or switching to the SIPP – there is a difference.

Further the point about SIPP operators being required to carry out the instructions it receives was considered and dealt with in the *BBSAL* decision where Jacobs J said at paragraph 135:

> *"…any suggestion that a SIPP provider must, as a result of COBS 11.2.19R, execute a transaction, regardless of the duties contained in the Principles, produces surprising results and in my view cannot be right. A number of examples were given during the course of argument as to circumstances in which, having received an instruction, the SIPP provider would or might think it inappropriate to proceed, or at the very least query the transaction with his client. These included situations where: (1) the proposed investment was not then "SIPPable"; i.e. was not eligible for the tax benefits of putting an investment into a SIPP; (2) the SIPP provider knew that although it was then SIPPable, there had been a legislative change which meant that it would no longer be SIPPable in a few months time; (3) the SIPP provider had received information which cast doubt on the integrity of those who were promoting the proposed investment, or as to whether underlying assets actually existed; (4) the SIPP provider had learnt of problems, such as a possible insolvency, which affected the proposed investment. In all of these situations, I consider that there is scope for the operation of the Principles, and that COBS 11.2.19R does not mandate the SIPP provider to proceed to execute the transaction. This is consistent with the underlying purpose of the COBS rules, which have their origin in MiFID, namely consumer protection."*

And in my view the thrust of the point is, in effect, acknowledged – at least in so far as the position before any contract is entered into with the client - by Heritage when it says it "*regularly declined to do business with introducers in whom they did not have confidence*."

The point made by Heritage also undermines its argument that by extension the *Adams v Carey* judgment means that it was not under no obligation to carry out due diligence on an introducer's business model. In practice it did carry out checks on introducers to it and this would inevitably have included checks on the introducer's business model.

The regulatory publications provided some examples of good industry practice observed by the FSA and FCA during their work with SIPP operators including being satisfied that a particular introducer/investment is appropriate to deal with/accept. That involves conducting checks – due diligence – on introducers and investments to make informed decisions about accepting business. The obligation was a continuing one. And in practice Heritage seems to have accepted the need to carry out some checks.

As set out above, to comply with the Principles, Heritage needed to conduct its business with due, skill, care and diligence; organise and control its affairs responsibly and effectively; and pay due regard to the interests of its clients (including Miss C) and treat them fairly. Its obligations and duties in this respect were not prescriptive and depended on the nature of the circumstances, information and events on an ongoing basis.

I agree with our investigator that it's clear Heritage understood and accepted that its obligations meant it had to carry out appropriate due diligence on TMI to ensure the quality of business it was introducing, and on the investments before accepting them into Miss C's SIPP. And to do this it needed to carry out checks on TMI's business model.

What due diligence did Heritage carry out on TMI?

With hindsight, it is possible for us to know more about TMI's business model and the process that likely occurred during transactions such as the one Miss C was involved in. However, even without this hindsight, Heritage was aware of much of this detail – and if it wasn't, I consider it ought to have been.

Having considered everything Heritage has told us, it is clear that Heritage understood and accepted that it had a responsibility to carry out due diligence on TMI.

I have outlined above the steps Heritage has said it took in relation to the due diligence and control on TMI's business. In summary these were:

- Obtaining details of the four directors of TMI
- Obtaining details of the standard sales process
- Checking FSA register
- Confirming the investments being offered via the TailorMade group had been approved by a third party specialist
- Preparing an Introducer Profile
- Confirming that suitability reports were prepared and signed off by an appropriately qualified pensions transfer specialist
- Signing a terms of business agreement with TMI
- Holding regular meetings, including quarterly reviews, with TMI
- Limiting the business it took on from TMI to 20 referrals each month, and
- Applying the "business hurdles" to TMI.

Like the investigator, I think that when taken together, these efforts went some way towards meeting the examples of good practice set out by the regulator in the publications I've set out above. I expect Heritage's action was taken with these – and its overarching regulatory obligations – in mind.

But I don't think this absolved Heritage of all further responsibility. Heritage may have been reassured that TMI had in place the necessary authorisations and permissions, but that didn't necessarily mean there was no risk of consumer detriment.

I think it ought to have been apparent to Heritage, given the contents of what it had reviewed, that it should not have accepted the introduction of business from TMI. That's because I think Heritage ought to have concluded that TMI's business model meant that accepting Miss C's introduction from TMI and facilitating the SIPP would not be treating her fairly and would expose her to an obvious risk of consumer detriment.

I think the "business hurdles" Heritage applied would only have flagged up the most obvious signs of potential detriment.

Heritage says TMI's management told it that TMI had been reviewed by the FSA in 2011 and had been found to have satisfactory procedures in place. It says it had no reason to doubt what TMI said. Again, whilst Heritage may have been reassured by what TMI told it I don't think it means it didn't need to check for itself and make up its own mind about TMI.

It seems to me that Heritage relied too heavily on what TMI told it and didn't pay sufficient attention to warning signs that things might not be as they should be.

Heritage says that the systems and controls it had in place didn't reveal an obvious risk of consumer detriment such as to prompt it to decline business from TMI.

I disagree, and I think the Introducer Profile is particularly relevant here.

As I've set out, the Introducer Profile was a pro-forma document which I understand Heritage produced in relation to each of its introducers. It was, essentially, a fact-find which set out various information about TMI including its sales process and typical volume of business. In effect, it summarised how TMI conducted its business. The form was completed on 23 November 2011 and I've set out above some of the key details contained in this form.

