DRN-4790248

The complaint

Mr M has a self-invested personal pension ('SIPP') with London & Colonial Services Limited ('L&C'). Mr M complains L&C failed to carry out appropriate due diligence checks on his SIPP application which led him to invest in non-mainstream investments. The majority of his investments now have no, or very little value, causing significant loss to his pension.

What happened

Parties involved

L&C

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

SVS Securities PLC ('SVS')

SVS was authorised from 9 April 2003, firstly by the Financial Services Authority ('FSA') and then by the Financial Conduct Authority ('FCA') – I will refer to both bodies as the 'regulator' or by their respective initials.

SVS had permissions for a range of regulated activities, including arranging (bringing about) deals in investments; dealing in investments as agent; dealing in investments as principal; making arrangements with a view to transactions in investments; and managing investments.

BlueInfinitas Ltd ('BlueInfinitas').

BlueInfinitas was authorised from January 2014 by the FCA. It had permissions for a range of regulated activities including advising on investments; arranging (bringing about) deals in investments; and making arrangements with a view to transactions in investments.

Background to Mr M opening his SIPP with L&C

Mr M established a SIPP with L&C in December 2014 following advice he received from a BlueInfinitas Independent Financial Adviser ('IFA'). He transferred just over £60,000 from a personal pension plan to a SIPP with L&C at the end of 2014. Mr M explained the background to establishing the SIPP as follows:

- Mr M initially received a cold call from a representative of BlueInfinitas offering him a pension review with the view to maximising his (Mr M's) pension returns.

- Mr M said he didn't have any intention of transferring his pension until he received a cold call from BlueInfinitas who at the time was an Intermediary for L&C.
- The cold call resulted in a visit to his (Mr M's) home address by an IFA from BlueInfinitas – the IFA was also the Managing Director ('MD') of BlueInfinitas.
- Mr M had no investment experience at the time of the advice and the pension he was advised to transfer into, which was a L&C SIPP, was his only source of income for his retirement.
- Mr M states the IFA, appeared professional and very knowledgeable and he had no reason not to trust him.
- Mr M was unaware of L&C's involvement at the time of advice as he cannot recall this firm being mentioned. Mr M says the IFA gave him the impression his funds would be transferred to another mainstream pension provider.
- Mr M said he was unaware of the exact investments his funds were transferred to as these were never mentioned to him by the IFA. However, the IFA guaranteed he (Mr M) would receive better returns by transferring his pension to a new provider. Mr M said this was the main incentive for him to proceed with the recommendations made by the IFA.
- Mr M says he was assured by the IFA that his funds would be invested within a low risk portfolio and his capital would remain secure. Therefore, he was shocked to realise his funds had been invested within a potentially high risk investment vehicle.
- Mr M cannot recall receiving any reports or other correspondence from the IFA.

The SIPP application

Mr M's SIPP application was unsigned and undated as it was submitted by the IFA electronically to L&C. The application included the following details:

- In section 2, Mr M's IFA was named as the MD of BlueInfinitas.
- Section 2 included the question: "Advice given at the point of sale that takes account of the intended underlying investment strategy". The answer to this question was *"Yes".*
- In section 4 'Platform Details', SVS was given as the relevant platform.
- Section 4.1 had the statement: *"I request London & Colonial Assurance PLC appoint the following appropriately authorised person or organisation to act as Platform Trader, in relation to my SIPP and the underlying investments."* The answer to this question was *"Financial Advisor".*
- Section 4.2 'Investment Manager/ Discretionary Fund Manager Details' (I will refer to these as 'IM' and 'DFM' respectively), no one was named and to each question it was answered as 'n/a'.
- In section 7 'Transfer Requests', one pension provider was given. Mr M's estimated transfer value was £57,631.
- In section 9 'Declaration', amongst other things, this said:
    - *"I hereby request London & Colonial to accept investment instructions from my financial adviser indicated in Section 2 or from the investment manager/ DFM indicated in Section 4.2."*
    - *"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 instructions received by facsimile or email from the address stated on this application form and/or provided by me…"*

A L&C employee emailed SVS Mr M's details on 1 December 2014. The email requested SVS set up an account for Mr M as he was appointing SVS as his DFM. And once the SVS account was opened L&C could transfer the requested amount of pension monies to the platform provider. It should be noted the employee incorrectly referred to SVS as acting as a DFM for Mr M but he hadn't chosen this service in his SIPP application.

On the same date (1 December 2014), L&C sent Mr M a 'Welcome Pack'. This included details on how to access his account online, as well as enclosing a 30-day 'Right to Change Your Mind' notice. L&C's records show that Mr M's IFA forwarded it investment instructions to invest in SVS.

Again on 1 December 2014, L&C wrote to Mr M stating that: *"Thank you very much for your recent application for a Multi Platform SIPP, submitted on your behalf by Blue Infinitas Ltd, who you have selected to be your financial adviser and trade on the platform."* The email had a number of attachments including a key features document. Mr M's IFA was sent an email confirming receipt of Mr M's SIPP application.

On 3 December 2014, L&C wrote to Mr M's then pension provider requesting a transfer of his pension to the scheme's bank account. And on 11 December 2014, £62,231.82 was transferred to his L&C SIPP by his (now) previous pension provider. His SIPP had already been established on 1 December 2014. On 15 December 2014, £60,781.82 was transferred from Mr M's SIPP to SVS. BlueInfinitas' fee of £1,091.20 was deducted from Mr M's SIPP account on 23 December 2014.

On 5 January 2015, L&C confirmed to Mr M that the first contribution of a series of regular contributions of £50 per month had been received. Mr M had sent in the necessary paperwork to set up the regular pension contribution payments, in or around, the time of his SIPP application.

The investments

L&C didn't carry out any due diligence on Mr M's investments which were all purchased via the SVS platform on the instructions of the BlueInfinitas IFA. In summary, the BlueInfinitas IFA instructed SVS to purchase several smaller amounts of shares in companies that appeared to be all listed on the London Stock Exchange. These were all purchased on 18 December 2014, for a total cost of around £165 for each separate stock. However, larger investment purchases which represented the majority of Mr M's pension funds went into non-mainstream investments, at a total cost of around £59,000. These investments were as follows:

Affinity Global Developments PLC ('Affinity Global')

On 15 December 2014, SVS invested £28,211 of Mr M's pension funds in Affinity Global (note that the company is now called Anilana International Developments PLC but for convenience I will continue to refer to it as 'Affinity Global' throughout this decision). Companies House records show that Affinity Global was a UK registered Private Limited company, incorporated in 2014. It became a Public Limited Company ('PLC') on 6 August 2014. And it appears Affinity Global's business activity was issuing bonds *"to be listed"* on the GXG Main Quote Market exchange ('GXG') which was based in Denmark.

It should be noted that it's unclear during which period the Affinity Global investment was listed on the GXG exchange. The exchange itself ceased trading in August 2015

and L&C told Mr M about this in a letter it sent to him in December 2015. However, Global Affinity's annual account's for the year ending May 2015, which was published at Companies House and audited, said the GXG exchange was due to close in August 2015. And as a result, Affinity Global would be looking to 'relist' on another alternative exchange. This seems to suggest that sometime from August 2014 (when it became a PLC) to August 2015 (when the GXG exchange ceased to trade), Affinity Global was a listed business on a foreign exchange.

On 2 August 2019, the FCA issued a 'First Supervisory Notice' against SVS. Affinity Global was noted in this document as follows:

> *"b) SVS' Advisory account contains exposure to AFFINITY DEVELOPMENTS PLC for c.£6.4mn which is the second largest holding in this account. The asset is held as a physical certificate. Companies House state that an administrator was appointed over this company on 12 June 2019.*
>
> *c) During the visit on 2 July, SVS provided a record of a holding in a related entity, ANILANA INTL DEVEL PLC (FORMERLY AFFINITY GLOBAL), held as a physical certificate with a value of c.£3.8mn. It appears that this valuation has now been marked to zero."*

Auhua Clean Energy PLC ('Auhua')

Mr M investment in Auhua was made by SVS on 17 December 2014 for £22,692.35. Auhua was a Jersey registered company that traded on the Alternative Investment Market ('AIM') until 2016. From the Jersey Financial Services Commission ('JFSC') publicly available records, Auhua was registered on 21 November 2011 and was dissolved on 1 October 2017.

Auhua's prospectus was registered on the JFSC's website. This said, amongst other things, that Auhua was an environmental technology group based in the Shandong Province of eastern China specialising in the development and application of green energy as well as energy efficient water heating solutions. Prospective investors were told to be aware that an investment in the company was speculative and involved a high degree of risk.

Goldcrest Resources PLC ('Goldcrest')

On 17 December 2014, SVS invested £6,047.51 of Mr M's pension funds in Goldcrest (the company's name was changed to Block Energy PLC in 2017 but I will continue to refer to it as Goldcrest throughout this decision). Goldcrest was incorporated and domiciled in England and Wales. The principal activity of this company was to evaluate opportunities for gold exploration in Ghana, West Africa. Goldcrest was publicly listed on the ISDX Growth Market ('ISDX').

Goldcrest's annual accounts for the year ending June 2013, which were published at Companies House prior to Mr M's investment, made a number of statements as to the financial position of the company. This included an Auditor's Report which stated: *"Short term funding has been established to finance the company in the immediate future. These funds are not sufficient for the foreseeable future and additional funds will need to be secured in order to safeguard the company's position. Although management have expressed optimism in this respect, material uncertainty exists which may cast significant doubt about the company's ability to continue as a going concern."*

Annual accounts showed Goldcrest had made losses in 2012 of £46,056 rising to £133,785 in 2013. The company continued to operate at a loss in the subsequent years. The financial statement for Goldcrest for the year ending 30 June 2016, showed SVS (Nominees) were listed as having 552,719,931 ordinary shares in that company (Goldcrest), which represented 26.38% of the Goldcrest's issued share capital. This meant SVS held, for its clients, the largest holding in Goldcrest. The second largest investor owned 9.75% share capital in the company.

Titania Internet Ventures PLC ('TIV')

SVS invested £2,025.68 in TIV on Mr M's behalf on 12 December 2014. TIV was a UK registered company which was initially registered under a different name and as a 'Limited' entity – it changed to a PLC status on 18 June 2007 and changed its name on 26 April 2011.

