

## The complaint

Mrs B's representative complains about the due diligence London & Colonial Services Limited ('L&C') undertook before accepting her Self-Invested Personal Pension ('SIPP') application.

Mrs B's representative complains that in 2012 L&C accepted her application and allowed her to invest in a Store First Limited ('Store First') investment when it shouldn't have, causing her a loss.

## What happened

I've outlined the key parties involved in Mrs B's complaint below.

### Involved parties

#### *L&C*

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

#### *The Pensions Office Limited ('TPO')*

TPO was authorised by the regulator – the Financial Services Authority ('FSA'), which later became the Financial Conduct Authority ('FCA') – to advise on products and services including giving investment advice and arranging deals in investments such as pensions. TPO was no longer authorised from 13 August 2015 and, as I understand it, TPO was declared in default by the Financial Services Compensation Scheme ('FSCS') in 2015.

#### *Store First*

The Store First investment took the form of one or more self-storage units, which were part of a larger storage facility in a UK location. Investors bought one or more units in the facility and were offered a guaranteed level of income for a set period of time. After that, they could either take whatever income the unit(s) provided, or sell them (assuming there was a market for them).

The Store First investment was marketed as offering a guaranteed 8% return in the first two years, an indicated return of 10% in the following two years, and 12% in the next two years. It was also marketed as offering a "*guaranteed*" buy back after five years.

In May 2014, the Self Storage Association of the UK ('SSA UK') issued a press release (amended in January 2015), detailing the outcome of a review it had commissioned Deloitte LLP to undertake of the marketing material made available to potential investors by Store First. The release recommended that any potential investors in Store First storage units consider the following key points before taking any investment decision:

- What will the impact be on the business model if VAT is charged on the rental of storage units to customers following a review by HM Revenue & Customs ('HMRC')?
- How is Store First funding guaranteed returns to investors? Is this from operating profits, the proceeds from the sale of other storage pods to investors, or a different source?
- Compare the total value being paid for all the units in a Store First self-storage site against the price at which stand-alone self-storage businesses have been valued and sold at recently.
- Consider if there is a realistic re-sale opportunity for, and exit, from this investment, particularly if Store First exits the business.
- Research the performance of investments based on a similar investment model that have been offered primarily in Australia, such as Ikin Self Storage in Townsville, Queensland and Strata Self Storage in Melbourne (these schemes had failed).

The release refers to a number of misleading and inaccurate statements made by Store First in its marketing material. It also makes the following observations:

*"SSA UK's investigations indicate that these storage units are being rented to the general public at approximately £18 - £21 per square foot including insurance. Normally the rent paid by a self-storage operator would be at most half of the income per square foot earned through storage fees. Presuming the Store First sites were at industry average occupancy levels, SSA UK believe that they would have to be earning £23.95 per square foot just to pay the guaranteed rent to investors, excluding operating costs such as insurance, staff, business rates, utilities, marketing and management fees for Store First. Furthermore, this does not factor in the losses incurred by each site as it takes some years to reach a mature occupancy level. During this time, Store First is obliged to pay the guaranteed returns to investors, yet there does not appear to be sufficient income from the operations of the business to fund these returns.*

*In addition, the analysis SSA UK has seen indicates that the purchase price being paid per square foot by investors to Store First for these self-storage units taken together equates to a much higher value than they would be worth if the whole sites were sold as stand-alone self-storage stores.*

*...a very serious question arises over how Store First is funding the guaranteed returns to existing investors, considering the absence of bank funding and the likely level of losses that require funding in each new store. It may yet prove to be the case that the rental returns being paid to investors are in fact being funded from the sale proceeds of new units, and not the operation of the self-storage business."*

Store First was the subject of a winding up petition issued by the Business Secretary. On 30 April 2019 the Court made an order to wind-up Store First and three associated companies in the public interest by consent between those four companies and the Secretary of State. The Official Receiver was appointed as liquidator and had responsibility for dealing with the assets and liabilities of the four companies.

Following this the freehold, associated assets and goodwill of 15 storage centres were sold by the Official Receiver to a company called Store First Freeholds Limited. As I understand it, the self-storage units continued to be rented to end users and a company called Pay Store now manages the storage sites trading as Store First. The Official Receiver and Store First Freeholds Limited agreed that the latter would accept any requests from investors to surrender their pods. Store First Freeholds Limited would cover its own costs of the surrender, but investors wouldn't receive any payment.

In the judgment in *Adams v Options SIPP UK LLP (formerly Options Pensions UK LLP)* [2020] EWHC 1299 (Ch) ('*Adams v Options*'), the judge found the value of Mr Adams' six pods, acquired for around £52,000 in July 2012, to be £15,000 as of January 2017. And in the judgement in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 1188 it was stated that, in February 2020, Options had said it was valuing Storepods at £430 each following (then) recent sales of Store First storage units at auction and the Court used that value in assessing the redress due to Mr Adams.

*Jackson Francis Ltd ('Jackson Francis')*

As I understand it, Jackson Francis was an unregulated sales company. It was explained on Jackson Francis' website in March 2012 that:

*"Jackson Francis's free, unique and no-obligation Pension Transfer Service means you can quickly understand what switching your pension means for you – and whether or not it's worth it.*

*One of our dedicated account managers will discuss the relevant information with you, and will collate details of charges from your existing provider, helping you to track old policies and understand the process.*

*We will then introduce you to either traditional schemes or alternative investments that might match or surpass your existing provider. Where you invest is your choice, we are unbiased and simply give you the facts."*

It was also explained that:

*"As you'd expect, deciding whether it's a good idea to switch your pension begins with looking at your existing arrangements. More often than not it does not take a great deal of detective work to realise just how badly most pensions are performing but if in doubt it's always best to take advice.*

*If you would like to speak to a financial advisor we will arrange one to call you with no obligation. Assessing the market for your options can be difficult but our unbiased 'just the facts' approach will help you to identify the right choice for your future. There are no up-front costs and of course, you will be under no obligation to transfer with us."*

In 2015 the British Broadcasting Corporation reported that:

*"The Liverpool sales company Jackson Francis Ltd was paid through an intermediary by Store First to cold call people with "dormant pensions" - savings they had accrued under previous employers.*

*From 2011, more than 1,000 people were persuaded by Jackson Francis staff to move these pensions into the Store First scheme.*

*...  
Over two years, Store First owner (Mr W) paid £33m commission to Transeuro Worldwide Holdings Ltd, which funded Jackson Francis."*

What happened?

TPO wrote to Mrs B in June 2012 and, amongst other things, said that it didn't recommend

she transfer her Defined Benefit ('DB') local government occupational pension scheme as the return needed to replicate the benefits being forfeited on transfer was highly unlikely to be achievable. TPO said that it had been informed by Jackson Francis that Mrs B wanted to transfer her monies into a SIPP so as to make investments that weren't permitted within her existing arrangement. TPO said that if Mrs B's overriding intention was to transfer then TPO would be happy to assist her with transferring her monies to L&C. It was explained that application forms for L&C were enclosed for her to complete and return to proceed.

TPO said that Mrs B's acceptance of risk was "*low to medium*" and that alternative investments represented a higher risk than appeared appropriate for Mrs B's risk profile. In its letter TPO didn't mention the Store First investment, it just said that Mrs B must take professional advice before making investments and that it wasn't able to assist with advice of this nature.

In August 2012, Mrs B completed an application form to open a SIPP with L&C and transfer in her DB Scheme. It appears that this form was sent to L&C by TPO on 28 September 2012. The Independent Financial Adviser ('IFA') details are on page three of the form. The IFA firm name was recorded as "*The Pensions Office Ltd*", with Mr P named as TPO contact, and TPO's FSA authorisation number was noted. In the same section there were two boxes for Mrs B to select from, reading either "*Advice given at point of sale to client*" or "*Advice not given at point of sale to client*" and neither box was ticked.

Elsewhere in the form it's recorded that Mrs B was looking to transfer in funds worth just over £26,000 from her DB Scheme and a box was ticked confirming that she was looking to manage the fund herself.

While I haven't seen L&C's checklist for the SIPP application, in previous cases I've seen that boxes were ticked to confirm that TPO has an agency agreement with L&C and to confirm that, if the IFA wasn't authorised, L&C had ensured the transfer wasn't from a DB Scheme.

It seems Mrs B's SIPP application was accepted and an L&C SIPP was established for her. And the transfer from Mrs B's DB scheme to her SIPP took place.

On 16 February 2013, Mrs B completed a Self Storage Commercial Property Investment form. Amongst other things, this noted that:

- L&C wasn't authorised to give financial or investment advice. But it had obtained legal advice in its capacity as trustee, in order to assess the risks of ownership and to ensure appropriate title was attained. That advice didn't cover the investment merits, marketability or value of the property.
- Mrs B had obtained whatever information, reports, legal or other advice she required.

On 20 March 2013, Mrs B completed an investment purchase request form. Amongst other things, this included the following:

- A question about whether the investor was a certified Sophisticated Investor (and a request to provide evidence where this was the case), which Mrs B didn't tick.
- A question about whether advice had been provided on the proposed investment. And Mrs B ticked that she hadn't received advice on the merits of this and that this decision was her sole responsibility. Where advice had been given there was a section for the adviser to complete (including a box for their FCA number(s)). In other forms I've seen, in none was the section to be filled out by an adviser, if advice had been given, completed.

- A typed member declaration section which Mrs B signed to confirm, amongst other things, that L&C hadn't provided advice on the investment, that she'd carried out her own due diligence into the investment, that the investment **may** be high risk and that there **may** not be an established market for selling the proposed holding. It was also stated that the responsibility for assessing the risks and merits of the investment rested with the consumer and any investment adviser they'd appointed, unregulated investments may not be protected by the FSCS and that the consumer indemnified L&C against any liabilities arising from the investment (bold my emphasis).

On 27 March 2013, L&C wrote to Mrs B to confirm it had received her Store Pod reservation form, which I can see she signed on 15 August 2012. L&C's letter said, amongst other things, that from what it had received so far, the investment appears to be acceptable in principle subject to satisfactory investigations into title and approving the contracts. L&C said it had been advised by solicitors to obtain a valuation report for each of the Store Pod sites, which should be revalued every six months. It said that it enclosed sample copies of the site reports and declaration letters, which it asked Mrs B to confirm she had seen and was happy to proceed with the investment.

The Storepod reservation form mentioned "*Storefirst.com self storage*", recorded Ms B's details and said that the agent was Jackson Francis. The location of the Storepods was noted and two plot numbers were shown. The total value of the units was £22,500 and the rental guarantee included was 8%.

It seems Mrs B confirmed that she was happy to proceed with the purchase, given it isn't in dispute that the investment went ahead.

While L&C hasn't said that it sent a copy to Mrs B, I'm aware it wrote to some customers in November 2013 and confirmed that TPO was no longer authorised to act as the financial adviser and that TPO had been removed from such SIPP. L&C explained that going forwarded it would send correspondence directly to the customers. And it recommended they seek independent financial advice on their SIPPs.

Mrs B made a complaint to the FSCS about TPO. The FSCS investigated this and awarded her £50,000.

In February 2018, Mrs B raised her complaint with L&C. And the FSCS entered into a reassignment of rights with Mrs B in April 2018, which has enabled her to bring this complaint against L&C.

I'm aware that L&C wrote to some customers with investments in Store First in or around January 2019 confirming that the value of their SIPP was £0. And Mrs B has confirmed the current value of her SIPP is £0.

#### Additional background information

We've previously been provided with a copy of a printout from the FSA Register. This records that, as at 30 August 2012, TPO's permissions included advising on Pension Transfers and Pension Opt Outs.

Mrs B's told us, amongst other things, that:

- She had no reason to transfer.
- She was initially contacted – although she can't recall who by – via a 'cold call' about transferring her pension to invest it via a SIPP.

- She was told it would be beneficial to transfer and that it was a good investment, as her existing pension was 'just sitting there'.
- She doesn't recall having sight of the suitability report telling her not to transfer.
- Her knowledge and understanding of investments was 'very low'.

An Investigator reviewed Mrs B's complaint and said it should be upheld. She said that had L&C acted fairly and reasonably it shouldn't have accepted Mrs B's application to open a SIPP with it. She also said that consumers were being misled in the investment marketing literature about the returns and risks associated with the investment and that there was the risk of consumer detriment. And that it's unlikely Mrs B's application would have otherwise gone ahead.

L&C didn't accept the Investigator's view. It asked for an extension until 9 December 2022 to provide submissions in response. In the meantime though it said, in summary, that:

- TPO acted as Mrs B's adviser and provided her with advice at the point of sale.
- L&C wasn't responsible checking the suitability of the investment. Its role was to satisfy itself, as trustee of the investment, that this was allowed within the trust and didn't breach HMRC regulations.
- L&C said it satisfied itself that good title could be obtained for the Store pod investment and that there wouldn't be adverse tax consequences if this was accepted into the SIPP.
- It undertook further due diligence in relation to TPO, to ensure it was authorised by the FCA.
- Mrs B's complaint letter is generic, without details specific to her circumstances.
- The compensation Mrs B has already received from the FSCS is nearly her entire loss, so without any admission of liability, it offered to pay her the remaining loss the FSCS had calculated of £1,211.02.

Mrs B didn't accept L&C's offer, as this meant she'd still own the investment which involved annual fees, and because she'd still have to pay SIPP fees as she wouldn't be able to close it in that case.