Although it is not expressly recorded in the Introducer Profile, it is clear that TMI were not operating what might be referred to as a typical IFA business model. By that I mean a firm operating with an array of clients with differing needs and objectives whose individual circumstances are assessed by the adviser, who then uses their judgment to recommend an investment they consider suitable for the client's particular circumstances.

TMI's business model was different. In its process an introducer, often TAI, promoted a limited number of what were considered unregulated investments to the potential client and the client in effect chose whether or not they wanted to invest in the investments on offer.

There was nothing in that process in which the individual client's circumstances were considered in an advice process, nor where any advice was given to the client that the investment under consideration was suitable for them. There was the possibility that the client could refer to an IFA but that was not the normal process.

If the client decided they would like to invest in say Harlequin it was only then that TMI would give its limited advice on whether transferring or switching their existing pension was suitable for them in order to invest in the type of investment the investor had chosen. And, I repeat, that is an investment or investments that they had chosen (under the normal process) without the benefit of any advice or at least not any advice from a regulated financial adviser. And the investments being considered were all exotic higher risk investments.

Further, the typical clients were retail clients whose average SIPP fund size was £61,000. They may have typically been dissatisfied with the performance of their pension, but they were also noted to be individuals who require independent advice. They were not non-advised clients as far as their relationship with TMI was concerned. But they were not receiving advice on the investment which was a crucial part of the overall transaction.

Heritage knew this was an unorthodox business model. And I note that it recorded the following in the Introducer Profile:

> *"TailorMade appear to write a lot of SIPP business and have provided clear insight into their process which we are told has been reviewed by the FSA satisfactorily."*

I do not consider such a comment would have been made in the case of a typical IFA business model or advice process.

Heritage did not however obtain a copy of any inspection report in which TMI's process was apparently considered satisfactory or otherwise obtain confirmation of the point from the FSA. Merely checking the FSA register (which it did) was not enough as inspection reports are not published there and if the FSA was not happy and was taking any kind of action against TMI it would take some time for that point to be publicised.

Heritage should have formed its own view on whether it had confidence in TMI and its process (as it had apparently done with other potential introducer firms) and in my view it should have concluded that it could not reasonably have confidence in TMI and the process it was operating.

Why this should have caused concern.

In my view the model operated by TMI was one that exposed the client to very considerable risk. There was the risk that the client would choose to invest in investments that were not suitable for them. There was also the risk that the introducer – who had a financial interest in the client choosing to invest – would encourage or even pressurise clients into choosing to invest in unsuitable investments.

And TMI's process would not prevent these unsuitable investments. Its process was such that the regulated business did not consider the suitability of the investment. It only advised on the suitability of transferring or switching existing pensions to a SIPP – something it could not reasonably or safely do without considering the overall transaction. It could not know, and therefore could not safely give advice upon, the suitability of the transfer or switch to the SIPP without considering the suitability of the proposed investments.

I acknowledge that the regulator's reports and guidance don't specifically mention considering the business model of an introducer as an example of good practice. But the reports and guidance are not exhaustive. They only provide examples of good practice and are based on the overarching Principles. What is reasonable will depend on the circumstances. In this case Heritage *did* consider the business model as part of its due diligence on TMI. And what it asked about and noted regarding the sales process should have given it serious cause for concern.

Having done so I think it ought to have been apparent to Heritage that there was a real risk of consumer detriment in accepting this business from TMI – as was identified by the FCA in 2015. This is because:

- TMI's business model involved it receiving introductions of business from third parties.
- Unless the consumer chose to get advice on the investments, none was given.
- Unregulated parties were involved in promoting the investments.
- TMI was transacting large volumes of SIPP business, including unusually large numbers of pension transfers.

Heritage says it couldn't have known the extent of the issues that gave rise to the FCA's concerns. That may be so. But I think there were sufficient "warning flags" in the Introducer Profile (and from the meetings that led up to it) to reasonably have alerted Heritage that introductions from TMI carried a significant risk that customers weren't receiving suitable advice.

In its Retail Conduct Risk Outlook 2011 the FSA referred to its 2009 thematic review and went on to say:

> *"SIPPs have also been used by some advisers as wrappers for exotic, risky and potentially poor value unregulated products such as Unregulated Collective Investment Schemes (UCIS). In our July 2010 review of the sale of UCIS, nearly half of all sales considered wee within SIPP wrappers. This maybe because the advisers mistakenly believed that some of [the] restrictions on marketing UCIS to retail customers do not apply if the UCIS is placed within a SIPP. We have warned advisers about this, but customers should take care when considering placing exotic products and funds in their SIPP."*

Although the point does not really need spelling out, it is clear from the use of the words such as Unregulated Collective Investment Schemes, that there is a risk from exotic investments regardless of their precise structure. Therefore, while I have noted that TMI provided opinions that the investments its introducers were promoting were technically not UCIS, the point remains that they were still exotic higher risk investments. That is the sort of investments that are not normally suitable for most retail investors. This means they are the sort of investments where – if it is being considered at all – a retail investor should be given carefully considered advice, rather than left to choose for themselves from a promotion by an unregulated introducer. This is because the risks involved in this type of transaction are unlikely to be fully understood by most people, without obtaining regulated advice.

I think the volume of SIPP applications and pension transfers which TMI was conducting should have been recognised by Heritage as being anomalous and acted as a further warning flag.

Heritage kept a good level of management information about the number and nature of introductions that TMI had made. I think this is an example of good practice identified in the 2009 report which said:
"Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified."