According to TIV's publicly available annual accounts for the year ending 30 June 2013, its principal activities were that of offering online auction services directly to consumers using various consumer brands by setting up and operating an online penny auction system, predominantly in Europe. Amongst the key risks highlighted by the company was the "ability to secure future investment", which it said depended on it being listed on the ISDX Growth Market in order to raise funds for working capital purposes.

The TIV annual account's for the year ending 30 June 2013, showed a carried forward loss of £2,384,533 and for the year ending 30 June 2014, the losses had risen to £2,484,456. On 12 January 2017, TIV went into Members Voluntary Liquidation. The liquidator confirmed that there would be no payment of dividends to creditors because there were no assets available to enable a distribution. TIV was dissolved on 31 March 2020.

<u>Due diligence carried out by L&C</u>

L&C's due diligence on SVS was completed in August 2013. Due diligence undertaken by L&C regarding SVS included:

- establishing whether SVS was regulated and what regulated permissions it had;
- whether it was subject to disciplinary action by the regulator;
- Companies House searches were carried out including checking Annual Returns;
- a check of SVS' website was done;
- checks were made in regard to the company's control and ownership;
- an agreement (the 'SVS agreement') dated 22 August 2013, was entered into between SVS and L&C. Amongst other things, this required SVS to abide by the L&C permitted investment list ('PIL') when purchasing investments for clients.

L&C also carried out due diligence checks on BlueInfinitas including checking its regulatory status. L&C has provided print outs of the BlueInfinitas' relevant FCA Register page which included the permissions held by BlueInfinitas at the time of the check which was dated 10 September 2014. L&C also entered into an Intermediary Agreement with BlueInfinitas.

On 9 September 2014, the Intermediary Application form was completed by BlueInfinitas and included the following information.

- Establishment date was 2 January 2014.
- The advisory status was 'Independent'.
- BlueInfinitas confirmed that it and/or its advisers hadn't been refused business by any other provider; hadn't been subject to County/High Court proceedings; hadn't been subject to any criminal or legal proceedings; and hadn't been subject to disciplinary proceedings by any regulatory/professional body.

Following the application, an Intermediary Agreement was set up by L&C for BlueInfinitas which started from around September 2014. Amongst other things, this said: (bold is the agreement's emphasis and only sections 9 and 13 have been quoted in full):

*"**7 Investment Trader Provisions***

7.1 If you have been nominated by the client as the Investment Trader and if we have agreed that you may so act then the following provisions will apply.

7.2 Unless specifically agreed with us all the investments must be within those shown on the most recent Permitted Investments List made available on our website.

7.3 You acknowledge that although the assets are those of London & Colonial, the investment transactions shall be those requested by or made upon the basis agreed with the client who shall be treated for these purposes as a retail client as defined by the UK Financial Conduct Authority (FCA)."

*"**8 General***

8.2 London & Colonial shall carry no responsibility for the selection or performance of investments made in connection with the Fund, this being a matter between you and the clients."

*"**9 Indemnity***

9.1 You shall indemnify us and keep us indemnified from all loss resulting to us arising from

(a) any failure by you to comply with the provisions of the Act any regulations made thereunder and the rules of any relevant self-regulatory organisation or recognised professional body; or
(b) any breach by you of any of the provisions of this Agreement including, without limitation any failure to provide promptly and accurately the information required under this agreement;
(c) any other acts or omissions on your part."

*"**10 Documentation***
…
10.3 You acknowledge that we may from time to time be obliged to send documents of various kinds direct to the client to comply with regulatory obligations but in all such circumstances we shall, unless required not to do

so, notify you of the content of the communication. We also reserve the right to communicate directly with the client if we believe that for any reason the client may not otherwise receive information or documents sent to you for onward transmission to the client but in all such circumstances we shall notify you of the content of the communication to the client."

*"**13 Amendment, delegation and termination***
…
13.4 This Agreement may be terminated by us with immediate effect so that no new business shall be placed with or accepted by us and without liability on our part by written notice to such affect to you on the occurrence of any or more of the following:

a) Any material breach by you of any of the provisions of this Agreement;
b) Misconduct on your part which is or could be prejudicial to our business or reputation;
c) You stop or intend to stop operating as an authorised intermediary"

L&C's updates to Mr M about his IFA, SVS and his investments

The status of BlueInfinitas and SVS

On 29 May 2015, BlueInfinitas entered into voluntary liquidation. The IFA (BlueInfinitas) was dissolved on 19 February 2022. My understanding is L&C wrote to SIPP members such as Mr M, who had used BlueInfinitas as their IFA, that it (BlueInfinitas) had entered into liquidation.

On 10 June 2015, Mr M's new financial adviser, who I will refer to as 'S' wrote to L&C providing a letter of authority along with a request for information. On 17 June 2015, L&C confirmed to S that it had been appointed as Mr M's new financial adviser and requested it (S) complete an Intermediary Agreement. Mr M changed financial adviser's again, which was confirmed in a letter to SVS from L&C dated 24 May 2019.

On 12 August 2019, L&C wrote to SVS clients letting them know SVS had entered into Administration. SVS was dissolved on 10 August 2023.

L&C's 10 December 2015 letter – the status of Mr M's investments

In a letter dated 10 December 2015, L&C wrote to Mr M with an update about his SIPP and investments. Under the heading 'Background' L&C told Mr M that: *"We wrote to you previously to inform you that your financial adviser - Blue Infinitas Ltd - went out of business, and as yet, we are not aware that you have appointed a replacement financial adviser."* However, as set out above, L&C had been notified of Mr M's new financial adviser and had updated its records accordingly.

L&C went on to say in its December 2015 letter that: *"To clarify, SVS are the investment company that you asked us to send your pension fund as indicated in your application form. Your application form also shows that you requested that your financial advisor (Blue Infinitas) to carry out the investment trading within the SVS account."*

L&C said a SVS valuation statement was enclosed and noted: *"…the amount currently shown is due to investment performance – which will fluctuate over time – and possible to any related platform or other charges."* But that: *"…whilst a value might be shown against a particular investment, this may not reflect the amount that*

could be received if the investment was sold. Indeed, it may not be possible to sell the investment in a timely manner, if at all. We refer to these investments as "illiquid"."

L&C noted the Affinity Global bond worked on a *"matched market"* basis, which it said meant a buyer would need to be found in order for the investment to be sold. But L&C went on to say the exchange (GXG) on which Affinity Global traded was at that time suspended which it said meant no sale could take place in any event. L&C told Mr M it understood Affinity Global was actively looking to re-list the investment on another exchange but that as at the date of the letter (15 December 2015), Affinity Global hadn't been successful.

L&C also let Mr M know about the status of Auhua and Goldcrest saying these investments were *"illiquid"*, which it said meant they currently couldn't be sold. L&C noted some of his other funds held on his SVS platform may also be illiquid. L&C explained to Mr M that unless, or until, the illiquid investments could be sold he would not be able to access the funds in his SIPP account and/or transfer to another pension provider. L&C strongly recommended Mr M appoint a new financial adviser. And it also recommended he contact the Financial Services Compensation Scheme ('FSCS') in respect of a potential claim against BlueInfinitas.

Further updates – the valuation of Mr M's investments

An indicative valuation of Mr M's SVS portfolio was provided in a SVS statement covering the period up to 8 December 2016. This showed Mr M's SVS portfolio had fallen in value from just over £60,000 to just over £34,000. At this point Auhua was valued at nil. Goldcrest was valued at £666.94 and Affinity Global was valued at £28,000. TIV was not included in Mr M's SVS portfolio at this point (i.e. by 8 December 2016).

A holding statement dated 22 July 2022, showed that Mr M had cash in his account totalling £4,389.62. And the SVS portfolio as of 30 June 2022, was valued at £1,750.95.

Mr M's complaint

On 7 January 2019, Mr M brought a claim to the FSCS in relation to BlueInfinitas and he was awarded £50,000 in line with the FSCS award limits. The FSCS calculated Mr M's total loss to be £76,782.70. This amount included a deduction of £7,484.44 for liquid assets held within Mr M's SVS portfolio as of 12 November 2018.

On 4 November 2019, Mr M, via a Claims Management Company ('CMC'), made a complaint to L&C. Amongst other things, the CMC said:

- Mr M was working and earning £20,000 a year. He had no investment experience, and given his financial circumstances, had a low to medium tolerance to investment risk.
- Mr M was cold called which led to a meeting with an IFA from BlueInfinitas to discuss his (Mr M's) pension arrangements. Mr M was advised to transfer his pension plan to a SIPP and told returns generated would be better than his existing pension. Mr M did not know a lot about SIPPs at that time. So, on the advice of the IFA he (Mr M) decided to confirm the instructions to transfer.
- The majority of investments were held in non-mainstream investments. These investments were chosen on Mr M's behalf once transferred from his

SIPP to the SVS platform. The majority of the investments were speculative and inherently very high risk.

- L&C, as trustee, owed a duty of care to Mr M and owed a regulatory duties to him under the regulator's rules and guidance as well as the Principles for Businesses (the 'Principles'). L&C did not comply with the Principles in a number of respects.
- L&C didn't carry out adequate due diligence on the investments - if it did, it ought to have raised concerns about why Mr M was investing nearly his whole pension in high risk, non-mainstream investments.
- It is not alleged L&C should have advised Mr M - rather in accepting the pension transfer and investment instructions, it was in breach of its regulatory and SIPP trustee duties.
- If L&C had acted in line with its regulatory/trustee duties, Mr M would not have invested in the SVS portfolio and would not have transferred from his existing pension to a SIPP.
- Mr M wants L&C to pay him redress to put him back in the position he would have been in but for L&C's failures.
- Mr M made a successful claim to the FSCS in relation to BlueInfinitas. Whilst he was awarded £50,000 by the FSCS, this did not cover all of his loss.

