DRN-4874937

## The complaint

Miss W complains that London & Colonial Services Limited ('L&C') allowed her to transfer monies from an existing pension arrangement into an L&C Self-Invested Personal Pension ('SIPP') and to invest in a Store First Limited ('Store First') investment. And that but for L&C's actions she would still enjoy the security of her previous pension arrangement.

Miss W complains about the due diligence L&C undertook and says that L&C didn't point out issues that were likely to cause her detriment and paid little attention to her best interests.

## What happened

I've outlined the key parties involved in Miss W's complaint below.

Involved parties

*L&C*

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

*The Pensions Office Limited ('TPO')*

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

*Store First*

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

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

In May 2014, the Self Storage Association of the UK ('SSA UK') issued a press release (amended in January 2015), detailing the outcome of a review it had commissioned Deloitte LLP to undertake of the marketing material made available to potential investors by Store First.

The release recommended that any potential investors in Store First storage units consider the following key points before taking any investment decision:

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

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

> *"SSA UK's investigations indicate that these storage units are being rented to the general public at approximately £18 - £21 per square foot including insurance. Normally the rent paid by a self-storage operator would be at most half of the income per square foot earned through storage fees. Presuming the Store First sites were at industry average occupancy levels, SSA UK believe that they would have to be earning £23.95 per square foot just to pay the guaranteed rent to investors, excluding operating costs such as insurance, staff, business rates, utilities, marketing and management fees for Store First. Furthermore, this does not factor in the losses incurred by each site as it takes some years to reach a mature occupancy level. During this time, Store First is obliged to pay the guaranteed returns to investors, yet there does not appear to be sufficient income from the operations of the business to fund these returns.*
>
> *In addition, the analysis SSA UK has seen indicates that the purchase price being paid per square foot by investors to Store First for these self-storage units taken together equates to a much higher value than they would be worth if the whole sites were sold as stand-alone self-storage stores.*
> *…*
> *…a very serious question arises over how Store First is funding the guaranteed returns to existing investors, considering the absence of bank funding and the likely level of losses that require funding in each new store. It may yet prove to be the case that the rental returns being paid to investors are in fact being funded from the sale proceeds of new units, and not the operation of the self-storage business."*

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

Following this the freehold, associated assets and goodwill of 15 storage centres were sold by the Official Receiver to a company called Store First Freeholds Limited. As I understand it, the self-storage units continued to be rented to end users and a company called Pay Store now manages the storage sites trading as Store First. The Official Receiver and Store First

Freeholds Limited agreed that the latter would accept any requests from investors to surrender their pods. Store First Freeholds Limited would cover its own costs of the surrender, but investors wouldn't receive any payment.

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

*Jackson Francis Ltd ('Jackson Francis')*

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

> *"Jackson Francis's free, unique and no-obligation Pension Transfer Service means you can quickly understand what switching your pension means for you – and whether or not it's worth it.*
>
> *One of our dedicated account managers will discuss the relevant information with you, and will collate details of charges from your existing provider, helping you to track old policies and understand the process.*
>
> *We will then introduce you to either traditional schemes or alternative investments that might match or surpass your existing provider. Where you invest is your choice, we are unbiased and simply give you the facts."*

It was also explained that:

> *"As you'd expect, deciding whether it's a good idea to switch your pension begins with looking at your existing arrangements. More often than not is does not take a great deal of detective work to realise just how badly most pensions are performing but if in doubt its always best to take advice.*
>
> *If you would like to speak to a financial advisor we will arrange one to call you with no obligation. Assessing the market for your options can be difficult but our unbiased 'just the facts' approach will help you to identify the right choice for your future. There are no up-front costs and of course, you will be under no obligation to transfer with us."*

In 2015 the British Broadcasting Corporation reported that:

> *"The Liverpool sales company Jackson Francis Ltd was paid through an intermediary by Store First to cold call people with "dormant pensions" - savings they had accrued under previous employers.*
>
> *From 2011, more than 1,000 people were persuaded by Jackson Francis staff to move these pensions into the Store First scheme.*
> *…*
> *Over two years, Store First owner* (Mr N) *paid £33m commission to Transeuro Worldwide Holdings Ltd, which funded Jackson Francis."*

<u>What happened?</u>

Miss W says that she was contacted by way of a cold call. And that following this an adviser from a firm that wasn't TPO visited at her home. Miss W recalls being told at the meeting that a transfer of her existing pension, and investing into Store Pods, was a lucrative opportunity and would increase the value of her pension monies.

A Storepod reservation form was completed for Miss W, this mentioned "*Storefirst.com self storage",* recorded Miss W's details and said that the agent was Jackson Francis. The location of the Storepods was noted and three plot numbers were shown, the total value of the units was £41,250. Miss W signed the form on 11 May 2012 the form was also signed by Jackson Francis on the same date.

We've also been provided with a letter from TPO addressed to Miss W that's dated 11 July 2012 (which I'll refer to as a suitability report) and, amongst other things, the report said that TPO didn't recommend Miss W transfer her Defined Benefit ('DB') pension scheme as the return needed to replicate the benefits being forfeited on transfer was unlikely to be achievable. TPO said that it had been informed by Jackson Francis that Miss W wanted to transfer her monies into a SIPP so as to make investments that weren't permitted within her existing arrangement. TPO said that if Miss W's overriding intention was to transfer then TPO would be happy to assist her with transferring her monies to L&C. It was explained that application forms for L&C were enclosed for completion and return to proceed.

TPO said that Miss W's acceptance of risk was *"medium"* and that the value of the pension benefits represented a major proportion of Miss W's financial wealth. TPO also said that alternative investments represented a higher risk than appeared appropriate for Miss W's risk profile. In its letter TPO didn't mention the Store First investment, it said that Miss W must take professional advice before making investments and that it wasn't able to assist with advice of this nature.

On 16 August 2012, Miss W signed an application form to open a SIPP with L&C and transfer monies in from her DB Scheme. It appears that this form was sent to L&C by TPO on 29 August 2012, along with a pension plan proposal form and a transfer information/discharge form for Miss W's ceding DB Scheme. The Independent Financial Adviser ('IFA') details are on page three of the form. The name of the IFA firm was recorded as The Pensions Office and Mr P is the named TPO contact. In the section immediately below these details, there are two boxes, one of which reads *"Advice given at point of sale to client"* and the other reads "*Advice not given at point of sale to client"*, in the copy of the SIPP application form that's been provided to us neither of these boxes has been ticked. Elsewhere in the form a box has been ticked to confirm that Miss W is looking to manage the fund herself.

We've also been provided with an L&C Open Pension Property investment form that Miss W signed on 16 August 2012. A brief description of the investment Miss W wished to acquire was given as *"Store First"*. A declaration at the end of the form confirmed, amongst other things that the investment may proceed and that Miss W had instructed surveyors, valuers and solicitors accordingly.

In L&C's checklist for the SIPP application, boxes have been ticked to confirm that TPO has an agency agreement with L&C and to confirm that, if the IFA wasn't authorised, L&C had ensured the transfer wasn't from a DB Scheme.

L&C wrote to Miss W on 20 September 2012 and then again on 28 September 2012, and said that it hadn't yet received a completed and signed Self Storage and Investment Purchase Request application to proceed with the Self Storage purchase. L&C asked Miss W to complete, sign and return the outstanding applications.

L&C wrote to Miss W and TPO on 23 January 2013 to confirm that her SIPP had been established as at 23 January 2013 and that a little over £47,000 had been transferred into the SIPP from Miss W's DB Scheme.

L&C wrote to Miss W on 29 January 2013 and said that it had received a reservation form in respect of the Self Storage investment. L&C said that its normal practice was to liaise with the financial adviser, but that it had been asked to contact Miss W directly and that it was enclosing forms that needed to be completed, signed and returned so as to proceed.

We've been provided with an L&C Investment Purchase Request form that Miss W signed on 30 January 2013. It was noted, amongst other things, in this form that:

- The investment was in Store First and the investment company's name was Jackson Francis.
- A box had been ticked to confirm that Miss W wasn't a certified (or self-certified) Sophisticated Investor.
- A box had been ticked to confirm that *"I have received no advice on the merits of my proposed investment and the investment decision is solely my responsibility".*
- The section to be completed by a financial adviser if advice had been given on the investment was left blank.
- Miss W signed the typed member declaration section towards the end of the form to confirm, amongst other things, that L&C hadn't provided advice on the investment, that the consumer had carried out their own due diligence into the investment and that the investment **may** be high risk and that there **may** not be an established market for selling the proposed holding. It was also stated that the responsibility for assessing the risks and merits of the investment rested with the consumer and any investment adviser they'd appointed, unregulated investments may not be protected by the FSCS and that the consumer indemnified L&C against any liabilities arising from the investment (bold my emphasis).