As no agreement could be reached, our Investigator let L&C know in January 2023 that Mrs B didn't accept its offer and that the complaint would be progressed to be considered by an Ombudsman for a final decision. But L&C doesn't appear to have provided our Service with any further responses.

Our Service issued a final decision on another complaint involving L&C's acceptance of a SIPP application from TPO in July 2023. This has been published on our website under DRN4230171. And I think Mrs B's complaint features the same key point – namely the due diligence L&C carried out on the introducer and the intended investment. L&C made a number of submissions on that complaint, which I've taken into consideration in Mrs B's case. Amongst other things, it said:

- The application to invest in Store First confirmed L&C wasn't authorised to give financial or investment advice and that the advice obtained by L&C as trustee was limited to assessing the risks of ownership and to ensure the acquisition of appropriate title. Further, that advice obtained by L&C didn't cover the investment's merits, marketability or value and that customer's had obtained whatever reports or advice they required.
- The investment purchase request said L&C hadn't provided advice and that the customer had carried out their own due diligence and was happy to proceed. The request confirmed the investment was high risk and that there may not be an

established market for resale.

- A declaration indemnified L&C against all liability arising from the investment and confirmed that responsibility for assessing the merits of the investment lay solely with the customer.
- The relationships are similar to those in *Adams v Options*, and it's unclear why we've reached a different conclusion to that arrived at in *Adams*.
- If anything the position here is stronger in that a regulated adviser was involved and would have been responsible for assessing any marketing materials and the suitability of the investment. This was not the case in *Adams*.
- Our Service is imposing a duty on L&C to decide whether to accept or reject business brought to it by a customer requesting an execution-only service.
- A breach of the Principles cannot, of itself, give rise to any cause of action at law.
- The ambit and application of the Principles, and such duties as may be imposed on L&C by these, fall to be construed in light of the Conduct of Business Sourcebook ('COBS') rules applicable to L&C, L&C's regulatory permissions, L&C's contractual arrangements and the statutory objective that consumers should take responsibility for their decisions.
- It was said in *Adams* that reports, guidance and correspondence issued after the events at issue couldn't be applied to Options' conduct at the time. So, publications issued after the transactions in this case shouldn't have a bearing on the complaint.
- Even if the 2009 Thematic Review Report had been statutory guidance made under FSMA S.139A (which it wasn't), the breach of such statutory guidance wouldn't give rise to a claim for damages under FSMA S.138D.
- The FCA's Enforcement Guide says that "*Guidance is not binding on those to whom the FCA's rules apply. Nor are the variety of materials (such as case studies showing good or bad practice, FCA speeches and generic letters written by the FCA to Chief Executives in particular sectors) published to support the rules and guidance in the Handbook. Rather, such materials are intended to illustrate ways (but not the only ways) in which a person can comply with the relevant rules.*"
- Regulatory publications can't alter the meaning, or the scope, of the obligations imposed by the Principles.
- *Adams* held that duties imposed by COBS can't all apply to all firms in all circumstances.
- Neither the obligations under COBS 14.2.3R and COBS 14.3 to provide clients with product information, nor the obligation under COBS 19.1.2R to provide clients with pension product information, apply to execution-only SIPP providers.
- The customer was aware L&C acted on an execution-only basis and didn't accept responsibility for the quality of the investment business.
- If L&C really had the obligations of due diligence we've set out and had acted in accordance with these then it would have been required to advise on investments, which was contrary to its regulatory permissions.
- With an execution-only service, it would be unfair if the SIPP provider couldn't rely on representations made by the consumer when signing the contractual documentation.
- Amongst other things, the judge in *Adams* held that in order to identify the extent of the regulatory duties imposed on Carey, "*one has to identify the relevant factual context*" and that "*the key fact ... in the context is the agreement into which the parties entered, which defined their roles in the transaction*".
- The judge also said that "*a duty to act honestly, fairly and professionally in the best interests of the client, who is to take responsibility for his own decisions, cannot be construed...as meaning that the terms of the contract should be overlooked, that the client is not to be treated as able to reach and take responsibility for his own decisions and that his instructions are not to be followed.*"
- In *Adams* the FCA agreed that the function of a firm, as determined by contract, would govern what it had to do to comply with its duties under the FCA Handbook.

- Insufficient weight has been given to contractual arrangements and the demarcation of roles and responsibilities. The documents setting out the contractual relationship between the parties make it clear that L&C was acting on an execution-only basis.
- Our position runs contrary to *Adams* by suggesting that, notwithstanding the clear contractual terms, L&C owed due diligence obligations under the Principles.
- Our Service is attempting to use the Principles to circumvent the *Adams* decision.
- The Service must take into account the relevant case law and, if this is deviated from, must set out why – R. (on the application of *Aviva Life and Pensions (UK) Ltd*) v *Financial Ombudsman Service* [2017] EWHC 352 (Admin) and Jay J's comments at paragraph 73 of that judgment were referenced.
- It's not fair or reasonable to determine the complaint by reference to the FCA publications and to do so only exacerbates the problem referred to by Jay J in *Aviva*.
- The Principles can't give rise to a cause of action if breached, and consideration of these must be via the appropriate COBS rules applying to the transaction.
- We've failed to have regard to the general principle that consumers should take responsibility for their decisions, the fundamental principle of freedom of contract and to the authority of *Adams* and *Kerrigan v Elevate Credit International Ltd* [2020] C.T.L.C. 161.
- Our position allows customers to recover against L&C for losses flowing from non-contractual obligations which were inconsistent with, and contrary to, the express obligations in the parties' contractual arrangements.
- In *Adams* the Store First investment being high risk didn't make it manifestly unsuitable.
- The suitability of a high-risk investment depends on the particular financial circumstances of the particular customer and their attitude to risk. An execution-only SIPP provider was under no regulatory obligation to ascertain these details.
- The investment purchase request clearly set out that the investment was high risk.
- That it wasn't clear how an investment could be independently valued wouldn't, of itself, make an investment unsuitable, and customers were clearly informed of this.
- That an investment didn't have investor protection wouldn't, of itself, make it unsuitable. And the member declaration stated that unregulated investments might not be protected by the FSCS.
- Our Service has criticised L&C for failing to independently verify claims made in Store First's marketing material.
- The duty the Service is seeking to impose on L&C appears to require an analysis of the investment commensurate with what one would expect from a financial adviser.
- L&C wasn't able to provide any views on the specific qualities of an investment without potentially putting itself in breach of its permissions.
- L&C wasn't able to refuse a member's instruction to invest based on the risk profile of an investment without completing a full assessment of suitability. This would fall well outside of the scope of L&C's duty and retainer. And L&C couldn't communicate the results of such an investigation to a consumer without giving advice.
- Suggestions that L&C should have looked into the viability of guarantees offered, the likelihood of expected returns being achieved and the credibility of statements about rental income, are far beyond the scope of the retainer agreed by the parties. And are at odds with the service offered by an execution-only SIPP provider.
- Any responsibility for assessing the viability of the investment returns fell to TPO.
- Store First investments were bona fide and good title was obtained, that they didn't perform as hoped doesn't change this.
- Documents customers signed confirmed the investment was high risk. And the customer had already decided to transfer before contacting L&C, presumably on TPO's advice.
- There's nothing to indicate the customer wouldn't still have gone ahead had L&C



refused the business.

- A number of other SIPP providers at the time were accepting such investments and it's most likely that if L&C had rejected the application it would still have been effected with a different provider.
- The Service's view of what was reasonable practice for the SIPP industry at the time is at odds with the view of the SIPP industry in general.
- There is a real unfairness if an execution-only SIPP provider is liable for the poor investment choices of consumers,
- Our Service has conveniently selected from case law and statute, ignoring case law that's far more applicable.
- The High Court decision in *Adams v Carey* held that the SIPP provider was not at fault in respect of its due diligence obligations and there was no finding that the Store First investments should have been rejected by Carey. And, if anything, the position here is stronger in that a regulated adviser was involved.
- Reference to the 2009 and 2012 Thematic Reviews contravene the decision in *Adams* on the basis these:
  - have no bearing on the construction of the Principles as the contents of the documents cannot found a claim for compensation of itself;
  - cannot alter the meaning of, or the scope of the obligations imposed by, the Principles;
  - do not provide "guidance" and even if they were considered statutory guidance, any breach would not give rise to a claim for damages under FSMA s.138D.
- Our Service is extending the scope of the duty owed by L&C beyond what was envisaged by the parties.
- Amongst other things, the judge in *Adams* held that *"there is a very plain inconsistency between the contract which was entered into between it and the claimant and the duties [under COBS 2.1.1R] which the claimant now suggests that the defendant owed to him."*
- Further, that *"there was... [no] duty on [Carey]... to consider the suitability of appropriateness of a SIPP or the underlying investment. The contract between [the parties] makes that clear."*
- The level of due diligence imposed by the Service goes far beyond what was agreed between the parties.
- Our Service is holding L&C to a standard that's not provided for by statutory guidance or by the law.
- No regard is paid to the respective duties of the parties under the contract.
- At the time of the transaction, there was no obligation for a customer to take advice on the transfer of a pension. There was also no requirement to ensure that customers were obtaining independent financial advice.
- TPO was authorised and regulated by the FCA and there was no issue in accepting business from it.
- At the time of the transaction, there was nothing in the DISP rules preventing SIPP providers accepting business from unregulated introducers, execution-only customers or high-risk business provided that adequate risk warnings were given.
- There was no requirement for L&C to request the information highlighted from TPO, so failing to do this couldn't have resulted in a breach of regulatory obligations.
- Our Service appears to disregard the detailed investigations carried out by L&C, and the conclusions it reached, instead focusing on documents that the Ombudsman hasn't seen.
- Our Service is putting disproportionate weight on the actions of the promoter but fails to link the promoter's conduct or actions to the investment itself.
- That an investment was likely to be high risk because it was unregulated, that it was unclear how an investment could be independently valued and that there was no

investor protection doesn't automatically equate to an unsuitable investment.

- The FSCS awarding compensation shows the customer received advice from TPO in respect of both the transfer and investment.
- DISP 3.6.4 R requires FOS to take into consideration (amongst others) laws and regulations which, for these purposes, includes the Civil Liability (Contribution) Act 1978 (the Act). Under the Act, a claimant must account for any contribution that they have received from another party. So customers need to account for compensation received from the FSCS.

## My provisional findings

I issued a provisional decision on Mrs B's complaint and concluded that it should be upheld.

While Mrs B accepted my provisional findings and had no further comments to add, L&C didn't accept my provisional findings and said, amongst other things, that:

- Our Service has failed to take account of the law, as required under DISP 3.6.4, and we've departed from legal precedent setting out the importance of the contract between SIPP provider and customer and the scope of an execution-only SIPP provider's due diligence obligations.
- *Adams v Options* is largely ignored, despite the relationships in Mrs B's complaint being similar (and Mrs B being in a safer position as she had the benefit of another FCA regulated entity, TPO). And despite *Adams* examining the responsibility of a SIPP provider offering an execution only service at length, both under COBS and contract.
- Our Service is deviating from established case law and using the Principles to circumvent *Adams*, which held that a SIPP provider's duties under the regulatory regime fall to be construed in light of its contractual arrangements.
- We haven't properly addressed using the Principles for finding against it in preference to the COBS rules or established case law. The Principles are no substitute for the COBS rules, the application of which were considered in *Adams*.
- The Principles and duties imposed on L&C by these fall to be construed in light of the COBS rules, as interpreted in *Adams*, and L&C's regulatory permissions. While it's accepted that L&C couldn't and didn't give advice, our Service hasn't explained how it could have effectively completed adviser level due diligence and communicated this to Mrs B without breaching its permissions. *Adams* held that "*there was... [no] duty on [Carey]... to consider the suitability of appropriateness of a SIPP or the underlying investment. The contract between [the parties] makes that clear.*" And our Service has applied the Principles in contrast to the contract terms.
- Section 5(2)(d) of the FSMA (now section 1C) sets out that consumers should take responsibility for their own investment decisions. Our Service has concluded though that Mrs B isn't responsible for hers, despite the transaction being execution only and the finding in *Adams* that "*a duty to act honestly, fairly and professionally in the best interests of the client, who is to take responsibility for his own decisions, cannot be construed...as meaning that the terms of the contract should be overlooked, that the client is not to be treated as able to reach and take responsibility for his own decisions and that his instructions are not to be followed.*"
- We've ignored that *Adams* held that duties imposed by COBS can't all apply to all firms in all circumstances. And that the express provisions in COBS relating to advice on the suitability and appropriateness of the investment didn't apply to execution only SIPP providers.
- The 2009 and 2012 Thematic Review Reports didn't provide guidance or claim to alter the meaning or scope of the obligations imposed by the Principles. And these are not statutory guidance made under FSMA S.139A. The Reviews do little more

than highlight some example measures SIPP providers could consider, taken from examples of good practice observed. And many of the matters firms are invited to consider are directed at advisory firms, rather than SIPP providers providing execution-only services. Determining the complaint by reference to the FCA publications only exacerbates the problem referred to by Jay J in *Aviva*.