L&C responded to Mr M in its final response letter dated 24 February 2020. In summary, L&C said:

- Mr M had invested in a regulated investment - this was the 'SVS investment'. The SIPP application included the signed declaration confirming that Mr M had read, and agreed to, the risks of investing in this regulated investment.
- L&C provides an execution only service - it is not qualified to give advice. This was all explained to Mr M in various documents including the SIPP application form and Key Features document.
- No paperwork that required an action on the transfer of Mr M's previous pension plan, the establishment of the SIPP, or the declaration to invest in his chosen investment, being 'SVS Securities Platform Account', would have been actioned without Mr M's receiving these to read, seek advice, sign to confirm he'd read and understood the contents of the relevant documentation.
- L&C cannot, and is not obligated, to go beyond the paperwork that Mr M signed.
- L&C acted in good faith and proceeded on the unambiguous instructions of Mr M.
- The full extent of L&C's role was the acceptance of the referral of business from BlueInfinitas in accordance with L&C's Terms of Business.
- The regulator's Conduct of Business Sourcebook ('COBS') 11.2.19, obliged L&C to follow Mr M specific instructions.
- L&C has acted in compliance with all the regulatory rules by providing Mr M with clear information and warnings throughout the application form, clear declarations on the application signing page and guiding its members to seek regulated financial advice about the suitability of their decision.
- The complaint should be properly directed to BlueInfinitas as the IFA who advised Mr M. It was the IFA who was responsible for the suitability of any advice to Mr M.
- The SIPP application form makes it clear that Mr M received advice from his IFA (BlueInfinitas) where it says: *"Advice given at point of sale to client that takes account of the intended underlying investment strategy - Yes".*
- The SIPP application gave authority to the IFA to purchase investments on behalf of Mr M. So, it was his IFA who was responsible for the investment funds that were purchased, not L&C.

- The 2009 Thematic Review is not binding on L&C as a SIPP operator. It only offers guidance to regulated firms. In any event, L&C considers it has acted in line with what the regulator expects of it as a regulated SIPP provider.
- L&C conducted due diligence checks on both BlueInfinitas and SVS before Mr M's SIPP was transferred to SVS and his investments were purchased.

Mr M remained dissatisfied with L&C, so referred his complaint to the Financial Ombudsman reiterating his complaint points above. It should be noted that the FSCS provided Mr M with a Reassignment of Rights in relation to L&C dated by the FSCS on 7 July 2022.

Our investigator recommended that Mr M's complaint should be upheld. She thought L&C hadn't carried out sufficient due diligence on BlueInfinitas before accepting introductions from it which, she said meant L&C hadn't gained a clear understanding of its (BlueInfinitas') business model. The investigator noted, amongst other things, that the BlueInfinitas business model involved investing clients' monies in non-mainstream investments via the SVS platform and a number of these breached L&C's PIL. She highlighted several areas where she considered L&C had not complied with what was expected of it under the Principles and other regulatory obligations.

The investigator also thought that by the time of Mr M's application, L&C would likely have received sufficient information from other applications to gain an understanding of how BlueInfinitas was operating. She concluded if L&C had carried out sufficient due diligence in line with its regulatory obligations, it would not have accepted Mr M's application in the first place. The investigator set out how she thought L&C should put things right which included an award of £500 for the distress and inconvenience caused to Mr M.

L&C disagreed with the investigator's view in a response dated 25 August 2022. Amongst other things, L&C said, Mr M did not complete the details of any IM or DFM, even though there was an opportunity to do so in his application. Therefore, Mr M was confirming to L&C that BlueInfinitas was selecting the underlying investments to be held within the SVS platform account, an activity which it (BlueInfinitas) held FCA permission to do. L&C went on to say as BlueInfinitas was appointed by Mr M to be the DFM of the SVS account this meant the IFA purchased investments without further referral or approval from either Mr M or L&C. L&C noted:

> *"Discretionary investment managers are commonplace in the UK's financial services sector and they should be held responsible for their actions, and where such a discretionary investment manager is no longer in existence, it is not fair or reasonable to hold a third party, in this case LCS, who had no control over the FCA regulated adviser's decisions, responsible for this unconnected party's actions just because there is no ability to recover the losses from the discretionary investment manager, in this case BlueInfinitas."*

In a follow up letter dated 24 May 2023, sent by L&C's representative, further submissions were made to the investigator's view. In summary, these were as follows (a number of these submissions were made in the letter dated 25 August 2022):

- L&C was/is an execution only service.
- Mr M was told about L&C's limited role in documents before he transferred his previous pension to the L&C SIPP.
- This is clearly a complaint about the suitability of the investments ultimately made by BlueInfinitas/SVS.

- L&C has acted in compliance with its regulatory and legal obligations in terms of due diligence.
- L&C did not breach the limited duties that it owed to Mr M.
- L&C denies it owes all the duties the Financial Ombudsman has decided it did.
- L&C is being held to an artificially, and excessively high standard, with the benefit of hindsight.
- The investigator finds L&C was under an obligation to safeguard clients' against facilitating SIPPs that are unsuitable or detrimental to them. L&C does not, and did not, have permissions to do this.
- It was not L&C's role to liaise with SVS as regards Mr M's investments due to its (L&C's) limited regulatory permissions.
- The Financial Ombudsman relies almost exclusively on non-binding regulatory guidance. The judgment in Adams v Options SIPP (full Court reference below) made it clear these non-binding publications are of no legal importance.
- There's been a failure to properly take into consideration key aspects of relevant case law.
- The Financial Ombudsman suggests L&C should have done more, without explaining what it should have done, what L&C would have found, what L&C should have done as a result, and how (or when) this would have prevented Mr M's loss.
- The investigator says that Mr M would not have gone ahead but for L&C accepting his application. But there is no evidence to support this conclusion.
- The investigator has ignored key points made by Ombudsmen in decisions involving BlueInfinitas – in these decisions, it was concluded that BlueInfinitas provided its clients with unsuitable advice.
- L&C carried out due diligence on both BlueInfinitas and SVS - searches were run on the FCA Register on SVS in August 2013 and BlueInfinitas in September 2014 and other checks were made, none of which gave L&C cause for concern.
- The FCA Register showed the MD of BlueInfinitas, who was Mr M's IFA, had no adverse entries against his name.
- An Intermediary Application was submitted by BlueInfinitas on 9 September 2014. This showed that BlueInfinitas was regulated, had never been refused registration, or business terms by relevant entities and was not currently, and had never been involved in any criminal, civil or disciplinary proceedings.
- BlueInfinitas undertook to be bound by L&C's Terms of Business.
- As to BlueInfinitas' business model, L&C was entitled to rely on the fact the IFA was a FCA regulated business - if L&C had carried out different or more extensive due diligence it would not have found out anything untoward.
- Under the SVS agreement, SVS was required to treat all L&C clients as retail clients.
- The SVS agreement made clear that any investment instructions and/or related decisions were delegated from L&C to either the client (Mr M) and/or the client's chosen Intermediary (BlueInfinitas).
- L&C's agreements with BlueInfinitas and SVS have not properly been considered by the investigator.
- It would not have been possible for L&C to monitor the purchase of each investment as this would have been a breach of its (L&C's) permissions in that it would be assessing suitability.
- In circumstances when it now seems BlueInfinitas were not acting in accordance with the advice it had given Mr M, it would have made no

difference if L&C had insisted on obtaining suitability reports (notwithstanding that it had no suitability permissions).

- Even if L&C had interrogated the underlying arrangements differently or more closely, there was nothing more that would have been uncovered which was not already known.
- L&C did not fail to carry out sufficient due diligence on SVS by virtue of SVS allegedly having been a high risk investment - SVS was simply a wrapper to hold the underlying investments chosen by the adviser that may be deemed high risk.
- SVS and BlueInfinitas had formally agreed with L&C to comply with the PIL but it was BlueInfinitas who had oversight over Mr M's investments and therefore, was responsible for any investments made contrary to the PIL.
- Any monitoring by L&C would take place once the investments had been effected by SVS. So, if an unsuitable investment had been purchased via SVS, it would have been extremely challenging for L&C to either unwind the specific investment or to prevent the consequences of that investment.
- L&C took appropriate steps to ensure that both entities would follow the PIL.
- Even if L&C had carried out an assessment of the investments to be held in Mr M's account, it could not have communicated the results of any assessment without putting itself in breach of its permissions.
- It would not have been fair or reasonable for L&C to reject Mr M's SIPP application given other FCA regulated entities were involved in the transaction.
- The SIPP application confirmed that Mr M had received advice at the point of sale on the chosen investment strategy.
- There is no justification for using the Principles as the basis for finding against L&C, as a breach of these 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]).
- If under the Principles L&C really had had the obligations of due diligence that are set out in the view, and had acted in accordance with them, it would have been required to engage in the activity of advising on investments.
- The Financial Ombudsman must take into account the relevant case law and, if this is deviated from, it must set out why it has done so: R. (on the application of Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman.
- The investigator ignores the decision in Adams v Options SIPP which is despite the fact that the Adams case contained broadly similar facts to those in this matter.
- The view has failed to properly take into account relevant case law. This is unreasonable and irrational.
- Adams v Options SIPP confirmed the starting point when considering a SIPP provider's duties was, and should always be, the contracts between the relevant parties.
- The High Court judgment of Adams made it clear that FCA guidance should not be taken into account when considering a SIPP provider's duties.
- The investigator, despite saying they took the Adams' judgements into account, has focused on something which was not considered, and ignored key points that were considered.
- The statutory objective set out in the Financial Services and Markets Act 2000 ('FSMA') section 5(2)(d), now s.1C, namely *"the general principle that consumers should take responsibility for their decisions",* should be taken into account.
- If the view is permitted to stand, the wider consequences will be very serious, both for consumers and for execution only SIPP providers.

- The letter of complaint fails to specify whether, and how, Mr M's losses exceed the amount he has already received in compensation from the FSCS.

A further view was issued to L&C addressing some of the points it made but the investigator remained of the view that the complaint should still be upheld.