But I don't think simply keeping records without scrutinising that information is reasonable. As highlighted in the 2009 report, the reason why the records are important is so that potentially unsuitable SIPPs can be identified.

TMI was a relatively small firm. Yet it was, prior to entering its agreement with Heritage, arranging almost 500 SIPPs a year. And by the time of Miss C's investment, this number had more than doubled.

I think that Heritage should have looked at this and been concerned that such a high volume of introductions, relating almost exclusively to non-mainstream unregulated investments was unusual – particularly from a small IFA business. And it should have considered how such a small business was able to meet regulatory standards and ensure the investments were suitable for such a high volume of customers.

Heritage was aware of this increase and was aware of TMI's desire for Heritage to take on more of its business. Whilst Heritage did act to limit the amount of business it was willing to take on from TMI, the increased amount of business TMI itself was involved in should have raised concerns for Heritage as to whether TMI's customers were receiving a service that meant Heritage would be treating them fairly by accepting that business.

I'm aware that Heritage has said that as a means of ensuring the quality of the investment business it limited the pipeline of new cases to twenty new introductions a month and required quarterly meetings with TMI. I've considered the notes of the meetings supplied but, as our investigator concluded, it seems the pipeline of business was largely determined by Heritage's capacity to take on the work. And whilst limiting the number of cases may have reduced Heritage's exposure to TMI's business I don't think it lowered the risk of potential detriment for the individual consumers with whom it dealt.

Given TMI introductions already accounted for almost half of Heritage's business – potentially doubling the workload it was handling from the previous year – it is perhaps not surprising that Heritage resisted taking on more business at this point. But limiting the number of referrals Heritage itself accepted, seems to have been largely due to Heritage's capacity to take this work on. And whilst limiting the number of cases may have reduced Heritage's exposure to TMI's business, I don't think it lowered the risk of potential detriment for the individual consumers with whom it dealt.

This concern ought to have been even greater where a final salary scheme was involved, as in Miss C's case. COBS 19.1.6G states:

> *"When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme whether to transfer or opt-out, a firm should start by assuming that a transfer or opt-out will not be suitable. A firm should only then consider a transfer or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer or opt-out is in the client's best interest".*

Whilst I acknowledge this aims to define the expectation of a regulated financial adviser when determining suitability of a pension transfer, it emphasises the regulator's concern about the potential detriment such a transaction could expose a consumer to. And, being a regulated firm with a requirement to ensure its clients were being treated fairly, I'd expect Heritage to have been familiar with the guidance contained in COBS – even if it didn't apply directly to it.

So, I think Heritage ought to have been aware that the chances of the introduction of such a large volume of applications, including Miss C's business, resulting in a suitable SIPP were very small.

Overall, whilst I acknowledge that Heritage did take *some* steps to conduct due diligence on TMI, I don't think it did everything it needed to do to meet its regulatory obligations in the circumstances or comply with good industry practice at the relevant time.

The FSA's actions

Heritage has said that it took comfort from the FSA's actions during the period prior to Miss C's investment. But this doesn't change my view about this complaint.

In a meeting with Heritage in November 2011, TMI said it has been inspected by the FSA and that the FSA has been satisfied with the service TMI provided. However, Heritage does not appear to have obtained a copy of the findings from this inspection. It is not known when this review took place or what its purpose was. So, I do not consider it is reasonable to say that Heritage could rely solely on this review having occurred.

I also note that the FSA was, prior to Miss C's investment, in the process of approving a company in the TailorMade group to act as an authorised SIPP provider. Whilst I appreciate Heritage may have taken some reassurance from the fact the TailorMade group was engaging with the regulator, the approval of this third party was not directly relevant to TMI's business model. TMI and the other TailorMade companies were legally separate, and the FSA's authorisation of the third party would not have involved a review of TMI's business model.

Additionally, regardless of the FSA's actions, it remained Heritage's responsibility to satisfy itself, through appropriate due diligence, that TMI's business model was appropriate and that it provided customers with a service that meant, by accepting the business, Heritage would be treating them fairly. I am not persuaded that Heritage did this, nor that it drew the conclusions it reasonably should have from the due diligence it did carry out.

I think Heritage should have recognised and acted on the warnings, that would have been raised through appropriate due diligence, by refusing to accept the referral from TMI - irrespective of any documents or disclaimers that Miss C signed. By failing to do so, I don't think Heritage met its regulatory obligations to treat Miss C fairly.

The underlying investments

I consider the nature of the investments the vast majority of customers were introduced to (often by TAI) and which were involved in the SIPPs which TMI recommended, and that were accepted by Heritage, was anomalous.

These were the investments that TMI was aware were going to be made via the SIPP it was recommending. Such knowledge is clear from the suitability reports prepared for customers. And, even if Heritage had not seen Miss C's particular suitability report prior to accepting her SIPP application, Heritage was aware that this was TMI's business model.

They were investments which were unusual, high risk and unregulated. Such investments will generally only be suitable for a small proportion of the population – generally sophisticated and/or high net worth investors.

Heritage says that investment advice was the responsibility of TMI. Nevertheless, it did carry out quite extensive due diligence on the investments, as outlined in our investigator's view. It denies that the investments were "esoteric". That is not the view the regulator came to.