- The provisional decision seeks to impose a duty of due diligence L&C doesn't owe, which goes far beyond the scope of duty envisaged by the parties. It seems to override the careful allocation of duties between different types of firms conducting different types of business in COBS, and to impose duties in addition on L&C by means of a generalised appeal to the Principles.
- This Service dismisses the rationale of *Adams* on the basis that the alleged breaches in it took place after the contract was entered into, while we considered whether L&C ought to have declined applications to invest before it received Mrs B's application. This creates a relationship between L&C and Mrs B before a contract was entered into and any funds received by it.
- While our Service recognised L&C carried out due diligence on TPO, no further comment is provided, evidencing cherry picking of evidence.
- L&C entered into an intermediary agreement with TPO so that advice could be provided to prospective clients through that means, if requested. And it was the customer's decision whether or not to take up the advice. The provisional decision placed insufficient weight on the parties' contractual obligations, which made it clear L&C was acting on an execution only basis, and this is a document our Service has made no reference to, despite the importance of it in determining the ambit and application of the Principles. And one of the reasons customers seek execution only SIPP providers is they don't wish to pay the higher charges of advisory pension providers.
- The judge in *Adams* held that in construing the SIPP provider's regulatory obligations, regard should be had to Section 5(2)(d) of the FSMA (now section 1C), which sets out the general principle and statutory objective that consumers should take responsibility for their own investment decisions. And that those decisions are set out in the documents which comprise the contract between the parties. The FCA didn't disagree with this approach.
- Contrary to *Aviva*, the provisional decision offers no explanation for its departure from the clear authority of *Adams* and *Kerrigan*, from the regulatory principle in Section 5(2)(d) or from the principle of freedom of contract. And it isn't fair or reasonable to enable Mrs B to recover against L&C for losses flowing from non-contractual obligations inconsistent with, and contrary to, express obligations in the contract.
- L&C acted on Mrs B's written instruction in setting up the SIPP. Mrs B was responsible for choosing the most appropriate scheme for her needs and to take responsibility for the level of investment risk in her circumstances. Mrs B received advice from TPO not to transfer her pension and to take professional advice before making investments following the transfer, which she chose to ignore. As well as being told the intended investment carried a higher risk than appropriate for her risk profile and that the level of growth required was likely unachievable. Such that Mrs B chose to make the investment in full knowledge of the risks, without taking advice on it. And there's nothing to indicate she didn't understand this and that responsibility for any losses suffered should sit with her.
- It was reasonable for L&C to be afforded comfort given a regulated adviser such as TPO is required to operate under regulatory obligations. COBS 2.4.8 states *"It will generally be reasonable (in accordance with COBS 2.4.6R (2)) for a firm to rely on information provided to it in writing by an unconnected authorised person or a professional firm, unless it is aware or ought reasonably to be aware of any fact that would give reasonable grounds to question the accuracy of that information."*
- We consider that L&C should have conducted some further "basic independent

searches" following Enhance Support Solutions Limited report. However the only example given is a reference to a County Court Judgment (CCJ) recorded against Harley Scott Holdings Limited where Enhance Support Solutions obtained information from it directly to query what this related to. This related to a fee dispute which was in the process of being settled and, given the limited nature information provided on a CCJ, it would have been necessary to ask the relevant party for this information directly. In any event, the CCJ was of an insignificant value and bears no relevance to the investment in Store First. And, despite this being the only example, we said we weren't satisfied L&C undertook sufficient due diligence on the Store First investment, which isn't logical and reasonable conclusion.

- The investment likely being high risk due to being unregulated, it being unclear how this could be independently valued and there being no investor protection doesn't automatically equate to an unsuitable investment or a breach by L&C. While we appear to have accepted this, we found that the investment was unsuitable in relation to Mrs B's attitude to risk. Notwithstanding that L&C couldn't advise on suitability, Mrs B was informed of the risks, the investment was bona fide and good title was obtained.
- L&C shouldn't be held responsible for decisions Mrs B made prior to its involvement. The decision to transfer was outside its control. Mrs B requested the transfer before it has any basis to refuse any business.
- Mrs B has been compensated by the FSCS. It offered to pay her remaining loss, which she rejected. If we refuse to take full account of the redress that Mrs B received from the FSCS then we should reduce any losses from the date of receipt of funds from the FSCS on the basis Mrs B has had the benefit of those and so to ignore these gives her a windfall as she will have received (i) £50,000, (ii) a return on £50,000 and (iii) compensation from L&C ignoring £50,000 and any return in their entirety.
- Mrs B should be put to proof of all her pension provisions and other income to confirm her tax rate. It isn't fair or reasonable to assume a basic rate of income tax of 20% when there's potential for this to be incorrect.

### **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.

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

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

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

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

I note that L&C has said that Mrs B's complaint isn't specific to her particular circumstances and doesn't include details about her investments. But our Service is an informal dispute resolution forum. A complaint made to us need not be, and rarely is, made out with the clarity of formal legal pleadings. And ultimately, what I'll be looking at here is whether L&C

took reasonable care, acted with due diligence and treated Mrs B fairly, in accordance with her best interests. And what I think is fair and reasonable in light of that.

### **Relevant considerations**

Around the time Mrs B's application form was accepted by L&C the then regulator of financial businesses – the FSA – became the FCA. For ease of reference, I've referred to the FCA throughout.

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

*“Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.*

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

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

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

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

And at paragraph 77 of BBA Ouseley J said:

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

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

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

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

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

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

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

I note that the Principles for Businesses didn’t form part of Mr Adams’ pleadings in his initial case against Options SIPP. And, HHJ Dight didn’t consider the application of the Principles to SIPP operators in his judgment. The Court of Appeal also gave no consideration to the application of the Principles to SIPP operators. So, neither judgment said anything about how the Principles apply to an Ombudsman’s consideration of a complaint. But, to be clear, I don’t say this means *Adams* isn’t a relevant consideration at all. As noted above, I’ve taken account of both judgments when making this decision on Mrs B’s case.

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

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

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

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

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

In Mrs B's complaint, amongst other things, I'm considering whether L&C ought to have identified that the Store First investment involved a significant risk of consumer detriment. And, if so, whether it ought to have declined to accept applications to invest in Store First before it received Mrs B's application.

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

So, I've considered COBS 2.1.1R – alongside the remainder of the relevant considerations, and within the factual context of Mrs B's case, including L&C's role in the transaction.

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

I also want to emphasise that I don't say that L&C was under any obligation to advise Mrs B on the SIPP and/or the underlying investments. Refusing to accept an application isn't the same thing as advising Mrs B on the merits of the SIPP and/or the underlying investments.

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

### **The regulatory publications**

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

- The 2009 and 2012 Thematic Review reports.

- The October 2013 finalised SIPP operator guidance.
- The July 2014 “Dear CEO” letter.

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

## **The 2009 Thematic Review Report**

The 2009 report included the following statement:

*“We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses (‘a firm must pay due regard to the interests of its clients and treat them fairly’) insofar as they are obliged to ensure the fair treatment of their customers. COBS 3.2.3(2) states that a member of a pension scheme is a ‘client’ for COBS purposes, and ‘Customer’ in terms of Principle 6 includes clients.*

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

...

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

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

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

- *Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm’s clients, and that they do not appear on the FSA website listing warning notices.*
- *Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.*
- *Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified.*



- *Being able to identify anomalous investments, e.g. unusually small or large transactions or more 'esoteric' investments such as unquoted shares, together with the intermediary that introduced the business. This would enable the firm to seek appropriate clarification, e.g. from the client or their adviser, if it is concerned about the suitability of what was recommended.*
- *Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely.*
- *Routinely identifying instances of execution-only clients who have signed disclaimers taking responsibility for their investment decisions, and gathering and analysing data regarding the aggregate volume of such business.*
- *Identifying instances of clients waiving their cancellation rights, and the reasons for this."*

### **The later publications**

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

*"This guide, originally published in September 2009, has been updated to give firms further guidance to help meet the regulatory requirements. These are not new or amended requirements, but a reminder of regulatory responsibilities that became a requirement in April 2007.*

*All firms, regardless of whether they do or do not provide advice must meet Principle 6 and treat customers fairly. COBS 3.2.3(2) is clear that a member of a pension scheme is a 'client' for SIPP operators and so is a customer under Principle 6. It is a SIPP operator's responsibility to assess its business with reference to our six TCF consumer outcomes."*

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

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

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

- *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for unauthorised business warnings.*
- *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*
- *Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of*

*business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.*

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

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

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

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

#### ***"Due diligence***

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

- *ensuring that all investments permitted by the scheme are permitted by HMRC, or where a tax charge is incurred, that charge is identifiable, HMRC is informed and the tax charge paid*
- *periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme*
- *having checks which may include, but are not limited to:*
  - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*
  - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*

- *ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified*
- *good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and*
- *ensuring these benchmarks clearly identify those instances that would lead a firm to decline the proposed business, or to undertake further investigations such as instances of potential pension liberation, investments that may breach HMRC tax-relievable investments and non-standard investments that have not been approved by the firm”*

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

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

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

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

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

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

At its introduction the 2009 Thematic Review Report says:

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

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

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

In L&C’s submissions on the case where the decision published under DRN4230171 was given, including when making its points about the regulatory publications, it has referenced the *R. (on the application of Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service* [2017] EWHC 352 (Admin) case. While the judge in that case made some observations about the application of our statutory remit, that remit remains unchanged. And, as noted above, in considering what’s fair and reasonable in all the circumstances of a case, I’m required to take into account (where appropriate) what I consider to have been good industry practice at the relevant time.

L&C has also said that many of the matters which the Report invites firms to consider are directed at firms providing advisory services. It didn’t specify which parts of the Report are directed at such firms but, to be clear, I think the Report is also directed at firms like L&C acting purely as SIPP operators. The Report says that “*We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses...*” And it’s noted prior to the good practice examples quoted above that “*We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs.*”

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

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

It’s also clear from the text of the 2009 and 2012 Thematic Review Reports (and the “*Dear CEO*” letter in 2014) that the regulator expected SIPP operators to have incorporated the

recommended good practices into the conduct of their business already. So, whilst the regulators' comments suggest some industry participants' understanding of how the good practice standards shaped what was expected of SIPP operators changed over time, it's clear the standards themselves hadn't changed.

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

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

The regulator also issued an alert in 2013 about advisers giving advice to consumers on SIPPs without consideration of the underlying investment to be held in the SIPP. The alert ("*Advising on pension transfers with a view to investing pension monies into unregulated products through a SIPP*") set out that this type of restricted advice didn't meet regulatory requirements. It said:

*"It has been brought to the FSA's attention that some financial advisers are giving advice to customers on pension transfers or pension switches without assessing the advantages and disadvantages of investments proposed to be held within the new pension. In particular, we have seen financial advisers moving customers' retirement savings to self-invested personal pensions (SIPPs) that invest wholly or primarily in high risk, often highly illiquid unregulated investments (some which may be in Unregulated Collective Investment Schemes).*

*...*

*Financial advisers using this advice model are under the mistaken impression that this process means they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect.*

*The FSA's view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, 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."*

The alert post-dates the events in this complaint – but, again, it didn't set new standards. It highlighted that advisers using the restricted advice model discussed in the alert generally weren't meeting *existing* regulatory requirements and set out the regulator's concerns about industry practices at the time.

To be clear, I don't say the Principles or the publications obliged L&C to ensure the transactions were suitable for Mrs B. It's accepted L&C wasn't required to give advice to Mrs B, and couldn't give advice. And I accept the publications don't alter the meaning of, or the scope of, the Principles. But as I've said above these are evidence of what I consider to have been good industry practice at the relevant time, which would bring about the outcomes envisaged by the Principles. As L&C notes from the FCA's Enforcement Guide,

publications of this type “*illustrate ways (but not the only ways) in which a person can comply with the relevant rules*”. And so it’s fair and reasonable for me to take them into account when deciding this complaint.

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

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

And in determining this complaint, I need to consider whether, in accepting Mrs B’s application to establish a SIPP and to invest in Store First, L&C complied with its regulatory obligations: to act with due skill, care and diligence; to take reasonable care to organise and control its affairs responsibly and effectively; to pay due regard to the interests of its customers and treat them fairly; and to act honestly, fairly and professionally. In doing that, I’m looking to the Principles and the publications listed above to provide an indication of what L&C should have done to comply with its regulatory obligations and duties.

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

And taking account of the factual context of this case, I think that in order for L&C to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), amongst other things it should have undertaken sufficient due diligence into TPO/the business TPO was introducing and the Store First investment *before* deciding to accept Mrs B’s applications.

Ultimately, what I’ll be looking at here is whether L&C took reasonable care, acted with due diligence and treated Mrs B fairly, in accordance with her best interests. And what I think is fair and reasonable in light of that. And I think the key issue in Mrs B’s complaint is whether it was fair and reasonable for L&C to have accepted her SIPP application and Store First application in the first place. So, I need to consider whether L&C carried out appropriate due diligence checks on TPO and the Store First investment before deciding to do so.

And the questions I need to consider include whether L&C ought to, acting fairly and reasonably to meet its regulatory obligations and good industry practice, have identified that consumers introduced by TPO and/or investing in Store First were being put at significant risk of detriment. And, if so, whether L&C should therefore not have accepted Mrs B’s application for the L&C SIPP and/or Store First investment.

## **The contract between L&C and Mrs B**

L&C made some submissions about its contract with Mrs B and I’ve carefully considered what it has said about this.

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

I've not overlooked or discounted the basis on which L&C was appointed. And my decision on what's fair and reasonable in the circumstances of Mrs B's case is made with all of this in mind. So, I've proceeded on the understanding that L&C wasn't obliged – and wasn't able – to give advice to Mrs B on the suitability of the SIPP or Store First investment.

### **What did L&C's obligations mean in practice?**

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

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

As set out above, to comply with the Principles, L&C 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 Mrs B) and treat them fairly. Its obligations and duties in this respect weren't prescriptive and depended on the nature of the circumstances, information and events on an ongoing basis.

