DRN-4587351

The complaint

Mr M complains that London & Colonial Services Limited ('L&C') didn't undertake sufficient due diligence on the firm, 1 Stop Financial Services, that introduced him to L&C. Mr M also complains that L&C didn't undertake sufficient due diligence on investments he made through his L&C Self-Invested Personal Pension ('SIPP'). As a result of this he says he's suffered losses.

What happened

The entities involved

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 Resort Group ('TRG')

TRG was founded in 2007. TRG owns a series of luxury resorts in Cape Verde. TRG sold luxury hotel rooms to UK consumers, either as whole entities or as fractional share ownership in a company. TRG wasn't regulated by the financial services regulator. This case involves investments in TRG's Dunas Beach Resort.

1 Stop Financial Services ('1 Stop')

At the time of the events in this complaint, 1 Stop was an independent financial adviser ('IFA') authorised by the then Regulator – the Financial Services Authority ('FSA'), which later became the Financial Conduct Authority ('FCA').

We've been provided with a copy of pages from 1 Stop's entry on the FSA Register. This says that 1 Stop's permissions included advising on investments (except on Pension Transfers and Pension Opt Outs). Other permissions 1 Stop held included arranging (bringing about) deals in investments.

In an April 2014 publication on its website, updated the following month, the FCA explained that:

"[Mr R] and [Mr H], partners at 1 Stop Financial Services (1 Stop), have been banned by the Financial Conduct Authority (FCA) from performing any significant influence function in relation to any regulated activity. [Mr R] and [Mr H] had advised customers to switch into self-invested personal pensions (SIPPs), which enabled those customers to invest in unregulated and often high risk products, regardless of whether those products were suitable for the customers."

It was noted in the FCA's Final Notice of 17 April 2014 for Mr R that:

- Mr R was one of two partners at 1 Stop, a firm that provided advice to customers seeking to transfer their pension to make unregulated investments via SIPPs.
- Between 1 October 2010 and 10 November 2012, Mr R failed to take reasonable steps to ensure that the business of 1 Stop complied with the relevant requirements and standards of the regulatory system. Specifically, Mr R failed to take reasonable steps to ensure that 1 Stop assessed the suitability of the underlying investment for the customer. Instead, 1 Stop's business model focussed solely on providing advice on the most suitable SIPP wrapper for the underlying investment.
- Mr R failed to take reasonable steps to ensure that 1 Stop gathered sufficient information to be able to assess the suitability of the underlying investment for its customers.
- In particular, Mr R failed adequately to take reasonable steps to ensure that 1 Stop:
  - established customers' investment aims and objectives;
  - assessed customers' attitude to risk; and
  - ascertained customers' knowledge and experience in relation to financial products.
- Mr R also failed to take reasonable steps to ensure that 1 Stop's customers understood the information provided to them, and therefore understood the key features of their investment, including both the operation of the SIPP that they were investing in (and the risks associated with that SIPP) and the underlying investment.
- As a result of Mr R's actions, 1,959 of 1 Stop's customers during the Relevant Period (the *"Relevant Period"* in the context of the contents of the Final Notice means the period from 1 October 2010 to 10 November 2012 inclusive) were at risk of having invested a total of £112,331,229, mostly from pension funds including some final salary schemes, into SIPPs which may not have been suitable for them.
- Prior to and during the Relevant Period, 1 Stop shifted the focus of its business from advising on a mix of mortgage, insurance and standard retail investment products to providing advice in relation to SIPPs. In April 2010, mortgage and insurance advice accounted for 52% of the revenue earned by 1 Stop. By October 2012 97% of 1 Stop's revenue was derived from its SIPP business.
- As a result of the risks posed by non-standard investments within the SIPPs, it was especially important that 1 Stop ensured that when making investment decisions, customers understood how their SIPPs operated and the potential increased risks associated with the underlying investments within them.
- It was also essential that 1 Stop assessed both the suitability of the SIPP wrapper and the proposed underlying investment for the customer, to ensure that customers only invested in investments which were suitable for them.
- The FCA had reviewed investments made by some of 1 Stop's customers who received advice on SIPPs. This review included, but was not limited to, a review of the documentation recorded on 15 of 1 Stop's customer files.
- *"1 Stop's SIPP advisory process*

  A 1 Stop customer seeking advice on moving their pension would typically be one looking to invest their pension into an unregulated product such as an overseas property investment. Such customers would typically have been introduced to the investment product by an unregulated Introducer…who would, on behalf of the underlying investment company, present marketing materials and/or provide presentations to the customer on which the customer based their decision to invest. The customer would then be introduced by the Introducer to 1 Stop in order to obtain advice on using their pension to facilitate the investment via a SIPP. During the Relevant Period, every customer was referred to 1 Stop by an Introducer."
- Upon referral to 1 Stop, the customer would:
  - Complete a brief fact find/pension profiler questionnaire document that included high level questions about their investment aims, objectives, attitude to risk

('ATR'), knowledge and experience of financial products. In some cases, the fact find would be completed by the Introducer for the customer with no input from 1 Stop.
  - Receive 1 Stop's complimentary pension review report, setting out details of consumers existing pensions and projected yield.
  - At the same time as the pension review report, or shortly thereafter, receive 1 Stop's suitability report, which contained 1 Stop's recommendation for the most suitable SIPP wrapper for the proposed investment. Typically, when selecting the most suitable SIPP for the customer, 1 Stop assessed, amongst other things, the set up and ongoing fees of the SIPP provider, the standard of administrative assistance and whether the SIPP was able to invest into the underlying investment product.
  - Receive a SIPP application pack that would enable the customer to purchase a SIPP from the SIPP Operator recommended by 1 Stop. This application pack would be submitted to the SIPP Operator, processed and then the customer's pension funds would be transferred. Those funds would then be used to purchase the underlying investment.
- Typically, 1 Stop would send the documents outlined above to the customer without providing any further explanation and/or clarification.
- The advisory model established at 1 Stop by Mr R and his partner didn't take into account any consideration of the suitability for the customer of the underlying investment within the SIPP.
- 1 Stop's customer documentation contained numerous disclaimers that as a business, 1 Stop didn't advise on, or have any involvement in considering, the underlying investment. Mr R himself confirmed that, *"…all we would be doing is looking at a suitable SIPP… that they could transfer their pension into a SIPP that would accept that particular investment."*
- As a result of this deficient business model, all 1,959 of 1 Stop's SIPP customers were at risk of investing their monies into an investment which may not have been suitable for them.
- Mr R confirmed that 1 Stop's customers were stated as having a *"High"* ATR because of the types of underlying investment that the customers were investing into through their SIPPs. A customer's ATR was inferred from their proposed underlying investment, as opposed to 1 Stop taking steps to confirm that the customer was willing to accept a high level of risk in their investment/to confirm whether that investment was suitable for the customer.
- Mr R confirmed that he didn't establish a customer's knowledge and understanding of financial services products. Similarly, Mr R confirmed that he didn't take any steps to establish the customer's knowledge and understanding of the underlying investment product beyond the fact that the customer had confirmed they wanted to invest into it. Further, the business model established required no further steps to be taken to confirm the customer's knowledge and experience of financial products.
- At the FCA's request, 1 Stop voluntarily varied its permissions, such that with effect from 10 November 2012, 1 Stop was no longer permitted to carry on any regulated activities. On 14 March 2013, 1 Stop voluntarily applied to cancel its permissions.

A number of similar points to those I've mentioned above were also referenced in Mr H's FCA Final Notice of 17 April 2014. It was also noted in Mr H's Final Notice that Mr H confirmed statements in the suitability report regarding the customer's *"high level of understanding"* of financial services products related solely to the customer's understanding of the underlying investment. Mr H also confirmed that the customer's understanding of that underlying investment product would be what he perceived to be as 'high', based on the customer having received promotional material from the Introducer. However, the business model established required no further steps to be taken to confirm the customer's knowledge

and experience of financial products, including taking no further steps to confirm whether the customer actually understood the promotional material they'd been given.

What happened here

Mr M says that he heard about TRG through a representative of TRG – Mr M was an estate agent so the representative called him directly at work to introduce the investment to him. He thought it sounded like a great opportunity and the details and figures presented sounded realistic. The investment was promoted as safe; he would achieve good annual returns plus the growth of the asset. Mr M says the TRG representative was very convincing. He says that because he knew a number of people doing the same thing, he believed all was in order and that he was making a good investment choice for his pension. Mr M also says that he was assured a pension IFA was there to look after him and he was referred to 1 Stop.

We've been provided with a signed copy of a 1 Stop client agreement, the agreement is a version from March 2011 and it's been signed by Mr M on 6 June 2011. It's noted in the agreement that, unless confirmed in writing to the contrary, 1 Stop would assume that the client didn't wish to place any restrictions on the advice it proffered. 1 Stop was an independent adviser and would advise on products from the whole of market.

A 1 Stop Personal Financial Questionnaire for Mr M was completed by Mr H, this is also dated 6 June 2011. Amongst other things, it's noted in this document that:

- Mr M was looking to plan for a secure retirement.
- Mr M *"had an external investment opportunity presented to them for the purchase of a hotel room style investment in the Caribbean."*
- Mr M had funds in a frozen final salary pension scheme and was unhappy that the pension would not be attracting future and additional growth, and he'd prefer to move the funds into a pension plan under his control. So, he wanted to explore the possibility of moving into a SIPP to invest in the proposed external investment opportunity.
- Mr M had been informed that a pension analysis report would be required by this type of pension and would be produced by a third party. *"The report will provide the client with detailed information to make an informed choice on moving funds from their existing scheme to a SIPP. The client is aware that moving funds from the final salary scheme may loose [sic] any guarantees that are held with this scheme."*
- If Mr M decided to move his funds, 1 Stop would conduct research and give recommendations on a suitable SIPP that would accept the investment he wanted to make.
- Advice on all other financial areas had been declined and the only advice requested and acted upon was his pension planning only.
- Mr M didn't want to disclose full information about his income and expenditure, liabilities, assets or insurance as he didn't see this as being relevant to pension advice. Mr M was aware of the restricted advice that could be given due this non-disclosure.
- Mr M was aware of the style of investment he was entering and full details would be included in the suitability report.
- *"Clients are…aware that the investment which has been self chosen to sit within the SIPP to be arranged are unregulated and not covered by the Financial Services Compensation Scheme."*
- 1 Stop had explained to Mr M that it did not offer advice or hold the necessary permissions to conduct reports on final salary schemes so it would contract a third party, a qualified pension specialist firm, to analyse the pension for him. The third

party would present him with a report on the pension scheme so he could make an informed decision as to the advantages and disadvantages of transferring the funds.
- If Mr M decided to transfer the funds, 1 Stop would only be providing advice on a suitable SIPP to house the requested investment.
- Mr M was aware that the investment he'd chosen was unregulated.
- The investments that are to be chosen for the SIPP are not the responsibility of 1 Stop and no advice has been given on investments that will be held in the SIPP in any way or form.
- *"The clients wanted a flexible SIPP contract that would allow full access to funding alternative investments that may include overseas property, commercial property, life settlements, commodities etc.. Advice issues were conducted around available SIPP companies that will allow these investment areas."*
- *"The advice issues that have been given are based upon researching and advising on the suitability of a SIPP only, in which the above investment requirement and criteria will sit."*

Mr M signed a declaration at the end of the Personal Financial Questionnaire on 6 June 2011.

