DRN-4837206

The complaint

Mr T has a self-invested personal pension ('SIPP') with London & Colonial Services Limited ('L&C'). Mr T complains that L&C failed to carry out appropriate due diligence checks on his SIPP application which led him to invest in a non-mainstream investment. The investment now has no, or very little, value causing him significant loss to his pension.

Mr T is being represented by a Claims Management Company ('CMC'). Any reference to Mr T will include information and evidence provided by his CMC.

What happened

The 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 and regulated by the FCA from around January 2014 and ceased to trade by May 2015 when it entered into voluntary liquidation. Whilst authorised 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.

Affinity Global Developments PLC ('Affinity Global')

Following the transfer of Mr T's personal pension plan to a L&C SIPP in mid-January 2015, the majority of the transferred funds of just over £60,000 was subsequently sent to the SVS platform. Nearly all the funds sent to the SVS platform, was used to purchase Affinity Global bonds.

Companies House records shows that Affinity Global was a limited company incorporated in the United Kingdom in May 2014. It changed it status to a Public Limited Company ('PLC') on 6 August 2014. The main trading activity of the company was to buy and sell real estate for investment purposes. And funds were to be raised for this activity through

issuing secured bonds which were to be listed on the GXG Main Quote Market exchange ('GXG') – the GXG was based in Denmark.

It should be noted that it is unclear during which period the Affinity Global investment was listed on the GXG. As noted above, Affinity Global became a PLC in August 2014. And Global Affinity's annual accounts, which were published at Companies House and audited for the year ending May 2015, said the GXG exchange was due to close in August 2015. And that as a result, Affinity Global would be looking to 'relist' on another alternative exchange. So, this does seem to suggest that sometime between 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 trading exchange.

The strategy of Affinity Global was described in its accounts for the year ending 31 May 2015 as follows:

> *"The company was established to invest in the international luxury hotels and resorts market and European residential market. The company intends to provide investors with access to these growing markets backed by underlying high quality land and real estate around the world."*

And:

> *"The Strategy of the company is to finance, acquire or develop property and land which is either:*
>
> - *Suitable for development into a leading luxury hotel or international resort in locations such as the Caribbean, Mediterranean or Indian Ocean.*
>
> - *Suitable for residential or mixed use Developments within Major European cities such as London, Prague and Barcelona".*

The accounts stated the main risks for this type of investment (bonds) included interest rate risk, liquidity risk, currency risk and market price risk. In terms of liquidity risk, the accounts said Affinity Global had invested funds in real estate projects, some of which were still under development.

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."*

<u>Background to the transfer of Mr T's personal pension plan to the SIPP</u>

Mr T, with the help of his CMC, has given an explanation of the background to the transfer of his personal pension plan to a L&C SIPP and the subsequent investment in the Affinity Global bond. In summary, he said:

- He received a cold call from a representative of BlueInfinitas following which a face-to-face meeting was arranged with an Independent Financial Adviser ('IFA') from BlueInfinitas.
- At the time, Mr T had not long been out of hospital due to health issues and he was in a 'very bad state'. A medical note from 2022 confirmed the history of Mr T's health issues and stated this had had a particular impact on his decision making and memory.
- The IFA who visited Mr T at his (Mr T's) home address, told him his personal pension plan was performing badly. The IFA had a proposal for an investment which he (the IFA) said would make Mr T far better returns than he was receiving under his current personal pension plan. Mr T said the figures presented to him by the IFA seemed very lucrative.
- Mr T told the IFA he was a cautious person and did not want to take risks with his money. Mr T said he was not told he would be investing in a high-risk investment, or that the investment had a ten-year fixed period. Mr T said if he'd known these facts then he would never have agreed to the transfer to the SIPP and/or the investment in the Affinity Global bond. It should be noted Affinity Global published accounts for the year ending 31 May 2015, state the bonds issued were for a five-year period.
- Mr T said he was a retail client and as such, he had a right to expect his investment would be managed prudently, without unnecessary risk or the potential for illiquidity in the investment.
- Mr T said he could not afford to lose any of his pension funds as this was his sole pension provision. His financial situation at the time of the visit from the IFA was that he (Mr T) had no other savings; had an interest only mortgage; and was unemployed due to his ill health.
- Mr T said he was not in the right frame of mind to make the decision to transfer his personal pension due to his illness. He said he would normally have his partner with him for any important meetings such as these. But on this occasion, she was not present. And he recalls the meeting lasting over two hours.
- Mr T said by the end of the meeting he felt pressured and rushed into making a decision and he accepted what the IFA had recommended to him. The recommendation was to switch his personal pension plan to a L&C SIPP and to invest in an Affinity Global bond via the SVS platform. Mr T does not recall if L&C was specifically mentioned as the SIPP provider.
- Following the meeting with the IFA, Mr T agreed to transfer the total amount of his personal pension plan with a value of £63,348 to a L&C SIPP.
- Mr T said prior to the cold call and visit from the IFA, he had no interest in transferring his pension to a different provider. Mr T said he did not receive any payment/incentive for transferring his pension.
- Mr T said that he did not, and still doesn't quite understand what a SIPP is.
- Mr T said that £61,157.24 was invested in the Affinity Global bond following the transfer of the funds to the SIPP. Other than being aware his funds were being invested with Affinity Global, Mr T said he was not aware of how his funds would to be managed.
- Mr T said nothing was provided to him in writing in terms of the advice he was given by the IFA during the face-to-face meeting.
- Mr T said the IFA seemed very professional and showed him samples of other successful cases and returns. He felt the IFA was acting in his (Mr T's) best interest and he (the IFA) seemed legitimate. So, this is what attracted Mr T to this particular IFA and the investment that was recommended to him.
- Mr T said he thought the IFA was partially a salesman, and he also got the impression that he (the IFA) was working for several companies, acting as a broker.

- Mr T doesn't recall being told about the adviser fees and what these would be.
- When asked what prompted him to complain when he did, Mr T's CMC said: *"Due to* [Mr T's] *partial memory loss, he cannot recall what caused him to complain or how he was onboarded with ourselves. He believes that he potentially could have received a letter or an email, which led him to look into his pension, though he cannot be certain. He also has a warped perception of time, so cannot confirm time periods."*

The transfer

On 8 January 2015, Mr T's SIPP application form was submitted electronically to L&C by the BlueInfinitas IFA. On 9 January 2015, L&C wrote to Mr T to acknowledge receipt of his L&C Multi-Platform SIPP application. On the same day, L&C wrote to Mr T's personal pension provider requesting the transfer of his pension funds to the SIPP scheme bank account.

