DRN-4732243

The complaint

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

What happened

Main parties involved

L&C

L&C is a SIPP provider and administrator, regulated by the Financial Conduct Authority ('FCA') who at the relevant time of the events being complained of, was regulated by the Financial Services Authority ('FSA') – I will refer to both names as the 'regulator' or by their respective initials.

L&C was authorised in relation to pension advice, to arrange (bring about) deals in investments, deal in investments as principle, establish, operate and wind-up a pension scheme and make arrangements with a view to transactions in investments.

The Resort Group ('TRG')

TRG was founded in 2007. TRG owned a series of luxury resorts in Cape Verde and it sold luxury hotel rooms to UK investors mainly through SIPPs, either as whole entities or as a fractional ownership in a company. This case involves an investment into TRG's 'Llana Beach Resort' (the 'TRG investment'). TRG was not a regulated entity.

Green Oil Plantations (Australia) Limited ('GOPA')

GOPA was founded in May 2010. It offered investments in leases for land pre-planted with green oil producing trees in Queensland, Australia (the 'GOPA investment'). GOPA was an unregulated entity.

Future Assets

Future Assets was an unregulated introducer. Mr W said the investments he purchased were promoted to him by a person I will refer to as Mr P, who worked for Future Assets.

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 FSA. We've been provided with a copy of pages from 1 Stop's entry on the FSA Register by L&C. 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, updated the following month, the FCA explained in its website 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."*

The Final Notice of 17 April 2014 for Mr R, who advised Mr W, noted:

- 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 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 focused solely on providing advice on the most suitable SIPP wrapper for the underlying investment.
- Mr R failed to take reasonable steps to ensure 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.
    - Ascertained customers' knowledge and experience in relation to financial products.
- Mr R also failed to take reasonable steps to ensure 1 Stop's customers understood the information provided to them and, therefore, understood the key features of their investment. This included both the operation of the SIPP they were investing in as well as the risks associated with that SIPP and/or the underlying investment.
- As a result of Mr R's actions, 1,959 of 1 Stop's customers during the period from 1 October 2010 to 10 November 2012 inclusive, were at risk of having invested a total of £112,331,229. This was mostly from pension funds including some final salary schemes into SIPPs which may not have been suitable for them.
- Prior to October 2010 up to November 2012, 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 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 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 fifteen of 1 Stop's customer files.

- The Final Notice said:

> *"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* [1 October 2010 to 1 November 2012]*, 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 which 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, Mr H, 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 1 Stop's customers were stated as having a *"High"* ATR because of the types of underlying investment 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 the customer was willing to accept a high level of risk in their investment and/or to confirm whether that investment was suitable for the customer.

- Mr R confirmed he didn't establish a customer's knowledge and understanding of financial services products.
- Similarly, Mr R confirmed 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 he 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 confirmed the customer's understanding of the underlying investment product, would be what he perceived to be as 'high' based on the customer having received promotional material from the unregulated introducer. However, 1 Stop's business model 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 received.

What happen in Mr W's case

Background - summary

In 2011 Mr W had a personal pension plan (please note, this is a correction as I referred to this as an Occupational Pension Plan in my provisional decision), with an estimated value of £221,757.63. On 15 November 2011, he signed and dated the majority of the forms necessary to transfer his pension plan to a L&C SIPP which was marketed under the name of 'Open Pension' and to invest in two investments - these were a TRG investment and the GOPA investment. Mr W said he was introduced to these investments by Mr P of Future Assets – as noted above this was not a regulated business. Mr W said once the investments were promoted to him by Mr P, he was referred to Mr R of 1 Stop who acted as his IFA for the purposes of opening the SIPP with L&C.

1 Stop client agreement

Whilst I have not been provided with a copy of the 1 Stop 'Client Agreement', I have seen a copy relating to the published decision DRN-4492164 (the 'published decision'). The Client Agreement is a version from March 2011. It's noted in the agreement that unless confirmed in writing to the contrary, 1 Stop would assume the client didn't wish to place any restrictions on the advice it proffered. It goes on to say 1 Stop was an IFA and would advise on products from the whole of market.

The GOPA investment

Mr W signed a 1 Stop 'Declaration' letter dated 15 November 2011, entitled 'Green Oil Investment Purchases via a SIPP' (the '1 Stop declaration'), which said:

"Please be advised that you have been presented with an opportunity of investment with regards to Green Oil. This investment has been presented to you as an investment opportunity by Future Assets.

This is a non regulated investment which is not authorised or regulated by the FSA. This means that you are not subject to the normal regulatory protection that would be available were it to be authorised and regulated. In other words you might not be able to make a complaint and claim any compensation.

I would like to stress however that the responsibility of this investment's success or failure is not a matter which involves 1 Stop Financial Services.

1 Stop Financial Services have not been involved in the decision of proceeding with this investment as part of your retirement financial planning strategy. The suitability of utilising pension funds to facilitate this purchase have been deemed to be appropriate by your own choice.

You have informed us that you deem this to be an investment opportunity for your pension funds.

We will not pass comment regarding the suitability of the investment you wish to make but you should know that this type of investment is typically suited to sophisticated investors. As such this is deemed to be an instructed investment request. We would recommend that if you have not done so already, that you undertake your own full due diligence on this matter.

1 Stop Financial Services however have researched and advised on a suitable Self Invested Personal Pension in order for this type of investment to sit. Full details of this research are available on request and reasons for using this company have been explained in your suitability report. We therefore request that you confirm and agree our responsibility lies only with assisting you with the provision of a suitable SIPP provider."

The GOPA application, which was to be submitted to L&C for its acceptance, was signed and dated by Mr W on 15 November 2011. Amongst other things, the GOPA application included the following details:

- The company offering land leases, and an optional buyback management contract, was GOPA, a private company limited by shares registered under the laws of England and Wales.
- Mr W was applying for one and a half hectares of land containing 2,778 Millettia Pinnata trees at a cost of £60,000. According to the form, the trees, amongst other things, produced 'valuable green oil and by-products'.
- The lease of the land was for a period of five years after which time, under the buyback agreement, Mr W could sell the trees back to GOPA for a fixed price of £38.88 per tree.
- The land lease was fully registered with the land registry in Australia.
- Where a buyback management contract was entered into, GOPA would manage and exploit trees' produce for five years for the purpose of generating a revenue.
- GOPA would be responsible for running costs and taxes associated with the land/trees.
- GOPA would take out comprehensive insurance to cover crop reinstatement and loss of income. This also covered the leaseholder's loss of income.
- Fees of £550 would be included for payment of legal fees.

- The monies to fund the investment were to come from the SIPP.
- If investors felt that financial advice was needed, they could contact their IFA.
- The grant of the lease wasn't a regulated investment under the Financial Services and Markets Act 2000 ('FSMA').
- The GOPA lease wasn't an investment regulated by the FSA.
- The 'Authorised Agent' who completed the form was named as Mr P with his firm named as Future Assets.

Mr W opted to enter into the GOPA buyback management contract. He signed and dated this on 15 November 2011. It should be noted that the application and buyback contract were all part of the same document. The contract, amongst other things, stated:

- The risk of loss of, or damage to, the crop would pass to GOPA on the execution of the buyback contract but title to the crop would only pass to GOPA when the price together with all interest had been paid in full to the owner.
- Until the price and interest had been paid, title to the crop would remain with the owner, provided that GOPA was entitled during the term of the agreement to sell or exploit in any way the produce of the crop and to retain as its own any consideration received.
- The price would be paid in full to the owner by GOPA upon the earliest of a number of provisions set out in the agreement.
- Until the price was paid in full, GOPA would pay annual interest to the owner at the rate of 14% a year, GOPA could defer payment until the determination of the underlease.
- GOPA would insure the payment to the owner throughout the duration of the agreement and until its full payment.

On 4 April 2012, 1 Stop sent a letter to L&C enclosing Mr W's GOPA application. L&C responded to GOPA in a letter dated 26 April 2012 enclosing the 'signed' GOPA application. Whilst L&C said it had sent a signed version to GOPA, it hasn't provided us with a copy that it, as Trustee, would've signed. The sections L&C needed to sign and complete were in sections five, six and eight of the application which incorporated the buyback contract (section eight).

I've seen a copy of a fully completed GOPA application in the published decision. In that case, L&C had completed the relevant sections with its details and signatures. L&C also made some handwritten notes in the 'SIPP Provider Disclaimer' text box, which said:

> *"The parties agree that notwithstanding any provision to the contrary herein the liability of London & Colonial Services Limited and any nominated or associated companies shall be limited to the net value of the assets held by London & Colonial Services Limited in its capacity as the sole trustee of the pension arrangements for* [client's name and reference number] *(or any other plans which may become entitled to the fund subject to this clause) at the point in time that a claim is made".*

In the published decision, L&C signed the GOPA form on 20 October 2011, which contained the above disclaimer wording. As this was only a few months from the time that Mr W's GOPA application was submitted to L&C (4 April 2012), I think a similar disclaimer would have been used by L&C in the 'SIPP Provider Disclaimer' text box.