A 1 Stop Pension Review report dated 8 August 2011, and prepared for Mr M by Mr R, records, amongst other things, that:

- Mr M had a final salary pension scheme with a transfer value of approximately £35,000.
- 1 Stop's fee of £1,295 was a one off fee, deductible from the fund value at the outset, to cover the set up advice, recommendations and liability for advising on the course of action and a suitable SIPP provider.
- It also set out that Mr M would pay £450 for a transfer value analysis report ('TVAS') which the third party would undertake.
- It had chosen L&C as a suitable SIPP provider based on the funds that Mr M had to transfer and the type of investment portfolio he'd chosen.
- The L&C SIPP offered full access to alternative investments.
- There were strong indications that switching to a SIPP would be more advantageous for Mr M and the switch would allow Mr M to invest into the investment he'd chosen.
- Moving the monies to the SIPP would give Mr M flexibility, control and a choice of future investments, including alternative investments.
- If Mr M decided to transfer a full report would be provided covering the advantages and disadvantages of doing so.

A covering letter from Mr H of 1 Stop dated 17 August 2011, stated he'd enclosed the SIPP application paperwork for Mr M.

An L&C SIPP application form was signed by Mr M on 10 August 2011. Section 3 of the application asked for Mr M's independent financial adviser details; the details of Mr H of 1 Stop were added. It was also instructed that an initial fee of £1,295 should be paid to 1 Stop. Under section 5 'Investments' a box was ticked denoting that L&C should act upon instructions it received from Mr M's financial adviser. On the same day, Mr M signed an L&C transfer request form and a transfer and discharge form to allow for his pension fund to be transferred to the SIPP.

L&C hasn't been able to provide evidence of Mr M's investment instruction due to a number of system migrations over the years. However, I know that in October 2011 Mr M invested in TRG. And I've seen copies of the instructions on other cases referred to our Service where 1 Stop was involved and the customer made a TRG investment. So I think Mr M's

investment instruction likely took the form of a L&C *"Investment in Dunas Beach form"* which included details such as:

- the apartment and resort Mr M was investing in;
- the purchase price;
- that it was understood that the initial deposit could be lost if, for any reason, there wasn't enough cash available to pay the balance when due;
- that L&C wasn't authorised to give financial or investment advice;
- that L&C had obtained legal advice in its capacity as trustee, in order to assess the risks of ownership and to ensure that appropriate title was attained;
- that the advice L&C had obtained didn't cover the investment merits, marketability or value of the property;
- that the investor had reviewed a due diligence report obtained in January 2010 and the promissory contract of purchase and sale;
- that the investor had obtained whatever information, reports, legal and other advice they required regarding investments, including the potential income and the associated costs and expenses which may fall to be paid;
- that the investor would indemnify L&C in respect of any loss claim action damage L&C incurred or suffered in respect of the investment; and
- that the investor (here Mr M) wished to proceed with the investment.

Based on the other cases I've seen, Mr M may have also completed a L&C Dunas Beach scheme borrowing form which would set out the details of sums to be borrowed, and the lender they'd be borrowed from. This form also noted that:

- This was an unusual investment structure involving property in a foreign jurisdiction, with a long period between the contract being entered into and completion, when the balance (including any scheme borrowing) would be due.
- There were no standard or previously agreed terms with any potential lender.
- Where scheme borrowing was needed, it was for the investor to choose a lender and obtain an offer, this would then be sent to L&C to review.

Mr M's SIPP was established on 18 August 2011 and a total of £31,887.19 was transferred in from his existing pension. A total of £28,186.07 was invested in TRG on 5 October 2011.

L&C has provided a copy of Mr M's membership certificate for his investment in the apartment in Dunas Beach from December 2015. Mr M has told us that he started with an investment in a different apartment but this was consolidated to fractional ownership of another as he didn't have the funds to complete the purchase of the original apartment.

Mr M made a claim to the Financial Services Compensation Scheme ('FSCS') in November 2016 about the advice he received from 1 Stop. Mr M said he had no contact with 1 Stop apart from the odd email but it sent all paperwork to him by post. Mr M said 1 Stop didn't properly establish his financial needs and attitude to risk and it didn't explain any of the risks associated with an unregulated investment.

Mr M ultimately received the maximum compensation from the FSCS of £50,000 in 2018. He obtained a reassignment of his right to complain about L&C's role in the transaction that led to his losses.

In September 2018 Mr M complained, via a representative, to L&C. Mr M said the SIPP was mis-sold, it wasn't suitable for him and L&C didn't carry out sufficient due diligence on the investment proposition or the adviser before accepting it into his SIPP. The representative

said Mr M was not a sophisticated investor and the investment was clearly unsuitable for him.

In response to Mr M's complaint, amongst other things, L&C said that:

- It received a SIPP application form from 1 Stop signed by Mr M indicating that he wished to transfer his pension into an L&C SIPP. 1 Stop was regulated by the FSA at the time and L&C's checks showed that 1 Stop was acting within the scope of its permissions.
- L&C has controls in place not just to monitor the business being introduced, but the source and the volume of that business. All such business is under review.
- L&C is the sole Trustee and administrator of the SIPP which was written under Trust. Under the rules of the Trust, it is the member who has the power to choose investments, following investment advice from their adviser.
- L&C does not provide any form of investment or financial advice, and it is not responsible for investigating the financial standing, integrity or expertise of the parties involved in running the investments. These aspects of an investment and its suitability, along with the suitability of the SIPP for the individual concerned are the responsibility of the adviser.
- Any concerns with the suitability or performance of the investment chosen or the SIPP, needed to be directed to the selling adviser firm. And if the firm is no longer solvent Mr M can make a claim to the FSCS.
- With regards to investment due diligence, L&C's role in connection with an investment is to satisfy itself, in its capacity as Trustee and potential owner of the investment, that it is allowed within the Trust rules and does not breach HMRC regulations – its due diligence is limited to this.
- It understood that advice had been given on the suitability of the SIPP and it was reasonable for L&C to expect that Mr M's adviser would have taken into account his personal and financial circumstances when advising on the SIPP.
- Although illiquid, Mr M's investment was still viable, it had increased in value and he continues to receive rental income.

Mr M referred his complaint to the Financial Ombudsman Service.

The Investigator asked Mr M about how he had been introduced to the investment in TRG. Mr M couldn't recall very many details but believes he received a call at his place of work about TRG, from a representative of TRG, which was presented as a business opportunity. The investment was then directed to him personally and TRG referred him to 1 Stop.

L&C provided us with information for our Investigator to consider, but it didn't explain what checks it had carried out on 1 Stop before accepting business from it or go into detail about the due diligence carried out on the investment in TRG before accepting it into Mr M's SIPP.

As such, when the Investigator considered the complaint, she took into account information L&C had provided on other cases involving TRG where the business had been introduced by 1 Stop. I've set this out below.

A final response L&C gave to a different consumer in which it said:

- L&C only accepts business from regulated advisers and all advisers complete an agency agreement before being able to submit business to it.
- L&C conducts numerous checks on advisers, including checking that they are regulated, checks on individual Directors and on the legal entity.
- Unless the client is a politically exposed person (PEP) then L&C is not required to

undertake enhanced due diligence (EDD) as it is not involved in the sale of the SIPP or investments and the adviser certifies that they have seen the client.
- L&C undertakes its own customer due diligence (CDD) by undertaking an Equifax check on the client.

An intermediary agreement between L&C and 1 Stop. I've seen a copy dated 21 December 2009, signed by 1 Stop and date stamped as having been received by L&C on 11 January 2010. Amongst other things, it's noted in the agreement that:

- The Intermediary complies with the requirements of the UK Financial Services and Markets Act 2000 and is regulated for this purpose by the FSA.
- The Intermediary agrees to comply with the regulatory and legal obligations for its continued authorisation, will comply with all appropriate rules of any self-regulatory organisation or professional body of which it is a member and agrees to inform L&C of any failure to do so. The Intermediary undertakes to inform L&C if its authorisation lapses or is suspended or withdrawn.
- L&C reserves the right at any time to cease to accept business from the Intermediary, or to refuse any particular business proposed without giving reason.

A copy of an L&C intermediary application form that was signed and dated on 6 December 2009. It's noted, amongst other things, in the form that the IFAs at 1 Stop who would sell or supervise sales of pension were Mr H (who had a little under 20 years' experience of selling/advising on pensions) and Mr R (who had a little over 10 years' experience of selling/advising on pensions).

A printout from the FSA Register from 16 December 2009. It's noted in the printout that 1 Stop had been authorised since November 2004.

A letter from L&C to 1 Stop from 22 December 2009, in which L&C confirms that it's approving 1 Stop's agency application and that it's enclosing intermediary agreements to be signed and returned.

A *"Vetting of Intermediary Applications"* form for 1 Stop, this recorded, amongst other things, that:

- An FSA check had been completed.
- The date an agreement had been received from 1 Stop was 11 January 2010.