On 9 January 2015, L&C sent an email to SVS with the subject matter 'New Account Opening Application'. The L&C agent said to SVS: *"Please find confirmation that the customer below has a London & Colonial SIPP and SVS Securities have been appointed as the Discretionary Fund Manager. On opening the account please could you provide me via my email address with the relevant account reference number so we can transfer the monies to the* [SVS] *account?".* Mr T's details were included in the email along with the details of his IFA, BlueInfinitas. It should be noted as Mr T had not appointed a DFM (Discretionary Fund Manager), it's likely that this was an error on the part of the L&C employee who sent the email to SVS.

As noted above, Mr T's SIPP application form was submitted electronically by his IFA on 8 January 2015. In summary, the SIPP application contained the following details:

- Under section 2 of the application, this gave the name of Mr T's IFA firm and individual who was an IFA and the Managing Director ('MD') of BlueInfinitas.
- The application said advice had been given at the point of sale to Mr T and that it: *"…takes account of the intended underlying investment strategy".*
- In section 4 of the application under the heading 'Platform Details', it was noted that the chosen platform was 'SVS'.
- Under section 4.1 'Platform Trading', it said: *"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 underlying investments."* The authorised person in this context was the BlueInfinitas IFA.
- Under section 4.2 which asked for details of any 'Investment Manager ('IM') and/or Discretionary fund Manager ('DFM'), all the boxes were completed as 'n/a'.
- Under section 7 of the application, transfer details of Mr T's personal pension provider were given and the value of his pension was estimated to be £60,794.
- Under the heading 'Declaration' in section 9 of the application, amongst other things, it contained the following disclaimer: *"I* [Mr T] *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. I understand that email is not a secure method of communication and confidential or sensitive information will not be transmitted in this format by London & Colonial unless I agree otherwise."*

On 16 January 2015, Mr T's personal pension provider acknowledged the transfer of £63,348 to his L&C SIPP account. This amount was transferred to his SIPP account on 20 January 2015. The SIPP statement shows IFA fees of £1,101.81 was paid on 27 January 2015. And

on 20 February 2015, £61,712.19 was transferred to the SVS platform. On 28 April 2015, a SVS Position Statement shows the purchase of 60,700 Affinity Global bonds valued at £1 each. The value of the bonds had risen to £64,503.15 by 22 January 2016.

Due diligence

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, who were all to be treated as retail clients.

In terms of BlueInfinitas, on 9 September 2014, an 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.

On 10 September 2014, L&C checked BlueInfinitas regulatory status. I've summarised above the permissions held by BlueInfinitas at that time. L&C also checked the regulatory permissions held by key individuals who worked at the firm, including Mr T's IFA.

Also on 10 September 2014, an Intermediary Agreement was set up by L&C for BlueInfinitas. 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."

<u>L&C's updates to Mr T about his IFA, SVS and his investments</u>

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 that L&C wrote to SIPP members such as Mr T, letting them know about the IFA's insolvency status (see further below).

On 10 June 2015, Mr T'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 (S) had been appointed as Mr T's new financial adviser and requested it complete an Intermediary Agreement. Mr T 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 subsequently dissolved on 10 August 2023.

L&C's 10 December 2015 letter

In a letter dated 10 December 2015 (the 'December letter'), L&C wrote to clients of BlueInfinitas. A copy of this letter has not been provided to us in Mr T's case. But I've seen copies of this letter on other similar cases. And I think it's likely that he would have been sent this, or a similar letter, given he was one of the investors impacted by the insolvency of BlueInfinitas and the investment, Affinity Global.

In the December letter this said under the heading 'Background': *"We* [L&C] *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 T's new financial adviser and had updated its records accordingly.

L&C went on to say in its December 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: *"…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 clients 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 strongly recommended to affected clients, they should appoint a new financial adviser. And it also recommended they should contact the Financial Services Compensation Scheme ('FSCS') in respect of a potential claim against BlueInfinitas.

Further updates

On 3 February 2017, Mr T requested a one-off 'maximum income' lump sum payment. He made a further request to take benefits from his pension savings in August 2017. L&C advised Mr T that his tax-free cash entitlement was exhausted and provided him with detailed information about taking benefits from his pension, as required by the FCA. On 15 December 2017, Mr T made a further request for a one-off lump sum payment of the maximum amount available from his pension savings.

By January 2019, Mr T's SVS statement showed that he had an indicative value of £60,700 held in his SVS portfolio. A L&C holding statement dated 8 September 2022, showed he had cash in his SIPP account of nil. And the SVS portfolio as of 17 August 2022 was described as 'N/A'.

In 2018, Mr T made a claim via the FSCS in relation to BlueInfinitas. On 30 July 2018, he received a notice of an interim payment from the FSCS. The interim payment made to Mr T from the FSCS was £13,387.18. But this took into account an indicative value of Affinity Global as of 28 June 2018 of £60,700. Mr T said he considers this investment should have been valued at nil.

The FSCS calculation also showed that Mr T had withdrawn some payments from his SIPP between the periods of July 2016 to February 2018 which was also taken into account. Mr T's notional value of his pension (i.e. if he had not transferred from his previous pension plan) was calculated to be £83,490. Mr T received a Reassignment of Rights from the FSCS on 19 August 2022, which allowed him to bring his complaint to the Financial Ombudsman about L&C.

Mr T's complaint

Mr T complained to L&C in a letter dated 13 March 2019. As noted above, Mr T's CMC said Mr T's partial memory loss meant he could not recall what caused him to complain at the time that he did. But it said Mr T believes he potentially could have received a letter or an email, which led him to look into his pension held with L&C.

In brief, Mr T complained, via his CMC, that L&C had failed to carry out sufficient due diligence in terms of the investment he made. He says the investment was high risk and illiquid. And was totally unsuitable for him as a retail client.

L&C sent a final response letter to Mr T dated 24 February 2020. In summary, it stated it was an execution only service and therefore, was not responsible for the suitability of Mr T's investment and/or the losses he made as a result of investing as he did. Or for the transfer of his pension to its SIPP. L&C also noted once it received Mr T's instructions it was under an obligation to carry out those instructions under the Conduct of Business Sourcebook ('COBS') section 11.2.19.