So, I think L&C ought to have understood well before the time of Mrs B's application that its obligations meant that it had a responsibility to carry out appropriate checks on TPO to ensure the quality of the business it was introducing. And I think L&C also ought to have understood that its obligations meant that it had a responsibility to carry out appropriate due diligence on investments, like the Store First holding, before accepting them into its SIPPs.

### **L&C's due diligence on TPO**

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

L&C explained to us in a previous complaint (that was the subject of another published decision under DRN-3587366) that at the date of the SIPP application in that case, which was towards the end of 2011, it wouldn't have accepted applications from a firm that wasn't authorised by the FCA.

L&C also told us in that case that its directors from the relevant period had confirmed that its policy was that applicants effecting a pension transfer, as Mrs B was here, had to have had advice made available to them. And that it was then for the applicant to choose whether to

take up the intermediary's offer of advice. Our Service has previously asked L&C to confirm and clarify if its policy had since changed on this point. But L&C hasn't stated that it had in order for me to think its policy might have changed before it received Mrs B's application.

While I don't appear to have been provided with L&C's New Business Checklist for Mrs B's SIPP, I'm aware from submissions on previous complaints with our Service that this mentioned that if the IFA isn't authorised L&C had to ensure that the transfer wasn't from a DB Scheme. L&C has previously provided evidence to show that it checked TPO's entry on the FSA register on 30 August 2012. And I can see that TPO's permissions included advising on Pension Transfers and Pension Opt Outs.

As I understand it, L&C also entered into an intermediary agreement with TPO. In complaints involving a different introducer I've previously seen a copy of an L&C Intermediary application form and an L&C Intermediary Agreement for Non-Insured Contracts. But, to date, I've not seen copies of any agreements entered into between L&C and TPO. I asked L&C to provide a copy of any agreements that are/were in effect between it and TPO to me alongside its response to my provisional decision, but it hasn't done so.

As part of an agreement process, it was open to L&C to mention to TPO any policy requirements it had for full regulated advice to be made available to applicants where introduced business involved pension transfers. To date, no correspondence I've seen between L&C and TPO mentioned this.

Our Service has previously asked L&C a series of detailed questions about the due diligence it undertook into the introducer (which was TPO for the SIPP). This included information about, amongst other things, what L&C understood TPO's business model/client process to involve, how introductions were made, whether TPO was advising on the transfer and/or the underlying investments, whether L&C's understanding was advice would be given by TPO and whether L&C asked to see any suitability reports/pension transfer reports provided to clients TPO was introducing, details about the volume of business TPO introduced to L&C, the period this occurred over, the percentage of the introductions that involved occupational pension transfers and the percentage of the introductions where applicants were to invest in non-mainstream investments. As far as I'm aware, L&C has provided us with very little information about its relationship with TPO to date. I asked L&C to provide me with such information about the due diligence it undertook into TPO alongside its response to my provisional decision, but it hasn't done so.

Under DISP 3.5.9(3)R I may "*reach a decision on the basis of what has been supplied and take account of the failure by a party to provide information requested.*"

From the information that has been provided, I'm satisfied L&C did take some steps toward meeting its regulatory obligations and good industry practice. However, I don't think those steps we've seen evidence of went far enough, or were sufficient, to meet L&C's regulatory obligations and good industry practice.

I think L&C was aware of, or should have identified potential risks of, consumer detriment associated with business introduced by TPO, including the following, before it accepted Mrs B's application:

- The SIPP business introduced by TPO had anomalous features – it appears to have been high risk business, including a number of DB Scheme transfers where monies were ending up invested in unregulated and esoteric investments post-transfer.
- TPO had the necessary permissions to give full advice on the business it was introducing. However, TPO wasn't giving consumers it was introducing to L&C (like



Mrs B) advice on the suitability, or otherwise, of the high-risk unregulated Store First investment that their L&C SIPP's were being established, and that their monies were being transferred to L&C, to effect.

- Unregulated firms were promoting the Store First investments.
- L&C should have taken steps to address these risks (or, given these risks, simply declined to deal further with TPO). Such steps should have involved getting a fuller understanding of TPO's business model, through requesting information from TPO and through independent checks.
- Such understanding would have revealed there was a significant risk of consumer detriment associated with introductions of business from TPO.
- In the alternative TPO would have been unwilling to answer or fully answer the questions about its business model.
- In either event, L&C should have concluded it shouldn't accept introductions from TPO.

I've set out below some more detail on anomalous features of the business TPO was introducing to L&C, and on potential risks of consumer detriment that I think L&C either knew about, or ought to have known about, before it accepted Mrs B's SIPP application. These points overlap, to a degree, and should have been considered by L&C cumulatively.

### **Anomalous features**

#### The type of investments being made by TPO-introduced consumers

In previous complaints we've asked L&C about the percentage of introductions it received from TPO where applicants were to invest in non-mainstream investments.

In the absence of a response from L&C to this question, and having regard to other complaints we've received against L&C where TPO was the introducer, I'm satisfied that in most, if not all, of these complaints the consumers ended up with SIPP monies invested in Store First. And I think this might be reflective of the pattern of total business L&C received from TPO. So, based on the evidence I've seen to date, I think it's more likely than not that either all of, or the vast majority of, consumers introduced to L&C by TPO ended up with SIPP monies invested in higher risk non-standard assets like the Store First investment.

That *most* TPO-introduced consumers were ending up invested in higher risk unregulated holdings doesn't appear inconsistent with what Mr P of TPO is quoted as stating by the FCA in a final notice it issued about a firm named United Claims Management Limited dated 14 May 2021. The FCA quotes Mr P as stating that:

*"...I was a director of The Pensions Office Limited, which went into Creditors Voluntary Liquidation on 9 March 2015"; "Since at least 16 July 2012 I misused my position as an 'Approved Person' with the regulatory authority by failing to ensure that The Pensions Office ('TPO') properly advise[d] its clients on the transfer of lowrisk personal and occupation (sic) pension products into Self-Invested Personal Pensions ('SIPPs') and failing to advise clients on the high risk unregulated underlying investment, much of which was into 'Storepod' investments"; and "TPO also failed to take into account financial circumstances, needs and objectives and attitude to risk when advising clients and failed to ensure that adequate systems,*

*controls, risk analysis and management information were put in place...*"

So, from the evidence made available to us to date, I think it's more likely than not that either all of, or the vast majority of, consumers introduced to L&C by TPO ended up with their SIPP monies invested in higher risk unregulated investments such as the Store First investment Mrs B invested in.

I think it's fair to say that such investments are highly unlikely to be suitable for the vast majority of retail clients. They will generally only be suitable for a small proportion of the population. And I think L&C either was aware, or ought reasonably to have been aware, that the type of business TPO was introducing was high risk and therefore carried a potential risk of consumer detriment.

#### Volume and nature of business introduced

In previous complaints our Service has asked L&C about the business TPO introduced to L&C, the period this occurred over and the percentage of those introductions that involved occupational pension transfers. As mentioned above, L&C hasn't responded to our questions about this. And under DISP 3.5.9 (3) R I may "*reach a decision on the basis of what has been supplied and take account of the failure by a party to provide information requested.*"

An example of good practice identified in the FSA's 2009 Thematic Review Report was:

*"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."*

I think L&C either had, or ought to have had, access to information about the number and type of introductions that TPO made. I say that because, as can be seen in the decision published under DRN-3587366, it's previously been able to provide similar information to us about a different firm that was introducing business to it.

And I don't think simply keeping records about the number and nature of introductions that TPO made without scrutinising that information would have been consistent with good industry practice and L&C's regulatory obligations. As highlighted in the 2009 Thematic Review Report, the reason why the records are important is so that potentially unsuitable SIPPs can be identified.

Mrs B's SIPP application form included TPO's details, but she didn't tick either of the prescribed boxes for her to say whether or not advice had been given to her at the point of sale.

This wasn't the only form L&C was receiving from TPO-introduced consumers like Mrs B. Mrs B's investment purchase request form had a question about whether advice had been provided on the proposed investment and she selected that she hadn't received any advice on that.

Where customers had ticked to say they had received advice on this form though, there was a section for the adviser to fill out (including a box for their FCA number(s)). And in none of the forms I've seen on previous complaints was the section to be filled out by an adviser, if advice had been given, completed.

From the point in time L&C first started receiving investment purchase request forms from TPO introduced consumers for Store First investments, I think it was on notice from the content of those forms that TPO might not have given consumers any advice on Store First investments.

TPO was a regulated business that had permissions to advise on the establishment of a SIPP, the transfer of monies into that SIPP and where monies would be invested post transfer. But I think that from very early on L&C was aware, or ought to have been aware, that TPO wasn't a firm that was doing things in a conventional way.

It's unusual for regulated advice firms to be involved in transactions involving pension transfers to invest in high-risk esoteric investments, such as the Store First investment, where no advice is being given by that firm on the investment. That's because the risks involved in such investments are unlikely to be fully understood by most people, without obtaining regulated advice. I think it's fair to say that most advice firms decline to be involved in such transactions.

I think this ought to have been a red flag for L&C in its dealings with TPO. And I think L&C ought to have recognised that there was a risk that TPO might be choosing to introduce consumers without it having offered them regulated advice on the unregulated investments that their transfers to L&C were being effected to make. I think L&C ought to have viewed this as a serious cause for concern – this was a clear and obvious potential risk of consumer detriment in this case.

And I think this concern ought to have been even greater in a case like Mrs B's where a DB Scheme was involved. At the relevant date COBS 19.1.6G stated:

*"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 interests".*

While I acknowledge this aims to define the expectation of a regulated financial adviser when determining the suitability of a pension transfer, it emphasises the regulator's concern about the potential detriment such a transaction could expose a consumer to. Given the nature of its business and regulatory status, I'd expect L&C to have been familiar with the guidance contained in the COBS – even if it didn't apply directly to it. This was a further clear and obvious potential risk of consumer detriment.

### **The involvement of an unregulated business**

As I've mentioned above, from the point in time L&C first started receiving investment purchase request forms from TPO-introduced consumers for Store First investments, I think L&C was on notice from the content of those that TPO might not have given consumers any advice on Store First investments.

Having carefully considered the available evidence, including Mr P's comments referenced above, and investment purchase request forms I've seen in Mrs B's case and in other complaints against L&C where TPO was the introducer, I think it's more likely than not that most, if not all, TPO introduced L&C consumers were doing the same thing. Either the SIPP application form for TPO-introduced L&C consumers didn't reflect whether or not advice had been given at the point of sale by TPO and then the investment purchase request form to L&C to invest in Store First said that advice hadn't been given on the investment, as in Mrs B's particular case. Or, in light of previous complaints I've seen, the SIPP application forms

recorded that advice was given at the point of sale by TPO, pension monies were then being transferred, and, subsequently, TPO-introduced customers were submitting an investment purchase request form to L&C to invest in Store First where the section of that form for an adviser to complete if advice had been proffered was blank.

If L&C believed that TPO was advising consumers, like Mrs B, on the Store First investment, I think L&C ought to have questioned this anomaly in the investment purchase request forms it was receiving. And I think it ought to have done this from the point in time that it first started receiving such forms from TPO-introduced consumers.

To be clear, I don't think it's credible that most, or all, of these TPO-introduced consumers were independently determining to invest their pension monies in Store First without any input from a third party. Given what L&C ought reasonably to have identified about the business it was receiving from TPO had it undertaken adequate due diligence, I think this should have been a significant cause for concern for L&C and caused it to consider the business it was receiving from TPO very carefully. I think that L&C ought to have been alive to the risk that an unregulated third party might have been involved in promoting the Store First investments to investors, like Mrs B, and that consumers might not have been receiving any regulated advice from TPO on their Store First investments.

L&C obtained a report from a firm named Enhanced Support Solutions Limited. This report stated that Store First was promoting its products in the UK through Harley Scott Holdings Limited ('the promoter'). And it was, or ought to have been, apparent from paperwork that L&C received, such as the Store First reservation form, that Jackson Francis was also involved in the process. Neither Harley Scott Holdings Limited nor Jackson Francis were regulated by the FSA/FCA.

TPO's suitability report also said that it had been informed by Jackson Francis that Mrs B wanted to transfer her monies into a SIPP so as to make investments that weren't permitted within her existing arrangement. Mrs B's Store First reservation form said that the agent was Jackson Francis. And Mrs B has said that she received a 'cold call' – which Jackson Francis was later reported as doing – about investing her pension within the SIPP. So I'm satisfied Jackson Francis was involved in promoting the Store First investment to Mrs B.

Even if the promotion of Store First wasn't a regulated activity, this was nonetheless another clear and obvious potential risk of consumer detriment – particularly where pension investors were being targeted, as appears to be the case here.

It's unlikely retail clients like Mrs B were proactively deciding to transfer their pension provisions to a SIPP in order to invest in Store First without the involvement of a third party. And I'm satisfied that's consistent with the testimony Mrs B has provided on this issue.

I think that L&C should have been alive to the risks associated with an unregulated firm that wasn't subject to regulatory controls promoting an unregulated investment for SIPPs to consumers being introduced to L&C, and which investment was unlikely to be suitable for the vast majority of retail clients. That's especially true in circumstances like this where I think L&C ought to have identified that regulated advice, on the unregulated investment that consumers' pension monies were being transferred to L&C to effect, wasn't being offered to those consumers by the regulated IFA who was introducing their business to L&C.