The Investigator upheld Mr M's complaint. While she accepted that L&C did not and could not advise Mr M on the suitability of his investment, overall she did not think that L&C had acted fairly and reasonably in relation to its obligations to Mr M under the regulatory principles. She didn't think L&C had a good understanding of 1 Stop's business model – contrary to good industry practice. And given the number of customers referred to it who were being advised to invest in high-risk, esoteric investments, it ought to have done more to consider whether there was a risk of consumer detriment. Furthermore, 1 Stop's business model was based on it only considering the suitability of the SIPP for the customer, and not the investments they would go on to make. So, had L&C made reasonable enquiries it would've found this serious flaw in the process that placed customers at risk. The Investigator didn't think L&C should have accepted the application for Mr M from 1 Stop had it carried out appropriate due diligence on the introducer, 1 Stop.

The Investigator was satisfied that Mr M would've kept his existing arrangements had L&C not accepted his SIPP application. She recommended L&C compensate Mr M fully for his loss and pay him compensation for the distress and inconvenience the matter caused him.

L&C didn't accept the investigator's findings and its representative noted, amongst other things, in their response that:

- As far as L&C is aware, 1 Stop advised Mr M on the establishment of the SIPP and to make the TRG investment in August 2011. It received the application forms directly from 1 Stop.
- In his SIPP application form Mr M informed L&C that he'd authorised his financial adviser to act on his behalf in dealing with the investments and correspondence shows that 1 Stop instructed L&C to purchase the investments.
- The investment instruction would have confirmed that Mr M understood that L&C couldn't give him advice; that he'd reviewed investment documentation including the due diligence report, contract of purchase and sale; rental agreement and the investor pack. That he'd obtained whatever other reports or advice needed regarding the investment and that he indemnified L&C against any loss connected with the asset.
- L&C understood that Mr M had made a successful FSCS claim and asked to be provided with a copy of the reassignment of rights.
- L&C considered the complaint was time-barred under DISP 2.8.2. The application for the SIPP was made in August 2011 and the letter of complaint was sent on 17 September 2018, more than six years after the application.
- Mr M ought to have been aware of his cause for complaint before 17 September 2015 (being three years before the complaint was made). The FCA issued a final notice regarding the actions of Mr R and Mr H, partners of 1 Stop, in April 2014. Following this, Mr R contacted all customers of 1 Stop, including Mr M, who invested in SIPPs informing them of the current investigation being undertaken with FSCS with regards to claims for redress owed.
- At this point, Mr M should have been alerted to any issues with the investments advised on by 1 Stop and, by consequence, any issues with these or the decision to hold them within a SIPP. As this was more than three years prior to the letter of complaint, the matter was clearly time barred.
- The Ombudsman may dismiss a complaint if dealing with it would impair the effective operation of the Financial Ombudsman Service.
- The Court would be a more appropriate jurisdiction than the Financial Ombudsman Service for this complaint and Mr M's evidence, including his position on causation, should be tested in Court.
- The wider impact of the findings, on L&C and the wider SIPP industry, are such that the claim should be subjected to full judicial scrutiny.
- Alternatively, the Pension Ombudsman ('TPO') would be a more appropriate jurisdiction given its specialist knowledge of pension complaints. The Memorandum of Understanding between the Financial Ombudsman Service and TPO contains a clause which states that the Financial Ombudsman Service and TPO should take reasonable steps to co-operate and exchange best practice around the resolution of similar complaints.
- The TPO had determined a similar complaint in favour of the SIPP operator where the complainant alleged the SIPP operator ought to have carried out extensive due diligence on the proposed investments.
- The Financial Ombudsman Service largely ignores the disclaimers contained in the SIPP and investment applications.
- The starting point should be to give primacy to the contract agreed between the parties.
- The contract here was made on an execution-only basis; L&C accepted no responsibility for checking the quality of the investment business, much less the decision to transfer and invest.

- The Financial Ombudsman Service is imposing a duty on L&C that goes far beyond what was agreed by the parties and which is not provided for either at law or in guidance or rules.
- The Financial Ombudsman Service states that the regulators' reports and guidance provided examples of good practice observed by the FCA and FSA. This assumes that the examples of good practice would have been known to the wider SIPP industry at the time of the transaction. But they weren't, due to having been published after the event, with the exception of any examples from the 2009 Thematic Review – but these examples didn't constitute formal guidance.
- The examples of good practice didn't have the force of guidance and there was no obligation to follow them.
- The investments were exactly as advertised; the Dunas Beach investment was an illiquid investment in real property with no established secondary market. Mr M was aware of this when he made the investment. Good title was obtained, and the investments produced a return. Returns ceased with the onset of the pandemic, however, the Dunas Beach Resort is trading again and rooms are available to book.
- Mr M was aware the investments were high-risk unregulated investments and there was nothing preventing a SIPP provider from accepting such business.
- L&C couldn't reject such business without making a value judgment on its suitability for each individual client, something which fell outside of its expertise and well outside of the terms of the contract.
- An execution-only SIPP provider cannot reject such business without completing a full suitability assessment. In the alternative, no SIPP provider could ever accept high risk investments into a SIPP.
- The introduction to L&C was from a regulated adviser, but there was no restriction on business being accepted from an unregulated introducer.
- It was the responsibility of 1 Stop as the financial adviser to advise Mr M on the suitability of both the product and the proposed investment.
- In compliance with COBS 11.2.19R, L&C acted on Mr M's written instructions.
- L&C did have an obligation to conduct due diligence on 1 Stop prior to accepting business from it and L&C carried out the following in 2010:
  - A review of the FSA Register to confirm that 1 Stop was regulated by the FSA to provide advice on pension transfers and investments.
  - A review of 1 Stop's publicly available information on Companies House (including checks on the individual directors as well as the legal entity).
  - Checks on directors which amounted to internet searches of publicly available information on 1 Stop and its key personnel.
- 1 Stop's original agency application was made in December 2009 which also contained the following information:
  - 1 Stop had been in business since November 2004.
  - The key individuals were Mr R and Mr H, they were regulated to provide financial advice. Mr H had 19 years of experience of advising on pensions and Mr R had 11 years of the same.
- L&C wasn't aware of the changes in 1 Stop's business model, since the original application was made in 2009 and it wasn't unreasonable that L&C was unaware of this.
- The October 2013 FCA guidance on SIPPs and the FCA Final Notice against 1 Stop dated April 2014 were both published after the fact and the Financial Ombudsman Service is using the benefit of hindsight.
- Had the October 2013 FCA guidance and the FCA Final Notice been available at the date that the due diligence was conducted, L&C may have come to a different conclusion regarding 1 Stop's involvement. At the time, there was no requirement for a SIPP provider to broaden the scope of its due diligence to include an understanding of an adviser's business model and, even if it did, the information

identifying 1 Stop retail clients as investing primarily in high risk, esoteric investments, was only made available in the FCA Final Notice in April 2014.

- The example Pension Review Report stating that 1 Stop didn't provide advice on the underlying investment isn't relevant as 1 Stop was a regulated entity and ought to have been aware of its own obligations when it came to suitability.
- In any event, L&C wasn't in a position to make any sort of assessment of suitability, which is what it would be doing if it read the suitability report.
- The level of due diligence imposed by the Financial Ombudsman Service goes far beyond what was agreed between the parties, and beyond any expectations that Mr M had of L&C.
- There's no reason why L&C should have had any concerns about accepting business from 1 Stop. 1 Stop was an FSA regulated entity and L&C was able to take comfort from that.
- A SIPP provider's role isn't to make a value judgement on the investment, it's to obtain good title to the investment and hold it within a pension wrapper.
- There was nothing requiring L&C to request information (or copies) of advice that had been provided and, in any event, L&C couldn't comment on this without potentially putting itself in breach of its permissions.
- While the Investigator didn't express a view on the due diligence carried out on the investment in TRG, in *Adams* the Store First investment being high risk didn't make it manifestly unsuitable and the same is true of TRG investments.
- In any event, the investments were as advertised and the book value of the TRG investment has continued to rise.
- The standard that L&C should be held to in looking to ascertain whether there was a breach of duty is that of a reasonably competent SIPP provider, not whether it followed the best possible practice.
- The Financial Ombudsman Service cherry picks from the case law.
- A breach of the Principles cannot, of itself, give rise to any cause of action at law.
- The Financial Ombudsman Service makes no attempt to explain why the Principles have been relied on rather than the High Court decision in *Adams*, despite this decision forming a much more solid foundation for any consideration of a complaint against a SIPP provider.
- The Principles fall to be construed in light of the 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.
- Using any examples of guidance from publications that were published after the transactions complained about runs contrary to common sense and the position in *Adams.* The only publication which could have any bearing on this complaint is the 2009 Thematic Review.
- Regulatory publications can't alter the meaning, or the scope, of the obligations imposed by the Principles.
- Many of the matters which the 2009 Thematic Review Report invites firms to consider are directed at firms providing advisory services.
- Even if the 2009 Thematic Review Report had been statutory guidance made under the Financial Services and Markets Act ('FSMA') S.139A (which it wasn't), the breach of such statutory guidance wouldn't give rise to a claim for damages under the FSMA.
- 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."*
- Duties imposed by the COBS can't all apply to all firms in all circumstances.

- The COBS rules contain some provisions and obligations that don't apply to execution-only SIPP providers.
- The Principles must necessarily be applied within the context of the specific duties imposed by the Rules, not the other way around.
- L&C didn't have permissions to carry on the regulated activity of advising on investments and it hasn't provided advice on whether consumers should open, or transfer monies, into SIPPs or on the underlying investments.
- Despite this, the Investigator found that L&C was under an obligation to protect against 'consumer detriment', to ensure that Mr M understood the level of risk involved and to have outlined the risk associated with the investment. If L&C was really under such an obligation, it would've been engaging in the activity of advising on investments.
- The relationships in this case are similar to those in *Adams*.
- At all times, Mr M was aware that L&C would act on an execution-only basis and would accept no responsibility for the quality of the investment business.
- 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.
- In suggesting that, notwithstanding the clear terms of the relevant contractual arrangements, L&C owed obligations of due diligence under the Principles, the reasoning of the investigator's view runs wholly contrary to that in *Adams*.
- Regardless of when due diligence was completed, *Adams* considered the duties of a SIPP provider under COBS at length and the findings of that case should be applied.
- At the time of the transaction complained of there was no obligation on a customer to take advice on the transfer of a pension. And there was no obligation on L&C to ensure that advice was taken. It's not fair or reasonable to use the Principles to artificially impose a duty that goes beyond that accepted and agreed by the parties.
- The Financial Ombudsman Service is attempting to circumvent the *Adams* decision.
- The investigator should have concluded that L&C's duties to Mr M extended no further than those owed to the claimant in *Adams*.
- The investigator's view fails 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.
- In 2012 it was common practice for SIPP providers to accept investments such as those this complaint concerns, and another SIPP provider would have accepted Mr M's application.
- L&C is left to *"carry the can"* as it's the last entity standing, this isn't fair or reasonable.
- If the Investigator's view is permitted to stand, the wider consequences will also be very serious, both for consumers and for execution-only SIPP providers.
- If, contrary to this contractual position, execution-only SIPP providers are made liable for the poor investment choices of such consumers, the execution-only SIPP market will cease to exist.