Miss W also signed an L&C Self Storage Commercial Property Investment form on 30 January 2013. This confirmed details of the units to be purchased and that the purchase price was £41,250. It was noted, amongst other things, in the form that:

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

Miss W also appears to have signed and dated a letter on 30 January 2013, confirming that she would like to proceed with the investment.

L&C wrote to Miss W on 4 February 2013 and said that it had received Self Storage forms from her. It was also explained that L&C was enclosing an updated Investment Purchase Request form for Miss W to complete and return. It was also enclosing a Self Storage Purchase Process document.

L&C wrote to Miss W on 20 February 2013, and again said that it hadn't yet received a completed and signed Self Storage and Investment Purchase Request application to proceed with the Self Storage purchase. L&C asked Miss W to complete, sign and return the outstanding applications.

In my provisional decision I asked L&C to provide me with a copy of the updated Investment Purchase Request form that Miss W completed alongside its response to my provisional decision. A copy of this document wasn't provided alongside L&C's response to my provisional decision.

A transaction history for Miss W's SIPP shows that a little over £47,000 was transferred into her L&C SIPP on 23 January 2013. And a little over £41,000 was then transferred to Hetherington Partnership (solicitors who were involved in the Store First purchase process) on 22 May 2013.

Miss W made a complaint to the FSCS about TPO. The FSCS investigated that complaint and paid Miss W £50,000 in total, this was by way of an initial interim payment followed by a later payment. The FSCS explained that its compensation limits didn't permit it to pay more than this and an FSCS calculation summary dated 31 October 2018 records that the FSCS had calculated Miss W's total losses as a little over £111,000. The FSCS subsequently gave Miss W a reassignment of rights in which, amongst other things, the FSCS explained it was transferring back to Miss W any legal rights it held against L&C.

Miss W's representatives complained to L&C on 1 February 2018 and, amongst other things, said that:

- L&C played an integral part in the demise of Miss W's SIPP investments.
- L&C's failings were numerous with reference to FCA historical reports and recommendations, Conduct of Business Sourcebook ('COBS') rules and the Principles for Businesses.
- On 11 July 2012, TPO recommended Miss W not to transfer monies from a DB Scheme but also included forms to enable her to transfer.
- TPO didn't contact Miss W to confirm whether she had received the report and understood its contents.
- A transfer value analysis report suggests that Miss W's monies had to grow by at least 8% to match the projected benefits under her existing DB Scheme.
- TPO's report records Miss W's risk profile as medium but a questionnaire she'd completed with her representatives suggests that her risk profile was low to medium.
- Miss W says that, at the time of the transfer, her knowledge and understanding of investments was *"medium".*
- Miss W says that the monies transferred from her DB Scheme represented all of her financial wealth and she didn't want to take unnecessary risks with these monies.
- The high risk nature of the unregulated illiquid investments that the transfer was being made to effect wasn't properly explained to Miss W.
- L&C should have recognised that the investment purchased within the SIPP was an unregulated collective investment scheme ('UCIS') or similar to a UCIS. And L&C should have ensured Miss W had received adequate warnings.
- It appears that L&C didn't request and obtain a copy of TPO's suitability report, or confirm that a report was presented and explained to Miss W.
- It was L&C's duty to point out issues that were likely to cause detriment to Miss W.
- It was L&C's duty to ensure Miss W received adequate warnings about the proposed investment.
- L&C hasn't complied with Principle 6 of the Principles for Businesses.
- Annual SIPP fees will continue while there are assets remaining in Miss W's L&C SIPP. With illiquid investments this means that Miss W could be forced to pay SIPP fees for many years to come.

- With regards to due diligence, L&C played a significant role in Miss W's losses. L&C was overenthusiastic in its drive for high volume business at all costs and paid little or no attention to Miss W's best interests.
- There appears to have been a lack of independent valuation of the assets Miss W purchased.
- L&C was complicit in allowing the transfer into the SIPP. But for L&C's involvement Miss W would still enjoy the security of her DB Scheme.

Additional background information

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

Miss W and/or her representative have told us, amongst other things, that:

- Miss W believes she may have carried out a search of potential investments, with a view to finding a product which would help increase her pension fund. Miss W recalls that, around the same time, she was contacted by way of a cold call. She can't remember going through TPO but a financial adviser who wasn't TPO had visited her home following the cold call. Miss W can't recall the name of the person who came or which company they represented.
- Miss W recalls being told at the meeting that a transfer of her existing pension and an investment into Store Pods was a lucrative opportunity and would increase her pension monies.
- Miss W doesn't recall having sight of TPO's suitability report at the time and she doesn't recall being advised not to proceed with the transfer. Contrary to the contents of the suitability report, Miss W recalls being advised that the proposed investment was a good way to increase her pension monies and that she should go ahead with the investment. That was the advice that she received, and it was the advice that she followed.
- Miss W's understanding of the Store Pods investment was that the Pods were rented out and that she would receive a share of the monies paid towards the use of the Pods as a return on her investment.
- Miss W recalls that she was told that a number of the Store Pods would be located at Cheshire Oaks, a well known shopping centre in Cheshire. Further, that she was advised that the Store Pods would be a lucrative and safe investment opportunity as there would be a lot of people interested in renting out the Pods.
- Miss W was advised repeatedly that the Store Pods would be a good and safe way to generate growth for her pension.
- The rental income had attracted her to the investment and Miss W's understanding was that the investment would provide rental income and capital would then be available from age 55.
- Miss W didn't understand the risks associated with the investment.
- Miss W had a low risk attitude towards investments at the time of the advice. She was simply looking to increase her pension to potentially generate savings and retire earlier than she'd expected, with as little risk as possible.
- If L&C had refused to allow the Store Pod investment, Miss W wouldn't have gone ahead with the transfer.

L&C has said to us, amongst other things, that:

- TPO was an FCA regulated financial advisory firm with specific specialist pension transfer advice permissions.

- L&C's understanding was that clients would approach TPO for advice about whether a transfer from a DB Scheme was suitable.
- There were no set expectations of the number of introductions L&C would receive from TPO each month.
- L&C received 42 introductions from TPO and about 60% of these involved transfers in from DB Schemes.
- From a sample of 24 introductions over 80% of consumers introduced invested in Store First.
- TPO's introductions constituted 3.4% of L&C's new business between the dates of the first and last introduction received from TPO.
- TPO's first introduction to L&C was on 13 August 2012. And the number of clients introduced by TPO varied each month, with one in August 2012, 15 in September 2012 and 14 in October 2012. The number of introductions then dropped to two or three per month thereafter until April 2013.
- Following a system migration, and despite a substantial interrogation of its electronic records, L&C has been unable to retrieve evidence of checks it undertook on TPO. But L&C can confirm it would have checked the FCA register.
- Following a system migration, L&C is unable to provide any records of any discussions it had with TPO about the client process or the business that TPO was referring.
- L&C says that a terms of business was in place when L&C accepted TPO as an introducer on 6 August 2012, but we've not been provided with a copy of this.
- As an execution-only SIPP Provider, L&C doesn't have permissions to advise or comment on the suitability of transactions.
- L&C didn't request copies of suitability reports TPO provided to clients.
- Miss W appointed TPO to provide holistic advice, which included advice on the establishment of the SIPP, the pension transfer and the investment.
- L&C understood that TPO would advise on the underlying investments.
- Following a system migration, L&C is unable to provide records of all of the searches it would have carried out into Store First and it's provided what it's been able to retrieve – this included a report from a firm named Enhanced Support Solutions Limited, which I discuss in more detail later in this decision.

An investigator reviewed Miss W's complaint and concluded it should be upheld. The investigator said that, in light of the investment marketing literature, L&C should have been concerned that consumers were being misled about the returns and risks associated with the Store First investment and that there was a risk of consumer detriment. Further, that L&C didn't act in a fair and reasonable manner in accepting the Store First investment within Miss W's SIPP. And that had L&C acted fairly and reasonably it shouldn't have accepted Miss W's application to open a SIPP with it.

Solicitors for L&C disagreed with the investigator's view and, amongst other things, said that:

- An Investment Purchase Request form of 27 September 2012 said, amongst other things, that:
    - The investment may be high risk and there may not be an established market for sale.
    - Unregulated investments may not be protected by the FSCS.
    - L&C wasn't responsible for the assessment of the merits of any particular investment, or the integrity and capability of the persons involved with promoting or administering it or the associated risks.
    - Responsibility for the decision to purchase the investment rested solely with Miss W or her appointed representative.