L&C requested that submissions it provided on another similar case (the 'previous case'), be taken into account in this decision. The submissions provided in the previous case, largely repeat what L&C has said above. However, it added the following points:

- By the time of the SIPP application in question, which was in November 2014, there would not have been sufficient management information ('MI') to form a view on BlueInfinitas' business model and/or the type of business it would be introducing. By November 2014, L&C had taken seven cases as a result of introductions.
- L&C had no obligation to obtain any MI from other SIPP providers. There'd be no reason for a competitor SIPP operator to agree to provide this information.
- It is unreasonable to suggest L&C should have been able to predict any risk of consumer detriment – it was/is an execution only service.
- The Financial Ombudsman is abusing its remit by attempting to regulate through its decisions, imposing artificial rules and standards that did/do not apply to SIPP providers.
- It is highly inappropriate to hold L&C liable simply because it means a further pot of money becomes available to the consumer to make up their losses.
- The Financial Ombudsman's approach means customers have a far better chance at succeeding in a complaint if they progress it through to the Financial Ombudsman as opposed to the Court.
- The FCA has specifically highlighted in the 2009 Thematic Review that any outcomes would relate only to reputation and/or enforcement action.
- L&C was/is aware of the regulator's publications, but this does not mean it should use them as a checklist regarding its due diligence process.
- L&C conducted itself properly and complied with the Principles.
- The FCA had no concerns about BlueInfinitas' operations. The regulator had conducted a review of BlueInfinitas shortly before a SIPP application was made in November 2014.
- L&C's due diligence into BlueInfinitas (and SVS) was sufficient, and in accordance with best practice at the time. In fact, it went beyond what an execution only SIPP provider was obliged to do.
- L&C was not obliged to consider each and every individual investment being made via the SVS platform on behalf of each investor
- BlueInfinitas was an FCA regulated firm and the investment was also in an FCA regulated entity, so there was no reason to regard Mr H's investment as high risk.
- Even if there was a Power of Attorney ('PoA') so that BlueInfinitas could act on behalf of clients in relation to instructing SVS, L&C does not think, in itself, this should have alerted it to the fact BlueInfinitas were likely to act as it did.
- BlueInfinitas were dealing with at least two other SIPP providers and many of their clients were investing in Affinity Global as well as other non-mainstream investments. So, another SIPP provider would have accepted applications from BlueInfinitas if L&C had not. Given this, L&C is not the cause of the loss.

- L&C had no reason to suspect that BlueInfinitas would not abide by its (L&C's) PIL. And it was highly unlikely that BlueInfinitas would've been entirely honest and told L&C outright it was planning to breach the PIL and/or its regulatory permissions.
- It was not foreseeable that BlueInfinitas might be advising on shares, which was potentially acting outside its permissions.

As no agreement could be reached, the matter was passed to me for a decision.

I issued a provisional decision. I address the arguments that were presented in this and the previous case. L&C responded by saying it had nothing further to add given the arguments it had already made in the previous case. Mr M accepted my provisional decision and had nothing further to add.

What I've decided – and why

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

Having carefully reconsidered all of the evidence, including both responses to my provisional decision, I am upholding this complaint. In 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, I should also say 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. And as neither party has added anything further, my final decision largely repeats what I said in my provisional decision.

Relevant considerations

As I said in my provisional decision, I consider the starting point is the regulator's Principles (the Principles for Businesses) which are of particular relevance to my final 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 that the Principles relevant to this complaint include Principles 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 R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service [2018] EWHC 2878 ('BBSAL'), Berkeley Burke brought a judicial review claim challenging the decision of an Ombudsman who had upheld a consumer's complaint against it. The Ombudsman considered the 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 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 which 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 therefore remain satisfied the Principles are a relevant consideration which 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, in reaching the decision in Mr M's case.

I've 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 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 this rule was considered by HHJ Dight in the High Court case. Mr Adams pleaded that Options SIPP owed him a duty to comply with COBS 2.1.1R, a breach of which, he argued, was actionable pursuant to section 138(D) of FSMA ('the COBS claim'). HHJ Dight rejected this claim and found that Options SIPP had complied with the best interests rule on the facts of Mr Adams' case.

The Court of Appeal rejected Mr Adams' appeal against HHJ Dight's dismissal of the COBS claim, on the basis Mr Adams was seeking to advance a case which 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 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 consider there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Mr M'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 M's complaint, amongst other things, I'm considering whether L&C ought to have identified that the introductions from BlueInfinitas to the SVS platform involved a significant risk of consumer detriment. And, if so, whether it ought to have ceased accepting introductions from BlueInfinitas, particularly in regard to the SVS platform before it (L&C) entered into a SIPP contract with Mr M.

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

However, 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 M on the SIPP and/or underlying investments. But in my view, refusing to accept an application isn't the same thing as advising Mr M 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 M'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've considered the relevance of these publications. And I've set out material parts of the publications here, although I've considered them in their entirety.

<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."*

<u>The later publications</u>

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 non-standard investments that have not been approved by the firm"*

The July 2014 Dear CEO letter provides a further reminder that the Principles apply and are 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 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've considered them in their entirety.

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

L&C has said, amongst other things, that the 2009 review wasn't formal guidance and/or wasn't binding on it as a SIPP operator. It has also questioned the use of the other FCA produced publications. It says, in brief, that the guidance wasn't meant to be relied on in the way the Financial Ombudsman has done. And it's unfair and unreasonable to use the guidance issued by the regulator to reach my decision.

To be clear, I have not simply relied on the FCA produced publications in reaching what I consider to be a fair and reasonable decision. I have formed my own view as I am bound to do. I am considering the circumstances including the nature of the relationship between the parties, and all the evidence and arguments in order to decide what is fair and reasonable taking into account the relevant law and regulations – this includes the case law as I've set out above. I do, however, also need to take account of the 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.

I acknowledge that the 2009 and 2012 reviews and the Dear CEO letter, aren't formal guidance (whereas the 2013 finalised guidance is). However, I'm 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 that when deciding what amounted to good industry practice in the BBSAL case, the Ombudsman found: *"…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."

I'm 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.

L&C says it was not bound to follow the examples in the FCA publications. But it is bound by the Principles. And the 2009 review makes this clear where it says: *"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses…".* And it's noted prior to the good practice examples quoted above that: *"We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs."*

I'm satisfied 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 it'd regard to the FCA produced publications and highlighted some areas of good practice. And as I've said, the remainder of the publications also 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 to produce the outcomes envisaged by the Principles.

All of the regulators' publications referred to above were issued before Mr M's SIPP was set up. In my view, these documents collectively gave examples of good industry practice and were good practice at the time of the relevant events. 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. 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 these publications are irrelevant to my consideration of what's fair and reasonable in the circumstances of this particular complaint.

I'm required to take into account good industry practice. And as previously mentioned, the publications indicate what I consider amounts to good industry practice at the relevant time. I've also taken into account the fact 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.

Further, to be clear, I don't say the Principles and/or the publications obliged L&C to ensure the transactions were suitable for Mr M. It's accepted L&C wasn't required to give advice to him and couldn't give advice under its permissions held at the time. I also 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.

In my view, 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 that existed at the relevant time before accepting Mr M's introduction from BlueInfinitas. It's important to keep in mind the judge in Adams v Options cases didn't consider the regulatory publications in the context of considering what's fair and reasonable in all the circumstances, bearing in mind various matters including the Principles (as part of the regulator's rules) or good industry practice.

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

Arrangements between L&C and Mr M

This decision is made on the understanding that L&C acted purely as a SIPP operator. As I've said, I don't say L&C should (or could) have given advice to Mr M or otherwise have ensured the suitability of the SIPP or the investments placed by his IFA (BlueInfinitas) into the SVS platform for him personally. I've not overlooked or discounted the basis on which L&C was appointed. I accept L&C made it clear to Mr M it wasn't giving, nor was it able to give advice, and that it played a purely administrative role in his SIPP investments. And the documents Mr M was sent by L&C, amongst other things, made it clear, that losses arising as a result of L&C acting on his instructions were his responsibility.

My decision on what's fair and reasonable in the circumstances of Mr M's case is made with all of the above in mind. So, I've proceeded on the understanding that L&C wasn't obliged – and wasn't able – to give advice to Mr M on the suitability of the SIPP, the proposed investments and using SVS as an execution only stockbroker. In this case, the business L&C was conducting was its operation of SIPPs. And I'm satisfied that, to meet its regulatory obligations, when conducting its operation of SIPP business, L&C had to decide whether to accept or reject particular investments and/or referrals of business with the Principles in mind.

The regulator's reports and guidance provided some examples of good practice observed by the FSA and FCA during its work with SIPP operators. This included being satisfied a particular introducer is appropriate to deal with and that a particular investment is appropriate to accept. That involves conducting checks – due diligence – on introducers and investments to make informed decisions about accepting business. This obligation was a continuing one, and to be clear, I consider this ought to have included having a clear oversight and understanding of the specific investments its (L&C's) clients, such as Mr M, were having their pension funds invested in.

The arrangement in this case was that the IFA was able to go direct to a stockbroker on behalf of the client and the IFA was able do so without first obtaining an agreement for each investment from the client, in this case Mr M. Whilst I have not seen a copy of a 'Power of Attorney' (PoA), the agreement that SVS had in place with L&C said: "*We* [SVS] *shall not accept instructions from third parties unless a valid Power of Attorney has been established for this purpose."* And this arrangement was reflected in the SIPP application where Mr M gave his authority for the IFA to act on his behalf in relation to SVS.

Even if a PoA was not in place in Mr M's case, I consider there was enough in the SIPP application to show L&C what type of arrangement Mr M was subject to. The L&C SIPP application stated at section 4.1 *"Platform Trading"* that: *"I request that London & Colonial Assurance PLC appoint the following appropriately authorised person or organisation to act as Platform Trader, in relation to my SIPP and the underlying investments."* In this section, it went on to say: *"Platform trading to be performed by: Financial Advisor".* And the 'financial advisor' was the IFA from BlueInfinitas.