- From the perspective of the execution-only SIPP provider, there is also a real unfairness if it is liable for the poor investment choices of consumers, since:
    i) its business is structured on the basis that it is not investigating the quality of the underlying investments (other than to ascertain that they are permitted within the SIPP);
    ii) its business is structured on the basis that it is not warning or advising clients as to whether a SIPP or the underlying investment is suitable or appropriate for the client; and
    iii) its fees and charges are based on the provision of execution-only services.

Mr M accepted the investigator's findings but his representative made the following comments:

- Mr M made a claim to the FSCS in November 2016 and received a decision from the it in May 2017; at that time his loss was deemed to be below the maximum compensation of £50,000. When the FSCS revisited the case in September 2018 because his pension was a final salary scheme, it was evident Mr M had suffered losses in excess of the compensation limit.
- Had Mr M been able to recover all his loss via the FSCS he would not have needed to make a complaint to L&C. As Mr M didn't discover the extent of his loss until 2018 he made his complaint in time.
- The Financial Ombudsman Service was an appropriate body to consider the complaint.
- It was unclear what interest Mr M held in the investment and as such, questions whether L&C obtained 'good title' to it.
- It was disputed that the investment in TRG had increased in value. A statement from 2022 showed the value of the investment in TRG had halved since 2021.

As agreement couldn't be reached the complaint was passed to me for review.

I asked both parties to provide any information they had that had not yet been provided. In particular I asked L&C to provide a copy of Mr M's investment instruction. However, L&C couldn't locate this.

I also asked L&C what evidence it had seen to demonstrate that Mr R of 1 Stop had written to Mr M about the FCA's investigation into 1 Stop and his eligibility to complaint to the FSCS. L&C pointed me to the FCA's final notice issued against Mr R on 17 April 2014, which stated:

"2.11 The FSCS is currently investigating such claims for redress at present and will be in communication with 1 Stop's customers in due course. However, in the interim, and at the Authority's request, [Mr R] has agreed to contact all of 1 Stop's SIPP customers to inform them of the Authority's action (as detailed in the Final Notice) and to notify them of the FSCS' investigation."

It said this was repeated on the FCA website when the final notices were published. L&C said it hadn't seen any correspondence from Mr R to this effect but it had no reason to doubt that Mr M hadn't been contacted by Mr R. Although Mr M was no longer 1 Stop's customer by this point, it said the FCA's notice covered the actions of 1 Stop when it arranged Mr M's SIPP and investment in TRG. It expected Mr R would've written to Mr M soon after the final notice was issued in April 2014 but says it can't be held responsible if Mr R failed to do what the FCA required of him. L&C maintained that Mr M ought reasonably to have been aware of his cause for complaint soon after April 2014, when he was contacted by Mr R, which was more than three years before he complained to L&C.

I asked Mr M whether he recalled the involvement of a third party when his final salary pension was transferred to L&C. I said the paperwork I'd seen said that the third party would be carrying out a pension transfer analysis and he would be required to pay £450 for this. Mr M said he only recalled the involvement of 1 Stop and did not make any payment to a third party either through his pension or directly.

I also asked Mr M whether he was aware that the FCA had issued final notices against Mr R and Mr H of 1 Stop in 2014 and whether he received a letter from Mr R or Mr H following the FCA's final notices. Mr M says he was unaware of the FCA's notices and does not recall receiving any letter from Mr R or Mr H about this.

As agreement couldn't be reached the complaint was passed to me for review.

I issued a provisional decision on 29 December 2023, upholding the complaint. I said I was satisfied Mr M had made his complaint in time and that I didn't think the complaint should be referred to an alternative complaints scheme or otherwise be dismissed. And I didn't think L&C should have accepted the application for Mr M from 1 Stop had it carried out appropriate due diligence checks on it for largely the same reasons given by the Investigator. So, I didn't think Mr M would've transferred out of his final salary pension scheme or made the investments he did post-transfer had it done so. I thought it was fair and reasonable for L&C to compensate Mr M fully for his loss and that it should pay him an additional £300 for the distress and inconvenience caused.

Mr M accepted the provisional decision. His representative commented that if Mr M's FSCS compensation was deducted from the settlement L&C was required to make after the notional deduction of income tax he would be undercompensated.

L&C didn't accept the provisional decision. It maintained the complaint had been made too late as Mr M ought to have been aware of his cause for complaint before 17 September 2015. It added that Mr M's recollections that he wasn't told about Mr R and Mr H's final notices couldn't be relied upon – it was satisfied all of 1 Stop's customers had been contacted about this. It also said that Mr M had obtained representation in August 2016 which resulted in him making a claim to the FSCS; it said Mr M's representative ought to have been in a position to advise him that he also had cause for complaint against L&C.

L&C said there were a number of points that I had not addressed or given sufficient weight to, and in particular had failed to take account of the law. It said I had departed from legal precedent setting out (a) the importance of the contract between the SIPP provider and the customer; and (b) the scope of an execution-only SIPP provider's due diligence obligations. L&C said I was creating new due diligence obligations in a way which was contrary to the FCA's own publications at the time.

L&C also asked for clarification as to why the FSCS revisited Mr M's case in September 2018, having originally made a decision on the matter in May 2017. It also requested a copy of the reassignment of rights.

L&C reiterated the points it made in response to the Investigator's view in detail but I won't repeat them here as they mirror the points I've set out above. But in summary, it said my conclusion was entirely inconsistent with the terms of the contract between the parties, the relevant COBS Rules and the restrictions on L&C's permissions. And that no fair or reasonable reading of the Principles could require L&C to conduct due diligence of the nature I had suggested.

L&C also said that the £50,000 Mr M had received from the FSCS should be taken into account in its entirety as 1 Stop's contribution to Mr M's losses, in accordance with the Civil Liability (Contribution) Act 1978. But if I refused to take account of the redress from the FSCS in full, I should reduce any losses from the date of receipt of funds from the FSCS on the basis that the Complainant has had the benefit of those funds and so to ignore them gives the Complainant a windfall as he 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.

L&C also said that it was unreasonable to assume that Mr M would be a basic rate taxpayer in retirement and said evidence of Mr M's total pension assets should be sought to ensure this position was factually correct.

Mr M was asked for further information about his pension provisions. Mr M said his former employer had been looking into setting a pension up for him but did not do so and he went self-employed in late 2015/early 2016. Mr M says he hasn't set up a pension for himself since going self-employed so his only retirement provisions are the pension he transferred to L&C and the state pension.

As both parties have responded to my provisional decision, I'm now providing my final decision on the matter.

What I've decided – and why

I've reconsidered all the available evidence and arguments to decide whether we can consider Mr M's complaint.

Jurisdiction

The rules I must follow in determining whether we can consider this complaint are set out in the Dispute Resolution ('DISP') rules, published as part of the FCA's Handbook.

Six-and-three year rule

The section of the rules that applies to this complaint means that, unless L&C consents, we can't look into this complaint if it's been brought:

- more than six years after the event complained of;
- or, if later, more than three years after Mr M was aware – or ought reasonably to have become aware – he had cause for complaint;
    - unless the complaint was brought within the time limits, and there's a written acknowledgement or some other record of it having been received; or
    - unless, in the view of the Ombudsman, the failure to comply with the time limits was as a result of exceptional circumstances.

L&C says that Mr M's complaint was raised outside of these time limits. That's because Mr M made his complaint in September 2018, which was more than six years after he applied for the L&C SIPP. L&C says the FCA issued a final notice regarding the actions of Mr H of 1 Stop in April 2014. And following this Mr R of 1 Stop contacted all customers of 1 Stop, including Mr M, who invested in SIPPs informing them of the investigation being undertaken with the FSCS with regards to claims for compensation. And at this point Mr M ought to have been alerted to any issues with the investments advised on by 1 Stop and, by consequence, any issues with the decision to hold them within a SIPP.

Mr M applied for the SIPP on 10 August 2011 and it was established on 18 August 2011. Although the monies were transferred into the SIPP and invested after this, I think that the

event Mr M complains of took place in August 2011. That's because he says that L&C should not have accepted his application from 1 Stop, and had it done so, it wouldn't have gone on to make the investments. This took place more than six years before Mr M had referred his complaint to L&C in September 2018.

So, I've also gone on to consider whether Mr M referred his complaint more than three years from the date on which he either was aware, or ought reasonably to have become aware, he had cause for complaint. And when I say here cause for complaint, I mean cause to make this complaint about this respondent firm, L&C, not just knowledge of cause to complain about anyone at all. I don't think Mr M would need to have understood the details of a SIPP provider's obligations to have been aware (or in a position whereby he ought reasonably to have been aware) of his cause for complaint. But I think Mr M would have needed to have actual or constructive awareness that an act or omission of L&C had a causative role in the loss.

There are a number of points which I think are relevant to this discussion:

- In order to be aware of cause for complaint the complainant should reasonably know there's a problem, that they have or may suffer loss, and that someone else is responsible for the problem – and who that someone is. So, to have knowledge of cause for complaint about L&C, Mr M needs to be aware, or should reasonably be aware, that there's a problem which has caused, or may cause, him loss and that L&C is responsible.

- Mr M transferred a little under £32,000 into his SIPP and just over £28,000 was invested into TRG in October 2011.

- Mr M says he wasn't told about the risks involved with investing in TRG.

- The FCA issued final notices against Mr R and Mr H in 2014 and L&C says the FCA had contacted customers, including Mr M, about this.

- Mr M does not recall seeing the FCA's final notices about Mr R or Mr H and does not recall receiving a letter from either of them.

- Mr M contacted his representative in August 2016 after being told he may be able to make a claim due to him receiving inappropriate pension advice. Mr M can't remember who told him this.