- The documentary evidence shows that Miss W was aware of the risks and nevertheless decided to proceed.
- L&C's conduct wasn't causative of any loss and no redress should be payable as a consequence.
- Where a complainant's memory contradicts the contemporaneous documents, case law has established that the documents should take precedence as a record due to the fallibility of memory – *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560.
- An oral hearing was requested. L&C should be permitted to question Miss W's position, so far as it contradicts what she said at the time.
- The relationships in this case are similar to those in the *Adams v Options* case, but the investigator's view doesn't explain why we've reached a different conclusion to that arrived at in *Adams.*
- The investigator's view imposes a duty on L&C to decide whether to accept or reject business brought to it by a customer requesting an execution-only service.
- The investigator's view extends the scope of the duty owed by L&C beyond what was envisaged by the parties.
- A breach of the Principles cannot, of itself, give rise to any cause of action at law.
- The ambit and application of the Principles, and such duties as may be imposed on L&C by these, fall to be construed in light of the COBS rules applicable to L&C, L&C's regulatory permissions, L&C's contractual arrangements and the statutory objective that consumers should take responsibility for their decisions.
- It was said in *Adams* that reports, guidance and correspondence issued after the events at issue couldn't be applied to Options' conduct at the time. So, publications issued after the transactions in this case shouldn't have a bearing on the complaint.
- Even if the 2009 Thematic Review Report had been statutory guidance made under FSMA S.139A (which it wasn't), the breach of such statutory guidance wouldn't give rise to a claim for damages under FSMA S.138D.
- The FCA's Enforcement Guide says that *"Guidance is not binding on those to whom the FCA's rules apply. Nor are the variety of materials (such as case studies showing good or bad practice, FCA speeches and generic letters written by the FCA to Chief Executives in particular sectors) published to support the rules and guidance in the Handbook. Rather, such materials are intended to illustrate ways (but not the only ways) in which a person can comply with the relevant rules."*
- Regulatory publications can't alter the meaning, or the scope, of the obligations imposed by the Principles.
- *Adams* held that duties imposed by COBS can't all apply to all firms in all circumstances.
- Neither the obligations under COBS 14.2.3R and COBS 14.3 to provide clients with product information, nor the obligation under COBS 19.1.2R to provide clients with pension product information, apply to execution-only SIPP providers.
- The Principles must necessarily be applied within the context of the specific duties imposed by the Rules (together with other factors), not the other way around.
- Miss W was aware that L&C would act on an execution-only basis and wouldn't accept responsibility for the quality of the investment business.
- If L&C really had the obligations of due diligence set out in the investigator's view and had acted in accordance with them then it would have been required to advise on investments, which was contrary to its regulatory permissions.
- The relationships in this case are similar to those in *Adams*, the distinguishing factor is that TPO wasn't an unauthorised introducer.
- With an execution-only service, it would be unfair if the SIPP provider couldn't rely on representations made by the consumer when signing the contractual documentation.

- Amongst other things, the judge in *Adams* held that in order to identify the extent of the regulatory duties imposed on Carey, "*one has to identify the relevant factual context"* and that *"the key fact ... in the context is the agreement into which the parties entered, which defined their roles in the transaction"*.
- The judge also said that *"there is a very plain inconsistency between the contract which was entered into between it and the claimant and the duties [under COBS 2.1.1R] which the claimant now suggests that the defendant owed to him."*
- And that *"there was… [no] duty on [Carey]… to consider the suitability or appropriateness of a SIPP or the underlying investment. The contract between [the parties] makes that clear."*
- Further, that *"a duty to act honestly, fairly and professionally in the best interests of the client, who is to take responsibility for his own decisions, cannot be construed...as meaning that the terms of the contract should be overlooked, that the client is not to be treated as able to reach and take responsibility for his own decisions and that his instructions are not to be followed."*
- In *Adams* the FCA agreed that the function of a firm, as determined by contract, would govern what it had to do to comply with its duties under the FCA Handbook.
- Insufficient weight has been given to contractual arrangements and the demarcation of roles and responsibilities. The documents setting out the contractual relationship between the parties make it clear that L&C was acting on an execution-only basis.
- The investigator's view runs contrary to *Adams* by suggesting that, notwithstanding the clear contractual terms, L&C owed due diligence obligations under the Principles.
- The Financial Ombudsman Service is attempting to use the Principles to circumvent the *Adams* decision.
- The ratio of the *Adams* case, as regards privacy of contract and the interpretation of the COBS Rules, remains relevant and good law regardless of the position on whether or not Miss W would have proceeded.
- The Financial Ombudsman Service must take into account the relevant case law and, if this is deviated from, must set out why – *R. (on the application of Aviva Life and Pensions (UK) Ltd) v Financial Ombudsman Service* [2017] EWHC 352 (Admin) and Jay J's comments at paragraph 73 of that judgment were referenced.
- It's not fair or reasonable to determine the complaint by reference to the FCA publications and to do so only exacerbates the problem referred to by Jay J in *Aviva*.
- At the time of the transaction complained of there was no obligation on a customer to take advice on the transfer of a pension.
- It's not fair or reasonable to use the Principles to impose a duty that goes beyond that accepted and agreed by the parties.
- The Principles can't give rise to a cause of action if breached, and consideration of the Principles must be via the appropriate COBS rules applying to the transaction.
- The investigator's view fails to have regard to the general principle that consumers should take responsibility for their decisions, the fundamental principle of freedom of contract and to the authority of *Adams* and *Kerrigan v Elevate Credit International Ltd* [2020] C.T.L.C. 161.
- The investigator's view enables Miss W to recover against L&C for losses flowing from non-contractual obligations which were inconsistent with, and contrary to, the express obligations in the parties' contractual arrangements.
- Miss W signed disclaimers confirming that she knew of the high-risk nature of the investment and that it was illiquid and may be difficult to sell.
- Miss W was made fully aware that L&C would take no responsibility for her decision to purchase the investment.
- Miss W took advice on the investment and any decision as to whether or not to proceed was presumably based on this advice and/or Miss W's own assessment of the potential risk/reward.
- In *Adams* the Store First investment being high risk didn't make it manifestly

unsuitable.

- The level of due diligence imposed by the Financial Ombudsman Service goes far beyond what was agreed between the parties.
- L&C couldn't have communicated the results of any assessment of an investment without putting itself in breach of its permissions.
- The suitability of a high risk investment depends on the particular financial circumstances of the particular customer and their attitude to risk.
- Suggestions that L&C should have looked into the viability of the investment, or how returns would be generated isn't fair or reasonable, these were roles for Miss W's financial adviser.
- There is nothing to indicate that Miss W wouldn't still have gone ahead had L&C refused the business.
- A number of other SIPP providers at the time were accepting such investments and it's most likely that if L&C had rejected the application the transaction would still have been effected with a different provider.
- There is a real unfairness if an execution-only SIPP provider is liable for the poor investment choices of consumers.

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

- I'm able to fairly determine Miss W's complaint without convening a hearing.
- L&C should have been conducting checks – due diligence – on introducers and investments to make informed decisions about accepting business. This obligation was a continuing one.
- There *was* a significant risk of consumer detriment associated with the introductions L&C received from TPO. And had L&C undertaken sufficient due diligence into TPO, it ought to have had real concerns that TPO wasn't acting in customers' best interests, and wasn't meeting its regulatory obligations.
- L&C didn't undertake appropriate steps, or draw reasonable conclusions, from information that would have been available to it had it undertaken adequate due diligence into the Store First investment *before* it accepted that investment into its SIPPs.
- L&C didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Miss W fairly by accepting her business from TPO.
- And, separately, L&C also didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Miss W fairly, by accepting the Store First investments into her SIPP.
- L&C didn't meet its obligations or good industry practice at the relevant times, and allowed Miss W to be put at significant risk of detriment as a result.
- It's fair and reasonable for L&C to compensate Miss W for the loss she's suffered as a result of L&C accepting her business from TPO and permitting her to invest her L&C SIPP monies in Store First.

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

- The ombudsman's conclusions are inconsistent with the terms of the contract between the parties, the relevant COBS Rules and the restrictions on L&C's permissions.

- No fair or reasonable reading of the Principles could require L&C to conduct due diligence of the nature suggested by the ombudsman.
- L&C considers that there are a number of points, set out in its previous submissions, that haven't been addressed or have been given insufficient weight.
- Of particular note is the ombudsman's failure to take account of the law and the ombudsman's departure from legal precedent.
- The ombudsman is creating new due diligence obligations in a way that is contrary to the FCA's publications at the time.
- The ombudsman's reliance on various FCA publications is misplaced and, if anything, supports L&C's position.
- There's a real unfairness if an execution-only SIPP provider is liable for the poor investment choices of consumers and the failures of other regulated entities, over which it put in place contractual controls that the regulated entity breached.
- An execution-only SIPP provider's fees and charges are based on the provision of execution-only services. And its business is structured on the basis that:
    - it isn't investigating the suitability of the underlying investments (other than to ascertain that they are capable of being held within a UK registered pension scheme such as a SIPP).
    - it isn't warning or advising clients as to whether a SIPP or the underlying investment is suitable or appropriate for the client (as to do so would put it in breach of its own regulatory permissions).
- Where a consumer chooses an execution-only service, it would be unfair if the SIPP provider wasn't able to rely on express representations made by the consumer when signing the contractual documentation, and further to hold L&C responsible in circumstances where the failure is that of TPO.