Further, L&C, in its initial submissions to the Financial Ombudsman said Mr M did not complete the details of any IM or DFM, even though there was an opportunity to do so in his application. So, in its view, Mr M was confirming to L&C that BlueInfinitas was selecting the underlying investments to be held within the SVS platform account, an activity which it said BlueInfinitas held FCA permission to do. L&C went on to say as BlueInfinitas was appointed by Mr M to be the DFM of the SVS account this meant the IFA purchased investments without further referral or approval from either Mr M or L&C. L&C added:

> *"Discretionary investment managers are commonplace in the UK's financial services sector and they should be held responsible for their actions, and where such a discretionary investment manager is no longer in existence, it is not fair or reasonable to hold a third party, in this case LCS, who had no control over the FCA regulated adviser's decisions, responsible for this unconnected party's actions just because there is no ability to recover the losses from the discretionary investment manager, in this case BlueInfinitas."*

Further, on 1 December 2014, which was at the time of Mr M's SIPP application, L&C wrote to Mr M stating: *"Thank you very much for your recent application for a Multi Platform SIPP, submitted on your behalf by Blue Infinitas Ltd, who you have selected to be your financial adviser and trade on the platform."*

From its submissions and paperwork at the time of Mr M's application, it seems to me L&C clearly understood the arrangement that was in place between Mr M and BlueInfinitas. I note L&C in it subsequent submissions, via its representative, said Mr M was being advised on the investments which were being made by the IFA on his (Mr M's) behalf. But, in my view, there was clearly a significant risk, which was evident from the SIPP application form submitted to L&C, that BlueInfinitas could act without Mr M's knowledge given it was acting as his 'Platform Trader'. And I think, on balance, this was something L&C was, or ought to have been, aware of at the time of Mr M's SIPP application.

BlueInfinitas was not offering, and did not, and/or could not, offer a DFM service as it did not have the regulatory 'managing investments' permission which was needed in order to carry out this type of service. This is something L&C would have seen from its checks of the FCA Register which showed the permissions BlueInfinitas had. Further, as L&C itself has noted, Mr M had specifically declined a DFM service in the SIPP application.

All in all, in my view, the SIPP application was sufficient to show L&C the IFA (BlueInfinitas) had the authority to act on Mr M's behalf. And this could be done without obtaining his agreement for each investment. I think this was clear from the SIPP application itself. And from its submissions, this seems to have been L&C's understanding of the arrangement as well.

What did L&C's obligations to Mr M mean in practice?

As set out above, to comply with the Principles, L&C needed to conduct its business with due skill, care and diligence; organise and control its affairs responsibly and effectively;

and pay due regard to the interests of its clients (including Mr M); and treat them fairly. And I agree with what L&C has indicated, that these weren't prescriptive. I also note what L&C did on a case by case basis would depend on the nature of the circumstances, information and events on an ongoing basis.

I think L&C understood its due diligence duties to some degree at the time too, as it did more than just check the regulator's entries for BlueInfinitas and SVS to ensure they were both regulated. It also entered into separate agreements with SVS and BlueInfinitas and obtained assurances from both firms that the investments would comply with its PIL (permitted investment list) via their respective agreements.

Given the arrangement to bring about/arrange investments in this case, L&C needed to pay regard to its due diligence duties to ensure it took account of this particular set up in order to avoid the risk of consumer detriment. In practice, neither L&C or Mr M had any oversight of the investment being purchased on Mr M's behalf, which I think left the arrangement open to abuse and/or misuse. I consider L&C ought to have understood its obligations meant that it had a responsibility to carry out appropriate due diligence on investments to be held in either its SIPP or by the third-party stockbroker, who in this case was SVS.

So, as far as its dealings with BlueInfinitas, who was Mr M's IFA, and who chose the investments on his behalf, L&C should've understood its obligations meant it had a responsibility to carry out appropriate checks on BlueInfinitas to ensure the quality of the business it (BlueInfinitas) was introducing. What type of checks were done should have borne in mind the type of arrangement Mr M had entered into where the BlueInfinitas IFA could act on his behalf when purchasing assets via the SVS platform. And these checks should have been done well before accepting Mr M's application.

With all that I've set out above, I'll focus on what due diligence L&C carried out on BlueInfinitas. I think this is where the main risk was in this particular arrangement. So, whilst I accept L&C's carried out due diligence on SVS as well as the IFA, given my findings which are set out below, I've not considered L&C's obligations under the Principles in respect of carrying out sufficient due diligence on SVS.

What due diligence did L&C do

As I've noted above, from the information that has been provided, I'm satisfied L&C did take some steps towards meeting its regulatory obligations and good industry practice. It has explained to us that it wouldn't have accepted SIPP business from a firm unless the firm had been authorised and regulated by the regulator - this is reflected in the Intermediary Agreement with BlueInfinitas. Amongst other things, I can see L&C:

- Carried out a credit check on the BlueInfinitas MD dated 10 September 2014.
- Checked that BlueInfinitas was regulated and authorised by the FCA – it has provided a printout from the time it made this search which includes the permissions BlueInfinitas held at the time. The relevant pages from the FCA Register are dated 10 September 2014.
- Ensured BlueInfinitas signed up to its Intermediary Agreement.
- Through the Intermediary Agreement, L&C obtained BlueInfinitas' written assurance that it would only advise on investments/assets which were permitted under the terms of the PIL and that this would be: *"…those requested by or made upon the basis agreed with the client who shall be treated for these purposes as a retail client as defined by the UK Financial Conduct Authority (FCA)."*

So, amongst other things, the L&C Intermediary Agreement, made it clear that BlueInfinitas had to agree each investment with the client before an investment was purchased. This was in-line with BlueInfinitas' regulatory permissions as it did not have the necessary permissions to carry out a DFM service for Mr M at the relevant time.

The PIL referred to in the Intermediary Agreement offered a measure of protection for clients, as it meant certain high risk investments would not be allowed to be purchased by the Intermediary on behalf of L&C clients. The PIL which was in force at the time of Mr M's SIPP included a definition for 'Investment Transactions' which was: *"…all matters relating to and including the purchase and sale of the assets of the fund."* And permitted investments was defined as: *"…the assets that London & Colonial have determined may be held within the Fund from time to time."*

Amongst other things, the PIL that was in force at the relevant time included the following prohibited investments:

- All esoteric investments including *"bio fuels, Teak, Bamboo, Agricultural leases etc".*
- Unquoted shares.
- And: *"Any investment that has been structured using a permitted vehicle but ultimately holds assets/investments that are not permitted".*

And under the 'permitted list' investments it included:

- Securities listed on the AIM, the London Stock Exchange, or a recognised overseas investment exchange.
- A DFM portfolio.
- An investment platform.
- A regulated collective investment scheme.

The Intermediary Agreement highlighted that BlueInfinitas was required to act in line with the latest PIL. And not to do so would be a breach of L&C's Terms of Business.

What was BlueInfinitas doing in practice?

<u>What arrangement did it have with Mr M</u>

As I've said above, given the details provided in the SIPP application form stating the IFA could act on Mr M's behalf when selecting investments, L&C needed to take account of the risk that BlueInfinitas would act without referral or approval from Mr M when making investments on his behalf. I think the consequences that could result from being able to act in this way posed a significant risk of consumer detriment and was something L&C ought to have been aware of.

L&C says Mr M was receiving advice about the investments from the IFA (BlueInfinitas). To support this position L&C reiterated Mr M had confirmed in his SIPP application that he'd agreed to the statement: *"Advice given at the point of sale to the client that takes account of the intended underlying investments strategy."* But this statement simply says he had received some type of advice about the 'underlying investment strategy', not about the particular investments that would be made in line with this strategy.

I've taken account of L&C's comments in a previous case, which, in brief, was that the statement in the application showed the consumer, who in this case was Mr M, had received advice on the relevant underlying investments. But I consider the statement

in Mr M's SIPP application, did not mean he received advice, or was made aware of, the underlying investments to be purchased via the SVS platform. Mr M says he was not given an explanation of exactly what investments were to be made on his behalf at the time of the advice received from the BlueInfinitas IFA. Mr M says the 'strategy' he discussed with his IFA was that his (Mr M's) pensions monies would be invested in low risk investments.

I note L&C has referred to the SVS platform as the 'investment'. And that Mr M was aware of this investment before his pension monies were invested. In his SIPP application, it said SVS would be appointed as the 'Platform'. Once the money was placed with the SVS platform following the transfer of Mr M's pension to his L&C SIPP, SVS was instructed by the IFA (BlueInfinitas) on what underlying investments to purchase. So, whilst Mr M was told about the platform from which his investments would be made, I don't think, on balance, he was told about the underlying investments that would be made subsequent to his transfer to the SIPP.

Given all I've said above, I am of the view that Mr M did not know about the underlying investments until *after* they were purchased on his behalf by BlueInfinitas. So, I think, as L&C has said, it (BlueInfinitas) was effectively providing a DFM service to Mr M, which BlueInfinitas did not have permissions to do.

I've also closely considered the extract from the FCA Register that L&C says it relied upon to confirm BlueInfinitas was regulated. From this I can see BlueInfinitas was regulated and was authorised in *'Advising on Investments'* and included in this was *'Personal Pension Schemes'*. And it appears that BlueInfinitas had, at the time of the events this complaint concerns, the required permissions to *'Arrange (bring about) deals in investments'*, and *'Shares'* was listed as one of the Investment Instruments. But it does not appear that BlueInfinitas had the required permissions to 'Advise' on shares.

I think after reviewing the permissions BlueInfinitas had, and also knowing that it wanted to use a stockbroking service to execute some of its investments on behalf of its clients, L&C should have identified the potential risk of consumer detriment associated with business introduced by BlueInfinitas before it accepted Mr M's application. I say this because BlueInfinitas was seeking to arrange/bring about investments through a stockbroking account. And shares were a permitted investment under the L&C PIL as well as an obvious investment type to be held with a stockbroker. Given these factors, I think this would likely mean, as an IFA, BlueInfinitas would *'advise'* some of its clients to invest in shares.

As BlueInfinitas didn't have the required regulatory permissions to advise on shares, L&C ought not to have permitted an arrangement under which there was a significant risk the IFA firm was going to act beyond its regulatory permission. BlueInfinitas was not authorised and so, therefore, presumably not competent to give advice on the merits of buying or selling shares. And so there was a real risk of consumer detriment in allowing an adviser to act in a way that exceeded its regulatory permissions.

L&C has said it wasn't reasonably foreseeable that BlueInfinitas would breach its permissions regarding 'advising' on shares. It says this is because Mr M hadn't selected this service in his SIPP application. But even if I'm wrong about this, as I explain further below, based on the available evidence, I think it's more likely than not that the majority of the SIPP business introduced to L&C by BlueInfinitas prior to it receiving Mr M's application was business where clients would be investing with SVS post-transfer. And L&C did not know where these funds would be invested.