As noted above, Mr W's GOPA application was sent to L&C by 1 Stop on 4 April 2012. And on 30 April 2012, £60,250 in total was paid to GOPA from Mr W's SIPP account along with a further £300 paid on 4 May 2012 - £60,000 was for the purchase of the investment and £550 was for the GOPA legal fees.

In a letter dated 11 May 2012, GOPA wrote to Mr W directly about his investment. Amongst other things, it said:

- Mr W's investment was a five-year lease for an area of one and a half hectares land based in Queensland, Australia.
- The lease would be prepared by a solicitor who was named in the letter.
- Once the lease was signed, the final lease title would be held in the name of the SIPP provider and Mr W would receive a copy.
- The 'Millettia Pinnata' trees on the plot would be managed by GOPA. The letter said the oil from these trees could be used to produce biofuel and green electricity.
- It noted: *"Your 80% return plus your capital will be paid in 2017 on the anniversary of your investment which is stated in your application and buy back agreement."*
- Mr W would receive regular updates.

On 15 April 2013, GOPA entered into Administration. And in a letter dated 21 November 2013, creditors of GOPA, including Mr W were provided with an update about the approval and terms of an agreed Company Voluntary Arrangement by the Joint Administrators.

On 20 January 2015, L&C wrote to Mr W enclosing correspondence from the Administrators of GOPA. The enclosed correspondence, which was addressed to L&C as Trustee, was dated 15 October 2014. This letter said in relation to Mr W's claim against GOPA for £60,000, he would receive a cheque for £1,476.42 and the investment would be removed from his SIPP.

TRG investment

The Financial Ombudsman has not been provided with a contract for Mr W's TRG investment that has been signed by the vendor. But we have been provided with a copy of the 'Llana Reservation Form' ('TRG reservation form') dated 15 November 2011, which set out some details about Mr W's TRG investment. Amongst other things, this said:

- Mr W was purchasing a room/suite at the Llana Beach Hotel based in Cape Verde for a total price of 159,950 euros, which would be paid via his SIPP.
- Mr W had opted to pay by way of a payment plan with a 65% deposit 'on contract'. This payment option required him to pay a further 30% 'on completion' after which 5% of the purchase price would be written off.
- A TRG reservation form recorded Mr P of Future Assets as Mr W's 'Agent'.

On 20 February 2012, 1 Stop sent L&C a cover letter stating it was enclosing Mr W's SIPP application, transfer form, TRG reservation form and 1 Stop's invoice. At this point, 1 Stop didn't send the GOPA application form – this was sent subsequently on 4 April 2012 (see further above).

On 23 March 2012, £87,435.76 was paid to TRG from Mr W's SIPP account. And on 8 May 2015, a further £33,411.78 was paid to TRG. In total £120,847.54 (excluding fees/expenses) was paid from Mr W's SIPP account for the TRG investment. A SIPP holding list statement shows as of 8 May 2015, Mr W held 100% in the TRG investment which, at that time, was valued at its total purchase price.

The L&C SIPP application and other key L&C forms

The L&C SIPP application was signed and dated by Mr W on 15 November 2011. Amongst other things, this said:

- The IFA was named as Mr R of 1 Stop. It was noted that advice had been given to Mr W at the point of sale. And that he (Mr W) wanted L&C to act on the instructions of his IFA.
- The IFA's fee was £1,495.
- In section 6, under the heading 'Declarations', it included the following statement: *"I hereby agree to be responsible for any, claims, losses, costs, charges or expenses which may be raised against London & Colonial or incurred by London & Colonial in consequence of London & Colonial acting on the instruction received by facsimile or email from the address stated on this application form and/or provided by me…"*

The application form had a number of appendices attached. This included Form F which was a 'Transfer request form' where Mr W's pension plan details were provided – this form was unsigned and undated. And Form G (signed and dated 15 November 2011), which was a 'Non advised supplemental declaration'. This form stated, amongst other things, that:

> *"If you wish to apply for an Open Pension we* [L&C] *strongly recommend you seek advice from an authorised Independent Financial Advisor as to the suitability of an Open Pension for your purposes and as to the investments that you choose.*
>
> *While London & Colonial is regulated by the FSA and consequently you have some degree of protection under the FSCS* [the Financial Services Compensation Scheme]*, this protection does not extend to the selection or performance of the investments you decide to make. However, if you have taken independent professional advice you may be further protected according to the regulation applying to your adviser.*
>
> *If however you have not sought such advice and do not intend to do so before applying for an Open Pension, please sign the declaration below.*
> *…*
> *I am satisfied that an Open Pensions is suitable for my requirements and apart from factual information relating directly to the Open Pension, I have not sought or been given any advice from the Provider London & Colonial Assurance Plc, or from the Trustee or Scheme Administrator, London & Colonial Services Ltd and – I understand and agree that neither the Provider nor the Trustee nor the Scheme Administrator has any liability to me with regard to the suitability of an Open Pension in my circumstances or with regard to the suitability of or risks associated with any of the investments that I request to be made."*

There was also a L&C 'Off-Plan Property Development Investment' form (the 'property investment form') which, amongst other things, stated Mr W wanted to invest in a hotel apartment based in the Llana Beach Resort. The purchase price was noted to be 159,950 euros.

In section 2 of the property investment form, Mr W confirmed he understood that: *"(a) that neither the Trustee nor its Administrator is authorised to give me financial or investment advice and that no information given to me by you* [L&C] *is intended to be and will not be taken as advice to me of any kind nor as any kind of recommendation of an investment in this asset and (b) that you have obtained legal advice in your capacity as Trustee in order to assess the risks of ownership and to ensure the acquisition of the appropriate title and (c) that the advice you obtained does not cover the investment merits, marketability or value of the property but only the risks of ownership."*

This section went on to say that Mr W had reviewed the following documents:

- Due Diligence Report/Report on Title
- Promissory Contract of Purchase and Sale
- Management/Rental agreement
- Investor Pack

And that he (Mr W) had: *"…obtained whatever information, reports, legal and other advice I require regarding the investment including the potential income and the associated costs and expenses which may fall to be paid out of my Arrangement."*

In section 4 of the property investment form there was an indemnity statement which included the following statement: *"*[Mr W] *will indemnify and keep you* [L&C] *fully indemnified in respect of any loss claim action damage incurred or suffered by you in respect of the asset."*

L&C's due diligence of 1 Stop

L&C says it carried out a number of checks on 1 Stop before agreeing to accept introductions from it. It said this included:

- Verifying 1 Stop's regulatory permissions via the FSA's Register.
- Undertaking checks of Companies House records, including making checks on the individual directors as well as the legal entity.
- Carrying out identification/vetting checks on both directors.
- 1 Stop was subject to L&C's terms and conditions via its (L&C's) Intermediary Agreement. The Financial Ombudsman has not been provided with a copy of the Intermediary Agreement in this case, but I've seen a copy relating to the published decision. This was dated January 2010 and as I understand it, this agreement followed an Intermediary Application completed by 1 Stop in December 2009. In summary, the agreement stated:

    - The Intermediary complies with the requirements of FSMA 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 was 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.

In its submissions, L&C stated that although Mr W's representative seemed to suggest an unregulated introducer was involved, it dealt directly with 1 Stop. And as far as it was concerned, at no point had it dealt with an unauthorised or unregulated introducer.

<u>Mr W's complaint</u>

Following the failure of 1 Stop, Mr W submitted a claim against this firm with the FSCS in 2017. The FSCS notified Mr W in a letter dated 17 August 2017, that his claim had been successful and he'd be awarded compensation of £50,000 in line with its award limits. The FSCS estimated Mr W's total loss to be £163,284.59. However, in the calculation for

compensation, amongst other things, an indicative value of £151,925.09 was deducted in respect of Mr W's TRG investment. The FSCS provided Mr W with a Reassignment of Rights ('RoR') letter dated 19 December 2017, which enabled him to bring a complaint against L&C.

After receiving the RoR Mr W took advice from a Claims Management Company ('CMC') who is representing him. He referred his complaint to L&C on 11 October 2018 but having not received a substantive response, he brought his complaint to the Financial Ombudsman on 31 January 2019 via his CMC. Amongst other things, the CMC said L&C hadn't carried out sufficient due diligence on 1 Stop and/or the investments Mr W made. And if it had undertaken such due diligence on 1 Stop, L&C would have gained the impression this firm was operating a deeply flawed advice model.

In its final response letter dated 15 November 2019, L&C said, amongst other things, that as an execution only service it was not liable for any losses suffered by Mr W due to the investments he held it his L&C SIPP, as at no time did it offer him any advice. And it had no duty to, and/or the necessary regulatory permissions to, assess the suitability of his investment decisions. L&C said it carried out appropriate due diligence on 1 Stop which at the time of Mr W's investments, was an FSA regulated business with all the correct permissions.

L&C also pointed to various sections of Mr W's SIPP application and the Open Pension Brochure which explained to him the limits of the duty L&C were required to perform. In essence, it said Mr W was told that L&C's prime duty was to look after the best interests of its SIPP members. And to ensure all investment transactions comply with relevant regulations and the Open Pension's trust deed and rules. L&C said Mr W had received advice from 1 Stop in relation to the establishment of the SIPP. And it was L&C's policy at the time to ensure that all clients (customers) who were transferring an existing pension to a SIPP, had advice available to them.