Miss W agreed with the provisional decision and had no further comments to add.

**What I've decided – and why**

Oral hearing

As I've referenced above, in its response to the investigator's view on the complaint L&C's representatives noted, amongst other things, that they were requesting an oral hearing on this case.

**The DISP rules on hearings**

As a preliminary point, the Financial Ombudsman Service provides a scheme under which certain disputes may be resolved quickly and with minimum formality (see section 225 of the Financial Services and Markets Act 2000 ('FSMA')). And, the Dispute Resolution rules found in the FCA Handbook under which we operate ('the DISP rules') provide the following in relation to the resolution of complaints by the ombudsman and hearings:

DISP 3.5.5R

> *"If the Ombudsman considers that the complaint can be fairly determined without convening a hearing, he will determine the complaint. If not, he will invite the parties to take part in a hearing. A hearing may be held by any means which the Ombudsman considers appropriate in the circumstances, including by telephone. No hearing will be held after the Ombudsman has determined the complaint."*

DISP 3.5.6R

*"A party who wishes to request a hearing must do so in writing, setting out:*

*(1) the issues he wishes to raise; and*
*(2) (if appropriate) any reasons why he considers the hearing should be in private;*

*so that the Ombudsman may consider whether:*

*(3) the issues are material;*
*(4) a hearing should take place; and*
*(5) any hearing should be held in public or private."*

DISP 3.5.7G

*"In deciding whether there should be a hearing and, if so, whether it should be in public or private, the Ombudsman will have regard to the provisions of the European Convention on Human Rights."*

Given my statutory duty under FSMA to resolve complaints quickly and with minimum formality, I'm satisfied that it would normally not be necessary for me to hold a hearing in most cases (see the Court of Appeal's decision in *R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service* [2008] EWCA Civ 642).

The key question for me to consider in making my decision on a hearing request is whether or not *"the complaint can be fairly determined without convening a hearing".*

**My consideration of the hearing request**

In accordance with my duties under FSMA and the relevant DISP provisions as set out above, I've carefully considered the request for a hearing on this complaint. And, I'm satisfied that a hearing would only be required in this case if I thought the complaint couldn't be fairly determined without convening one.

As L&C will be aware, we don't operate in the same way as the Courts. Unlike a Court, we have the power to carry out our own investigation. And, if particular information is required to decide a complaint fairly, in most circumstances we're able to request this information from either party to the complaint, or even from a third party.

DISP 3.5.8R provides:

*"The Ombudsman may give directions as to:*

*(1) the issues on which evidence is required;*
*(2) the extent to which evidence should be oral or written; and*
*(3) the way in which evidence should be presented."*

This means I, as the ombudsman determining this complaint, am able to decide the issues on which evidence is required and how that evidence should be presented. And I'm not restricted to oral cross-examination to further explore points or to test the veracity of information that's been provided to me.

There are a number of issues that are in dispute in this complaint, but it is not uncommon for us to deal with complaints where the parties involved disagree as to what has happened and/or with the findings we've reached. But this doesn't necessarily mean that a hearing is required to fairly determine the complaint.

We generally decide complaints on the basis of the paperwork and submissions made either in writing or over the phone. We've received written responses and documentary evidence from both parties during our investigation of this complaint, and I'm able to consider that evidence fully. A number of written submissions have been made over the course of this complaint and I don't consider a hearing will necessarily make a difference or cause Miss W's recollections of events that occurred many years ago to change.

I also want to emphasise that a hearing is only an opportunity for me to ask the parties to provide oral evidence. A hearing wouldn't normally provide L&C with the opportunity to cross-examine evidence/testimony provided. Our hearings don't follow the same format as a Court. We're inquisitorial in nature and not adversarial. The purpose of any hearing would be for me to obtain any further information from the parties that I require in order to fairly determine the complaint.

Where I considered further evidence was needed on any point, I've been able to ask the relevant party for the evidence I required. And the parties to this complaint have been given ample opportunity to make submissions at every stage of the process.

L&C has been invited to make submissions to us on a number of occasions during our investigation of this complaint.

We initially wrote out to L&C to ask for its submissions on this complaint on 1 September 2019. And an investigator issued a provisional assessment on this complaint on 14 May 2021. Later the same investigator wrote to L&C on 17 June 2021 and invited it to submit any further points or information it would like the ombudsman to consider. I also gave L&C an opportunity to make further representations for me to consider in response to my provisional decision. So, L&C has been given a number of opportunities to make representations.

DISP 3.5.4R provides:

> *"If the Ombudsman decides that an investigation is necessary, he will then:*
>
> > *(1) ensure both parties have been given an opportunity of making representations;*
> > *(2) send both parties a provisional assessment, setting out his reasons and a time limit within which either party must respond; and*
> > *(3) if either party indicates disagreement with the provisional assessment within that time limit, proceed to determination"*

I'm satisfied this procedure has been followed in this case.

Having taken all of the evidence and arguments into account, I remain satisfied that I'm able to fairly determine Miss W's complaint without convening a hearing. In deciding this, I have had regard to the parties' rights under the European Convention on Human Rights.

**Merits**

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

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.

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

**Relevant considerations**

Having carefully reconsidered all of the evidence, including the submissions in response to my provisional decision, I'm still of the view that the relevant considerations in this case are those that I'd previously set out in my provisional decision. As such, and while taking into account all of the submissions that have been made, I've largely repeated what I'd said about this point in my provisional decision.

I've carefully taken account of the relevant considerations to decide what's fair and reasonable in the circumstances of this complaint.

In my view, the FCA's Principles for Businesses are of particular relevance. The Principles for Businesses, which are set out in the FCA's Handbook "*are a general statement of the fundamental obligations of firms under the regulatory system"* (PRIN 1.1.2G – at the relevant date). Principles 2, 3 and 6 provide:

> *"Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.*
>
> *Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.*
>
> *Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly."*

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

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

And at paragraph 77 of BBA Ouseley J said:

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

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

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

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

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

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

On 18 May 2020, the High Court handed down its judgment in the case of *Adams v Options SIPP* [2020] EWHC 1229 (Ch). Mr Adams subsequently appealed the decision of the High Court and, on 1 April 2021, the Court of Appeal handed down its judgment in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474. I've taken account of both these judgments and the judgment in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 1188 when making this decision on Miss W's case.

I've considered whether *Adams* means that the Principles should not be taken into account in deciding this case, and I'm of the view that it doesn't. I note that the Principles for Businesses didn't form part of Mr Adams' pleadings in his initial case against Options SIPP. And, HHJ Dight didn't consider the application of the Principles to SIPP operators in his judgment. The Court of Appeal also gave no consideration to the application of the Principles to SIPP operators. So, neither of the judgments say anything about how the Principles apply to an ombudsman's consideration of a complaint. But, to be clear, I don't say this means *Adams* isn't a relevant consideration at all. As noted above, I've taken account of the *Adams* judgments when making this decision on Miss W's case.

I acknowledge that COBS 2.1.1R (*A firm must act honestly, fairly and professionally in accordance with the best interests of its client)* overlaps with certain of the Principles, and that this rule was considered by HHJ Dight in the High Court case. Mr Adams pleaded that

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

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

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

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

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

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

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

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

However, I think it's important to emphasise that I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And, in doing that, I'm required to take into account relevant considerations which include: law and regulations; 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.

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

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

**The regulatory publications**

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

- The 2009 and 2012 Thematic Review Reports.
- The October 2013 finalised SIPP operator guidance.
- The July 2014 *"Dear CEO"* letter.