L&C added the complaint should be directed at BlueInfinitas as Mr T's IFA as it provided the advice to transfer to the SIPP and purchase the underlying investment. L&C noted BlueInfinitas' as the 'Platform Trader': *"…indicates that* [Mr T's] *financial adviser was responsible for the online trading of the underlying investment funds that were purchased within the SVS Securities Platform Account, not London & Colonial."*

And that: *"This was in contravention of our permitted investment list that Blueinfinitas Ltd agreed to abide by when London & Colonial agreed Terms of Business with it. As such, we believe your complaint regarding* [Mr T's] *investment should be properly directed at the party who did advise* [Mr T] *and who did buy the underlying investments, which were purchased without our knowledge and authorisation, this being Blueinfinitas Ltd and not London & Colonial. The selection of the underlying Investments within the SVS Securities account were out of London & Colonial's control as they were being purchased by Blueinfinitas Ltd without London & Colonial's knowledge on a discretionary basis."*

L&C said as an execution only SIPP provider it was not qualified to give advice or assess suitability of an individual's investment needs. L&C said this was made clear to Mr T in the application form he was asked to submit, read and sign to confirm his understanding of the instructions he was giving L&C. And it said it wasn't its role to look beyond Mr T's instructions, nor to decline these instructions based on the assumption he did not understand what he was signing for when there was no indication of this in his application.

L&C said it undertook due diligence on both BlueInfinitas and SVS, both of whom were regulated entities. And it pointed out that both entities held the appropriate permissions for

the services they provided to Mr T. L&C concluded its due diligence didn't raise any cause for concern about these FCA regulated firms or about the advice offered to Mr T.

The investigator at the Financial Ombudsman who reviewed Mr T's complaint, recommended it should be upheld. The investigator didn't think L&C had due regard to the regulator's Principles for Businesses (the 'Principles') when carrying out its due diligence duties particularly in relation to BlueInfinitas.

The investigator referred to several publications issued by the FSA and FCA, which she said were all published prior to Mr T's transfer to a L&C SIPP and investment in the Affinity Global bond. She noted these publications provided non-exhaustive examples of how SIPP providers could meet with their obligations under the Principles and its other regulatory obligations. The investigator took into account case law including Adams v Options SIPP (full case reference below) when reaching her conclusions.

Overall, the investigator considered L&C should have had cause for concern about the nature of the business it was receiving from BlueInfinitas. She didn't think L&C had taken sufficient steps to gain an understanding of its business model. In particular, she noted BlueInfinitas' pattern of business was to recommend to many of its clients high-risk esoteric investments which posed a significant risk of consumer detriment to clients such as Mr T. As a result, she concluded that if L&C had acted in accordance with its regulatory obligations, it should never have accepted Mr T's application in the first place, which, she said, would have avoided the losses he suffered to his pension funds. Our investigator set out how things should be put right as well as recommending L&C should pay Mr T £500 for the distress and inconvenience it had caused him.

L&C responded to the investigator's view through its representative. In summary, the representative made the following points:

- L&C is an execution only business. This was clearly explained to Mr T in various documents such as the SIPP Key Features document, the SIPP fee basis document and acknowledgement letters, which cumulatively, highlighted general risks and L&C's limited role.
- L&C had no advisory permissions. Mr T's complaint is about the suitability of his investment.
- This complaint relates to the role of BlueInfinitas, not L&C.
- It would not have been fair for L&C to reject Mr T's SIPP application. This is because other FCA regulated entities were involved in advising and carrying out the investments on his behalf.
- It was not possible or within the scope of L&C's SIPP provider duties to monitor each investment transaction being made via SVS.
- Mr T's IFA changed from BlueInfinitas in April 2016. Mr T's new financial adviser would also have been responsible for the ongoing monitoring of his investments.
- Any monitoring carried out by L&C would take place once the investments had been effected by SVS. So, any unsuitable investment purchased via SVS, would be challenging to unwind once made.
- Where an Intermediary was appointed such as BlueInfinitas, the SVS agreement made it clear that any investment instructions and/or related decisions were delegated from L&C to either the client and/or their Intermediary.
- It was not L&C's role to liaise with SVS as regards Mr T's investments due to its (L&C's) limited regulatory permissions.

- It would have been improper for L&C to intervene in the advisory process between Mr T and his IFA, given its (L&C's) limited regulatory permissions.
- It was reasonable and proper for L&C to place reliance on BlueInfinitas as Mr T's chosen IFA.
- L&C carried out extensive due diligence on both SVS and BlueInfinitas – these checks revealed no concerns.
- The Intermediary Application completed by BlueInfinitas showed this firm was FCA regulated, had never been refused registration or business terms from other businesses and had never been involved in criminal or civil proceedings.
- L&C entered into separate agreements with BlueInfinitas and SVS. L&C provided SVS/BlueInfinitas with a PIL in accordance with the agreement.
- Even if L&C had sought further clarification from BlueInfinitas as regards its business model, there is no basis to conclude L&C was likely to have discovered anything that would have given it (L&C) cause for concern.
- Mr T made a claim against BlueInfinitas through the FSCS – this shows BlueInfinitas is responsible for Mr T's losses.
- The letter of complaint fails to specify whether, and how, Mr T's losses exceed the amount he's already received in compensation from the FSCS.
- The investigator's view is inconsistent with previous Financial Ombudsman published decisions where BlueInfinitas, as the IFA, was found to be wholly responsible for losses suffered by the relevant complainant.
- Mr T agreed to a indemnify L&C from any losses he suffered as set out in the SIPP application.
- The Court in Adams confirmed the contract between the parties is of paramount importance. So, the FCA publications referred to by the investigator, are not relevant when considering the SIPP provider's duties which is subject to the contractual terms and conditions.
- L&C's view is that as with the Adams cases, the application of the Principles is not relevant to Mr T's complaint.
- In terms of COBS 2.1.1R, the investigator has considered, and relied almost exclusively on, non-binding guidance such as the 2009 Thematic Review. As per the judgment at first instance in Adams, these documents are of no legal consequence.
- The FCA produced documents provide only indicative guidance, or 'suggestions' only. They were not and are not intended to be prescriptive. Notwithstanding this, L&C's position is that it complied with its legal and regulatory duties at all material times.
- The Financial Ombudsman are holding L&C to an artificially, and excessively, high standard, with the benefit of hindsight. The investigator has failed to set out any explanation as to how any alleged failings by L&C has caused Mr T's losses.
- The investigator suggests L&C should have done more to prevent Mr T's loss, without explaining what L&C 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 T's losses.