L&C said it carried out appropriate due diligence on 1 Stop. L&C said this included:

- A due diligence report for Cape Verde solicitors in respect of the Salina Sea Project in January 2011, showing good title.
- A September 2011 report issued by a firm named Enhance Support Solutions Limited, which showed the TRG investments were capable of being held in a SIPP.
- The due diligence on 1 Stop included requiring the advisory firm to complete an introducer profile, agree to L&C's terms of business and checking the FSA's Register to ensure the firm was appropriately regulated to undertake the services it was providing, which it was.
- L&C said it did not carry out any checks on any other party as Mr W had not indicated that any other party was involved.

Whilst L&C provided a detailed final response letter on the merits of Mr W's complaint, it also noted the matter could be time barred. L&C said this was because Mr W referred his complaint to it more than six years after he made his investments/opened his SIPP.

Our investigator issued a view recommending the complaint should be upheld. They were satisfied that L&C hadn't carried out sufficient due diligence on 1 Stop in line with, amongst other things, the regulator's Principles for Businesses (the 'Principles') and good industry practice, examples of which, were set out in various publications issued by the regulator since 2009. Our investigator concluded that if L&C had carried out

appropriate due diligence as it was required to do, L&C would not have accepted Mr W's application in the first place.

The investigator also noted L&C had told the Financial Ombudsman in another case that it had received 21 referrals from 1 Stop between February 2010 and July 2012. And whilst it hadn't said where Mr W's application submitted in November 2011 was in this number, they (the investigator) understood that by September 2011, L&C had received ten applications. Our investigator considered this was a sufficient number for L&C to gain an understanding of L&C's business model by the date of Mr W's application, including the types of investments 1 Stop's clients were investing in. The investigator thought that if L&C had made reasonable enquiries about how 1 Stop was operating, it would have discovered there were serious flaws in its business model such as it not considering the underlying investment when advising clients such as Mr W.

Our investigator concluded the matter had been brought within the relevant time limits. They accepted that Mr W would have known his GOPA investment and 1 Stop had failed more than three years before he (Mr W) referred his complaint to L&C. But our investigator considered Mr W was unlikely to have known about the due diligence duties that applied to SIPP providers such as L&C.

L&C disagreed. And said:

- Mr W's complaint is time-barred.
- The Financial Ombudsman should dismiss the complaint, as this case is more suited for consideration by the Court or The Pension Ombudsman ('TPO').
- The Financial Ombudsman 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 is imposing a duty on L&C which goes far beyond what was agreed by the parties.
- The cases of Adams (full court references below) made it clear the contractual relationship should not be overlooked. The investigator's view in this regard, runs wholly contrary to the judgements in the Adams cases.
- The Financial Ombudsman is attempting to circumvent the Adams decision.
- The investigator makes no attempt to explain why the Principles have been relied on rather than the High Court decision in Adams.
- The publications used by the investigator to reach their view were not widely known by the SIPP industry at the time of Mr W's transaction other than the 2009 Thematic Review Report. Even this latter document does not constitute formal guidance.
- Many of the matters which the 2009 Thematic Review invites firms to consider are directed at firms providing advisory services.
- Even if the 2009 Thematic Review had been statutory guidance made under FSMA section 139A (which it wasn't), the breach of such statutory guidance wouldn't give rise to a claim for damages under FSMA.
- The FCA's Enforcement Guide says guidance is not binding on those to whom the FCA's rules apply.
- The FCA's Final Notice against 1 Stop issued in April 2014, was published after the fact so, the investigator is using the benefit of hindsight.
- 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 Financial Ombudsman 'cherry picks' from the case law.
- A breach of the Principles cannot, of itself, give rise to any cause of action at law.
- The Principles fall to be construed in light of:

    - The duties imposed by the Conduct of Business Sourcebook ('COBS').
    - L&C's regulatory permissions.
    - L&C's contractual arrangements.
    - The statutory objective that consumers should take responsibility for their own decisions.

- COBS contains obligations that don't apply to execution only SIPP providers (for example, suitability/appropriateness).
- The Principles must necessarily be applied within the context of the specific duties imposed by COBS and case law, not the other way around.
- L&C is left to *"carry the can"* as it's the last entity standing, this isn't fair or reasonable.
- The investigator makes no finding on the quality of the investments, presumably because these operated exactly as advertised.
- Mr W knew the investments were high risk when he invested. And there was nothing preventing L&C from accepting such business.
- The judgement in Adams made it clear that the investment being high risk didn't make it manifestly unsuitable and the same is true of the TRG/GOPA investments.
- L&C couldn't reject Mr W's application without undertaking a suitability assessment, which it did not have the relevant permissions to do.
- Mr W says there was an unregulated introducer, but even if this was the case, there was no restriction on business being accepted from an unregulated introducer. Beyond this, the introduction to L&C came from a regulated entity (1 Stop). And it was the responsibility of 1 Stop to advise Mr W on the suitability of both the product and the proposed investments.
- L&C considers 1 Stop provided advice to Mr W on the investments, and this is evidenced by 1 Stop supplying L&C with his (Mr W's) SIPP application form.
- Further, in his SIPP application, Mr W informed L&C that he'd authorised his financial adviser (IFA) to act on his behalf in dealing with the investments and correspondence shows 1 Stop instructed L&C to purchase the investments.
- L&C was not aware of the change in 1 Stop's business model since the original application in 2009. This was not unreasonable.
- 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.
- 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.
- The investigator points to a document to show that 1 Stop did not provide advice on the underlying investment, but this misses the point. 1 Stop was a regulated entity and therefore, ought to have been aware of its own obligations when it came to assessing suitability for its clients.
- L&C accepts it had 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 (now the FCA) Register to confirm that 1 Stop was regulated 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 Intermediary 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 – both 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.

- The investigator acknowledges the result of the due diligence conducted by L&C would not have given it cause for concern.
- The level of due diligence imposed by the Financial Ombudsman goes far beyond what was agreed between the parties, and beyond any expectations that Mr W had of L&C.
- The standard 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.
- 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.
- There's no reason why L&C should have had any concerns about accepting business from 1 Stop.
- In compliance with COBS 11.2.19R, L&C acted on Mr W's written instructions.
- In 2011, it was common practice for SIPP providers to accept investments such as those this complaint concerns.
- If L&C hadn't accepted Mr W's application, he would have opened an account with another SIPP provider. So, L&C is not the cause of his loss.
- 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.

As agreement couldn't be reached the complaint was passed to me for review. I issued a provisional decision on this complaint and I concluded Mr W's complaint should be upheld. In brief, I said that:

- I don't consider 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 to them.
- I'm not required to dismiss this complaint and I'm not exercising my discretion to dismiss it.
- L&C should have been conducting checks – due diligence – on introducers and investments to make informed decisions about accepting business. This obligation was a continuing one.
- L&C didn't undertake appropriate steps, or draw reasonable conclusions, mindful of the information that would have been available to it had it undertaken adequate due diligence.
- L&C didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Mr W fairly by accepting his business from 1 Stop.
- L&C didn't meet its obligations or good industry practice at the relevant times and allowed Mr W to be put at significant risk of detriment as a result.
- It's fair and reasonable for L&C to compensate Mr W for the loss he's suffered because of L&C accepting his business from 1 Stop.

L&C didn't accept my provisional decision - solicitors for L&C, provided a response. I've set out below a summary of what I consider to be the main points made in the solicitors' response. However, the list isn't exhaustive and before making this decision I carefully considered the response in full.

Time limits

- The matter has been brought too late.

Merits

- L&C offered (and still does) an execution only service. Its fees, charges and structure are based on it providing this level of service.
- The Ombudsman cherry picks from case law. The judgments in the Adams cases are largely ignored.
- The Berkeley Burke judgment (full court reference below) is quoted at length whilst the case of Adams is only given a passing reference.
- The Berkeley Burke case was a judicial review whilst the Adams case, examined at length, the responsibility of a SIPP provider. To apply the former at the expense of the latter does not make logical sense.
- The Ombudsman largely ignores the findings of the High Court in Adams on the duties imposed by COBS. Adams held that the duties cannot all apply to all firms in all circumstances.
- The Court held in Adams that while the COBS rules contain express provisions dealing with the need to advise clients on both *"suitability"* (COBS 9) and *"appropriateness"* (COBS 10) of their investment, those rules did not apply to execution only SIPP providers.
- The Ombudsman seeks to circumvent the Adams decision and provides no rational reason for imposing obligations beyond the contractual relationship between L&C and Mr W.
- Despite L&C carrying out sufficient due diligence, in line with good industry practice, the Ombudsman finds L&C was under further obligation to protect Mr W from 'consumer detriment'. This is wrong as L&C was not providing an advisory service.
- 1 Stop's Intermediary Application was made in December 2009 and showed it had been in business since 2004. Further, the key regulated individuals had 11 and 19 years' experience in selling/advising on annuities and pensions. So, it was reasonable for L&C to take a significant level of comfort from these factors.
- COBS 2.4.8 makes it clear it is reasonable for a firm such as L&C to rely on information provided by an unconnected authorised person or a professional firm, unless it is aware or ought reasonably to be aware of any fact that would give reasonable grounds to question the accuracy of the information.
- At the time of the transactions complained of, there was no requirement for L&C, as a SIPP provider, to broaden the scope of its due diligence to include an understanding of an advisers' business model.
- 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 Ombudsman ignores the fact that the Principles fall to be construed in light of the COBS rules and L&C's regulatory permissions.
- The Ombudsman does not properly address using the Principles as a basis for finding against L&C in preference to COBS rules and established case law. A breach of the Principles cannot, of itself, give rise to any cause of action at law (see, e.g., Kerrigan v Elevate Credit International Ltd [2020] C.T.L.C. 161 at [30]).