### **What fair and reasonable steps should L&C have taken, in the circumstances?**

L&C could simply have concluded that, given the potential risks of consumer detriment – which I think were clear and obvious at the time – it should not accept applications from TPO. That would have been a fair and reasonable step to take, in the circumstances.

Alternatively, L&C could have taken fair and reasonable steps to address the potential risks of consumer detriment.

#### Requesting information directly from TPO

Given the significant potential risk of consumer detriment I think that, as part of its due diligence on TPO, L&C ought to have found out more about how TPO was operating and before it accepted Mrs B's application. Mindful of the type of introductions I think it was receiving from TPO, and the content of investment purchase request forms it was receiving for TPO-introduced consumers, I think it's fair and reasonable to expect L&C, in-line with its regulatory obligations, to have made some very specific enquiries and obtained information about TPO's business model.

As set out above, the 2009 Thematic Review Report explained that the regulator would expect SIPP operators to have procedures and controls, and for management information to be gathered and analysed, so as to enable the identification of, amongst other things, *"consumer detriment such as unsuitable SIPPs"*. Further, that this could then be addressed in an appropriate way *"...for example by contacting the members to confirm the position, or by contacting the firm giving advice and asking for clarification."*

The October 2013 finalised SIPP operator guidance gave an example of good practice as:

*"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."*

I think that L&C, and before it received Mrs B's application from TPO, should have checked with TPO about things like: how it came into contact with potential clients, what agreements it had in place with its clients, whether all of the clients it was introducing were being offered full advice, what its arrangements with any unregulated businesses were, how and why retail clients were interested in making Store First investments, whether it was aware of anyone else providing information to clients, how it was able to meet with or speak with all its clients, and what material was being provided to clients by it.

I think obtaining this type of information from TPO was a fair and reasonable step for L&C to take, in the circumstances, to meet its regulatory obligations and good industry practice.

And, on balance, I think it's more likely than not that if L&C *had* checked with TPO and asked the type of questions I've mentioned above that TPO would have provided a full response to the information sought.

In the alternative, if TPO had been unwilling to answer such questions if they'd been put to it by L&C, I think L&C should simply then have declined to accept introductions from TPO.

#### Making independent checks

I think, in light of what I've said above, it would also have been fair and reasonable for L&C, to meet its regulatory obligations and good industry practice, to have taken independent steps to enhance its understanding of the introductions it was receiving from TPO. For example, it could have asked for copies of correspondence in which applicants were being offered advice.

The 2009 Thematic Review Report said that:

*“...we would expect (SIPP operators) to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, **for example by contacting the members to confirm the position, or by contacting the firm giving advice and asking for clarification.**”* (bold my emphasis)

The 2009 Thematic Review Report also said that an example of good practice was:

*“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.”*

So I think it would have been fair and reasonable for L&C to speak to some applicants, like Mrs B, directly and/or to seek copies of the suitability reports.

I accept L&C couldn’t give advice. But it had to take reasonable steps to meet its regulatory obligations. And in my view such steps included addressing a potential risk of consumer detriment by speaking to applicants and/or having sight of advice letters, as this could have provided L&C with further insight into TPO’s business model. It could also have helped to clarify to L&C whether full regulated advice on the overall proposition was being offered to consumers, including on the Store First investment that TPO-introduced consumers’ pension monies were being transferred to L&C to effect. These were fair and reasonable steps to take in reaction to the clear and obvious risks of consumer detriment I’ve mentioned.

#### **Had it taken these fair and reasonable steps, what should L&C have concluded?**

If L&C had undertaken these steps I think it ought to have identified, amongst others, the following risks before it accepted Mrs B’s application:

- TPO was having business referred to it by introducers, like Jackson Francis, and it was then introducing business to L&C.
- TPO wasn’t offering consumers it was introducing to L&C (like Mrs B) advice on the suitability, or otherwise, of the high-risk unregulated Store First investment that their L&C SIPPs were being established, and that their monies were being transferred to L&C, to effect.
- Consumers might have been ‘sold’ on the idea of transferring pension monies to invest in Store First before the involvement of any regulated parties.
- The anomalous features I’ve mentioned above carried a significant risk of consumer detriment.

Each of these in isolation is significant, but cumulatively I think they demonstrate that there was a significant risk of consumer detriment associated with the introductions L&C received from TPO. I think that L&C ought to have had real concerns that TPO wasn’t acting in customers’ best interests and that it wasn’t meeting its regulatory obligations.

Had L&C carried out the due diligence I’ve mentioned above, I think it should have identified that consumers (like Mrs B) introduced by TPO hadn’t been offered, or received, regulated

advice from TPO on the suitability, or otherwise, of the high-risk unregulated investment that their pension monies were being transferred to L&C so as to effect.

In Mrs B's case, TPO's suitability report said that it didn't recommend she transfer her DB scheme, as this was unlikely to leave her better off. It mentioned that Mrs B's acceptance of risk was "*low to medium*" and that alternative investments represented a higher risk than appeared appropriate for Mrs B's risk profile. But TPO also said that Jackson Francis had "*advised*" it that Mrs B wanted to effect a transfer so as to make an investment(s). And TPO still proactively offered to assist in effecting the transfer if Mrs B wanted to do so to make one or more investments that aren't permitted in her (then) existing pension arrangement. TPO did this without offering any advice on the specific Store First investment, stating that it wasn't "*able to assist with advice of this nature*" while at the same time enclosing application forms for Mrs B to complete and return to TPO, so that the transfer could proceed. I've seen advice letters from TPO which adopt a similar approach on a number of other complaints we've received against L&C where TPO was the introducer (copies of which have previously been sent to L&C on other complaints).

It's unusual for regulated advice firms to be involved in transactions involving pension transfers to invest in high-risk esoteric investments, such as the Store First investment, where no advice is being given by that firm on the specific investment. That's because the risks involved in such investments are unlikely to be fully understood by most people, without obtaining regulated advice. I think it's fair to say that most advice firms decline to be involved in such transactions.

So, the approach TPO was taking was an unusual role for a regulated advice firm to take. TPO wasn't discussing the specific risks associated with the Store First investment with consumers it was introducing to L&C, even though the reason those consumers were establishing L&C SIPPs, and transferring pension monies to L&C, was so as to effect the Store First investment. This raises significant questions about the motivations and competency of TPO – particularly where consumers were being introduced by an unregulated business like Jackson Francis.

Had L&C taken appropriate steps, such as seeking clarification from some applicants introduced by TPO at the time, like Mrs B, and/or requesting copies of some suitability reports for TPO-introduced consumers, I think it's more likely than not that the information L&C obtained would have accorded with what TPO was stating in its suitability reports at the time, and with what Mr P is quoted as saying in the FCA's 14 May 2021 final notice mentioned above. Namely, that TPO wasn't offering consumers it was introducing any advice on investing in high-risk unregulated investments, like Store First, that their pension monies were being transferred to invest in.

In which case, I think L&C ought to have concluded that Mrs B – and applicants before her – weren't being offered regulated advice by TPO on the unregulated investment that their pension monies were being transferred to L&C to effect. And I think that L&C ought to have viewed this as a significant point of concern. Retail consumers, like Mrs B, were transferring pension monies, including DB schemes, to L&C to invest in higher-risk esoteric investments like Store First, and without the benefit of having been offered any regulated advice on that investment by the financial advisory firm who was introducing their business to L&C.

I also think L&C should have concluded that consumers introduced by TPO who were investing in Store First might have been 'sold' on the Store First investments by an unregulated third party. And I think, if asked by L&C, Mrs B would have explained how her Store First application came about which, as I mention, I think was likely the result of the involvement of the unregulated business Jackson Francis. I'm satisfied the contents of TPO's suitability report and Mrs B's comments support such a conclusion.

So, I think that L&C should have identified that the business it was receiving from TPO, whereby TPO wasn't offering consumers it was introducing to L&C (like Mrs B) advice on the suitability, or otherwise, of the high-risk unregulated Store First investment that their monies were being transferred to L&C to effect, raised serious questions about the motivation and competency of TPO.

And I think L&C should have concluded, and before it accepted Mrs B's business from TPO, that it shouldn't accept introductions from TPO. I therefore conclude that it's fair and reasonable in the circumstances to say that L&C shouldn't have accepted Mrs B's application from TPO.

L&C didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mrs B fairly by accepting her application from TPO. To my mind, L&C didn't meet its regulatory obligations or good industry practice at the relevant time, and allowed Mrs B to be put at significant risk of detriment as a result.

L&C shouldn't have accepted Mrs B's introduction from TPO at all. And, to be clear, even if I thought L&C had undertaken adequate due diligence on Store First and acted appropriately in permitting that investment into its SIPP's (which, as I explain below, I don't), I'd still consider it fair and reasonable to uphold Mrs B's complaint on the basis of what I've already set out above – that L&C shouldn't have accepted Mrs B's introduction from TPO in the first place. However, for completeness, I've also gone on to consider the due diligence that L&C carried out on the Store First investment.

### **L&C's due diligence on Store First**

I'm satisfied that, to meet its regulatory obligations when conducting its business, L&C was required to consider whether to accept or reject a particular investment (here Store First), with the Principles in mind.

I think that it's fair and reasonable to expect L&C to have looked carefully at the Store First investment before permitting it into its SIPP's. To be clear, for L&C to accept the Store First investment without carrying out a level of due diligence that was consistent with its regulatory obligations, while asking its customer to accept warnings absolving it of the consequences, wouldn't in my view be fair and reasonable or sufficient. And if L&C didn't look at the investment in detail, and if such a detailed look would have revealed that potential investors might be being misled, or that the investment might not be secure or might be fraudulent, it wouldn't in my view be fair or reasonable to say L&C had exercised due skill, care and diligence – or treated its customer fairly – by accepting such an investment.

In previous complaints L&C provided us with some evidence of the due diligence it undertook into Store First. Including a copy of a report by Enhanced Support Solutions Limited dated 22 March 2011. Amongst other things, the report says that:

- The Store First investment concerned ownership of individual leasehold storage units within a storage facility.
- Individual units were held under a 250-year lease.
- Units were sub-let to a management company subject to a six-year term.
- To provide income through the sub-lease to Store First Management Limited ('SFML'), SFML rented the units, under licence, to end users.
- The seller of the sub-lease was Store First and the UK promoter was Harley Scott Holdings Limited.



- A CCJ was issued against the promoter of the scheme, but Enhanced Support Solutions Limited understood this arose from a disputed invoice which was in the course of being settled.
- The leasehold interest could be sold/assigned at any time.
- It was anticipated that the individual value would primarily be based on the rental income achieved. A standard valuation could be obtained as per any property from a RICS surveyor.
- The lease was on commercial terms with SFML. The scheme member shouldn't use the storage space for their own use to avoid any personal benefit being derived.
- As the investment was unregulated, no protection was offered through the FSCS.
- The review had been based on information supplied by Harley Scott Holdings Limited.
- Where used by a SIPP operator, a scheme member 'high risk/illiquid' disclaimer could be considered.
- The SIPP operator should engage legal advice on conveyancing.
- The investment was approved for SIPP investment by an Enhanced Support Solutions Limited consultant on 5 April 2011.

On 23 August 2012 an L&C employee (as I understand it an investment support manager) emailed several colleagues at L&C, including L&C's Director & Head of Compliance. The email was titled "Store First – Review" and stated that:

*"Following the receipt of the SIP Member Update which mentioned that (Mr W's) firm faces tax investigation' we immediately imposed a temporary suspension on all Store First investments pending further investigation. I advised all three IFA introducers by telephone that we have a technical issue and have imposed a temporary suspension until we resolve.*

*I have carried out an investigation and based on the information obtained my findings follow:*

#### *Findings*

*1) The tax investigation is into Harley Scott Group of companies and this does not currently extend to Store first or its parent Group First. We have received written confirmation of this from Pierce Accountants.*

*2) It is not apparent that Harley Scott is linked to Store First or Group First in anyway other than that (Mr W) is a director and shareholder in all.*

*(there is no 3)*

*4) (Mr W's) business dealings seem to attract the label of 'controversial' in press articles.*

*5) (An employee of) SIPP Investment Platform Limited confirmed that he has an increased level of enquiries on Store First (I suspect in response to their member bulletin) and mentioned (sic) that some providers are not allowing investment into Storefirst, and that others are awaiting their report. He was unable to provide any further additional information. They are starting their review of this investment at the moment and the report will not be available for a few weeks.*

*6) (An employee of) Hetheringtons Solicitors (sic) confirmed that Harley Scott is a separate company to Store First, and added that as we are purchasing a lease she*

*believes that a (sic) even if a tax investigation was to be carried out on Store First it should have no detrimental effect on our purchase. She was of the opinion that we did not need to be concerned by the tax investigation.*

#### *Recommendation*

*My recommendation would be to lift the suspension with immediate effect to be reviewed again upon receipt new information or the SIP report whichever is sooner. If everyone is in agreement then I will also confirm to the IFAs introducing the business that we have lifted the suspension pending the detailed DD report being carried out by SIP. I suggest that we also make a weekly internet search of the above until the SIP report is available.*

*Please confirm if you are all in agreement."*

I've seen two replies from two different individuals, including from L&C's Director & Head of Compliance, to the 23 August 2012 email. The effect of the responses is to support the recommendation and it's noted in one of the responses that:

*"Good investigation and analysis. Your recommendations are agreed by me.*

*...*

*...we should probably check to see if the Storepods investment is captured by the latest FSA initiative re UCIS or UCIS-type investments as this will determine whether we should be vetting the apps to check that the clients are Sophisticated/High Net Worth etc.*

*...*

*(Name of investment support manager) will you also give (L&C colleague) the go ahead to process the apps."*

On 17 January 2013 the same investment support manager at L&C sent an email to a L&C sales team address and a L&C property address. The subject of the email was "*Subject: Storefirst - Storepods - Self Storage Units - Suspension of investment*" and the email said that:

*"We have with, immediate effect, suspended all new investments in the above.*

*Storefirst have failed to provide us with certain ongoing monitoring information within a reasonable timescale and our Investment Committee have decided that we suspend all new investments. This includes any applications we have already received.*

*Please would you make sure you update any of your IFA's who submit Storefirst - Storepod applications **immediately**. I believe that the majority are submitted by The Pensions Office and Real SIPP. I suggest that if you are questioned then you say something like **'we have requested an update on the progress of the facilities and a response has not been forthcoming'**."*

We've been provided with an ongoing monitoring report by L&C's investment support manager dated 26 February 2013. It's noted amongst other things in the report that:

- L&C had requested an update on the progress of the investment.
- Store First hadn't provided information within a reasonable timescale, so L&C had decided to temporarily suspend any pending or new investment into Store First.
- The total value of L&C's Storepod purchases was £1,400,000 as at end of January 2013.