As no agreement could be reached, the matter was passed to me for a decision. I issued a provisional decision. In summary, I agreed with much of what the investigator had said which I've summarised above but gave slightly different reasons for upholding the complaint. I also said that I would be increasing the amount for distress and inconvenience caused to Mr T due to his particular circumstances. As I am setting out what I said in my provisional decision again below, I won't repeat this again here.

Mr T said he agreed with the provisional decision and had nothing further to add. L&C said it disagreed with the provisional decision but noted that it had given reasons for this in another similar decision, so had nothing further to add. It should be noted that I had taken into account other submissions made by L&C in another similar case. But I still considered that Mr T's complaint should be upheld. And I gave my reasons for this.

As both parties have now responded to my provisional decision, I am issuing my final decision.

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 reconsidered all the evidence, I am upholding Mr T's complaint against L&C for the same reasons I set out in my provisional decision. As no further substantive submissions have been provided by either party, my reasoning will remain the same. Before I set out my reasoning, I think it is important to note that when considering what's fair and reasonable in the circumstances, I need to take account of relevant law and regulations, regulator's rules, guidance and standards, codes of practice and, where appropriate, what I consider to have been good industry practice at the relevant time.

As a preliminary point, 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.

The relevant considerations

In my view, 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 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 that it was fair and reasonable for Berkeley Burke to have undertaken due diligence in respect of the investment before allowing it into the SIPP wrapper. And that if it (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 the Financial Services and Markets Act 2000 ('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 relevant time as relevant considerations that were required to be taken into account.

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

On 18 May 2020, the High Court handed down its judgment in the case of Adams v Options SIPP [2020] EWHC 1229 (Ch). Mr Adams subsequently appealed the decision of the High Court and, on 1 April 2021, the Court of Appeal handed down its judgment in Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 474. I've taken account of both these judgments and the judgment in Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 1188, when making this decision in Mr T's case.

I have considered whether Adams means the Principles should not be taken into account in deciding this case and I am 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 that HHJ Dight didn't consider the application of the Principles to SIPP operators in his judgment. The Court of Appeal also gave no consideration to the application of the Principles to SIPP operators. So, neither of the judgments say anything about how the Principles apply to an Ombudsman's consideration of a complaint. But to be clear, I don't say this means Adams isn't a relevant consideration at all. As noted above, I've taken account of the Adams judgments when making this decision.

I acknowledge that COBS 2.1.1R *('A firm must act honestly, fairly and professionally in accordance with the best interests of its client')* overlaps with certain of the Principles, and 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 that in Adams v Options SIPP, HHJ Dight found the factual context of a case would inform the extent of the duty imposed by COBS 2.1.1R. HHJ Dight said at paragraph 148: *"In my judgment in order to identify the extent of the duty imposed by Rule 2.1.1 one has to identify the relevant factual context, because it is apparent from the submissions of each of the parties that the context has an impact on the ascertainment of the extent of the duty. The key fact, perhaps composite fact, in the context is the agreement into which the parties entered, which defined their roles and functions in the transaction."*

I further note that there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Mr T'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 which 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 T's complaint, amongst other things, I'm considering whether L&C ought to have identified 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 T.

The facts of Mr Adams' and Mr T's cases are also different. I make this point to highlight there are factual differences between Adams v Options SIPP and Mr T's case. And I need to construe the duties L&C owed to Mr T under COBS 2.1.1R in light of the specific facts of his (Mr T's) case. So, I've considered COBS 2.1.1R, alongside the remainder of the relevant considerations, and within the factual context of Mr T'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 T on the SIPP and/or underlying investments. But in my view, refusing to accept an application isn't the same thing as advising Mr T on the merits of the SIPP and/or the underlying investment.

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 T'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 an indication of the regulator's expectations about the kinds of practical steps a SIPP operator might reasonably take to achieve the outcomes envisaged by the Principles. And it also sets out how a SIPP operator might meet its obligations in relation to investment due diligence. It says those obligations could be met by:

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

This section ended 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 in response to the investigator's view, that the 2009 review wasn't formal guidance. I acknowledge the 2009 and 2012 reviews and the Dear CEO letter, aren't formal guidance (whereas the 2013 finalised guidance is). However, I consider the fact the reviews and the Dear CEO letter didn't constitute formal guidance doesn't mean their importance should be underestimated.

The publications provide a reminder that the Principles apply. And are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. In this respect, the publications which set out the regulator's expectations of what SIPP operators should be doing, also go some way to indicate what I consider amounts to good industry practice. I'm, therefore, satisfied it's appropriate to take them into account.

It's relevant when deciding what amounted to good industry practice in the BBSAL case, the Ombudsman found: *"…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 the 2009 review and later FCA publications, didn't provide guidance in any meaningful sense. But as the 2009 review's introduction says: *"In this report, we describe the findings of this thematic review, and make clear what we expect of SIPP operator firms in the areas we reviewed. It also provides examples of good practices we found."* And as referenced above, the 2009 review goes on to provide: *"…examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms."*

So, I'm satisfied the 2009 review as well as the later FCA publications, are reminders that the Principles apply. And they give 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 publications set out the regulator's expectations of what SIPP operators should be doing and, therefore, indicates what I consider amounts to good industry practice at the relevant time.

I also consider the 2009 review was directed at firms like L&C acting purely as SIPP operators. The review says: *"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses…".* Given this, I'm satisfied these publications are relevant and appropriate to take into account.

And in terms of a SIPP provider's non-advisory role, it's noted prior to the good practice examples quoted above that: *"We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs."*
I'm also satisfied that L&C, at the time of the events under consideration here, thought the 2009 review and other publications were relevant. L&C acknowledged in its submissions that the publications are relevant to how it conducts its business and highlights some areas of good practice.

And as noted above, the remainder of the publications also provide a reminder the Principles apply and are an indication of the kinds of things a SIPP operator might do to

ensure it is treating its customers fairly. And to produce the outcomes envisaged by the Principles. In this respect, these publications also go some way to indicate what I consider amounts to good industry practice at the relevant time. Therefore, I remain satisfied it's appropriate to take them into account.

Further, all of the regulators' publications referred to above were issued before Mr T's SIPP was set up. These documents collectively gave examples of the 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 those publications are irrelevant to my consideration of what's fair and reasonable in the circumstances of this complaint.

