DRN-5051259

The complaint

Mr T complains that London & Colonial Services Limited ("L&C") didn't undertake sufficient due diligence on the investment into Carbon Credits he made through his L&C self-invested personal pension ("SIPP"), or on the firm that introduced his SIPP application to it. As a result of this, he says he's suffered significant losses.

What happened

I will first set out my understanding of the investment and the various parties involved in this complaint.

Carbon Credits

A Carbon Credit is a generic term for any tradable certificate or permit representing the right to emit one tonne of carbon dioxide or the mass of another greenhouse gas with a carbon dioxide (tC02e) equivalent to one tonne of carbon dioxide.

Buyers and sellers can use an exchange platform to trade, like a stock exchange for Carbon Credits. The quality of the credits is based in part on the validation process and sophistication of the fund or development company that acted as the sponsor to the carbon project.

L&C

L&C is a SIPP provider and administrator, regulated by the Financial Conduct Authority ("FCA"). L&C is authorised, in relation to SIPPs, to arrange (bring about) deals in investments, deal in investments as principal, establish, operate or wind up a pension scheme and to make arrangements with a view to transactions in investments. L&C is not authorised to advise on investments.

Talk Financial Solutions Limited ("TFS")

TFS was, at the time of the events in this complaint, an independent financial advice firm ("IFA"), authorised by the then regulator – the Financial Services Authority ("FSA"), which later became the FCA. TFS was authorised from April 2011 to June 2016 and was dissolved in October 2019.

Carbon Neutral Investments Limited ("CNI")

CNI was regulated by the FSA at the time of the events that are the subject of this complaint. This firm operated under various registered names since its incorporation, most recently Opus Capital Limited ("Opus"), which at the time of writing this decision is in the process of being liquidated. Opus was registered with the name CNI between October 2011 and April 2013 and was authorised by the financial services regulator between 2004 and March 2017.

Mr T purchased his Carbon Credits investment from CNI. The contact listed for the purchase was Mr S, who was a director of CNI. Mr S is currently serving a prison sentence following a

conviction in 2021 for his involvement in fraudulent activities, which included the sale of Carbon Credits investments. In January 2022, the FCA issued a final notice against Mr S prohibiting him from performing any function in relation to a regulated activity.

Green Planet Investment Limited ("Green Planet")

Green Planet was a company incorporated in Gibraltar. Green Planet wasn't authorised by the financial services regulator. It was involved in marketing a property investment scheme in Brazil and Carbon Credits. TFS's suitability report indicated Mr T was intending to invest in Carbon Credits marketed by them, but ultimately his SIPP invested in Carbon Credits via another broker.

Viceroy Jones Ltd ("Viceroy Jones")

Viceroy Jones wasn't authorised by the financial services regulator. Viceroy Jones promoted the sale of Carbon Credits. It's my understanding Mr T's SIPP purchased approximately 35,000 Carbon Credits units in a hydro power project based in India that had been marketed by Viceroy Jones.

As I understand it, Viceroy Jones received a winding up order from the High Court in January 2017 following a petition that had been lodged by the Insolvency Service on the grounds of public interest due to its role in selling Carbon Credits.

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

TFS completed L&C's "*Intermediary Application*" dated 28 November 2011 and L&C told us it received 16 applications from the firm between December 2011 and June 2016 when the agreement was terminated due to the loss of TFS's FCA authorisation.

L&C says it checked the FSA register to ensure TFS held the appropriate permissions before accepting any new applications from it and had an introducer agreement in place with the firm. With regards to its understanding of TFS's business model, L&C has explained:

> "*The client had formally appointed the introducer,* [TFS]*, as their Financial Adviser and Investment Manager. As an execution only SIPP provider it is our expectation that* [TFS] *would provide the client with advice in relation to the transactions they intended to make.* [TFS] *would submit any applications and instructions, including investment, to us, endorsing the client's decisions following their advice to them."*

That said, Mr T's investment instruction form and insistent client letter indicate TFS did not provide him with advice on the Carbon Credits investment.

L&C also told us the following:

- It did not request copies of suitability reports (although the evidence I've seen indicates L&C did obtain a copy of TFS's advice to Mr T).

- None of the applications it received from TFS were to invest in non-mainstream investments.

- Applications received from TFS made up 1% of its total new business during the course of its relationship with the firm.

<u>Due diligence carried out by L&C on Mr T's investment</u>

L&C says it carried out due diligence on Mr T's Carbon Credits investment. However, having thoroughly searched its systems, it has not been able to provide any evidence of the checks that it says were carried out.

L&C says it would have carried out various checks to determine if the investment could be held in a UK registered pension scheme and not result in any unauthorised payments. Typical searches it says it carried out on investments prior to accepting them into its SIPPs included:

- A search of Companies House including the directors and majority shareholders.
- Internet searches of the company, the directors and majority shareholders, including a search of the company's website if applicable.
- Checking the FCA website to see if the regulator had issued any adverse publications.

L&C says it also routinely requested product literature for the investment prior to progressing its review into whether the investment could be accepted into its SIPPs.

With regard to ensuring that the valuation of Carbon Credits investments was reasonable, L&C says it would have relied on comparing unit prices of Carbon Credits being traded and discussions with Carbon Credits brokers to obtain values for the units being purchased by its SIPPs.

Mr T's dealings with TFS and L&C

Mr T, via his professional representative, said he was contacted by a third-party intermediary, who put him in touch with TFS. I understand a meeting was arranged to discuss Mr T's requirements. Mr T said while he "*was not looking to move* [his] *pension per se,* [he] *was exploring at the time whether there was a way to unlock a small amount of capital from the pension investment"*.

Mr T signed L&C's SIPP application form on 4 May 2012. The form noted that Mr T was employed, and he selected 65 as his intended retirement age. TFS was listed as his IFA, and it was noted TFS would receive an initial advice fee of £1,995 from the SIPP. The application form provided details of the existing defined contribution pension scheme Mr T intended to transfer to his SIPP, but his intended investment wasn't specified, instead the form instructed L&C to hold Mr T's SIPP funds in cash.

L&C says it received Mr T's SIPP application form on 14 May 2012, and that it received the application without any supporting documentation to confirm how Mr T intended to invest his fund. That said, I have seen evidence that Mr T signed an L&C 'Investment Purchase Request' on 13 May 2012, so, before L&C says it received his application, which requested L&C to purchase Carbon Credits from CNI. I'll refer to this again below.

The SIPP application included a declaration signed by Mr T, which said:

> "*1. I am satisfied that an Open Pension is suitable for my requirements and apart from factual information relating directly to the Open Pension, I have not sought or been given any advice from the Provider, London & Colonial Assurance Plc, or from the Trustee or Scheme Administrator, London & Colonial Services Ltd and*
>
> *2. I understand and agree that neither the Provider nor the Trustee nor the Scheme Administrator has any liability to me with regard to the suitability of an Open Pension*

in my circumstances or with regard to the suitability of or risks associated with any of the investments that I request to be made."

A letter addressed to TFS, which appears to have also been prepared by TFS, was signed by Mr T and also dated 4 May 2012. It said the following:

"*I can confirm that I have disclosed all relevant information to enable you to assess my suitability for investing in Unregulated Collective Investments. I have not sought your advice on the specific Unregulated Investment as I already knew the product I wanted to invest in. I fully understood the risks associated with Unregulated Investments and I also fully understand the Green Planet product into which I am choosing to invest.*

I appreciate the time you have taken talking about risk and I acknowledge your recommendation to split my investment in order to have a more balanced portfolio, however I am not seeking your advice regarding my chosen investment. I do not want to dilute my potential investment returns and to that end I will ignore your advice and make an investment of 100% into Green Planet.

I take full responsibility for the investment funds I choose to Self Invest into."

It's not clear when L&C received a copy of this letter but a copy of it seems to have been attached to an email to L&C on 27 June 2012. And although the intended investment wasn't specified on the SIPP application form, this letter demonstrates an investment or investments had already been selected.