- L&C accepts it needs to take into account the Principles but they are no substitute for COBS rules.
- The Ombudsman applies the Principles wholly in contrast to the terms of the contract and the statutory objective previously set out at FSMA section 5(2)(d), now section 1C, namely: *"the general principle that consumers should take responsibility for their decisions"* (the 'consumer protection provision').
- The Ombudsman offers no explanation for the departure from the consumer protection provision and indeed, from the fundamental principal of freedom of contract.
- There is an unfairness in making L&C liable for the poor investment decisions of Mr W and/or his adviser.
- The Ombudsman ignores the regulatory permissions that L&C had at the relevant time. And fails to explain how it (L&C) could effectively have completed adviser level due diligence and communicated this to Mr W without breaching its permissions.
- The Ombudsman should take account of the following factors:

    - The FCA publications have no bearing on the interpretation of the Principles.
    - Regulatory publications cannot alter the meaning of, or the scope of, the obligations imposed by the Principles.
    - The 2009 and 2012 Thematic Reviews did not provide *"guidance"* in any meaningful sense. They did little more than highlight some examples of measures that SIPP providers could consider taking.
    - Many of the matters the Thematic Review invites firms to consider, are plainly directed at advisory firms.
    - The Thematic Reviews do not give rise to a claim for damages under FSMA section 138D (only a breach of the rules can give rise to such a right).
    - The FCA's Enforcement Guide makes it clear that guidance is not binding on those to whom the FCA rules applies. Any guidance is only intended to be illustrative.
    - In light of the above matters, it's not fair, or reasonable, for the Ombudsman to determine Mr W's complaint by reference to the FCA publications.

- The Ombudsman's findings create a relationship between L&C and Mr W before a contract is entered into and before any funds were received by L&C – this is inconsistent with the law.
- The outcome of L&C's due diligence in relation to 1 Stop gave it (L&C) no cause for concern.
- L&C acted in line with good industry practice in that it made sure 1 Stop was listed on the FCA Register with the relevant regulatory permissions to provide investment advice. L&C also entered into an Intermediary Agreement with 1 Stop.
- The assessment of suitability of any pension product, transfer of pension rights or investments, was wholly the responsibility of Mr W and/or his financial adviser (1 Stop).
- L&C ensured advice was available to the client if they wanted this via 1 Stop. In any event, there was no obligation on Mr W to take advice on the transfer of the pension.
- In compliance with its obligations pursuant to COBS 11.2.19R, L&C acted on Mr W's written instructions in the setting up of the SIPP and the transfer of monies to TRG.
- L&C could not decline the application to open a SIPP and make the investments on the grounds the transaction was unsuitable. By definition, this would have required L&C to make an assessment of suitability which it could not do without breaching section 19 of FSMA.
- The Ombudsman does not provide a view on the appropriateness of the TRG/Green Oil investments. L&C assumes this is because the investments operated as advertised. Given this, it's odd for the Ombudsman to conclude that L&C should not have accepted introductions from 1 Stop.

- Whilst the investments were illiquid, there were no restrictions on their promotion and Mr W made exactly the investments he intended to.
- Mr W received nearly £15,000 in rental income from the TRG investments up to May 2022, which suggests it was a suitable investment to be held within a SIPP.
- The Ombudsman can find nothing wrong with the investments but instead, concludes there was a responsibility on L&C to police the provision of pension transfer advice, which it didn't have the permission or obligation to do.
- Mr W has received £50,000 in compensation from the FSCS. This should be taken into account in its entirety as 1 Stop's contribution to Mr W's losses. Or failing this there should be a reduction in compensation from the date of receipt of funds from the FSCS on the basis of Mr W having had the benefit of the funds.
- Mr W should be put to proof that he will be a basic rate taxpayer in retirement.
- The £500 award made by the Ombudsman for the distress and inconvenience caused by L&C to Mr W, takes no account of the distress and inconvenience he has caused by his own actions.

Mr W had no further matters to add.

The matter has been passed back to me for a final decision.

What I've decided – and why

I've considered all the available evidence and arguments and whilst I've taken everything into account, I still consider the matter is within the relevant time limits. I'll explain why.

Jurisdiction – time limits

The time limits to bring a complaint to the Financial Ombudsman are set out in the Dispute Resolution: Complaints ('DISP') section of the FCA Handbook. At the time Mr W referred his complaint to us, DISP 2.8.2R said:

> *"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:*
>
> *(1) more than six months after the date on which the respondent sent the complainant its final response, redress determination or summary resolution communication; or*
>
> *(2) more than:*
>
> *(a) six years after the event complained of; or (if later)*
>
> *(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;*
>
> *unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;*
>
> *unless:*

(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R or DISP 2.8.7 R was as a result of exceptional circumstances; or

…

(5) the respondent has consented to the Ombudsman considering the complaint where the time limits in DISP 2.8.2 R or DISP 2.8.7 R have expired (but this does not apply to a "relevant complaint" within the meaning of section 404B(3) of the Act)."

L&C has said it doesn't consent to the Financial Ombudsman looking at the complaint if it has been brought too late.

The relevant time limits that apply in this case is whether Mr W brought his complaint within six years after the event complained of, or within three years of when he knew or ought reasonably to have known, he had cause for complaint. Given Mr W's SIPP was opened in March 2012 and he complained to L&C in October 2018, I consider he has brought his complaint outside of the six-year time limit. Given this I will need to consider whether Mr W brought his complaint within the three-year time limit. Before I consider this, I will start by setting out some relevant case law.

In The Official Receiver v Shop Direct Finance Company Limited [EWCA] Civ 367 Singh LJ said:

"44. The FCA Handbook is similar in its drafting style to the Financial Services Authority's Client Assets Sourcebook (CASS), which was considered by this Court in Re Lehman Brothers International (Europe) (No 2) [2010] EWCA Civ 917; [2011] 2 BCLC 184."

…

46. For present purposes I derive the following propositions from the judgments in Re Lehman Brothers:

1) Ultimately it is the actual wording of a provision that must govern any decision as to its effect.

(2) The Handbook should be read as a whole, taking a holistic and iterative approach, so that a preliminary view on one provision can be tested by reference to the rest of the relevant provisions.

(3) The provision should be construed in the light of its overall purpose.

(4) It should be construed on the basis that it is intended to produce a practical and commercially sensible result. The rules should be taken to be grounded in reality. The court should keep in proportion any drafting infelicities."

And Nugee LJ said the following in relation to DISP2.8.2R:

"155. The resemblance to the ordinary limitation periods for claims in negligence where there is also a primary period of 6 years (under s. 2 of the Limitation Act 1980 ("LA 1980")) and a secondary period of 3 years from the date of the claimant's actual or constructive knowledge (under s. 14A LA 1980) is striking. We have in fact been shown evidence that this is not a coincidence, but even without this material (which is of doubtful admissibility) it would have been a reasonable assumption that the general

structure was modelled on the LA 1980 provisions and was designed to do the same thing in general terms.

156. What then is the purpose of having these two time-limits? The purpose of an ordinary limitation period is to prevent stale claims from being litigated, the period of 6 years being fixed as a generally reasonable period to bring a claim. This explains the primary period. But as is well-known that could and did lead to some claimants who had suffered latent injury or damage finding that they had lost their rights to sue before they even knew, or could reasonably be expected to know, that they had been injured or suffered loss. Provision was therefore made, first in s. 11 and 14 LA 1980 (applicable to claims for personal injury) and subsequently in s. 14A LA 1980 (applicable to other claims in negligence), for the claimant to have 3 years from his date of knowledge to bring a claim. The purpose of this is obvious. It was to remedy the injustice of a claimant's claim being time-barred before they knew, or could reasonably be expected to know, that they had a claim. On the other hand the selection of a (relatively short) 3 year time period shows that another purpose was to provide that once they did, or should, have that knowledge they should get on with the claim and bring proceedings reasonably promptly. Precisely the same in my view applies to the secondary time-limit in DISP 2.8.2R(2)(b). The purpose of the rule is to prevent a complainant from losing the right to complain before they are, or ought reasonably to be, aware that they have cause for complaint, but to require them to pursue the complaint with reasonable promptness once they are, or should be, so aware."

The FCA Handbook includes the following rule (GEN 2.2.1R): *"Every provision in the Handbook must be interpreted in the light of its purpose."* And there is guidance in the same section that says the purpose of any provision in the Handbook is to be gathered from the text of the provision in question and its context amongst other relevant provisions (GEN 2.2.2(G)).