- Mr M's SIPP statements valued the investment in TRG at €30,800 (£26,759.56) until 22 February 2021, when L&C reduced the value to €15,825 (£13,451.08).

Having considered the above points, it doesn't appear that Mr M would've been aware of any identifiable loss to his pension until he saw L&C's revaluation of his investment in 2021. But it's evident that Mr M complained to L&C long before this, in September 2018. So I think it's fair to say that Mr M's claim to the FSCS about 1 Stop and his subsequent complaint to L&C were not triggered by any specific loss to his investment.

Mr M says he contacted his representative in August 2016 as someone else had told him he might have received unsuitable pension advice. Given the time that has since passed, I don't think it's unusual that Mr M cannot recall any further details. But based on what I've seen, it seems to me that Mr M's claim was somewhat speculative; that is, he didn't necessarily know if he'd received the right advice. And Mr M's FSCS claim form focuses on the process employed by 1 Stop rather than any perceived loss. Mr M believed 1 Stop had acted

negligently because it had accepted business from an unregulated introducer (the promoter of TRG) and had failed to contact him and carry out its own fact-find or make an assessment of his attitude to risk. So, I'm not persuaded that at the time Mr M would've reasonably considered he had any grounds to complain about L&C.

In May 2017, the FSCS told Mr M it agreed he had a valid claim against 1 Stop and he'd suffered a loss. But I've seen no evidence that Mr M had been told by any party, including this representative, more than three years prior to his raising a complaint with L&C in September 2018, that L&C may have done something wrong and might be wholly or partly responsible for the position he was in.

L&C maintains Mr M ought reasonably to have questioned whether L&C had any responsibility for the loss to his pension following the FCA's final notices. Although Mr M says he doesn't recall seeing any letter from Mr R or Mr H about this, L&C says it has no reason to doubt that such a letter was sent. It refers to case law which it says supports its view that Mr M's testimony about this will be unreliable.

I've taken this into consideration. But as I said in my provisional decision, even if I accept that Mr M did receive such a letter, I'm still not persuaded that would've given Mr M reasonable grounds to consider that L&C might have done something wrong here. The notices themselves talk exclusively about the failings and misconduct of Mr R and Mr H in relation to 1 Stop's business practices. There isn't anything within the notices that alludes to or infers that a SIPP operator, such as L&C, ought to have refused to accept business from 1 Stop, given the practices it was employing. So, even if Mr M received a letter of this nature, I'm not persuaded that he or any other reasonable retail investor in his position would've considered, or ought reasonably to have considered, L&C had any responsibility for any problem which had caused the loss he complained about.

L&C says that Mr M was in contact with his representative from August 2016, so the representative ought to have advised him to complaint to L&C about its involvement given the action the FCA took against Mr R and Mr H. But I'm satisfied Mr M's representative did not tell Mr M he had grounds to complain about L&C. The relevant test here is what Mr M knew or ought reasonably to have known, not what his representative ought reasonably to have known and made him aware of.

In summary, I've carefully considered all the evidence we've been provided and, on balance, I don't think Mr M's circumstances were such that a reasonable investor in his position ought to have concluded that L&C had done something wrong more than three years before Mr M's complaint was raised with L&C. So, I don't think that Mr M was aware, or ought reasonably to have become aware, that he had cause for complaint against L&C more than three years before his complaint was referred to it in September 2018. Accordingly, I'm satisfied this complaint has been brought in time and that it's one we can consider.

Should Mr M's complaint be referred to another complaints scheme or be dismissed?

L&C has said that it believes the complaint is better suited to be considered by TPO or a Court. Having carefully reconsidered L&C's submissions on this point, I'm satisfied that Mr M's complaint is one we can and should consider. We have a statutory duty to resolve complaints referred to us which are within our jurisdiction, subject to certain discretions which are set out in our rules. Regarding L&C's submission about TPO; the rules set out in the FCA Handbook, at DISP 3.4.1R, say:

"The Ombudsman may refer a complaint to another complaints scheme where:

1) *he considers that it would be more suitable for the matter to be determined by that scheme; and*
2) *the complainant consents to the referral."*

L&C has argued that Mr M's complaint should be referred to TPO. And I could now refer the complaint to TPO on the basis of DISP 3.4.1R if I take the view it's more suitable for TPO and if, in the light of that view, Mr M consents to a referral to TPO.

But I don't consider this is a complaint that would be more suitable for determination by TPO. This complaint requires consideration to be given to the rules and principles set down by the regulator. In my view, these are matters which the Financial Ombudsman Service is particularly well placed to deal with. I'm also satisfied we possess the necessary knowledge and expertise to fairly determine the complaint. Our investigation is also well advanced. So I don't think it would be more suitable for the subject matter of this complaint to be considered by TPO.

In reaching this conclusion I've considered the Memorandum of Understanding ('MoU') between our service and TPO. The MoU is a document about practical cooperation where there's remit overlap between the two organisations – however the MoU doesn't determine the jurisdiction of either organisation. Ultimately, DISP 3.4.1R says that I may refer the complaint to another complaints scheme, not that I must. So I've discretion to decide what I'll do in the circumstances. And, for the reasons I've given above, I've decided to exercise my discretion not to refer Mr M's complaint to TPO.

For similar reasons, I'm satisfied that I don't need to exercise my discretion to dismiss the complaint under DISP 3.3.4A R on the basis it would significantly impair our effective operation, as it is more suitable to be dealt with by a Court or a comparable ADR entity. As I've explained, I'm satisfied the complaint is well suited to the work of the Financial Ombudsman Service. We have significant experience of dealing with complaints of this type and are well-placed to consider them. Considering Mr M's complaint would not in my view seriously impair our effective operation.

In summary, I don't consider that it would be more suitable for this complaint to be determined by TPO and I've decided not to exercise my discretion to refer it. I'm also not required to dismiss this complaint, and for the reasons I've given, I'm not exercising my discretion to dismiss it.

As such, I've gone on to reconsider the merits of this complaint below.

Merits of the complaint

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

The parties to this complaint have provided detailed submissions to support their position and I'm grateful to them for doing so. I've considered these submissions in their entirety. However, I trust that they won't take the fact that my decision focuses on what I consider to be the central issues as a discourtesy. To be clear, the purpose of this decision isn't to comment on every individual point made or question asked by the parties, rather it's to set out my findings and reasons for reaching them.

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 consider to have been good industry practice at the relevant time.

In my view, the FCA's Principles for Businesses are of particular relevance. The Principles for Businesses, which are set out in the FCA's Handbook "*are a general statement of the fundamental obligations of firms under the regulatory system"* (PRIN 1.1.2G – at the relevant date). 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 these judgments when making this decision on Mr M's case.

I've considered whether *Adams* means that the Principles should not be taken into account in deciding this case and I'm of the view that it doesn't. 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 of the judgments say 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 the *Adams* judgments when making this decision on Mr M'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 that Mr Adams was seeking to advance a case that was radically different to that found in his initial pleadings. The Court found that this part of Mr Adams' appeal 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."

In my view 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 Mr M'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 store pods investment into its SIPP.

Furthermore, in Mr M's complaint, amongst other things, I'm considering whether L&C ought to have identified that the introductions from 1 Stop involved a significant risk of consumer detriment and, if so, whether it ought to have ceased accepting introductions from 1 Stop before entering into a contract with Mr M.

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

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

However, I think it's important to emphasise that I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And, in doing that, I'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 Mr M on the SIPP and/or the underlying investments. Refusing to accept an application isn't the same thing as advising Mr M on the merits of the SIPP 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 Mr M'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.

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 Business ('a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems').

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

- *Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm's clients, and that they do not appear on the FSA website listing warning notices.*

- *Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.*

- *Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified.*

- *Being able to identify anomalous investments, e.g. unusually small or large transactions or more 'esoteric' investments such as unquoted shares, together with the intermediary that introduced the business. This would enable the firm to seek appropriate clarification, e.g. from the client or their adviser, if it is concerned about the suitability of what was recommended.*

- *Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely.*

- *Routinely identifying instances of execution-only clients who have signed disclaimers taking responsibility for their investment decisions, and gathering and analysing data regarding the aggregate volume of such business.*

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

The later publications

In the 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 un-authorised 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 non-regulated 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 their relevance, I've considered them in their entirety.

L&C's representatives have said that the 2009 Thematic Review isn't statutory guidance. And I acknowledge that the 2009 and 2012 Thematic Review Reports and the *"Dear CEO"* letter aren't formal guidance (whereas the 2013 finalised guidance is). However, I'm of the view that the fact that the reports and *"Dear CEO"* letter didn't constitute formal guidance doesn't mean their importance should be underestimated. They 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 them 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.

In 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 indeed what many SIPP operators were already doing, and therefore indicates what I consider amounts to good industry practice at the relevant time. So I'm satisfied it's relevant and therefore appropriate to take it into account.

In its submissions, including when making points about the regulatory publications, L&C's representatives have 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's representatives have also said that many of the matters that the Report invites firms to consider are directed at firms providing advisory services. It's not specified which parts of the Report L&C's representatives think 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."*

I'm also satisfied that L&C, at the time of the events under consideration here, thought the 2009 Thematic Review Report was relevant. L&C did carry out some due diligence on 1 Stop. So, it clearly thought it was good practice to do so, at the very least.

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'm therefore satisfied it's appropriate to take them into account too.

I've carefully considered what L&C has said about the publications published after Mr M's SIPP was set up. But, like the Ombudsman in the *BBSAL* case, I don't think the fact the publications, (other than the 2009 Thematic Review Report), post-date the events that took place in relation to Mr M'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 them existed throughout, as did the obligation to act in accordance with those 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* case 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 amounts to good industry practice at the relevant time.

That also 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 Mr M. It's accepted L&C wasn't required to give advice to Mr M, 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, they're 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 Mr M's introduction from 1 Stop.

It's also 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 Mr M's SIPP application from 1 Stop, 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 submissions but it's not my role to determine whether something that's taken place gives rise to a right to take legal action. I'm making a decision on 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, it's my view 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 1 Stop and the business 1 Stop was introducing, both initially and on an ongoing basis, *before* deciding to accept Mr M's application.