TFS wrote to Mr T on 5 May 2012 with its suitability report setting out its advice. The letter referred to a meeting TFS had with Mr T at his home some months prior and explained its advice was limited to retirement planning. It referred to a confidential financial review TFS completed with Mr T – a copy of which has not been provided. The suitability report stated:

"*With regards to your own individual investment experience you confirmed that you have a very good working knowledge of investments, including derivatives due to your employment with* [business media outlet] *and access to investment experts within your workplace.*

To this end you wish to be treated as a Professional Client."

The report didn't clarify what Mr T's role at his employer was, or what specific experience with investing he had. Mr T told us he worked in a department not related to investments and had no investment experience at the time. He also explained he didn't have a good understanding of what it meant to be a professional client in the context of the COBS rules set out in the FCA's Handbook. He said, "*I thought the phrase meant something else, meaning that I was a 'professional' in terms of work, not a 'professional' client.*"

In terms of his objectives, the suitability report said Mr T was looking to take a more aggressive approach to his investments and he wanted to invest in overseas property and Carbon Credits. It said he'd visited the offices of Green Planet and had decided to invest with them and transfer his existing pensions to a SIPP as he was aware his current provider was unable to accommodate his intended investments. The report noted the adviser had assessed Mr T's attitude to risk as being "*high*" without providing any further detail to confirm on what basis this had been established aside from stating Mr T had "*a very good working knowledge of investments*". With regard to TFS's recommendation, the report said:

> "*You know and understand that our normal recommendation even to a "**high risk**" investor is to spread your investments. Even if you were to make a spread of all high risk investments that would have the effect of lowering the overall level of risk. Even with a High Risk investor we would normally have a more balanced approach and our recommendation was to make some low and some medium risk investments to compliment* [sic] *and diversify your holdings.*
>
> *We had very lengthy discussion* [sic] *around splitting your pension pot up so as not to expose the entire pot to the types of risks mentioned above. You initially agreed to take my advice to use more traditional regulated funds to balance off the risk. However, you subsequently text and emailed me to say that having discussed your options further with your colleagues and industry experts, you did not want to dilute any potential gains by splitting your investment. You felt the potential for returns well outweighed the associated risks and decided to invest 100% into Green Planet's Unregulated Investments."*

And

> "*Our recommendation is that you transfer your benefits to your existing Self Invested Personal Pension with London & Colonial*
>
> *This company, according to current information, is the only SIPP provider that can currently facilitate your chosen Overseas Property & Carbon Credit investment with Green Planet."*

And

> "*You have not fully decided on the expect* [sic] *percentages you will invest in Green Planet. You will spread your pension funds over the Overseas Property Fund and the Carbon Credit Fund.*
>
> *I confirm that these funds are consistent with your attitude towards investment risk."*

I note the suitability report referred to Mr T's *existing* SIPP, but it's my understanding the SIPP wasn't established until *after* TFS's suitability report had been issued.

Mr T has also explained that he believes the suitability report contains other inaccuracies and "*may have been exaggerated*". He told us he didn't visit the Green Planet office and only recalls having one in-person meeting throughout the whole process at his office, which I understand from his comments to have been with his adviser to discuss investing in Carbon Credits. He told us he remembers being given an investment brochure and being told "*there was a possibility of taking a small amount of cash from* [his] *pension as an incentive".* He has also disputed TFS's assessment of his attitude to risk, saying:

> "*As a rule, my attitude to risk is low to medium and in this case, I was willing to go to medium risk to receive the lump sum but not to the degree of losing all my pension.*"

And

> *"Had the suitability report stated that I could potentially lose everything, I would not have gone through with it and I didn't realize that there could be a 'total wipeout' of my pension.*"

Mr T says he has no recollection of Viceroy Jones and that he doesn't "*think* [he] *signed up for"* the investment he eventually ended up with – Carbon Credits purchased from CNI.

An L&C instruction form dated 13 May 2012 noted Mr T's intention for his SIPP to purchase Carbon Credits with CNI, via Viceroy Jones (not Green Planet), for a consideration of approximately £240,000. Mr S of CNI was listed as the contact name and a box was selected to confirm that Mr T was neither a certified sophisticated investor or a self-certified sophisticated investor. Another box was selected on the form to confirm that Mr T had not received any advice on his proposed investment.

The form included a member declaration, which began:

> "*I confirm that London & Colonial has not provided me with financial or investment advice in respect of this investment…*
>
> *I confirm that I have carried out my own due diligence in relation to this investment and am happy to proceed with the purchase.*
>
> *I understand that:*
>
> - *this investment may be high risk and there may not be an established market for selling the proposed holding meaning that it may be difficult to sell at a later date".*

The declaration covered a number of other points including an agreement by Mr T to indemnify L&C against "*any and all liability arising from this investment"*.

It's not clear when L&C received a copy of this instruction form, and it was later superseded by a second.

L&C sent Mr T a letter on 15 May 2012, which said it was processing his application. Mr T's existing pension scheme was transferred into his SIPP on 22 June 2012. The transfer value was approximately £238,000.

The second investment instruction form dated 24 June 2012 confirmed Mr T's intention for his SIPP to invest in Carbon Credits amounting to approximately £230,000. A contract note signed by Mr T on 24 June 2012 indicated his instruction to purchase 35,000 Carbon Credits units in a hydro power project based in India through the intermediary Viceroy Jones. The contract note stated the purchase price was £6.50 per unit, which amounted to a total of approximately £230,000.

L&C told us it first received details of Mr T's investment instruction on 2 July 2012. However, I've seen email correspondence from L&C to TFS dated 28 June 2012 to request confirmation that Mr T was no longer intending to invest with Green Planet. TFS responded the following day to confirm L&C's understanding was correct.

The copy of the suitability report I've seen contained a handwritten annotation, which I understand to have been added by L&C who was emailed a copy of it on 21 June 2012. The handwritten note indicated the report had been "approved" on 29 June 2012 and said:

> *"for approval – please hand back to investments.*
>
> *Rigorous report + risks explained client understands + is overriding advice. Email of 29/6/12 confirms 'Green Planet' in report has changed to Viceroy Jones."*

I understand that approximately £230,000 from Mr T's SIPP was invested into the Carbon Credits investment on 2 July 2012.

On 6 July 2012, approximately £45,000 was paid into Mr T's personal bank account. The bank statement I've seen suggests that this money was paid in by a company linked to Viceroy Jones

L&C wrote to Mr T on 18 July 2014 enclosing its annual valuation for his SIPP. The letter explained Mr T's Carbon Credits investment was illiquid, but the valuation statement showed its value remained at the purchase price of approximately £230,000. The following year's statement showed the investment had been valued at £nil. The accompanying letter dated 5 June 2015 explained the investment had been valued at £nil as a result of there being no readily available market for it and no immediate means of determining a sale value.

On 30 June 2016, L&C wrote to Mr T to explain there appeared to be no realistic prospects for a sale of the Carbon Credits investment in the foreseeable future. L&C said Mr T had the option to take the investment into his name personally so that his SIPP could be converted to a simpler product with lower fees.

A further letter from L&C to Mr T dated 17 August 2016 explained L&C was of the opinion that it would be appropriate to "*write off*" the asset so that the SIPP would no longer incur fees for holding it.

L&C told us that Mr T's Carbon Credits investment was written off, but that the asset remains in his SIPP.

In April 2019, the Financial Services Compensation Scheme ("FSCS") upheld a claim for Mr T regarding TFS. It calculated his financial loss at approximately £400,000 and paid him £50,000, which was the maximum it could award. The FSCS then reassigned the right to complain to L&C back to Mr T.

Mr T's complaint to L&C

Mr T, with the help of his professional representative, complained to L&C on 30 May 2019. Mr T said L&C breached its fiduciary, contractual and regulatory obligations to him, causing him serious financial detriment. Amongst other points, Mr T said:

- L&C was in breach of various duties set out within the Principles for Businesses ("the Principles"), set out within the FCA Handbook, in particular principles 1, 2, 3, 6 and 10.