There is also a rule that says (GEN 2.2.7(R)):

"In the Handbook …:

(1) an expression in italics which is defined in the Glossary has the meaning given there; and

(2) an expression in italics which relates to an expression defined in the Glossary must be interpreted accordingly." (GEN2.2.7(R))

The term 'cause for complaint' is not defined. However, the term is used in the context of a rule that begins*: "The Ombudsman cannot consider a complaint* [in italics so a defined term] *if...".* And that rule is in chapter 2 of a section of the Handbook which begins: *"This part of the FCA Handbook sets out how complaints* [in italics so a defined term] *are to be dealt with by respondents … and the Financial Ombudsman Service. … Chapters 2, 3 and 4 set out how the Financial Ombudsman Service … considers unresolved complaints* [in italics so a defined term]*."*

So, the term 'cause for complaint', though not in italics, appears in a rule that sets out what complaints (in italics) the 'Ombudsman' cannot consider. And it is reasonable to infer in light of all the above rules and guidance on interpreting the Handbook that the definition of the word complaint, (in italics) was intended to apply to this phrase.

The term 'complaint 'is defined for the purposes of DISP in the FCA Handbook as:

> *"any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a person about the provision of, or failure to provide, a financial service…which:*
>
> *(a) Alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience; and*
> *(b) Relates to an activity of that respondent, or any other respondent with whom that respondent has some connection in marketing or providing financial services or products …which comes under the jurisdiction of the Financial Ombudsman Service."*

And respondent means a regulated firm covered by the jurisdiction of the Financial Ombudsman. So the Glossary definition of complaint requires that the act or omission complained of must relate to an activity of *"<u>that</u> respondent"* or firm (my emphasis).

It is, therefore, my view that it is necessary for Mr W to have an awareness (within the meaning of the three-year time limit rule) that related to L&C not just awareness of a problem that had caused a loss. Knowledge of a loss alone is not enough. It cannot be assumed that upon obtaining knowledge of a loss and/or a problem that a consumer had knowledge of its cause. I consider Mr W would've needed to have actual or constructive awareness that an act or omission of L&C had a causative role in the loss.

Accordingly the material points required for Mr W to have awareness of a cause for complaint include:

- awareness of a problem,
- awareness that the problem had or may have caused him material loss, and
- awareness that the problem was or may have been caused by an act or omission of L&C (the respondent in this complaint).

Mr W was told by the FSCS that his claim against 1 Stop was successful in August 2017. And it appears it was within a reasonably short time, in November 2017, that he started to link his loss with L&C, the SIPP provider. This is evident given the fact he applied for and received, a RoR from the FSCS dated by him on 18 December 2017. This form clearly says that the FSCS reassigned its rights to any claims over L&C to Mr W with the undertaking to repay what had been paid to him by the FSCS if he recovered any compensation.

L&C's representative says Mr W should have known he had cause to complain against L&C earlier than this (end of 2017). It says he should have known by no later than 15 October 2015 (being three years before his complaint was received by L&C). It says this is because the FCA issued its Final Notice regarding Mr R and his partner of 1 Stop in April 2014. Following this, Mr R would have contacted all the clients of 1 Stop including Mr W, informing him of the current investigation being undertaken with the FSCS with regards to redress owed.

Further, L&C says on 20 January 2015, it wrote to Mr W enclosing correspondence from the Administrators of the GOPA investment informing him that he would be receiving only a small proportion of his investment back from the £60,000 he had invested. I also note that Mr W has provided us with a letter dated 21 November 2013 from the Administrators address to 'all known creditors'. This appears to be a letter that

would've been sent to L&C as Trustee as it has, what appears to be, L&C's date stamp on it so it's unclear when this was sent to or received by Mr W.

I've taken account of all the above dates and what L&C has said. But even if Mr W had known as early as November 2013, that GOPA had entered into insolvency proceedings, which clearly would have given him an indication of something going wrong with his investment, I don't think he, or a reasonable investor in his position, would've likely understood L&C had any responsibility for the resulting loss to his pension. I think Mr W would've most likely considered his IFA was responsible for his loss. I have also seen no evidence that Mr W had been told by any party, and more than three years prior to him raising a complaint with L&C in October 2018, that L&C had any responsibility for the position he was in – the position of having a SIPP with investments in it that were performing badly.

Further, even after receiving the notices referred to above, if Mr W had carried out some level of research online (or otherwise) appropriate for a lay consumer who had experienced the problem he had experienced, I think it's unlikely he would have reasonably acquired enough understanding of the role and obligations of the SIPP provider to understand he had cause to complain about the provider.

As I said in my provisional decision, it was only in late 2018 that the unsuccessful judicial review challenge in R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service [2018] EWHC 2878 ('BBSAL') was published. Although there had been some build up in the amount of information about SIPP complaints up until the point of the BBSAL decision, the industry maintained that its obligations were very limited. But from the judicial review decision it could be seen that this was not the only view and that there was also a reasonable body of opinion that SIPP providers did have responsibilities that meant they could in some circumstances be held responsible for problem investments in SIPPs.

Given all I've said above, I'm of the view the three-year time limit only started when Mr W actually knew he had cause for complaint which was in or around November 2017. As he referred his complaint to L&C in October 2018, I think the matter has been made within the three-year time limit that applies. And it is, therefore, a complaint the Financial Ombudsman can consider.

Dismissal

In response to the view, amongst other things, L&C said it believes the complaint is better suited to be considered by TPO or a Court. It didn't refer to this aspect again in response to my provisional decision but for completeness, I will set out why I don't think this case is better suited to be considered by TPO or a Court.

Having carefully reconsidered L&C's request, I remain satisfied that Mr W's complaint is one we can, and should, consider. I'll explain why.

The Financial Ombudsman has 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 submissions about TPO, the rules set out in DISP 3.4.1R state that: *"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 says Mr W'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 W 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 that the Financial Ombudsman is particularly well placed to deal with. I'm also satisfied we possess the necessary knowledge and expertise to fairly determine the complaint. Further, 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.

I've also considered the Memorandum of Understanding ('MoU') between the Financial Ombudsman and TPO in reaching my conclusion. 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 I may refer the complaint to another complaints scheme, not that I must. So, in other words, I've discretion to decide what I'll do in the circumstances. And, for the reasons I've given above, I have decided to exercise my discretion not to refer Mr W'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 3.3.4AR 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 (alternative dispute resolution) entity. As I've explained, I'm satisfied the complaint's well suited to the work of this service. We have significant experience of dealing with complaints of this type and are well-placed to consider them. And I do not consider reviewing Mr W's complaint would seriously impair our effective operation.

I will now consider the merits of Mr W's complaint.

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

Having reconsidered all the available evidence and further arguments, I remain of the view that this complaint should be upheld. Before I set out my reasoning, which remains similar to what I said in my provisional decision, I think it's important to note that 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.

As a preliminary point, it should be noted that the purpose of this decision is to set out my findings on what's fair and reasonable, and explain my reasons for reaching those findings, not to offer a point by point response to every submission made by the parties to the complaint. And so, whilst I've taken into account all the submissions made by both parties, I've focussed here on the points I consider to be key to my decision on what's fair and reasonable in all the circumstances.

In my view, the starting point is the regulator's Principles (the Principles for Businesses) which are of particular relevance to my decision. The Principles, which are set out in the FCA's handbook: *"…are a general statement of the fundamental obligations of firms under the regulatory system"* (PRIN 1.1.2G). I consider the Principles relevant to this complaint include 2, 3 and 6, which say:

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

Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.
…
Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly."

I've carefully considered the relevant law and what it says about the application of the 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 requirement they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules."*

And at paragraph 77 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 the BBSAL case referred to above (R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service [2018] EWHC 2878), 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 regulator's Principles and good industry practice at the relevant time. He concluded 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 (Berkeley Burke) had done so, it would have refused to accept the investment. The Ombudsman found Berkeley Burke had therefore, not complied with its regulatory obligations and had not treated its client fairly.

Jacobs J, having set out some paragraphs of BBA including paragraph 162 which I've set out above, said (at paragraph 104): *"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 considered section 228 of 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 have described above, and included the Principles and good industry practice at the time as relevant considerations that were required to be taken into account.

As outlined above, Ouseley J in BBA held it would be a breach of statutory duty if I were to reach a view on a complaint without taking the Principles into account in deciding what'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 and the judgment in Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 1188 when making the decision in Mr W's case.

I have considered whether Adams means the Principles should not be taken into account in deciding this case and I'm of the view that it doesn't. I note the Principles 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 the Adams judgments when making this decision.

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 the 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 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 the factual context of a case would inform the extent of the duty imposed by COBS 2.1.1R. HHJ Dight said at paragraph 148: *"In my judgment in order to identify the extent of the duty imposed by Rule 2.1.1 one has to identify the relevant factual context, because it is apparent from the submissions of each of the parties that the context has an impact on the ascertainment of the extent of the duty. The key fact, perhaps composite fact, in the context is the agreement into which the parties entered, which defined their roles and functions in the transaction."*

I further note there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Mr W's complaint. The breaches were summarised in paragraph 120 of the Court of Appeal judgment. 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.