I consider L&C was unaware of where the funds would be invested post-transfer because in practice it was not monitoring compliance with the PIL. In other words, there was a potential that consumer's monies could end up being invested in investments which were not included in its PIL post-transfer. And L&C would not have known it was happening.

Breaching the PIL

On that latter point, in addition to choosing investments on behalf of Mr M on a discretionary basis, it also appears BlueInfinitas was choosing investments which breached the PIL it had with L&C. In using its discretion with no monitoring in place by L&C, I'm of the view this facilitated BlueInfinitas breaching the L&C terms of business including its PIL.

L&C has said BlueInfinitas did breach its (L&C's) PIL – it said this in relation to a previous case where the client had the exact same four main investments. But it hasn't clarified which investments were in breach. Looking at the four largest investments, I can see at least one of these investments was in breach of the PIL because it was an investment in unquoted shares. This was the TIV investment. This investment was not on any relevant exchange and was therefore, an investment in unquoted shares.

It is also questionable whether other investments purchased on behalf of Mr M fell within the PIL because, whilst they were listed on a relevant exchange, the PIL also had the following term in regard to a permitted investment becoming prohibited under certain conditions, which was: *"Any investment that has been structured using a permitted vehicle but ultimately holds assets/investments that are not permitted".*

So, for example, whilst held on a permitted vehicle (the AIM exchange), Aumua's business activity was 'developing green energy' and 'efficient water solutions' which is likely to fall under the definition of an 'esoteric' investment. Given this, the fact it was registered on the AIM, may not have prevented it from being a prohibited investment as defined by the L&C PIL in place at the time of Mr M's investment. I think the same could be said for Goldcrest, whose principal activity was *"to evaluate opportunities for gold exploration in Ghana, West Africa."* I consider this would likely fall under the definition of: *"All Esoteric Investments including "bio fuels, Teak, Bamboo, Agricultural leases etc"".*

What ought L&C should have done*?*

Checks to establish the business model of BlueInfinitas

Given the arrangement that was in place, which, in my view, was open to abuse and misuse by BlueInfinitas, I think L&C should have gained a better understanding of its (BlueInfinitas') business model. As I noted above, L&C would have known or ought to have known, that there was a possibility BlueInfinitas would advise on purchasing shares on behalf of some or all of its clients given it was proposing to use a stockbroking service. And/or it ought to have known there was a risk of a client not knowing about their investment(s) until post-transfer. Both of these issues should have been a red flag for L&C and in my view, prompted it to find out more about the BlueInfinitas business model before agreeing to do business with it.

BlueInfinitas only started to trade in or around January 2014 and the Intermediary Agreement with L&C started in mid-September 2014. So, there was little in the way of a previous business relationship or an established trading history that L&C could draw comfort from.

I can see from the Intermediary Application form that some questions relevant to due diligence were asked, such as whether BlueInfinitas and/or its advisers had been refused business by any other provider; had it been subject to County/High Court

proceedings; had it been subject to any criminal or legal proceedings; and had it been subject to disciplinary proceedings by any regulatory/professional body. To all these questions BlueInfinitas said 'no'. However, in my view, given L&C was dealing with a relatively new business who was proposing to invest via a share trading platform and the risk BlueInfinitas could buy shares or other investments without the clients' agreement, L&C should have done more to understand its (BlueInfinitas) business model. I don't think the questions asked in the Intermediary Application went far enough to do this.

For example, L&C could have asked BlueInfinitas what businesses it had worked with before/at present and the level of business it was dealing with up until that point through those other businesses. Another question would have been the type of business/investments it was undertaking with those businesses. I think if L&C had done so, it would have found out that BlueInfinitas was dealing with at least two other SIPP providers.

One of the SIPP operators had started working with BlueInfinitas accepting introductions via the SVS platform around two months before the Intermediary Agreement with L&C. The other SIPP provider had had an agreement in place since in or around January 2014. And it was apparent that through these other SIPP providers, many of its (BlueInfinitas) clients were investing in one particular asset which was Affinity Global as well as other non-mainstream investments. It was also executing these deals through the SVS platform.

Looking at the published decision DRN-4045393, BlueInfinitas had submitted over 332 applications over an 18-month period via another SIPP provider up until April 2015 at which point BlueInfinitas ceased to trade. Of these applications, 248 clients were placed in non- mainstream investments as part of a wider portfolio. Further, many of these clients invested in the Affinity Global investment.

An explanation in terms of the selling of Affinity Global by BlueInfinitas is that it seems to have had a relationship with it (Affinity Global), which it acknowledged to another SIPP operator referred to in the published decision DRN-4045393. And as I've noted there was at least one other SIPP provider BlueInfinitas was working with as an introducer and working in the same manner as it had with the other SIPP firm as well as L&C.

It does seem BlueInfinitas carried on with its business model in terms of purchasing this investment (Affinity Global) for the clients it introduced to L&C. As noted above, in a previous case referred to the Financial Ombudsman involving an introduction from BlueInfinitas using the SVS platform, exactly the same four main investments were purchased for a client as those purchased for Mr M shortly before his (Mr M's) investments were made. Again, Affinity Global was one of these investments.

I accept the number of SIPP applications to these other SIPP providers would have been less than those I've set out above by September 2014, which is when the Intermediary Application was completed. L&C has said in another case where the SIPP application was submitted shortly before Mr M, that there simply would not have been sufficient MI to gain an understanding of the BlueInfinitas business model either by the time of the SIPP application and/ or the Intermediary Agreement was entered into. L&C also noted that by November 2014 it had only received seven introductions from BlueInfinitas.

But I note BlueInfinitas had been trading since January 2014. And it had started introducing business to L&C nine months later. Given this, I consider, on balance, BlueInfinitas would have been able to provide L&C with sufficient information about the type of business it was undertaking with the other SIPP providers for L&C to make an informed decision about whether to accept introductions from the IFA. Even if there was not sufficient information at the time of the Intermediary Application, I think it's likely there would have been by the time of Mr M's SIPP application. I say this because by the

time of his application, L&C had accepted at least eight introductions from BlueInfinitas. And at least one of these if not more, involved the IFA purchasing non-mainstream investments including Affinity Global via the SVS platform.

L&C also could have asked BlueInfinitas other questions before it received Mr M's SIPP application, such as: how it came into contact with potential clients; what agreements it had in place with its clients; what agreements it had in place with SVS; how and why all of the retail clients it was introducing were interested in investing specifically through SVS (which would have been apparent if it had found out information about its business model which it operated through other SIPP providers as I've set out above); how a firm of its size was able to meet with or speak with all its clients given the not insignificant volume of business that it had already introduced through one or more other SIPP providers; and what material was being provided to clients by it and what it was telling its clients about SVS and the proposed investments.

L&C said BlueInfinitas may not have provided a truthful response if asked about its business model. But there's no reason to think BlueInfinitas would not have acknowledged what it had already told at least one other SIPP provider if L&C had asked it about the source of its business (which it didn't). And I've also noted that L&C said other SIPP providers would not have shared information with it. But it was for BlueInfinitas to provide this information. The IFA would, or should, have had the information of the types and numbers of introductions it had made with other SIPP providers.

To be clear, whilst there is nothing inherently wrong with a client investing in riskier investments to hold in their respective SIPPs, they have to be suitable for them. The type of investments being purchased by BlueInfinitas for its clients weren't ones that were normally suitable for retail clients such as Mr M. So, I do think there should have been some concern if L&C had found out information about BlueInfinitas' business model from the outset. And certainly by the time of Mr M's application submitted in December 2014.

Monitoring the activities being carried out by BlueInfinitas

In addition to what I've said above, I think L&C should have done more to monitor the activities of BlueInfinitas under the Intermediary Agreement it had with it. From what L&C has said, it didn't know the IFA was breaching the PIL, or that Mr M was unaware of the investments he was making. This clearly posed a significant risk of consumer detriment. And I think L&C should have taken steps to address this potential risk.

I accept L&C had agreements in place with both SVS and BlueInfinitas which included that each party needed to comply with the L&C PIL. But this did not absolve L&C from carrying out adequate checks to ensure the Intermediary Agreement it had with BlueInfinitas and/or SVS was being adhered to. The Intermediary Agreement was set up to, in part, meet with L&C's due diligence duties to ensure that its clients were being treated fairly and weren't put at risk of consumer detriment by those firms L&C chose to do business with. But despite this, by its own admittance, L&C was unaware that some of the investments held in Mr M's SVS account were in breach of its (L&C's) PIL.

In the previous case, L&C provided the number of cases it received from BlueInfinitas by November 2014, which it said was seven. Whilst it has said that not all of the introductions involved clients investing in the same way, it hasn't said whether the SVS platform was used on each occasion. L&C has also said there simply wasn't enough MI to carry out a review or establish any patterns. But I think seven applications would have been sufficient to reach a view on whether further questions needed to be asked of BlueInfinitas. I also think put together with information L&C could have asked for (see further above), it's likely there was sufficient information to make an informed decision

about whether to do business with BlueInfinitas from the outset (September 2014) and certainly by the time of Mr M's application (December 2014).

I consider that having gone to the trouble of setting up an Intermediary Agreement and PIL, relevant extracts I've set out above, the onus was on L&C, in its capacity as the SIPP operator, to have adequate systems and controls in place to monitor the agreement was being adhered to by BlueInfinitas. Given the significance of the risk of consumer detriment, I don't think it was reasonable for L&C to have just relied on the Intermediary Agreement without any monitoring of it. As Principle 3 says: *"A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems."*

I also think given it was dealing with a new business, L&C didn't have to wait for the investments to be made before making appropriate checks. As I've said above, the onus was on the SIPP provider to ensure it carried out sufficient due diligence to gain an understanding of what type of business BlueInfinitas would be introducing to it (L&C). I don't think the fact that both SVS and BlueInfinitas were regulated firms was sufficient to discharge it (L&C) of its due diligence duties.