- TFS did not adequately advise Mr T on the investment. Had L&C carried out appropriate checks, it would have seen TFS did not advise on the suitability of Mr T's intended investment strategy and so failed to fulfil the requirements of COBS 9 (Conduct of Business Sourcebook). L&C ought to have understood TFS's advice was fundamentally flawed and should have refused to accept business from the firm.

- Had Mr T been informed of the flawed advice, he would not have agreed to open the SIPP, transfer his existing pensions and invest in the asset.

- An appropriateness test would have identified the asset was inappropriate for Mr T. Had L&C carried out appropriate due diligence, it would not have allowed the SIPP to acquire the investment.

L&C did not uphold Mr T's complaint. It made a number of points including:

- It had obtained a copy of the advice report, which included a letter from Mr T confirming he understood the advice was in relation to the establishment of the SIPP

and pension transfer only, not the intended investment.

- L&C does not provide advice and would have been in breach of the General Prohibition set out within the Financial Services and Markets Act 2000 ("FSMA") had it carried out an appropriateness test as suggested by Mr T's representative.

- It was obligated to carry out Mr T's instructions in accordance with COBS 11.2.19.

- It carried out appropriate due diligence on Mr T's chosen financial adviser and the investment by ensuring it was suitable to be held in a UK registered pension scheme.

- Mr T was provided with risk warnings.

- It fully complied with its regulatory requirements and is not responsible for the performance of the investment.

Unhappy with L&C's response, Mr T referred his complaint to the Financial Ombudsman Service.

One of our Investigators considered the complaint. During the course of their investigation, L&C raised an objection to us considering the merits of Mr T's complaint on the basis that it had been made too late under the rules that apply to this Service, which are set out within the Dispute Resolution: Complaints Sourcebook ("DISP") within the FCA Handbook.

Our Investigator concluded that Mr T's complaint had been made in time and should be upheld. In summary, the Investigator:

- Explained they were satisfied Mr T's complaint had been referred within the time limits that apply to this Service.

- Set out the relevant rules, guidance and caselaw considered in reaching their view, which included the Principles and various publications the FCA (and its predecessor, the FSA) has issued.

- Accepted L&C was not authorised to provide advice to Mr T, but said it was under an obligation to carry out sufficient due diligence before accepting Mr T's application.

- Made a finding that L&C failed to evidence that it carried out appropriate due diligence on the Carbon Credits investment to meet its regulatory obligations. Had it carried out sufficient checks, L&C ought to have refused Mr T's application and so the investment and subsequent loss would not have come about.

- Determined it would be fair and reasonable for L&C to compensate Mr T for his loss.

Finally, our Investigator set out how L&C should put things right by putting Mr T into the position he would now be in had it refused his application. They considered Mr T would have remained a member of his existing pension scheme and set out how L&C should calculate his losses and compensate him. Our Investigator also recommended L&C pay Mr T £500 compensation to acknowledge the distress caused by the knowledge he has suffered the loss of almost his entire pension fund.

Mr T, via his representative, acknowledged the Investigator's view and provided no further comments. L&C didn't agree and made further submissions, which the Investigator confirmed did not alter their view.

L&C's further submissions

L&C told us it remains of the view that the complaint has been referred too late and that it should not be upheld. I have considered L&C's comments in their entirety and set out below what I consider to be the key points raised:

- The Investigator failed to apply the correct test to determine when Mr T ought reasonably to have become aware of his cause to complain.

- DISP 2.8.2 is silent as to a requirement that the complainant must know *who* may be responsible for their loss for the time bar clock to start running.

- Mr T was put on formal notice that he may have suffered a loss and have cause to complain when L&C wrote to him in June 2015 to confirm his Carbon Credit investment had been valued at £nil. As his complaint was made more than three years after this date, the complaint was made too late.

- The Investigator did not explain their reasons for establishing the point at which Mr T became aware – or ought reasonably to have become aware of his cause for complaint about L&C.

- L&C carried out appropriate due diligence to establish whether the investment could be held within the SIPP.

- Mr T had explained he was willing to ignore the recommendation of his professional adviser to make the investment, so had L&C refused his application, he would have found another way to make the investment. Investments into Carbon Credits were being accepted by multiple pension providers at the time.

- The Investigator did not explain why they reached a different conclusion to the High Court Judge in Adams v Options SIPP [2020] EWHC 1229 (CH) where the facts of the case were broadly similar to the circumstances surrounding Mr T's complaint. In Adams, the claimant conceded that he would have proceeded with the investment regardless.

- The transaction involved a specified investment and a regulated financial adviser provided advice on the transaction. There was therefore no reason for L&C to have refused the application.

- There is no justification for the Principles to be used as a basis to uphold the complaint against L&C. A breach of the Principles cannot, of itself, give rise to a cause of action in law.

- The regulator's publications that were issued after the date of the relevant events have no relevance to the complaint and should not be relied on.

As no agreement could be reached, the complaint was passed to an Ombudsman to review and make a decision.

The provisional decision

An Ombudsman colleague issued a provisional decision on this complaint, inviting the parties to respond with any final comments and to provide any further evidence before a final decision was reached. She provisionally found that the complaint was within the jurisdiction of the Financial Ombudsman Service to consider and set out why she'd concluded that it

should be upheld. That colleague has now left the Financial Ombudsman Service and so the complaint has been passed to me to make a final decision.

Both parties acknowledged receipt of the provisional decision, but neither wished to make any further comments.

Having reviewed the case afresh and noting that neither party made any further submissions in response to the provisional decision, I have decided I agree with my colleague's decision about our jurisdiction to consider Mr T's complaint. I won't repeat the detailed reasoning for that decision here, but I agree that Mr T complained to L&C within the relevant time limits.

I also agree with, and have not been persuaded to depart from, her findings about the merits of Mr T's complaint. I've therefore repeated those findings below, as my final decision and have not therefore included any further detail of them in this background summary.

What I've decided – and why

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

As noted above, we haven't received any further submissions from either party in response to the provisional decision, and I agree with my Ombudsman colleague's findings, as set out in that decision. So, I have repeated those findings below, with a few minor changes, as my final decision.

As a preliminary point, the purpose of this decision is to set out my findings on what's fair and reasonable, and explain my reasons for reaching those findings, not to offer a point-by-point response to every submission made by the parties to the complaint. And so, whilst I've carefully considered all the submissions made by both parties, I've focussed here on the points I believe to be key to my determination of what's fair and reasonable in the circumstances. In light of Mr T's complaint, I think the key issue is whether L&C carried out sufficient due diligence on Carbon Credits before allowing the investment to be held in its SIPPs.

As I'll go on to explain, I'm satisfied the transfer of Mr T's existing pension to a SIPP was arranged for the purpose of investing in Carbon Credits. So, if L&C had made a decision to refuse to allow Carbon Credits investments to be held in its SIPPs, then Mr T's application for an L&C SIPP would never have been made in the first place.

Accordingly, I don't think it's necessary to consider what due diligence checks L&C carried out on TFS, and what it ought to have determined from those checks had it carried them out in detail. That's because I think L&C failed to comply with its regulatory obligations and good industry practice prior to receiving Mr T's application.

In considering what's fair and reasonable in all the circumstances of this complaint, 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.

So, I'll start by setting out what I have identified as the relevant considerations to deciding what is fair and reasonable in this complaint.