- This was made up of 53 different SIPP members equating to an average holding per member of £26,415.
- It was looking to check that Store First was delivering on the promises made to investors.

It had asked Store First for the following:

*“The present sites that we have accepted are Barnsley, Liverpool, Rochdale and Blackburn. Please can you confirm if the units have been built and are ready for leasing.*

*If any of the sites have been built can you confirm if any of the units we have purchased have been rented out or if they are still working under the guaranteed rental agreement set out in the contracts.*

- 1) Report & Accounts for each company
- 2) Plan of each site detailing all storage units
- 3) How many storage units on each site have been completed to date
- 4) How many storage units on each site have not been completed to date
- 5) How many storage units on each site have been let to date
- 6) Have any of the storage units subsequently been sold, how many, at what price compared with the original purchase price
- 7) How many storage units we own on each site”

The report continued noting that:

- Members are provided with an outline of costs and sample legal documents by L&C before entering into any obligation to purchase. Purchases only proceed once members have confirmed that they’re happy with the documents and fees.
- It insists on a valuation for each site from an appropriately qualified valuer, and its property team obtain valuations on a six-monthly basis for each site.
- All Storepod purchases are made via scheme appointed lawyers and have clear title and are registered individually at HM Land Registry.
- L&C’s property team had advised that rent was coming in as expected with no issues. All of the Storepods were (then) within the rent guarantee period.
- Store First appeared to have made all of their annual returns and submitted accounts as required.
- A SIPP Investment Platform (‘SIP’) Review was carried out by SIP’s precursor Enhance Support Solutions in 2011 (as I understand it this is the Enhance Support Solutions Limited report I’ve referred to elsewhere in this decision).
- Store First had provided L&C with the information it had requested.
- L&C hadn’t verified information and commentary provided by Store First regarding timescales, achievable rent, resale values, and market research. However, the valuations provided appear to support Store First’s claims.
- It’s appropriate that L&C carry out checks from time to time to ensure that the investment is operating as promised by the investment provider.
- It appears that Storepods are being sold constructed and let out as promised. Rent is being received, and the purchases are all being made as expected. The Hetherington Partnership had no cause for concern and legal title was being registered at HM Land Registry.
- There didn’t appear to be cause for concern at this stage, but due to the unregulated nature of the investment and large sums of money already invested L&C should exercise continued caution.
- The recommendation was to continue ongoing monitoring and to lift the suspension immediately. Further, that any new sites from the same corporate entities with an

identical set up to those L&C had already invested in wouldn't need to pass through SIP.

We've previously been provided with some of the correspondence that's referred to in the 26 February 2013 report. But I've not seen copies of the emails that were exchanged between L&C's investment support manager and Group First/Store First on 21 January 2013, 24 January 2013, 28 January 2013 and 5 February 2013 – this included correspondence with Mr W. I've also not seen copies of emails that are referred to between L&C's investment support manager and The Hetherington Partnership on 19 February 2013, despite our Service previously asking for these in the complaint where the decision published under DRN4230171 was given.

Group First emailed L&C's investment support manager on 9 January 2013 and it was stated that some of the information that had been requested was being enclosed. This included reports and accounts for each company, a plan of each site, a current valuation and site information.

I've seen copies of the site plans and a copy of the valuation. But I've not seen the content of the response provided by Group First/Store First to the other queries L&C raised. Including, amongst other things, information about the number of storage units that had been completed on each site, the number of storage units that had been let to date and whether any storage units had been sold and, if so, the price they'd been sold at compared to the original purchase price. That is despite our Service also previously asking for these in the complaint where the decision published under DRN4230171 was given.

The valuation report was undertaken by a chartered surveyor who had received instructions from Group First to inspect a Storage Pods property in Barnsley. The valuer said amongst other things that:

*"The property is likely to enjoy a fair level of occupational demand by virtue of its site, general characteristics and condition.*

*...*

*We consider there are unlikely to be any significant fluctuations in the general levels of both rental and capital values.*

*...*

*The individual store pods are held on a 250 year Long leasehold basis with a ground rent of £12.50 per sq ft payable. There is a service charge of £1.95 per sq ft payable. A management fee of 15% of the rent receivable is charged by Store First.*

*The store pods are sublet back to Store First at a rental of £17 per sq ft per annum on an 86 year lease. There are fixed upwards-only rent reviewed every two years.*

*...*

*There had been a general downturn in the commercial property market over the past four years. This has affected all types of commercial properties with a large reduction in values from the peak of the market in Autumn 2007."*

There's then a section titled "Capital Value" with a table that reads as follows:

Size (sq.ft)	Market Value
25	£4,750.00
50	£9,500.00
75	£13,950.00
100	£18,750.00
150	£27,950.00
175	£32,950.00

On 8 March 2013, the investment support manager at L&C sent an email to a number of L&C colleagues. The subject of the email was “Storefirst - New Sites” and the email said that:

*“As we agreed - The property team can proceed with investments in the following sites on the basis that we have already carried out a review of the existing sites/investment and that we must have received and accepted a valuation of the site for the specific purchase. We have already carried out a recent review of the contracting entities involved in the existing sites and it is our understanding that the entities will be the same for new sites.*

*Barnsley x1  
Blackburn x3  
Burnley x2  
Ellesmere Port x1 (aka Cheshire Oaks)  
Glasgow x1  
Leeds x1  
Liverpool x2  
Rochdale x2  
Preston x1  
Wakefield x1*

*Property Team - Please ensure you have received a valuation for each site and that it has been accepted by us. If you detect any changes to contracts or companies involved then please notify Corporate Governance immediately.*

*(L&C colleague) please put this in the Storefirst file.”*

Having carefully considered all of the information that’s been made available to us to date, I don’t think L&C’s actions went far enough. As I explain in more detail below, I’m not currently satisfied that L&C undertook sufficient due diligence on the Store First investment before it decided to accept that investment into its SIPPs. As such, in my view, L&C didn’t comply with its regulatory obligations and good practice, and it didn’t act fairly and reasonably in its dealings with Mrs B, by not undertaking sufficient due diligence on the Store First investment before it accepted her application to invest in Store First.

Further, based on what it knew or ought to have known had it undertaken sufficient due

diligence, I think L&C failed to draw a reasonable conclusion on accepting the Store First investment into its SIPPs.

**If L&C had completed sufficient due diligence, what ought it reasonably to have discovered?**

I note that some information about the Store First investment was compiled by Enhance Support Solutions Limited. That firm provided L&C with a brief report and, amongst other things, the report said that no adverse history had been found about the seller of the sublease, Store First, or the UK promoter, Harley Scott Holdings Limited.

Reference was made to a CCJ being recorded against Harley Scott Holdings Limited and Enhance Support Solutions Limited said that it understood this arose from a disputed invoice that was in the course of being settled. Enhance Support Solutions Limited doesn't expand on how it's come to that understanding, but it does say elsewhere in its report that "*This review has been based on information supplied by email from...Harley Scott Holdings Limited.*"

In my view, it would have been fair and reasonable for L&C to have conducted some further basic *independent* searches following its receipt of Enhance Support Solutions Limited's report. I think that's especially true in the circumstances given the fact that Enhance Support Solutions Limited acknowledged its review was premised on information supplied by Harley Scott Holdings Limited.

Enhance Support Solutions Limited's report was mentioned in the 26 February 2013 ongoing monitoring report by L&C's investment support manager. It's not clear how much weight L&C placed on Enhance Support Solutions Limited's report before first permitting Store First investments to be held in its SIPPs. However, in my view Enhance Support Solutions Limited's report was of limited value. It was cursory, it states it's based on material emailed to it by Harley Scott Holdings Limited and it makes no comment on the obvious issues with the Store First marketing material. So, I don't think L&C should have taken much comfort from Enhance Support Solutions Limited's report or attached any significant weight to it.

Had basic independent searches been completed by L&C following its receipt of Enhance Support Solutions Limited's report, I think it's more likely than not that they'd have shown that Dylan Harvey Group Limited (Harley Scott Holdings Limited's previous business name before a name change in June 2010) and one of its directors, Mr W, had been the subject of national press reports, online petitions and proposed legal action, as a result of a failed property investment. It was reported that hundreds of investors had invested money in a scheme to develop flats, but the flats had not been built and the investors had been unable to recover their money. Mr W was also a director of Store First. Some of these things were briefly mentioned in the internal L&C email of 23 August 2012 I've mentioned above.

I think a basic search of Harley Scott Holdings Limited's filing history would also have shown issues being raised by Harley Scott Holdings Limited's then auditors at the start of 2010, which resulted in their resignation. And that in Harley Scott Holdings Limited's account made up to 28 February 2009, auditors had highlighted that they're materially uncertain as to the future of Harley Scott Holdings Limited.

Importantly, and consistent with its regulatory obligations, I think that when undertaking due diligence into the proposed Store First investment that L&C should have had regard to, and given careful consideration to, Store First's marketing material.

Store First's marketing material from the relevant period included the following prominent statements:

*"You will receive guaranteed returns from a 6 year lease already in place upon completion, making this a high yielding, hassle-free investment which has been specifically designed to meet the needs of today's astute investor."*

*"You will receive a 6 year lease in place upon completion. The lease produces an excellent return of 8% (guaranteed for the first 2 years) rising to over 12% in years 5 and 6. The lease contains upward-only rental reviews and break clauses for both parties every two years."*

The marketing material also sets out in a table the returns payable in years 1&2, 3&4 and 5&6 at 8%, 10% and 12%. In the "Your Questions Answered..." section the following is included:

*"What rental income can I expect?"*

*Storepod rental starts at £17 per Sq/Ft per annum (+ VAT). The 6 year tenancy/lease in place on your Storepod has fixed upwards only rental reviews and break clauses (for both parties) every 2 years. This produces an 8% yield on your investment within the first two years, this then is predicted to rise to over 10% return in years 3&4 and then surpass 12% return in years 5&6.*

*Can I easily re-sell my Storepod?"*

*Yes, you can re-sell your Storepod at any time and selling your Storepod couldn't be simpler. Store First Ltd can market your Storepod upon your request. We believe that because Storepods are so competitively priced when new, they will make a very attractive sale proposition in the future. We also expect that many tenants will wish to purchase the Storepod they are using. For example, other self storage PLCs usually achieve rent of between £20.00 - £25.00 per square foot. Our Storepods are costed at a rent of only £17.00 per square foot; once higher rents are achieved the capital value of the Storepod will increase.*

*Guaranteed exit route?"*

*In year 5, investors have the option to enter the guaranteed buy-back scheme. In this scheme, Store First Management Ltd will guarantee to buy the Storepod back off the investor for the original price paid within the next 5 years. This is a unique offer in the market place and we are happy to be able to offer this exit route to our investors.*

*Most investors are driven to keep the property investment they have purchased and carry on receiving the rental yield produced for years to come, this means only a very limited number of Storepods per centre will ever come onto the resale market, this creates a high sale value and demand for the future."*

The marketing material says the "figures shown are for illustration purposes". But it does not contain any type of risk warning, or illustrations of any other returns. No explanation of the guarantees was offered, or the basis of the projected returns – other than Store First's own confidence in its business model and the self-storage marketplace.

L&C's internal August 2012 email records that an employee of SIP confirmed that there'd been an increased level of enquiries on Store First and that some providers were not allowing investments in Store First, and that others were awaiting SIP's report. It was noted that this report wouldn't be available for a few weeks.

As I understand it, L&C opted not to wait for the report from SIP before continuing to permit Store First investments to be held in its SIPPs. L&C later decided to suspend further investments being made in Store First in January 2013, noting that Store First had failed to provide it with information requested in a reasonable timescale.

I can see L&C asked Store First some questions, as these are set out in correspondence we've previously been provided alongside L&C's ongoing monitoring report of 26 February 2013. Aside from question 7) "*How many storage units we (L&C) own on each site*", the other questions set out in this are all questions I think L&C ought to have asked Store First before it permitted consumers, like Mrs B, to invest in Store First through their L&C SIPP. I've not seen that L&C did this.