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

**The 2009 Thematic Review Report**

The 2009 Report included the following statement:

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

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

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

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

- *Confirming, both initially and on an ongoing basis, that intermediaries that advise*

*clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm's clients, and that they do not appear on the FSA website listing warning notices.*

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

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

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

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

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

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

**The later publications**

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

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

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

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

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

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

- *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions*

*to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for un-authorised business warnings.*

- *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*

- *Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.*

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

- *Identifying instances when prospective members waive their cancellation rights and the reasons for this.*

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

- *conducting independent verification checks on members to ensure the information they are being supplied with, or that they are providing the firm with, is authentic and meets the firm's procedures and are not being used to launder money*

- *having clear terms of business agreements in place which govern relationships and clarify responsibilities for relationships with other professional bodies such as solicitors and accountants, and*

- *using non-regulated introducer checklists which demonstrate the SIPP operators have considered the additional risks involved in accepting business from non-regulated introducers*

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

*"**Due diligence***

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

- *ensuring that all investments permitted by the scheme are permitted by HMRC, or where a tax charge is incurred, that charge is identifiable, HMRC is informed and the tax charge paid*

- *periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme*

- *having checks which may include, but are not limited to:*

    - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*
    - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*

- *ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified*

- *good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and*

- *ensuring these benchmarks clearly identify those instances that would lead a firm to decline the proposed business, or to undertake further investigations such as instances of potential pension liberation, investments that may breach HMRC tax-relievable investments and non-standard investments that have not been approved by the firm"*

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

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

- *correctly establishing and understanding the nature of an investment*

- *ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation*

- *ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable)*

- *ensuring that an investment can be independently valued, both at point of purchase and subsequently, and*

- *ensuring that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc.)*

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

I acknowledge that the 2009 and 2012 Thematic Review Reports and the *"Dear CEO"* letter aren't formal guidance (whereas the 2013 finalised guidance is). However, the fact that the

reports and *"Dear CEO"* letter didn't constitute formal guidance doesn't mean their importance should be underestimated. They provide a reminder that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it's treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications which set out the regulators' expectations of what SIPP operators should be doing also go some way to indicate what I consider amounts to good industry practice, and I'm therefore satisfied it's appropriate to take them into account.

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

At its introduction the 2009 Thematic Review Report says:

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

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

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

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

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

The remainder of the publications also provide a *reminder* that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and to produce the outcomes envisaged by the Principles. In that respect, these publications also go some way to indicate what I consider amounts to good

industry practice at the relevant time. I'm therefore satisfied it's appropriate to take them into account too.

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

It's also clear from the text of the 2009 and 2012 Thematic Review Reports (and the *"Dear CEO"* letter in 2014) that the regulator expected SIPP operators to have incorporated the recommended good practices into the conduct of their business already. So, whilst the regulators' comments suggest some industry participants' understanding of how the good practice standards shaped what was expected of SIPP operators changed over time, it's clear the standards themselves hadn't changed.

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

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

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

> *"It has been brought to the FSA's attention that some financial advisers are giving advice to customers on pension transfers or pension switches without assessing the advantages and disadvantages of investments proposed to be held within the new pension. In particular, we have seen financial advisers moving customers' retirement savings to self-invested personal pensions (SIPPs) that invest wholly or primarily in high risk, often highly illiquid unregulated investments (some which may be in Unregulated Collective Investment Schemes).*
> *…*
> *Financial advisers using this advice model are under the mistaken impression that this process means they do not have to consider the unregulated investment as part of their advice to invest in the SIPP and that they only need to consider the suitability of the SIPP in the abstract. This is incorrect.*
>
> *The FSA's view is that the provision of suitable advice generally requires consideration of the other investments held by the customer or, when advice is given on a product which is a vehicle for investment in other products (such as SIPPs and*

*other wrappers), consideration of the suitability of the overall proposition, that is, the wrapper and the expected underlying investments in unregulated schemes."*

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

To be clear, I don't say the Principles or the publications obliged L&C to ensure the transactions were suitable for Miss W. It's accepted L&C wasn't required to give advice to Miss W, and couldn't give advice. And I accept the publications don't alter the meaning of, or the scope of, the Principles. But as I've said above they're evidence of what I consider to have been good industry practice at the relevant time, which would bring about the outcomes envisaged by the Principles. As L&C notes from the FCA's Enforcement Guide, publications of this type *"illustrate ways (but not the only ways) in which a person can comply with the relevant rules"*. And so it's fair and reasonable for me to take them into account when deciding this complaint.

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

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

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

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

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

Ultimately, what I'll be looking at here is whether L&C took reasonable care, acted with due diligence and treated Miss W fairly, in accordance with her best interests. And what I think is fair and reasonable in light of that. And I think the key issue in Miss W's complaint is whether

it was fair and reasonable for L&C to have accepted Miss W's SIPP application and Store First application in the first place. So, I need to consider whether L&C carried out appropriate due diligence checks on TPO and the Store First investment before deciding to accept Miss W's applications.

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

**The contract between L&C and Miss W**

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 Miss W or otherwise have ensured the suitability of the SIPP or Store First investment for her. I accept that L&C made it clear to Miss W that it wasn't giving, nor was it able to give, advice and that it played an execution-only role in her SIPP investments. And that forms Miss W signed confirmed, amongst other things, that losses arising as a result of L&C acting on her instructions were her responsibility.

I've not overlooked or discounted the basis on which L&C was appointed. And my decision on what's fair and reasonable in the circumstances of Miss W'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 Miss W on the suitability of the SIPP or Store First investment.

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

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

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

As set out above, to comply with the Principles, L&C needed to conduct its business with due skill, care and diligence; organise and control its affairs responsibly and effectively; and pay due regard to the interests of its clients (including Miss W) and treat them fairly. Its obligations and duties in this respect weren't prescriptive and depended on the nature of the circumstances, information and events on an ongoing basis.

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

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

Having carefully reconsidered all of the evidence on this point, including the submissions in response to my provisional decision, I'm still of the view that I'd previously set out in my provisional decision. As such, and while taking into account all of the submissions that have been made, I've largely repeated what I'd said about this point in my provisional decision.

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

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

L&C also told us in that case that its directors from the relevant period had confirmed that its policy was that applicants effecting a pension transfer, as Miss W was here, had to have had advice made available to them. And that it was then for the applicant to choose whether to take up the intermediary's offer of advice. In my provisional decision I explained that if L&C's policy on this point had changed before it received Miss W's application that L&C should confirm and clarify this alongside its response to my provisional decision. In response to my provisional decision, L&C hasn't stated that its policy had changed before it received Miss W's application.

I note that in L&C's New Business Checklist for Miss W's SIPP application, it's mentioned that if the IFA isn't authorised L&C had to ensure that the transfer wasn't from a DB Scheme. L&C has previously provided the Financial Ombudsman Service with evidence to show that it checked TPO's entry on the FSA register on 30 August 2012. And I can see that TPO's permissions included advising on Pension Transfers and Pension Opt Outs.

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

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

As part of our investigation, L&C was asked a series of detailed questions about the due diligence it undertook into the introducer (which was TPO for the SIPP). This included information about, amongst other things, what L&C understood TPO's business model/client process to involve, how introductions were made, whether TPO was advising on the transfer and/or the underlying investments, whether L&C's understanding was advice would be given by TPO and whether L&C had asked to see any suitability reports/pension transfer reports provided to clients TPO was introducing, details about the volume of business TPO introduced to L&C, the period this occurred over, the percentage of the introductions that involved occupational pension transfers and the percentage of the introductions where applicants were to invest in non-mainstream investments. We've received some information from L&C. However, L&C has provided limited responses in respect of some our questions, referencing the fact that it's not been able to find contemporaneous records on its systems

and it also hasn't replied to all of the questions we've asked – for example, we've not had confirmation of what number introduction Miss W was from the total number of clients introduced to it by TPO.

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

L&C has provided us with very limited information about its relationship with TPO. From that information which has been provided, I'm satisfied that L&C did take *some* steps towards meeting its regulatory obligations and good industry practice. However, I don't think those steps we've seen evidence of went far enough, or were sufficient, to meet L&C's regulatory obligations and good industry practice.

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

- The SIPP business introduced by TPO had anomalous features – it appears to have been high risk business, including a number of DB Scheme transfers where monies were ending up invested in unregulated and esoteric investments post-transfer.
- TPO had the necessary permissions to give full advice on the business it was introducing. However, TPO wasn't giving consumers it was introducing to L&C (like Miss W) advice on the suitability, or otherwise, of the high risk unregulated Store First investment that their L&C SIPPs were being established, and that their monies were being transferred to L&C, to effect.
- Unregulated firms were promoting the Store First investments.

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

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

**Anomalous features**

<u>The type of investments being made by TPO-introduced consumers</u>

We've previously asked L&C in this complaint about the percentage of introductions it received from TPO where applicants were to invest in non-mainstream investments. In

response L&C said that, based on a sample of consumers introduced by TPO it had checked, over 80% of the consumers in the sample had invested in Store First.

L&C's comments on the sample appears to be consistent with complaints we've received against L&C where TPO was the introducer. I'm satisfied that in *most,* if not all, of these complaints the consumers ended up with SIPP monies invested in Store First. So, based on the evidence I've seen, I'm satisfied that the vast majority of consumers introduced to L&C by TPO ended up with SIPP monies invested in higher risk non-standard assets like the Store First investment.

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

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

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

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

Volume and nature of business introduced

L&C has confirmed that it received 42 introductions from TPO and that the first member was introduced in August 2012 and that it received the first introduction on 13 August 2012. TPO submitted a SIPP application to L&C for Miss W towards the end of August 2012 and L&C subsequently sent Miss W a letter confirming that her SIPP had been established on 23 January 2013.

I asked L&C to clarify what number introduction Miss W was from the total number of clients introduced to it by TPO in its response to my provisional decision. L&C hasn't done so.