I'm required to take into account good industry practice at the relevant time. As mentioned, the publications indicate what I consider amounts to good industry practice at the time of Mr T's transactions. This doesn't mean that in considering what's fair and reasonable, I'll only consider L&C's actions with these documents in mind. The reviews, the Dear CEO letter and guidance, gave non-exhaustive examples of good practice. They didn't say the suggestions given were the limit of what a SIPP operator should do. As the annex to the Dear CEO letter notes, what should be done to meet regulatory obligations will depend on the circumstances.

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

I find the 2009 review and later publications together with the Principles provide a very clear indication of what L&C could, and should, have done to comply with its regulatory obligations which existed before accepting Mr T's introduction from BlueInfinitas. It's important to keep in mind, that the judges in the Adams 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.

So, in light of all that I've said above, in determining this complaint, I need to consider whether in accepting Mr T'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 this, I'm looking to the Principles and the publications listed above to provide an indication of what L&C should have done to comply with its regulatory obligations and duties.

Arrangements between L&C and Mr T

This decision is made on the understanding that L&C acted purely as a SIPP operator. I don't say L&C should (or could) have given advice to Mr T or otherwise have ensured the

suitability of the SIPP or the investment placed by his IFA into the SVS platform for him personally. I accept L&C made it clear to Mr T that it wasn't giving, nor was it able to give advice. And that it (L&C) played a purely administrative role in his SIPP investments. I also note the forms Mr T signed confirmed, amongst other things, his understanding that losses arising as a result of L&C acting on his instructions were his responsibility.

Further, I've not overlooked or discounted the basis on which L&C was appointed. And my decision on what's fair and reasonable in the circumstances of Mr T's case is made with all of this in mind. So, I've proceeded on the understanding that L&C wasn't obliged – and wasn't able – to give advice to Mr T on the suitability of the SIPP, the proposed investments and using SVS as an execution only stockbroker.

What did L&C's obligations to Mr T 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 T) and treat them fairly. Its obligations and duties in this respect weren't prescriptive and depended on the nature of the circumstances, information and events on an ongoing basis.

I think L&C understood its due diligence duties to some degree at the time of Mr T's transactions, 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.

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 (BlueInfinitas), 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.

L&C's arrangements with BlueInfinitas

As I've noted above, from the information provided, I am satisfied that L&C did take *some* steps towards meeting its regulatory obligations and good industry practice before accepting any business from BlueInfinitas.

In summary, L&C carried out the following checks before accepting business from BlueInfinitas:

- L&C carried out a credit check on the BlueInfinitas MD dated 10 September 2014.
- L&C checked that BlueInfinitas was regulated and authorised by the FCA – L&C has provided a printout from the time it made this search and this FCA printout includes the permissions BlueInfinitas and some of its employees held at the time. The print outs L&C has provided of the relevant FCA Register pages are dated 10 September 2014.
- L&C explained to us it wouldn't have accepted SIPP business from a firm unless that firm had been authorised and regulated by the regulator and this is reflected in the Intermediary Agreement it had with BlueInfinitas.

- L&C ensured BlueInfinitas signed up to its Intermediary Agreement which I've quoted from above.
- 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 Permitted Investment List ('PIL') and 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)."*

The PIL referred to in the Intermediary Agreement, in itself, offered a measure of protection for clients as it meant certain, high risk investments would not be allowed to be purchased by the IFA on their behalf. The PIL that was in force at the time of Mr T'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: *"…the assets that London & Colonial have determined may be held within the Fund from time to time."*

In summary, the L&C PIL which 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 Alternative Investment Market, the London Stock Exchange, or a recognised overseas investment exchange.
- A DFM portfolio.
- An investment platform.
- A regulated collective investments 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?

In this case, the business L&C was conducting was its operation of SIPPs. And I'm satisfied in order to meet its regulatory obligations when conducting its operations of SIPP business, L&C had to decide whether to accept, or reject, referrals of business and/or particular investments with the Principles in mind.

The regulators' 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. This involved conducting checks (due diligence) on introducers and investments to make informed decisions about accepting business. This obligation was a continuing one. And 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 T, were proposing to have their pension funds invested in.

The arrangement in this case was that BlueInfinitas was able to go direct to a stockbroker (SVS) on behalf of the client and this meant the IFA (BlueInfinitas) was able to do so without first obtaining an agreement for each investment from the client. This arrangement was reflected in the SIPP application where Mr T gave his authority for the IFA to act on his behalf in relation to SVS. So, I think it's likely the arrangement which was in place was that the BlueInfinitas IFA could go directly to SVS, and could, in practice, do so without obtaining Mr T's agreement for each investment. And, as L&C said in its final response letter, there was no oversight by L&C of what type of investments were being purchased.

However, in Mr T's case, unlike other cases I've seen involving a similar arrangement between BlueInfinitas and SVS, it does appear that Mr T was told beforehand what investment the BlueInfinitas IFA would be investing in via the SVS platform on his (Mr T's) behalf. Mr T has told us that whilst he knew he was investing in Affinity Global, he wasn't told about the risks and/or timescales involved in investing in the Affinity Global bond. Mr T says he was led to believe by the BlueInfinitas IFA that this was a low risk investment. And he (Mr T) had stressed to the IFA that due to his financial situation, he did not want to put his pension funds at risk.

From what I can see, BlueInfinitas was introducing clients to the Affinity Global investment on a regular basis. In a similar case which was referred to the Financial Ombudsman, L&C told us that up until mid-November 2014, it had dealt with seven cases (excluding the case that was under consideration). But L&C didn't specify the type of investments those seven clients had invested in and/or whether it was via the SVS platform. However, four cases (including Mr T's case but excluding the seven pre-mid November 2014 cases), have been referred to the Financial Ombudsman. And the similarity between the cases referred to the Financial Ombudsman are that these involved BlueInfinitas investing via the SVS platform with each client investing a significant proportion of their pension funds in Affinity Global. In Mr T's case, almost all of his pension funds were invested in the Affinity Global bonds.

In total, I think there were at least ten SIPP applications from BlueInfinitas to L&C prior to Mr T's application. And at least three of these involved BlueInfinitas purchasing non-mainstream investments including Affinity Global. In addition, in the published decision DRN-4045393, BlueInfinitas had submitted over 332 applications during an 18-month period from January 2014 to April 2015 via another SIPP provider. From these SIPP applications, 248 clients were placed in non-mainstream investments as part of a wider portfolio. And many of the clients invested in the Affinity Global investment. There was also at least one other SIPP provider BlueInfinitas was working with as an introducer.