I've also not seen the answers that L&C received from Store First to the questions "*How many storage units on each site have been let to date*" and "*Have any of the storage units subsequently been sold, how many, at what price compared with the original purchase price.*"

I do think L&C having concerns about these issues on an ongoing basis and asking these questions was good practice. But I also think that questions like these were relevant to establishing an understanding of the nature of the investment and trying to ensure the investment was genuine at outset. Such that L&C should also have obtained answers to questions akin to these before it allowed Store First investments to be held in any of its SIPPs.

And I think that's especially true in circumstances like these where, as I explain below, I think that L&C should have identified, and before permitting the Store First investments to be held in its SIPPs, that there was a significant risk that potential investors were being misled by Store First's marketing material.

To be clear, if Store First was unwilling or unable to fully answer L&C's questions and to provide information sought then I think, consistent with its regulatory obligations and good practice L&C should simply have concluded it wouldn't permit Store First investments to be held within its SIPPs.

**If L&C had completed sufficient due diligence on Store First, what ought it reasonably to have concluded?**

The failure of the previous scheme which Dylan Harvey Group Limited/Harley Scott Holdings had been involved in may have been entirely down to market forces. But I think the fact that Store First's UK promoter, who was commented on in Enhance Support Solutions Limited's report and who had supplied information that was relied upon in that report, had recently been involved in a property investment scheme which failed, had recently changed its name and had relatively recently been subject to some adverse comments following audit, ought to have given L&C cause for concern. Particularly when considered alongside the content of Store First's marketing material and the fact that L&C had identified that "(Mr W's) *business dealings seem to attract the label of 'controversial' in press articles.*"

I think there were a number of things about Store First's marketing material which ought to have given L&C significant cause for concern and led it to draw similar conclusions to those later drawn by the SSA UK on the basis of a report by Deloitte LLP and the Insolvency Service. Namely, that there was a significant risk that potential investors were being misled.

Store First appeared to be presenting the investment as one that was assured to provide high and rising returns, was underwritten by guarantees, and offered a high level of liquidity together with a strong prospect of a capital return – despite the fact that there was no



investor protection associated with the investment and the investment was potentially illiquid.

Store First had no proven track record for investors, so L&C couldn't be certain that the investment operated as claimed. L&C should also have been very concerned about a guarantee offered by a new business with no track record (and promoted by a business with a questionable one).

I think, in light of this, L&C should have been concerned that consumers may have been misled or didn't properly understand the investment they intended to make. Consumers could easily have been given the impression, from the marketing material, that they were assured of high returns with little or no risk and would easily be able to sell their investment when they wished to. Such an impression was clearly misleading.

And I note that in an internal L&C email we received on a different complaint, dated 21 January 2015, L&C's Corporate Governance Director raised concerns internally about some information Store First was publishing, they noted that:

*"... it still remains to be seen whether the sites will "mature" as Storefirst describe it, to the point that rentals start coming in and a secondary market for sales evolves.*

*I do think that their website is misleading on a number of fronts. I have an email in drafting to bring this to their attention."*

From the evidence I've seen I think the information Store First was publishing before Mrs B's L&C monies were invested with it, including marketing material available through its website, gave rise to a significant risk that potential investors were being misled by Store First. I think L&C's Corporate Governance Director's comments in 2015 were equally applicable in 2012. And I think that L&C ought to have identified this *before* permitting the Store First investment into its SIPPs. This is a clear point of concern, which I think L&C ought reasonably to have identified before it accepted Mrs B's application to invest in Store First.

In my opinion, the issues I've identified above should have, when considered objectively, put L&C on notice that there was a significant risk of consumer detriment. And, without more evidence to ensure the investment was an appropriate one to permit within its SIPPs, I'm satisfied that L&C shouldn't have accepted the Store First investment.

In my opinion it's fair and reasonable to say that L&C ought to have concluded there was an obvious risk of consumer detriment here. All in all, I am satisfied that L&C ought to have had significant concerns about the Store First investment from the beginning. And I think such concerns ought to have been a red flag for L&C when it was considering whether to accept the Store First investments into its SIPPs. Such concerns emphasise the importance of sufficient due diligence being undertaken before investments are accepted and before SIPP investors monies are invested.

Had L&C done what it should have, and drawn reasonable conclusions from what it knew or ought to have known, I think that it ought to have concluded there was a significant risk of consumer detriment if it accepted the Store First investment into its SIPPs and that the Store First investment wasn't acceptable for its SIPPs.

As such, and based on the available evidence, I don't think L&C undertook appropriate steps or drew reasonable conclusions from the information that I'm satisfied would have been available to it, had it undertaken adequate due diligence into the Store First investment before it accepted that investment into its SIPPs. I don't think L&C met its regulatory obligations and, in accepting Mrs B's application to invest in Store First, it allowed her funds to be put at significant risk.

To be clear, I'm not saying L&C should have identified all the issues the SSA UK press release set out or to have foreseen the issues which later came to light with Store First. I'm only saying that, based on the information available to L&C at the relevant time, it should have drawn a similar overall conclusion – that there was a significant risk that potential investors were being misled. I'm satisfied, on a fair and reasonable basis, that a significant risk of consumer detriment ought to have been apparent from the information available to L&C at the time. And I do think that appropriate checks would have revealed issues which were, in and of themselves, sufficient basis for L&C to have declined to accept the Store First investment in its SIPP's before Mrs B invested in it. And it's the failure of L&C's due diligence that's resulted in Mrs B being treated unfairly and unreasonably.

There's a difference between accepting or rejecting a particular investment for a SIPP and advising on its suitability for the individual investor. I accept that L&C wasn't expected to, nor was it able to, give advice to Mrs B on the suitability of the SIPP and/or Store First investment for her personally. To be clear, I'm not making a finding that L&C should have assessed the suitability of the Store First investment for Mrs B. I accept L&C had no obligation to give her advice, or to otherwise ensure the suitability of an investment for her.

And I'm also not saying that L&C shouldn't have allowed the Store First investment into its SIPP's because it was high risk. My finding isn't that L&C should have concluded that Mrs B wasn't a candidate for high-risk investments or that an investment in Store First was unsuitable for Mrs B. Instead, it's my fair and reasonable decision that there were things L&C knew or ought to have known about the Store First investment and how it was being marketed, which ought to have led L&C to conclude it wouldn't be consistent with its regulatory obligations or good practice to allow it into its SIPP's. And that L&C failed to act with due skill, organise and control its affairs responsibly, or treat Mrs B fairly by accepting the Store First investments into her SIPP.

I think the fair and reasonable conclusion based on the evidence available is that L&C shouldn't have accepted Mrs B's application to invest in Store First. I think it ought to have concluded that it would not be consistent with its obligations to do so. To my mind, L&C didn't meet its regulatory obligations or good industry practice at the relevant time, and allowed Mrs B to be put at significant risk of detriment as a result.

Acting fairly and reasonably to investors (including Mrs B), L&C should have concluded that it wouldn't permit the Store First investment to be held in its SIPP's at all. And I'm satisfied that it's likely Mrs B's pension monies were only transferred to L&C to effect the Store First investment. So, I think it's more likely than not that if L&C hadn't permitted the Store First investment to be held in its SIPP's at all that Mrs B's pension monies wouldn't have been transferred to L&C. Further, that Mrs B wouldn't then have suffered the losses she has as a result of transferring to L&C and investing in Store First.

For the reasons given above, L&C shouldn't have accepted Mrs B's application to invest in Store First. And, to be clear, even if I thought L&C had undertaken adequate due diligence on TPO and acted appropriately in accepting Mrs B's business from TPO (which, as I've explained earlier, I don't), I'd still consider it fair and reasonable to uphold Mrs B's complaint on the basis that L&C didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mrs B fairly, by accepting the Store First investments into her SIPP.

I make this point here to emphasise that while I've concluded both that L&C shouldn't have accepted Mrs B's business from TPO and also that it shouldn't have accepted her application to invest in Store First, had I only reached the conclusions I've set out above on one of those aspects and not also gone on to reach findings on the other aspect for

completeness, I'd still consider it fair and reasonable in all the circumstances to uphold this complaint. That's because L&C didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mrs B fairly by accepting her business from TPO. And because, separately, L&C also didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mrs B fairly, by accepting the Store First investments into her SIPP. And to my mind, L&C didn't meet its regulatory obligations or good industry practice at the relevant times, and allowed Mrs B to be put at significant risk of detriment as a result.

### **Was it fair and reasonable in all the circumstances for L&C to proceed with Mrs B's application?**

Having carefully considered all of the evidence – including the submissions made in the complaint where the decision published under DRN4230171 was given – for the reasons given above, I don't think L&C should have accepted Mrs B's business from TPO or that it should have accepted the Store First investment into her SIPP. So things shouldn't have got beyond that.

Further, in my view it's fair and reasonable to say that just having Mrs B sign declarations, wasn't an effective way for L&C to meet its regulatory obligations to treat her fairly, given the concerns L&C ought to have had about the business being introduced by TPO and the Store First investment.

L&C knew Mrs B had signed forms intended to acknowledge, amongst other things, her awareness of some of the risks involved with investing and to indemnify L&C against losses that arose from acting on her instructions. And, in my opinion, relying on the contents of such forms when L&C knew, or ought to have known, that both the type of business it was receiving from TPO and allowing the Store First investment to be held within its SIPPs would put investors at significant risk, wasn't the fair and reasonable thing to do. Having identified the risks I've mentioned above, it's my view that the fair and reasonable thing for L&C to do would have been to decline to accept Mrs B's business from TPO and to refuse to accept the Store First investment in her SIPP.

The Principles exist to ensure regulated firms treat their clients fairly. And I don't think the paperwork Mrs B signed meant that L&C could ignore its duty to treat her fairly. To be clear, I'm satisfied that indemnities contained within the contractual documents don't absolve, nor do these attempt to absolve, L&C of its regulatory obligations to treat customers fairly when deciding whether to accept or reject investments or business.

So, I'm satisfied that Mrs B's L&C SIPP shouldn't have been established and her L&C monies shouldn't have been invested in the Store First holdings. And that the opportunity for L&C to execute investment instructions to invest Mrs B's monies in Store First or proceed in reliance on an indemnity and/or risk disclaimers shouldn't have arisen at all. I firmly think that it wasn't fair and reasonable in all the circumstances for L&C to accept Mrs B's business from TPO or for it to accept her application to invest in Store First.

### **Is it fair to ask L&C to pay Mrs B compensation in the circumstances?**

#### The involvement of other parties

In this decision I'm considering Mrs B's complaint about L&C. However, I accept that other parties were involved in the transactions complained about – including TPO and Jackson Francis.

Regarding TPO, Mrs B pursued a complaint against TPO with the FSCS. The FSCS upheld

Mrs B's complaint, it calculated her losses to be in excess of £50,000 and paid her £50,000 compensation. Following this the FSCS provided Mrs B with a reassignment of rights.

The DISP rules set out that when an Ombudsman's determination includes a money award, then that money award may be such amount as the Ombudsman considers to be fair compensation for financial loss, whether or not a Court would award compensation (DISP 3.7.2R).

In my opinion it's fair and reasonable in the circumstances of this case to hold L&C accountable for its own failure to comply with its regulatory obligations, good industry practice and to treat Mrs B fairly.

The starting point therefore, is that it would be fair to require L&C to pay Mrs B compensation for the loss she's suffered as a result of its failings. And, having carefully considered if there's any reason why it wouldn't be fair to ask L&C to compensate Mrs B for her loss, I don't think there is.

I accept that other parties, including TPO and/or Jackson Francis, might have some responsibility for initiating the course of action that led to Mrs B's loss. However, I'm satisfied that it's also the case that if L&C had complied with its own distinct regulatory obligations as a SIPP operator, the arrangement for Mrs B wouldn't have come about in the first place, and the loss she's suffered could have been avoided.

Having taken everything L&C has said into consideration, I think this that it's appropriate and fair in the circumstances for L&C to compensate Mrs B to the full extent of the financial losses she's suffered due to L&C's failings. And, having carefully considered everything, I don't think that it would be appropriate or fair in the circumstances to reduce the compensation amount that L&C is liable to pay to Mrs B.

To be clear, I'm not making a finding that L&C should have assessed the suitability of the SIPP or the Store First holdings for Mrs B. I accept that L&C wasn't obligated to give advice to Mrs B, or otherwise to ensure the suitability of the pension wrapper or investments for her. Rather, I'm looking at L&C's separate role and responsibilities – and for the reasons I've explained, I think it failed in meeting those responsibilities.

#### Mrs B taking responsibility for her own investment decisions

In reaching my conclusions I've thought about section 5(2)(d) of the FSMA (now section 1C). This section requires the FCA, in securing an appropriate degree of protection for consumers, to have regard to, amongst other things, the general principle that consumers should take responsibility for their own investment decisions.

I've considered this carefully and I'm satisfied that it wouldn't be fair or reasonable to say Mrs B's actions mean she should bear the loss arising as a result of L&C's failings. In my view, if L&C had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted Mrs B's business from TPO or accepted her application to invest in Store First at all. That should have been the end of the matter – if either of those things had happened, I'm satisfied the arrangement for Mrs B wouldn't have come about in the first place, and the loss she's suffered could have been avoided.

As I've made clear, L&C needed to carry out appropriate initial and ongoing due diligence on TPO and the Store First investment and reach the right conclusions. I think it failed to do this. And just having Mrs B sign forms containing declarations wasn't an effective way of L&C meeting its obligations, or of escaping liability where it failed to meet its obligations.