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

It's not clear to me the precise date on which L&C accepted Miss W's SIPP application. But as it doesn't appear that Miss W's business was introduced to TPO on 13 August 2012, and as L&C has said the next introduction it received after 13 August 2012 was the following

month, I've proceeded on the basis that Miss W was (at the very earliest) one of the September 2012 introductions that L&C referred to in its response to our questions.

It's clear that L&C had access to information about the number and nature of introductions that TPO made, as it's previously been able to provide us with details about this when requested.

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

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

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

Miss W's SIPP application form included TPO's details. I note that in the copy of Miss W's SIPP application form that has been provided to us, the box that said "A*dvice given at point of sale to client"* wasn't ticked. And I think from the point it received this SIPP application form, and in the absence of having sought clarification from TPO and/or Miss W on whether the *"Advice given"* or *"Advice not given"* box ought to have been ticked (as neither were), L&C couldn't reasonably be sure about whether TPO had given Miss W *any* advice on the establishment of the SIPP.

The SIPP application form wasn't the only form L&C was receiving from TPO-introduced consumers like Miss W. As I mentioned above, I can't see that we've received a copy of the updated Investment Purchase Request form that L&C first asked Miss W for in its letter of 4 February 2013. However, given that L&C was requesting this, and given that the purchase of the Store First investments did subsequently proceed, it seems more likely than not L&C did receive an updated Investment Purchase Request form from Miss W.

While we've not yet been provided with a copy of the updated Investment Purchase Request form, I've seen a copy of the original Investment Purchase Request from that Miss W signed on 30 January 2013 and returned to L&C. And in this form it's recorded that Miss W had received no advice on the merits of the proposed Store First investment. And the section for the adviser to complete if advice had been given was left blank, which is consistent with some other Investment Purchase Request forms that we've received on different complaints for different TPO-introduced consumers who also invested L&C SIPP monies in Store First. With those forms I've seen also having a question about whether advice had been provided on the proposed investment and a corresponding section for the adviser to complete *if* advice had been given. And, in none of the forms I've seen, was the section to be completed by an adviser, if advice had been given, completed.

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

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

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

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

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

> *"When advising a retail client who is, or is eligible to be, a member of a defined benefits occupational pension scheme whether to transfer or opt-out, a firm should start by assuming that a transfer or opt-out will not be suitable. A firm should only then consider a transfer or opt-out to be suitable if it can clearly demonstrate, on contemporary evidence, that the transfer or opt-out is in the client's best interests".*

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

**The involvement of an unregulated business**

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

Having carefully considered the available evidence, including Mr P's comments referenced above, and Investment Purchase Request forms I've seen in other complaints against L&C where TPO was the introducer, I think it's more likely than not that most TPO-introduced L&C consumers were doing the same thing. By which I mean that SIPP application forms to establish an L&C SIPP were being submitted for TPO-introduced L&C consumers, pension monies were then being transferred into the newly established L&C SIPPs for those consumers, and, subsequently, they were submitting an Investment Purchase Request form to L&C to invest in Store First and where the section of that form for an adviser to complete if advice had been proffered was blank.

If L&C believed that TPO was advising consumers on the Store First investment, I think L&C ought to have questioned this anomaly in the Investment Purchase Request forms it was receiving. And I think it ought to have done this from the point in time that it first received such a form from a TPO-introduced consumer. That would have been a fair and reasonable step for L&C to take in the circumstances. And, had L&C done so, I think it's more likely than not that TPO would have confirmed what it was already clearly stating in consumers' suitability reports about the fact that it was giving no advice on the specific alternative

investments that some consumers' (like Miss W's) pension monies were being transferred to L&C to effect.

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

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

Miss W has said that a financial adviser who wasn't TPO visited her home following a cold call. Miss W can't recall the name of the person who came or which company they represented. Miss W has also said she was told at the meeting that transferring her existing pension and investing in Store Pods was a lucrative opportunity and would increase the value of her pension monies.

It's apparent that a Storepod reservation form was signed by both Miss W and Jackson Francis on 11 May 2012, TPO also says in its suitability report that it had been informed by Jackson Francis that Miss W wanted to transfer her monies into a SIPP so as to make investments that weren't permitted within her existing arrangement. It's also explained that Miss W must take professional advice before making investments and that TPO wasn't able to assist with advice of this nature.

On balance, and having carefully considered all of the available evidence, I think it's more likely than not that it was Jackson Francis who met with and promoted the Store First investment to Miss W.

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

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

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

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

Having carefully reconsidered all of the evidence on this point, including the submissions in response to my provisional decision, I'm still of the view that I'd previously set out in my provisional decision. As such, and while taking into account all of the submissions that have been made, I've largely repeated what I'd said about this point in my provisional decision.

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

Requesting information directly from TPO

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

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

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

> *"Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with."*

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

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

And, on balance, I think it's more likely than not that if L&C had checked with TPO and asked the type of questions I've mentioned above that TPO would have provided a full response to the information sought. In the alternative, if TPO had been unwilling to answer such questions if they'd been put to it by L&C, I think L&C should simply then have declined to accept introductions from TPO.

Making independent checks

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

The 2009 Thematic Review Report said that:

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

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

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

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

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

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

Having carefully reconsidered all of the evidence on this point, including the submissions in response to my provisional decision, I'm still of the view that I'd previously set out in my provisional decision. As such, and while taking into account all of the submissions that have been made, I've largely repeated what I'd said about this point in my provisional decision.

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

- TPO was having business referred to it by introducers like Jackson Francis, and it was then introducing business to L&C.

- TPO wasn't offering consumers it was introducing to L&C (like Miss W) advice on the suitability, or otherwise, of the high risk unregulated Store First investment that their L&C SIPPs were being established, and that their monies were being transferred to L&C, to effect.

- Consumers might have been 'sold' on the idea of transferring pension monies so as to invest in Store First before the involvement of any regulated parties.

- The anomalous features I've mentioned above carried a significant risk of consumer detriment.

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

Had L&C carried out the due diligence I've mentioned above, I think it should have identified that consumers (like Miss W) introduced by TPO hadn't been offered, or received, regulated advice from TPO on the suitability, or otherwise, of the high risk unregulated investment that their pension monies were being transferred to L&C so as to effect.

In Miss W's case, TPO's suitability report says that TPO doesn't recommend she transfer her DB scheme, but TPO still proactively offers to assist in effecting the transfer if Miss W wants to transfer to make one or more investments that aren't permitted in her (then) existing pension arrangement. TPO mentions that Miss W's acceptance of risk was *"medium"* and that alternative investments represented a higher risk than appeared appropriate.

TPO states that it had been *"advised"* by Jackson Francis that Miss W wanted to transfer her monies into a SIPP so as to make investments that weren't permitted within her existing arrangement. TPO says that if Miss W's overriding intention was to transfer, it would be happy to assist her with transferring her monies to L&C. TPO does this without offering any advice on the specific Store First investment, stating that it's not "*able to assist with advice of this nature"* while at the same time enclosing application forms for the consumer to complete and return to TPO, so that the transfer could proceed. I've seen advice letters from TPO which adopt a similar approach on a number of other complaints we've received against L&C where TPO was the introducer (copies of which have previously been sent to L&C on other complaints).

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

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

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

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

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

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

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

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

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

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

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

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

L&C has provided us with some evidence of the due diligence it undertook into Store First.

L&C has provided a copy of a report by Enhanced Support Solutions Limited dated 22 March 2011. Amongst other things, the report says that:

- The Store First investment concerned ownership of individual leasehold storage units within a storage facility.
- Individual units were held under a 250-year lease.
- Units were sub-let to a management company subject to a six-year term.
- To provide income through the sub-lease to Store First Management Limited ('SFML'), SFML rented the units, under licence, to end users.
- The seller of the sub-lease was Store First and the UK promoter was Harley Scott Holdings Limited.
- A CCJ was issued against the promoter of the scheme, but Enhanced Support Solutions Limited understood this arose from a disputed invoice which was in the course of being settled.
- The leasehold interest could be sold/assigned at any time.
- It was anticipated that the individual value would primarily be based on the rental income achieved. A standard valuation could be obtained as per any property from a RICS surveyor.
- The lease was on commercial terms with SFML. The scheme member shouldn't use the storage space for their own use to avoid any personal benefit being derived.
- As the investment was unregulated, no protection was offered through the FSCS.
- The review had been based on information supplied by Harley Scott Holdings Limited.
- Where used by a SIPP operator, a scheme member 'high risk/illiquid' disclaimer could be considered.
- The SIPP operator should engage legal advice on conveyancing.
- The investment was approved for SIPP investment by an Enhanced Support Solutions Limited consultant on 5 April 2011.