Ultimately, what I'll be looking at is whether L&C took reasonable care, acted with due diligence and treated Mr M fairly, in accordance with his best interests. And what I think is fair and reasonable in light of that. And I think the key issue in Mr M's complaint is whether it was fair and reasonable for L&C to have accepted Mr M's SIPP application in the first place. So, I need to consider whether L&C carried out appropriate due diligence checks on 1 Stop before deciding to accept Mr M's SIPP application.

And the questions I need to consider are whether L&C ought to, acting fairly and reasonably to meet its regulatory obligations and good industry practice, have identified that consumers introduced by 1 Stop were being put at significant risk of detriment. And, if so, whether L&C should therefore not have accepted Mr M's application from 1 Stop.

The contract between L&C and Mr M

L&C has made some submissions about its contract with Mr M and I've carefully considered what has been said about this.

To be clear, I don't say L&C should (or could) have given advice to Mr M or otherwise have ensured the suitability of the SIPP or the TRG investment for him. I accept that L&C made it clear to Mr M that it wasn't giving, nor was it able to give, advice and that it played an execution-only role in his SIPP investments. And that forms Mr M signed confirmed, amongst other things, that losses arising as a result of L&C acting on his instructions were his responsibility.

So, 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 Mr M's case is made with all of this in mind. I've proceeded on the understanding that L&C wasn't obliged – and wasn't able – to give advice to Mr M on the suitability of the SIPP or the investments he went on to make. But I'm satisfied that, to meet its regulatory obligations when conducting its operation of SIPPs business, L&C had to decide whether to accept introductions of business with the Principles in mind. And I don't agree that it couldn't have rejected introductions or applications without contravening its regulatory permissions by giving investment advice.

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'm 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.

The Regulator's reports and guidance provided some examples of good practice observed by the FSA and 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 Mr M) 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.

And I think that L&C understood this to some degree at the time too, as it did more than just check the FSA entries for 1 Stop to ensure they were regulated to give advice. It also entered into intermediary agreements with 1 Stop.

So, and well before the time of Mr M's application, I think that L&C ought to have understood that its obligations meant that it had a responsibility to carry out appropriate checks on 1 Stop 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 before accepting them into a SIPP. I think L&C's submissions on the fact it did undertake some due diligence prior to allowing the TRG holding within its SIPPs reflect this. So, I'm satisfied that, to meet its regulatory obligations when conducting its business, L&C was also required to consider whether to accept or reject a particular investment (here TRG), with the Principles in mind.

L&C's due diligence on 1 Stop

L&C explained to us in a previous complaint (that was the subject of published decision 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 FSA.

And L&C appears to have carried out some checks before it accepted business from 1 Stop, amongst other things, I'm satisfied this included:

- Checking the FSA register to ensure that 1 Stop was regulated and authorised to give financial advice.
- Entering into intermediary agreements with 1 Stop.

From the information that has been provided on this complaint and another complaint considered by us, I'm satisfied that L&C did take *some* steps towards meeting its regulatory obligations and good industry practice. However, I don't think those steps that 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 1 Stop *before* it accepted Mr M's application.

As I explain below, based on the available evidence, I think it's more likely than not that the SIPP business introduced to L&C by 1 Stop was all, or mostly, very high risk business where consumer's monies were ending up invested in unregulated and esoteric investments post-transfer. I think L&C should have taken steps to address this potential risk. And I think such steps should have included getting a fuller understanding of 1 Stop's business model – through asking questions of/requesting information from 1 Stop and through independent checks.

Further, I'm satisfied such information, had it been requested, would have confirmed there was a significant risk of consumer detriment associated with introductions of business from 1 Stop. In the alternative 1 Stop might have been unwilling to answer, or fully answer, questions it received from L&C. In either event I think L&C should have concluded it shouldn't accept introductions from 1 Stop and *before* it accepted Mr M's SIPP application.

So, based on the evidence provided, I'm of the view L&C failed to conduct sufficient due diligence on 1 Stop *before* accepting Mr M's business from it, or draw fair and reasonable conclusions from what it did know, or ought to have known, about 1 Stop. My view is that L&C ought reasonably to have concluded it should not accept business from 1 Stop, and have ended its relationship with it, *before* it received Mr M's application. I've set out some more detail about this below, the points I make below overlap, to a degree, and should have been considered by L&C cumulatively.

The type of investments being made by 1 Stop-introduced consumers

We've previously asked L&C in connection with other complaints involving 1 Stop about the number of introductions it received from 1 Stop and the percentage of introductions it received from 1 Stop where applicants invested in non-mainstream investments. L&C responded as follows:

- 1 Stop introduced 21 clients to L&C between February 2010 and July 2012;
- It was L&C's understanding that 1 Stop was acting as the adviser for all the clients introduced to it but it did not request copies of any suitability reports;
- As well as investments in TRG, other investments that were made by 1 Stop clients included investments in:
    - Unquoted Shares
    - Storage pods

- Physical Gold
- Platforms (Interactive Brokers)
- Zurich
- Sustainable Agro Energy
- Carbon Credits

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."

But I don't think simply keeping records about the number and nature of introductions that 1 Stop 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.

Based on the information L&C has provided, it appears most consumers 1 Stop introduced to L&C ended up with SIPP monies invested in higher risk unregulated assets. This finding also appears to be consistent with what the FCA's Final Notices for Mr R and Mr H say about the type of investments 1 Stop clients' pension monies were being invested into.

So, I think that the introductions L&C received from 1 Stop were predominantly for applicants intending to invest in high risk non-standard esoteric holdings, such as the unregulated holding in TRG that Mr M's SIPP monies were invested into. 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. The risks are multiplied where the property is *"off plan"* and further funding is necessary from investors to complete the purchases, as was the case with many of the deposit based TRG investments, including the one Mr M made.

And based on the evidence L&C has provided, I'm satisfied it's more likely than not that L&C had received a number of introductions from 1 Stop, where consumers had invested in unregulated holdings, before it received Mr M's introduction.

So, I think L&C either was aware, or ought reasonably to have been aware and prior to receiving Mr M's SIPP application, that the type of business 1 Stop was introducing was high risk, with consumers' pension monies typically being invested in unregulated holdings, and carried a potential risk of consumer detriment.

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 from the pattern of business being introduced to it by 1 Stop – which I think should have been clear and obvious at the time – it should not continue to accept applications from 1 Stop. 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, such as those I've set out below.

Requesting information directly from 1 Stop

Given the potential risk of consumer detriment I think that, as part of its due diligence on 1 Stop, L&C ought to have found out more about how 1 Stop was operating before it received Mr M's application. And, mindful of the type of introductions L&C was receiving

from 1 Stop from the outset, I think it's fair and reasonable to expect L&C, in line with its regulatory obligations, to have made some specific enquiries and obtained information about 1 Stop'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 manner *"…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, also 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."

And I think that L&C, and long before it received Mr M's SIPP application, should have checked with 1 Stop and asked 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 advice, what its arrangements with any unregulated businesses were, how and why retail clients were interested in making these esoteric 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.

Mr M says he dealt with 1 Stop mostly by post – he never met or spoke with a representative of 1 Stop on the phone. The advisory process in Mr M's case appears to be very similar to the analysis in the FCA's Final notice for Mr R, quoted towards the start of this decision in "1 Stop's advisory process". And I think it's more likely than not this would also have been the case for a number of other consumers introduced to L&C by 1 Stop before it received Mr M's application.

The FCA Final Notice also highlighted that, much as in Mr M's case, 1 Stop's customer documentation contained numerous disclaimers that as a business, 1 Stop didn't advise on, or have any involvement in considering, the underlying investment. And that Mr R himself confirmed that, *"…all we would be doing is looking at a suitable SIPP … that they could transfer their pension into a SIPP that would accept that particular investment."*

The contents of the documentation we've seen on this complaint that was being completed and retained by 1 Stop doesn't suggest 1 Stop was trying to mask what it was doing. For example, in 1 Stop's notes in the questionnaire it completed with Mr M, 1 Stop was recording that it wasn't advising on the suitability of the investments transfers were being effected in order to make. And that no advice had been given on investments by 1 Stop in any way or form.

And, on balance, I think it's more likely than not that if L&C had checked with 1 Stop and asked the *type* of questions I've mentioned earlier on in this section that 1 Stop would have provided a full response to the information sought. In the alternative, if 1 Stop 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 1 Stop.

L&C might say that it didn't have to obtain this information from 1 Stop. But I think this was a fair and reasonable step to take, in the circumstances, to meet its regulatory obligations and good industry practice.

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 1 Stop. 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 Mr M, directly and/or to seek copies of the suitability reports.

I appreciate that L&C might say that it couldn't comment on advice without potentially being in breach of its permissions. Again, I confirm that 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 1 Stop's business model. This was a fair and reasonable step to take in reaction to the clear and obvious risk 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 received Mr M's application:

- 1 Stop was explaining to consumers that 1 Stop would give no advice on unregulated investments to be held within a SIPP. And that 1 Stop's role was to research and advise on a suitable SIPP that the investment could be held in.
- Consumers were being introduced to L&C without having been offered full regulated advice on the overall proposition.
- 1 Stop was having business referred to it by third parties and it was then introducing business to L&C.
- Some consumers might have been sold on the idea of transferring pension monies so as to invest in unregulated investments before the involvement of any regulated parties.

Each of these in isolation is significant, but cumulatively I think they demonstrate that there was a significant risk of consumer detriment associated with introductions from 1 Stop. I think that L&C ought to have concluded 1 Stop had a complete disregard for its consumers' best interests, and wasn't meeting many of its regulatory obligations.

As I've mentioned above, the contemporaneous documentation, such as the 1 Stop questionnaire, suggests that 1 Stop was being open about the limited service it was offering to consumers like Mr M. And had L&C carried out the due diligence I've mentioned above, I'm satisfied it's more likely than not that it would have identified that consumers introduced by 1 Stop hadn't been offered, or received, full regulated advice from 1 Stop on their transactions.

The approach 1 Stop was taking was a highly unusual role for an advisory firm to take. 1 Stop was stating it wouldn't discuss the specific risks associated with unregulated investments with consumers like Mr M and it wasn't advising on the suitability of the overall proposition for consumers (i.e. including advice about the intended post-transfer unregulated investments). This raises significant questions about the motivations and competency of 1 Stop – particularly where consumers were being introduced by unregulated businesses.