In its review of the TMI business model in 2015/2016 the FCA said:

> *"TMI provided advice to consumers who were considering switching or transferring their pension funds to a SIPP to make unregulated investments in biofuel oil, farmland and overseas property. Those investments were high risk, illiquid and esoteric and not suitable for all retail customers".*

I appreciate that Heritage thinks it's unfair to use the findings of this regulatory action against it when it says it couldn't have known the extent of the issues that gave rise to the FCA's concerns. However, although the regulatory action post-dated the time we're looking at, the nature of the investments hadn't changed.

Additionally, the risks are multiplied where further funding is necessary from investors to complete the purchases. This was the case with the vast majority of the investments involved in TMI's business model, such as most of the investments in Harlequin Property, which, initially at least, was deposit based – with further funds required on completion of the property development. The risks with such investments are often heightened not only because the properties might not be built, but also because customers will need to find additional cash at some point when the properties are completed. The investment also involved the uncertainties that come with property being overseas for UK based investors such as Miss C, as well as a high degree of specific risk/lack of diversity.

Heritage has said it was unaware that the investment Miss C made into Harlequin Property was deposit based or that any further payment was required. But having carried out due diligence on Harlequin Property itself, Heritage should have been aware this was a common process for these investments. And even if it isn't correct to say Heritage ought to have known about this investment model, I think Heritage should have approached these introductions with caution.

Other investments were unusual and unregulated, so offered no protection for investors. I think that should have rung alarm bells. Such investments were unlikely to be suitable for most retail investors and were only likely to be suitable for a very small part of the investment portfolio of a sophisticated investor.

Heritage was aware that all of TMI's customers, who received a recommendation to transfer, were advised to transfer into a SIPP and that the majority of these invested in one or more of the unregulated investments promoted by TAI and its agents. Heritage was also aware that around a quarter of these involved pension transfers. This was coupled with the lack of evidence over how the assumption firms should take, outlined in COBS 19.1.6 G, was overcome. And this should have led Heritage to carefully consider whether it would be treating customers, including Miss C, fairly by accepting business from TMI given its business model.

I think Heritage knew that the kind of business that TMI was introducing was risky and that heightened caution needed to be exercised when dealing with these kinds of applications, even if there was a regulated advice firm involved.

From the information Heritage gleaned for itself I think it should reasonably have been aware that the kind of business TMI was introducing would generally be considered higher risk and that it needed to be very cautious.

In conclusion

Overall, I think the introductions from TMI involved anomalous features and Heritage knew, or ought to have known, about and acted on this. It certainly knew that TMI had introduced execution-only business in significant volumes. It also knew there were unregulated parties involved in promoting the investment.

Despite TMI being a regulated firm, Heritage should have concluded that customers introduced by TMI were likely being "sold" on the idea of the alternative investments by unregulated parties and, most importantly, not receiving advice about the investments from TMI. The applications were being introduced by TMI in high volumes and it was likely that most of these applications would result in unsuitable SIPPs. As such, Heritage should have concluded that it was not in accordance with its own regulatory obligations to accept introductions from TMI. I think it's reasonable to say that Heritage should have arrived at this conclusion long before it accepted Miss C's application.

As such, Heritage didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Miss C fairly by accepting her application from TMI. To my mind, Heritage didn't meet its regulatory obligations or good industry practice at the relevant time, and allowed Miss C to be put at significant risk of detriment as a result. I therefore conclude that it is fair and reasonable in the circumstances to say that Heritage should not have accepted Miss C's application from TMI.

To be clear, I am not making a finding that Heritage should have assessed the suitability of the investment or the SIPP for Miss C. I accept Heritage had no obligation to give advice to Miss C, or otherwise ensure the suitability of a pension product or investment for her.

My finding is not that Heritage should have concluded that the investment or SIPP was not suitable for Miss C. It is that Heritage did not meet its regulatory obligations and should not have accepted the business from TMI.

Taking all this into account my view, in summary, is that Heritage should have decided not to accept introductions of business from TMI. It should have concluded that its sales process or business model was high risk and did not treat customers fairly. It should have concluded that it did not have confidence in TMI as an introducer as it had done with other firms that had approached it. This means no application would have been made to Heritage for a SIPP by Miss C or that if she had made the application Heritage would not have accepted it.

Did Heritage's errors cause Miss C's loss?

As I've made clear, Heritage didn't comply with its regulatory obligations or treat Miss C fairly. My conclusion is that had Heritage acted in accordance with its regulatory obligations and good industry practice at the time, it should have refused to accept her introduction from TMI. If it had done so, I think there are three possibilities:

- Miss C would have decided to do nothing, and left her pensions where they were. In that case, she wouldn't have suffered loss as a result of making the investments (outcome 1).
- Miss C would have asked TMI to go ahead anyway, and tried to place the business through a different SIPP operator (outcome 2).
- Miss C would have gone elsewhere and tried to arrange the investment through a third party (outcome 3).

If Heritage had told Miss C that its concerns meant it was not prepared to deal with TMI at all, I think that would have led Miss C to question whether it would be treating Miss C fairly by accepting her application to move her pension as a result of her contact with TMI. And I think she'd have taken Heritage's refusal to deal with TMI as reason for her not to have any further dealings with it either. So, if Heritage had acted in accordance with its regulatory obligations and not accepted Miss C's business from TMI, I'm satisfied that Miss C would also have chosen to terminate her own relationship with TMI.

So, I'm satisfied if Heritage had treated Miss C fairly, it's much more likely than not that she would have decided not to go ahead with the investment, and would not have suffered the loss she did (outcome 1).