One explanation in terms of the selling of the Affinity Global investment 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 case referred to above (DRN-4045393). So, in my view, there is no reason to think BlueInfinitas would not have acknowledged the same information about its relationship with Affinity Global if L&C had asked it about the source of its business.

All in all, based on the evidence L&C has provided, I'm satisfied it's more likely than not that by January 2015, when Mr T transferred to the SIPP and invested in Affinity Global, L&C had received a number of introductions from BlueInfinitas where consumers had similarly invested in unregulated, non-mainstream investment post-transfer. Further, BlueInfinitas also had submitted a significant number of applications involving non-mainstream investments, including Affinity Global, to other SIPP providers. So, I think L&C either was aware, or ought reasonably to have been aware and prior to receiving Mr T's SIPP application, that the type of business BlueInfinitas was introducing was high risk, with consumers' pension monies typically being invested in unregulated holdings and carrying a potential risk of consumer detriment.

Further, whilst L&C did say in its final response letter to Mr T that BlueInfinitas had acted in breach of its PIL, I can't say for certain that the Affinity Global bond was in breach as it appeared to be a security listed on a recognised overseas investment exchange at the time of Mr T's investment. But I consider the evidence from other cases supports that BlueInfinitas had on at least two occasions prior to Mr T's application, breached the PIL agreement in respect of other L&C-introduced clients. In these cases, BlueInfinitas breached the L&C PIL by, for example, purchasing unquoted shares and making investments in esoteric holdings on behalf of clients post-transfer.

I also note that in the two cases referred to above, it's likely BlueInfinitas was acting outside its regulatory permissions. I say this because it is likely that it (BlueInfinitas) acted on a 'discretionary basis' in these cases without the 'managing investment' permissions to do so. And given it was using a stockbroking service and shares were purchased for clients in those cases, BlueInfinitas may also have been advising the clients on which shares to purchase. Again, it did not have the regulatory permission to carry out this particular activity.

L&C has said that even if BlueInfinitas did act outside of its regulatory permissions and/or breached the PIL in those cases, it (L&C) is not responsible for the failings of a separate regulated party such as BlueInfinitas. However, in my view, there was a real risk of consumer detriment in allowing an adviser to act in a way that exceeded its regulatory permissions and/or acted outside the agreed terms of business.

What ought L&C should have done?

Checks to establish the business model of BlueInfinitas

From what I've set out above, it doesn't appear that L&C took any action to address the issue of BlueInfinitas breaching the Intermediary Agreement before Mr T's pension was transferred and his investment was made. I think if it had done so, by carrying out appropriate due diligence checks, which were ongoing, this should have been a red flag to L&C that BlueInfinitas was not acting in a conventional way. I consider given BlueInfinitas' willingness to breach the Intermediary Agreement as I've described above, there was a real risk of consumer detriment. And I think if L&C had carried out appropriate due diligence this would have come to light prior to Mr T's pension transfer and his subsequent investment in Affinity Global.

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. Given the arrangement that was in place, I think L&C should have gained a better understanding of its (BlueInfinitas') business model.

I can see in the Intermediary Application that L&C did ask some relevant questions 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 and/or 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 these SIPP operators had started working with BlueInfinitas accepting introductions via the SVS platform around two months before the Intermediary Agreement with L&C started in September 2014. The other SIPP provider had an agreement in place with BlueInfinitas since 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.

As noted above, looking at the published decision DRN-4045393, BlueInfinitas had submitted over 332 applications over an 18-month period via another SIPP provider. And of the 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.

By the time of Mr T's application in January 2015, BlueInfinitas had been working with the SIPP provider referred to in the published decision for a year. And only continued working with the IFA for another few months after this period. So, I think it's likely the majority of SIPP applications from BlueInfinitas to that other SIPP provider, would have been made by the time of Mr T's L&C SIPP application in January 2015. Given this, I'm of the view that the level of 'management information' which would have been available to L&C if it had asked BlueInfinitas for it, was likely to have been sufficient enough for it (L&C) to gain a reasonable understanding of BlueInfinitas' business model.

I think L&C also could have asked BlueInfinitas other questions before it received Mr T's SIPP application, such as: how it (BlueInfinitas) 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; what material was being provided to clients by it; and what it was telling its clients about SVS and the proposed investments.

Further, by the time of Mr T's application, L&C had accepted at least ten applications from BlueInfinitas. So, by this point (January 2015), L&C had sufficient information of its own to gain an understanding of the type of business BlueInfinitas was undertaking for its clients. This included a possibility BlueInfinitas was breaching its regulatory permissions and/or the PIL agreement it had with L&C. These issues should have been red flags 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 and/or accept Mr T's SIPP application.

Even if BlueInfinitas had not breached its regulatory permissions, by the time of Mr T's application, it appears most likely that consumers BlueInfinitas introduced to L&C ended up with SIPP monies invested in higher risk unregulated assets. This finding appears to be consistent with the cases that I've seen relating to L&C where BlueInfinitas was the introducer and those cases where BlueInfinitas was introducing business via other SIPP providers. So, I think the introductions L&C received from BlueInfinitas were predominantly for applicants intending to invest in high risk non-standard esoteric holdings, such as the unregulated holdings in Affinity Global that Mr T's SIPP monies was invested into.

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. And the type of investments being purchased by BlueInfinitas for its clients weren't ones that were normally suitable for retail clients such as Mr T. 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 T's application in January 2015.

Monitoring the activities being carried out by BlueInfinitas

As I've already touched on, 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 previously said, it was unaware at the time that BlueInfinitas was breaching the PIL in other cases that came before Mr T's application. Or that it (BlueInfinitas) may have been acting in breach of its regulatory permissions.

So, all in all, I think it's unlikely L&C was carrying out any monitoring of BlueInfinitas' introductions as if it had been L&C, would have seen the IFA had not been adhering to its (L&C's) PIL agreement. From what I can see, breaches happened as early as November 2014 and again in December 2014. This was two and three months respectively after L&C set up the Intermediary Agreement with BlueInfinitas. I think this raises questions about the motivation and competency of BlueInfinitas. And also about why L&C continued to accept business from it.

I accept L&C had agreements in place with SVS and BlueInfinitas. But this did not absolve it from carrying out adequate checks to ensure the Intermediary Agreement it had with BlueInfinitas was being adhered to. As I've said, it's unclear whether the Affinity Global investment did breach the PIL but L&C has said in other cases, that this is something BlueInfinitas had done in those cases (i.e. breached the PIL). So, even if the Affinity Global investment did not breach the PIL, which is the only investment purchased by Mr T, I consider if L&C had carried out reasonable checks of the type of business being introduced by BlueInfinitas prior to his application, it would have refused to accept it due to the IFA's previous breaches of its Intermediary Agreement which incorporated the PIL agreement.