I've carefully considered what L&C has previously said about customer's being aware of the risks and having signed documents confirming that the Store First investment was high risk. L&C hasn't provided us with any documents Mrs B signed confirming that the Store First investment was high risk. In any case, as I explain below, I don't agree that the evidence we've seen to date supports the contention that it's more likely than not that Mrs B understood the Store First investment was high risk. And, in any eventuality, this is a secondary point because, as mentioned above, if L&C had acted in accordance with its regulatory obligations and good industry practice I'm satisfied the arrangement for Mrs B wouldn't have come about in the first place.

So, overall, I'm satisfied that in the circumstances, for all the reasons given, it's fair and reasonable to say L&C should compensate Mrs B for the loss she's suffered. I don't think it would be fair to say in the circumstances that Mrs B should suffer the loss because she ultimately instructed the transactions be effected.

Had L&C declined Mrs B's business from TPO, would the transactions complained about still have been effected elsewhere?

From the correspondence I've seen, I think that Mrs B's pension monies were transferred to L&C to make the Store First investment. That position seems to be supported by the contents of TPO's suitability report, which says that *"...it had been advised by Jackson Francis that she (Mrs B) wanted to transfer her monies into a SIPP so as to make investments that weren't permitted within her existing arrangement."*

L&C might say that if it hadn't accepted Mrs B's application from TPO and/or permitted the Store First investment in its SIPPs, that the transfer and investment would still have been effected with a different SIPP provider. But I don't think it's fair and reasonable to say that L&C shouldn't compensate Mrs B for her loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found L&C did. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted Mrs B's business from TPO or permitted the Store First investment into its SIPPs.

In the circumstances, I'm satisfied it's fair and reasonable to conclude that if L&C had refused to accept Mrs B's application from TPO and/or hadn't permitted the Store First investment in its SIPPs, the transactions wouldn't still have gone ahead and Mrs B would have retained her monies in her DB Scheme.

In *Adams v Options SIPP*, the judge found that Mr Adams would have proceeded with the transaction regardless. HHJ Dight says (at paragraph 32):

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

I haven't seen anything to suggest Mrs B understood that her pension monies were being moved into a pension that was high risk. L&C has said in other complaints that the investment purchase request form shows customers understood the investment was high risk. But this simply says that the investment *may* be high risk, it doesn't say that it *is* high risk. Further, the form appears to be generic, by which I mean it appears to be one that could be used for a number of investments rather than being bespoke to the Store First investment. I can see why the term *may* might have been used because of this, but I don't agree the contents of that form support the contention that Mrs B understood the Store First investment was high risk.

I've also not seen any evidence to show Mrs B was paid a cash incentive. It therefore cannot be said she was "*incentivised*" to enter into the transaction. And, on balance, I remain satisfied that Mrs B, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for herself.

So, in my opinion, this case is very different from that of Mr Adams. And I'm not satisfied that Mrs B proceeded knowing that the investments she was making were high risk and speculative, and that she was determined to move forward with the transactions in order to take advantage of a cash incentive.

Having carefully considered all of the circumstances, I'm satisfied it's fair and reasonable to conclude that if L&C had refused to accept Mrs B's application from TPO and/or to permit Store First investments in its SIPP, the transactions this complaint concerns wouldn't still have gone ahead.

Overall, I do think it's fair and reasonable to direct L&C to pay Mrs B compensation in the circumstances. While I accept that other parties might have some responsibility for initiating the course of action that's led to Mrs B's loss, I consider that L&C failed to comply with its own obligations and didn't put a stop to the transactions proceeding by declining to accept Mrs B's applications when it had the opportunity to do so. And I'm satisfied that Mrs B wouldn't have established the L&C SIPP, transferred monies in from her DB Scheme or invested in Store First if it hadn't been for L&C's failings.

In making these findings, I've taken into account the potential contribution made by other parties to the losses suffered by Mrs B. But, as mentioned above, in considering what fair compensation looks like in this case, I think it's reasonable to make an award against L&C that requires it to compensate Mrs B for the full measure of her loss. L&C accepted Mrs B's business from TPO and the Store First investments into its SIPP and, but for L&C's failings, I'm satisfied that Mrs B's pension monies wouldn't have been transferred to L&C and invested in Store First.

As such, I'm not asking L&C 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. However, that fact shouldn't impact on Mrs B's right to fair compensation from L&C for the full amount of her loss. The key point here is that but for L&C's failings, Mrs B wouldn't have suffered the loss she's suffered. As such, I'm of the opinion that it's appropriate and fair in the circumstances for L&C to compensate Mrs B to the full extent of the financial losses she's suffered due to its failings, and notwithstanding any failings by other firms involved in the transactions.

I acknowledge Mrs B has received a sum of compensation from the FSCS. And that L&C offered to compensate Mrs B for the remaining loss that she wasn't compensated for by the FSCS. But Mrs B didn't accept L&C's offer. And the terms of her reassignment of rights with the FSCS require Mrs B to return compensation paid by it in the event this complaint is successful. I understand that the FSCS will ordinarily enforce the terms of the assignment if required. So, I think it's fair and reasonable to make no deduction in the redress calculation for the sum of compensation Mrs B received from the FSCS. It will be for Mrs B to make the arrangements to make any repayments she needs to make to the FSCS.

## **In conclusion**

Taking all of the above into consideration, I think that in the circumstances of this case it's fair and reasonable for me to conclude that L&C should have decided not to accept business from TPO and/or to accept the Store First investment to be held in its SIPP before it had

received Mrs B's application from TPO. I conclude that if L&C hadn't accepted Mrs B's introduction from TPO and/or the Store First investment to be held in its SIPP, Mrs B wouldn't have established a L&C SIPP, transferred her DB Scheme monies into it or invested in Store First.

For the reasons I've set out, I also think it's fair and reasonable to direct L&C to compensate Mrs B for the loss she's suffered as a result of L&C accepting her business from TPO and permitting her to invest her L&C monies in Store First.

I say this having given careful consideration to the *Adams v Options* judgments but also bearing in mind that my role is to reach a decision that's fair and reasonable in the circumstances of the case having taken account of all relevant considerations.

### **Putting things right**

My aim is to return Mrs B to the position she'd now be in but for what I consider to be L&C's failure to carry out adequate due diligence checks before accepting Mrs B's business from TPO and before permitting Mrs B to invest her L&C monies in Store First.

I think that L&C should calculate fair compensation by comparing the current position to the position Mrs B would be in if she'd not transferred from her DB Scheme. In summary, L&C should:

1. Take ownership of the Store First investments if possible.
2. Calculate and pay compensation for the loss Mrs B's pension provisions have suffered as a result of L&C accepting her applications.
3. Pay Mrs B £500 for the trouble and upset she's suffered.

I explain how L&C should carry out these steps in further detail below.

1. Take ownership of the Store First investments if possible.

In order for the SIPP to be closed and further SIPP fees to be prevented, any remaining Store First investments need to be removed from Mrs B's SIPP. To do this, L&C should calculate an amount it's willing to accept for Mrs B's Store First investments and pay that sum into Mrs B's SIPP and take ownership of the Store First investments. Any sums paid into the SIPP to purchase the Store First investments will then make up part of the current actual value of the SIPP.

If L&C's unable to purchase the Store First investments, the actual value of any Store First investments it doesn't purchase should be assumed to be nil for the purposes of the redress calculation. To be clear, this would include their being given a nil value for the purposes of ascertaining the current value of Mrs B's SIPP.

I think that is fair because I think it's unlikely the Store First investments will have any significant realisable value in the future. Further, I understand Mrs B has the option of returning her Store First investments to the freeholder for nil consideration. And that should enable Mrs B to close her SIPP if L&C is unable to take ownership of her Store First investments.

In the event the Store First investments remain in the SIPP, as L&C is unable to purchase them and Mrs B decides not to transfer them to the freeholder, Mrs B should be aware that she will be liable for all future costs associated with the investment such as the ongoing SIPP fees, business rates, ground rent and any other charges. She should also be aware it's unlikely she will be able to make a

further complaint about these costs.

2. Calculate and pay compensation for the loss Mrs B's pension provisions have suffered as a result of L&C accepting her applications.

A fair and reasonable outcome would be for L&C to put Mrs B, as far as possible, into the position she'd now be in but for its failings. And, as I explained above, I'm satisfied it's fair and reasonable to conclude that if L&C had refused to accept Mrs B's application from TPO and/or hadn't permitted the Store First investment in its SIPP, the transactions wouldn't still have gone ahead and Mrs B would have retained her monies in her DB Scheme.

L&C must therefore undertake a redress calculation in line with the rules for calculating redress for non-compliant pension transfer advice, as detailed in policy statement PS22/13 and set out in the regulator's handbook in DISP App 4: <https://www.handbook.fca.org.uk/handbook/DISP/App/4/?view=chapter>.

This calculation should be carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mrs B's acceptance of the final decision.

If the redress calculation demonstrates a loss, as explained in policy statement PS22/13 and set out in DISP App 4, L&C should:

- always calculate and offer Mrs B redress as a cash lump sum payment,
- explain to Mrs B before starting the redress calculation that:
  - her redress will be calculated on the basis that it will be invested prudently (in line with the cautious investment return assumption used in the calculation), and
  - a straightforward way to invest her redress prudently is to use it to augment her defined contribution pension
- offer to calculate how much of any redress Mrs B receives could be augmented rather than receiving it all as a cash lump sum,
- if Mrs B accepts L&C's offer to calculate how much of her redress could be augmented, request the necessary information and not charge Mrs B for the calculation, even if she ultimately decides not to have any of her redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mrs B's end of year tax position.

I acknowledge Mrs B has received a sum of compensation from the FSCS, and that she has had the use of the monies received from it. The terms of Mrs B's reassignment of rights require her to return compensation paid by the FSCS in the event this complaint is successful, and I understand that it will ordinarily enforce the terms of the assignment if required. So, I think it's fair and reasonable to make no *permanent* deduction in the redress calculation for the compensation Mrs B received from the FSCS. And it will be for Mrs B to make the arrangements to make any repayments she needs to make to the FSCS. However, I do think it's fair and reasonable for some allowance to be made for the sum(s) Mrs B actually received from the FSCS and has had the use of for a period of the time covered by the calculation.



As such, for the purposes of the calculation that's being carried out using the most recent financial assumptions in line with PS22/13 and DISP App 4, if it wishes, L&C *may* notionally, for the period from the point of their payment through until the valuation date (as per the DISP App 4 definition of that term), allow for the payment(s) Mrs B received from the FSCS following the claim about TPO, as an income withdrawal payment. Where such an allowance is made then L&C must also, at the end of the calculation, allow for a notional addition to the overall calculated loss that's equivalent to the payment(s) Mrs B received from the FSCS following the claim about TPO. The effect of this notional addition will be to increase the overall loss calculated using the most recent financial assumptions in line with PS22/13 and DISP App 4, by a sum that's equivalent to the payment(s) Mrs B received from the FSCS.

Redress paid to Mrs B as a cash lump sum will be treated as income for tax purposes. So, in line with DISP App 4, L&C may make a notional deduction to cash lump sum payments to take account of tax that Mrs B would otherwise pay on income from her pension. It's reasonable to assume that Mrs B is likely to be a basic rate taxpayer at her selected retirement age, so the reduction would equal 20%. However, if Mrs B would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

I asked L&C and Mrs B to let me know by the deadline given in my provisional decision if either of them disputed that this is a reasonable assumption, so that the assumption can be clarified and Mrs B receive appropriate compensation. I said it won't be possible for us to amend this assumption once any final decision has been issued on the complaint.

In response, L&C disputed that it is reasonable to assume Mrs B will be a basic rate taxpayer in retirement. But I maintain that it is a reasonable assumption based on the evidence provided to date. We know from the documents TPO completed at the time, as well as from Mrs B's complaint letter to L&C, that her DB scheme – which I can see had a transfer value of around £26,000 – represented most, if not all, of her financial wealth. And, amongst other things, I can also see from the documents TPO completed at the time that Mrs B was 47 years old and earning around £18,000 per year. So, on balance, and having carefully considered all of the evidence we've received, I think it's fair and reasonable to conclude that it is more likely than not that Mrs B will be a basic rate taxpayer in retirement. And Mrs B hasn't disputed this.

3. Pay Mrs B £500 for the trouble and upset she's suffered.

In addition to the financial loss that Mrs B has suffered as a result of the problems with her pension, I think that the loss of a significant portion of her pension provisions has caused Mrs B distress. And I think that it's fair for L&C to compensate her for this as well.

### **My final decision**

For the reasons given, it's my final decision that Mrs B's complaint should be upheld and that London & Colonial Services Limited must pay fair redress as set out above.

Where I uphold a complaint, I can award fair compensation of up to £160,000, plus any interest and/or costs that I consider are appropriate. Where I consider that fair compensation requires payment of an amount that might exceed £160,000, I may recommend that the business pays the balance.

**determination and award:** I uphold the complaint. I consider that fair compensation should be calculated as set out above. My final decision is that London & Colonial Services Limited must pay the amount produced by that calculation up to the maximum of £160,000 (including distress and/or inconvenience but excluding costs) plus any interest set out above.

**recommendation:** If the amount produced by the calculation of fair compensation exceeds £160,000, I recommend that London & Colonial Services Limited pay Mrs B the balance plus any interest on the balance as set out above.

The recommendation isn't part of my determination or award. London & Colonial Services Limited doesn't have to do what I recommend. It's unlikely that Mrs B could accept a final decision and go to court to ask for the balance and Mrs B may want to get independent legal advice before deciding whether to accept this final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 4 March 2024.

Holly Jackson  
**Ombudsman**