In Mr W'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 it (L&C) entered into a SIPP contract with Mr W.

The facts of Mr Adams' and Mr W's cases are also different. I make this point to highlight there are factual differences between Adams v Options SIPP and Mr W's case. And I need to construe the duties L&C owed to Mr W under COBS 2.1.1R in light of the specific facts of his (Mr W's) case. So, I've considered COBS 2.1.1R, alongside the remainder of the relevant considerations, and within the factual context of his case, including L&C's role in the transaction.

However, as I've indicated above, I also 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 so, I'm required to take into account relevant considerations which include the law and regulations; regulators' rules; guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. This is a clear and relevant point of difference between this complaint and the judgments in Adams v Options SIPP. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

Additionally, I want to emphasise that I don't say L&C was under any obligation to advise Mr W on the SIPP and/or underlying investments. But it remains my view that refusing to accept an application isn't the same thing as advising Mr W on the merits of the SIPP and/or the underlying investments. Overall, I'm satisfied that COBS 2.1.1R is a relevant consideration. However, I think it needs to be considered alongside the remainder of the relevant considerations, and within the factual context of Mr W's case.

The regulatory publications

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

- The 2009 and 2012 Thematic Review Reports (the 'review' or 'reviews').
- The October 2013 finalised SIPP operator guidance.
- The July 2014 'Dear CEO' letter.

I have considered the relevance of these publications. Whilst I've set out material parts of the publications here, I have considered them in their entirety.

<u>The 2009 review</u>

The 2009 review 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 clients. 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* [treating customers fairly] *consumer outcomes.*
>
> *We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also*

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

Of particular concern were firms whose systems and controls were weak and inadequate to the extent that they had not identified obvious potential instances of poor advice and/or potential financial crime. Depending on the facts and circumstances of individual cases, we may take enforcement action against SIPP operators who do not safeguard their clients' 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 regulator 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 clients 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 nonstandard 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 regulator's expectations about the kinds of practical steps a SIPP operator might reasonably take to achieve the outcomes envisaged by the

Principles. And it 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*
- *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)*

This section ends by saying: *"Please note that the due diligence necessary for individual investments may vary depending on the circumstances, and the five areas highlighted above are not exhaustive."*

Although I've referred to selected parts of the publications to illustrate their relevance, I have considered them in their entirety.

L&C's response to the application of the regulators' publications

In its response to my provisional decision, L&C said the 2009 review wasn't formal guidance. I acknowledge the 2009 and 2012 reviews and the Dear CEO letter, aren't formal guidance (whereas the 2013 finalised guidance is). However, I remain of the view that the fact the reviews and the Dear CEO letter didn't constitute formal guidance doesn't mean their importance should be underestimated.

The publications provide a reminder that the Principles apply. And are 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. In this respect, the publications which set out the regulator's expectations of what SIPP operators should be doing, also go some way to indicate what I consider amounts to good industry practice. I'm, therefore, satisfied it's appropriate to take them into account.

It's relevant when deciding what amounted to good industry practice in the BBSAL case, the Ombudsman found said: *"…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.

L&C has also indicated that the 2009 review didn't provide guidance in any meaningful sense. But as the review's introduction 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 2009 review 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 remain satisfied the 2009 review 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 2009 review sets out the regulator's expectations of what SIPP operators should be doing and,

therefore, indicates what I consider amounts to good industry practice at the relevant time. Given this, I'm satisfied it's relevant and appropriate to take it into account.

L&C says many of the matters which the 2009 review invites firms to consider are directed at firms providing advisory services. It's not specified which parts of the review it thinks are directed at such firms but, to be clear, I consider the 2009 review was also directed at firms like L&C acting purely as SIPP operators. The review says: *"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses…"*.

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 review and other publications were relevant. L&C acknowledged in its submissions that the publications are relevant to how it conducts its business and highlights some areas of good practice. And L&C said it 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 the Principles 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 this respect, these publications also go some way to indicate what I consider amounts to good industry practice at the relevant time. Therefore, I'm satisfied it's appropriate to take them into account.

I've carefully considered what L&C has said about the publications published after Mr W'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 review, post-date the events that took place in relation to Mr W's complaint, mean 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 them.

It's also clear from the text of the 2009 and 2012 reviews (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. So, whilst the regulator's 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've noted L&C's point that the judge in the Adams case didn't consider the 2012 review, 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. As mentioned, the publications indicate what I consider amounts to good industry practice at the relevant time.

This 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 reviews, the 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 and/or the publications obliged L&C to ensure the transactions were suitable for Mr W. It's accepted L&C wasn't required to give advice to him and couldn't give advice under its permissions held at the time. And I accept the publications don't alter the meaning of, or the scope of the Principles. But they're evidence of what I consider to have been good industry practice at the relevant time, which, as I've said, would bring about the outcomes envisaged by the Principles.

I'd also add, even if I agreed with L&C that any publications, or guidance, which 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), this doesn't alter my view on what I consider to have been good industry practice. That's because I find that the 2009 review together with the Principles, provide a very clear indication of what L&C could and should have done to comply with its regulatory obligations before accepting Mr W's introduction from 1 Stop. It is 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.

It's my view that in determining this particular complaint, I need to consider whether, in accepting Mr W'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 this, 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 FSMA. I've carefully reconsidered 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 the Principles and the publications listed above are relevant considerations to that decision.

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. And L&C should have done this both initially and on an ongoing basis, before deciding to accept Mr W's application.

Ultimately, what I'll be looking at is whether L&C took reasonable care, acted with due diligence, and treated Mr W 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 W's complaint is whether it was fair and reasonable for L&C to have accepted his 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 W's SIPP application.

With what I've said above in mind, 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 W's application from 1 Stop.

The contract between L&C and Mr W

L&C has made some submissions about its contract with Mr W 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 W or otherwise have ensured the suitability of the SIPP or the investments for him. I accept L&C made it clear to him 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 forms Mr W 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. My decision on what's fair and reasonable in the circumstances of Mr W'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 W on the suitability of the SIPP or the investments he went on to make. But I remain satisfied that to meet its regulatory obligations when conducting its operation of SIPP 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, 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 reviews and guidance provided some examples of good practice observed by the regulator during its work with SIPP operators. This included being satisfied a particular introducer is appropriate to deal with and that a particular investment is appropriate to accept. This involved conducting checks – due diligence – on introducers and investments to make informed decisions about accepting business. L&C's 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 W) 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 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 it was regulated to give advice. It also entered into an Intermediary Agreement with 1 Stop.

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

L&C's due diligence on 1 Stop

L&C explained to us in a previous complaint, which was the subject of the published decision DRN-3587366, that at the date of the relevant SIPP application towards the end of 2011, it wouldn't have accepted applications from a firm who 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 an Intermediary Agreement with 1 Stop.

From the information that has been provided on this complaint, I'm satisfied L&C took some steps towards meeting its regulatory obligations and good industry practice. However, I don't think the steps that I've seen 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 W's application. As I explain below, based on the available evidence, I think it's more likely than not 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.

For example, by asking questions of, and 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. I appreciate 1 Stop might have been unwilling to answer, or fully answer, questions it received from L&C. But in either event, I think L&C should have concluded it shouldn't accept introductions from 1 Stop and before it accepted Mr W'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 W'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 W'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 this firm, as well as the percentage of introductions it (L&C) received 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 L&C 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
    - Energy Carbon Credits

An example of good practice identified in the FSA's 2009 review 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 review, 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 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 holdings in TRG and GOPA that Mr W'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 W 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 W's introduction. So, I think L&C either was aware, or ought reasonably to have been aware and prior to receiving Mr W'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 carrying 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 W's application. And, mindful of the type of introductions L&C was receiving from 1 Stop from the outset, I consider 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 review explained that the regulator would expect SIPP operators to have procedures and controls, and for management information to be gathered as well as 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."*

I think L&C, and long before it received Mr W'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 W says he dealt with an unregulated introducer who introduced him to 1 Stop. The advisory process in Mr W'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 W's application.

The FCA's Final Notice about 1 Stop, also highlighted, much as in Mr W'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 I've seen on this complaint, and other similar complaints involving 1 Stop doesn't suggest it (1 Stop) was trying to mask what it was doing.

For example, I've seen in other cases that questionnaires were completed by clients. I think it's more likely than not that Mr W completed one of these as there was a consistent pattern of 1 Stop operating in this way. But Mr W, to date, has not provided a copy of his questionnaire. From what I can see in other cases, the questionnaire recorded that 1 Stop wasn't advising on the suitability of the investments. This correlates with what Mr W has said i.e. that he did not receive any advice on the underlying investment. And as I've said Mr R said this as well to the FCA.