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

> *"Following the receipt of the SIP Member Update which mentioned that* (Mr N's) *firm faces tax investigation' we immediately imposed a temporary suspension on all Store First investments pending further investigation. I advised all three IFA introducers by telephone that we have a technical issue and have imposed a temporary suspension until we resolve.*
>
> *I have carried out an investigation and based on the information obtained my findings follow:*
>
> *Findings*
>
> *1) The tax investigation is into Harley Scott Group of companies and this does not currently extend to Store first or its parent Group First. We have received written confirmation of this from Pierce Accountants.*
>
> *2) It is not apparent that Harley Scott is linked to Store First or Group First in anyway other than that* (Mr N) *is a director and shareholder in all.*

[there is no 3]

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

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

*6)* (An employee of) *Hetheringtons Solictors* (sic) *confirmed that Harley Scott is a separate company to Store First, and added that as we are purchasing a lease she believes that a* (sic) *even if a tax investigation was to be carried out on Store First it should have no detrimental affect on our purchase. She was of the opinion that we did not need to be concerned by the tax investigation.*

*Recommendation*

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

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

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

*"Good investigation and analysis. Your recommendations are agreed by me.*
*…*
*…we should probably check to see if the Storepods investment is captured by the latest FSA initiative re UCIS or UCIS-type investments as this will determine whether we should be vetting the apps to check that the clients are Sophisticated/High Net Worth etc.*
*…*
(Name of investment support manager*) will you also give* (L&C colleague) *the go ahead to process the apps."*

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

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

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

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

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

- L&C had requested an update on the progress of the investment.
- Store First hadn't provided information within a reasonable timescale, so L&C had decided to temporarily suspend any pending or new investment into Store First.
- The total value of L&C's Storepod purchases was £1,400,000 as at end of January 2013.
- This was made up of 53 different SIPP members equating to an average holding per member of £26,415.
- It was looking to check that Store First was delivering on the promises made to investors.

It had asked Store First for the following:

*"The present sites that we have accepted are Barnsley, Liverpool, Rochdale and Blackburn. Please can you confirm if the units have been built and are ready for leasing.*
*If any of the sites have been built can you confirm if any of the units we have purchased have been rented out or if they are still working under the guaranteed rental agreement set out in the contracts.*

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

The report continued noting that:

- Members are provided with an outline of costs and sample legal documents by L&C before entering into any obligation to purchase. Purchases only proceed once members have confirmed that they're happy with the documents and fees.
- It insists on a valuation for each site from an appropriately qualified valuer, and its property team obtain valuations on a six-monthly basis for each site.
- All Storepod purchases are made via scheme appointed lawyers and have clear title and are registered individually at HM Land Registry.
- L&C's property team had advised that rent was coming in as expected with no issues. All of the Storepods were (then) within the rent guarantee period.
- Store First appeared to have made all of their annual returns and submitted accounts as required.
- A SIPP Investment Platform ('SIP') Review was carried out by SIP's precursor Enhance Support Solutions in 2011 (as I understand it this is the Enhance Support Solutions Limited report I've referred to elsewhere in this decision).
- Store First had provided L&C with the information it had requested.

- L&C hadn't verified information and commentary provided by Store First regarding timescales, achievable rent, resale values, and market research. However, the valuations provided appear to support Store First's claims.
- It's appropriate that L&C carry out checks from time to time to ensure that the investment is operating as promised by the investment provider.
- It appears that Storepods are being sold constructed and let out as promised. Rent is being received, and the purchases are all being made as expected. The Hetherington Partnership had no cause for concern and legal title was being registered at HM Land Registry.
- There didn't appear to be cause for concern at this stage, but due to the unregulated nature of the investment and large sums of money already invested L&C should exercise continued caution.
- The recommendation was to continue ongoing monitoring and to lift the suspension immediately. Further, that any new sites from the same corporate entities with an identical set up to those L&C had already invested in wouldn't need to pass through SIP.

We've previously been provided with some of the correspondence that's referred to in the 26 February 2013 report. But, I've not seen copies of the emails that were exchanged between L&C's investment support manager and Group First/Store First on 21 January 2013, 24 January 2013, 28 January 2013 and 5 February 2013 – this included correspondence with Mr N. I've also not seen copies of emails that are referred to between L&C's investment support manager and The Hetherington Partnership on 19 February 2013. I explained in my provisional decision that L&C should provide a copy of these emails to me alongside its response to my provisional decision. L&C hasn't provided me with copies of these emails alongside its response to my provisional decision.

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

I've seen copies of the site plans and a copy of the valuation. But I've not seen the content of the response provided by Group First/Store First to the other queries L&C raised. Including, amongst other things, information about the number of storage units that had been completed on each site, the number of storage units that had been let to date and whether any storage units had been sold and, if so, the price they'd been sold at compared to the original purchase price. I explained in my provisional decision that L&C should provide me with a copy of Store First's responses to it to these questions alongside its response to my provisional decision. L&C hasn't provided me with copy of Store First's responses to it to these questions alongside its response to my provisional decision.

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

> *"The property is likely to enjoy a fair level of occupational demand by virtue of its site, general characteristics and condition.*
> *…*
> *We consider there are unlikely to be any significant fluctuations in the general levels of both rental and capital values.*
> *…*

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

*The store pods are sublet back to Store First at a rental of £17 per sq ft per annum on an 86 year lease. There are fixed upwards-only rent reviewed every two years.*
*…*
*There had been a general downturn in the commercial property market over the past four years. This has affected all types of commercial properties with a large reduction in values from the peak of the market in Autumn 2007.*

There is then a section titled *"Capital Value"* with a table that reads as follows:

| Size (*sq ft*) | Market Value |
|---|---|
| 25 | £4.750.00 |
| 50 | £9,500.00 |
| 75 | £13,950.00 |
| 100 | £18,750.00 |
| 150 | £27,950.00 |
| 175 | £32,950.00 |

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

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

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

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

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

Having carefully considered all of the information that's been made available to us, I don't think L&C's actions went far enough. As I explain in more detail below, I'm not satisfied that

L&C undertook sufficient due diligence on the Store First investment *before* it decided to accept that investment into its SIPPs. As such, in my view, L&C didn't comply with its regulatory obligations and good practice, and it didn't act fairly and reasonably in its dealings with Miss W, by not undertaking sufficient due diligence on the Store First investment *before* it accepted Miss W's application to invest in Store First.

Further, based on what it knew or ought to have known had it undertaken sufficient due diligence, I think L&C failed to draw a reasonable conclusion on accepting the Store First investment into its SIPPs.

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

Having carefully reconsidered all of the evidence on this point, including the submissions in response to my provisional decision, I'm still of the view that I'd previously set out in my provisional decision. As such, and while taking into account all of the submissions that have been made, I've largely repeated what I'd said about this point in my provisional decision.

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

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

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

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

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

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

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

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

> *"You will receive guaranteed returns from a 6 year lease already in place upon completion, making this a high yielding, hassle-free investment which has been specifically designed to meet the needs of today's astute investor."*
>
> *"You will receive a 6 year lease in place upon completion. The lease produces an excellent return of 8% (guaranteed for the first 2 years) rising to over 12% in years 5 and 6. The lease contains upward-only rental reviews and break clauses for both parties every two years."*

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

> *"What rental income can I expect?*
>
> *Storepod rental starts at £17 per Sq/Ft per annum (+ VAT). The 6 year tenancy/lease in place on your Storepod has fixed upwards only rental reviews and break clauses (for both parties) every 2 years. This produces an 8% yield on your investment within the first two years, this then is predicted to rise to over 10% return in years 3&4 and then surpass 12% return in years 5&6.*
>
> *Can I easily re-sell my Storepod?*
>
> *Yes, you can re-sell your Storepod at any time and selling your Storepod couldn't be simpler. Store First Ltd can market your Storepod upon your request. We believe that because Storepods are so competitively priced when new, they will make a very attractive sale proposition in the future. We also expect that many tenants will wish to purchase the Storepod they are using. For example, other self storage PLCs usually achieve rent of between £20.00 - £25.00 per square foot. Our Storepods are costed at a rent of only £17.00 per square foot; once higher rents are achieved the capital value of the Storepod will increase.*
>
> *Guaranteed exit route?*
>
> *In year 5, investors have the option to enter the guaranteed buy-back scheme. In this scheme, Store First Management Ltd will guarantee to buy the Storepod back off the investor for the original price paid within the next 5 years. This is a unique offer in the market place and we are happy to be able to offer this exit route to our investors.*
>
> *Most investors are driven to keep the property investment they have purchased and carry on receiving the rental yield produced for years to come, this means only a very*

*limited number of Storepods per centre will ever come onto the resale market, this creates a high sale value and demand for the future."*

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

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

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

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

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

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

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

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

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

Having carefully reconsidered all of the evidence on this point, including the submissions in response to my provisional decision, I'm still of the view that I'd previously set out in my provisional decision. As such, and while taking into account all of the submissions that have been made, I've largely repeated what I'd said about this point in my provisional decision.