I acknowledge that it's possible that TMI would have tried to find another SIPP operator that would accept Miss C's application – outcome 2. As I've said above, I think that is less likely than outcome 1. In any event, it's not fair and reasonable to say that Heritage should not be responsible for its errors because another SIPP operator would have made the same mistakes. I think it's fair to instead assume that another SIPP provider wouldn't have processed the transaction if it had carried out sufficient due diligence in accordance with its own regulatory responsibilities and good industry practice. Again therefore, it's likely that Miss C would have remained invested in her existing pension and wouldn't have suffered the loss she did.

I think it's unlikely that Miss C would have sought help from a third party other than TMI to make the investment – outcome 3. But if she had, I think it's likely that a suitably qualified third party would have advised against the investments and Miss C would have remained invested in her existing pension and wouldn't have suffered the loss she did.

The involvement of other parties

I accept that Heritage is not responsible for initiating the course of action that has led to Miss C's loss. It was a third party, not Heritage, who was originally in contact with Miss C. I note also that the Harlequin Property investment is currently subject to a criminal investigation by the SFO. On this basis, a court *might* not require Heritage to compensate Miss C in regard to this investment – notwithstanding Heritage's failings. But FSMA requires me to award "*fair compensation*" and I'm not therefore limited to the position a court might take.

I consider that Heritage failed to put a stop to the transactions when it should have done. If Heritage had acted in accordance with its regulatory obligations and had treated Miss C fairly, then the transfer to the SIPP and the associated investments would not have gone ahead.

So, I conclude that it would be fair and reasonable to make an award, given the specific circumstances of Miss C's complaint. This is notwithstanding arguments about a break in the "*chain of causation*" and the "*remoteness*" of the loss from Heritage's errors.

As a regulated firm, Heritage was in a position to protect Miss C from this level of consumer detriment. Had it not been for Heritage's failure to meet its obligations, I think it unlikely that Miss C would have invested. As a result, I'm satisfied that it's fair and reasonable to hold Heritage responsible for the whole of the loss suffered by Miss C.

I'm not asking Heritage to account for loss that goes *beyond* the consequences of its failings. I'm satisfied those failings have caused the full extent of the loss in question. That other parties might also be responsible for that same loss is a distinct matter, which I'm not able to determine. However, that fact should not impact on Miss C's right to compensation from Heritage for the full amount of her loss.

If Heritage believes other parties to be wholly or partly responsible for the loss, it should be free to pursue those other parties. And if Miss C is compensated in full now, Heritage (rather than Miss C) should benefit from any future payments that might be made in relation to the investments. So, compensation payable to Miss C should be contingent on the assignment by her to Heritage of any rights of action she may have against other parties in relation to her transfer to the SIPP and the investments. It should also be contingent on Miss C undertaking to give to Heritage any future payments she might receive in relation to the investments.

FSCS compensation

Miss C has received a sum of compensation from the FSCS. However, the terms of her reassignment of rights require her to return any compensation paid by the FSCS in the event this complaint is successful. So, I will make no allowance for what has been paid by the FSCS. It will be for Miss C to make the arrangements to make any repayments she needs to make to the FSCS.

I then went on to say how I thought Heritage should put things right and invited the parties to respond.

<u>The responses to my provisional decision</u>

Miss C responded to my provisional decision, highlighting my typographical error in relation to the size of her mortgage. And making some other comments. But did not disagree with any of the overall findings.

Heritage responded in more detail, disagreeing with the provisional decision. In summary, it said the provisional decision:

1. seeks to distinguish the cases of *Adams v Options* in relation to the application of the Principles and fails to give full effect to that decision as to the proper understanding of the relationship between contractual and regulatory obligations. And it misunderstands Heritage's case in relation to the limited extent of its contractual duties.

2. fails to give proper weight to the suitability advice given by TMI to Miss C. It was not as narrow or unhelpful as the provisional decision suggests. In fact, the suitability report specifically said the proposed investments had not "been risk assessed and may not match [Miss C's] risk assessment", and that there was a risk the investment decisions might leave Miss C worse off.

3. wrongly concludes that Heritage should have had serious concerns about TMI's business model despite the extensive evidence pointing to it having good reason not to have such concerns at the relevant time. And based on an unrealistic expectation of the role of an execution-only SIPP provider receiving referrals in relation to which specialist pension transfer advice had already been given.

4. wrongly treats the supposed obligation on Heritage as an execution-only provider to decline to do business with TMI as not entailing any suitability advice. It is impossible to separate this supposed obligation from the making of such an assessment.

5. wrongly fails to take account of the extensive due diligence on the investments actually carried out by Heritage. It was entirely reasonable for Heritage to proceed as it did and not consider that the investments would necessarily be unsuitable for retail customers such as Miss C.

6. wrongly concludes that Heritage caused Miss C to suffer the loss she alleges. This is inconsistent with the finding that Heritage ought never to have accepted business from TMI since Miss C would have been advised to transfer to a different SIPP provider which was willing to accept TMI's business.

What I've decided – and why

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

In doing so, I've taken into account relevant law and regulations; regulators rules, guidance and standards; codes of practice; and, where appropriate, what I consider to be good industry practice at the relevant time.

I have considered all the points made by Heritage. I will not however respond to all of these in detail. Rather, I will concentrate on what I consider to be the main issues in determining this complaint.

Relationship between regulatory obligations and contractual relationship

I accept that it is right to consider the nature of the relationship between the parties when considering the regulatory obligations on the regulated firm. This applies to COBS 2.1.1R and it applies to the Principles.