Relevant considerations

<u>The Principles for Businesses ("the Principles")</u>

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

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

I have 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 requirement they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules."*

And at paragraph 77 of BBA, Ouseley J said:

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

In R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service [2018] EWHC 2878) ("BBSAL"), Berkeley Burke brought a judicial review claim challenging the decision of an Ombudsman who had upheld a consumer's complaint against it. The Ombudsman considered the 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 had not treated its client fairly. Jacobs J, having set out some paragraphs of BBA including paragraph 162 set out above, said (at paragraph 104 of BBSAL):

> *"These passages explain the overarching nature of the Principles. As the FCA correctly submitted in their written argument, the role of the Principles is not merely to cater for new or unforeseen circumstances. The judgment in BBA shows that they are, and indeed were always intended to be, of general application. The aim of the Principles based regulation described by Ouseley J. was precisely not to attempt to*

formulate a code covering all possible circumstances, but instead to impose general duties such as those set out in Principles 2 and 6."

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

As outlined above, Ouseley J in 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 is fair and reasonable in all the circumstances of a case. And, Jacobs J adopted a similar approach to the application of the Principles in BBSAL. I'm therefore satisfied the Principles are a relevant consideration here and I will consider them in the specific circumstances of this complaint.

The Adams court cases and COBS 2.1.1R

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. I note the Supreme Court refused Options permission to appeal the Court of Appeal judgment.

I've considered whether these judgments mean that the Principles should not be taken into account in deciding this case. And I am of the view they do not. In the High Court case, HHJ Dight did not consider the application of the Principles and they did not form part of the pleadings submitted by Mr Adams. One of the main reasons why HHJ Dight found that the judgment of Jacobs J in BBSAL was not of direct relevance to the case before him was because "*the specific regulatory provisions which the learned judge in Berkeley Burke was asked to consider are not those which have formed the basis of the claimant's case before me*."

Likewise, the Principles were not considered by the Court of Appeal. So, the Adams judgments say nothing about the application of the FCA's Principles to the Ombudsman's consideration of a complaint.

I acknowledge that COBS 2.1.1R (A firm must act honestly, fairly and professionally in accordance with the best interests of its client) overlaps with certain of the Principles, and that this rule was considered by HHJ Dight in the High Court case. Mr Adams pleaded that Options SIPP owed him a duty to comply with COBS 2.1.1R, a breach of which, he argued, was actionable pursuant to section 138(D) of FSMA ("the COBS claim"). HHJ Dight rejected this claim and found that Options SIPP had complied with the best interests rule on the facts of Mr Adams' case.

Although the Court of Appeal ultimately overturned HHJ Dight's Judgment, it rejected the part of Mr Adams' appeal that related to HHJ Dight's dismissal of the COBS claim on the basis that Mr Adams was trying 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 did not 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 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 para 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."*

The facts in this case are different from those in Adams. There are also differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Mr T's complaint. The breaches were summarised in paragraph 120 of the Court of Appeal judgment. In particular, HHJ Dight considered the contractual relationship between the parties in the context of Mr Adams' pleaded breaches of COBS 2.1.1R that happened after the contract was entered into. And he wasn't asked to consider the question of due diligence before Options agreed to accept the investment into its SIPP.

In Mr T's complaint, amongst other things, I am considering whether L&C ought to have identified that the investment in Carbon Credits involved a significant risk of consumer detriment and, if so, whether it ought to have declined to accept such investments within its members' SIPPs prior to receiving Mr T's application. I also want to emphasise that I don't say that L&C was under any obligation to advise Mr T on the SIPP and/or the underlying investments. Refusing to accept an investment in a SIPP and/or rejecting an application isn't the same thing as advising Mr T on the merits of the investment and/or the SIPP.

As already mentioned, 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 am required to take into account relevant considerations which include: law and regulations; regulator's rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. This is a clear and relevant point of difference between this complaint and the judgments in both Adams cases. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

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 this case.

Regulatory publications

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

- The 2009 and 2012 Thematic Review Reports.
- The October 2013 Finalised SIPP Operator Guidance.
- The July 2014 "Dear CEO" letter.

I've considered the relevance of these publications. And whilst I've only set out material parts of the publications below, I have 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 customers 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 member to confirm the position, or by contacting the firm giving advice and asking for clarification. Moreover, while they are not responsible for the advice, there is a reputational risk to SIPP operators that facilitate the SIPPs that are unsuitable or detrimental to clients.*
>
> *Of particular concern were firms whose systems and controls were weak and inadequate to the extent that they had not identified obvious potential instances of poor advice and/or potential financial crime. Depending on the facts and circumstances of individual cases, we may take enforcement action against SIPP operators who do not safeguard their 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 states:

> *"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 unauthorised 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 nonregulated 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.

- 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).

I acknowledge that the 2009 and 2012 reports and the "Dear CEO" letter are not formal "guidance" (whereas the 2013 finalised guidance is). However, the fact that the reports and "Dear CEO" letter did not constitute formal guidance does not mean their importance should be underestimated. They provide a reminder that the Principles apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications, which set out the regulator's expectations of what SIPP operators should be doing, also go some way to indicate what I consider amounts to good industry practice and I am, therefore, satisfied it is appropriate to take them into account.

It is relevant that when deciding what amounted to have been 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.

The remainder of the publications also provide a reminder that the Principles apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and to produce the outcomes envisaged by the Principles. In that respect, these publications also go some way to indicate what I consider amounts to good industry practice at the relevant time. I therefore remain satisfied it's appropriate to take them into account too.

I appreciate that some of the publications I've listed above were published after Mr T's SIPP application and investment in Carbon Credits. But like the Ombudsman in the BBSAL case, I do not think the fact that some of the publications post-date the events that took place in relation to this complaint, mean that the examples of good practice they provide were not 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 is also clear from the text of the 2009 and 2012 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 regulator's comments suggest some industry participants' understanding of how the good practice standards shaped what was expected of SIPP operators changed over time, it is clear the standards themselves had not changed.

I note that HHJ Dight in the Adams case did not consider the 2012 thematic review, 2013 SIPP operator guidance and 2014 "Dear CEO" letter to be of relevance to his consideration of Mr Adams' claim. But it does not follow that those publications are irrelevant to my consideration of what is fair and reasonable in the circumstances of this complaint. I am 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 is fair and reasonable, I will only consider L&C's actions with these documents in mind. The reports, Dear CEO letter and guidance gave non-exhaustive examples of good industry practice. They did not say the suggestions given were the limit of what a SIPP operator should do. As the annex to the "Dear CEO" letter notes, what should be done to meet regulatory obligations will depend on the circumstances.

To be clear, I do not say the Principles or the publications obliged L&C to ensure the transactions were suitable for Mr T. It is accepted L&C was not required to give advice to Mr T, and could not give advice. And I accept the publications do not 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. And so, it's fair and reasonable for me to take them into account when deciding this complaint. I find that the 2009 report together with the Principles provide a very clear indication of what L&C could and should have done to comply

with its regulatory obligations that existed at the relevant time before accepting Mr T's application.

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 Mr T's application to establish a SIPP and to invest in Carbon Credits, 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.

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 TFS/the business TFS was introducing and the Carbon Credits investments before deciding to accept Mr T's application to open a SIPP and invest in Carbon Credits.

I've looked at whether L&C took reasonable care, acted with due diligence and treated Mr T fairly, in accordance with his best interests. And what I think is fair and reasonable in light of that. I think the key issue is whether it was fair and reasonable for L&C to have accepted Mr T's SIPP application in the first place. So, I need to consider whether L&C carried out appropriate due diligence checks before deciding to accept Mr T's application.

I've considered whether L&C ought to, acting fairly and reasonably to meet its regulatory obligations and good industry practice, have identified that consumers investing in Carbon Credits were being put at significant risk of detriment. And, if so, whether L&C should not therefore have accepted Mr T's application.

The contract between L&C and Mr T

It's my understanding that L&C provides execution only (i.e. non-advised) SIPP administration services. To be clear, I don't say L&C should (or could) have given advice to Mr T, or otherwise have ensured the suitability of the investment for him. I accept that L&C's product literature made it clear to Mr T that it wasn't giving, nor was it able to give, advice and that it played an execution-only role in his SIPP investments.