It should be noted the Intermediary Agreement was set up, in part, to meet with L&C's due diligence duties in order to ensure 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. As noted, by its own admittance, L&C was unaware what investment was held in Mr T's SVS account and, it would seem, it didn't know whether or not, Affinity Global was an investment that was in breach of its PIL. Or that in previous cases, BlueInfinitas almost certainly did breach the PIL by, for example, purchasing unquoted shares.

Having gone to the trouble of setting up an Intermediary Agreement, in my view, 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."*

Further, I think given the type of investments BlueInfinitas was purchasing for its clients and the relatively small pension fund Mr T was transferring, which was all invested in one non-mainstream investment, this should have prompted L&C to check that Mr T knew what type of investment he was putting his pension funds into. I think if it had done so, L&C would not have accepted Mr T's application as it would have been apparent the type of investment he'd

agreed to was low risk and not the type of investment Affinity Global was, which BlueInfinitas was purchasing for a significant proportion of its clients.

To be clear, I don't think this type of action was to check on the suitability of Mr T's investments. But it was to check he had been given correct information by BlueInfinitas. 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 consider this type of action i.e. checking directly with the client on matters of concern, to have been good industry practice at the relevant time, particularly when viewed in light of what L&C knew or ought to have known about BlueInfinitas' business model.

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 it monitored its Intermediary Agreement 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 that agreement. L&C could not absolve itself from its due diligence duties. Even if BlueInfinitas didn't breach the PIL in Mr T's particular case, it had done so in previous cases in November and December 2014 – Mr T's transfer and investment was not completed until January 2015.

The Intermediary Agreement said if BlueInfinitas breached any of its conditions, L&C could, and presumably would, terminate the agreement with immediate effect. So, given there were at least two instances where L&C could have found that BlueInfinitas was breaching its PIL and potentially acting in contravention of its (BlueInfinitas') regulatory permissions, L&C could have terminated the agreement prior to Mr T's application. 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. And 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.

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 T's application, or to draw fair and reasonable conclusions from what it did know, or ought to have known, about the business model of BlueInfinitas. 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 T's application, L&C ought to have ended its relationship with BlueInfinitas *before* it accepted his application. Alternatively, L&C could have taken fair and reasonable steps to address the potential risk of consumer detriment.

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 T's application. And, mindful of the fact that 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 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 of its agreements and/or arrangements being open to abuse or misuse by those it had entered into a business relationship with, would've been reasonable steps to take.

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.

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 L&C had sufficient systems and controls in place and as a result, I think Mr T 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 which I've set out above. However, I maintain, 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 in itself this was not a cause for concern, there was cause for concern about the number of applications it was making that involved introducing clients who were investing in non-mainstream investments. I consider by January 2015, the time of Mr T's application, there would have been sufficient information that BlueInfinitas could have provided from its records for L&C to have formed a view about the type of business it (BlueInfinitas) was going to introduce.

L&C may argue it wasn't privy to the agreements that BlueInfinitas had with the other providers. But this is information it could have asked BlueInfinitas for 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 they conduct with them'. So I don't think these are unusual questions to ask.

Reasonable questions with suitable evidence to support what BlueInfinitas was saying, would have helped L&C to gain an understanding of its (BlueInfinitas) business model before entering into an agreement with it. Knowing the type of investments BlueInfinitas was purchasing for its SIPP clients, with some clients having investments chosen without their knowledge of what the investment(s) would be, may have led L&C to not have done business with BlueInfinitas at all. Or at the very least, have set up adequate systems and controls to ensure that its (L&C's) clients weren't put at risk of consumer detriment due to BlueInfinitas selling practices.

Examples of the types of actions it 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 T'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 T. 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 T's application, I think there would have been enough information for L&C to have reasonably refused to accept Mr T's SIPP application.

If L&C had carried out adequate due diligence on the investments being purchased for clients introduced to it by BlueInfinitas, it (L&C) would have gained the necessary understanding about the IFA's willingness to act outside its regulatory permissions. And/or select investments which breached L&C's PIL agreement. 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. These were reasonable questions to ask and if the IFA refused to answer them, then this would have been a cause for concern in itself.

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

Was it fair and reasonable in all the circumstances for L&C to proceed with Mr T'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 T'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 T 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 T had signed forms intended to acknowledge, amongst other things, his awareness of some of the risks involved with investing as well as to indemnify L&C against losses that arose from acting on his instructions. And, in my opinion, relying on the contents of such forms when L&C ought to have known that the type of business it was receiving from BlueInfinitas would put investors 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 T's application, was to have declined to accept business from BlueInfinitas.

The Principles exist to ensure regulated firms treat their clients fairly. And I don't think the paperwork Mr T signed meant 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 or business.

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

I consider by the time of Mr T's 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 T'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 T's application because of the disclaimer he signed and that it was obliged to carry out his instructions by COBS 11.2.19R. L&C says it complied with its obligations under COBS 11.2.19R in acting on Mr T'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 T's financial circumstances. And L&C did not have regulatory permission to carry out such work.

I do not agree with this argument. L&C could have refused Mr T'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 T's SIPP application in the first place, I do not think it fair and reasonable for L&C to rely on the disclaimer he signed saying he instructed it to make the investment, and that it would not be responsible for any losses based on those instructions. Things should never have reached that stage. If L&C had acted in its clients best interests, Mr T 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 T compensation in the circumstances?

From the evidence provided to me to date, I think it's more likely than not that BlueInfinitas arranged for Mr T's pension monies to be transferred to L&C to be specifically invested through SVS. L&C has said if it hadn't accepted Mr T's application from BlueInfinitas to invest in its SIPP and trade through SVS, that the transfer and investments would still have been affected with a different SIPP provider.

But I don't think it's fair and reasonable to say L&C shouldn't compensate Mr T 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 that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted Mr T's business from BlueInfinitas.