I do not say, and did not say in the provisional decision, that the Principles or COBS 2.1.1R impose an obligation to advise on an execution-only SIPP provider.

Heritage is an execution-only SIPP provider. But it is, in the capacity of that limited role, as it accepts, subject to the Principles and COBS rule 2.1.1. As Heritage says, at issue is what it means to perform that role honestly, fairly and professionally and in the best interests of the client.

Heritage has itself said that it made checks on TMI and the investments TMI was promoting. Heritage has also said it made checks on other introducers and decided not to do business with some of them. In doing these things Heritage was not doing something outside the scope of its contractual (or contemplated contractual) role. It was acting in a way that was consistent with Heritage's role as an execution-only SIPP operator.

Heritage also made the decision to limit the amount of new business it would accept from TMI, *"To manage work performance and risk restrict new business to circa 20 per month."*

The decision to limit the amount of new business accepted in this way – and to in effect refuse to accept further application after its cap of "circa 20 applications" had been received in a given month - was also consistent with Heritage's role as an execution-only SIPP provider.

In its role as an execution-only SIPP operator Heritage was not obliged to accept TMI's business. It could use its judgement about whether it had confidence in TMI. And it decided it did – albeit limited to "circa 20 applications per month". It is my view that this decision was not the right one in the circumstances. And that pursuant to its obligation to act professionally and fairly and in the best interests of the client in its capacity as an execution-only SIPP provider it should have refused to accept any business from TMI.

The suitability advice given by TMI

Heritage says it was not its function or role to advise Miss C in relation to her investment choices. But if it did have some responsibility it was entitled to rely on the advice given by TMI. It may not have seen the suitability report, but it had seen similar reports in relation to other customer prior to Miss C's application.

Having now seen this report, Heritage says Miss C had expressed an interest in using her pension fund to purchase alternative investments and using these investments to achieve a better investment performance than was being enjoyed. This was one of a number of objectives listed in the suitability report, alongside consolidating her existing pension plans, being able to control the flexibility of her plans, achieve a greater investment fund choice, being able to access tax free cash before she was 60 years old, and being able to pass on the whole of her fund to her spouse in the event of her death.

The report assessed Miss C's attitude to risk as 6 – high medium risk. Heritage says it was entitled to rely on this assessment made by a regulated firm with permission to give pensions transfer advice.

And the report addressed the possibility of investing in certain alternative investment and warns there was no past performance figures that could be used in evaluating such investments. Heritage says it is therefore clear that the suitability advice was given for the kind of investment in contemplation in a report which contains risk warnings in stark terms.

Heritage says it was not required to consider that TMI might have be wrong to conclude that the transfer out of a defined benefit scheme was suitable for Miss C.

Heritage says the suitability advice was appropriate for the purpose of helping Miss C to make her own decision, she was entitled to make the decision she did and take responsibility for that decision.

I note all of Heritage's points, but a crucial point is that the TMI advice process relating to the SIPP was flawed. The standard TMI model made no provision for advice to the consumer about the suitability for them of the investments TailorMade was promoting through TAI and other introducers. Risk warnings, even from a regulated firm, are not equivalent to advice. Providing information about investments and then inviting the consumer to choose is not an advice process.

The investments to be made in the SIPP are fundamental to the effectiveness of the SIPP as a means of providing pension benefits. It is necessary to ensure that the contemplated investments are suitable in order to assess whether the SIPP is suitable as an alternative to the consumer's existing pension. Giving warnings that the SIPP might not provide as good a pension does not make up for the lack of personal advice on the suitability of the overall transaction being considered by the consumer.

To be clear, I do not say that Heritage should have given Miss C advice. Nor do I say that it was obliged to check the advice was suitable for Miss C. It is however my view that Heritage can take no comfort from the advice TMI gave to Miss C. This is not a case where Miss C ended up with suitable advice despite there being a flawed process. It is clear from the suitability report itself that Miss C's attitude to risk was not especially high, at 6 out of 10 "high medium risk", and that a transfer of her final salary pension scheme to invest in the alternative investments she did, involved more risk than was suitable for her.

There was a clear risk of such unsuitable outcomes for many clients given that TMI's typical client was not identified as being sophisticated and able to make decisions about complex investments without advice. The risk of consumer detriment was considerable. Heritage should have refused to accept business from TMI.

Also, the warnings in the report were undermined by TMI when it said:

> *"If you agree with my recommendations, and the reasons for them, you must accept a risk that when you come to retirement age you might find yourself worse off – perhaps considerably so <u>although I feel the likelihood of this happening is quite small and the potential for an improvement in your pension benefits at age 65 could be likely.</u>* [emphasis added]

Rather than being advice on the suitability of the particular financial decisions involved, this is a risk warning that is moderated by the emphasised part of this statement.

I do not consider the suitability report shows that Miss C was given such clear warnings that it must be assumed she would have transferred her final salary pension scheme and invested in high risk investments in any event.

Concerns about TMI's business model

Heritage says the conclusion that it should have had concerns about TMI's business model is wrong. It says the view is based on a misunderstanding of the law in relation to an execution-only SIPP provider.

Heritage says TMI had a pension transfer specialist giving suitability advice which addressed the customers circumstances. There was reason to have confidence in TMI.