So, I've not overlooked or discounted the basis on which L&C was appointed. And my decision on what's fair and reasonable in the circumstances of this complaint is made with all of this in mind. I've proceeded on the understanding that L&C wasn't obliged – and wasn't able – to give advice to Mr T on the suitability of the SIPP or investment in Carbon Credits that he made.

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 remain 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 introductions or 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/investment is appropriate to deal with/accept. That involves conducting checks – due diligence – on introducers and investments to make informed decisions about accepting business. This obligation was a continuing one.

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

So, and well before the time of Mr T'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 TFS 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 Carbon Credits, before accepting them into a SIPP.

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, Carbon Credits), with the Principles in mind.

Amongst other things, L&C has said that its role was to satisfy itself that the investment was allowed within the trust rules and that it didn't breach HMRC regulations. To be clear, it's my view that L&C was obliged to carry out due diligence on the Carbon Credits investment – due diligence that went further than simply checking that the investment was 'SIPP-able' under HMRC rules. I say that after taking into account the regulatory publications I've referenced earlier in this decision, amongst other matters, in considering whether L&C acted fairly and reasonably in this case.

And I think that it's fair and reasonable to expect L&C to have looked carefully at the Carbon Credits investment it was allowing Mr T's pension fund to be invested in. To be clear, for L&C to accept Carbon Credits 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 an investment in detail, and if such a detailed look would have revealed that the investment might not be secure, might be fraudulent, or might not exist, 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's due diligence on Carbon Credits – and what it should have concluded

L&C had a duty to conduct due diligence and give thought to whether investing in Carbon Credits was acceptable for inclusion into a SIPP. That's consistent with the Principles and the regulator's publications as set out earlier in this decision. It's also consistent with HMRC rules that govern what investments can be held in a SIPP.

L&C says it carried out due diligence on Mr T's Carbon Credits investment. However, having thoroughly searched its systems, it has not been able to provide any evidence of the checks that it says were carried out. The extent of the checks L&C carried out is therefore unclear, but it provided examples of the typical checks it likely carried out to determine if the investment could be held in a UK registered pension scheme and not result in any unauthorised payments, which included:

- A search of Companies House including the directors and majority shareholders.

- Internet searches of the company, the directors and majority shareholders, including a search of the company's website if applicable.

- Checking the FCA website to see if the regulator has issued any adverse publications.

L&C says it also routinely requested product literature for the investment prior to progressing its review into whether the investment could be accepted into its SIPPs.

I note L&C's intention behind the types of checks listed above were whether the investment was simply capable of being held in its SIPPs. But L&C was obliged to go further by considering whether the investment was an appropriate investment to be held in its SIPPs *at all*, bearing in mind what it should have ascertained about the investment if it had carried out appropriate due diligence checks.

It's also important to note that L&C's obligations under the principles were continuous, i.e., it wasn't sufficient to carry out checks once and allow the investment to proceed, it had to be alive to developments, including any updates or commentary from the Regulator, and carry out ongoing checks to limit the risk of consumer detriment.

In August 2011, i.e., before Mr T applied for his SIPP and made his investment, the FSA issued a consumer warning about the risks of investing in Carbon Credits schemes.

Within this alert, although the FSA stressed not all Carbon Credit schemes are scams, it strongly recommended consumers sought advice from an FSA-authorised financial adviser before getting involved in the Carbon Credits trading market. It said:

> *"It is not often made clear to investors that this involves trading on over-the-counter markets which require experience and skill. You may lose money or not be able to sell at all …*
>
> *Beware that VERs certificates are often labelled as 'certified', but this certification is voluntary involving a wide range of bodies and different quality standards that are not recognised by any UK financial compensation scheme …*
>
> *… Just because the salesperson mentions the Kyoto Protocol or 'government-backed' plans does not tell you anything about the type of carbon credit you are investing in."*

I think it's fair to say these investments were unlikely to be suitable for the majority of retail investors. And they were only generally likely to be suitable for a small element of the investment portfolio of a sophisticated investor.

TFS stated within its suitability report, that Mr T wished to be considered a professional client. However, I'm satisfied from what I understand of his circumstances at the time and what he has told us, that this classification was inaccurate. I've seen no evidence to demonstrate COBS 3.5.3 of the FCA's Handbook had been complied with. It's my view that Mr T was, at all times, a retail client. He confirmed within his investment instruction form that he was not to be considered a sophisticated investor and he told us he had no investment experience at the relevant time.

Overall, I think L&C ought to have had serious concerns about the information it gathered, had it completed sufficient due diligence process checks on Carbon Credits. And had it done so, I think it would have drawn different conclusions about the appropriateness of the Carbon Credits investment to be held in its SIPPs. I think the information L&C would have obtained –

had it carried out sufficient checks – ought to have given it real cause for concern regarding the risk of serious consumer detriment associated with the investment.

Based on the information that's been made available to us, I'm not satisfied that L&C undertook sufficient due diligence on the Carbon Credits investment before it decided to accept it into its SIPPs. And I think such due diligence ought to have led it to conclude Carbon Credits shouldn't be accepted into its SIPPs. So, based on the evidence we've been provided with, my view is that L&C didn't meet its regulatory obligations and didn't act fairly and reasonably in its dealings with Mr T by not performing sufficient due diligence on the Carbon Credits investment before deciding to accept it into its SIPPs and before accepting Mr T's applications.

What should L&C have done?

Taking everything into account, I'm satisfied that L&C should – as a minimum – have:

- Identified the Carbon Credits investment as a high-risk, speculative and non-standard investment and carried out due diligence on it.
- Correctly established and understood the nature of the investment.
- Considered whether the investment was an appropriate investment to make available via its SIPPs.
- Made sure the investment was genuine and not a scam, or linked to fraudulent activity.
- Made sure the investment worked as claimed.
- Ensured that the investment could be independently valued, both at the point of purchase and subsequently.

A key issue with Carbon Credits in general is there is no price transparency – there is no independent source regarding the price being set, and nothing to confirm at what price the credits should be acquired. So, there was no way to establish how the purchase price was being arrived at. As such, there could've been a very significant difference between the price the units were acquired at and the price they were sold to investors, such as Mr T. This is something L&C could and should have investigated further.

While it's been unable to locate any evidence to demonstrate the checks it carried out, L&C says it would have relied on comparing unit prices of Carbon Credits being traded and discussions with Carbon Credits brokers to obtain valuations for the units being purchased by its SIPPs. However, I'm not satisfied this would have allowed L&C to determine whether there appeared to be a significant difference between the price the credits were acquired at and what they were sold for.

I haven't seen any evidence to confirm L&C carried out appropriate checks prior to Mr T's application to determine the validity of the underlying project the Carbon Credits originated from – it does appear however, that the project had been independently verified as meeting the Verified Carbon Standard ("VCS") at the relevant time. So, I'm satisfied the units were likely valid.

While L&C likely could have been satisfied the credits investors, such as Mr T, were purchasing were valid, I haven't seen that it was demonstrated that there was any ready market for the units. I haven't seen any evidence to show it was demonstrated how investors

in Carbon Credits would find a buyer for their allocation of Carbon Credit units. I think L&C ought to have appreciated prior to receiving Mr T's SIPP application, that there might not be a market for the Carbon Credits, and that there was no guarantee that the credits could be sold at a profit.

So, at the time of receiving Mr T's application, there was little confirmation that Mr T's SIPP would be acquiring anything of any realisable value, whether the credits were being sold at inflated prices and whether there was a market for them. I think L&C needed to weigh up these concerns and features and consider whether it was an appropriate investment to be held in its members' pensions.

L&C may consider that carrying out the kind of assessment that would be required to establish and interrogate such factors as I've discussed and carry out appropriate due diligence, imposes on it requirements over and above its responsibilities as a SIPP provider. But I'm satisfied these are the kind of things it needed to do when deciding whether to accept business to meet its regulatory obligations and good practice. And, I don't think that this amounts to a conclusion that L&C should've assessed the suitability of Carbon Credits investments for its members' individual circumstances.