I also note the 1 Stop 'Declaration' signed by Mr W on 15 November 2011, relating to the GOPA investment, clearly stated that 1 Stop would not be providing advice on the underlying investment. For example, it said:

> *"1 Stop Financial Services have not been involved in the decision of proceeding with this investment as part of your retirement financial planning strategy. The suitability of utilising pension funds to facilitate this purchase have been deemed to be appropriate by your own choice.*
> *…*
> *We will not pass comment regarding the suitability of the investment you wish to make but you should know that this type of investment is typically suited to sophisticated investors. As such this is deemed to be an instructed investment request. We would recommend that if you have not done so already, that you undertake your own full due diligence on this matter."*

On balance, I think it's more likely than not that if L&C had checked with 1 Stop and/or asked the type of questions I've mentioned earlier, that it (1 Stop) would've 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 consider 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 review said: *"…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."

The 2009 review also said 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 W, directly and/or to seek copies of the suitability reports.

I appreciate L&C has said in response to my provisional decision, that it couldn't comment on advice without potentially being in breach of its permissions. Again, I confirm 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 W's application:

- 1 Stop was explaining to clients it 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.
- Clients 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 clients might've been sold on the idea of transferring their pension(s) in order 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.

L&C has said in response to my provisional decision, that it only found out about how 1 Stop was operating following the FCA Final Notice issued in April 2014. But as I've mentioned above, the pattern of business operated by 1 Stop suggests it was being open about the limited service it was offering to consumers. 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 W 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 clients were being introduced by unregulated businesses, which was the case for Mr W.

Had L&C taken appropriate steps in reaction to this such as seeking clarification from some applicants introduced by 1 Stop at the time, such as Mr W. And/or requesting copies of some paperwork for 1 Stop introduced clients, I think it's more likely than not the information L&C obtained would've accorded with what 1 Stop was stating in the contemporaneous documentation I've seen in this and other similar complaints. Mr R also said this was 1 Stop's business model in the FCA's Final Notice, namely, that 1 Stop wasn't offering clients it was introducing to L&C any advice on investing in high risk unregulated investments, which were being purchased from clients' pension monies once transferred to the L&C SIPP.

Therefore, I remain of the view that L&C ought to have concluded Mr W, and applicants before him, didn't have full regulated advice on the overall proposition made available to them by 1 Stop. And I consider L&C ought to have viewed this as a significant point of concern. Retail clients, like Mr W, were transferring pension monies to L&C to invest in higher risk investments. But this was 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 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, where no advice is being given by that firm on the 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 most advice firms decline to be involved in such transactions.

I also think this ought to have been a red flag for L&C in its dealings with 1 Stop. And I consider L&C ought to have identified 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 consider 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 W, 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.

I remain of the view that 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 clients by the introducer L&C was dealing with who, in this case, was 1 Stop.

As I've said above, L&C should have identified the business it was receiving from 1 Stop, whereby it was arranging the transfer of pension monies for clients into a SIPP, so as to invest in unregulated investments without the benefit of advice, raised serious questions about the motivation and competency of 1 Stop. And I think L&C should have concluded,

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

I appreciate L&C have submitted that, as far as it was aware, 1 Stop advised Mr W on the establishment of the SIPP as well as the investments he made. It says the fact advice was given on the investments is evidenced by 1 Stop supplying L&C with a copy of the investment application alongside the SIPP application. L&C have highlighted in Mr W's SIPP application he informed it (L&C) he'd been advised by an IFA and that this IFA was to act on his behalf in dealing with investments.

Whilst I've taken into account what L&C has said, the weight of the evidence including the contemporaneous documentation from the point of sale that has been provided, as well as Mr W's testimony, I think it's more likely than not, an unregulated introducer promoted the unregulated investments to him. And that 1 Stop didn't advise Mr W on these investments. This unregulated introducer is stated to be Mr W's agent in both his TRG reservation form and the GOPA application form as I've set out above. Further, Mr W said he was advised by 1 Stop (Mr R) on the SIPP itself but not on the underlying investments. I'm satisfied that conclusion is supported by the weight of evidence from this case. And from what Mr R on behalf of 1 Stop said in the FCA Final Notice.

In any event, what I've said above is a secondary point because as I've also said, I'm satisfied that if L&C had undertaken adequate due diligence on 1 Stop, it should've stopped accepting introductions from it before receiving Mr W's application. And L&C should have declined to accept Mr W's application from 1 Stop. So, things shouldn't have got beyond that. In my view, L&C didn't act with due skill, care, and diligence, organise and control its affairs responsibly, or treat Mr W 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 W 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 W 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 investments he made 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 W's application?

For the reasons given above, I remain of the view L&C should have declined to accept Mr W's application from 1 Stop. So, things shouldn't have gone beyond that. Further, in my view it's fair and reasonable to say that just having Mr W 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 W 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 W'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 W'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 W signed meant that L&C could ignore its duty to treat him fairly.

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

COBS 11.2.19R

L&C argues it was reasonable to proceed with Mr W's application because of the disclaimer he signed. And that it was obliged to carry out his instructions under COBS 11.2.19R.

L&C says it complied with its obligations under COBS 11.2.19R in acting on Mr W's written instructions to switch his pension rights and transfer funds to a L&C SIPP which were subsequently invested as set out above. L&C says to decline to do so would have been akin to assessing suitability requiring it to investigate the full extent of Mr W's financial circumstances. And L&C did not have regulatory permission to carry on such work. I do not agree with this argument. L&C could have refused Mr W's application without giving advice or acting in a way that was akin to giving advice. And such a refusal would have been consistent with its role as a non-advisory SIPP operator.

As the Court made clear in the BBSAL case, COBS 11.2.19R is concerned with the method of execution of a client's order. It does not regulate the question of whether or not an order should be accepted in the first place. As I consider L&C should not have accepted Mr W's application, I don't think it's fair and reasonable for L&C to rely on the disclaimer he signed saying he instructed it to make the investment and that it (L&C) would not be responsible for any losses based on those instructions. Things should never have reached that stage. If L&C had acted in its client's best interests Mr W would never have been put in the position where he was asked to sign that disclaimer.

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

In this decision I'm considering Mr W's complaint about L&C. However, I accept that other parties were involved in the transactions complained about, including 1 Stop, TRG, GOPA and an unregulated introducer, Mr P. L&C has contended that it's 1 Stop that's really responsible for Mr W's losses.

The Financial Ombudsman 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, GOPA or the unregulated introducer.

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 W fairly.

The starting point, therefore, is that it would be fair to require L&C to pay Mr W 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 W 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 W to the full extent of the financial losses he's suffered due to L&C's failings.

I accept it may be the case that 1 Stop might have some responsibility for initiating the course of action that led to Mr W's loss. However, I'm satisfied it's also the case that if L&C had complied with its own 3distinct regulatory obligations as a SIPP operator, the arrangement for Mr W wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

I want to make clear I've carefully taken everything L&C has said into consideration. And it is my view that it's appropriate and fair in the circumstances for L&C to compensate Mr W 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 is liable to pay to Mr W.

Further, I'm not making a finding that L&C should have assessed the suitability of the SIPP, or the investments, for Mr W. I accept that L&C wasn't obligated to give advice to him, 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 W 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 reconsidered this point carefully and I remain satisfied it wouldn't be fair or reasonable to say Mr W'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 W'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 W 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 W 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. Mr W used the services of a regulated adviser,1 Stop, who had the necessary permissions to advise him on his pension provisions. Mr W 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 W being aware the investments were high risk. But I've seen nothing to convince me he had any specialist knowledge or experience such that it meant he likely understood the risks of the particular investments proposed to him. Indeed, when making his complaint to the Financial Ombudsman Service, Mr W said the risks associated with unregulated investments weren't explained to him. He says he was told the pension would provide a secure income for him in his retirement.

Having carefully considered all of the evidence, I'm satisfied Mr W's testimony that he didn't receive an explanation of the risks involved, and he was led to believe 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 W 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 W's application.

But, in any event, 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 W's application from 1 Stop to open a SIPP at all. That should have been the end of the matter – if this had happened, I'm satisfied the arrangement for Mr W wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

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

Had L&C declined Mr W's business from 1 Stop would the transactions complained about still have happened elsewhere?

I think Mr W's pension monies were transferred to L&C so as to effect unregulated investments. I'm satisfied this position is supported by the available evidence from the relevant time. And Mr W says he was told by the unregulated introducer that he (Mr W), could increase his pension by investing the unregulated investments.

L&C has said that if it hadn't accepted Mr W's application from 1 Stop, the transfer and investment would still have happened with a different SIPP provider. But I don't think it's fair and reasonable to say L&C shouldn't compensate Mr W 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 consider it's fair instead to assume another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted Mr W's application from 1 Stop.

Further, if L&C had declined to accept Mr W's business from 1 Stop and he had then sought advice from a different adviser, I think it's unlikely that another adviser, acting properly, would have advised him to transfer away from his pension plan and to invest in an unregulated holding in a SIPP. Alternatively, if L&C had declined to accept Mr W's business from 1 Stop, Mr W might have simply decided not to seek pensions advice elsewhere from a different adviser and still then retained his existing pension.

In all the circumstances, I'm satisfied it's fair and reasonable to conclude that if L&C had declined to accept Mr W's application from 1 Stop, the transactions complained about would not have gone ahead. And Mr W would have retained his pension plan.

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 persuaded Mr W proceeded knowing 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.