Heritage also says that although the informal guidance is not exhaustive it is wrong not to treat the omission of express mention of an introducer's business model as indicating that the FCA did not intend to impose any obligation in that respect on an execution-only SIPP provider. Heritage says it's wrong to treat it as a guarantor of TMI's compliance with its own regulatory obligations. It is an attempt to impose obligations that go beyond Heritage's contractual obligation.

I note all of Heritage's points, but I do not agree.

Making checks on introducers such a TMI was consistent with its contractual role and its regulatory obligations in that role. It did make checks. It sometimes refused to accept business from some introducers. It decided to put limits on the amount of new business it would accept from TMI.

Heritage asked TMI about how it did business and it found out that it did not operate in a conventional way. Although it had a pension transfer specialist it did not give advice on the investments that were promoted to the consumer. Heritage therefore knew that consumers were not receiving advice on a crucial part of the overall proposed transaction that involved transferring away from existing pensions to one of its SIPPs.

Heritage knew TMI's sales process and business model was high risk and did not treat customers fairly. Limiting the amount of new business from TMI to circa 20 cases per month "*to manage work performance and risk"* was not enough. It did not do enough to protect those circa 20 cases per month it did accept from the considerable risk involved in unsuitable transfers to SIPPs.

Wrong to say declining business from TMI does not entail giving advice on the suitability of investments

Heritage says an execution-only SIPP provider, who has contracted expressly on terms excluding the possibility of giving advice, cannot be obliged by COBS 2.1.1R or the Principles to give advice.

Heritage says the flaw in the analysis in the provisional decision is that when one asks what risk Miss C and others were supposedly exposed to, the answer given is a suitability risk. And this issue can only be addressed by carrying out individual suitability assessments which is not consistent with Heritage's limited role as an execution-only SIPP provider.

But as I have said, Heritage's did carry out checks on introducers, did sometime refuse to accept business from some introducers and did put limits on the amount of new business it would accept from TMI. These acts were all consistent with its limited role as an execution-only SIPP provider. And It did all this without making individual suitability assessments for individual potential clients.

There was in the system operated by TMI a very real risk that consumers would transfer away from suitable pensions to unsuitable SIPPs with unsuitable investments. There was a very real risk consumers would suffer considerable detriment in the form of considerable losses in the pensions that were supposed to provide long term financial security. It did not require the individual assessment of suitability for an individual client, such as Miss C, to understand that the business model itself involved considerable risk of consumer detriment.

The investment due diligence carried out by Heritage

Heritage says it carried out extensive due diligence on the investments promoted by TMI. This led it to be comfortable with the investments.

Heritage says the view that the investments were risky and unsuitable is based on an FCA review carried out in 2015/2016 which did not inform its view at the relevant time.

I accept that Heritage carried out due diligence checks on the three investments referred to in this case. It concluded the investments were appropriate to be held within a SIPP wrapper.

The investments were unregulated alternative investments. Heritage knew them to be and classified them as complex investments at the time.

In addition to being complex, they did not have Financial Service Compensation Scheme protection nor were they subject to UK regulatory oversight. They involved overseas investment for a UK based investor. They involved a high degree of specific risk/lack of diversity. These were not run-of the mill, common place investments that posed little or no risk.

The investments would generally, and reasonably at the time, have been regarded as complex and higher risk. That does not make them unsuitable for a SIPP. It does however mean that they would generally be considered unsuitable for most retail investors. And that means there was a high likelihood of unsuitability if the consumers were buying those investments without individual advice about the investment - as in the process set up by TMI.

So, while the investments may have been suitable for SIPPs the process that led to the investment in those investments was flawed and involved a considerable risk of consumer detriment. Heritage should therefore have refused to accept such business from TMI.

Miss C would have invested in the same way if Heritage had not accepted business from TMI

It is correct that TMI was doing business with other SIPP providers. However, in deciding how things should be put right, a reasonable counterfactual should be considered. Comparison should be with what should reasonably have occurred even if in practice some other market participants were acting in a similar way to the conduct which is found to be wrong in the dispute being remedied.

Heritage should not have accepted business from TMI under its existing business model. If TMI had not been able to get business accepted from SIPP providers it is likely Miss C would never have been approached to consider transferring her pension. Alternatively, she would have been given suitable advice from a regulated financial adviser which means she would have been advised not to transfer her final salary pension. And it is more likely than not that she would have accepted such reasonable advice rather than insisting on acting contrary to it.

It remains my view that Heritage's conduct is one of the factors that caused Miss C to suffer the losses it did. Heritage should have made checks on TMI, as it did. Having made those checks, it should have decided not to accept business referred to it by TMI. So, Miss C's application should not have been accepted by Heritage. Accepting the application has caused a loss to Miss C which I think it is fair and reasonable in the circumstances of this case to ask Heritage to compensate her for.

So, for the reasons given in my provisional decision and above I uphold Miss C's complaint and require Heritage to put things right as set out in my provisional decision and replicated below.

Putting things right

A fair and reasonable outcome is for Heritage to put Miss C in the position she would now be in but for what I consider to be Heritage's failure to treat Miss C fairly when it received her SIPP application from TMI. For the reasons I've explained above, if Heritage had done everything it should have, I don't think Miss C would have made the investments in Harlequin Property, Green Oil Plantations and SCS Farmland. And I think she would have left her pensions as they were.

So, Heritage should calculate fair compensation by comparing the position she would be in, if she had not transferred. In summary, Heritage should:

1. Calculate the loss Miss C has suffered as a result of making the transfer.
2. Take ownership of the Harlequin Property and SCS Farmland investments. As Green Oil Plantations Ltd has dissolved, this not required for this investment.
3. Pay an amount into Miss C's SIPP so that the transfer value is increased to equal the loss calculated in (1). This payment should take account of any available tax relief and the effect of charges.
4. Pay Miss C interest as set out below.
5. Pay Miss C £500 for trouble and upset.