So, on the basis of the available evidence, I find that L&C didn't undertake sufficient due diligence into the Carbon Credits investments before it accepted Carbon Credits investments into its SIPPs, and before accepting Mr T's application to invest in Carbon Credits, and I find its failure to do so was unfair to Mr T.

If L&C had completed sufficient due diligence, what should it reasonably have concluded?

As I've explained previously, L&C has provided us with very little information about any due diligence it undertook into Carbon Credits. So, I've carefully considered information about the Carbon Credits investment from documents available elsewhere, such as the 2011 FSA alert, internet research, and what we've seen on similar cases involving Carbon Credits.

I think it's more likely than not that L&C had received, and acted on, applications to invest in Carbon Credits from different consumers (whether introduced by TFS or a different introducer) before it received Mr T's SIPP application. I think that's consistent with what TFS said about L&C in its May 2012 suitability report – the suitability report specifically said L&C was "*the only SIPP provider*" that, at the time, could facilitate Mr T's intended investment. So, it's clear TPS was aware of or had direct experience of past acceptances of Carbon Credits by L&C.

I think L&C ought to have understood that its obligations meant that it had a responsibility to carry out appropriate due diligence on investments before accepting them into its SIPPs. I think that appropriate checks would have revealed some fundamental issues which were, in and of themselves, sufficient basis for L&C to have declined to accept Carbon Credits investments in its SIPPs. And I think L&C ought to have identified these fundamental issues before it received Mr T's SIPP application.

Given what I've seen surrounding the VCS registration of the underlying project that generated the Carbon Credits in this case, I'm satisfied the Carbon Credits Mr T purchased were likely legitimate. And this reflects the FSA's warning that not all Carbon Credit investments are scams. I also accept that technically there was a market for Carbon Credits. But it's been highlighted that it often wasn't possible to sell Carbon Credits even though there was a market for them. So, although they might have worked as claimed in theory, the reality was very different.

The FSA warning was published before L&C began accepting business from TFS, and this made it clear that there may be issues with selling Carbon Credits. I'm satisfied this is something L&C was, or ought to have been aware of before accepting Carbon Credits investments into its SIPPs, and it should have considered this as a significant factor in deciding whether to permit the investment. The fact investors, such as Mr T, might have struggled to realise the investment should've caused L&C significant concern – especially if members were intending for the vast majority of their pension savings to be invested in Carbon Credits. It wasn't clear how investors, including Mr T, would be able to take benefits from their SIPPs if the investment was difficult to value or realise.

These factors were an indicator of the kinds of risk its SIPP members would be exposed to if L&C accepted Carbon Credits investments into its SIPPs. These were 'red flags', so to speak, which should've caused L&C significant concern as to whether or not the investment was appropriate to be held in members' SIPPs.

It could be argued that not being able to independently value an investment wouldn't necessarily be indicative of its future performance or legitimacy. But I think the investment was very likely predicated on the Carbon Credits being sold for more than what was paid for them. And so, I think there should've been concerns if it wasn't possible to independently value them. And if an independent valuation had been possible, it's now been highlighted that voluntary Carbon Credits were often sold at "*significantly inflated prices*", so it seems likely this would then have been identified. This would effectively render the investment fundamentally unviable.

L&C should also have been aware that investors would be unlikely to benefit, in terms of the investment itself, from any regulatory protections (the investment being unregulated), such as access to the Financial Services Compensation Scheme or the Financial Ombudsman Service.

In the circumstances, I'm satisfied there were a number of concerns L&C should have identified. It should've known there was a significant risk of consumer detriment, and it shouldn't have permitted the investment to be held in its members' SIPPs. When doing so, I think it didn't act with due skill, care and diligence or treat Mr T fairly.

To be clear, I reiterate, I'm not making a finding that L&C should've assessed the suitability of the Carbon Credits investment for its members' individual circumstances, including Mr T. I accept L&C had no obligation to give advice to Mr T, or to ensure otherwise the suitability of the SIPP, or an investment, for him personally.

I'm satisfied L&C could've identified the concerns I've mentioned, and ought to have drawn the conclusions I've set out, based on what was known at the time. L&C ought to have identified significant concerns in relation to the investment, and this ought to have led it to conclude it shouldn't accept the Carbon Credits investment into its SIPPs before it accepted Mr T's SIPP application; an application I'm satisfied was only made to L&C because of its willingness to accept Carbon Credits investments. It ought to have identified that there was a high risk of consumer detriment here. And it's the failure of L&C's due diligence that resulted in Mr T being treated unfairly and unreasonably.

It's my opinion that L&C didn't meet its regulatory obligations or standards of good practice at the time, and its actions resulted in Mr T's pension fund being put at significant risk. So, I think it's fair and reasonable to conclude that L&C didn't act with due skill, care and diligence, and it didn't treat Mr T fairly, by allowing Carbon Credits investments in its SIPPs – the investment that Mr T's SIPP application to L&C was made on the basis of.

L&C's due diligence on TFS

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

I accept that TFS was authorised by the FSA when it introduced Mr T to L&C. But checking TFS had appropriate permissions to carry out relevant activities doesn't necessarily mean that L&C did all the checks it needed to do.

However, given what I've said about L&C's due diligence on the Carbon Credits investment and my conclusion that it failed to comply with its regulatory obligations and good industry practice prior to receiving Mr T's application, I don't think it's necessary for me to also consider L&C's due diligence on TFS. I'm satisfied that L&C wasn't treating Mr T fairly or reasonably when it accepted the Carbon Credits investment into its SIPPs, so I've not gone on to consider the due diligence it should have carried out on TFS before accepting Mr T's business from it and whether this was sufficient to meet its regulatory obligations. And I make no findings about this issue.

Was it fair and reasonable in all the circumstances for L&C to proceed with Mr T's applications?

For the reasons I've given above, I think L&C should have refused to accept Carbon Credits investments in its SIPPs. So, things shouldn't have gone beyond that.

L&C may argue Mr T signed forms to highlight risk warnings and to agree to indemnify L&C for any losses associated with his investment instructions. In my view it's fair and reasonable to say that just having Mr T sign declarations, wasn't an effective way for L&C to meet its regulatory obligations to treat him fairly, given the concerns L&C ought to have had about the Carbon Credits investment.

In my opinion, relying on the contents of such forms when L&C knew, or ought to have known, allowing the Carbon Credits investment to be held within its SIPPs would put investors at significant risk, wasn't the fair and reasonable thing to do. Having identified some of the risks I've mentioned above, it's my view that the fair and reasonable thing to do would have been to refuse to accept Carbon Credits investments in its SIPPs.

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

To be clear, my finding is that, acting fairly and reasonably to investors, L&C should have concluded that it wouldn't permit Carbon Credits to be held in its SIPPs at all, and Mr T's investment shouldn't have been permitted. And I'm satisfied that Mr T's pension monies were only transferred to L&C because it was allowing Carbon Credits investments – I think it's quite clear from TFS's report that's why L&C was the recommended SIPP provider. And I think it's more likely than not that if L&C hadn't permitted Carbon Credits to be held in its SIPP that Mr T's pension monies wouldn't have been transferred to L&C or invested in Carbon Credits. Further, that Mr T wouldn't then have suffered the losses he's encountered as a result of transferring to L&C and investing in Carbon Credits.

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

<u>The involvement of other parties</u>

In this decision I'm considering Mr T's complaint about L&C. However, I accept that other regulated parties were involved in the transaction complained about – TFS and CNI. I understand Mr T submitted a claim about TFS to the FSCS. The FSCS upheld Mr T's complaint, it calculated his losses to be in excess of £400,000, and it paid him £50,000 compensation. Following this the FSCS provided Mr T with a reassignment of rights to pursue his complaint about L&C.

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 Mr T fairly.

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

And, for the following reasons, I consider it appropriate and fair in the circumstances for L&C to compensate Mr T to the full extent of the financial losses he's suffered due to its failings.