Had L&C taken appropriate steps in reaction to this, such as seeking clarification from some applicants introduced by 1 Stop at the time, like Mr M, and/or requesting copies of some suitability reports for 1 Stop-introduced consumers, I think it's more likely than not that the information L&C obtained would have accorded with what 1 Stop was stating in the contemporaneous documentation we've seen in other customers' complaints, and with what Mr R is quoted as saying in the FCA's 14 April 2014 Final Notice. Namely, that 1 Stop wasn't offering consumers it was introducing to L&C any advice on investing in high risk unregulated investments, like TRG, which investments consumers' pension monies were being transferred to L&C so as to effect.

I therefore think L&C ought to have concluded Mr M – and applicants before him – didn't have full regulated advice on the overall proposition made available to them by 1 Stop. And I think that L&C ought to have viewed this as a significant point of concern. As retail consumers, like Mr M, were transferring pension monies to L&C to invest in higher-risk esoteric investments like TRG, without the benefit of having been offered full regulated advice on those investments, by an advisory business which appeared to be actively avoiding its responsibility to give advice on the intended investments.

1 Stop was a regulated business that had permissions to advise on the establishment of a SIPP, the switch 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 1 Stop 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 transfers to a SIPP to invest in high risk esoteric investments, such as the TRG holding, where no advice is being given by that firm on the esoteric investments. 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 1 Stop. And I think L&C ought to have identified that there was a risk that 1 Stop was choosing to introduce consumers without them having been offered full regulated advice. 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.

I also think that if L&C had carried out the due diligence I've mentioned above, it should have identified that some consumers introduced by 1 Stop, like Mr M, who were investing in unregulated investments were likely being 'sold' on those investments by third parties, including unregulated introducers.

Although the promotion of some unregulated investments, including TRG, might not have been 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. L&C should have been alive to the risks associated with unregulated firms promoting unregulated investments for SIPPs, which investments were unlikely to be suitable for the vast majority of retail clients. And I think that's particularly the case where full regulated advice wasn't being offered to consumers by the introducer L&C was dealing with – here 1 Stop.

I think that L&C should have identified that the business it was receiving from 1 Stop, whereby 1 Stop was arranging the transfer of pension monies for consumers into a SIPP, so as to invest in unregulated investments and without those consumers receiving any assessment from 1 Stop about the suitability, or otherwise, of those investments raised serious questions about the motivation and competency of 1 Stop.

And I think L&C should have concluded, and *before* it accepted Mr M's business from 1 Stop, that it shouldn't accept introductions from 1 Stop. I therefore conclude that it's fair and reasonable in the circumstances to say that L&C shouldn't have accepted Mr M's application from 1 Stop.

I appreciate that L&C's representatives have submitted that, as far as L&C is aware, 1 Stop advised Mr M on the establishment of the SIPP and the TRG investment. Further, that the fact advice was given on the investment is evidenced by 1 Stop supplying L&C with a copy of the investment application form alongside the SIPP application form. L&C's representatives have also highlighted that in his SIPP application form Mr M informed L&C that he'd authorised his financial adviser to act on his behalf in dealing with investments and correspondence shows that 1 Stop instructed L&C to purchase the investment.

Having carefully considered all of the submissions that have been made, including the contemporaneous documentation from the point of sale and Mr M's testimony, I think it's more likely than not an agent of TRG promoted the unregulated investment Mr M's SIPP monies was invested in and that 1 Stop didn't advise Mr M on these investments. I'm satisfied that conclusion is supported by the weight of evidence in this specific case.

But, in any event this is a secondary point because, as I've mentioned above, I'm satisfied that if L&C had undertaken adequate due diligence on 1 Stop it should have stopped accepting introductions from 1 Stop *before* it received Mr M's application. I think L&C should have declined to accept Mr M's application from 1 Stop. So things shouldn't have got beyond that.

L&C didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr M fairly by accepting his application from 1 Stop. To my mind, L&C didn't meet its obligations or good industry practice at the relevant time, and allowed Mr M to be put at significant risk of detriment as a result.

Due diligence on the underlying investments

L&C had a duty to conduct due diligence and give thought to whether an investment itself is acceptable for inclusion into a SIPP. That's consistent with the Principles and the regulators'

publications as set out earlier in this decision. It's also consistent with HMRC rules that govern what investments can be held in a SIPP.

However, given what I've said about L&C's due diligence on 1 Stop and my conclusion that it failed to comply with its regulatory obligations and good industry practice at the relevant time, I don't think it's necessary for me to also consider L&C's due diligence on the TRG investment at this stage. I'm satisfied that L&C wasn't treating Mr M fairly or reasonably when it accepted his introduction from 1 Stop, so I've not gone on to consider the due diligence it may have carried out on the TRG investment and whether this was sufficient to meet its regulatory obligations. And I make no findings about this issue.

Was it fair and reasonable in all the circumstances for L&C to proceed with Mr M's application?

For the reasons given above, I think L&C should have declined to accept Mr M's application from 1 Stop. So things shouldn't have got beyond that.

Further, in my view it's fair and reasonable to say that just having Mr M sign declarations, wasn't an effective way for L&C to meet its regulatory obligations to treat him fairly, given the concerns L&C ought to have had about the business being introduced by 1 Stop.

L&C knew that Mr M had signed forms intended to indemnify it against losses that arose from acting on his instructions. And, in my opinion, relying on such indemnities when L&C knew, or ought to have known, Mr M's dealings with 1 Stop were putting him 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 Mr M's business from 1 Stop.

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

I'm satisfied that Mr M's SIPP shouldn't have been established and the opportunity to execute investment instructions or proceed in reliance on an indemnity shouldn't have arisen at all. And I'm firmly of the view that it wasn't fair and reasonable in all the circumstances for L&C to proceed with Mr M's application.

COBS 11.2.19R

L&C's representatives have made the point that L&C complied with COBS 11.2.19R in executing Mr M's written instructions.

However, in the circumstances it's my view that the crux of the issue in this complaint is whether L&C should have accepted the SIPP application from 1 Stop and established Mr M's SIPP in the first place.

An argument about having to execute the transaction as a result of COBS 11.2.19R was considered and rejected by the judge in *BBSAL*. In that case Jacobs J said:

"The heading to COBS 11.2.1R shows that it is concerned with the manner in which orders are to be executed: i.e. on terms most favourable to the client. This is consistent with the heading to COBS 11.2 as a whole, namely: "Best execution". The text of COBS 11.2.1R is to the same effect. The expression "when executing orders" indicates that it is looking at the

moment when the firm comes to execute the order, and the way in which the firm must then conduct itself. It is concerned with the "mechanics" of execution; a conclusion reached, albeit in a different context, in Bailey & Anr v Barclays Bank [2014] EWHC 2882 (QB), paras [34] – [35]. It is not addressing an anterior question, namely whether a particular order should be executed at all. I agree with the FCA's submission that COBS 11.2 is a section of the Handbook concerned with the method of execution of client orders, and is designed to achieve a high quality of execution. It presupposes that there is an order being executed, and refers to the factors that must be taken into account when deciding how best to execute the order. It has nothing to do with the question of whether or not the order should be accepted in the first place."

And I don't think that L&C's representatives' argument on this point is relevant to L&C's obligations under the Principles to decide whether to accept Mr M's application to open a SIPP in the first place.

Is it fair to ask L&C to pay Mr M compensation in the circumstances?

The involvement of other parties

In this decision I'm considering Mr M's complaint about L&C. However, I accept that other parties were involved in the transactions complained about, including 1 Stop and TRG. L&C has contended that it's 1 Stop that's really responsible for Mr M's losses. The Financial Ombudsman Service won't look at complaints against 1 Stop as it's been dissolved and no longer exists as a regulated business. And we also can't look at complaints about TRG.

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).

As I set out above, 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 the regulatory obligations, good industry practice and to treat Mr M fairly.

The starting point, therefore, is that it would be fair to require L&C to pay Mr M compensation for the loss he's suffered as a result of its failings. I've carefully considered if there's any reason why it wouldn't be fair to ask L&C to compensate Mr M for his loss, including whether it would be fair to hold another party liable in full or in part. And, for the following reasons, I consider it appropriate and fair in the circumstances for L&C to compensate Mr M to the full extent of the financial losses he's suffered due to L&C's failings.

I accept that it may be the case that 1 Stop might have some responsibility for initiating the course of action that led to Mr M'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 Mr M wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

I want to make clear that I've carefully taken everything L&C has said into consideration. And it's my view that it's appropriate and fair in the circumstances for L&C to compensate Mr M to the full extent of the financial losses he's suffered due to L&C's failings. And, taking into account the combination of factors I've set out above, I'm not persuaded that it would be appropriate or fair in the circumstances to reduce the compensation amount that L&C's liable to pay to Mr M.

I'm not making a finding that L&C should have assessed the suitability of the SIPP or TRG holding for Mr M. I accept that L&C wasn't obligated to give advice to Mr M, or otherwise to ensure the suitability of the pension wrapper or investments for him. 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.

Mr M taking responsibility for his own investment decisions

It's been submitted that in construing L&C's obligations, regard should be had to 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 point carefully and I'm satisfied that it wouldn't be fair or reasonable to say Mr M's actions mean he 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 Mr M's application from 1 Stop to open a SIPP *at all*. That should have been the end of the matter – if that had happened, I'm satisfied the arrangement for Mr M wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

As I've made clear, L&C needed to carry out appropriate due diligence on 1 Stop and reach the right conclusions. I think it failed to do this. And just having Mr M 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.

1 Stop was a regulated firm with the necessary permissions to advise Mr M on his pension provisions. I'm satisfied that in his dealings with 1 Stop, Mr M trusted that 1 Stop was acting in his best interests. Mr M also then used the services of a regulated personal pension provider in L&C.

I've carefully considered what L&C has said about Mr M being aware the investments were high risk. Mr M was a mortgage adviser for a period of time before changing careers – he no longer works in the financial services industry. But I've seen nothing to convince me that Mr M had any specialist knowledge or experience such that it meant he likely understood the risks of the particular investment proposed to him. Indeed, when making his claim to the FSCS and his complaint to the Financial Ombudsman Service, Mr M said the risks associated with unregulated investments weren't explained to him, he was told the investment was safe and he would achieve better returns than he'd previously been getting.