On balance, I'm satisfied Mr W, 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 W's application from 1 Stop, the transactions this complaint concerns wouldn't still have gone ahead.

Overall, I do think it's fair and reasonable to direct L&C to pay Mr W compensation in the circumstances. While I accept 1 Stop might have some responsibility for initiating the course of action that's led to Mr W'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 W's application from 1 Stop when it had the opportunity to do so. And I'm satisfied that Mr W wouldn't have established the SIPP, transferred his pension plan, or invested in the unregulated investments 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 W. 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 W for the full measure of his loss.

1 Stop was reliant on L&C to facilitate access to Mr W'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, this fact shouldn't impact on Mr W's right to fair compensation from L&C for the full amount of his loss.

The key point here is but for L&C's failings, Mr W 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 W to the full extent of the financial losses he's suffered due to its failings, and notwithstanding any failings by 1 Stop.

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 W'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 W 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 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

I'm upholding this complaint. I consider L&C failed to comply with its own regulatory obligations and didn't put a stop to the transactions. My aim in awarding fair compensation is to put Mr W back into the position he would likely have been in had it

not been for L&C's failings. Had L&C acted appropriately, I think it's most likely that Mr W would've remained a member of the pension plan he transferred into the SIPP.

In light of the above, L&C should:

- Obtain the notional transfer value of Mr W's previous pension plan.
- Obtain the actual transfer value of Mr W's SIPP, including any outstanding charges.
- Pay a commercial value to buy any illiquid investments (or treat them as having a zero value).
- Pay an amount into Mr W's SIPP so as to increase the transfer value to equal the notional value established. This payment should take account of any available tax relief and the effect of charges.
- If the SIPP needs to be kept open only because of any illiquid investments and is used only or substantially to hold these assets, then any future SIPP fees should be waived until the SIPP can be closed.
- If Mr W has paid any fees or charges from funds outside of his pension arrangements, L&C should also refund these to Mr W. And interest at a rate of 8% simple per year from date of payment to date of refund should be added to this.
- Pay Mr W an amount of £500 to compensate him for the distress and inconvenience he's been caused.

I've set out how L&C should go about calculating compensation in more detail below.

Treatment of the illiquid assets held within the SIPP

I think it would be best if any illiquid assets held could be removed from the SIPP. Mr W would then be able to close the SIPP if he wishes. That would then allow him to stop paying the fees for the SIPP. The valuation of the illiquid investment may prove difficult, as there is no market for it. For calculating compensation, L&C should establish an amount it's willing to accept for the investment as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investment.

If L&C is able to purchase the illiquid investment then the price paid to purchase the holding will be allowed for in the current transfer value (because it will have been paid into the SIPP to secure the holding). If L&C is unable, or if there are any difficulties in buying Mr W's illiquid investment, it should give the holding a nil value for the purposes of calculating compensation.

If L&C doesn't purchase the investment, and if the total calculated redress in this complaint is less than the award limit of £150,000, L&C may ask Mr W to provide an undertaking to account to it for the net amount of any future payment the SIPP may receive from the investment. That undertaking should allow for the effect of any tax and charges on the amount Mr W may receive from the investment after the date of my decision, 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.

If L&C doesn't purchase the investment, and if the total calculated redress in this complaint is greater than the award limit of £150,000 and L&C does not pay the recommended amount as set out below, Mr W should retain the rights to any future returns from the investment(s) until such time as any future benefit he receives from the investment(s), together with the compensation paid by L&C (excluding any interest), equates to the total calculated redress amount in this complaint.

L&C may ask Mr W to provide an undertaking to account to it for the net amount of any further payment the SIPP may receive from the investment thereafter. That undertaking should allow for the effect of any tax and charges on the amount Mr W may receive from the investment from that point, 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.

Calculate the loss Mr W has suffered as a result of making the transfer

L&C should first contact the provider of Mr W's pension plan which was transferred into the SIPP and ask it to provide a notional value for the policy as at the date of calculation. For the purposes of the notional calculation the provider should be told to assume no monies would've been transferred away from the plan, and the monies in the policy would've remained invested in an identical manner to that which existed prior to the actual transfer.

Any contributions or withdrawals L&C has made will need to be taken into account whether the notional value is established by the ceding provider or calculated as set out below. Any withdrawal out of the SIPP should be deducted at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. The same applies for any contributions made, these should be added to the notional calculation from the date they were actually paid, so any growth they would've enjoyed is allowed for.

If there are any difficulties in obtaining a notional valuation from the previous provider, then L&C should instead arrive at a notional valuation by assuming the monies would have enjoyed a return in line with the FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return index). That is a reasonable proxy for the type of return that could have been achieved over the period in question.

I acknowledge L&C's point that Mr W has received a sum of compensation from the FSCS. And that he has had the use (benefit) of the monies received from the FSCS. The terms of the RoR 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 assignment if required. So, I think it's fair and reasonable to make no permanent deduction in the redress calculation for the compensation Mr W received from the FSCS. It will be for Mr W to make the arrangements to make any repayments he needs to make to the FSCS.

However, I do think it's fair and reasonable to allow for a temporary notional deduction equivalent to the payment Mr W actually received from the FSCS for a period of the calculation, so the payment ceases to accrue any return in the calculation during that period. As such, if it wishes, L&C may make an allowance in the form of a notional withdrawal (deduction) equivalent to the payment Mr W received from the FSCS following the claim about 1 Stop, and on the date the payment was actually paid to Mr W.

Where such a deduction is made there must also be a corresponding notional contribution (addition) at the date of the final decision equivalent to the FSCS payment(s) notionally deducted earlier in the calculation. To do this, L&C should calculate the proportion of the total FSCS' payment that it's reasonable to apportion to each transfer into the SIPP - this should be proportionate to the actual sums transferred in. And L&C should then ask the operator of Mr W's previous pension policy to allow for the relevant notional withdrawal in the manner specified above.

The total notional deduction allowed for shouldn't equate to any more than the actual payment from the FSCS that Mr W received. L&C must also then allow for a corresponding notional contribution (addition), as at the date of my final decision,

equivalent to the accumulated FSCS payment notionally deducted by the operator of Mr W's previous pension plan.

Where there are any difficulties in obtaining notional valuations from the previous operator, L&C can instead allow for both the notional withdrawals and contributions in the notional calculation it performs, provided it does so in accordance with the approach set out above.

The notional value of L&C existing plan if monies hadn't been transferred (established in line with the above) less the current value of the SIPP (as at the date of the final decision) is Mr W's loss.

L&C must also provide the details of its redress calculation to Mr W in a clear, simple format.

Pay an amount into Mr W's SIPP so the transfer value is increased by the loss calculated above

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

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr W as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his 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 has disagreed with the income tax assumption that I've made but it hasn't provided any evidence that Mr W will be anything but a basic rate taxpayer in retirement. I'm satisfied based on all the available evidence, my assumption that Mr W would be a basic rate taxpayer in retirement, is fair and reasonable.

SIPP fees

If the investments can't be removed from the SIPP, and because of this it can't be closed after compensation has been paid, then it wouldn't be fair for Mr W to have to continue to pay annual SIPP fees to keep the SIPP open. So, if the SIPP needs to be kept open only because of the illiquid investment and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.

Interest

The compensation resulting from this loss assessment must be paid to Mr W or into his SIPP within 28 days of the date L&C receives notification of his acceptance of my final decision. The calculation should be carried out as at the date of my final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation is not paid within 28 days.

Income tax may be payable on any interest paid. If L&C deducts income tax from the interest, it should tell Mr W how much has been taken off. L&C should give Mr W a tax

deduction certificate if he asks for one (in relation to any interest in respect of any part of this redress), so he can reclaim the tax from HMRC if appropriate.

Distress & inconvenience

I've noted L&C's submissions regarding the level of compensation for the distress and inconvenience it caused to Mr W. And whilst I've taken these submissions into account, I am still of the view that the loss of the value of Mr W's pension provision has caused him a significant amount of distress and inconvenience. He was expecting to have a 'secure' pension for his retirement. And L&C's acts/omissions resulted in nearly the total loss of his pension provision. So, I consider L&C should pay Mr W £500 to compensate him for the distress and inconvenience it has caused him.

My final decision

Where I uphold a complaint, I can make an award requiring a financial business to pay compensation of up to £150,000, plus any interest and/or costs/ interest on costs that I consider appropriate. If I think fair compensation exceeds £150,000, I may recommend that London & Colonial Services Limited pays the balance.

Determination and award: I'm upholding the complaint. I think fair compensation should be calculated as set out above under 'Putting things right'. My final decision is that London & Colonial Services Limited should pay Mr W the amount produced by the calculation, up to a maximum of £150,000 plus any interest.

Recommendation: If the amount produced by the calculation of fair compensation is more than £150,000, I recommend that London & Colonial Services Limited pays Mr W the balance. This recommendation is not part of my determination or award. London & Colonial Services Limited doesn't have to do what I recommend. It's unlikely that Mr W can accept my decision and go to court to ask for the balance. Mr W may want to get independent legal advice before deciding whether to accept this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 29 May 2024.

Yolande Mcleod
Ombudsman