I accept that TFS and/or Green Planet/Viceroy Jones/CNI might have some responsibility for initiating the course of action that led to Mr T's loss. However, I'm satisfied that it's also the case that if L&C had complied with its own distinct regulatory obligations as a SIPP operator, the arrangement for Mr T wouldn't have come about in the first place, and the loss he's suffered could have been avoided.

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

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

Mr T taking responsibility for his own investment decisions

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

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

In my view, if L&C had acted in accordance with its regulatory obligations and good industry practice it shouldn't have accepted the Carbon Credits investments into its SIPPs at all. That should have been the end of the matter – if that had happened, I'm satisfied the

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

As I've made clear, L&C needed to carry out appropriate due diligence on the Carbon Credits investments and reach the right conclusions. I think it failed to do this. And just having Mr T 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.

TFS was a regulated firm with the necessary permissions to advise on the transactions this complaint concerns. I'm satisfied that in his dealings with it, Mr T trusted TFS to act in his best interests. Mr T also then used the services of a regulated personal pension provider in L&C.

I've carefully considered what L&C has said about Mr T being aware of the risks. Mr T was made aware of some of the risks associated with unregulated investments. But, on balance, I also think that Mr T acted with reliance on the adviser he was dealing with. 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 that it shouldn't have accepted the Carbon Credits investment into its SIPPs at all. That should have been the end of the matter – and if that had happened, I'm satisfied the arrangement for Mr T wouldn't have come about in the first place.

In my view, I'm not persuaded Mr T was truly an insistent client. The '*insistent client*' letter he signed dated 4 May 2012 appears likely to have been pre-written for him to sign and crucially pre-dated the suitability report, which itself didn't clearly set out TFS's recommendation. Mr T has also provided testimony to indicate his understanding was that the recommendation was to invest in Carbon Credits, for which he didn't fully understand the risks. I find what he's told us to be credible. He said his recollection when meeting with his adviser "*is that the conversation was about carbon credits only and the fact that if you invested in the product and transferred your pension into this vehicle, there would be an incentive (cash lump sum)*."

He also said:

> "*I was willing to incur some losses but not at the cost of the whole pension pot. Had anybody at any point explained that I could lose all my pension, I would not have gone through with it."*

And:

> *"As a rule, my attitude to risk is low to medium and in this case, I was willing to go to medium risk to receive the lump sum but not to the degree of losing all my pension."*

Given what I've said above, I don't think Mr T fully understood the risks involved in the transaction, or that he was genuinely acting as an insistent client.

I've carefully considered what L&C has said about Mr T's acceptance of the risks – that he had signed documents confirming the investments were high risk, and that Mr T was willing to ignore professional advice and was '*insistent*' on the transfer. As I'll proceed to explain below, I don't agree that the evidence that has been provided supports the contention that it's more likely than not that Mr T understood the risks associated with the intended transactions and wanted to proceed regardless.

So, overall, I'm satisfied that in the circumstances, for all the reasons given, it's fair and reasonable to say L&C should compensate Mr T for the loss he's suffered. I don't think it

would be fair to say in the circumstances that Mr T should suffer the loss because he ultimately instructed the transactions to be executed disregarding TFS's advice, which as I've discussed, I don't agree accurately represents what happened.

Had L&C declined to accept Carbon Credits into its SIPPs, would the transactions complained about have been effected elsewhere?

In Adams v Options SIPP, the judge found that Mr Adams would have proceeded with the transaction regardless. HHJ Dight said (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."*

I've seen no evidence to persuade me that Mr T was determined to open a SIPP and invest in Carbon Credits no matter what. As I've previously explained, I think L&C ought to have had serious doubts that Mr T was genuinely an insistent client.

I've also considered what Mr T has told us about his motivations for effecting the transactions. Mr T received a payment after the investment was made into his SIPP amounting to approximately £45,000. He told us he wasn't necessarily looking to move his pension at the time but was attracted to the investment because of the incentive payment, which he intended to use to maintain a good standard of living. I therefore think Mr T decided to transfer his existing pensions to an L&C SIPP principally in order to make the intended investment.

And in terms of his understanding of the risks associated with the investment, as discussed above, Mr T has explained he didn't understand the risk was so high that it could fail, or that almost his entire pension was at risk. And that had he known this, he wouldn't have gone ahead.

L&C says Mr T understood the risks associated with the investments. But Mr T's explanation of what he understood the risk to be at the time doesn't suggest that he had a clear understanding.

I've carefully considered what L&C has said about Mr T's awareness of the risks – that Mr T had been given numerous risk warnings and had specifically confirmed he understood the risks. But the risk warnings I've seen were quite generic in reference to alternative investments generally. And I think the information Mr T likely received at the start regarding the Carbon Credits investment likely wouldn't have sufficiently highlighted the risks.

In this case, I'm not persuaded that Mr T was determined to move forward with the transaction in order to take advantage of a cash incentive. Whilst Mr T has explained that he was interested in the cash incentive, I'm not persuaded his desire to receive the cash payment would have outweighed the risk of losing the entire fund had he truly understood the nature of the risks involved. I find Mr T's testimony on this point, as outlined above, to be credible.

I've not seen any evidence to suggest Mr T had an overriding need for the cash which would have outweighed other considerations – such as the potential impact to his retirement, or tax implications associated with the incentive payment. Overall, and having carefully considered all the submissions that have been made, I'm satisfied that Mr T, unlike Mr Adams, wasn't eager to complete the transactions and receive the cash regardless of the risk.

L&C has asserted that it did not cause Mr T's loss as Mr T was clearly willing to ignore professional advice to make the investment and so would have found a way to invest in

Carbon Credits even if L&C would not accept the investment into its SIPPs. L&C has said TFS's suitability report was incorrect to suggest L&C was the only provider that could accept the investment as many other SIPP providers were accepting Carbon Credits investments into their SIPPs at the time.

From the correspondence I've seen, TFS's suitability report stated L&C was the only available provider that would accept the investment. While it's possible this was an incorrect statement, I think that the only reason Mr T's pension monies were transferred to L&C was because TFS understood it to be amongst the only, if not the only, SIPP provider accepting the Carbon Credits investments into its SIPP – or at least the only SIPP provider accepting Carbon Credits investments that was willing to accept business from it.

For completeness, even if there was another SIPP provider prepared to accept Carbon Credits in its SIPPs, I wouldn't think it's fair and reasonable to say that L&C shouldn't compensate Mr T for his loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found L&C did. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore wouldn't have accepted Carbon Credits into its SIPPs.

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 Carbon Credits to be held in its SIPPs before it had received Mr T's application from TFS. And I conclude that if L&C hadn't accepted Carbon Credits into its SIPPs, Mr T wouldn't have established an L&C SIPP, transferred his pension provisions into it and made the Carbon Credits investments he then made. For the reasons I've set out, I also think it's fair to ask L&C to compensate Mr T for the loss he's suffered as a result of L&C accepting Carbon Credits in its SIPPs.

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.

Fair compensation

I consider that L&C failed to comply with its regulatory obligations and good industry practice, which resulted in Mr T's application to open a SIPP in order to invest in Carbon Credits. My aim in awarding fair compensation is to put Mr T back into the position he would likely have been in had it not been for L&C's failings. Had L&C acted appropriately, I think it's more likely than not that Mr T would have remained a member of the existing pension scheme he transferred into his L&C SIPP. I say this because Mr T told us he wasn't necessarily looking to move his pension at the time, but was ultimately motivated to agree to the switch to obtain the incentive payment via investing in Carbon Credits. For the reasons I've set out above, had L&C carried out sufficient due diligence and refused to accept Carbon Credits investments into its SIPPs, I don't think Mr T would have ended up investing in Carbon Credits. I think it's more likely than not he would've kept his pension invested with his existing provider.