Having carefully considered all of the evidence that's been provided, I'm satisfied that Mr M's testimony that he didn't receive an explanation of the risks involved, and that he was led to believe that transferring his pension monies would help him to better grow his fund, is credible. And I wouldn't consider it fair or reasonable for L&C to have concluded that Mr M *had* received an explanation of the risks involved with the overall proposition from 1 Stop given what L&C knew, or ought to have known, about 1 Stop's business model by the time it received Mr M's application.

But, in any eventuality, in my view this is a secondary point. That's because, as mentioned above, I'm satisfied that if L&C had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted Mr M's application from 1 Stop to open a SIPP *at all*. That should have been the end of the matter – if that had happened, I'm satisfied

the arrangement for Mr M wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

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 Mr M for the loss he's suffered. I don't think it would be fair to say in the circumstances that Mr M should suffer the loss because he ultimately instructed the transactions to be effected.

Had L&C declined Mr M's business from 1 Stop, would the transactions complained about still have been effected elsewhere?

I think that Mr M's pension monies were transferred to L&C so as to effect unregulated investments. I'm satisfied that position is supported by the contents of the contemporaneous documentation that's available, including the contents of 1 Stop's Personal Financial Questionnaire for Mr M. And Mr M says that he was told by the TRG representative that he could increase his pension by investing in TRG.

L&C might say that if it hadn't accepted Mr M's application from 1 Stop, 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 Mr M for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found it 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 Mr M's application from 1 Stop.

Further, if L&C had declined to accept Mr M's business from 1 Stop and Mr M had then sought advice from a different adviser, I think it's unlikely that another adviser, acting properly, would have advised Mr M to transfer away from his final salary pension and to invest in an unregulated holding in a SIPP.

Alternatively, if L&C had declined to accept Mr M's business from 1 Stop, Mr M might have simply decided not to seek pensions advice elsewhere from a different adviser and still then retained his existing pension.

In the circumstances, I'm satisfied it's fair and reasonable to conclude that if L&C had declined to accept Mr M's application from 1 Stop, the transactions complained about wouldn't still have gone ahead and Mr M would have retained his final salary pension.

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."

But, in this case, I'm not satisfied that Mr M proceeded knowing that the investments he was making were high risk, and that he was determined to move forward with the transactions in order to take advantage of a cash incentive.

Mr M says that he was told that transferring his pension monies would help him to better grow his fund and that he wasn't told the investments were high risk. I've not seen any evidence to show Mr M was paid a cash incentive, it therefore cannot be said he was *incentivised* to enter into the transaction in this way. On balance, I'm satisfied that Mr M, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for himself. So, in my opinion, this case is very different from that of Mr Adams. And 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 Mr M's application from 1 Stop, the transactions this complaint concerns wouldn't still have gone ahead.

So, overall, I do think it's fair and reasonable to direct L&C to pay Mr M compensation in the circumstances. While I accept that 1 Stop might have some responsibility for initiating the course of action that's led to Mr M's loss, I consider that L&C failed to comply with its own regulatory obligations and didn't put a stop to the transactions proceeding by declining Mr M's application from 1 Stop when it had the opportunity to do so. And I'm satisfied that Mr M wouldn't have established the SIPP, transferred his final salary pension or invested in TRG 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 Mr M. In my view, in considering what fair compensation looks like in this case, it's reasonable to make an award against L&C that requires it to compensate Mr M for the full measure of his loss. 1 Stop was reliant on L&C to facilitate access to Mr M's pension. And but for L&C's failings, I'm satisfied that the transactions this complaint concerns wouldn't have occurred in the first place.

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, which I'm not able to determine. However, that fact shouldn't impact on Mr M's right to fair compensation from L&C for the full amount of his loss.

The key point here is that but for L&C's failings, Mr M wouldn't have suffered the loss he's suffered. And, as such, I'm of the opinion that it's appropriate and fair in the circumstances for L&C to compensate Mr M to the full extent of the financial losses he's suffered due to its failings, and notwithstanding any failings by 1 Stop.

I acknowledge that Mr M has received £50,000 from the FSCS – he received payments in 2017 and 2018. L&C has asked why the FSCS reconsidered Mr M's claim in 2018 but I don't think that is relevant to my consideration of this case.

Mr M has provided us with a copy of the reassignment of rights. The terms of his reassignment of rights require him to return compensation paid by the FSCS in the event this complaint is successful, and I understand that the FSCS will ordinarily enforce the terms of the reassignment if required. So, if L&C was to deduct £50,000 from the total compensation it is required to pay to him, Mr M will likely be undercompensated. As such, I think it's fair and reasonable to make no *permanent* deduction in the redress calculation for the sum of compensation Mr M received from the FSCS. But I do think it's fair and reasonable to allow for a *temporary* notional deduction equivalent to the payments Mr M actually received from the FSCS for a period of the calculation, so that the payments cease to accrue any return in the calculation during that period.

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 shouldn't have accepted Mr M's application from 1 Stop. For the reasons I've set out, I also think it's fair to ask L&C to compensate Mr M for the full losses he's suffered.

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 Mr M to the position he would now be in but for what I consider to be L&C's failure to carry out adequate due diligence checks before accepting Mr M's SIPP application.

As I've already mentioned above:

- I don't think it's fair and reasonable to say that L&C shouldn't compensate Mr M for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found it 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 Mr M's application from 1 Stop.
- If L&C had declined to accept Mr M's business from 1 Stop and Mr M had then sought advice from a different adviser, I think it's unlikely that another adviser, acting properly, would have advised Mr M to transfer away from his final salary pension scheme and to invest in an unregulated holding in a SIPP.
- Alternatively, if L&C had declined to accept Mr M's business from 1 Stop, Mr M might have simply decided not to seek pensions advice elsewhere from a different adviser and still then retained his existing scheme.

Fair compensation

A fair and reasonable outcome would be for L&C to put Mr M**,** as far as possible, into the position he would now be in but for the unsuitable advice. I consider Mr M would most likely have remained in his final salary occupational pension scheme but for L&C's failings.

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.

For clarity, Mr M has not yet retired, and he has no plans to do so at present. So, compensation should be based on the scheme's normal retirement age, as per the usual assumptions in the FCA's guidance.

This calculation should be carried out using the most recent financial assumptions in line with 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 Mr M'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:

- calculate and offer Mr M redress as a cash lump sum payment,
- explain to Mr M before starting the redress calculation that:
  - the 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 the redress prudently is to use it to augment his personal pension
- offer to calculate how much of any redress Mr M receives could be augmented rather than receiving it all as a cash lump sum,

- if Mr M accepts L&C's offer to calculate how much of his redress could be augmented, request the necessary information and not charge Mr M for the calculation, even if he ultimately decides not to have any of his redress augmented, and
- take a prudent approach when calculating how much redress could be augmented, given the inherent uncertainty around Mr M's end of year tax position.

I acknowledge that Mr M has received a sum of compensation from the FSCS, and that he has had the use of the monies received from the FSCS. The terms of Mr M's reassignment of rights require him to return compensation paid by the FSCS in the event this complaint is successful, and I understand that the FSCS will ordinarily enforce the terms of the reassignment if required. So, I think it's fair and reasonable to make no *permanent* deduction in the redress calculation for the compensation Mr M received from the FSCS. And it will be for Mr M to make the arrangements to make any repayments he needs to make to the FSCS. However, I do think it's fair and reasonable for some allowance to be made for the sums Mr M 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 payments Mr M received from the FSCS following the claim about 1 Stop, 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 payments Mr M received from the FSCS following the claim about 1 Stop. 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 payments Mr M received from the FSCS.

Redress paid to Mr M as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. 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 Mr M would otherwise pay on income from his pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to Mr M's likely income tax rate in retirement – presumed to be 20%. So making a notional deduction of 15% overall from the loss adequately reflects this.

L&C disputes that it is reasonable to assume Mr M will be a basic rate tax payer in retirement. But Mr M has confirmed that the pension transferred to L&C and the state pension are his only retirement provisions. So, on balance, I think it's fair and reasonable to conclude it is more likely than not that Mr M will be a basic tax rate payer in retirement.

Illiquid Investments

My aim is to return Mr M to the position he would've been in but for the actions of L&C. This is complicated where investments are illiquid (meaning they cannot be readily sold on the open market) as their value can't be determined, which appears to be the case here.

In order for the SIPP to be closed and further SIPP fees to be prevented, the illiquid investment needs to be removed from the SIPP. To do this L&C should reach an amount it's willing to accept as a commercial value for any investment that cannot currently be redeemed, and pay this sum into the SIPP and take ownership of the relevant investment.

If L&C is unwilling or unable to purchase the investments, then the actual value of any such investment 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 Mr M's SIPP.

If L&C doesn't purchase the investments, it may ask Mr M to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from these investments. That undertaking should allow for the effect of any tax and charges on the amount Mr M may receive from the investments, and any eventual sums he would be able to access from the SIPP. L&C will need to meet any costs in drawing up the undertaking.

SIPP fees

If there remain illiquid investments that can't be removed from the SIPP, and it hence cannot be closed after compensation has been paid, then it wouldn't be fair for Mr M to have to continue to pay L&C annual SIPP fees to keep the SIPP open. As such, if the L&C SIPP needs to be kept open only because of an illiquid investment, and is used only or substantially to hold the illiquid investment, then any future L&C annual SIPP fees must be waived by L&C until the SIPP can be closed.

Compensation for distress and inconvenience

In addition to the financial loss that Mr M has suffered as a result of the problems with his pension, I think that the loss suffered to Mr M's pension provisions has caused him distress. And I think that it's fair for L&C to compensate him for this as well. So, L&C should pay Mr M £300 for the distress and inconvenience its actions caused him. I think this is a reasonable sum given that L&C's actions did not lead to a total loss to Mr M's pension, but will still have caused him to worry about the impact of the loss on his future retirement.

My final decision

Where I uphold a complaint, I can make an award requiring a financial business to pay compensation of up to £160,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £160,000, I may recommend that London & Colonial Services Limited pays the balance.

Determination and award: I uphold the complaint.

My final decision is that London & Colonial Services Limited must calculate and pay Mr M the compensation amount produced by the calculation, as set out in the steps above, up to the maximum of £160,000.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £160,000, I recommend that London & Colonial Services Limited pay Mr M the balance.

My recommendation would not be binding. Further, it's unlikely that Mr M could accept a final decision and go to court to ask for the balance. Mr M may want to get independent legal advice before deciding whether to accept any final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 26 February 2024.

Hannah Wise
Ombudsman