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

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

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

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

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

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

> *"… it still remains to be seen whether the sites will "mature" as Storefirst describe it, to the point that rentals start coming in and a secondary market for sales evolves.*
>
> *I do think that their website is misleading on a number of fronts. I have an email in drafting to bring this to their attention."*

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

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

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

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

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

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

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

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

I think the fair and reasonable conclusion based on the evidence available is that L&C shouldn't have accepted Miss W's application to invest in Store First. In my opinion, it ought to have concluded that it would not be consistent with its obligations to do so.

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

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

I make this point here to emphasise that while I've concluded *both* that L&C shouldn't have accepted Miss W's business from TPO and also that it shouldn't have accepted her application to invest in Store First, had I only reached the conclusions I've set out above on one of those aspects and not also gone on to reach findings on the other aspect for completeness, I'd still consider it fair and reasonable in all the circumstances to uphold this complaint. That's because L&C didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Miss W fairly by accepting her business from TPO. And because, separately, L&C also didn't act with due skill, care and diligence, organise and control its affairs responsibly, or treat Miss W fairly, by accepting the Store First investments into her SIPP. And to my mind, L&C didn't meet its regulatory obligations or good industry practice at the relevant times, and allowed Miss W to be put at significant risk of detriment as a result.

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

Having carefully reconsidered all of the evidence on this point, including the submissions in response to my provisional decision, I'm still of the view that I'd previously set out in my provisional decision. As such, and while taking into account all of the submissions that have been made, I've largely repeated what I'd said about this point in my provisional decision.

For the reasons given above, I think L&C shouldn't have accepted Miss W's business from TPO and I also think it shouldn't have accepted the Store First investments into her SIPP. So things shouldn't have got beyond that.

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

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

do would have been to decline to accept Miss W's business from TPO and to refuse to accept the Store First investments in her SIPP.

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

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

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

Having carefully reconsidered all of the evidence on this point, including the submissions in response to my provisional decision, I'm still of the view that I'd previously set out in my provisional decision. As such, and while taking into account all of the submissions that have been made, I've largely repeated what I'd said about this point in my provisional decision.

The involvement of other parties

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

Regarding TPO, Miss W pursued a complaint against TPO with the FSCS. The FSCS upheld Miss W's complaint, it calculated Miss W's losses to be in excess of £50,000 and paid her £50,000 compensation. Following this the FSCS provided Miss W with a reassignment of rights.

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

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

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

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

full extent of the financial losses she's suffered due to L&C's failings. And, having carefully considered everything, I don't think that it would be appropriate or fair in the circumstances to reduce the compensation amount that L&C is liable to pay to Miss W.

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

Miss W taking responsibility for her own investment decisions

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

I've considered this point carefully and I'm satisfied that it wouldn't be fair or reasonable to say Miss W's actions mean she should bear the loss arising as a result of L&C's failings.

I'm satisfied that in her dealings with them, Miss W trusted Jackson Francis and TPO to act in her best interests. Miss W also then used the services of a regulated personal pension provider in L&C.

In my view, if L&C had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted Miss W's business from TPO or accepted her application to invest in Store First *at all*. That should have been the end of the matter – if either of those things had happened, I'm satisfied the arrangement for Miss W wouldn't have come about in the first place, and the loss she's suffered could have been avoided.

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

Miss W doesn't recall having sight of TPO's suitability report at the time and says that, contrary to the contents of that report, she was told that transferring to invest into the Store Pods was a lucrative opportunity and would increase the value of her pension monies. I'm satisfied that Miss W's testimony about what she was told by the adviser she met with is credible.

I've carefully considered what L&C has said about Miss W being aware of the risks. L&C says that Miss W signed documents confirming that the Store First investment was high risk. L&C hasn't provided us with a copy of the updated Investment Purchase Request form that it requested from Miss W. I'm not satisfied that the evidence we've seen supports the contention that it's more likely than not that Miss W *understood* the Store First investment was high risk. But, in any eventuality, this is a secondary point because, as mentioned above, if L&C had acted in accordance with its regulatory obligations and good industry practice I'm satisfied the arrangement for Miss W wouldn't have come about in the first place.

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

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

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

I'm satisfied that L&C should have decided not to accept Store First in its SIPPs *before* it received Miss W's business and also that L&C should not have accepted Miss W's business from TPO. And I'm satisfied that if L&C had done these things that the transfer and investment this complaint concerns wouldn't have come about.

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

Further, if Miss W had sought advice from a second regulated advisory firm that wasn't TPO on the proposed transaction, I think it's more likely than not that she would have been given clear, full and suitable advice by that firm including an assessment of the suitability, or otherwise, of the proposed Store First investment. And I think it's far more likely than not such advice would have been not to establish a SIPP and not to invest in Store First, I think Miss W would then have remained in her DB Scheme. Alternatively, Miss W might have simply decided not to seek pensions advice elsewhere and still then remained in her DB Scheme.

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

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

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

Miss W says she can't recall any discussion about the risks involved with the Store First investments, and that she was told transferring her pension and investing into Store Pods was a lucrative opportunity that would increase her pension monies. Miss W says that she was simply looking to increase her pension, to potentially generate savings and retire earlier than she'd expected, and with as little risk as possible. L&C says that Miss W was aware of the risks and decided to proceed and has pointed to the contents of the Investment Purchase Request form.

As I've mentioned above, I've not seen the updated Investment Purchase Request form Miss W completed. But I've seen the Investment Purchase Request form that Miss W signed on 30 January 2013 and I've also seen Investment Purchase Request forms we've received on

some other complaints where TPO-introduced L&C consumers invested monies in Store First. I think it's more likely than not that the updated form Miss W signed would have been similar to the form Miss W signed on 30 January 2013. And the form Miss W signed on 30 January 2013 simply said that the investment *may* be high risk, it doesn't say the investment *is* high risk. Further, the form appears to be generic, by which I mean it appears to be a form that could be used for a number of investments and it doesn't appear to be a form that's bespoke to the Store First investment. I can see why the term *may* might have been used because of this, but I don't agree the contents of that form support the contention that Miss W *understood* the Store First investment was high risk.

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

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

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

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

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

As such, I'm not asking L&C to account for loss that goes beyond the consequences of its failings. I'm satisfied those failings have caused the full extent of the loss in question. That other parties might also be responsible for that same loss is a distinct matter. However, that fact shouldn't impact on Miss W's right to fair compensation from L&C for the full amount of her loss. The key point here is that but for L&C's failings, Miss W wouldn't have suffered the loss she's suffered. As such, I'm of the opinion that it's appropriate and fair in the circumstances for L&C to compensate Miss W to the full extent of the financial losses she's suffered due to its failings, and notwithstanding any failings by other firms involved in the transactions.

**In conclusion**

Taking all of the above into consideration, I think that in the circumstances of this case it's fair and reasonable for me to conclude that L&C should have decided not to accept business

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

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

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

**Putting things right**

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

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

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

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

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

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

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

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

   In the event the Store First investments remain in the SIPP, as L&C is unable to purchase them and Miss W decides not to transfer them to the freeholder, Miss W should be aware that she will be liable for all future costs associated with the

investment such as the ongoing SIPP fees, business rates, ground rent and any other charges. She should also be aware it's unlikely she will be able to make a further complaint about these costs.

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

   A fair and reasonable outcome would be for L&C to put Miss W, as far as possible, into the position she'd now be in if L&C hadn't accepted her applications. As explained above, had this occurred I consider it's more likely than not Miss W would have remained in her DB Scheme.

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

   Compensation should be based on the scheme's normal retirement age, per the usual assumptions in the FCA's guidance.

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

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

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

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

However, I do think it's fair and reasonable for some allowance to be made for the sum(s) Miss W actually received from the FSCS and has had the use of for a period of the time covered by the calculation.

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

Redress paid directly to Miss W as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, in line with DISP App 4, L&C may make a notional deduction to allow for income tax that would otherwise have been paid. I'm satisfied that it's reasonable to assume that Miss W is likely to be a basic rate taxpayer at her selected retirement age, so the reduction would equal 20%. However, if Miss W would have been able to take 25% tax-free cash from the benefits the cash payment represents, then this notional reduction may only be applied to 75% of the compensation, resulting in an overall notional deduction of 15%.

3. Pay Miss W £500 for the trouble and upset she's suffered.

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

**My final decision**

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

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

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

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

The recommendation isn't part of my determination or award. London & Colonial Services Limited doesn't have to do what I recommend. It's unlikely that Miss W could accept a

decision and go to court to ask for the balance and Miss W may want to get independent legal advice before deciding whether to accept this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss W to accept or reject my decision before 24 July 2024.

Alex Mann
**Ombudsman**