I think Mr T would have remained with his previous provider, however I cannot be certain that a value will be obtainable for what the previous policy/ies would now be worth. I am satisfied what I have set out below is fair and reasonable, taking this into account and given what I understand of Mr T's circumstances and objectives when he invested.

What I've set out below is based on my understanding that:

- The SIPP still exists.

- Mr T has not yet retired and would not have begun to take pension benefits if he'd remained with his existing provider.

- Mr T's existing pension schemes did not contain any guaranteed benefits that were lost upon transfer to the L&C SIPP.

I acknowledge that Mr T has received a sum of compensation from the FSCS. The terms of his reassignment of rights require him to return any compensation paid by the FSCS in the event this complaint is successful. I won't be asking L&C to notionally reduce its redress calculation by the amount awarded by the FSCS, as it will be for Mr T to make the necessary arrangements to repay any amount if required by the FSCS. However, I have set out how this award should be considered within the calculation below.

Putting things right

It's my finding that L&C failed to comply with its own regulatory obligations, which resulted in the transactions that are the subject of this complaint. My aim in awarding fair compensation is to put Mr T, as far as possible, into the position he would now be in had it not been for L&C's failings. Had L&C acted appropriately, I think it's most likely that Mr T would've remained a member of the existing pension he transferred into the SIPP.

In light of the above, I require L&C to do the following:

- Obtain the notional transfer value of Mr T's previous pension plan as at the date of my final decision.

- Obtain the actual transfer value of Mr T's SIPP, including any outstanding charges as at the date of my final decision.

- Pay a commercial value to buy any illiquid investments (or treat them as having a zero value).

- Pay an amount into Mr T's SIPP so as to increase the transfer value to equal the notional value established. This payment should take account of any available tax relief and the effect of charges. L&C may need to add interest to this payment if it is not made within 28 days of Mr T's acceptance of my final decision.

- If Mr T has paid any fees or charges from funds outside of his pension arrangements, L&C should also refund these to Mr T. Interest at a rate of 8% simple per year from date of payment to date of refund should be added to this.

- Pay to Mr T an amount of £500 to compensate him for the distress and inconvenience he's been caused due to L&C's failings.

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

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

L&C should first contact the provider of the existing defined contribution pension which was transferred into Mr T's SIPP and ask it to provide a notional value for the policy/ies as at the date of my final decision. For the purposes of the notional calculation, the provider should be told to assume no monies would've been transferred away from the plan, and the monies in

the policy/ies would've remained invested in an identical manner to that which existed prior to the actual transfer.

Any contributions or withdrawals Mr T has made will need to be taken into account whether the notional value is established by the ceding scheme provider or calculated as set out below.

Any withdrawal out of the SIPP should be deducted at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. The same applies for any contributions made, these should be added to the notional calculation from the date they were actually paid, so any growth they would've enjoyed is allowed for. To be clear this doesn't include SIPP charges or fees paid to third parties like an adviser. But it does include any pension commencement lump sums or pension income Mr T actually took after his pension monies were transferred to L&C.

L&C should take the 'incentive' payment Mr T received into account when completing its calculations. This can be accounted for in the calculation by way of treating it as an income withdrawal payment paid on 6 July 2012 (the date Mr T received the payment into his bank account). This is money Mr T would not have received if he hadn't transferred his existing pension to L&C.

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

I acknowledge that Mr T has received a sum of compensation from the FSCS, and that he has had the use of the monies received from the FSCS. The terms of Mr T's reassignment of rights require him to return compensation paid by the FSCS in the event this complaint is successful, and I understand that the FSCS will ordinarily enforce the terms of the assignment if required. So, I think it's fair and reasonable to make no *permanent* deduction in the redress calculation for the compensation Mr T received from the FSCS. And it will be for Mr T to make the arrangements to make any repayments he needs to make to the FSCS. However, I do think it's fair and reasonable to allow for a *temporary* notional deduction equivalent to the payment Mr T actually received from the FSCS for a period of the calculation, so that the payment ceases to accrue any return in the calculation during that period.

As such, if it wishes, L&C may make an allowance in the form of a notional withdrawal (deduction) equivalent to the payment Mr T received from the FSCS following the claim about TFS, and on the date the payment was actually paid to Mr T. Where such a deduction is made there must also be a corresponding notional contribution (addition), at the date of my final decision equivalent to all FSCS payment(s) notionally deducted earlier in the calculation.

To do this, L&C should calculate the proportion of the total FSCS' payment(s) that it's reasonable to apportion to each transfer into the SIPP, this should be proportionate to the actual sums transferred in. And L&C should then ask the operator of Mr T's previous pension plans to allow for the relevant notional withdrawal in the manner specified above. The total notional deductions allowed for shouldn't equate to any more than the actual payment from the FSCS that Mr T received. L&C must also then allow for a corresponding notional contribution (addition) as at the date of my final decision, equivalent to the accumulated FSCS payment(s) notionally deducted by the operator of Mr T's previous pension plan.

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

The notional value of Mr T's ceding scheme if monies hadn't been transferred (established in line with the above) less the transfer value of the SIPP (as at the date of my final decision) amounts to Mr T's financial loss.

Treatment of the illiquid asset(s) held within the SIPP

I think it would be best if any illiquid asset(s) held could be removed from the SIPP. Mr T would then be able to close the SIPP, if he wishes. That would then allow him to stop paying the fees for the SIPP. For calculating compensation, L&C should establish an amount it's willing to accept for the Carbon Credits investment as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investment.

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

If L&C is unwilling or unable to purchase the investment, the value of it should be assumed to be £nil for the purposes of the loss calculation. L&C may ask Mr T to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the investment. That undertaking should allow for the effect of any tax and charges on the amount Mr T may receive from the investment and any eventual sums he would be able to access. L&C should meet any costs in drawing up the undertaking and any reasonable costs for advice required by Mr T to approve it. L&C should only benefit from the undertaking once Mr T has been fully compensated for his loss (to be clear, this includes any loss that's in excess of our award limit).

Pay an amount into Mr T's SIPP so that the transfer value is increased by the loss calculated above

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

If a payment into the pension isn't possible, or has protection or allowance implications, it should be paid directly to Mr T as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Redress paid to Mr T as a cash lump sum includes compensation in respect of benefits that would otherwise have provided a taxable income. So, L&C may make a notional deduction to cash lump sum payments to take account of tax that consumers would otherwise pay on income from their pension. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

Fees and charges paid outside the SIPP

If Mr T has paid any fees or charges from funds outside of his pension arrangements, L&C should also refund these to Mr T. Interest at a rate of 8% simple per year from date of payment to date of refund should be added to this.

Distress & inconvenience

I think Mr T will have been caused considerable distress and inconvenience in relation to his SIPP and investment. I think seeing the value of his investment be written down to £nil will have caused significant worry and upset to Mr T. I consider that a payment of £500 is appropriate to compensate for that.

Interest

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

Income tax on interest

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

Determination and money award: my decision is that I require that L&C pays Mr T compensation as set out above, up to a maximum of £160,000 plus any interest payable.

Until the calculations are carried out, I don't know how much the compensation will be, but having reviewed the FSCS's calculation, it appears likely Mr T's loss may exceed £160,000, which is the maximum sum that I'm able to award in Mr T's complaint. So, I'll also make a recommendation below in the event the compensation is to exceed this sum, although I can't require that L&C pays this.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £160,000, I also recommend that L&C pays Mr T the balance.

If Mr T accepts my final decision, the money award and the requirements of the decision will be binding on L&C. My recommendation won't be binding on L&C.

Further, it's unlikely that Mr T will be able to accept my determination and go to court to ask for the balance of the compensation owing to him after the money award has been paid. Mr T may want to consider getting independent legal advice before deciding whether to accept this, my final decision.

My final decision

For the reasons given, my decision is that I uphold this complaint. To put things right I require that London & Colonial Services Limited must calculate and pay Mr T the award set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 28 October 2024.

Beth Wilcox
Ombudsman