Lastly, in order to be fair to Heritage, as mentioned, it should have the option of payment of this redress being contingent upon Miss C assigning to Heritage any claim she may have against TMI, or others, in respect of this loss – but only in so far as Miss C is compensated here. The terms of the assignment should require Heritage to account to Miss C for any amount it subsequently recovers against the other parties that exceeds the loss paid to Miss C.

I have explained how Heritage should carry out the calculation set out at 1-3 above in further detail below:

1. Calculate the loss Miss C has suffered as a result of making the transfer

To do this, Heritage should work out the likely value of Miss C's pensions, had she left them where they were instead of transferring to the SIPP.

For the part of the transfer which related to defined benefits Heritage should undertake a redress calculation in line with the revised methodology issued by the FCA in October 2017 (Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers).

This calculation should be carried out as at the date of my final decision, using the most recent financial assumptions at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate actuarial services provider promptly following receipt of notification of Miss C's acceptance of the decision. Heritage may wish to contact the Department for Work and Pensions (DWP) to obtain Miss C's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P). These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the employer's scheme on Miss C's SERPS/S2P entitlement.

For any remainder Heritage should ask Miss C's former pension providers to calculate the current notional transfer values had she not transferred her pensions. If there are any difficulties in obtaining a notional valuation then the FTSE UK Private Investors Income Total Return index should be used to calculate the value. That is a reasonable proxy for the type of return that could have been achieved if suitable funds had been chosen.

The total of the amounts resulting from these calculations will be the loss Miss C has suffered. The calculations should take account of the value of any cash held in the SIPP currently. And any dividend Miss C received from the liquidator in relation to the Green Oil Plantation investment. The Harlequin Property and SCS Farmland investments should be assumed to have no value.

2. Take ownership of the Harlequin Property and SCS Farmland investments

It is likely that the SIPP only exists because of the investments in Harlequin Property and SCS Farmland made in 2012. In order for the SIPP to be closed and further SIPP fees to be prevented, the investments need to be removed from the SIPP.

To do this Heritage should reach an amount it is willing to accept as a commercial value for Harlequin Property and SCS Farmland, and pay this sum into the SIPP and take ownership of the relevant investments. This amount should be taken into account for the loss calculation.

If Heritage is unwilling or unable to purchase the investments, the value of it should be assumed to be nil for the purposes of the loss calculation.

Provided she is compensated in full, Heritage may ask Miss C to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the investments. That undertaking should allow for the effect of any tax and charges on the amount Miss C may receive from the investments and any eventual sums she would be able to access from the SIPP. Heritage will need to meet any costs in drawing up the undertaking.

If Heritage does not take ownership of the investments, and they continue to be held in Miss C's SIPP, there will be ongoing fees in relation to the administration of that SIPP.

Miss C would not be responsible for those fees if Heritage had not accepted the transfer of her pension into the SIPP. So I think it's fair for Heritage to waive any SIPP fees until such time as Miss C can dispose of the investments and close the SIPP.

3. Pay an amount into Miss C's SIPP so that the transfer value is increased to equal the loss calculated in (1).

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Miss C's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Miss C as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. The notional deduction should be calculated using Miss C's marginal rate of tax in retirement. Typically, 25% of the loss could have been taken as tax free cash and 75% would have been taxed according to Miss C's likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

4. Interest

Pay Miss C interest of 8% simple a year on the above compensation from the date of the decision to the date compensation is paid – if compensation isn't paid within 90 days of Heritage being notified of acceptance.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period – and so any period of time where the only outstanding item required to undertake the calculation is data from the DWP may be added to the 90 day period in which interest won't apply.

5. Trouble and upset

I also think Miss C has been caused upset as a result of Heritage's actions. The sudden loss of a significant portion of her pension fund would have come as a shock to her, and has clearly had a significant impact. I think it would be fair and reasonable for Heritage to pay Miss C £500 compensation for this.

My final decision

My final decision is that I uphold Miss C's complaint against Heritage Pensions Limited.

Where I uphold a complaint, I can award fair compensation of up to £150,000, plus any interest and or costs that I think are appropriate. If I think that fair compensation might be more than £150,000, I may recommend that the business pays the balance.

Determination and money award: I require Heritage Pensions Limited to pay Miss C the compensation amount as set out in the steps above, up to a maximum of £150,000.

Where the compensation amount does not exceed £150,000 I additionally require Heritage Pensions Limited to pay Miss C any interest on that amount in full, as set out above.

Where the compensation amount already exceeds £150,000 I only require Heritage Pensions Limited to pay Miss C any interest as set out above on the sum of £150,000.

Recommendation: If the compensation amount exceeds £150,000, I also recommend that Heritage Pensions Limited pays Miss C the balance. I additionally recommend any interest calculations as set out above on this balance to be paid to Miss C.

If Miss C accepts my final decision, the money award is binding on Heritage Pensions Limited. My recommendation is not binding on Heritage Pensions Limited. Further, it's unlikely that Miss C can accept my decision and go to court to ask for the balance. Miss C may want to consider getting independent legal advice before deciding whether to accept my final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss C to accept or reject my decision before 9 February 2022.

Sam Thomas
Ombudsman