In the circumstances, I'm satisfied it's fair and reasonable to conclude that if, and *before* it received Mr T's application, L&C had declined to accept business from BlueInfinitas, Mr T's monies wouldn't still have been invested with SVS. In Adams v Options SIPP, the judge found 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."*

In this case, I'm satisfied that Mr T proceeded without knowing the investment he was making was high risk and speculative. Mr T says he was told by BlueInfinitas there was little or no risk to his pension fund. And based on the evidence I've seen to date I'm satisfied Mr T didn't know anything about the risks the specific investment posed to his

funds. I've also not seen any evidence to show Mr T 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 T, unlike Mr Adams, wasn't eager to complete the transaction for reasons other than securing the best pension for himself.

So, in my opinion, this case is very different from that of Mr Adams. And having carefully considered all of the circumstances, I'm satisfied it's fair and reasonable to conclude that if L&C had refused to accept Mr T's application from BlueInfinitas, the transaction this complaint concerns wouldn't still have gone ahead.

I appreciate L&C might say its contract was with BlueInfinitas and not Mr T. And that if his application was refused it wouldn't have been at liberty to, or had reason to, contact Mr T. But L&C *did* receive Mr T'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 T's application from BlueInfinitas, it shouldn't then have accepted it.

Mr T 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, then Mr T would have wanted to find out why from BlueInfinitas and L&C. I don't think it fair and reasonable to say L&C shouldn't compensate Mr T for his losses on the basis of any speculation that BlueInfinitas and/or L&C wouldn't have confirmed to Mr T the reason why the transfer hadn't proceeded if he'd asked.

I think it's more likely than not that if L&C had refused to accept Mr T's application from BlueInfinitas, and he 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 business which had the necessary permissions would have resulted in Mr T taking the same course of action particularly as his main objective was to save money. I consider it's reasonable to say a regulated business with the necessary permissions would have given suitable advice. Alternatively, Mr T 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 T's complaint about L&C. However, I accept other parties were involved in the transactions complained about. I also accept that Mr T pursued a complaint against BlueInfinitas with the FSCS. The FSCS upheld Mr T's complaint, it calculated his interim losses to be just over £13,000 and paid him compensation. Following this the FSCS provided Mr T 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 T fairly.

I'm not making a finding that L&C should have assessed the suitability of the SIPP for Mr T. I accept L&C wasn't obligated, or indeed able to, give advice to Mr T, 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 that led to Mr T'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 T 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. And it's my view, that it's appropriate in the circumstances for L&C to compensate Mr T 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 T's SIPP application. And I also think it's fair and reasonable for me to conclude that if L&C hadn't accepted Mr T's introduction from BlueInfinitas then Mr T 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 T 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 with SVS. I say this having given careful consideration to the *Adams v Options* judgments but also bearing in mind that my role is to reach a decision that's fair and reasonable in the circumstances of the case having taken account of all relevant considerations.

Putting things right

I consider that 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 T 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 T 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 T's previous pension plan.
- Obtain the actual transfer value of Mr T'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 T'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 investment/s and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.
- If Mr T has paid any fees or charges from funds outside of his pension arrangements, L&C should also refund these to Mr T. Interest at a rate of 8% simple per year from date of payment to date of refund should be added to this.
- Pay Mr T an amount of £750 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 T would then be able to close the SIPP, if he wishes. That would then allow him to stop paying the fees for the SIPP. The valuation of the illiquid investment may prove difficult, as there is no market for it. For calculating compensation, L&C should establish an amount it's willing to accept for the investment/s as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investment.

If L&C is able to purchase the illiquid investment/s then the price paid to purchase the holding will be allowed for in the current transfer value (because it will have been paid into the SIPP to secure the holding).

If L&C is unable, or if there are any difficulties in buying Mr T's illiquid investment/s, it should give the holding a nil value for the purposes of calculating compensation. In this instance L&C may ask Mr T to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the relevant holding. That undertaking should allow for the effect of any tax and charges on the amount Mr T may receive from the investment/s 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 T 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 this 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 T has made will need to be taken into account whether the notional value is established by the ceding provider or calculated as set out below. Any withdrawal out of the SIPP should be deducted at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. The same applies for any contributions made, these should be added to the notional calculation from the date they were actually paid, so any growth they would've enjoyed is allowed for.

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

I acknowledge Mr T 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 T's Reassignment of Rights require him to return compensation paid by the FSCS in the event this complaint is successful, and I understand 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 T received from the FSCS. And it will be for Mr T to make the arrangements to make any repayments he needs to make to the FSCS. However, I do think it's fair and reasonable to allow for a *temporary* notional deduction equivalent to the payment

Mr T actually received from the FSCS for a period of the calculation, so that the payment ceases to accrue any return in the calculation during that period.

As such, if it wishes, L&C may make an allowance in the form of a notional withdrawal (deduction) equivalent to the payment/s Mr T received from the FSCS following the claim about BlueInfinitas, and on the date the payment/s was actually paid to Mr T. 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 all FSCS payment 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 operators of Mr T'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 from the FSCS that Mr T 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 T'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 T's existing plan if monies hadn't been transferred (established in line with the above), less the current value of the SIPP (as at date of my final decision), is Mr T's loss.

Pay an amount into Mr T'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 T'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 T 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%. I note Mr T may have exhausted his tax-free allowance but if he has not, an adjustment should be made to the calculations to take account of any tax-free cash allowance that remains.

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 T to have to continue to pay annual SIPP fees to keep the SIPP open. So, if the SIPP needs to be kept open only because of the illiquid investment/s and is used only, or substantially, to hold the asset/s, then any future SIPP fees should be waived until the SIPP can be closed.

Interest

The compensation must be paid as set out above within 28 days of the date L&C receives notification of Mr T's acceptance of my final decision. Interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement if the compensation is not paid within 28 days.

Income tax may be payable on any interest paid. If L&C deducts income tax from the interest, it should tell Mr T how much has been taken off. L&C should give Mr T a tax deduction certificate if he asks for one, so he can reclaim the tax from HMRC if appropriate.

Pay Mr T £750 for the distress and inconvenience caused

As I said in my provisional decision, I note that Mr T has been very ill throughout his encounter with L&C. Further, this was his sole pension and his only source of savings for his retirement. I think given Mr T's particular circumstances including the impact this would have had on his pre-existing health issues, the matters raised in this complaint would have caused him a great deal of distress and inconvenience. So, I consider £750 is a fair and reasonable amount for L&C to pay him for the distress and inconvenience it has caused him.

My final decision

My final decision is that I uphold this complaint and order London and Colonial Services Limited to pay Mr T the amount as calculated and set out under 'Putting things right'.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 4 July 2024.

Yolande Mcleod
Ombudsman