If L&C had obtained a clear understanding of the BlueInfinitas business model, as part of its monitoring activities and/or initial checks, I think it (L&C) could have checked with Mr M before accepting his application to, for example, ask him if he was aware of the 'strategy' that had been agreed and/or what this strategy was. The Intermediary Agreement made it clear that L&C could directly communicate with clients – whilst this was to ensure they (the client) had received relevant material, I think contacting clients directly under certain conditions was something open to L&C in order to meet with its regulatory requirements under the Principles.

I think given the type of investments BlueInfinitas were making and the relatively small pension fund Mr M was transferring, this could have prompted L&C to check he knew what type of investments were being made on his behalf. L&C disagrees with this as it says it would effectively be assessing suitability which it did not, and still does not, have the regulatory permissions to do. But if L&C didn't think it was appropriate to contact Mr M directly, if, from the outset, it had taken appropriate action to understand BlueInfinitas' business model by finding out more information from the IFA directly, I think it's unlikely it would've accepted business from it (BlueInfinitas) in the first place.

L&C argues BlueInfinitas' breaches of its (L&C's) PIL and any other failings it made, was something it (BlueInfinitas), as a regulated business was responsible for. L&C says BlueInfinitas was a regulated firm and the expectation was it would conform to the PIL as it was required to do. But in my view, this was an agreement that L&C had set up. And as I've said, the onus was on it to ensure that it monitored its Intermediary Agreements to ensure the introducers it chose to do business with were not posing a significant risk of detriment to its members by acting in a way which was contrary to its agreement.

The Intermediary Agreement said if the IFA breached any of its conditions, L&C could, and presumably would, terminate the agreement with immediate effect. But this could only have been done if L&C was taking appropriate actions to monitor the Intermediary Agreement and the way BlueInfinitas was acting in relation to it. I think L&C had a duty to do so as part of its obligations under the Principles to act with skill care and diligence, to take reasonable care to organise and control its affairs responsibly and effectively with adequate risk management systems, and to pay due regard to its customers interests and treat them fairly. And I don't think by the date of Mr M's application it was 'too early' to monitor the type of business BlueInfinitas was introducing.

What fair and reasonable steps should L&C have taken if it had carried out adequate due diligence checks?

Based on the evidence provided to us to date, I'm of the view L&C failed to conduct sufficient due diligence on BlueInfinitas before accepting Mr M's application or draw fair and reasonable conclusions from what it did know, or ought to have known, about the business model of BlueInfinitas. L&C ought to have identified that BlueInfinitas did not have the required regulatory permissions to carry out the type of business it was likely to be doing i.e. advising on buying shares and acting as a DFM.

Given the above, I consider L&C ought reasonably to have concluded it should not have accepted business from BlueInfinitas in the first place. And certainly by the time of Mr M's application, L&C ought to have ended its relationship with it before it accepted his SIPP application. I say this because by this point, I think it would or could have gained an understanding of the type of business BlueInfinitas was undertaking if it had carried out sufficient checks. L&C could simply have concluded that, given it appeared BlueInfinitas did not have the required regulatory permissions to advise on shares or act in a DFM capacity, it should not accept applications from the IFA. That would have been a fair and reasonable step to take in the circumstances.

Even if I'm wrong about that, and BlueInfinitas did hold the required permissions to carry out the business it was operating (which I do not think it did), I still consider L&C shouldn't have accepted applications from the IFA. I say this because of the potential risk of consumer detriment that would have been evident from the pattern of business being introduced by BlueInfinitas.

L&C would likely have found out what type of business BlueInfinitas was introducing if it had made reasonable enquiries from other SIPP providers BlueInfinitas was doing business with and/or asked the IFA directly for data about the business it was doing with other firms. I appreciate L&C's point that other 'competitive' SIPP providers would not have shared information with it. But as I set out above, this didn't stop it asking the IFA directly for such information.

Given the potential risk of consumer detriment I've identified above, I think L&C ought to have found out more about how BlueInfinitas was operating before it received Mr M's application. And, mindful of the fact this was a new introducer relationship with an only recently regulated business, I think it's fair and reasonable to expect L&C, in-line with its regulatory obligations, to have made some specific enquiries and carried out independent checks on early cases to ensure all was in order and nothing of concern was happening.

I accept that L&C was not responsible for checking the suitability of the investments or the SIPP for each of its clients. But it was responsible for carrying out due diligence checks on the firms it was doing business with to mitigate the risk of consumer detriment. And I think having adequate systems and controls to manage the risk that its agreements/arrangements weren't open to abuse or misuse by those it had entered a business relationship with would've been reasonable steps to take.

I note what L&C has said about the FCA being happy with it and BlueInfinitas at the relevant time. I take on board what L&C has said including that it should be able to rely on the regulatory status of other parties. However, I've not disregarded the regulatory status of BlueInfinitas and/or SVS – I have taken these facts into account. But as I've set out above, I'm reaching a view on all the circumstances of this particular case including the nature of the relationship between the parties, and all of the evidence and arguments in order to decide what is fair and reasonable.

As I've said above, I'm of the view, the regulatory status of the firm does not absolve a SIPP provider from its due diligence duties. 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 suggestions outlined in the finalised guidance would have been reasonable steps for L&C to take before accepting business from BlueInfinitas.

Had it taken these fair and reasonable steps, what would L&C have discovered?

I've already touched on some of the areas where I think L&C had failings and what it would have discovered if it had not been but for these failings. In particular, I don't think it had sufficient systems and controls in place. And as a result, I think Mr M wasn't treated fairly or reasonably as this led to a number of breaches of the Intermediary Agreement going unchecked.

As I've already acknowledged L&C did carry out a number of due diligence checks before accepting BlueInfinitas as its Intermediary. For example, L&C checked the regulatory status of BlueInfinitas as well as SVS. The Intermediary Application completed in September 2014 also asked a number of questions such as how long BlueInfinitas had been trading and other relevant questions.

But, as I've said above, further reasonable questions about the BlueInfinitas business model would've led to L&C considering whether this was a firm it wanted to do business with. BlueInfinitas was a relatively new advisory firm who was already working with at least two other SIPP providers. Whilst this in itself was not a cause for concern, there was cause for concern about the number of applications it (BlueInfinitas) was making which involved introducing clients who were investing in non-mainstream investments. I consider by December 2014, the time of Mr M's application, there would have been sufficient information that BlueInfinitas could have provided from its own records for L&C to have formed a view about the type of business BlueInfinitas was going to introduce.

L&C has argued it was not privy to the agreements that BlueInfinitas had with the other providers. But as I've said above, this is information it could have asked BlueInfinitas to provide before doing business with it. I've seen other Intermediary Applications/Introducer Applications that ask questions such as 'what other businesses have you worked with' and 'what type of business have you conducted with them'. So I don't think these are unusual questions to ask an Intermediary firm.

Further, I think it's likely that if L&C had asked BlueInfinitas reasonable questions and requested suitable evidence to support what it (BlueInfinitas) was saying, this would have helped L&C to gain an understanding of its (BlueInfinitas') business model. Knowing the type of investments BlueInfinitas was purchasing for its SIPP clients without their knowledge, L&C may have chosen not to have done business with it at all. Or at the very least, have set up adequate systems and controls to ensure its (L&C's) clients weren't put at risk of consumer detriment due to BlueInfinitas selling practices.

As I've set out in detail above, examples of the types of actions L&C could have taken were set out in a number of publications issued by the regulator all of which had been issued by the time of Mr M's investments. And the type of investments being recommended/sold by BlueInfinitas to its clients weren't ones that were normally suitable for retail clients such as Mr M. On balance, by the time of Mr M's SIPP application, I think there would have been enough information for L&C to have reasonably refused to accept his application.

If L&C had carried out adequate due diligence on the investments being purchased for its clients by BlueInfinitas, it would also have found out that the IFA was in breach of the PIL. L&C refer to 'SVS' as the 'investment', which it did carry out due diligence on. But SVS could only act on the instructions of Mr M or his IFA – and as I've said, it was Mr M's IFA that gave these instructions. The 'investments' were the underlying investments held on the SVS platform. And a breach of the PIL, on its own, according to the terms of its Intermediary Agreement, would have led to the immediate termination of the relationship with BlueInfinitas as one or more of the investments were in breach of the PIL.

I also consider if L&C had gained the necessary understanding about BlueInfinitas willingness to act outside its regulatory permissions, L&C ought to have declined to accept business from the IFA. And as I've said, I don't think there's anything to show that BlueInfinitas would not have provided information requested from L&C i.e. about the way it operated and the type of investments it was recommending to investors and in what numbers. What I've set out above, are reasonable steps to take and if BlueInfinitas refused to answer them, then this would have been a cause for concern in itself.

I think understanding the business model of firms you are conducting business with, is in line with the Principles such as to treat clients fairly and reasonably (Principle 6) and to act with skill, care, and diligence (Principle 2). By L&C not gaining an understanding of the BlueInfinitas business model before deciding to do business with it, and once L&C had made the decision not continuing with this due diligence, I consider this put clients such as Mr M at significant risk of consumer detriment.

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

For the reasons given above, I think L&C should not have been accepting business from BlueInfinitas by the time it received Mr M's application. So things shouldn't have gone beyond that. Further, in my view it's fair and reasonable to say that just having Mr M sign declarations, wasn't an effective way for L&C to meet its regulatory obligations to treat him fairly, given the concerns it ought to have had about the business being introduced by BlueInfinitas.

L&C knew Mr M had signed forms intended to acknowledge, amongst other things, his awareness of some of the risks involved with investing. These forms also required Mr M to agree to indemnify L&C against losses that arose from acting on his instructions. In my opinion, relying on the contents of such forms when L&C ought to have known the type of business it was receiving from BlueInfinitas could put clients at significant risk of detriment, wasn't the fair and reasonable thing to do. L&C ought to have identified the risks I've mentioned above. And having identified them, it's my view that the fair and reasonable thing for L&C to have done, and before it received Mr M's application, would have been to decline to accept the business from BlueInfinitas.

The Principles exist to ensure regulated firms treat their clients fairly. And I don't think the paperwork Mr M signed meant that L&C could ignore its duty to treat him fairly. I'm satisfied the 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, investments and/or business.

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

L&C to accept Mr M's business from BlueInfinitas. I consider by the time of his SIPP application, knowing the type of business BlueInfinitas was conducting with its clients, or with other SIPP operators, L&C should have been concerned enough to carry out further checks before accepting Mr M's application. And I think if it had done so, it would have refused to accept his application due to the concerns I've raised above.

COBS 11.2.19R

L&C argues it was reasonable to proceed with Mr M'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 M's written instructions to switch his pension rights and transfer funds to SVS 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 M's financial circumstances. And L&C did not have regulatory permission to carry out such work.

I've taken into account what L&C has said. But I don't agree with L&C's argument regarding COBS 11.2.19R. I consider L&C could have refused Mr M's application without giving advice or acting in a way that was akin to giving advice, just as it would have done if the application had instead involved a prohibited investment (if it had been aware of there being one). 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 M's application, I do not think it fair and reasonable for L&C to rely on the disclaimer he signed saying he instructed L&C to make the investment. And L&C would not be responsible for any losses based on those instructions. Things should never have reached this stage. If L&C had acted in its clients best interests Mr M 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 M compensation in the circumstances?

L&C has said it was not the cause of Mr M's losses because if it hadn't accepted his SIPP application from BlueInfinitas the transfer and investments would still have been effected with a different SIPP provider. But I'm of the view it's not fair and reasonable to say L&C shouldn't compensate Mr M for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found L&C did. I think 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 M's business from BlueInfinitas.

I note L&C's submissions about the two other SIPP operators accepting applications from BlueInfinitas. But this doesn't mean it can be assumed that every SIPP provider would have accepted introductions from BlueInfinitas. And/or not complied with regulatory obligations and good industry practice. In all the circumstances, I'm satisfied it's fair and reasonable to conclude that if, and before it received Mr M's application, L&C had declined to accept business from BlueInfinitas, the transfer would not have gone ahead.

Further, I note in the case of 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 satisfied that Mr M proceeded without knowing the investments he was making were high risk and speculative.

Mr M says he was told by BlueInfinitas that there was little or no risk to his pension fund. And based on the evidence I've seen to date, I'm satisfied that Mr M didn't know anything about the specific investments his funds were placed in until after the transactions had occurred. I've also not seen any evidence to show Mr M was paid a cash incentive. It therefore cannot be said he was incentivised to enter into the transaction, and, on balance, I'm satisfied that Mr M, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for himself. So, in my opinion, this case is very different from that of Mr Adams.

Mr M went through a process with BlueInfinitas, which culminated in him completing paperwork to set up a new L&C SIPP, and with the expectation that monies from his existing pension plan would be transferred into the newly established SIPP. Having gone to the time and effort of doing this, I think it's more likely than not that if the L&C SIPP wasn't then established, and if his pension monies weren't then transferred to L&C, Mr M would have wanted to find out why this was the case from either BlueInfinitas or L&C. I don't think it fair and reasonable to say L&C shouldn't compensate Mr M for his losses on the basis of any speculation that BlueInfinitas and/or L&C wouldn't have confirmed to Mr M the reason why the transfer hadn't proceeded if he'd asked.

I appreciate L&C might say its contract was with BlueInfinitas and not Mr M, and if his application was refused it wouldn't have been at liberty to, or had reason to, contact him. But L&C did receive Mr M's application, so I'm considering what it ought to have done having received it. And for the reasons I've explained at length above I'm satisfied that having received Mr M's application from BlueInfinitas, it shouldn't then have accepted it.

I consider it's more likely than not that if L&C had refused to accept Mr M's application from BlueInfinitas and Mr M had received an explanation as to why his application hadn't been accepted, even in very broad or general terms, he wouldn't have continued to accept, or act on, pensions advice provided by BlueInfinitas. And I think it's very unlikely that advice from another regulated advisory business which had the necessary permissions, would have resulted in Mr M taking the same course of action. I think it's reasonable to say that a regulated business with the necessary permissions would have given suitable advice. Alternatively, Mr M might have simply decided not to seek pensions advice from a different adviser at all and retain his existing pension plan.

The involvement of other parties

In this decision I'm considering Mr M's complaint about L&C. However, I accept that other parties were involved in the transactions complained about – BlueInfinitas and SVS. I also accept Mr M pursued a complaint against BlueInfinitas with the FSCS. The FSCS upheld Mr M's complaint, it calculated his losses to be in excess of £50,000 and paid him this amount in compensation as this was its award limit. Following this the FSCS provided Mr M with a Reassignment of Rights.

The DISP rules set out when an Ombudsman's determination includes a money award, then that money award may be such amount as the Ombudsman considers to be fair compensation for financial loss, whether or not a Court would award compensation (DISP 3.7.2R). In my opinion it's fair and reasonable in the circumstances of this case to hold L&C accountable for its own failure to comply with its regulatory obligations, good industry practice and to treat Mr M fairly.

I am not making a finding that L&C should have assessed the suitability of the SIPP for Mr M. I accept L&C wasn't obligated or indeed able to give advice to Mr M, or otherwise to ensure the suitability of the pension wrapper 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. I accept other parties might have some responsibility for initiating the course of action which led to Mr M's loss. However, I'm satisfied it's also the case that if L&C had complied with its own distinct regulatory obligations as a SIPP operator, the arrangement for Mr M wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

I want to make clear that I've taken everything L&C has said into consideration. This includes the submissions on a previous case which it asked me to take into account in this case. I did this in my provisional decision and L&C had nothing further to add other than to reiterate that I should consider its submissions from the previous case, which as I said, I have done. But I remain satisfied it's appropriate in the circumstances for L&C to compensate Mr M to the full extent of the financial losses he's suffered due to its failings.

In conclusion

Taking all of the above into consideration, I think in the circumstances of this case it's fair and reasonable for me to conclude that L&C should have decided not to accept business from BlueInfinitas before it received Mr M's SIPP application. And I also think it's fair and reasonable for me to conclude that if L&C hadn't accepted Mr M's introduction from BlueInfinitas then Mr M wouldn't have invested with SVS.

So, for the reasons I've set out, I also think it's fair and reasonable to direct L&C to compensate Mr M for the loss he's suffered as a result of L&C accepting his business from BlueInfinitas and the resultant investment of his L&C monies through the SVS platform. 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 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 M 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 M 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 M's previous pension plan.
- Obtain the actual transfer value of Mr M'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 M'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 the illiquid investments and is used only or substantially to hold one or more of those assets, then any future SIPP fees should be waived until the SIPP can be closed.

- If Mr M has paid any fees or charges from funds outside of his pension arrangements, L&C should also refund these to Mr M. Interest at a rate of 8% simple per year from date of payment to date of my final decision should be added to this.
- Pay to Mr M 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 M 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 investments may prove difficult as there is no market for them. For calculating compensation, L&C should establish an amount it's willing to accept for the investments as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investments. If L&C is able to purchase the illiquid investments then the price paid to purchase the holdings will be allowed for in the current transfer value (because it will have been paid into the SIPP to secure the holdings).

If L&C is unable, or if there are any difficulties in buying Mr M's illiquid investments, it should give the holdings a nil value for the purposes of calculating compensation. In this instance L&C may ask Mr M to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the relevant holdings. That undertaking should allow for the effect of any tax and charges on the amount Mr M may receive from the investments and any eventual sums he would be able to access from the SIPP. L&C will have to meet the cost of drawing up any such undertaking.

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

L&C should first contact the provider of the plan which was transferred into the SIPP and ask it to provide a notional value for the policy as at the date of my final decision. 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 Mr M 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 the 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). This is a reasonable proxy for the type of return that could have been achieved over the period in question. And, again, there should be a notional allowance in this calculation for any additional sums Mr M has contributed to, or withdrawn from, his SIPP since its inception.

I acknowledge Mr M has received a sum of compensation from the FSCS, and that he has had the use of the monies received from the FSCS. The terms of Mr M's Reassignment of Rights require him to return compensation paid by the FSCS in the event this complaint is successful, and I understand that the FSCS will ordinarily enforce the terms of the assignment if required. So, I think it's fair and reasonable to make no permanent deduction in the redress calculation for the compensation Mr M received from the FSCS. And it will be for him 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 any payment Mr M actually received from the FSCS for a period of the calculation, so any payment he received, 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(s) Mr M received from the FSCS following the claim about BlueInfinitas, and on the date the payment(s) was actually paid to Mr M. Where such a deduction is made there must also be a corresponding notional contribution (addition), at the end date of my final decision equivalent to any 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 M's previous pension plan to allow for the relevant notional withdrawal in the manner specified above.

The total notional deductions allowed for shouldn't equate to any more than the actual payment(s) from the FSCS that Mr M 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 operators of Mr M's previous pension plan. Where there are any difficulties in obtaining notional valuations from the previous operators, L&C can instead allow for both the notional withdrawal and contribution in the notional calculation it performs, provided it does so in accordance with the approach set out above.

The notional value of Mr M's 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 my final decision) is Mr M's loss.

Pay an amount into Mr M's SIPP so that 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 M'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 M 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.

I know in the previous case L&C argued the consumer should be put to proof of their likely tax rate in retirement. But L&C has provided no evidence to show that Mr M

would be anything other than a basic rate taxpayer in retirement. And looking at Mr M's relatively small pension provision, I'm satisfied the assumption that he will be a basic rate taxpayer in retirement is a fair and reasonable assumption to make.

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 M 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 investments and is used only or substantially to hold those assets, 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 M 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.

Where L&C pays interest, income tax may be payable on any interest paid. If L&C deducts income tax from the interest, it should tell Mr M how much has been taken off. And L&C should also then give Mr M a tax deduction certificate in respect of interest if he asks for one. This applies to any interest relating to any part of Mr M's redress as set out above.

Distress & inconvenience

Mr M has suffered significant distress and inconvenience due to L&C's failings. He has lost nearly the full amount of his pension provision despite expecting to invest in low risk investments. I think losing nearly all of his retirement provision would be naturally worrying for him. So, I consider £500 to be a fair and reasonable amount to reflect the distress and inconvenience caused to Mr M due to L&C's failings.

My final decision

I uphold this complaint and I require London & Colonial Services Limited to pay redress to Mr M in line with the calculations as set out above under 'Putting things right'.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 10 June 2024.

Yolande Mcleod
Ombudsman